

No. 05-1416

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IN THE

**Supreme Court of the United States**

GIZELLA WEISSHAUS and JACOB FRIEDMAN, et al.,

*Cross-Petitioners,*

—v.—

UNION BANK OF SWITZERLAND, et al.,

*Respondents.*

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT

**LEAD SETTLEMENT COUNSEL'S BRIEF IN OPPOSITION  
FILED ON BEHALF OF THE SETTLEMENT-CLASSES**

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**COUNTER-STATEMENT OF QUESTIONS  
PRESENTED**

- 1. Whether, in view of the possibility that all currently available settlement funds may be distributed pursuant to existing claims-based processes, this Cross-Petition, seeking prospective guidance concerning future hypothetical *cy pres* distributions, raises an Article III case or controversy?**
  
- 2. Whether the unanimous panel of the Second Circuit below erred in recognizing that it is premature to speculate about hypothetical future *cy pres* distributions until completion of the Deposited Assets claims process, especially since that process may leave no substantial undistributed funds for *cy pres* distribution?**
  
- 3. Whether a unanimous panel of the Second Circuit erred on July 26, 2001 in holding that the District Court, having properly found that individualized administration of the Looted Assets class is impracticable, was authorized to dedicate funds allocated to the Looted Assets class to the relief of the poorest members of the class pursuant to the *cy pres* doctrine?**
  
- 4. Whether a single dissenting settlement counsel who objects to the dedication of Looted Assets funds to the relief of the poorest members of the class pursuant to the *cy pres* doctrine is authorized to prosecute an appeal to this Court in the purported name of the settlement classes in opposition to Court-designated Lead Settlement Counsel, and in the absence of support from any remaining settlement counsel?**

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No. 05-1416

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GIZELLA WEISSHAUS AND JACOB FRIEDMAN, et  
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Cross-Petitioners

v.

UNION BANK OF SWITZERLAND, et al.,

Respondents

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*On Cross-Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Second Circuit*

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LEAD SETTLEMENT COUNSEL'S BRIEF IN  
OPPOSITION FILED ON BEHALF OF THE  
SETTLEMENT-CLASSES

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SUMMARY OF ARGUMENT

Robert A. Swift, a single dissenting settlement counsel, acting unilaterally and without the support of any named class members or any other settlement counsel, cross-petitions for certiorari<sup>1</sup> seeking an advisory opinion from this Court concerning the District Court's power to allocate a

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<sup>1</sup> The Cross-Petition is in response to the Petition in 05-1275.

portion of settlement fund in the Swiss Bank Holocaust settlement for the relief of the neediest survivors of the Holocaust pursuant to the *cy pres* doctrine.

The Cross-Petition suffers from three fatal flaws. First, the likelihood of substantial uncommitted funds in this case is so questionable that a Cross-Petition avowedly confined to a request for guidance concerning hypothetical future *cy pres* payments fails to raise a ripe Article III case or controversy. *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). Moreover, even if substantial uncommitted funds were likely to become available at some time in the future, the Second Circuit panel below was clearly correct in rejecting this request for prospective guidance on grounds of ripeness. *In re Holocaust Victim Assets Litig.*, 424 F.3d 132, 149, n.14 (2<sup>nd</sup> Cir. 2005)(Appendix A to the petition in 05-1275 at A-29). See *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990). In the event that uncommitted funds become available for *cy pres* distribution at some time in the future, there will be time enough to consider any objections to the District Court's proposed distribution in the context of a crystallized case or controversy.

Second, nothing in the District Court's past invocation of the *cy pres* doctrine raises a serious legal issue. Having properly determined that it was impracticable to distribute funds allocated to the Looted Assets class on an individualized basis, the District Court was clearly empowered to dedicate the funds for the relief of the neediest members of the class. *In re Holocaust Victim Assets Litig.*, 413 F.3d 183 (2<sup>nd</sup> Cir 2001)(Appendix D to the petition in 05-1275).

Finally, Counsel of Record on the Cross-Petition is not authorized to purport to speak on behalf of the settlement classes in pursuing a personal disagreement with the District

Court over the District Court's potential future use of the *cy pres* doctrine, especially where, as here, Mr. Swift is opposed by Court-designated Lead Settlement Counsel and by the numerous settlement counsel appearing on this Brief in Opposition, and is not supported by any settlement counsel or named member of the plaintiff-classes. *Kowalski v. Tesmer*, 543 U.S. 125 (2004).

### COUNTER-STATEMENT OF THE CASE

The \$1.25 billion Swiss Bank Holocaust settlement is described in the Brief in Opposition in 05-1275 at pp. 7-17. Its fairness was upheld in *In re Holocaust Victim Assets Litig.*, 105 F. Supp.2d 139 (EDNY 2000)(Appendix B to the petition in 05-1275). The plan of allocation and distribution was adopted by the District Court on November 22, 2000. *In re Holocaust Victim Assets Litig.*, 2000 WL 33241660 (EDNY November 22, 2000) (Appendix C to the petition in 05-1275), and was affirmed by the Second Circuit on July 26, 2001. *In re Holocaust Victim Assets Litig.*, 413 F.3d 183 (2<sup>nd</sup> Cir 2001)(Appendix D to the petition in 05-1275).

