UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK

In re:
HOLOCAUST VICTIM ASSETS
LITIGATION

Master Docket No. CV-96-4849
(ERK) (MDG)

This Document Relates to All Cases

NOTICE OF MOTION

PLEASE TAKE NOTICE that upon the annexed declaration of Burt Neuborne, dated April 27, 2004, and upon all of the proceedings heretofore held herein, and the Memorandum of Law submitted herewith, plaintiff-classes hereby move the Court for an order (1) compelling defendant banks to restore to the Account Holder Database (AHD) all non-duplicative accounts removed from the original ICEP listing of 54,000 accounts "probably or possibly" owned by Holocaust victims, and to augment the AHD by adding all unpaid accounts previously identified by defendants or by Swiss authorities as possibly owned by Holocaust victims, including accounts identified in 1962 and 1997; (2) directing the publication of all accounts listed on the AHD database, including the approximately 15,000 accounts falling into Categories III(B) and IV that have not yet been published, and the re-publication of all accounts previously identified as possibly owned by Holocaust victims; (3) authorizing CRT II officials to match claims against the Total Accounts Database (TAD) in settings where CRT II officials believe such matching to be necessary for the just and efficient processing of a given claim; (4) authorizing CRT II officials to investigate documentary material related to a matched account when necessary for the fair and efficient processing of a claim to that account

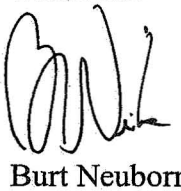
whether or not the documentary material is located in an ICEP audit folder; (5) compelling defendants to cooperate in the establishment of a CRT II claims facility in New York City to be administered in accordance with rules assuring strict confidentiality; and (6) providing CRT II claims officials with access to all documents in defendants' possession identifying accounts possibly owned by Holocaust victims.

PLEASE TAKE FURTHER NOTICE that plaintiff-classes believe that such an order should issue as a matter of law. If the Court deems it necessary to resolve any contested issues of fact, plaintiff-classes request the issuance of an appropriate discovery schedule, and the scheduling of a factual hearing.

Plaintiff-classes request oral argument at the Court's convenience in connection with this motion.

Dated: April 27, 2004
New York, New York

Yours etc.



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Special Master Judah Gribetz
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Burt Neuborne, an attorney duly admitted to practice before the Courts of New York, hereby declares:

1. I have served as Court-appointed lead settlement counsel in this case since February 1, 1999. I make this declaration in support of an application by the plaintiffs for an order pursuant to Rule 23 FRCP, the Due Process Clause of the Fifth Amendment, and the inherent equitable powers of the Court directing the defendant banks to make certain information in their possession available to members of the deposited assets class and to officials of the Claims Resolution Tribunal II (CRT II) in order to assure the fair and just administration of the deposited assets claims process.

A. The Structure of the Swiss Bank Settlement

2. This application arises out of efforts to administer the settlement of a class action brought on behalf of numerous persons claiming ownership of funds that were deposited in Swiss banks between 1933-1945 by victims of the Holocaust.[1] Upon information and belief, the defendants,

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[1] The fairness of the $1.25 billion settlement was upheld by the District Court on August 9, 2000. *In re Holocaust Victim Assets Litig.*, 105 F. Supp.2d 139 (EDNY 2000). See *In re Holocaust Victim*

Credit Suisse, Union Bank of Switzerland and Swiss Bank Corporation, represent through merger, acquisition, or succession approximately 75% of the almost 300 Swiss banks that were in existence during the relevant period. During the litigation, Union Bank of Switzerland and Swiss Bank Corporation merged. The resulting entity is known as UBS. Thus, the surviving Swiss bank defendants are Credit Suisse and UBS.

3. Pursuant to the settlement agreement, executed on January 26, 1999, the members of five plaintiff-classes agreed to release Holocaust-related claims against the defendants and numerous non-party Swiss entities in return for a payment of $1.25 billion to the plaintiff-classes, $800 million of

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Assets Litig., 2000 U.S. App. LEXIS 29529 (2d Cir. Nov. 20, 2000) (dismissing appeal, which was reinstated and eventually withdrawn). The plan of allocation and distribution was upheld by the District Court on November 22, 2000, and by the Second Circuit on July 26, 2001. *In re Holocaust Victim Assets Litig.*, 2000 U.S. Dist. LEXIS 20817 (EDNY 2000), aff'd 14 Fed. Appx. 132 (2nd Cir. July 26, 2001). For other opinions relating to the Swiss bank litigation, see: *In re Holocaust Victim Assets Litig.*, 1998 U.S. Dist. LEXIS 18014 (EDNY Oct. 7, 1998) (Joint Stipulation describing August 12, 1998 agreement in principle); *In re Holocaust Victim Assets Litig.*, 225 F3d 191 (2d Cir. 2000) (upholding definition of plaintiff-class); *In re Holocaust Victim Assets Litig.*, 2001 WL 419967 (EDNY April 4, 2001) (defining membership in Slave Labor II class), affirmed in part and vacated in part, 282 F.3d. 103 (2nd Cir. 2002), resolved by stipulation on remand; *In re Holocaust Victim Assets Litig.*, 270 F.Supp.2d 313 (EDNY 2002) (denying risk multiplier); *In re Holocaust Victim Assets Litig.*, 256 F.Supp.2d 150 (EDNY 2003) (requiring payment of compound interest on escrow funds); *In re Holocaust Victim Assets Litig.*, 2003 U.S. Dist LEXIS 20686 (EDNY Nov. 17, 2003) (adopting Special Master's Interim Report); *In re Holocaust Victim Assets Litig.*, 302 F.Supp.2d 59 (EDNY 2004) (rejecting banks' opposition to Special Master's Interim Report). See also *In re Holocaust Victim Assets Litig.*, 302 F.Supp.2d 89 (EDNY 2004) (rejecting objections to Special Master's Interim Report); *In re Holocaust Victim Assets Litig.*, 2004 U.S. Dist. LEXIS 6197 (EDNY Mar. 31, 2004) (denying fee request); *In re Holocaust Victim Assets Litig.*, 2004 U.S.Dist. LEXIS 5432 (EDNY Apr. 2, 2004); *In re Holocaust Victim Assets Litig.*, 2004 U.S. Dist. LEXIS 6895 (EDNY Apr. 22, 2004).

which has been allocated by the Court pursuant to the recommendation of the Special Master to the payment of Swiss bank account claims by members of the "deposited assets" class.

4. The settlement agreement recognizes five plaintiff-classes, designed to reflect the nature of the Holocaust-related injuries suffered by their members: (1) the "deposited assets" class consists of persons who deposited, owned or held assets in Swiss banks between 1933-45, but who have not received payment of the proceeds of the accounts in question; (2) the "slave labor I" class consists of persons who performed slave labor during World War II for non-Swiss entities that received financial assistance from Swiss banks; (3) the "slave labor II" class consists of persons who performed slave labor during World War II for Swiss entities; (4) the "refugee" class consists of persons denied entry into, expelled from, or persecuted in, Switzerland during WW II because of membership in a victim group; and (5) the "looted assets" class consists of persons whose property was stolen by the Nazis and knowingly disposed of through Swiss entities. Membership in four settlement classes, including the deposited assets class, is restricted to persons belonging to the five victim groups that were singled out by the Nazis for systematic persecution on the basis of race, religion or personal status: Jews, Jehovah's Witnesses; Sinti-Roma; gays and the disabled. Membership in a fifth class, dealing with slave labor claims against certain self-identified non-party Swiss corporations, is unrestricted.[2]

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[2] Copies of the settlement agreement, dated January 26, 1999; Amendment 1 to the settlement agreement, dated November 23, 1999, and Amendment 2 to the settlement agreement; a contemporaneous Memorandum to the File by counsel, dated August 2, 1999; and an escrow agreement associated with the settlement agreement, established on November 23, 1999, are annexed as Exhibits 1A, 1B, 1C, and 1D, respectively.

5. The entity vested by the Court with responsibility for administering the deposited assets process is known as the Claims Resolution Tribunal II (CRT II), which is headquartered in Zurich and functions under the supervision of two Court-appointed Special Masters. CRT II's predecessor organization, CRT I, adjudicated claims to Swiss bank accounts under an unrelated program that pre-dated the settlement. Although CRT I and CRT II share similar names, their functions are quite different. CRT I functioned in an adjudicative capacity, with claimants and the banks appearing as adversaries. CRT II is an investigative arm of the settlement class designed to assist in the equitable allocation of settlement funds. Since the banks' financial liability is fixed by the settlement, and since the operations of CRT II are funded by the settlement, the banks have no formal legal interest in the operation of CRT II.

6. I have been informed by officials of the CRT II that increased access to six sources of information currently in the possession of the defendant banks is necessary for the fair and just administration of the deposited assets claims program.

B. The Six Items of Relief Requested in this Motion

I. Publication of Information Concerning 15,000 Swiss Bank Accounts Identified by Auditors as "Possibly" Owned by Holocaust Victims

7. CRT II officials seek the publication of information concerning approximately 15,000 Swiss bank accounts that were found by auditors working for the Independent Committee of Eminent

Persons (ICEP), chaired by Paul Volcker,[3] to be "possibly" owned by Holocaust victims, but that have not yet been publicly identified.

8. The ICEP Report, as subsequently modified by a so-called "scrubbing" process described *infra* at para. 69-73, identifies approximately 21,000 Swiss accounts deemed "probably" owned by Holocaust victims, and approximately 15,000 Swiss accounts deemed "possibly" owned by Holocaust victims. Information concerning the 21,000 "probable" accounts has been made public pursuant to publication on the Internet on February 5, 2001. No information has been made public concerning the 15,000 "possible" accounts.

9. The 15,000 "possible" accounts consist of approximately 3,000 accounts where the account owner's name matches closely to a name on the Holocaust victim lists, but where no other corroborating evidence of victim ownership exists; and approximately 12,000 foreign accounts where the owner's name does not match to a name on the Holocaust victim lists, but where the account remained dormant for at least 10 years after the end of WW II under circumstances consistent with victim ownership.

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[3]The ICEP audit refers to a comprehensive investigation undertaken between1996-1998 by the ICEP Committee, also known as the Volcker Committee, with the approval of the Swiss government, designed to determine whether substantial numbers of Holocaust victim-owned accounts remain in Swiss banks. The auditors reported their findings in "The Independent Committee of Eminent Persons, Report on Dormant Accounts of Victims of Nazi Persecution in Swiss Banks, dated December 6, 1999"(the ICEP Report), a copy of which is annexed hereto as Exhibit 2, and is available on the Internet at www.swissbankclaims.com, under "Key Documents." The operation of the ICEP audit is described *infra* at para.45-90.

10. In 2000, Swiss regulatory officials declined to authorize the publication of the 15,000 "possible" accounts because, in their opinion, evidence of Holocaust victim-ownership uncovered during the ICEP audit was deemed by Swiss banking officials to be insufficiently probative to warrant publication, but sufficiently probative to warrant eligibility for so-called "black box" matching. "Black box" matching places the account information on a database against which claims are matched, but does not publicly identify the account. If a claimant happens to file a claim for the account without being informed of its existence, the claim will succeed.

11. Several years of experience with the administration of the deposited assets claims process has persuaded officials of CRT II that failure to provide public notice of the existence of the 15,000 "possible" accounts is adversely affecting the fairness of the deposited assets claims process. I have been informed by officials of the CRT II that a statistically significant difference has arisen between the "match rate" of claims for accounts that have been publicly identified, and accounts, such as the 15,000 accounts at issue in this motion, that have not been publicly identified, but are subject to "black box" matching. Not surprisingly, in the absence of targeted public notification of an account's existence, it is now apparent that members of the deposited assets class will not file claims to the account's ownership.

12. If information concerning the existence of the15,000 so-called "possible" accounts is made available to the deposited assets class through publication, CRT II officials anticipate that substantially more accounts owned by Holocaust victims will be claimed, matched, and paid by the settlement fund. Indeed, despite the failure to have published information concerning the 15,000 "possible" accounts, CRT II officials have informed me that CRT II officials have identified more

than 200 accounts belonging to Holocaust victims among the 15,000 unpublished accounts by the use of "black box" matching.

13. Since all future claims for Holocaust-era bank accounts held in Swiss banks will be claim precluded upon the completion of these proceedings, I believe that failure to provide members of the deposited assets class with the best practicable notice of the existence of the accounts in question would deny their putative owners the notice to which they are entitled by the Due Process clause of the Fifth Amendment prior to the extinguishment of their legal rights.

II. Publication of Information Concerning Several Thousand Swiss Bank Accounts Previously Identified as Potentially Owned by Holocaust Victims

14. CRT II officials also seek the publication or republication of information concerning several thousand Swiss bank accounts that have been previously identified in earlier audits and investigations as potentially owned by Holocaust victims. Upon information and belief, investigations that preceded this litigation in 1945, 1952, 1959, 1962, and 1997 resulted in the identification of several thousand Swiss accounts deemed potentially owned by Holocaust victims.

15. CRT II officials believe that previously identified accounts include a significant number of unpaid accounts belonging to members of the deposited assets class, and are prepared to reimburse the current owners of such unclaimed accounts from the deposited assets settlement fund.

16. Although the owners of such accounts are members of the deposited assets class, and although many of the previously identified accounts remain unpaid or were paid to charity, information concerning previously identified potential Holocaust victim-owned accounts was not made available by defendants to the CRT II for publication herein, or for matching against claims filed by plaintiffs.

17. Upon information and belief, information concerning some or all of such previously identified accounts was made public by Swiss authorities in 1962, and twice in 1997. Accordingly, no issue of privacy impedes their republication by CRT II. Since all future claims for Holocaust-era bank accounts in Swiss banks will be claim precluded upon the completion of these proceedings, failure to provide public notice that CRT II is prepared to compensate the owners of such previously identified accounts would deny their putative owners the notice to which they are entitled by the Due Process clause of the Fifth Amendment.

18. In order to permit the operation of an orderly claims process in connection with such previously identified accounts, in addition to publication, the accounts must also be entered on any database listing potential Holocaust victim-owned accounts against which plaintiffs' claims are matched by officials of CRT II.

III. Publication of Information Concerning Holocaust-Era Accounts Belonging to Polish and Hungarian Nationals Transferred to Communist Government Ownership

19. CRT II officials seek the publication of information concerning Swiss bank accounts owned by Holocaust victims residing in Poland and Hungary that were seized subsequent to WW II by the communist governments of Poland and Hungary.

20. Upon information and belief, some or all of such accounts were, pursuant to international agreements between Switzerland, Poland and Hungary, identified by Swiss banking authorities and transferred to the communist governments of Poland and Hungary. Upon information and belief, the seized Holocaust era accounts were then either used to satisfy claims by Swiss

nationals against the governments of Poland and Hungary, or retained by the governments of Poland and Hungary.

21. Since the owners of such accounts are members of the deposited assets class, CRT II officials are prepared to compensate the current owners of such Polish and Hungarian accounts. Upon information and belief, publication of information in connection with such accounts has taken place in Poland and Hungary, but notice has not been given that CRT II is prepared to compensate the owners of such accounts as members of the deposited assets class. Since all future claims for Swiss banks bank accounts will be claim precluded upon the completion of these proceedings, I believe that failure to provide public identification of the Polish and Hungarian-owned accounts in question, and failure to provide notice that the CRT II is prepared to compensate the owners of such accounts, would deny their putative owners the notice to which they are entitled by the Due Process clause of the Fifth Amendment.

