

No. 05-1275

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SUPREME COURT OF THE UNITED STATES

IN THE
Supreme Court of the United States

HOLOCAUST SURVIVORS FOUNDATION USA, INC., ET AL.,

Petitioners,

—v.—

UNION BANK OF SWITZERLAND, ET AL.,

Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

BURT NEUBORNE

Counsel of Record

40 Washington Square South

New York, New York 10012

(212) 998-6172

Lead Settlement Counsel

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**COUNTER-STATEMENT OF QUESTIONS
PRESENTED**

1. Whether the unanimous panel of the Second Circuit erred in holding that the District Court acted lawfully in allocating funds set aside for the worldwide relief of the poorest survivors of the Holocaust solely on the basis of individual need without regard to current national residence? (*In re Holocaust Victim Assets Litig.*, 424 F.3d 132 (2nd Cir. 2005), *rehearing and rehearing en banc denied* (January 3, 2006)(upholding District Court's *cy pres* allocation formula)(reproduced as Appendices A (opinion) and I (denial of rehearing and rehearing *en banc*) to the petition for certiorari).
2. Whether petitioners, having filed and then withdrawn appeals raising the issues that they now urge in this petition, are precluded by principles of direct estoppel recognized in *Federated Dep't Stores, Inc. v. Motie*, 452 U.S. 394 (1981) from pursuing this appeal? (The relevant documents relating to the withdrawal of the prior appeals are reproduced in Appendix J to this brief in opposition).
3. Whether petitioners are barred by principles of direct and collateral estoppel from seeking to re-argue issues that were resolved by the Second Circuit in connection with an earlier appeal prosecuted with the assistance of court-appointed counsel by other members of the class? (*In re Holocaust Victim Assets Litig.*, 413 F.3d 183 (2nd Cir 2001)(upholding allocation formula and use of *cy pres* doctrine to distribute funds for relief of poorest Holocaust survivors)(reproduced as Appendix D to the petition for certiorari).
4. Whether petitioners are barred by principles of laches from challenging the procedural rules governing the administration of the \$1.25 billion Swiss Bank Holocaust settlement more

than seven years into the administration of the settlement, after the distribution of more than \$875 million to almost 400,000 persons throughout the world, especially where they filed and withdrew two appeals in May, 2001, raising the same issues?

5. Whether a unanimous panel of the Second Circuit erred in reviewing petitioners' procedural concerns, and rejecting them as wholly unjustified in view of the "exemplary" behavior of the District Court, the Special Master, and the Lead Settlement Counsel at "every step of the allocation and distribution of this historic settlement?" See *In re Holocaust Victim Assets Litig.*, 424 F.3d 132, 149 n. 15 (2nd Cir. 2005).

6. Whether chronic procedural deficiencies including lack of appellate jurisdiction, lack of standing, laches, direct estoppel, collateral estoppel and questionable motivation render this petition a particularly inappropriate vehicle to attack a unique, remarkably successful class action settlement on behalf of Holocaust victims and their heirs that has been praised as "exemplary" by the Second Circuit, and that has succeeded in distributing more than \$875 million to almost 400,000 persons over the past seven years?

STATEMENT PURSUANT TO RULE 29.6

Although the nominal respondents are UBS and Credit Suisse, the petition is, in fact, directed against the settlement classes herein by several objectors who believe that the allocation formula utilized by the District Court in connection with the distribution of funds set aside under the *cy pres* doctrine for the relief of the poorest Holocaust survivors provides too much relief to 135,000 destitute survivors residing in the former Soviet Union, at the expense of less needy survivors residing in the United States. Accordingly, no respondent holds stock in a relevant entity.

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**IN THE
SURPREME COURT OF THE UNITED STATES**

No. 05-1275

**HOLOCAUST SURVIVORS FOUNDATION USA,
INC, *ET AL.*,**

Petitioners

v.

UNION BANK OF SWITZERLAND, ET AL.,

Respondents

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

RESPONDENTS' BRIEF IN OPPOSITION

Summary of Argument

Petitioner, "G.K.," a survivor of the Holocaust residing in South Florida, seeks to challenge the validity of an allocation formula governing the distribution of funds set aside for the relief of the poorest survivors of the Holocaust adopted by the District Court on November 22, 2000, in connection with the administration of the historic \$1.25 billion class action settlement of Holocaust-era claims against Swiss banks¹

¹"G.K." is the only petitioner with Article III standing to challenge the District Court's allocation rulings. The purported lead petitioner, the Holocaust Survivors Foundation, USA, Inc., (HSF) claims to speak for all

Petitioner does not challenge the fairness of the \$1.25 billion Swiss bank settlement. Nor does petitioner challenge the allocation of settlement funds among the five settlement classes, or the administration of any of the claims programs. Petitioner does not challenge the finding that the Looted Assets class is incapable of individualized claims-based administration, requiring resort to the *cy pres* doctrine. Nor does petitioner quarrel with the finding that the expenditure of looted assets funds for the relief of the poorest Holocaust survivors throughout the world constitutes an appropriate exercise of *cy pres*. Finally, petitioner does not quarrel with the proposition that a supervising District Judge enjoys extremely broad discretion in choosing among available *cy pres* options.