Shortly after the execution of the settlement agreement on January 26, 1999, the District Court named a committee of lawyers who had served as members of the plaintiffs' Executive Committee to serve as settlement counsel. On April 11, 1999, with the consent of all counsel, the District Court designated Burt Neuborne as Lead Settlement Counsel.

Over the past seven years, Lead Settlement Counsel and the co-settlement counsel listed on this Brief in Opposition, have provided wide-ranging legal representation to the settlement classes, including: (1) representation in at least 29 reported proceedings relating to the defense and

administration of the settlement;<sup>2</sup> (2) the successful petitioning of Congress to exempt the settlement fund's earnings and distributions from federal income taxation;<sup>3</sup> and (3) assistance in the development and maintenance of claims programs that have distributed, to date, more than \$875 million to almost 400,000 Holocaust victims, or their heirs, around the world.<sup>4</sup> The Cross-Petition herein is opposed by Court-designated Lead Settlement Counsel, and by the settlement counsel appearing on this Brief in Opposition. With the exception of Mr. Swift, no settlement counsel appears in support of the Cross-Petition.

The Second Circuit panel below properly declined to consider Mr. Swift's request for advisory relief concerning possible future *cy pres* distributions, noting that it was premature to speculate about the future allocation of possible unclaimed funds until the completion of the Deposited Assets claims program. *In re Holocaust Victim Assets Litig.*, 424 F.3d 132, 149, n.14 (2<sup>nd</sup> Cir. 2005)(Appendix A to the petition in 05-1275 at A-29).

In this Court, in an effort to manufacture an Article III case or controversy involving the future use of *cy pres* funds, Mr. Swift erroneously asserts that \$500 million will become available for future *cy pres* distribution in this case, justifying a grant of certiorari to establish prospective guidelines for its allocation. (Cross-Petition at pp. 3, 5, 7).

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<sup>2</sup>Citations to the 29 legal proceedings are set forth in Appendix BB to this Brief in Opposition.

<sup>3</sup> See H.R. Conf. Rep 1836 (2001)(exempting Swiss Bank Holocaust settlement fund from federal income taxation).

<sup>4</sup> See Appendix M to the Brief in Opposition in 05-1275 for a detailed description of distributions from the settlement fund.

In fact, as Appendix AA annexed to this Brief in Opposition makes clear, it is questionable whether significant additional sums will become available for future *cy pres* distribution in this case. Quite the contrary, it currently appears that the entire \$800 million sum initially allocated to the Deposited Assets class for the return of Swiss bank accounts may well be distributed to individual claimants, leaving no significant sums for future *cy pres* distribution.

To date, more than \$875 million has been distributed from the settlement fund to almost 400,000 Holocaust survivors or their heirs, including \$375 million to owners of Swiss bank accounts. See Brief in Opposition in 05-1275, at pp 10-15, and n.11, and Appendix M.

Special Master Junz's calculations,<sup>5</sup> described in Appendix AA to this Brief in Opposition, indicate that at the close of the Deposited Assets claims process, the \$425 million currently remaining in the Deposited Assets settlement fund may be exhausted, leaving little or nothing for residual *cy pres* distribution. Special Master Junz notes that since most transactional records of Holocaust-era Swiss bank accounts had been destroyed by the banks prior to this litigation, the audit of Swiss banks carried out by the International Committee of Eminent Person (ICEP) under the leadership of Paul Volcker, established "presumptive values" for types of accounts based on average balances maintained in Holocaust related accounts for which account balance information was available. Approximately 90% of bank account awards, to date, have been calculated using presumptive values.

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<sup>5</sup> On April 14, 2004, the District Court appointed Helen B. Junz, an internationally respected expert in Holocaust-era economics, as a Special Master with particular responsibility for the Deposited Assets claims process.

As Appendix AA reveals, beginning in May, 2004, Special Master Junz meticulously compared the awards in the cases for which information exists concerning the actual balance in a given account with the presumed value awards, and discovered that the presumed value averages appear to understate significantly the actual value of Holocaust-victim owned accounts. Accordingly, on March 31, 2006, in Appendix AA, Special Master Junz recommended a substantial retroactive re-valuation of the presumed value awards which, when added to the additional awards currently in process, would exhaust the \$800 million allocated to the Deposited Assets class, leaving little or no settlement funds for residual *cy pres* distribution. The revaluation issue is currently under active consideration in the District Court.<sup>6</sup>

Since Mr. Swift makes no effort to challenge the District Court's past *cy pres* distribution orders, conceding that he supported the distribution of past *cy pres* funds in the Court below, and that his concerns in this Court are purely prospective in nature (Cross-Petition at p.4), and since it is questionable whether future substantial *cy pres* distributions will take place in this case, the Cross-Petition not even raise an Article III case or controversy.