IV. Augmentation of the Account History Database (AHD) by Restoring Accounts "Scrubbed" From the List of Accounts Deemed by the Auditors to be "Probably" or "Possibly" Owned by Holocaust Victims

22. Bank account claims by members of the deposited assets class are routinely matched against a database, known as the Account History Database (AHD), consisting of 36,000 accounts deemed by the auditors to be "probably" or "possibly" owned by Holocaust victims. The accuracy and comprehensiveness of the AHD database is, therefore, crucial to the integrity of the deposited assets claim process.

23. In order to assure that the AHD database can be relied upon as the primary source of information concerning potential Holocaust victim-owned accounts, CRT II officials seek to

augment the existing AHD by: (a) adding all accounts described *supra* that have been previously identified as potentially belonging to Holocaust victims; and (b) reversing the so-called "scrubbing" process described *infra*, pursuant to which the number of potential Holocaust victim-owned accounts listed on the AHD was reduced from the 54,000 figure initially established by the ICEP audit, to its current size of approximately 36,000 accounts.

24. Experience gained during the past two years in administering the deposited assets claims program has led CRT II officials to question the accuracy of the AHD as currently constituted. For example, I have been informed by officials of the CRT II that ongoing investigations of 1,807 claims filed with the New York State Banking Commission's Holocaust Claims Processing Office (HCPO), and an experimental match of approximately 550 claims filed with the CRT II, more fully described below at para.113-15, demonstrate that numerous meritorious bank account claims do not match to the AHD as currently constituted because certain of the criteria utilized in establishing the AHD, especially during the so-called "scrubbing" process, described *infra* at para. 69-73, appear to have resulted in the exclusion of numerous accounts owned by Holocaust victims.

25. In establishing the AHD, ICEP auditors, in an understandable effort to save money and time, categorically disqualified from significant aspects of the auditing process: accounts with Swiss addresses; accounts with addresses in areas outside Axis-control; accounts closed prior to Axis-invasion or occupation; and accounts with post-1945 activity. Experience has revealed, however, that many Holocaust victim-owned accounts utilized Swiss addresses and addresses in non-Axis controlled areas to avoid Nazi scrutiny. Similarly, experience has taught that many Holocaust victim-owned accounts were involuntarily transferred to Nazi banks prior to actual Axis-control of an area,

either because the account holder maintained multiple residences, one of which was in a Nazi-controlled area, or because an account holder residing in an area not yet under Nazi control was forced to transfer assets to ransom family members residing in Nazi-controlled areas. Finally, experience indicates that the mere existence of post-1945 account activity does not negate Holocaust victim-ownership.

26. After the issuance of the ICEP Report, the defendant banks insisted upon a year-long "scrubbing" process pursuant to which the overbroad categorical exclusions were rigorously applied to reduce the AHD from its initial figure of 54,000 accounts to its current status of 36,000 accounts. Given the demonstrated inaccuracy of the AHD in its "scrubbed" state, CRT II officials seek to augment its scope by reversing the scrubbing process to restore the AHD to the scope originally recommended by the ICEP auditors.

V. Increased Access to the Total Accounts Databases (TADS) Listing All Accounts Open During the Relevant Period for Which Records Survive

27. In connection with the ICEP audit, auditors assembled lists, known as the Total Accounts Databases (TADS), of 4.1 million accounts open in Swiss banks between 1933-45 for which records survive. All records in connection with approximately 2.8 million accounts open during the relevant period have been destroyed by the banks, and cannot be the subject of a claims process.

28. CRT II claims officials are not permitted to match bank account claims against the TADS, except in narrowly circumscribed settings. Instead, CRT II officials are required to match claims against the much smaller AHD.

29. In connection with efforts to investigate claims, especially claims that do not match to the AHD, CRT II officials seek to increase their access to the TADS to assure that the overbroad

categorical exclusions used in assembling the AHD do not act to exclude accounts owned by Holocaust victims from the claims process.

30. Several years of experience with administering the deposited assets claims process has convinced CRT II officials that the categorical disqualifications utilized by the ICEP auditors to "filter" and "scrub" accounts with an indication of Holocaust victim ownership from the final list of accounts deemed to be "probably" or "possibly" owned by Holocaust victims, described *infra* at para. 55-68; 69-73, while appropriate in the context of the ICEP audit, had the effect of removing numerous potential Holocaust victim-owned accounts from the 36,000 Account History Database (AHD) that is utilized by CRT II claims officials in connection with the matching of claims by members of the deposited assets class.

31. Accordingly, CRT II officials seek leave to match deposited assets claims that fail to match to the AHD against the full 4.1 million TAD database. Given the apparent overbreadth of the categorical exclusions used to "filter" and "scrub" potential Holocaust victim-owned accounts from 4.1 million to 36,000, I believe that the Due Process clause requires that claims deemed appropriate for further investigation by CRT II officials be matched against the full 4.1 million TAD to assure that all claims are thoroughly investigated before the claims are claim precluded. Moreover, defendants' refusal to accept the recommendation of Paul Volcker that a single, consolidated TAD be established, as opposed to hundreds of separate databases in each bank that now exist, imposes a wholly unnecessary obstacle to efficient processing of bank account claims that should be rectified immediately.

VI. Access to Documentary Records Needed to Resolve Claims Involving Matched Accounts

32. Finally, once CRT II officials determine that a name match exists between a claimant and a Holocaust-era account listed on the AHD, it is occasionally impossible to determine the validity of the claim without inspecting surviving bank records relating to the matched account that fall outside the period from 1933-45. When necessary to determine the validity of a particular claim involving a matched account, CRT II officials seek access to all documentary material relating to the matched account, regardless of the date of the document.

33. The relief sought will not affect defendants' financial liability, which is fixed at $1.25 billion by the settlement agreement. Efforts at securing voluntary access to the needed information have failed. Plaintiffs request that the relief be accompanied by an order directing defendants to permit the deposited assets claims process to be carried out in New York, rather than in Zurich, in order to permit substantial savings in cost and personnel efficiency. For example, Swiss authorities have placed obstacles to the efficient staffing of CRT II in Zurich by imposing onerous visa requirements for employees, and by subjecting CRT II to costly and time consuming government audits despite its status as an arm of the United States District Court. Plaintiffs are prepared to conduct the operations of CRT II in New York under conditions that will assure respect for Swiss law.

C. The Historical Context of the Swiss Bank Litigation

34. Prior to WW II, Swiss banks vigorously marketed themselves throughout Europe as financial safe-havens, promising that recently-enacted Swiss bank secrecy laws would provide protection against efforts by Nazis to seize the property of victims or targets of Nazi persecution. Not

surprisingly, thousands of persons made deposits in Swiss banks on the eve of the Holocaust, hoping to shield their assets from the coming storm. Tragically, many thousands of depositors perished in Nazi death camps, leaving their Swiss bank accounts unredeemed. Thousands more were forced to authorize transfer of their Swiss funds to Nazi banks in an effort to ransom themselves or family members from Nazi imprisonment, or to gain government permission for themselves or family members to leave Nazi-controlled areas. Yet others were forced to authorize transfer of their Swiss funds to Nazi banks while imprisoned by the Nazis, often in a concentration camp.

35. After the defeat of the Nazis in WW II, numerous Holocaust survivors and their families sought information from Swiss banks about pre-war accounts opened by Holocaust victims. The information was needed in order to claim unredeemed accounts, or to seek compensation from German authorities or Swiss banks in connection with the unjustified or compelled transfer of Swiss accounts to Nazi entities.

36. As documented in the Bergier Commission Report,[4] and the ICEP Report,[5] and in Chief Judge Korman's recent opinion rejecting the banks' objections to the Special Master's Interim Report,[6] many Swiss banks behaved appallingly in the immediate post-war period, placing

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[4]The Bergier Commission, made up of distinguished Swiss historians, was established by the Swiss government to prepare an authoritative historical record of Swiss behavior during WW II. The multi-volume report, formally entitled Independent Committee of Experts Switzerland - Second World War, Switzerland , National Socialism and the Second World War: Final Report (2002), has been lodged with the Court, and is also available on the Internet at www.swissbankclaims.com, under "Key Documents."

[5]The ICEP Report is annexed as Exhibit 2.

[6]302 F.Supp.2d 59 (EDNY 2004).

insurmountable documentary hurdles in the path of persons seeking to recover pre-war Swiss bank deposits, and denying accurate information about the existence of many Holocaust-era accounts.

37. Among the damning findings contained in the Bergier Commission Report, is the following statement:

> In May, 1954, the legal representatives of the big banks co-ordinated their response to heirs so that the banks would have at their disposal a concerted mechanism for deflecting any kind of enquiry. They agreed not to provide further information on transactions dating back more than ten years under any circumstances, and to refer to their statutory obligation to keep files for only ten years, even if their records would have allowed them to provide the information....Throughout the post-war period the banks relied on a combination of discreetly playing down the problem and erecting barriers to investigation: time and again they would bring bank secrecy into play in order to legitimise their reluctance to provide information while at the same time charging high search fees for conducting investigations. ... Due to the deduction of such fees, unclaimed accounts, deposits and safe-deposit boxes could also disappear in the space of a few decades. The assets found by ICEP in 1999...therefore constitute only part of the total. Final Report of the Bergier Commission, Volume II, at 446 (Emphasis added).

38. The ICEP Report also vigorously criticizes the banks' post-war conduct at Annex 5, 81-100. After assessing the conduct of many banks at 13-14, the ICEP Report concludes:

> There is ...confirmed evidence of questionable and deceitful actions by some individual banks in the handling of accounts of victims, including withholding information from Holocaust victims or their heirs about their accounts...and a general lack of diligence -even active resistance - in response to

> earlier private and official inquiries about dormant accounts. Important in the questioned actions that are outlined in detail in Annex 4 was, at the least, a widespread lack of diligence in searching for victims' accounts....The Committee's concern about these problem actions is based both on multiple specific instances identified by auditors in a number of individual banks, and on the record of repeated failures to respond adequately to individual claims or to the various industry or official inquiries...These actions, and those discussed in more detail in Annex 5, led the Committee to question whether their duty of due care in their dealings with customers was observed by a number of banks and their officers in the special situation following World War II."

39. It appears that the banks' indefensible post-war behavior was motivated, in part, by a desire to conceal the fact that many Holocaust victim-owned accounts had been transferred to German banks at the request of Nazis under questionable circumstances.[11] It also appears that many other Holocaust victim-owned accounts were plundered by faithless fiduciaries or dishonest bank employees who took advantage of the death of the owner to seize the funds for themselves. Other accounts were closed by the banks because of the accumulation of bank fees. Yet other Holocaust era accounts were simply retained by the banks themselves since, in the absence of a Swiss escheat law, unclaimed accounts became the de facto property of the banks. ICEP Report, para. 48-49, at 15.

40. Repeated efforts by the international community to obtain an accounting for the pre-war

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[11]See Bergier Report at 276-277, describing the wartime decision of the directors of major Swiss banks to transfer Holocaust-victim accounts to Nazi banks even when the legal justification for transfer were not present in order to retain the "goodwill" of the Nazis.

deposits were met by assurances by Swiss banks in 1945, 1947, 1950, 1956, and 1962 that they had examined their records and could find virtually no evidence of unpaid Holocaust era accounts. ICEP Report, Annex 5 at 87-92.

41. At the same time that they were lying to Holocaust victims about the existence of Holocaust era accounts, Swiss banks were carrying out a massive destruction of Holocaust-era bank records, eventually destroying all records relating to approximately 2.7-2.8 million accounts open during the relevant period, and destroying the bulk of the transactional records relating to the remaining 4.1 million accounts. See ICEP Report, Annex 4, para. 5; Id at 6, 12, 108-09; 111. In fact, substantial evidence exists that record destruction continued past 1996. Bergier Final Report at 40.

42. The banks' wholesale destruction of Holocaust-era bank records coincided with the post-war campaign of falsehood and evasion agreed to by the banks in May, 1954, chronicled by the Bergier Commission, *supra*, at para. 37. No doubt exists that the Swiss banks were aware of widespread concern over the existence of unpaid Holocaust era Swiss accounts at the very moment they were destroying their records. See *Albers v. Credit Suisse*, 188 Misc. 229, 67 NYS2d 239 (NY City Ct. 1946); Bergier Final Report at 443-444; 446-449; ICEP Report at 81-83

43. Although Swiss banks insist that the document destruction was legal under Swiss law and was not improperly motivated, no question exists that the banks' massive document destruction, coupled with the post-war campaign of deceit and deception, has made it impossible to trace the fate of more than 2.7 million accounts open during the Holocaust-era, and has rendered it extremely

difficult to investigate claims by members of the deposited assets class to the 4.1 million accounts for which fragmentary records survive. ICEP Report, para. 23, and note 19, at 6.[13]

44. In 1997, the United States government released a report on Swiss gold transactions with the Nazis during WW II, the so-called Eizenstat report, that re-ignited the controversy over the behavior of Swiss banks during WW II.[14] At approximately the same time the Eizenstat report was released, the World Jewish Restitution Organization demanded an accounting of unpaid Holocaust victim-owned accounts in Swiss banks. Numerous government officials in the United States, including Senator Alfonse D'Amato, in his capacity as Chair of the Senate Banking Committee; and Alan Hevesi, in his capacity as Comptroller of the City of New York, also demanded an accounting. This litigation followed the public demand for an accounting.

D. The ICEP Audit

45. In 1996, in response to demands for an accounting, the Swiss government authorized the Independent Committee of Eminent Persons (ICEP), chaired by Paul Volcker, to conduct an audit of Swiss banks to determine whether substantial numbers of unpaid Holocaust victim-owned accounts remained in Swiss banks.

46. ICEP auditors, paid by the Swiss banking industry, utilized the services of five prominent international accounting firms doing business in Switzerland, and, with the authorization of the

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[13]The ICEP Report notes that the complete destruction of records relating to between 2.7-2.8 million accounts "leaves an unfillable gap of almost three million accounts that can now never be known or analyzed for their relationship to Holocaust victims." ICEP Report para. 38, at 12.

[14]The formal title of the Eizenstat Report is U.S. Department of State, Preliminary Study on U.S. and Allied Efforts to Recover and Restore Other Assets Stolen or Hidden by Germany During World War II (May 1997).

Swiss government, sought to assemble a list of all Swiss bank accounts open between 1933-45, with the intention of matching the accounts against lists of Holocaust victims maintained at Yad Vashem and elsewhere.

47. The ICEP auditors found, however, that Swiss banks had destroyed all records relating to more than 2.7 million accounts open during the relevant period, rendering it impossible to account for those funds. ICEP Report at 81-83; Bergier Report, Vol II, at 446. The fate of those 2.7 million accounts has been lost to posterity. ICEP auditors also found that Swiss banks had destroyed much of the transactional records of the remaining 4.1 million accounts for which some records survived.

48. ICEP auditors, nevertheless, took the first important step of assembling a series of databases in each participating bank, known as the Total Accounts Databases (TADS), listing the 4.1 million accounts open during the relevant period for which any records survived.[15]

49. Upon information and belief, it had been ICEP's intention to match the 4.1 million accounts listed on the TADS databases against Holocaust victim lists at Yad Vashem and elsewhere. At the urging of certain Swiss banks, however, the ICEP report notes that 1.9 million accounts with Swiss addresses or in cantonal savings banks, were removed from the TADS prior to victim-list matching, based upon an assumption that account owners with Swiss addresses or cantonal savings accounts were not victims of the Holocaust. ICEP Report para. 26, at 8.[16]

50. In fact, since many Holocaust victims used Swiss addresses or Swiss intermediaries

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[15] The process is described in the ICEP Report at 5-12, and Annex 4, at 57-80.