Indeed, the only argument advanced by petitioner is that the District Court was required, as a matter of law, to allocate funds for the poorest survivors on the basis of the total number of Holocaust survivors currently residing in each country without regard to need, even though such a formula provides an inequitable windfall to the United States, with its large survivor population and its relatively small number of extremely poor survivors, and imposes an inequitable penalty upon destitute survivors residing in the former Soviet Union, where the incidence of great want among the survivor population is enormous.

Holocaust survivors residing in the United States. However, apart from its grandiose name, HSF has neither official status, nor individual members. See 424 F.3d. at 146, n. 13. (App A). Appellate jurisdiction is lacking, as well, since the allocation formula at issue was adopted by a final order dated November 22, 2000, rendering the April 8, 2004 notice of appeal from a subsequent November, 2003 order routinely applying the formula to \$60 million in interest untimely. See *In re Holocaust Victim Assets Litig.*, 282 F.3d 103, 105-107 (2nd Cir. 2002)(dismissing appeal from similar subsequent implementing order as untimely).

The District Court firmly rejected the “national quota” allocation scheme, characterizing it as “arbitrary and unreasonable.” *In re Holocaust Victim Assets Litig.*, 302 F. Supp.2d at 109. (App G 35) Judge Cabranes, writing for a unanimous Second Circuit panel, agreed, stating:

There are at least two reasons why the District Court did not exceed its discretion by rejecting HSF’s proposed allocation methodology. First, the HSF’s methodology implies that Jewish Holocaust survivors who reside in the United States today are legally entitled to a particular share of the settlement fund based on their *total* number (rather than the number of *needy* survivors among them). We find no legal or equitable support for this view...

Second, the District Court articulated a compelling equitable reason to reject the HSF’s proposed allocation. As a logical matter, the methodology “is tailored to benefit individuals who are part of a small group of needy survivors within a large nationwide survivor population.” *In re Holocaust Victim Assets Litig.*, 302 F. Supp.2d 95. Needy survivors in the United States are precisely the group that stands to gain, since the United States share of *needy* Holocaust survivors is substantially less than the United States’ share of *all* Holocaust survivors. *Id.* But from the perspective of the *worldwide* population of needy Holocaust survivors – the population for which the funds allocated to the Looted

Assets Class are being distributed – there is nothing equitable about an allocation methodology that provides the “relatively few needy survivors” in the United States “with a disproportionate benefit solely because of the overall size of the survivor community in the United States. *Id* at 109.

In re Holocaust Victim Assets Litig., 424 F.3d at 148-49 (2nd Cir 2005), *rehearing and rehearing en banc denied* (January 3, 2006). (App. A 28-29; App. I).

II

Almost seven years after the fairness hearings which took place in Brooklyn on November 29, 1999 and in Jerusalem on December 14, 1999, and after the distribution of more than \$875 million to almost 400,000 persons around the world, including more than \$190 million to persons residing in the United States (See Appendix M to the brief in opposition), petitioner argues that the members of the settlement classes should not have been asked to decide whether to opt out before knowing precisely how much each would receive under the allocation plan, and that multiple separate counsel were required for each of the five settlement classes (and, presumably, for each of the five victim groups – Jews, Jehovah’s Witness, Sinti-Roma, gays and the disabled), and even, as this petition makes clear, each of the five geographical residence areas (Israel, United States, former Soviet Union, Europe, and the rest of the world) – a potential total of 125 separate counsel).