Even if a genuine possibility existed that substantial *cy pres* funds might become available for distribution by the District Court at some time in the future, the Second Circuit was clearly correct in declining to consider the matter until: (1) the precise sum could be determined; and (2) the District Court was given an opportunity to develop a distribution plan. 424 F.3d at 148, n. 14; App A to the Petition in 05-1275 at A-29. Inexplicably, the Cross-Petition simply ignores the

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<sup>6</sup> Pending additional investigation, Lead Settlement Counsel has taken no position concerning any potential revaluation of presumed value awards.

repeated statements of the District Court, the Special Master, and Lead Settlement Counsel that no decisions have been made concerning any future *cy pres* distributions of hypothetical unclaimed funds. In fact, the District Court held a day-long hearing on April 29, 2004 to solicit suggestions concerning possible *cy pres* distribution of residual funds, if any. JA 4027-4476.<sup>7</sup> A remarkable array of thoughtful suggestions were made to the Court. Special Master Gribetz recommended use of such funds, if any, to aid poor survivors, but declined to speculate concerning any allocation formula until precise amounts were known. JA 3705-3714; 3733-3776; 3710. Lead Settlement Counsel declined to endorse any plan until precise amounts were known. SA 177. The District Court declined to rule on any suggestions until specific amounts were known and the community was consulted. JA 4475-76. It borders on sharp practice for Mr. Swift, who participated in the April 29 hearing, to have omitted such material from his Cross-Petition.

Finally, even if an actual *cy pres* issue were properly before this Court (it is not), the Counter-Statement of the Case set forth in the Brief in Opposition in 05-1275 at pp. 7-17, makes it clear that the District Court's disciplined invocation of the *cy pres* doctrine in this complex and unique proceeding has been "exemplary." 424 F.3d at 149, n.15. (Appendix A to petition in 05-1275, at A-30).

The District Court has continually sought to administer this historic settlement on an individualized claims-based basis. In connection with four of the five settlement classes, that is exactly what has occurred, resulting in the distribution, to date, of more than \$660 million to many thousands of members of the Deposited Assets, Slave Labor I, Slave Labor

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<sup>7</sup> JA and SA citations are to the appendix in the Second Circuit below in *In re Holocaust Victim Assets Litig.*, 424 F.3d 132 (2<sup>nd</sup> Cir. 2005).

II, and Refugee classes on an individualized claims basis. See Appendix M to the Brief in Opposition in 05-1275, and the Brief in Opposition in 05-1275, at p.13, n.11. Unfortunately, the Looted Assets class proved impossible to administer on a claims-based basis. As the District Court has carefully explained, two factors made individualized administration of the Looted Assets class impracticable. See *In re Holocaust Victim Assets Litig.*, 302 F. Supp.2d 89 (EDNY 2004)(Appendix G 9-13 to the petition in 05-1275). See also *Special Master's Proposed Plan of Allocation and Distribution* (September 11, 2000)(available on line at [www.swissbankclaims.com](http://www.swissbankclaims.com)).

First, the sheer size of the Looted Assets class, consisting of virtually every victim of Nazi oppression, all of whom suffered looting, necessarily rendered any amount payable to an individual extremely small.<sup>8</sup>

Even more importantly, it was impossible to ascertain which items of Nazi loot had been knowingly “fenced” through Switzerland, and which items of loot had been disposed of through the myriad other channels used by the Nazis to dispose of their ill-gotten gains. Since this is a lawsuit against Swiss defendants, the impossibility of establishing a plausible nexus between Swiss culpability and any individual claim for looted assets doomed any possibility of a principled individualized claims-based administration involving looted assets.<sup>9</sup>

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<sup>8</sup> Mr. Swift’s suggestion that the Looted Assets class be artificially confined to the 425,000 persons who filed informational questionnaires during the notice phase (Cross Petition at 3) has been rejected as both arbitrary and legally impossible because the class was carefully informed that since the questionnaires were not claim forms, there was no obligation to complete one.

<sup>9</sup> Awards from each of the four claims-based classes rest on a showing of Swiss culpability.

Rather than de-certify the Looted Assets class and distribute its funds to other class members (who were already receiving claims-based compensation), the District Court invoked the *cy pres* doctrine, and, with the enthusiastic support of the vast bulk of the survivor community, ordered that the \$100 million initially allocated to the Looted Assets class be dedicated to the relief of the poorest members of the class. See *In re Holocaust Victim Assets Litig.*, 2000 WL 33241660 (EDNY, Nov. 22, 2000), *aff'd*, *In re Holocaust Victim Assets Litig.*, 413 F.3d 183 (2<sup>nd</sup> Cir. 2001)(upholding \$800 million allocation to Deposited Assets class, and use of *cy pres* doctrine to distribute \$100 million allocated to Looted Assets class to the poorest members of the class) (Appendices C and D to the petition in 05-1275).