[16] I have been informed that certain banks, including UBS, allege that so-called Swiss address accounts were not removed from the TADS prior to matching against the Holocaust victim lists.

whenever possible to open a Swiss bank account in order to deter Nazis from learning of its existence, such a wholesale categorical exclusion of 1.9 million accounts was significantly overbroad, and may well have had the effect of excluding numerous Holocaust victim-owned accounts from the ICEP audit. In fact, the ICEP Report recognized the overbroad nature of "filtering" Swiss address accounts out of the process, explicitly noting that Swiss address accounts were omitted "even though victims may have used false Swiss addresses." ICEP Report para. 38 at 12.

51. ICEP auditors then matched the remaining 2.2 million accounts on the TADS against victim lists maintained at Yad Vashem of persons murdered by the Nazis, as well as lists of victims maintained elsewhere, totaling approximately 5.5 million victim names.

52. The victim-list match yielded approximately 280,000 exact or extremely close name matches with the 2.2 million accounts listed on the TADS.[17]

53. The initial 280,000 figure was reduced to approximately 277,000 exact or near exact name matches because of the existence of a different middle name, a clear discrepancy in age, evidence of death or deportation prior to the account's opening, or an age status clearly inconsistent with the depositor's actions. ICEP Report Annex 4 para. 12 at 61.

54. The 276,905 accounts with close victim name matches were then augmented by approximately 76,000 non-matching accounts listed on the TADS and chosen by ICEP auditors for further investigation because information embedded in surviving fragmentary bank records, such as

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[17] Although the victim list matching was carried out using the best available data, recent significant additions to the list of murdered victims maintained at Yad Vashem has raised questions as to the comprehensiveness of the ICEP audit victim name match.

evidence of incarceration in a concentration camp, indicated that the owner was a victim of the Holocaust whose name did not appear on the concededly incomplete victim lists. ICEP Report para. 27 and note 25 at 7-8; Id. Annex 4 para 15, at 63.

55. The approximately 353,000 accounts with either an exact or close match to a Holocaust victim, or internal record evidence of Nazi persecution, were then investigated by ICEP auditors to determine whether the accounts were "probably or possibly" owned by victims of the Holocaust. ICEP Report para 29 at 8; Id Annex 4 para. 16, at 62.

56. In connection with the investigation, four categorical disqualifications were used to "filter" out entire categories of accounts deemed to be unlikely to be Holocaust victim-owned.

57. First, approximately 118,000 (117,898) victim name-matched or otherwise victim-connected accounts were "filtered" out of the process because they appeared to be owned by persons with a Swiss residence address. ICEP Report Annex 4 para 18, at 64. This second filtering of Swiss address accounts was based upon an assumption that Swiss residents had not been victims of Nazi oppression.

58. Once again, such an assumption appears to have overlooked the widespread use by Holocaust victims of false Swiss addresses or Swiss intermediaries in connection with the opening of Swiss bank accounts in an effort to foil Nazi investigators.

59. Second, thousands of accounts owned by persons residing in areas that were never under Axis control, such as London and New York, were categorically disqualified. ICEP Report Annex 4 n.17, at 64. As with the categorical disqualification of accounts with Swiss addresses, such a categorical disqualification was overbroad because many Holocaust victims used addresses of friends

or relatives residing in non-Axis controlled areas when opening a Swiss bank account in an effort to shield Swiss accounts from Nazi scrutiny.

60. Third, thousands of accounts closed prior to Nazi occupation or control of the owners' place of residence were disqualified on the assumption that such accounts were paid to the true owner before the Nazis gained control of the depositor's place of residence. ICEP Report Annex 4 para. 19, at 65.

61. It now appears, however, that in many cases, Holocaust victim-owned Swiss accounts were transferred to Nazi banks prior to formal occupation and annexation of the owner's residence in order to ransom the owner or family members from Nazi imprisonment, or to permit the owner or family members to escape from countries under Nazi control.

62. Moreover, experience has indicated that many account owners maintained more than one residence, rendering it impossible to presume conclusively that they were not in an Axis-controlled area prior to the invasion of the country of residence listed on their account.[19]

63. Fourth, thousands of accounts with records that indicated post-1945 activity were categorically disqualified because it was assumed that such activity demonstrated that the true owner had survived the Holocaust and was exercising dominion and control over the account.

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[19]For example, a recent investigation by CRT II officials reveals an example of an account holder with a Polish residence address whose name matched to the victim lists, but whose account was "filtered" or "scrubbed" out of the ICEP audit because it was closed prior to the invasion of Poland in 1939. Review of the bank file reveals, evidence of a German address, suggesting that the owner may have been forced by the Nazis to surrender the account unlawfully. See HCPO, TAD Preliminary Progress Report, Account Numbers 465491, 465495.

64. It now appears, however, that much post-1945 activity reflected efforts by family members to recover a Holocaust-era account, or consisted of efforts to plunder the accounts by faithless persons.

65. While the banks assert that mere post-1945 requests for information did not disqualify an account, an ongoing CRT II investigation described *infra* indicates that accounts categorically excluded because of post-1945 activity were, in fact, owned by victims of the Holocaust who died in a Nazi concentration camp, rendering it impossible for the true owner to have engaged in the post-1945 activity. In fact, much post-1945 activity does not reflect an exercise of dominion and control by the true owner, but is evidence of looting or other improper disposition of the Holocaust victim's account.

66. The four categorical disqualifications described above reduced the original ICEP figure of 353,000 potential victim-owned unpaid Swiss accounts to approximately 54,000 (53,886) "probable" and "possible" accounts potentially owned by Holocaust victims. ICEP Report Annex 4 para. 20-30, at 65-67.

67. The ICEP Report then used four categories to describe the 54,000 accounts potentially owned by Holocaust victims: Category I accounts consisted of dormant accounts or accounts closed under suspicious circumstances that were inactive after the war and exactly match the name of a Holocaust victim. Category II accounts consisted of dormant or suspiciously closed accounts that were inactive after the war and exhibited strong record evidence of victim status, even though they did not match to a victim list. Category III accounts consisted of accounts that exactly match the name of a Holocaust victim, and that were facially marked as closed to unknown persons or under

unknown circumstances after 1945, but for which no records exist as to who received the money. Category IV accounts consisted of accounts that did not match the victim lists, but that were open between 1933-45, remained inactive for at least 10 years after the war, were either dormant or closed with no evidence of who received the money, and were otherwise consistent with victim ownership. ICEP Report para. 22-26, at 65-66; Exhibit C to Annex 4, at 78-80.

68. The 54,000 accounts in Categories I-IV were deemed by ICEP auditors to be "probably" or "possibly" owned by victims of the Holocaust, and were the subject of the report issued by ICEP on December 6, 1999, annexed hereto as Exhibit 2. Thus, despite the destruction of all records concerning more than 2.7 million accounts, the destruction of most of the transactional records for the remaining 4.1 million accounts for which some records survive, and the use of four overbroad categorical disqualifications, ICEP auditors ultimately identified approximately 54,000 Holocaust-era Swiss bank accounts "probably" or "possibly" belonging to Holocaust victims that either: (1) remained unpaid; (2) had been transferred by Swiss banks to Nazi institutions under conditions rendering it questionable whether the true owner received the proceeds; (3) had been closed with no evidence to whom the money was paid; or (4) had been closed to the bank's account.

69. At the banks' insistence, the original 54,000 names described in the ICEP Report were then subjected to a year-long so-called "scrubbing" process at the banks' expense, utilizing ICEP auditors and ICEP criteria, ostensibly to eliminate duplicate accounts and to correct "errors."[22]

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[22]The scrubbing process was described to the Court as follows: "It is understood that the [original 54,000 ICEP audit names] are being checked to eliminate errors, e.g. duplicate accounts." See Paragraph C of Memorandum to the File in connection with Amendment 2, reproduced in Exhibit 1(C).

70. In fact, a principal purpose of the "scrubbing" appears to have been an effort by the banks to persuade ICEP auditors to reduce the number of Category III and IV accounts by examining surviving documentary records. CRT II officials were not permitted to participate in the "scrubbing" process.

71. While the year-long "scrubbing" process identified certain accounts that could not have belonged to Holocaust victims because they were closed prior to 1933 or opened after 1945, and did correct certain duplications and clerical errors, many accounts were "scrubbed" pursuant to overbroad criteria, such as closure immediately prior to Nazi invasion, or existence of a Swiss or non-Axis area address, that were fully consistent with Holocaust-victim ownership. The "scrubbing" process resulted in the ultimate reduction in the ICEP identified accounts from 54,000 to 36,000.

72. Although participants in the scrubbing process were under a duty to maintain records of any scrubbed account in order to permit review by the Court, it is unclear whether such records have been maintained.

73. CRT II officials believe that a combination of human error and overbroad application of the categorical exclusions during the "scrubbing" process resulted in the elimination of numerous accounts potentially owned by Holocaust victims. For example, in 2000, ICEP auditors conducted a test match of approximately 7,000 Swiss bank account claims that had been filed with the Holocaust Claims Processing Office (HCPO) of the New York State Banking Commission against the portion of 4.1 million TAD database reflecting all Swiss accounts open at UBS during the relevant period for which records have survived.

74. The HCPO test match resulted in name matches with the UBS TAD for 1,807 HCPO claims, including 885 accounts for which a highly persuasive double match existed involving an account holder and a related person, even though none of the 1,807 matched to the AHD. Further investigation by CRT II indicates that a significant proportion of the HCPO matches with the UBS TAD will result in the payment of a claim by the CRT II. Since none of the 1,807 HCPO TAD matched accounts appear on the list of 36,000 "probable or possible" accounts that currently constitute the AHD, the conclusion is inevitable that a combination of human error and overly rigorous application of the four categorical exclusions erroneously "filtered" or "scrubbed" numerous Holocaust victim-owned accounts from the list of "probable or possible" victim owned accounts that currently makes up the AHD.

75. Similarly, an experimental match recently conducted by CRT II officials against the UBS portion of the TAD of 550 CRT II claims that failed to match to the 36,000 account AHD indicates that 14% of the 550 claims may qualify for payment, even though none matched to the AHD.

76. It is, therefore, no longer possible to view the AHD as a definitive listing of potential Holocaust victim-owned accounts. Experience teaches that in order to be certain that no victim-owned account is overlooked by claims officials, all claims must be matched against the TADS in accordance with the long-standing recommendations of Paul Volcker and the unanimous International Committee of Eminent Persons.

77. Once the "possible" or "probable" accounts had been "filtered" from 373,000 accounts to 54,000 accounts, and further "scrubbed" to 36,000 accounts, Swiss bank regulators authorized publication on the Internet of 21,000 accounts deemed "probably" owned by Holocaust victims.

Swiss bank regulators declined to authorize publication of the remaining 15,000 accounts, which were deemed by ICEP auditors to be "possibly" owned by Holocaust victims.

78. Swiss bank regulators argued that while the evidence uncovered by ICEP auditors justified making the 15,000 accounts available for "black box" claims processing on the AHD, it did not justify publication of information concerning the accounts because Swiss officials deemed that evidence of Holocaust victim ownership was too attenuated.

79. In order to effectuate their decision not to publish certain accounts, Swiss bank regulators divided Category III accounts, consisting of accounts exactly matching to victim lists that had been marked as closed with no record to whom the money was paid, into Categories IIIA and IIIB, based on the degree of corroboration of an account's ownership by a Holocaust victim. Those accounts with an exact name match, plus additional corroboration, were deemed Category IIIA accounts and were published. Approximately 3,000 accounts with an exact name match to a victim list, but with no additional corroboration of victim ownership, were deemed Category III B accounts and were not published. Upon information and belief, no basis whatever exists to make such an arbitrary distinction.

80. Thus, approximately 3,000 Category III B accounts with an exact or near-exact name match to a victim list were deemed by Swiss authorities as too speculative to publish, although they were included in the 36,000 account AHD. No public notice has ever been given in connection with such accounts. ICEP Report, para. 68-76, at 19-21.

81. In addition, Swiss bank regulators declined to authorize the publication of any of the 12,000 Category IV accounts, despite the fact that Category IV accounts had remained dormant for

at least 10 years after the war under circumstances fully consistent with Holocaust victim ownership.

82. During the administration of the claims process, CRT II officials have identified a number of Category IV accounts owned by Holocaust victims rendering the continued categorical refusal by the banks to publish any information concerning the Category IV accounts wholly indefensible.

83. In its Report, annexed hereto as Exhibit 2, ICEP recommended the creation of a single, consolidated 4.1 million Total Account Database (TAD) listing all known accounts open during the relevant period against which deposited assets claims could be matched in order to assure that any Holocaust victim-owned account that had been erroneously disqualified from the 36,000 AHD database because of overbroad categorical disqualification or human error could, nevertheless, be matched to specific claims filed by members of the deposited assets class. ICEP Report para. 65-67, at 18. A letter from Paul Volcker to Dr. Karl Hauri, a Swiss banking official, dated April 12, 2000, seeking establishment of the consolidated TAD database in accordance with the recommendation of the ICEP Report is annexed hereto as Exhibit 3A. Mr. Volcker's Congressional testimony in February 2000 to the same effect is annexed as Exhibit 3B.

84. Although the defendant banks had pledged to respect the recommendations of the ICEP Report, defendants flatly refused to assemble a single TAD data base of all 4.1 million Holocaust-era bank accounts, insisting upon the maintenance of separate fragmentary TAD databases in hundreds of Swiss banks.

85. More importantly, the banks refused to permit CRT II officials operating under the supervision of the Court to match bank account claims filed by members of the deposited assets class against the banks' 4.1 million account total accounts data bases (TADS), restricting the deposited

assets claims process to matching bank account claims against a far smaller 36,000 account database, referred to as the Account History Database (AHD).

86. The banks confined the CRT II claims process to the 36,000 AHD database as opposed to the more complete 4.1 million TAD database despite the ICEP Report's recognition that the AHD list could not be deemed a full listing of victim owned accounts. See ICEP Report at 6, boxed note ("There can be no assurance that all possible accounts have been identified...").

87. The ICEP Report states:

> ... the process of filtering down the 4.1 million accounts in the database to 53,886 names was in many respects cautious, e.g., it excluded, *inter alia*, accounts with permanent Swiss addresses even though victims may have used false Swiss addresses (emphasis added). ICEP Report para. 38, at 12.

88. Such "cautious" filtering has removed more than two million accounts from the database available to CRT II, including at least 118,000 accounts that matched to known victims' names, or otherwise indicated victim ownership.

89. Acting within the above-described constraints imposed by Swiss bank regulators and the defendant banks, CRT II officials have overseen the publication of information concerning 21,000 accounts on the Internet; received 33,000 claims from members of the deposited assets class in response to the publication; matched the 33,000 claims against the AHD database of 36,000 accounts; recorded approximately 12,000 name matches[23] triggering individual forensic investigations by the CRT II that have, thus far, validated approximately 1,900 bank account claims

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[23] CRT II officials report that recent adoption of improved data processing programs by CRT II will generate a substantial number of additional matches.

totaling $150 million, with an average payment of $77,000 per account, and $125,000 per successful claim.

90. While significant progress has been made in returning Holocaust-era accounts to their true owners, CRT II officials have informed me that it will be impossible to complete the administration of the deposited assets claims process in a fair and just manner in the absence of access to the additional information sought herein. This motion is designed to obtain that information by: (a) reversing the so-called "scrubbing" process that reduced the "probable" or "possible" accounts identified by the ICEP audit from 54,000 to 36,000 accounts, and restoring non-duplicative scrubbed accounts to the AHD database; (b) requiring the publication of the, thus far, unpublished 15,000 Category III B and Category IV accounts deemed by the ICEP audit to be "possibly" owned by Holocaust victims, together with any "scrubbed" accounts restored to the AHD database pursuant to (a), as well as any account identified earlier as potentially owned by Holocaust victims; (c) permitting the matching of deposited assets claims against the full 4.1 million TAD database when deemed appropriate by CRT II officials; and (d) authorizing CRT II officials to inspect existing documentary material relating to a matched account that is not included in the ICEP audit file.