As a procedural matter, the structural challenges are barred by settled doctrines of preclusion and laches. Mr. Dubbin, counsel for HSF and counsel of record herein, raised the issues that he seeks to raise herein in two appeals to the

Second Circuit in 2000, only to withdraw both appeals in May, 2001. (See Appendix J). Moreover, in July, 2001, a parallel appeal raising similar procedural issues was prosecuted by members of the class represented by court-appointed counsel. *In re Holocaust Victim Assets Litig.*, 413 F.3d 183 (2d Cir. 2001) (Appendix D). The Second Circuit upheld the District Court's allocation formula, and the decision to dedicate looted assets funds under the *cy pres* doctrine for the relief of the poorest Holocaust survivors. *Id.* No appeal was taken from the Circuit's 2001 decision, which, in conjunction with the withdrawal of Mr. Dubbin's appeals, definitively resolved all procedural challenges to the Swiss bank settlement. *Federated Dep't Stores, Inc. v. Motie*, 452 U.S. 394 (1981).

Most importantly, the Second Circuit looked closely into HSF's claims that the District Court had imposed a "flawed judicial process." Judge Cabranes, writing for a unanimous panel, stated:

The HSF's appellate brief averts to the "District Court's 'flawed judicial process,'" referring principally to (1) the District Court's approval of the Settlement Agreement before adopting a plan for distributing and allocating settlement funds; and (2) alleged "assurances by the Lead Settlement Counsel and the court that the initial allocation imbalance would be rectified with subsequent distributions of larger amounts" for the benefit of survivors residing in the United States. Appellants' Br. at 26. The HSF characterizes these purported procedural irregularities as "examples" by which this Court's "examination" of the merits of this appeal would be "informed." *Id.* at 17, 20.

Upon carefully reviewing the record of this case, we find no evidence whatsoever of a 'flawed judicial process.' To the contrary, the careful consideration that the District Court, the Special Master, and the Lead Settlement Counsel have accorded to every step in the allocation and distribution of this historic settlement has been exemplary.

424 F3d at 149, n.15 (emphasis added) (App. A 30).

COUNTER-STATEMENT OF THE CASE:

AN OVERVIEW OF THE IMPLEMENTATION OF THE SWISS BANK HOLOCAUST SETTLEMENT

Petitioner's counsel paint a myopic and inaccurate picture of the implementation of the Swiss bank settlement, claiming that it has been unfair to Holocaust survivors residing in the United States.²

In fact, the extraordinarily successful implementation of the Swiss bank settlement has treated Holocaust survivors

² The nature of the Swiss bank settlement is discussed in *In re Holocaust Victim Assets Litig.*, 105 F. Supp.2d 139 (EDNY 2000)(upholding fairness of settlement)(App B). The secondary literature describing the settlement is substantial. Eg. MICHAEL J. BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICAN COURTS (2003); Burt Neuborne, *Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts*, 80 Wash. U. L. Q. 795 (2002). The most complete description of the litigation occurs in the magisterial two volume report of the Special Master supporting his recommended plan of allocation. The report was before the Court below. JA 2053-2577; 5698. It is available on line at www.swissbankclaims.com.

throughout the world with scrupulous equality and fairness in distributing, to date, more than \$875 million to approximately 400,000 persons, including more than \$190 million to persons residing in the United States. *Letter, dated April 24, 2006, from Special Master to District Court Summarizing Current Distributions from Settlement Fund*(App M). To date, approximately 29% of the settlement funds have been distributed to persons residing in the United States, even though only 14%-19% of the survivor population resides in the United States.³ *Id.* Indeed, the only segment of the Swiss settlement funds that has not been disproportionately distributed to persons residing in the United States is the \$205 million set aside for the relief of the poorest survivors – precisely because the bulk of the poorest survivors do not live in the richest country on earth, but are

³ The information on demographics and relative need before the District Court was drawn primarily from 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) (a Report prepared for the Joint Distribution Committee by researchers from Brandeis University), available at <http://www.cmjs.org/files/JDCBrandeisReport01-26-04Final.pdf>. As Chief Judge Korman noted in his March 9, 2004 opinion rejecting HSF's proposed formula, the best available demographic information places 14%-19% of Holocaust survivors in the United States, and 19%-27% in the former Soviet Union. Demographic studies indicate that the number of Holocaust survivors requiring assistance with basic necessities of life such as food, fuel in winter and warm blankets is far higher in the former Soviet Union, reaching a minimum of 135,000 identified persons; while the incidence of comparable need in the United States is far lower, numbering less than 5,000. See *In re Holocaust Victim Assets Litig.*, 302 F. Supp.2d 89, *reh'g denied*, 311 F. Supp. 363 (EDNY 2004)(explaining basis for denial of HSF objections)(App G), cited with approval in *In re Holocaust Victim Assets Litig.*, 424 F.3d 132, 144-145 (2nd Cir. 2005), *rehearing and rehearing en banc denied* (Jan. 3, 2006) (upholding District Court's *cy pres* allocation formula)(App A) (opinion); (App I) (denial of rehearing).

disproportionately clustered in the economic ruins of the former Soviet Union.⁴

The Swiss bank settlement, signed on January 26, 1999, calls for the payment of \$1.25 billion by two Swiss banks – UBS and Credit Suisse – in return for the release of most Swiss entities (except all but two Swiss insurance companies) from claims by Holocaust victims arising out of the WW II behavior of Swiss entities.