Higher than anticipated interest earned on the settlement fund as a result of Congressional action exempting the fund from federal income taxation enabled the District Court to increase the allocation by \$45 million in 2002, and \$60 million in 2003, bringing the total dedicated to the relief of the poorest survivors to \$205 million. See *In re Holocaust Victim Assets Litig.*, CV 96-4849 (ERK)(MDG)(unreported) (September 25, 2002)(applying allocation formula to \$45 million in interest)(See Appendix E to the petition in 05-1275); and *In re Holocaust Victim Assets Litig.*, 2003 U.S. Dist LEXIS 20686 (EDNY Nov. 17, 2003)(applying allocation formula to \$60 million in interest).

Finally, the District Court conducted a meticulous investigation into the whereabouts of the poorest survivors, and developed a principled formula designed to allocate the funds to those members of the Looted Assets class who are most in need. See *In re Holocaust Victim Assets Litig.*, 302 F. Supp.2d 89, *rehearing den.*, 311 F. Supp.2d 363 (EDNY 2004)(See App G to petition in 05-1275), *aff'd* 424 F.3d 132

(2<sup>nd</sup> Cir. 2005)(See App A to petition in 05-1275). See also Andrew Hahn et al., *Jewish Elderly Nazi Victims: A Synthesis of Comparative Information on Hardship and Need in the United States, Israel, and the Former Soviet Union* (2004) (available on line at [http://www.cmjs.org/files/JDCBrandeisReport 01-26-04Final.pdf](http://www.cmjs.org/files/JDCBrandeisReport%2001-26-04Final.pdf)).

While Mr. Swift dismisses such thoughtful judicial activity as an exercise in Foundation charity, as the Second Circuit noted below, the District Court's disciplined and principled invocation of the *cy pres* doctrine has been an exemplary model of thoughtful restraint.

Given Appendix AA to this Brief in Opposition, it is questionable whether additional substantial *cy pres* distributions will take place in this case. If, however, such distributions do become appropriate, the same level of discipline, restraint and transparency that has characterized the District Court's past actions will govern any future proceedings, rendering action by this Court at this time wholly unwarranted.

#### **REASONS FOR DENYING THE WRIT**

Given the possibility that the Swiss Bank Holocaust settlement fund will be exhausted by the payment of individualized claims, Mr. Swift's request for prospective guidance concerning hypothetical future *cy pres* distributions does not raise an Article III case or controversy. At a minimum, the request for an advisory opinion is not ripe for judicial consideration.

Moreover, nothing in the District Court's past "exemplary" invocation of the *cy pres* doctrine warrants review by this Court.

Finally, Counsel of Record on the Cross-Petition, acting unilaterally and without the knowledge or support of any other settlement counsel, lacks authority to purport to speak on behalf of the settlement classes.

**I. The Cross-Petition Does Not Raise a Ripe Article III Case or Controversy Concerning Future Application of the *Cy Pres* Doctrine in This Case**

It is axiomatic that an Article III court may not deliver an advisory opinion. *Opinion of the Justices*, reprinted in Richard H. Fallon, et al., *Hart & Wechsler, The Federal Courts in the Federal System*, 92-93 (4<sup>th</sup> ed. 1996). Given the likelihood that the balance in the settlement fund will be exhausted by the payment of individualized bank account claims, Mr. Swift's request for prospective guidance concerning hypothetical future *cy pres* distributions is a classic request for an advisory opinion. This Cross-Petition is, therefore, directly governed by *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), where this Court ruled that speculation about the hypothetical re-occurrence of an unlikely event does give rise to an Article III case or controversy. In *Lyons*, a plaintiff who had been injured as the result of a chokehold utilized by the Los Angeles Police Department, sought injunctive relief against future use of the chokehold. This Court ruled that, given the extremely low probability that plaintiff would be subjected to the chokehold in the future, an Article III case or controversy warranting prospective injunctive relief did not exist.

Whatever the merits of *Lyons* in settings where the challenged behavior continues to be applied to third persons, in this case, where the behavior in question may not recur because substantial *cy pres* funds are unlikely to become available, *Lyons* teaches that this Court lacks Article III power to consider the Cross-Petition's request for an

advisory opinion. Moreover, unlike *Lyons*, where plaintiff had standing to seek damages for past actions, Cross-Petitioner concedes that no appellate jurisdiction exists over challenges to past exercises of *cy pres* authority by the District Court. (Cross-Petition at 4.) Accordingly, the Cross-Petition must be dismissed.