E. Prior Proceedings Regarding Access to Information

91. The settlement agreement herein, as originally executed on January 26, 1999, made no specific provision for access to information needed to administer a deposited assets claims process. With the publication of the ICEP Report on December 6, 1999, it became clear that a substantial

claims program would be necessary to resolve claims to the thousands of accounts identified by the ICEP audit as "probably" or "possibly" owned by Holocaust victims.

92. At the two Rule 23(e) fairness hearings held in connection with the settlement herein on November 29, 1999 in Brooklyn, New York, and on December 15, 1999 in Jerusalem, Israel, objectors warned that it would be impossible to administer a fair and just deposited assets claims process in the absence of adequate access to information in the hands of the defendant banks. In response to such concerns, Chief Judge Korman deferred a ruling on the fairness of the Swiss bank settlement pending clarification of the availability of information needed to administer a fair and just deposited assets claims process.

93. At the urging of Chief Judge Korman, in my capacity as lead settlement counsel, I sought to negotiate a minimum level of information access that would permit the commencement of a fair and just deposited assets claim process. The ensuing negotiations focused on publication of accounts identified by the ICEP audit as "probably" or "possibly" belonging to Holocaust victims; and the creation of a database of accounts against which deposited assets claims could be matched.

94. The defendant banks initially declined to publish the names of any bank account owners, arguing that, under Swiss privacy law, they were powerless to publish any account information in the absence of authorization by Swiss banking regulators. After protracted negotiations between and among the plaintiffs, the defendant banks, ICEP, and the Swiss banking authorities, Swiss banking regulators authorized the publication of 21,000 accounts that had been deemed by the ICEP auditors to be "probably" owned by Holocaust victims, but declined to authorize the defendant banks to

publish the remaining 15,000 accounts deemed "possibly" owned by Holocaust victims, arguing that, as to merely "possible" accounts, privacy interests protected under Swiss law outweighed any potential Holocaust victim's interest in public disclosure.

95. The 15,000 unpublished "possible" accounts were, instead, included on the AHD database for so-called "black box" matching against deposited assets claims actually filed.

96. In the interest of permitting elderly survivors to participate in the settlement prior to their deaths, I did not object to the publication of the 21,000 accounts and the "black box" matching of the 15,000 unpublished accounts, in the hope that partial publication and "black box" matching of the rest would provide an adequate means of resolving claims to the accounts.

97. I noted, however, that it might become necessary at a later date to seek publication of the 15,000 unpublished accounts if experience indicated that failure to have published the accounts was adversely affecting the fairness of the settlement process. A copy of my declaration, dated June 26, 2000, reserving the right at para.16-30 to seek additional publication is annexed as Exhibit 4.

98. The banks' agreement to support the Swiss bank regulators' decision to authorize publication of 21,000 accounts, and to place the remaining 15,000 accounts on the AHD database for "black box" matching, was formalized in Amendment 2 to the settlement agreement, annexed as Exhibit 1B.

99. The defendant banks also resisted the establishment of a consolidated 4.1 million account database for use in connection with the deposited assets claims process. Despite the public urging of Paul Volcker, the defendant banks refused to establish a central total accounts data base (TAD),

and refused to permit CRT II claims officials access to the fragmentary TADS that existed in each bank. Instead, the banks agreed to create a smaller AHD database consisting of the 36,000 accounts identified in the ICEP audit, and to permit CRT II officials to match claims against the smaller AHD database. I supported the creation of the AHD database, but noted that it might become necessary in the future to seek access to a larger database. See Exhibit 4, para 16-30.

100. The parties formalized the banks' commitment to providing plaintiffs' access to an AHD database of the 36,000 accounts identified by the ICEP audit in Amendment 2 to the settlement agreement, signed on August 2, 2000, a copy of which is annexed hereto as Exhibit 1B.

101. In view of my concerns over the failure to have published the 15,000 "possible" accounts, and the refusal to permit CRT II officials routine access to the TADS, I insisted upon the inclusion of para. 3.17 in Amendment 2, explicitly reserving the right, if necessary, to seek additional publication, and access to additional information, if needed to administer the deposited assets claims program in a fair and just manner. Paragraph 3.17 of Amendment 2 provides:

> Nothing herein shall be deemed to abrogate whatever power the Court may have under Rule 23(d)(2) of the Federal Rules of Civil Procedure to make appropriate orders required for the fair conduct of any claims process; provided, however, that no such order shall be inconsistent with the terms of this Settlement Agreement. The Settlement Fund shall pay all costs incurred by the Settling Defendants in complying with such orders, including, but not limited to, the expenditure of time by the Settling Defendants' own employees.

102. When the contents of Amendment 2 were made known to Chief Judge Korman, he expressed concern over the banks' refusal to honor their promise to carry out the recommendations

of the ICEP Report. Chief Judge Korman recognized, however, that the bank's agreement to publish the names of 21,000 account owners, and to establish a data base of 36,000 names against which all claims could be matched, when added to an informal agreement described in a Memorandum to the File by counsel and annexed to Amendment 2 assuring claims officials access to the 4.1 million TAD if needed to process claims involving a possible Swiss address account, and the language of para 3.17 authorizing future efforts to seek additional information access if necessary, established a minimally acceptable claims process.

103. Accordingly, Chief Judge Korman entered an order on August 9, 2000 upholding the overall fairness of the settlement, including the banks' promises concerning information access codified in Amendment 2 to the settlement agreement and the annexed Memorandum to the File.

104. In my capacity as lead settlement counsel, I supported the settlement's general fairness. In my declaration in support of the fairness of the settlement, dated June 26, 2000, annexed hereto as Exhibit 4, I noted that the banks' agreement to publish information concerning 21,000 accounts and to permit access to a database of all 36,000 accounts identified in the ICEP Report made it possible to administer a minimally fair deposited assets claims process. I noted, as well, that the banks had, in an informal Memorandum to the File, negotiated simultaneously with Amendment 2, agreed to permit CRT II claims officials to have access to the TADS to search for Swiss address accounts whenever a claims official reasonably suspected the existence of such an account.[27]

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[27]Unfortunately, several years of experience with the claims program has demonstrated that claimants, who are often the children or grandchildren of the person who established the account, generally lack knowledge of whether a Swiss address existed, rendering it almost impossible to

105. I noted, however, that the failure to publish the names of the owners of the remaining 15,000 ICEP audit accounts, and the failure to follow the Paul Volcker's recommendation, joined in by a unanimous Board of ICEP, concerning the establishment of a central 4.1 million TAD database against which all bank account claims could be matched, rendered the deposited assets claims process less than ideal. Nevertheless, in view of the fact that more than 1,000 Holocaust victims were dying each month, many in great need, I supported the settlement's overall fairness in the interest of expediting the availability of funds to victims, deferring concerns over additional publication and information access to a later date when actual experience with the deposited assets claims process would provide a better understanding of the need for such data.

106. I explicitly reserved the right to seek future orders under Rule 23 providing for additional publication and broader access to information if such relief seemed necessary to the fair administration of the deposited assets claims process. Indeed, I insisted that para. 3.17 be added to Amendment 2 to the settlement agreement providing that nothing in the agreement limited the Court's power under Rule 23(d)(2) to order the provision of additional information, as long as the relief sought was not "inconsistent" with the settlement agreement. I conveyed my reading of para. 3.17 of Amendment 2 to the Court in my declaration supporting the settlement's fairness. The banks did not contest my reading of Amendment 2.

107. Given the experience gained in seeking to administer the deposited assets claims process during the past several years, CRT II officials have informed me that it is necessary to invoke the

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satisfy the criteria described in the Memorandum to the File.

remedy anticipated by para. 3.17 of Amendment 2.

F. The Need for Additional Information

108. Pursuant to the recommendation of the Special Master, $800 million was initially allocated to the deposited assets class.[28] The Court designated the Claims Resolution Tribunal II (CRT II), under the supervision of Michael Bradfield and Paul Volcker as Court-appointed Special Masters, to administer the deposited assets claims process in Zurich.

109. As described above, CRT II has received 33,000 claims from members of the deposited assets class, and has matched each claim against the 36,000 AHD database, yielding 12,000 name matches. Thus far, forensic investigation of the 12,000 matched claims has resulted in validation of approximately 1,900 claims, totaling $150 million.

110. CRT II officials have informed me that experience gained in administering the deposited assets claims process for the past several years indicates several information-related gaps that must be corrected in order to assure the fair and just administration of the deposited assets claims process. The information-related concerns expressed by CRT II officials are particularly troublesome because, at the close of these proceedings, members of the deposited assets class will be formally precluded by principles of claim preclusion from seeking to recover Swiss bank accounts in the future.

111. First, CRT II officials believe that the four categorical disqualifications - Swiss address;

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[28]A copy of the multi-volume Special Master's Proposed Plan of Allocation and Distribution of Settlement Proceeds, which was adopted by the Court and approved by the Second Circuit, has been lodged with the Court, and is available on the Internet at www.swissbankclaims.com, under "Key Documents."

non-Axis area address; pre-Nazi-occupation closure; and post-1945 activity - used in connection with the "filtering" of victim owned accounts from the 373,000 initially identified by the ICEP auditors, to the 54,000 identified in the ICEP Report; and the subsequent "scrubbing" of the ICEP audit list from its original figure of 54,000 "probable or possible" accounts, to its present form of 36,000 accounts, were overbroad, and almost certainly had the effect of removing numerous Holocaust victim-owned accounts from the final list of "probable or possible" accounts. ICEP Report para. 38 at 12.

112. While the wholesale disqualification of categories of accounts with a low probability of yielding a high percentage of Holocaust victim-owned accounts may well have been a prudent judgment by ICEP auditors as a legitimate effort to conserve money and time, mechanical application of the categorical exclusions, coupled with human error, operated to exclude numerous Holocaust victim-owned accounts from the final list of 36,000 AHD accounts.

113. The overbroad effects of the four categorical disqualifications are graphically demonstrated by an ongoing analysis by CRT II of Swiss bank account claims filed with the New York State Banking Commission's Holocaust Claims Processing Office (HCPO) indicating that fully 1,807 HCPO claims match to the 4.1 million TAD database, even though they do not match to the 36,000 AHD database. Moreover, CRT II's preliminary investigation of the 1,807 claims that match only to the TAD indicates that a substantial number of the HCPO claims will eventually qualify for payment from the settlement fund, with potential payments from the settlement fund approaching $100 million.

114. Similar results were observed when 550 claims lodged with the CRT II were matched to the UBS portion of the TAD after failing to match to the AHD. Preliminary investigation suggestion that 14% of the claims may result in payments by the CRT II , even though none of the claims match to the AHD. If such a pattern holds across the remaining 23,000 claims that have failed to match the AHD, more than $200 million in additional claims payments may result from gaining routine access to the TAD.

115. The most obvious explanation for such a serious flaw in the accuracy of the AHD is a combination of human error and the overbroad effect of using the four categorical disqualifications to "filter" and "scrub" the AHD list from the initial ICEP finding of 373,000 victim-related accounts to 54,000 "probable" or "possible" victim owned accounts described in the ICEP Report, to its current form of 36,000 accounts. Accordingly, the first recommendation of CRT II is to restore to the AHD the non-duplicative accounts that were removed from the original ICEP Report list of 54,000 "probable" or "possible" Holocaust victim-owned accounts pursuant to the overbroad scrubbing criteria.

116. Second, CRT II officials inform me that a disturbing 90/10 statistical anomaly has arisen between the number of name matches to the 21,000 ICEP audit accounts that have been published, and the number of name matches to the 15,000 unpublished accounts. Not surprisingly, it appears that the failure to publish an account materially affects the likelihood that a claim will be filed that matches to the account holder's name.

117. Accordingly, CRT II officials have advised me that they believe it necessary to publish

the 15,000 accounts deemed by the ICEP audit to be "possibly" owned by Holocaust victims, together with any accounts that are reinstated to the AHD list as a result of the reversal of the scrubbing process described in para. 69-73.

118. CRT II officials inform me, as well, that numerous accounts have been previously identified by the banks as potentially owned by Holocaust victims, but have been excluded from the CRT II publication and claims process. Since the current owners of such accounts are members of the deposited assets class whose claims will be claim precluded at the close of these proceedings, information concerning such accounts must be assembled, published, and made available to CRT II officials for use during the claims process.

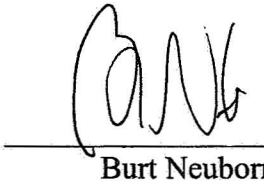
119. Third, CRT II officials inform me that in order to assure the proper disposition of a deposited assets claim, when a claim does not match to the AHD, CRT II officials must be able to match the claim against the 4.1 million TAD database to assure that a valid claim has not been inadvertently excluded because of the overbreadth of the categorical disqualifications, or because of human error.

120. Fourth, CRT II officials inform me that in settings where a claim has matched to an account listed on the AHD or the TAD, it is occasionally impossible to resolve the claim using documents in the ICEP audit file for such account. In those settings, CRT II officials seek access to all available documents relevant to the matched account in order to resolve the claim.

121. Accordingly, plaintiffs seek an order: (1) compelling defendant banks to restore to the Account Holder Database (AHD) all non-duplicative accounts removed from the original ICEP listing

of 54,000 accounts "probably or possibly" owned by Holocaust victims; (2) directing the publication of all accounts listed on the AHD database, as well as all accounts previously identified as potentially owned by Holocaust victims; (3) authorizing CRT II officials to match claims against the Total Accounts Database (TAD) in settings where CRT II officials believe such matching to be necessary; and (4) authorizing CRT II officials to investigate documentary material related to a matched account whether or not the documentary material is located in an ICEP audit folder.

Dated: April 27, 2004
New York, New York



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UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK

In re:
HOLOCAUST VICTIM ASSETS
LITIGATION

Master Docket No. CV-96-4849
(ERK) (MDG)

This Document Relates to All Cases

**MEMORANDUM OF LAW IN SUPPORT OF
MOTION SEEKING ADDITIONAL INFORMATION**

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Attorney for Plaintiff-Classes

Dated: April 27, 2004
New York, New York

Introduction

On January 26, 1999, the parties entered into an historic settlement agreement in this case, pursuant to which plaintiffs agreed to release Holocaust-era claims against the defendant banks and an array of non-party Swiss entities in return for a payment of $1.25 billion. On August 9, 2000, after extensive notice to the plaintiff classes and fairness hearings in Brooklyn and Jerusalem, Chief Judge Korman entered an order upholding the fairness of the settlement, as amended by Amendment #2 to the settlement agreement dated August 2, 2000. *In re Holocaust Victim Assets Litig.*, 105 F. Supp.2d 139 (EDNY 2000).

On March 31, 1999, Chief Judge Korman appointed Judah Gribetz, Esq., as a Special Master to recommend a proposed plan of allocation and distribution of the settlement funds. On September 11, 2000, Special Master Gribetz submitted a comprehensive report recommending the allocation of $800 million to the "deposited assets" class, consisting of persons claiming ownership of unpaid Holocaust-era deposits in Swiss banks. On November 22, 2000, after a hearing, Chief Judge Korman accepted the Special Master's recommended plan of allocation and distribution, including the allocation of $800 million to the deposited assets class. *In re Holocaust Victim Assets Litig.*, 2000 U.S. Dist. LEXIS 20817 (EDNY). On July 26, 2001, the Second Circuit rejected all challenges to the Allocation Plan. *In re Holocaust Victim Assets Litig.*, 14 Fed. Appx. 132 (2nd Cir. 2001).