The settlement agreement provides relief to the members of five victim groups – Jews, Jehovah’s Witnesses, Sinti-Roma, gays and the disabled – who bore the brunt of Nazi persecution.⁵ The agreement provides for payments to members of the five victim groups in connection with five violations of law: (1) failure to return “deposited assets” placed in Swiss banks for safekeeping; (2) forced labor for German companies in settings assisted by Swiss banks; (3) forced labor for Swiss companies; (4) exclusion from, or mistreatment in, Switzerland on grounds of religion or ethnic status; and (5) knowing “fencing” by Swiss entities of assets looted by Nazis.⁶

⁴ To date, 41% of distributions to the Deposited Assets class; 23% of the distributions to the Slave labor I class; and 41% of the distributions to the Refugee class have gone to persons residing in the United States. (App. M).

⁵ The Second Circuit has affirmed the decision to limit participation in the settlement classes to members of the five victim groups. *In re Holocaust Victim Assets Litig.*, 225 F.3d 191 (2nd Cir. 2000).

⁶ The discrete violations of law are reflected in the membership of the five settlement classes: (1) the Deposited Assets class is made up of members of the five victim groups seeking the return of funds deposited in Swiss banks on the eve of the Holocaust; (2) the Slave Labor I class is made up of members of the five victim groups who performed slave labor for German companies receiving financial assistance from Swiss banks;

The settlement agreement did not seek to allocate the \$1.25 billion settlement fund among the five settlement classes; among the five victims groups; or among the five geographical areas – Israel, the United States, the former Soviet Union, Europe and the rest of the world - within which the victims reside. Instead, the District Court adopted a scrupulously fair two-step procedure that, first, determined whether the \$1.25 billion settlement was fair; and, second, asked the members of the settlement classes to pre-commit to the outcome of a fair process for allocating and distributing the settlement funds. See *In re Holocaust Victim Assets Litig.*, 105 F. Supp.2d 139 (EDNY 2000)(App B). Class-members who were unwilling to pre-commit to the results of the fair allocation procedures were offered the opportunity to opt out. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). Class members who failed to opt out, but who objected to the outcome of the allocation process, were assured judicial review of the lawfulness of any allocation.

The scrupulously fair allocation process consisted of a neutral court-appointed Special Master with a duty to develop a proposed plan of allocation and distribution after broad consultation with any member of the settlement classes who wished to be heard, either with or without counsel; and a financially unconflicted⁷ Lead Settlement Counsel, one of

(3) the Slave Labor II class is made up of persons who performed slave labor for Swiss-owned companies; (4) the Refugee class is made up of members of the five victim groups who were excluded from, or were abused in, Switzerland during WW II because of race, religion or ethnicity; and (5) the Looted Assets class is made up of members of the five victim groups who suffered looting at the hands of the Nazis *and* whose assets were improperly “fenced” by Swiss entities.

⁷ Lead Settlement Counsel was financially unconflicted within the meaning of *Amchem Prods. v. Windsor*, 521 U.S. 591 (1997), first,

whose principal duties was to assure unfettered access to the Special Master for all class members wishing to communicate with him concerning the allocation of the settlement proceeds. *Id.*

Once a proposed plan of allocation was developed, the Special Master was to notify the members of the settlement classes of the plan's content, and present the plan to the Court for its consideration. The Court was to hold a hearing on the proposed plan, and put the plan into effect only if it appeared fair and just.

The settlement classes overwhelmingly approved the pre-commitment strategy, returning more than 564,000 questionnaires expressing a willingness to participate in the allocation process. After two fairness hearings, Chief Judge Korman explicitly accepted the settlement as fair, including the pre-commitment strategy. *In re Holocaust Victim Assets Litig.*, 105 F. Supp.2d 139 (EDNY 2000) (App B).