Even if one were to assume that substantial *cy pres* funds might become available in the future, the Second Circuit was clearly correct in noting that Mr. Swift's concerns about hypothetical future *cy pres* allocations are not ripe for current judicial scrutiny. 424 F.3d 148, n.14. (Appendix A-29 to petition in 05-1275). See *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990); *Socialist Labor Party v. Gilligan*, 406 U.S. 583 (1972). If future *cy pres* distributions become appropriate, there will be time enough for Mr. Swift, acting on behalf of an objector, to place his concerns before the District Court in the context of a crystallized case or controversy.

**II. The District Court, Having Properly Determined That Individualized Administration of the Looted Assets Class Is Impracticable, Was Authorized to Distribute Looted Assets Funds for the Relief of the Neediest Members of the Class Pursuant to the *Cy Pres* Doctrine**

Even if a case or controversy involving the *cy pres* doctrine were before the Court, no basis would exist to question the meticulous actions of the District Court, which have been accurately characterized as “exemplary” by the Second Circuit. 424 F.3d at 149, n. 15. (Appendix A-30 to the petition in 05-1275).

The *cy pres* doctrine plays a role in Rule 23 cases in three contexts. Occasionally, the *cy pres* doctrine is invoked under a “fluid recovery” theory that permits damages from a

defendant's allegedly unlawful action to be distributed to persons having no personal connection to the violation. *Van Gemert v. Boeing Co.*, 553 F.2d 812 (2d Cir. 1977). "Fluid recovery" is a controversial expansion of the concept of a case or controversy, and has nothing to do with this litigation, which has carefully linked recovery to a showing of personal connection to both the Holocaust and to Swiss duplicity. Indeed, the impossibility of linking individual Looted Assets claims to a plausible showing of Swiss culpability is a major reason why the Looted Assets class was deemed incapable of individualized administration.<sup>10</sup>

The *cy pres* doctrine is also invoked in settings where class members have been fully compensated, leaving "unclaimed funds" to be distributed by the supervising District Court. Eg. *Wilson v. Southwest Airlines, Inc.*, 880 F.2d 807 (5<sup>th</sup> Cir. 1989); *In re Airline Ticket Commission Antitrust Litig.*, 307 F.3d 679 (8<sup>th</sup> Cir. 2002); *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301 (9<sup>th</sup> Cir. 1990); *Nelson v. Greater Gadsden Hous. Auth.*, 802 F.2d 405 (11<sup>th</sup> Cir. 1986). The so-called "unclaimed funds" cases have no relevance to this proceeding, since it is all too clear that every cent of the settlement fund could be used to pay known and identifiable members of the settlement classes without providing them with full compensation.

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<sup>10</sup> See *In re Holocaust Victim Assets Litig.*, 2000 WL 33241660 (EDNY, Nov. 22, 2000), aff'd, *In re Holocaust Victim Assets Litig.*, 413 F.3d 183 (2<sup>nd</sup> Cir. 2001)(upholding \$800 million allocation to Deposited Assets class, and use of *cy pres* doctrine to distribute \$100 million allocated to Looted Assets class to the poorest members of the class) (Appendices C and D to the petition in 05-1275). See also *In re Holocaust Victim Assets Litig.*, 302 F. Supp.2d 89, *rehearing den.*, 311 F. Supp.2d 363 (EDNY 2004)( Appendix G to petition in 05-1275), aff'd 424 F.3d 132 (2<sup>nd</sup> Cir. 2005)( Appendix A to petition in 05-1275).

Finally, as here, *cy pres* is invoked to justify a distribution to a sub-set of a class when it is administratively impracticable to provide individualized payments to each class member. *In re Agent Orange Prod. Liability Litig.*, 818 F.2d 179 (2<sup>nd</sup> Cir. 1987)(upholding distribution to neediest members of class).

The Cross-Petition confuses the three contexts, painting a false picture of disagreement among the Circuits. In fact, in this case, involving an inability to distribute Looted Assets class funds on an individualized basis, the rules governing the District Court's behavior are well-settled. A District Court must, first, make a genuine effort to distribute the funds on an individualized basis. Once individualized distribution is found impracticable, however, the District Court is granted broad discretion pursuant to the *cy pres* doctrine to select a distribution plan that provides significant benefit to the class, while focusing the distribution on an identifiable sub-set of the class. In this case, the District Court selected the identifiable members of the class most in need, and concentrated the funds on their relief. Since the alternative was decertification of the class, it is difficult to understand why any class member is worse off because the District Court preserved the class by concentrating the funds on relief of the poorest members.

It is, of course, true that such a *cy pres* distribution would be more troublesome if it were practicable to distribute the class funds on an individualized basis. That is why no *cy pres* distributions have taken place in connection with the administration of the Deposited Assets, Slave Labor, and Refugee classes. But, with the possible exception of Mr. Swift,<sup>11</sup> all agree that it was simply impracticable to seek to

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<sup>11</sup> Mr. Swift's casual prescriptions for individualized distribution are manifestly unworkable. His suggestion that the Looted Assets class be

distribute Looted Assets funds on an individualized basis, necessitating resort to *cy pres*. Once individualized distribution was deemed impracticable, as the Second Circuit found below, the District Court's precise, disciplined and transparent exercise of its *cy pres* power was a textbook example of how the doctrine should work in practice.