On December 8, 2000, in accordance with the Special Master's recommendation, Chief Judge Korman designated the Claims Resolution Tribunal II (CRT II), headquartered in Zurich, to administer a Court-supervised claims process pursuant to which members of the deposited assets class could assert claims to a Swiss bank account. Paul Volcker and Michael Bradfield were appointed Special Masters with authority to oversee the deposited assets claims process.

On February 5, 2001, acting under the supervision of the District Court, officials of CRT II oversaw publication on the Internet of information concerning 21,000 Swiss bank accounts deemed "probably" owned by Holocaust victims. In response to the publication, CRT II officials received 33,000 bank account claims from members of the deposited assets class; conducted a match of the 33,000 claims against a database listing 36,000 Swiss bank accounts deemed to be "probably" or "possibly" owned by Holocaust victims; recorded 12,000 name-matches between a claim and a "probable" or "possible" Holocaust victim-owned account; and conducted forensic investigations leading to the recognition and payment, as of March 1, 2004, of claims to more than 1,900 Swiss bank accounts valued at over $150 million.

Several years of experience with administering the deposited assets claims process has, however, revealed significant gaps in the information available to plaintiffs and to CRT II claims officials that, in the view of officials of CRT II, render it impossible to assure the fair resolution of the claims of many members of the deposited assets class.[1]

[1] The factual basis for the concerns of CRT II officials is set forth in the accompanying declaration of Burt Neuborne, dated April 27, 2004.

Since plaintiffs' legal claims to Holocaust-era Swiss bank accounts will be extinguished by government-imposed claim preclusion at the close of these proceedings, it is crucial that the information gaps be filled in order to assure compliance with procedural due process of law.

The information gaps identified by CRT II claims officials, described in detail in the accompanying declarations, fall into three general categories: (1) a need for additional notice to the deposited assets class of the existence of identifiable Swiss accounts potentially owned by members of the class; (2) a need to augment the databases against which claims are matched to assure that valid claims are not overlooked; and (3) a need to inspect additional documentary records in connection with matched claims.

CRT II officials question whether adequate notice has been provided to members of the deposited assets class of the existence of numerous Swiss bank accounts that are potentially owned by Holocaust victims. In the absence of public notice of the accounts' existence, CRT II claims officials fear that members of the deposited assets class will lack the information needed to file a claim of ownership.

CRT II officials also question the comprehensiveness of the so-called Account History Database (AHD), a listing of 36,000 Swiss bank accounts deemed to be "probably" or "possibly" owned by Holocaust victims, against which deposited assets claims are matched by CRT II claims officers. CRT II officials believe that numerous victim-owned accounts have been omitted from the AHD pursuant to process described in detail in the accompanying declarations, rendering it necessary both to augment the

AHD and to provide greater access to the so-called Total Account Databases (TADS), listing all 4.1 million Swiss bank accounts open during the relevant period for which records survive. CRT II officials fear that, unless the AHD is augmented and the TAD is accessed, inadequate information will exist against which to match many bank account claims submitted by many members of the deposited assets class.

Finally, CRT II officials seek routine access to all documentary records in the banks' possession that will assist CRT II officials to corroborate or to reject claims where a name-match exists to the AHD, but where additional investigation is deemed necessary.

Having failed to persuade defendants to make the needed information available on a voluntary basis, plaintiffs seek an order pursuant to the Due Process Clause of the Fifth Amendment, Rules 23(d)(2) and (e) FRCP, and the inherent equitable power of the Court codified in Rule 23(e) FRCP, directing defendants to make the following six categories of information available to plaintiffs, and to officials of the CRT II:

(1) public disclosure of the existence of 15,000 identifiable Swiss bank accounts deemed "possibly" owned by Holocaust victims in order to provide reasonable notice to the deposited assets class of the accounts' existence, and of the availability of a claims process for asserting ownership of such accounts;

(2) public disclosure of the existence of several thousand Swiss bank accounts previously identified by Swiss authorities as potentially owned by Holocaust victims in order to provide reasonable notice to the deposited assets class of the accounts' existence, and of the availability of a claims process for asserting ownership of such accounts;

(3) public disclosure of the existence of hundreds of Swiss bank accounts owned by Polish and Hungarian Holocaust victims that were seized by the governments of Poland and Hungary after WW II and subsequently were made available to Swiss citizens in satisfaction of claims against the governments of Poland and Hungary. Public disclosure is needed in order to provide reasonable notice to the deposited assets class of the accounts' existence, and of the availability of a claims process for asserting ownership of such accounts;

(4) restoration to the Account History Database (AHD) purporting to list all potential Holocaust victim-owned Swiss bank accounts of up to 18,000 Swiss bank accounts "scrubbed" from the database pursuant to overbroad and potentially erroneous criteria;

(5) access by CRT II officials to the Total Accounts Databases (TADS) listing all known Swiss bank accounts open during the relevant period for which records survive in order to investigate bank account claims filed by members of the deposited assets class that fail to match to the AHD; and

(6) access to all documents in the banks' possession needed to resolve bank account claims filed by plaintiffs that match to a potential Holocaust victim-owned account, but that require further investigation.

CRT II officials believe that access to each of the six categories of information is crucial to a fair and just deposited assets claim process.[2]

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[2] Plaintiffs will also seek two procedural changes in the operation of the claims process

A. The Historical Facts Giving Rise to this Litigation

In the period immediately prior to WW II, Swiss banks vigorously marketed themselves throughout Europe as financial safe-havens, promising that recently-enacted Swiss bank secrecy laws would provide a degree of protection against efforts by Nazis, who had come to power in Germany in 1933, to seize the property of victims or targets of Nazi persecution. Not surprisingly, many thousands of persons deposited money or property in Swiss banks on the eve of the Holocaust, hoping to shield their assets from the coming storm. Tragically, many thousands of depositors perished in Nazi death camps, leaving their Swiss bank accounts unredeemed. Thousands more were compelled to authorize unlawful, forced transfer of their Swiss funds to Nazi banks in an effort to ransom themselves or family members from Nazi imprisonment, or to gain government permission for themselves or family members to leave Nazi-controlled areas. Yet others were forced to authorize transfer of their Swiss funds to Nazi banks, often while imprisoned by the Nazis in concentration camps.

In the years immediately following the defeat of the Nazis in WW II, numerous Holocaust survivors and their families sought information from Swiss banks about pre-war accounts opened by Holocaust victims. The information was needed in order to claim unredeemed Swiss accounts, or, in the case of unlawful forced transfers, to seek compensation from German authorities or the Swiss banks themselves.

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in order to achieve cost savings and personnel efficiency: consolidation of the TAD database into a single, easily searchable document; and transfer of many CRT functions from Zurich to New York.

As documented in the Bergier Commission Report,[3] the ICEP Report,[4] and in the recent opinion of Chief Judge Korman rejecting the defendant-banks' objections to the Special Master's Interim Report on Distribution,[5] many Swiss banks behaved appallingly in the immediate post-war period, placing insurmountable documentary hurdles in the path of persons seeking to redeem pre-war Swiss bank deposits, and systematically and deceitfully denying accurate information about the existence of many Holocaust-era accounts.

Among the damning findings contained in the Bergier Commission Report is the following description of the post-war behavior of the "big" Swiss banks:

> In May, 1954, the legal representatives of the big banks co-ordinated their response to heirs so that the banks would have at their disposal a concerted mechanism for deflecting any kind of enquiry. They agreed not to provide further information on transactions dating back more than ten years under any circumstances, and to refer to their statutory obligation to keep files for only ten years, even

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[3]The Bergier Commission, made up of distinguished Swiss historians, was established by the Swiss government to prepare an authoritative historical record of Swiss behavior during WW II. The Bergier Commission's multi-volume report, formally entitled "Independent Committee of Experts Switzerland - Second World War, Switzerland, National Socialism and the Second World War: Final Report (2002)," has been lodged with the Court, and is available on the Internet at www.swissbankclaims.com, under "Key Documents."

[4]The ICEP Report was issued on December 6, 1999, at the close of the audit of Swiss Banks by the International Committee of Eminent Persons (ICEP) chaired by Paul Volcker. It is annexed as Exhibit 2 to the accompanying Declaration of Burt Neuborne, and is available on the Internet at www.swissbankclaims.com, under "Key Documents." The ICEP audit is described in the Declaration of Burt Neuborne at para. 45-90, and discussed *infra* at 11-17.

[5]*In re Holocaust Victim Assets Litig.*, 302 F.Supp.2d 59 (EDNY 2004).

> if their records would have allowed them to provide the information....Throughout the post-war period the banks relied on a combination of discreetly playing down the problem and erecting barriers to investigation: time and again they would bring bank secrecy into play in order to legitimise their reluctance to provide information while at the same time charging high search fees for conducting investigations. ... Due to the deduction of such fees, unclaimed accounts, deposits and safe-deposit boxes could also disappear in the space of a few decades. The assets found by ICEP in 1999...therefore constitute only part of the total. Final Report of the Bergier Commission, Volume II, p. 446. (Emphasis added).[6]

The ICEP Report also vigorously criticizes the banks' post-war conduct at 13-15, and Annex 5, 81-100. After assessing the conduct of many banks at 13-14, the ICEP Report concludes:

> There is ...confirmed evidence of questionable and deceitful actions by some individual banks in the handling of accounts of victims, including withholding information from Holocaust victims or their heirs about their accounts...and a general lack of diligence - even active resistance - in response to earlier private and official inquiries about dormant accounts. Important in the questioned actions that are outlined in detail in Annex 4 was, at the least, a widespread lack of diligence in searching for victims' accounts....The Committee's concern about these problem actions is based both on multiple specific instances identified by auditors in a number of individual banks, and on the record of repeated failures to respond adequately to individual claims or to the various industry or official inquiries...These actions, and those discussed in more

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[6]The Bergier Commission also criticizes the willingness of many Swiss banks to curry favor with the Nazis by transferring Swiss accounts owned by Holocaust victims to Nazi banks even when the authorization for transfer was so inadequate that the legal officers of the banks balked at approving the transfers. See Bergier Report at 276-277.

> detail in Annex 5, led the Committee to question whether their duty of due care in their dealings with customers was observed by a number of banks and their officers in the special situation following World War II." (Emphasis added).

Purported audits by the Swiss banking community in 1945, 1947, 1950, 1956, and 1962 erroneously reported virtually no unpaid Holocaust victim-owned accounts. ICEP Report, Annex 5 at 87-92.

In addition, at the very moment the Swiss banks were engaged in carrying out the May 1954 conspiracy of silence and deceit chronicled in the Bergier Committee Report, quoted *supra* at 7-8, and repeatedly lying to the international community in 1945, 1947, 1950, 1956 and 1962 about the existence of Holocaust-related accounts, ICEP Report, Annex 5 at 87-92, the banks carried out a massive destruction of Holocaust-era bank records, eventually destroying all records relating to approximately 2.7 million accounts open during the relevant period, and destroying the bulk of the transactional records relating to the remaining 4.1 million accounts. See ICEP Report, Annex 4, para. 5; Id at 6, 12, 108-09; 111. In fact, substantial evidence exists that record destruction continued past 1996.[7] Bergier Report at 40. No doubt exists that the banks were fully aware of widespread international concern over the existence of unpaid Holocaust-era Swiss accounts at the very moment they were destroying their records. See *Albers v. Credit*

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Christopher Meili, a night watchman, very publicly called attention to the continued destruction of records at UBS in 1997, soon after the initiation of this lawsuit and the December 1996 Swiss Federal Decree, which called upon banks not to destroy archive records relating to accounts existing prior to 1945. See Bergier Report at 40.

Suisse, 188 Misc. 229, 67 NYS2d 239 (NY City Ct. 1946); Bergier Final Report at 443-444; 446-449; ICEP Report at 81-83.

The banks will doubtless argue that the destruction of bank records more than ten years old was lawful under Swiss law and was not done "systematically" "for the purpose of concealing behavior." ICEP Report at 6. Whatever the truth of such an assertion - which is belied by the conspiracy of silence and deceit entered into in May, 1954, and by the banks' repeated lying to the international community about the existence of Holocaust-era accounts - it is irrelevant to this post-settlement effort to obtain information needed to operate a fair and just deposited assets claims process using surviving bank records. The fact is, the bulk of the Holocaust-era bank records have been destroyed; and it was the banks' deplorable post-war conduct that both destroyed the records and prevented legitimate owners of the accounts from learning of their existence while bank records still existed.

Given such a record of post-war deceit and dishonor, it is indefensible for Swiss banks to make it any more difficult than it already is to search for accounts belonging to Holocaust victims and their heirs. Indeed, such past deplorable behavior places a special responsibility on the banks' current management to cooperate in making their surviving fragmentary records available to the plaintiffs and to the CRT II in a fair and just manner. Whatever the legal or moral responsibility of current Swiss bank officials for the appalling behavior of their post-war predecessors, the fact remains that the combined effect of a massive document destruction and a successful cover-up has rendered it

impossible to trace the fate of 2.7 million accounts open during the Holocaust-era, and renders it extremely difficult for the CRT II to investigate claims by members of the deposited assets class to the 4.1 million accounts for which fragmentary records survive. ICEP Report, para. 23, and note 19, at 6.[8]

B. The ICEP Audit

During the 1990's, demands mounted that long-deferred grievances of victims of Nazi persecution be resolved before the death of the Holocaust generation. The result was a spate of efforts to provide a degree of justice for Holocaust victims who had suffered grievous property losses at the hands of private entities. Efforts were launched on behalf of owners of Holocaust-era Swiss bank accounts, slave and forced laborers required to work under horrific conditions for German and Swiss companies, holders of Holocaust-era insurance policies, victims of German and Austrian bank profiteering, and victims of Nazi looting.[9] In each setting, plaintiffs sought the assistance of an American court to require private defendants who had knowingly profited from the Holocaust at the expense of victims to disgorge their unjust profits.

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[8]The ICEP Report notes that the complete destruction of records relating to between 2.7-2.8 million accounts "leaves an unfillable gap of almost three million accounts that can now never be known or analyzed for their relationship to Holocaust victims." ICEP Report para. 38, at 12.

[9]See generally, Michael J. Bayzler, Litigating the Holocaust in American Courts, 34 U. Rich L. Rev. 1 (2000); Michael J. Bayzler, The Legality and Morality of the Holocaust-Era Settlement with the Swiss Banks, 25 Fordham Int'l L. J. S64 (2002)(Symposium Issue). See also Michael J. Bayzler, The Battle for Restitution in American Courts (2003); Stuart Eizenstat, Imperfect Justice (2003). See also Burt Neuborne, Preliminary Reflections on Aspects of Holocaust Litigation in American Courts, 80 Wash. U. L. Q. 795 (2002).

In response to such renewed demands for an accounting, in 1996, the Swiss government authorized the Independent Committee of Eminent Persons (ICEP), chaired by Paul Volcker, to conduct an audit to determine whether substantial numbers of unpaid Holocaust victim-owned accounts remained in Swiss banks. ICEP, at the expense of the banks, retained the services of five international accounting firms to conduct the audit.

ICEP auditors initially sought to assemble a list of all accounts open between 1933-45 in order to match the accounts against known lists of Holocaust victims. Unfortunately, ICEP auditors discovered that all records of between 2.7-2.8 million accounts had been completely destroyed by the banks, rendering it impossible to conduct an audit of those accounts. ICEP Report at 81-83; Bergier Report, Vol II, at 446. Moreover, ICEP auditors found that the bulk of the transactional records for the remaining 4.1 million accounts had also been destroyed.