**III. Counsel of Record on the Cross-Petition Lacks Authority to Prosecute an Appeal to This Court in the Purported Name of the Settlement Classes in Opposition to the Brief in Opposition Filed by Lead Settlement Counsel and in the Absence of Support From Any Other Settlement Counsel**

As Points I and II demonstrate, the Cross-Petition fails to raise a justiciable issue, and is devoid of legal merit.

There is a third fatal flaw in the Cross-Petition. Mr. Swift, acting unilaterally and in opposition to Lead Settlement Counsel and the settlement counsel appearing on this Brief in Opposition, lacks standing to purport to speak personally for the settlement classes. Mr. Swift is, of course, entitled to appear on behalf of an objecting member of the class in the capacity as counsel for an objector. But no such objector is identified in the Cross-Petition. Instead, Mr. Swift has

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artificially narrowed to those Holocaust survivors who filled out informational questionnaires during the notice phase is arbitrary, and overlooks the fact that the class was assured that the questionnaires had no legal effect. His suggestion that the funds be used to pay health insurance premiums for all survivors erroneously assumes the existence of vast resources, and ignores the fact that more than 900,000 qualifying survivors would be involved, residing in numerous countries with varying health systems and multiple insurance companies, resulting in minimal payments and massive transaction costs. Concentrating the funds on the neediest class members was clearly the preferable solution. Certainly, it was a permissible one.

anointed himself as the personal embodiment of the settlement classes, despite the fact that he is opposed by Lead Settlement Counsel, and the other settlement counsel appearing on this Brief in Opposition.

This Court has made it clear that a lawyer lacks standing to litigate the claims of unidentified clients. *Kowalski v. Tesmer*, 543 U.S. 125 (2004). Thus, the mere fact that Mr. Swift asserts that he individually represents thousands of class members does not entitle him to litigate on their behalf in this Court without the inconvenience of identifying a single client. Moreover, Mr. Swift's status as one of multiple court-designated settlement counsel does not authorize him to dissent from the collective judgment of his co-counsel, and to claim to speak authoritatively for the settlement classes in opposition to Lead Settlement Counsel and the settlement counsel appearing on this Brief in Opposition.

Rule 23 cannot function if a single disgruntled lawyer, in the absence of individual clients and in opposition to Court-designated Lead Settlement Counsel and the other settlement counsel appearing on this Brief in Opposition, is free to hold himself out as a self-appointed embodiment of the class. Were dissenting lawyers like Mr. Swift granted the unilateral power to purport to speak for a class in opposition to Court-designated Lead Settlement Counsel and the other settlement counsel, the result would be legal cacophony and administrative chaos.<sup>12</sup>

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<sup>12</sup> Nothing in Mr. Swift's prior activities during the settlement phase of this litigation would justify permitting him to speak unilaterally on behalf of the settlement classes. See *In re Holocaust Victim Assets Litig.*, 270 F. Supp.2d 313 (EDNY 2002)(denying Mr. Swift's application for risk multiplier; describing behavior).

## CONCLUSION

For the above-stated reasons the cross-petition for certiorari should be denied.

Dated: May 17, 2006  
New York, New York

Respectfully submitted

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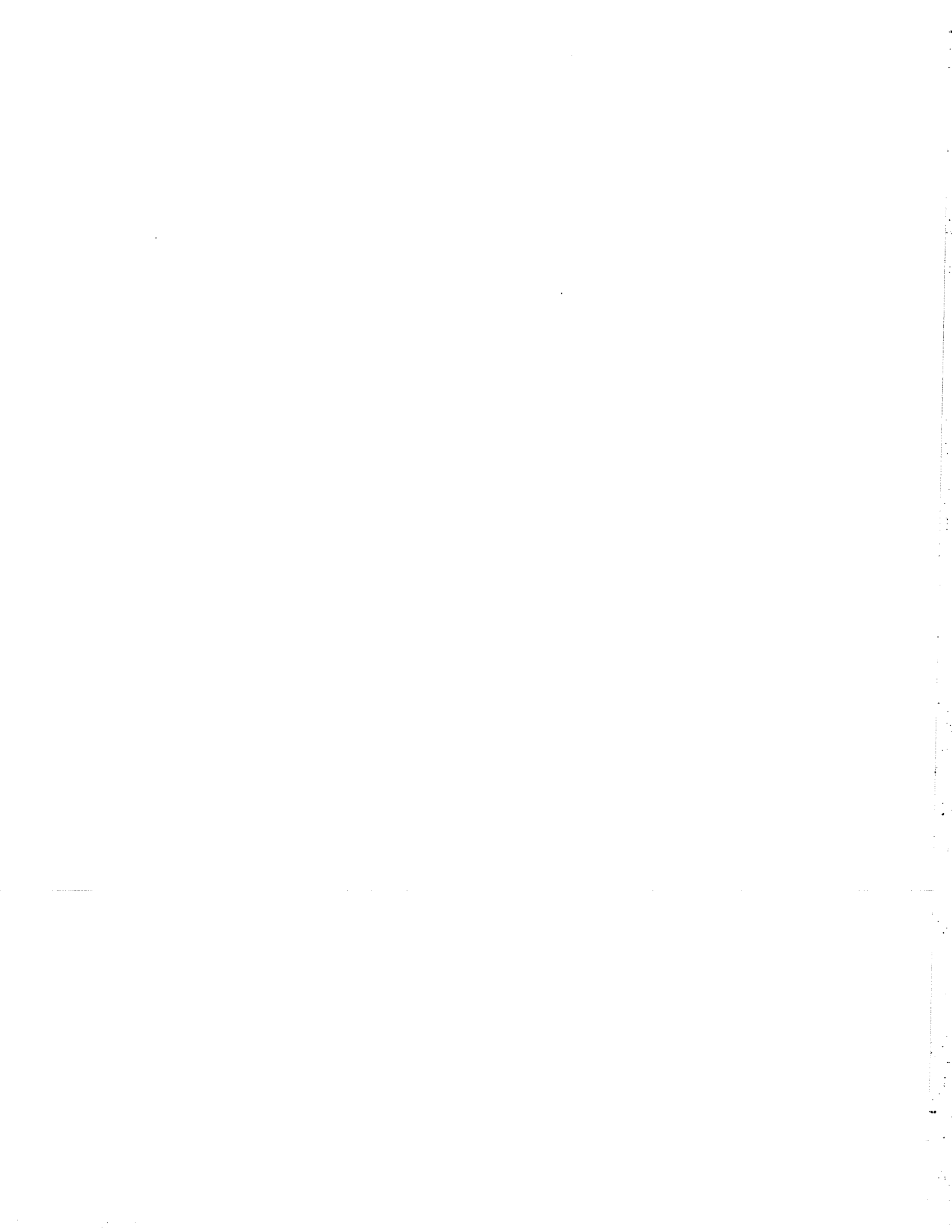
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**APPENDICES AA & BB**



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**Appendix AA**

**LETTER, DOCKETED MARCH 31, 2006, FROM  
SPECIAL MASTER HELEN JUNZ RECOMMENDING  
RE-CALCULATION OF BANK ACCOUNT AWARDS**

March 22, 2006

The Honorable Edward R. Korman  
United States District Judge  
United States District Court  
for the Eastern District of New York  
225 Cadman Plaza East  
Brooklyn, New York 11201

Dear Judge Korman:

Please find attached my note in which, after sustained monitoring of the question, I propose adjustments to the set of presumptive values presently used to establish award amounts for accounts for which no balance value can be established.

The estimated cost of adopting the proposed adjustments would amount to US\$ 179,270,216 for already awarded accounts (through Set 94) and US\$ 106,017,727 for the projected awards from the remaining stock of claims in CPS, for a total of US\$ 285,287,943. This would put the grand total of payments for deposited assets, already awarded and projected from CPS, at US\$ 737,204,341.

The average account values on which these totals are based include adjustments to 1945 values for deducting interest from post-1945 balances only if and when it is clear that interest had been credited by the banks and for adopting the guidelines for valuing securities. These adjustments also entail amendments to a few already

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awarded accounts. At the proposed presumptive values, these are preliminarily estimated to affect 20 accounts at a cost of US\$ 1,154,104.

The estimated amendments together with the grand total postulated above come to US\$ 738.4 million. Addition of the US\$ 65 million estimated for awards under Category 3 would put payments for deposited assets at US\$ 803.4 million. This total does not yet take into account potential adjustments to MPM awards, which may be appropriate given the award amounts established for Category 3 and the adjustment of minimum award amounts associated with the proposed presumptive values.

Yours sincerely,

HELEN B. JUNZ

Helen B. Junz

Appendix BB

**CITATIONS TO PRIOR PROCEEDINGS  
INVOLVING LEAD SETTLEMENT COUNSEL  
REPRESENTATION OF THE  
SETTLEMENT CLASSES**

*In re Holocaust Victim Assets Litig.*, 225 F.3d 191 (2nd Cir. 2000) (upholding limited definition of settlement classes);

*In re Holocaust Victim Assets Litig.*, 413 F.3d 183 (2nd Cir. 2001) (upholding Special Master's proposed allocation formula and use of *cy pres* doctrine);

*In re Holocaust Victim Assets Litig.*, 282 F.3d 103 (2nd Cir. 2002) (dismissing appeal from court-imposed self-identification requirement in connection with Slave Labor II releases; vacating and remanding on issue of after-acquired companies—issue resolved favorably by stipulation on remand);