ICEP auditors, nevertheless, established databases in each of several hundred banks, known as the Total Accounts Databases (TADS), listing the 4.1 million Swiss accounts open between 1933-1945 for which any records survive. ICEP Report at 5-12, and Annex 4, at 57-80. According to the ICEP report, ICEP auditors then categorically excluded 1.9 million accounts with Swiss addresses or cantonal bank books from further investigation on the assumption that Swiss residents had not been victims of Nazi persecution.[10] ICEP Report para. 26, at 8. ICEP auditors then matched the remaining 2.2

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[10]Such an assumption overlooked the widespread use of false Swiss addresses in opening accounts, and the widespread use of Swiss intermediaries in opening accounts. See *infra* at 15-17.

million accounts against lists of 5.5 million Holocaust victims maintained at Yad Vashem and elsewhere. ICEP Report Annex 4 para. 12, at 61. The resulting 277,000 exact or extremely close name-matches were then augmented by 76,000 additional accounts that did not match to a victim list, but that, nevertheless, appeared to ICEP auditors to be linked to Holocaust victims on the basis of documentary evidence in the bank's files, such as evidence of incarceration in a concentration camp. ICEP Report para. 27 and note 25, at 7-8; Id. Annex 4 para.15, at 63.

The resulting 353,000 names of putatively victim-owned Holocaust-era accounts were then "filtered" by ICEP auditors, who categorically excluded accounts with Swiss addresses, non-Axis area addresses, accounts that were closed prior to Nazi occupation, or accounts for which post-1945 activity existed, on the assumption that no such accounts could have been owned by a Holocaust victim. ICEP Report para. 29, at 8; Id Annex 4 para. 16, at 62, para. 18, at 64; para. 19, at 65.

At the close of the wholesale categorical filtering, ICEP auditors identified approximately 54,000 accounts as "probably" or "possibly" owned by Holocaust victims. The 54,000 accounts were placed on an Account History Database (AHD), for use in resolving claims to their ownership. ICEP Report Annex 4 para. 20-30, at 65-67.

Not content with the "filtering" process that had reduced the putative victim-owned accounts from 353,000 to 54,000, the banks insisted upon a year-long round of "scrubbing." Accordingly, ICEP auditors, this time paid and supervised by the banks, further "scrubbed" the list of "probable or possible" victim-owned accounts from 54,000,

to its final number of 36,000, which make up the current AHD. Although the banks claimed that the principal purpose of the "scrubbing" was to eliminate duplicate accounts and to correct "errors," the real purpose of the exercise was to carry out yet a third wave of rigorous categorical disqualifications, this time under the intense scrutiny of the banks. CRT II officials were not permitted to participate in the scrubbing process.

In describing the three waves of categorical disqualification, no criticism of the ICEP audit is intended. Its function was to determine whether a significant number of unredeemed Holocaust-era accounts remained in Swiss banks. It performed that function brilliantly. Given the limitations of time and resources, the auditors could not have been expected to produce a definitive list of Holocaust-era accounts. Choosing to apply categorical disqualifications in settings where a relatively small proportion of the disqualified accounts might be owned by Holocaust victims may well have made good sense. It almost certainly resulted, however, in the unwitting exclusion of many Holocaust victim-owned accounts from the audit's final list of "probable" and "possible" accounts ultimately listed on the AHD.

In retrospect, the three waves of wholesale categorical "exclusions," "filtering," and "scrubbing," which may have been necessary and appropriate to reduce the ICEP auditors' massive workload to a manageable scope, almost certainly caused many accounts owned by Holocaust victims to be eliminated from the AHD. For example, the triple process of: (1) excluding 1.9 million accounts with Swiss addresses from the original victim list match; (2) "filtering" yet another 118,000 Swiss address accounts

from the 353,000 accounts deemed by ICEP auditors to have significant evidence of Holocaust-victim ownership; and (3) "scrubbing" an unknown number of additional Swiss address accounts from the 54,000 accounts identified by the ICEP audit as "probably" or "possibly" owned by Holocaust victims simply ignored the fact that many Holocaust victims used false Swiss addresses in opening a Swiss bank account in an effort to thwart detection by Nazi investigators. In addition, such a triple round of categorical exclusions simply ignored the fact that many Holocaust survivors used Swiss intermediaries to open their accounts, often using the intermediary's Swiss address. See ICEP Report para. 38, at 12 (acknowledging that false Swiss addresses were often used).

Similarly, categorical disqualification of accounts with addresses in non-Axis controlled area, such as London or New York, overlooked the large number of victims who used the names and addresses of friends and relatives living in secure areas when opening an account in an effort to foil Nazi investigators.

Categorical disqualification of accounts closed prior to Nazi occupation also overlooked the fact that many Eastern European victims maintained multiple residences, often throughout Europe.[11] Even more significantly, it overlooked the fact that many victims living outside Axis controlled areas were compelled to transfer Swiss bank accounts to Nazi banks in order to ransom family members living under Axis control, often long before Nazi invasion.

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[11]For an example of an erroneously excluded account that overlooked the use of a German address for the account owner, see Holocaust Claims Processing Office (HCPO), TAD Preliminary Progress Report, Account Numbers 465491, 465495.

Finally, categorical disqualification of accounts with evidence of post-1945 activity overlooked the fact that such activity often consisted of inquiries by family members, or reflected the plundering of an account by a faithless fiduciary or a dishonest bank employee.

The ICEP Report acknowledged the real possibility that the waves of wholesale categorical disqualifications had eliminated a substantial number of victim-owned accounts from the AHD database. See ICEP Report at 6, boxed note ("There can be no assurance that all possible accounts have been identified..."). The ICEP Report states:

> ... the process of filtering down the 4.1 million accounts in the database to 53,886 names was in many respects cautious, e.g., it excluded, *inter alia*, accounts with permanent Swiss addresses even though victims may have used false Swiss addresses (emphasis added). ICEP Report para. 38, at 12.

Accordingly, the ICEP report strongly recommended that the deposited assets claim process be permitted to match bank account claims filed by class members against the full 4.1 million TAD database in order to assure that no victim-owned account fell through the cracks.

Unfortunately, the defendant banks rejected the recommendation of the ICEP Report and the personal plea of Paul Volcker to create a single 4.1 million TAD against which all deposited assets claims could be matched.[12] Instead, the banks insisted that

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[12]A copy of Paul Volcker's letter to Swiss banking authorities urging the use of a 4.1 million TAD database against which deposited assets claims could be matched is annexed to the accompanying Declaration of Burt Neuborne as Exhibit 3A. Mr. Volcker's testimony before Congress urging access to the TADS is annexed to the Neuborne declaration as Exhibit 3B.

CRT II access be confined to the 36,000 AHD database, with access to the 4.1 million TAD available only in settings where CRT II independently developed plausible evidence that an account owner had used a Swiss address.[13] However, three years of experience with the claims process has taught that since deposited assets class members lack first-hand knowledge of the events, they, ordinarily, have no independent evidence of whether a Swiss address was used, rendering it virtually impossible to prove independently that a Swiss address existed.

C. The Administration of the Swiss Bank Settlement

The multiple complaints herein were originally filed in December 1996 and January 1997. Arguments on defendants' voluminous motions to dismiss were heard by the Court on August 2, 1997. Approximately one year later, on August 12, 1998, after intensive negotiations under the auspices of Chief Judge Korman, the parties agreed in principle to a settlement pursuant to which plaintiffs agreed to release defined Holocaust-related claims against the defendant banks and a broad array of non-party Swiss entities in return for a payment to the plaintiff-classes of $1.25 billion. *In re Holocaust Victim Assets Litig.*, 1998 U.S. Dist. LEXIS 18014 (EDNY Oct. 7, 1998) (Joint Stipulation describing August 12, 1998 agreement in principle).

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[13]See Memorandum to the File, annexed as Exhibit 1C to the accompanying Declaration of Burt Neuborne.

The complex settlement agreement was formally executed on January 26, 1999, and materially supplemented on August 2, 2000, with the execution of Amendment 2.[14] The settlement agreement contemplated five settlement classes: a deposited assets class consisting of claimants to Holocaust-era Swiss bank accounts; a slave labor I class consisting of persons forced to perform slave labor for non-Swiss entities; a slave labor II class consisting of persons forced to perform slave labor for Swiss entities; a refugee class consisting of persons excluded from Switzerland or persecuted within Switzerland because of victim status; and a looted assets class consisting of persons whose property had been looted by the Nazis and disposed of through Swiss entities. The settlement agreement provided for the appointment of a Special Master to recommend a plan of allocation and distribution.[15]

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[14]The settlement agreement and all amendments and related documents are set forth as Exhibits 1A-D to the accompanying Declaration of Burt Neuborne.

[15]Aspects of the class definition were upheld in *In re Holocaust Victim Assets Litig.*, 225 F.3d 191 (2d Cir. 2000). Disagreements over the make up of the slave labor II class were resolved in *In re Holocaust Victim Assets Litig.*, 2001 WL 419967 (EDNY April 4, 2001) (defining membership in Slave Labor II class), affirmed in part and vacated in part, 282 F.3d. 103 (2nd Cir. 2002), resolved by stipulation on remand. A dispute over interest calculations was resolved in *In re Holocaust Victim Assets Litig.* 256 F.Supp.2d 150 (EDNY 2003) (requiring payment of compound interest on escrow funds). An aspect of attorneys fees was resolved in *In re Holocaust Victim Assets Litig.*, 270 F.Supp.2d 313 (EDNY 2002) (denying risk multiplier). Judge Korman recently adopted Special Master's Interim Report. See *In re Holocaust Victim Assets Litg.*, 2003 U.S. Dist. LEXIS 20686 (EDNY Nov. 17, 2003). The banks' historical responsibility, and their refusal to cooperate fully in current clams processes, is chronicled in Chief Judge Korman's recent opinion rejecting the banks' objections to Special Master Gribetz' Interim Report. See *In re Holocaust Victim Assets Litig.*, 302 F.Supp.2d 59 (EDNY 2004). See also *In re Holocaust Victim Assets Litig.*, 302 F.Supp.2d 89 (EDNY 2004) (rejecting objections to the Special Master's Interim Report); *In re Holocaust Victim Assets Litig.*, 2004 U.S. Dist. LEXIS 6197 (EDNY Mar. 31, 2004) (denying fee request); *In re Holocaust Victim*

After extensive notice to all class members,[16] and fairness hearings held in Brooklyn on November 29, 1999, and Jerusalem on December 15, 1999, the District Court upheld the basic fairness of the settlement, as amended by Amendment 2, on August 9, 2000. *In re Holocaust Victim Assets Litig.*, 105 F. Supp.2d 139 (EDNY 2000), aff'd, *In re Holocaust Victim Assets Litig.*, 2000 U.S. App. LEXIS 29529 (2d Cir. Nov. 20, 2000)(dismissing appeal, which was reinstated and eventually withdrawn).

On September 11, 2000, Special Master Judah Gribetz issued an extensive report proposing a detailed plan of allocation and distribution recommending allocating $800 million to the "deposited assets" class. The District Court then invited the members of the deposited assets class to file claims for unpaid Swiss bank accounts with the Claims Resolution Tribunal II (CRT II), an entity with expertise in dealing with Swiss bank claims headquartered in Zurich, operating under the supervision of the Court, with Michael Bradfield and Paul Volcker serving as Special Masters. On November 22, 2000, the District Court, after notice and hearing, adopted the Special Master's proposed plan of allocation and distribution. The Second Circuit upheld the plan of allocation and distribution on July 26, 2001. *In re Holocaust Victim Assets Litig.*, 2000 U.S. Dist. LEXIS 20817 (EDNY 2000), aff'd 14 Fed. Appx. 132 (2nd Cir. July 26, 2001).[17]

Assets Litig., 2004 U.S. Dist. LEXIS 5432 (EDNY Apr. 2, 2004); *In re Holocaust Victim Assets Litig.*, 2004 U.S. Dist. LEXIS 6895 (EDNY Apr. 22, 2004).

[16]The notice program was among the most extensive ever attempted. It resulted in the receipt of 586,000 completed questionnaires from Holocaust victims and their families.

[17]A copy of the Special Master's Proposed Plan of Allocation and Distribution of Settlement Proceeds, dated September 11, 2000, has been lodged with the Court and is

In February, 2001, after extensive negotiations with Swiss banking authorities, CRT II oversaw the publication on the Internet of the names of the owners of 21,000 Swiss bank accounts listed on the AHD identified in the December, 1999 ICEP Report as "probably" owned by Holocaust victims. Swiss banking authorities declined, however, to authorize publication of the names of the owners of an additional 15,000 accounts deemed in the ICEP Report to be "possibly" owned by Holocaust survivors. The Swiss banks also declined to heed the personal plea of Paul Volcker to establish a single, integrated TAD listing all 4.1 million accounts open during the relevant period for use by CRT II officials in matching bank account claims.[18] Instead, the banks confined CRT II officials to the much smaller 36,000 account AHD database, unless CRT II officials independently discovered plausible evidence that a particular claimed account was listed under a Swiss address.

Acting under the above-described constraints as to publication and access to data, CRT II has overseen the publication of information concerning 21,000 accounts, received 32,000 formal claims, matched the 32,000 claims against the 36,000 accounts listed on the AHD, recorded 12,000 name matches,[19] and, thus far, has completed forensic

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available on the Internet at www.swissbankclaims.com, under "Key Documents."

[18]Paul Volcker's effort to persuade Swiss officials to permit access to the 4.1 million TAD is set forth as Exhibit 3A to the accompanying Declaration of Burt Neuborne. Mr. Volcker's Congressional testimony urging access to the 4.1 million TAD database is set forth as Exhibit 3B to the accompanying Neuborne Declaration.

[19]The recent development of improved computer software is likely to result in a significant increase in name matches and awards. The difficulty flows from the need to compare names using Hebrew, Cyrillic and European language roots, requiring

investigations resulting in payments to owners of approximately 1,900 accounts totaling $145 million, with an average of approximately $77,000 per account, and $125,000 per award.

In the several years since the approval of the plan of allocation and distribution by the Second Circuit on July 26, 2001, more than $550 million has been distributed by the District Court to, or on behalf of, the five plaintiff-classes: $207 million has been distributed to the slave labor classes; $205 million has been committed on behalf of the poorest members of the looted assets class pursuant to a *cy pres* process approved by the Court; $150 million has been distributed to members of the deposited assets class; and approximately $10 million to the refugee class. See Special Master Gribetz' Interim Report.[20]

The District Court has recently sought suggestions concerning the ultimate distribution of any so-called "residual" funds, consisting primarily of funds allocated to the deposited assets class that cannot be distributed because the necessary records no longer exist to validate the claims. See *In re Holocaust Victim Assets Litig.*, 2003 U.S.Dist. LEXIS 20686 at *4-6. The precise amount of any such residual funds will turn on the efficacy of improved computer matching software described, and on the outcome

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sophisticated transliteration programs.

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A copy of the Special Master's Interim Report, dated October 2, 2003, is available on the Internet at www.swissbankclaims.com.

of this effort to secure access to additional data needed to resolve claims accurately and definitively.

D. The Need for Additional Information in Connection with the Deposited Assets Claims Process

This motion is premised on several years of experience in administering the deposited assets claims program. The original settlement agreement, executed on January 26, 1999, approximately 11 months before the release of the ICEP Report on December 6, 1999, did not discuss access to information needed to administer a claims program, relying upon the supervisory power of the District Court to assure fairness. With the release of the ICEP Report identifying 54,000 identifiable Swiss accounts as "probably or possibly" owned by Holocaust victims, it became clear that it would be necessary to carry out a significant deposited assets claims program aimed at resolving large numbers of claims to identifiable accounts. Responding to concerns expressed at the fairness hearings, Chief Judge Korman declined to rule on the settlement's fairness in the absence of minimum guaranties that adequate information would be available to administer a meaningful claims process.