*In re Holocaust Victim Assets Litig.*, (HSF), 424 F.3d 132 (2nd Cir. 2005), rehearing den., January 3, 2006 (upholding Looted Assets class *cy pres* allocation formula; rejecting challenge to structure of settlement);

*In re Holocaust Victim Assets Litig.*, (Dubbin), 424 F.3d 150 (2nd Cir. 2005) (upholding denial of attorneys fee to counsel for objector);

*In re Holocaust Victim Assets Litig.*, (DRA), 424 F.3d 158 (2nd Cir. 2005) (upholding denial of *cy pres* payments to persons with no personal connection to Holocaust);

*In re Holocaust Victim Assets Litig.*, (Pink Triangle), 424 F.3d 170 (2nd Cir. 2005) (upholding denial of *cy pres* payments on group as opposed to individual basis).

*Matter of Swift: In re Holocaust Victim Assets Litig.*, (unnumbered—referred to panel in 04-1898. 424 F3d at 149, n. 14;

*In re Holocaust Victim Assets Litig.*, (Ramsey Clark-Romani), 00-9593 (challenge to Looted Assets allocation formula) (withdrawn after full briefing);

*In re Holocaust Victim Assets Litig.*, (Katz Estate), 00-9595 (challenge to cy pres administration of Looted Assets class) (withdrawn after full briefing);

*In re Holocaust Victim Assets Litig.*, (Weiss), 00-9217 (challenge to fairness of settlement) (withdrawn after extensive motion practice and discussion);

*In re Holocaust Victim Assets Litig.*, (HSF), 00-9614 (challenge to allocation plan) (withdrawn after discussions);

*In re Holocaust Victim Assets Litig.*, (Wolf-Dunaevsky), 00-9103 (challenge to adequacy of representation) (withdrawn after motion practice);

*In re Holocaust Victim Assets Litig.*, (Bloshteyn), 00-9613, 14, (challenge to allocation formula (dismissed for non-prosecution after extensive discussions with appellants);

*In re Holocaust Victim Assets Litig.*, (Schonbrun) (unnumbered) (challenge to fairness and allocation plan—withdrawn after inquiry into client authorization);

*In re Holocaust Victim Assets Litig.*, (Wolinsky) (unnumbered) (challenging notice given to disabled persons) (withdrawn);

*In re Holocaust Victim Assets Litig.*, 256 F. Supp. 2d 313 (EDNY 2002) (directing banks to pay additional com-

pound interest of \$5 million on funds held in escrow account);

*In re Holocaust Victim Assets Litig.*, 02-3314 (Block, J.) (motion to construe settlement agreement to exclude after-acquired companies from receiving slave labor II releases) (successfully resolved by stipulation permitting after-acquired companies to receive slave labor I, but not slave labor II, releases);

*In re Holocaust Victim Assets Litig.*, (unnumbered) (Block, J.) (motion demanding access to additional information needed to administer the bank account claims process; and for leave to establish a NYC claims facility) (resolved successfully by negotiation after lodging motion papers with Court resulting in the June 10, 2004 Amendment 3 to the Settlement Agreement);

*In re Holocaust Victim Assets Litig.*, 105 F. Supp.139 (EDNY 2000) (opinion upholding fairness of settlement under Rule 23(e));

*In re Holocaust Victim Assets Litig.*, 2000 U.S. Dist. LEXIS 20817 (EDNY November 22, 2000) (opinion upholding allocation plan);

*In re Holocaust Victim Assets Litig.*, 270 F. Supp 2d 313 (EDNY 2002) (opinion setting attorneys fees; denying risk multiplier to Robert Swift);

*In re Holocaust Victim Assets Litig.*, 2003 U.S. Dist. LEXIS 20686 (EDNY November 17, 2003) (opinion allocating supplemental distribution);

*In re Holocaust Victim Assets Litig.*, 302 F. Supp. 2d 89 (EDNY 2004), rehearing den., 311 F. Supp.2d 363 (EDNY) (rejecting objections to allocation of Looted Assets funds; rejecting fee application);

*In re Holocaust Victim Assets Litig.*, 311 F. Supp.2d 407, reconsideration denied, 314 F. Supp. 155 (EDNY) (rejecting cy pres payments to gay and disabled communities);

*In re Holocaust Victim Assets Litig.* (day-long fairness hearing held by the District Court on November 29, 1999);

*In re Holocaust Victim Assets Litig.* (all-night telephone connection to fairness hearing held in Jerusalem on December 14, 1999);

*In re Holocaust Victim Assets Litig.* (day-long hearing on November 20, 2000 on the Special Master's proposed plan of allocation); and

*In re Holocaust Victim Assets Litig.* (day-long hearing on April 29, 2004 on the possible allocation of residual funds).