Accordingly, in Amendment 2 to the settlement agreement, executed on August 2, 2000, the banks formally agreed to support the Swiss banking regulators' authorization to publish the names of 21,000 accounts deemed to be "probably" owned by Holocaust victims,[21] and agreed to provide CRT II officials convenient access to the AHD database,

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[21] Amendment 2 is silent about the refusal to publish the remaining 15,000 accounts on the AHD.

consisting of the 36,000 accounts identified by the ICEP audit as "probably" or "possibly" owned by Holocaust victims, as well as to the surviving documentary records for each such account for the period of 1933-45 that had been assembled by ICEP auditors.[22] In addition, counsel executed a joint Memorandum to the File contemporaneously with the execution of Amendment 2 reiterating the banks' willingness to provide good faith cooperation with a claims process, and promising CRT II officials access to the full 4.1 million TAD in connection with individual claims with plausible evidence that a Swiss address may have been used.[23] The Memorandum to File noted that the banks were involved in a process to remove duplicative accounts from the AHD, and to correct "errors" in the original ICEP listing of accounts, but failed to note that the "scrubbing" process involved a 1/3 reduction in the size of the AHD from 54,000 to 36,000 accounts.

In view of ongoing disagreements over publishing the full list of "probable" and "possible" victim owned accounts, and the banks' refusal to permit CRT II officials to match claims against the full 4.1 million TAD, except in the highly limited circumstances described in the Memorandum to the File, plaintiffs insisted that language be added to Amendment 2 preserving plaintiffs' right to seek additional information access under Rule 23 (d)(2) FRCP if the minimal information access commitments set forth in

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[22]Amendment 2 is silent about the refusal to permit CRT II officials access to the 4.1 million TAD.

[23]Amendment 2 to the settlement agreement and the contemporaneous Memorandum to the File are annexed to the accompanying Declaration of Burt Neuborne as Exhibits 1B and 1C.

Amendment 2 proved inadequate. Plaintiffs agreed to pay the cost of obtaining any such additional information. The banks agreed, but only if the Rule 23 (d)(2) relief was not "inconsistent" with the settlement agreement.[24]

Once the minimal information access guaranties codified in Amendment 2 were in place, lead settlement counsel re-iterated support for the settlement, as amended, expressly reserving the right to seek access to additional information if experience with the claims program demonstrated that such information was necessary. See Declaration of Burt Neuborne in Support of Settlement's Fairness, dated June 26, 2000, at para. 16-30.[25] The banks also supported the settlement's fairness, but, apart from restating a willingness to act in good faith, were silent concerning possible future additional information access requirements.

When Chief Judge Korman was apprised of the contents of Amendment 2, and the provisions of the parties' declarations in support, he issued an opinion and order

[24]Para. 3.17 of Amendment 2 provides:

> Nothing herein shall be deemed to abrogate whatever power the Court may have under Rule 23(d)(2) of the Federal Rules of Civil Procedure to make appropriate orders required for the fair conduct of any claims process; provided, however, that no such order shall be inconsistent with the terms of this Settlement Agreement. The Settlement Fund shall pay all costs incurred by the Settling Defendants in complying with such orders, including, but not limited to, the expenditure of time by the Settling Defendants' own employees.

[25]Lead settlement counsel's June 26, 2000 declaration in support of the settlement's fairness is annexed to the accompanying Declaration of Burt Neuborne, dated April 27, 2004, as Exhibit 4.

upholding the settlement's fairness. *In re Holocaust Victim Assets Litig.*, 105 F. Supp.2d 139 (EDNY 2000).[26]

It was counsel's hope that the information access guaranties contained in Amendment 2 and the Memorandum to the File would permit the fair and just operation of a deposited assets claims program. Until the arrangements codified in Amendment 2 were shown to be inadequate, it appeared inappropriate to allow hypothetical disagreements over information access to further delay the settlement, and the distribution of hundreds of millions of dollars to elderly Holocaust survivors, many of whom are in great need. Accordingly, with the caveats expressed in para. 3.17 to Amendment 2 and counsel's June 26, 2000 declaration, CRT II has sought to administer the deposited assets claims program under the minimal information access rules set forth

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[26]Chief Judge Korman's opinion upholding the settlement's fairness notes:

> It is disturbing, to say the least, that, having participated in creating the problem that the Volcker Committee was attempting to address, the Swiss private and cantonal banks do not feel a moral obligation to the victims of Nazi persecution. Nevertheless, if they seek the benefit of releases under the Settlement Agreement, these banks cannot legally continue to conceal from the class information needed to take advantage of the benefits conferred by the Settlement Agreement. Requiring this minimal cooperation as a condition for a release does not deny any benefit that the Settlement Agreement confers. To the contrary, it grants the benefit of the Settlement Agreement subject to the releasees' compliance with the duty to act in good faith. 105 F.Supp.2d at 158 (citations omitted).

in Amendment 2. Several years of experience in administering the deposited assets claims process has taught, however, that CRT II is significantly hampered in carrying out a wholly fair and just claims process by several serious information deficiencies.

First, the refusal of Swiss bank regulators to authorize publication on the Internet of all accounts listed on the AHD has meant that the existence of at least 15,000 accounts "possibly" owned by Holocaust victims has never been made public. CRT II officials report a disturbing statistical disparity between name matches to the 21,000 published accounts and name matches to the 15,000 unpublished accounts.[27] Not surprisingly, the number and quality of claims to an account is strongly affected by whether or not public notice has been given to the claimant community of the account's existence.[28] Accordingly, CRT II officials have urged counsel to seek Internet publication of all accounts listed on the AHD. CRT II officials also urge publication of the information concerning several thousand accounts previously identified by Swiss authorities as potentially owned by Holocaust victims.

Second, the banks have restricted CRT II officials seeking to match bank account claims to the 36,000 account AHD database that is the result of three waves of highly questionable categorical disqualifications described in the accompanying declarations, and described *supra* 11-17.

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[27]CRT II officials have reported that there is a higher incidence of name matches to the published 21,000 accounts than to the unpublished 15,000 accounts, at the statistical rate of 90/10.

[28]See Letter of Ms. D, annexed to the Declaration of Burt Neuborne as Exhibit 5.

As counsel has noted, 1.9 million accounts with Swiss addresses were excluded from the original victim list match conducted by ICEP; 118,000 accounts with Swiss addresses were "filtered" from the 373,000 accounts deemed by ICEP auditors to have a significant connection with Holocaust victims because of an exact name match or other documentary proof; and an unknown number of Swiss address accounts were "scrubbed" from the 54,000 accounts deemed by the ICEP Report to be "probably" or "possibly" owned by Holocaust victims.

Large numbers of victim-owned accounts were also excluded when accounts with addresses in non-Axis controlled areas were categorically "filtered" and "scrubbed." Similar exclusions also resulted from the categorical disqualification of accounts closed prior to formal Nazi takeover of an owner's place of residence, and accounts with evidence of post-1945 activity. The net result is a database used for claims matching that is almost certainly incomplete.

As the accompanying declarations demonstrate, CRT II's concern with the comprehensiveness of the AHD database is not confined to speculation. Two recent sets of forensic investigations by CRT II officials make it impossible to ignore the inadequacy of the existing AHD.

The first investigation involves 7,000 Swiss bank account claims initially filed with the Holocaust Claims Processing Office (HCPO) of the New York State Banking Commission. During the ICEP audit, the banks authorized ICEP auditors to match HCPO claims for Swiss bank accounts against the UBS TAD database. The resulting

approximately 2,500 name matches included 1,807 accounts that matched to the TAD database, often with highly persuasive "double matches" involving the account holder and a relative, but that failed to match to the smaller AHD database.[29] CRT II officials have recently concluded a forensic investigation of the 1,807 HCPO claims, and have determined that numerous HCPO claims appear to qualify for payment from the settlement fund, despite the fact that none of the 1,807 claims matched to the AHD.

In addition, CRT II officials, with the banks' permission, have recently conducted a test match of approximately 550 bank account claims with plausible indicia of Holocaust-victim ownership (none of which matched to the AHD database) against the full TAD database for UBS.[30] The results indicate that as many as14 % of the AHD unmatched accounts not only match to the TAD, but may qualify for payment from the settlement fund, thereby confirming that the AHD database may not be relied on by CRT II as a definitive listing of all Holocaust victim-owned accounts.

Thus, years of experience with the claims process has yielded information about the account owners demonstrating that the four sets of categorical disqualifications were overbroad and/or inappropriately applied. In fact, the most plausible explanations for the

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[29]Since the banks confined the HCPO test match to the UBD TAD, it is highly probable that a match against the full 4.1 million TAD would reveal even more matches.

[30]The banks have continued to refuse to create a single, integrated TAD database, forcing CRT II officials to use multiple databases in different banks. The experimental match was conducted against the UBS TAD. An experimental match against the full TAD might well have revealed yet more qualifying claims. CRT II officials had initially sought permission to conduct a test match of 1,036 claims. The banks have, thus, far, declined to grant permission for the test matching of second 500 claims.

startling examples of the limited reliability of the AHD database are human error in the "filtering" and "scrubbing" processes, and the inevitable overbreadth of the categorical disqualification process.

At least four ways exist to shore up the inadequate AHD database. The parties could adopt Paul Volcker's original recommendation to match all claims against the 4.1 million TAD. Alternatively, the AHD could be increased to the 373,000 accounts initially identified by the ICEP auditors before the waves of categorical "filtering" reduced it. Third, the AHD could be returned to the original 54,000 accounts identified by ICEP auditors as "probably" or "possibly" victim owned before the banks "scrubbed" the number down to 36,000 accounts. Fourth, CRT II could use the 54,000 account original ICEP recommended AHD, supplemented by the ability to match claims against the TADS whenever CRT II officials believe that the evidence warrants further investigation.

CRT II officials recommend the fourth alternative of a modestly augmented AHD, coupled with the ability to access the full TAD when, in the opinion of CRT II officials, the evidence warrants such further investigation.

E. The Precise Relief Requested

CRT II officials recommend, first, that the AHD be returned to its pre-"scrubbing" status of approximately 54,000 accounts, and that CRT II officials be authorized to match claims against the full 4.1 million TAD whenever such further investigation appears warranted.

In addition, CRT II officials recommend the immediate publication on the Internet of all names on the AHD that have not yet been published, including newly restored names. Moreover, all accounts previously found to be potentially owned by Holocaust victims must be published and added to the AHD.

Third, CRT II officials seek authority to review all available documentary records in the banks' possession relating to a matched account, even when the documents do not fall within the 1933-45 time period.[31]

Finally, CRT II officials seek leave to shift aspects of the claims process from Zurich to New York City in order to realize significant savings in administrative costs and personnel efficiency. In order to assure compliance with Swiss law, all New York operations would be conducted under careful procedures designed to assure that no Swiss bank records are made public.

I. The Court Should Grant the Requested Relief

A. The Sources of the Court's Power

At the close of the deposited assets claims process, thousands of members of the deposited assets class will be precluded under principles of *res judicata* (claim preclusion) from seeking judicial assistance to recover any Holocaust-era bank accounts they may own in a Swiss bank, even if new evidence surfaces tending to validate their claims. Eg., *Kremer v. Chem. Constr. Co.*, 456 U.S. 461 (1982) (defining and applying

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[31] Current access is confined to documents from the period 1933-45 assembled in the ICEP auditor's file, even when relevant additional documents from other time periods may exist. For example, pre-1933 documents may act to verify or disqualify a claimant, but are currently unavailable.

preclusion); *Federated Department Store v. Motie*, 452 U.S. 394 (1981) (same); *Montana v. United States,* 440 U.S. 147 (1979) (same).

Since the government will, in effect, extinguish the legal rights of thousands of absent members of the deposited assets class, procedural due process of law requires that scrupulous care be taken to assure that class members receive the best practicable notice that they may have a claim to a given account, and access to the information they require in order to pursue a valid claim. Eg., *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (requiring notice); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (requiring notice). Cf. *Stephenson v. Dow Chemical Co.,* 273 F3d 249 (2nd Cir. 2001), aff'd by an equally divided Court,123 S.Ct. 2161 (2003). Otherwise, the state will have extinguished class members' legal rights without providing them with a fair chance to file a successful claim. Eg. *Hansberry v. Lee*, 311 U.S. 32 (1940) (requiring adequate representation); *Richards v. Jefferson County*, 517 U.S. 793 (1996) (same). See also *Logan v. Zimmerman Brush Co.,* 455 U.S. 422 (1982) (state may not unfairly destroy legal claim); *Mills v. Hableutzel*, 456 U.S. 91 (1982) (same); *Pickett v. Brown*, 462 U.S. 1 (1983)(same).

The Supreme Court has repeatedly ruled that the Due Process Clauses of the Fifth and Fourteenth Amendments require adequate notice to an affected party and a fair opportunity to present his or her case before the state may foreclose the party's legal rights. Eg., *Mennonite Board of Missions v. Adams,* 462 U.S. 791 (1983) (requiring actual notice to mortgagee of impending tax foreclosure); *Memphis Light, Gas & Water*

Div. v. Craft, 436 U.S. 1 (1978) (requiring actual notice of impending utility cut-off); *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478 (1988) (requiring actual notice to known creditors in probate proceeding). Moreover, it is now settled that adequate notice within the meaning of the due process clause requires the best practicable notice. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (requiring best practicable notice); *Mennonite Board of Missions v. Adams,* 462 U.S. 791 (1983) (rejecting publication when targeted notice is practicable); *Schroeder v. City of New York,* 371 U.S. 208 (1962) (same). See *Eisen v. Carlisle & Jaquelin,* 417 U.S. 156, 173-74 (1974) (requiring best practicable notice under Rule 23(c)(2)).

Given the experience gained by the CRT II over the past several years, it is simply impossible to describe the refusal of Swiss authorities to authorize public identification of at least 15,000 known accounts deemed "possibly" owned by Holocaust victims or their heirs as the best practicable notice. Experience with the claims process teaches that once the ICEP audit identified an identifiable account as "possibly" belonging to a Holocaust victim, due process requires the public identification of such an account in a manner likely to come to the attention of its true owner. *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478 (1988) (requiring of actual notice to known or reasonably ascertainable creditors). Since most of the members of the deposited assets class lack first-hand knowledge of the existence of a Swiss bank account opened more than 60 years ago, failure to provide public notice of the record of an identifiable account holder is often the functional equivalent of foreclosing the putative claimant's ability to file a

potentially valid claim. See *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617, 620-21 (1997) (discussing need for targeted notice in context of class action), aff'g *Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 633-34 (3rd Cir. 1996) (discussing notice issue). See also *Dusenberg v. United States*, 534 U.S. 161 (2002) (notice required in forfeiture proceeding; certified mail to prison satisfies due process); *Standard Oil Co. v. New Jersey,* 341 U.S. 428 (1951) (notice required in escheat proceedings). The significant statistical disparity between name matches for publicly identified accounts and name matches for unpublished accounts described in the accompanying declarations, demonstrates the crucial importance of public notice of the existence of a potential victim-owned account. Experience has taught that failure to provide public notice of the existence of a particular account virtually dooms any effort to file a claim for that account.

Similarly, the lack of public awareness of the existence of accounts previously identified as potentially Holocaust victim-owned compels publication or republication of information needed to permit members of the class to file a claim for ownership.

If an American government entity sought to escheat allegedly abandoned property, but failed to provide public notice of the last record owner's name, the proceeding would almost certainly violate procedural due process of law. *Western Union Telegraph Co. v. Pennsylvania*, 368 U.S. 71 (1961); *Standard Oil Co. v. New Jersey,* 341 U.S. 428 (1951). Similarly, if an American government entity sought to foreclose on real property for non-payment of taxes, but failed to provide known mortgagees with actual

notice of an intent to foreclose on the specific parcel, the proceeding would unquestionably violate the due process clause. *Mennonite Board of Missions v. Adams,* 462 U.S. 791 (1983). Finally, if a probate Court sought to preclude creditors from lodging claims against an estate without providing targeted notice to known creditors, the proceeding would unquestionably violate procedural due process of law. *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478 (1988).

In this case, the potential legal rights of the putative owners of at least 15,000 identifiable Swiss bank accounts found by the ICEP audit to be "possibly" owned by Holocaust victims, as well as the legal rights of owners of thousands of accounts previously found to be potentially owned by Holocaust victims, will be extinguished by state-imposed preclusion just as surely as if they had been escheated or foreclosed. Surely, the putative owners of identifiable Holocaust-era accounts are entitled under the due process clause to public notice of the accounts' existence before the state extinguishes the owners' legal rights to their identifiable property.

Thus, while it made excellent sense for the parties to attempt to administer the deposited assets claims process without a contentious dispute over additional publication and access, experience has now made it impossible to avoid the publication issue.

Similarly, given the knowledge gained in the past several years, it would violate procedural due process of law to continue to require claimants to match their claims against a database of potential Holocaust victim-owned accounts that is demonstrably

incomplete, especially when defendants are in possession of information needed to render the database reliable.

The Court is clearly empowered to grant the requested relief.

First, the Due Process Clause of the Fifth Amendment provides the Court with affirmative power to take all necessary steps to assure that members of the deposited assets class are provided with adequate notice and a fair claims process before their legal claims are extinguished by the government. See *Davis v. Passman*, 442 U.S. 228 (1979) (recognizing independent cause of action based of Due Process Clause of Fifth Amendment). See also *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Boddie v. Connecticut*, 401 U.S. 371 (1971).

Second, Rule 23(d)(2) explicitly vests a supervising Judge to order additional notice and access to additional information needed for the fair administration of a class action.

Rule 23(d) provides:

> Orders in Conduct of Actions
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> In the conduct of actions to which this rule applies, the court may make appropriate orders...requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action.

The obvious purpose of Rule 23(d) is to vest a supervisory judge with clear authority to require appropriate notice to absent class members at any time during the class action proceedings, including the administration of a claims program established

as an integral part of a settlement. Eg., *Maywalt v. Parker & Parsley Petroleum*, 67 F.3d 1072 (2d. Cir. 1995).

As the Third Circuit noted in *In re Cendant Corp. Prides Litig.* 233 F.3d 188, 195 (3d Cir. 2000):

> ... far from serving a merely ministerial function with respect to the disposition of a class action settlement, when parties avail themselves of the District Court to implement such a settlement, the District Court may use its traditional powers to implement the settlement fairly and in accordance with its usual role."

In Amendment 2, the parties explicitly referenced Rule 23 (d)(2) as a potential source of the Court's power to order the provision of additional information in connection with the administration of the claims program if the limited information access guaranties codified in Amendment 2 proved inadequate in practice. See Exhibit 1C to the accompanying Declaration of Burt Neuborne. See *Grace v. City of Detroit*, 145 FRD 413, 415 (D. Mich. 1992) (Rule 23(d) codifies inherent equitable powers of court).

A third source of judicial power is the inherent ability of a court of equity, codified in Rule 23(e), to assure the fair and just administration of a class action claims program. It is clear that a supervising judge is vested with ongoing responsibility under Rule 23(e) to assure the fairness of the claims process. It is also clear that, in exercising that responsibility, the supervising judge exercises the inherent powers of a court of equity, including the power to modify the procedural aspects of a settlement agreement to assure the fair implementation of the settlement's substantive terms. Eg., *In re*

Orthopedic Bone Screw Liab. Litig., 246 F3d 315 (3rd Cir. 2001); *In re Cendant Corp. Prides Litig.*, 233 F.3d 188 (3rd Cir. 2000); *Maywalt v. Parker & Parsley Petroleum*, 67 F.3d 1072 (2nd Cir. 1995); *In re Agent Orange Prod. Liab. Litig.*, 821 F2d 139 (2nd Cir. 1987); *Beecher v. Able*, 575 F2d 1010 (2nd Cir. 1978); *Zients v. LaMorte*, 459 F2d 628 (2nd Cir. 1972). See generally, Manual for Complex Litigation, (Third), para. 30.47 (describing equitable powers of supervisory judge).

While, under *Evans v. Jeff D*, 475 U.S. 717 (1986), the exercise of such inherent equitable power cannot result in the substantive amendment of a settlement agreement, courts are unanimous in recognizing an equitable power to alter the procedural components of a class action settlement agreement to assure the fair and just administration of a substantive claims program. Thus, for example, where a settlement agreement establishes claims deadlines that operate in an unfair manner to exclude eligible claimants, supervising courts have repeatedly exercised an inherent equitable power to override the settlement agreement by setting claims deadlines which are more fair, even when the net effect is to increase the defendant's liability. Eg., *In re Orthopedic Bone Screw Liab. Litig.*, 246 F3d 315 (3rd Cir. 2001); *In re Cendant Corp. Prides Litig.*, 233 F.3d 188 (3rd Cir. 2000).

Here, where providing additional necessary information will have no effect on defendants' liability, there is no basis for hesitating in exercising the court's equitable power to assure that adequate notice exists, and adequate access to information needed for a fair claims process is made available. In fact, cases are legion requiring defendants

to make information in their possession available to plaintiffs in order to permit plaintiffs to provide adequate notice to the class. Eg., *Southern Ute Tribe v. Amoco*, 2 F3d 1023 (10th Cir. 1993) (requiring defendants to provide information to plaintiffs needed for notice to class); *Thomas v. NCO Fin. Sys.*, 2002 US Dist LEXIS 14157 (ED Pa. 2002) (same); *In re Nissan Motor Corp Antitrust Litig.*, 552 F2d 1088, 1101-02 (5th Cir. 1977) (listing cases). See generally *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978).

B. Defendants' Objections to the Exercise of the Power

The usual objection to judicial action under Rule 23(e) - cost to the defendant - is not present in connection with this motion. The banks' substantive liability is fixed at $1.25 billion, regardless of the outcome of the deposited assets claims process. The banks' responsibility for financing the operations of CRT II was dealt with in Amendment 2 by accelerating the schedule of settlement payments. The reasonable cost of compliance with the provision of additional information has been explicitly assumed by the plaintiffs in para. 3.17 of Amendment 2.

Instead, defendants appear to argue that the banks' promise to provide information in Amendment 2 and the accompanying Memorandum to the File constitutes a ceiling on the banks' informational obligations, entitling the banks to decline to provide the plaintiffs with access to additional information, even when such information is deemed by CRT II to be necessary to the fair and just administration of the deposited assets claims process. The banks' effort to convert Amendment 2 from an informational floor to an informational ceiling founders on at least three levels.

First, the text of Amendment 2 clearly contemplates the possibility that experience with the deposited assets claims process might give rise to a need for additional information. Para. 3.17, inserted at the insistence of plaintiffs, provides:

> Nothing herein shall be deemed to abrogate whatever power the Court may have under Rule 23(d)(2) of the Federal Rules of Civil Procedure to make appropriate orders required for the fair conduct of any claims process; provided, however, that no such order shall be inconsistent with the terms of this Settlement Agreement. The Settlement Fund shall pay all costs incurred by the Settling Defendants in complying with such orders, including, but not limited to, the expenditure of time by the Settling Defendants' own employees.

Defendants may argue that any increase in the banks' duty to provide information to the plaintiff-class is literally "inconsistent" with the settlement agreement within the meaning of para. 3.17. But such a circular reading of the term would cause the entire provision to lose all meaning. Why would the parties have explicitly discussed possible resort to Rule 23(d)(2) to obtain additional information needed to operate a claims process if every such resort would be automatically blocked as "inconsistent" with the settlement agreement? Similarly, why would the parties have carefully allocated the cost of Rule 23(d)(2) compliance to the plaintiffs, including the time of defendants' employees, if every effort to require the provision of additional information access were doomed because it would be "inconsistent" with the settlement?

In fact, lead settlement counsel made it clear to both the banks and to the Court that plaintiffs understood the banks' information access obligations as codified in

Amendment 2 to be a floor, not a ceiling. In lead settlement counsel's Declaration in Support of the Settlement's Fairness, dated June 26, 2000, at para. 16-30, counsel noted that the information access provisions contained in Amendment 2 were flawed, but provided the basis for a deposited assets claims process that could assist thousands of Holocaust victims in resolving claims to Holocaust-era bank accounts. Counsel noted, however, that defendants' failure to provide for full publication of all accounts on the AHD database, and failure to provide full access to the 4.1 million TAD database, created flaws in the process that might require future action by the Court. Defendants made no effort to object to counsel's characterization of the information access obligations codified in Amendment 2. It was on such a "legislative" record that Chief Judge Korman accepted the settlement as fair under Rule 23(e).[32]

In fact, the term "inconsistent with the settlement agreement" as used in para. 3.17 is designed to prevent a supervising Court from altering the *substantive* contours of the settlement agreement in violation of *Jeff D,* by, for example, requiring defendants to pay more money to the plaintiffs if the claims programs were to reveal that $1.25 billion was an inadequate sum; or by requiring defendants to limit the scope of their releases to

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[32] Until actual experience with the deposited assets claims process informed the participants about the need for additional information, the decision by plaintiffs, the banks, and the Court to downplay disagreements over the need for full publication of all accounts on the AHD, and the size of the database available to the CRT II for claims matching, enabled the historic settlement to move forward, and permitted the expeditious distribution of more than $550 million to Holocaust victims, many of whom were elderly and in great need.

permit additional litigation by class members unable to secure adequate compensation from the limited settlement fund.

Such an effort to use Rule 23(d) to alter the *substantive* terms of a settlement is, however, a far cry from requiring the provision of additional information needed to carry out the core substantive terms of the agreement. The provision simply cannot be read to limit the inherent equitable power of a court to alter *procedural* aspects of the settlement that a supervising court finds are jeopardizing the substantive provisions of the agreement by rendering it impossible to operate a fair and just claims program. Eg., *In re Orthopedic Bone Screw Liab.* Litig., 246 F3d 315 (3rd Cir. 2001); *In re Cendant Corp. Prides Litig.*, 233 F.3d 188 (3rd Cir. 2000); *Maywalt v. Parker & Parsley Petroleum*, 67 F.3d 1072 (2nd Cir. 1995); *In re Agent Orange Prod. Liab. Litig.*, 821 F2d 139 (2nd Cir. 1987); *Beecher v. Able*, 575 F2d 1010 (2nd Cir. 1978); *Zients v. LaMorte*, 459 F2d 628 (2nd Cir. 1972).

Such a common sense reading of "inconsistent" is fully consistent with the treatment of analogous issues under *Erie RR Co. v. Tompkins*, 304 U.S. 58 (1938). In deciding whether a federal norm is "inconsistent" with a state norm in the context of *Erie*, the Supreme Court has ruled that merely because a federal procedural provision goes beyond its state counterpart, it is not in conflict with the state provision. Instead, the federal procedural provision may be enforced in a diversity setting, as long as it does not alter the *substantive* rights of the parties. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996). Indeed, the paradigm of a federal procedural norm that is not

deemed "inconsistent" with the substantive rights of the parties is the increased access to information that is often available in a federal court. *Insurance Corp. of Ireland v. Compagnie des Bauxite de Guinea*, 456 U.S. 694 (1982).

Moreover, a reading of "inconsistent" that would render it impossible for a supervising judge to direct the provision of information needed to administer a fair and just claims process would cause the settlement agreement to risk violating the Due Process clause. *Stephenson v. Dow Chemical Co.*, 273 F3d 249 (2nd Cir. 2001), aff'd by an equally divided Court,123 S.Ct. 2161 (2003). Thus, even if the parties had wished to create a court-approved information ceiling that acted to deprive many claimants of a fair chance to file successful bank account claims (no such intent existed), they would have been powerless to do so. See *Ortiz v. Fibreboard*, 527 U.S. 815 (1999); *Amchem Products v. Windsor*, 521 U.S. 591 (1997). Under clearly established canons of construction, therefore, Amendment 2 should be read to avoid any such potential constitutional question by confining the term "inconsistent" to its traditional protection of the *substantive* terms of a class action settlement.

Finally, the banks may argue that they are powerless to provide additional information to the deposited assets class because their hands are tied by Swiss laws guarantying bank secrecy. Such an argument bears an eerie resemblance to the banks' deplorable refusal to provide information to Holocaust victims in the years after WW II. The argument is wholly unpersuasive.

First, it is highly unlikely that Swiss law actually forbids the provision of

information to putative owners concerning the existence of accounts more than 60 years old, especially when the information is needed to determine the true owners of such accounts. Plaintiffs are confident that Swiss courts would not condone the deplorable practice of refusing to provide information about long-dormant accounts when the information is needed to determine the true owner. Second, the banks seek government-enforced protection from future litigation in the form of Rule 23 claim preclusion. Having invoked the assistance of the courts in obtaining future legal peace, the banks should not be permitted to claim the benefit of class action status, while simultaneously hiding behind Swiss bank secrecy law to refuse to provide information needed to administer a fair deposited assets claims process. Having invoked the power of the federal courts to grant preclusive relief, the banks are obliged to provide information deemed necessary to the administration of a fair deposited assets claims process.

As the Supreme Court has unequivocally held, the so-called "privacy" laws of a foreign jurisdiction cannot be used to block compliance with lawful requirements to produce information in the context of a case pending in a United States court, especially where, as here, the information is required to prevent a violation of procedural due process of law. *Insurance Corp. of Ireland v. Compagnie des Bauxite de Guinea*, 456 U.S. 694 (1982); *Societe Internationale v. Rogers,* 357 U.S. 197 (1958); *Laker Airways, Ltd. v. Pan American World Airways, Inc.,* 103 FRD 42 (DDC 1984); *United States v. Bank of Nova Scotia*, 691 F2d 1384 (11th Cir. 1982); *Arthur Anderson & Co. v.*

Finesilver, 546 F2d 338 (10th Cir. 1976); *United States v. Vetco*, 691 F2d 1281 (9th Cir. 1981); *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138 (N.D. Ill. 1979).

While *Societe Internationale* requires a complex balancing process before imposing sanctions, where, as here, settling defendants affirmatively seek government assistance in the form of claim preclusion, the banks may not seek the benefits of class action status without accepting its informational burdens.

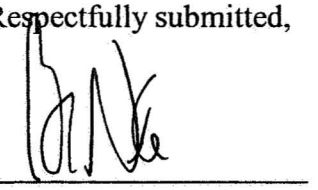
Conclusion

For the above-stated reasons, the Court should: (1) require Internet publication of all accounts listed on the Account Holders Database (AHD) as "probably" or "possibly" owned by Holocaust victims, as well as all accounts previously identified as potentially owned by Holocaust victims; (2) direct that all accounts "scrubbed" from the AHD database as initially described in the Report of the International Committee of Eminent Persons (ICEP) be restored to the AHD; (3) direct that officials of the Claims Resolution Tribunal II (CRT II) be granted access to the TAD databases in connection with any claim deemed worthy of further investigation; (4) direct that officials of CRT II be permitted to inspect documentary material relevant to any matched account, whether or not such documentary material is contained in an ICEP audit folder; and (5) authorize CRT II to conduct its activities in New York City under appropriate conditions designed

to assure respect for the confidentiality of the records involved.

Dated: April 27, 2004
New York, New York

Respectfully submitted,



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