After 18 months of intense communication with class members, the Special Master proposed a plan of allocation in September, 2000. See *Special Master's Proposed Plan of Allocation and Distribution* (September 11, 2000)(available on line at www.swissbankclaims.com). After notice to the class, and a full day of hearings before the District Court, Chief Judge Korman approved the proposed allocation plan on November 22, 2000. *In re Holocaust Victim Assets Litig.*, 2000 WL 33241660 (EDNY Nov. 22, 2000)(App C), *aff'd* 413 F.3d 183 (2d Cir. 2001)(App. D).

because he had no economic interest in the approval of the settlement since he had waived attorneys' fees for helping to achieve it; and, second, because his hourly lodestar compensation as Lead Settlement Counsel was completely independent of any particular allocation.

The plan of allocation adopted by the District Court recognized that the claim for the return of Swiss bank accounts was the legal heart of the case. Accordingly, based on information revealed in an audit of Swiss banks conducted by Paul Volcker which had been made public on December 8, 1999, the District Court accepted the recommendation that up to \$800 million be allocated to the Deposited Assets class, and established an elaborate claims procedure headquartered in Zurich to adjudicate the many thousands of claims for Swiss bank accounts that resulted from the publication, pursuant to the settlement agreement, of information concerning 21,000 (subsequently increased to 24,000) "probable or possible" Holocaust victim-owned Swiss accounts. *In re Holocaust Victim Assets Litig.*, 413 F.3d 183 (2nd Cir 2001) (upholding allocation of up to \$800 million to deposited assets class) (App. D). To date, approximately \$375 million has been distributed to owners of WW II Swiss bank accounts. (App M). It currently appears that the claims procedure will be successful in distributing much, if not all, of the \$800 million to owners of WW II accounts.⁸

The District Court also accepted the Special Master's recommendation that each survivor forced to work in a slave labor camp for German or Swiss companies receive \$1,000 (in addition to the \$7,500 awarded by the German Holocaust Foundation: Remembrance, Responsibility and the Future).⁹

⁸ Petitioner's assertion at p.12 of the *Petition* that the *cy pres* fund will grow to between \$500-\$600 million is wildly overblown. In fact, it appears that once the deposited assets claims process is completed, little or no residual funds will remain to supplement the existing *cy pres* fund.

⁹ Lead Settlement Counsel serves as one of the two United States representatives on the Board of Trustees of the German Holocaust Foundation, permitting a degree of coordination between the two funds which occasionally overlap in providing benefits to slave laborers. The

The \$1,000 figure was subsequently raised to \$1,450 as a result of interest earned on the settlement funds during the period of administration, and as a result of Congress's exemption of the settlement fund's earnings and distributions from federal income taxation. *In re Holocaust Victim Assets Litig.*, 2000 WL 33241660 (EDNY November 22, 2000)(adopting proposed allocation plan)(App. C). See Sec. 803, *H.R. Conf. Rep.* 1836 (2001). Slave laborers have received approximately \$275 million, to date.¹⁰ (App M).

Finally, the District Court accepted the Special Master's recommendation that \$100 million (subsequently increased to \$205 million as the result of tax exempt interest earned on the settlement fund) be allocated to the Looted Assets class, both because of the relatively weak legal underpinnings of the class's legal claims against Swiss entities, and because of the virtual impossibility of individualized administration of a looted assets claims program. See *In re Holocaust Victim Assets Litig.*, 2000 WL 33241660 (EDNY November 22, 2000)(allocating \$100 million to looted assets class for *cy pres* relief of poorest Holocaust survivors)(App C); *In re Holocaust Victim Assets Litig.*, CV 96-4849 (ERK)(MDG) (unreported)(September 25, 2002) (applying allocation formula to \$45 million in interest earned on the settlement fund)(App. E); *In re Holocaust Victim Assets Litig.*, 96 CV 4849 (ERK)(MDG), 2003 U.S. Dist. LEXIS 20686 (EDNY November 17, 2003)(rejecting HSF challenge to allocation

combined resources of the Swiss Bank Holocaust settlement and the German Holocaust Foundation approximate \$7 billion. See *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003).

¹⁰ The District Court approved, as well, payments to persons who were excluded from, or mistreated in, Switzerland during WW II because of race or religion ranging from \$725 to \$3,625, depending upon the severity of the conduct. *Id.* To date, approximately \$11 million has been distributed to the so-called "refugee class." (App M).

formula and applying formula to \$60 million in interest earned on settlement fund).

Four of the five settlement classes were provided with a carefully designed claims process. Claims for Swiss bank accounts were and are adjudicated by a Claims Resolution Tribunal (CRT II) in Zurich initially headed by Paul Volcker in his capacity as a Special Master reporting directly to the Court. Slave labor claims by Jewish claimants were and are processed by the Conference on Jewish Material Claims Against Germany (the "Claims Conference"), headquartered in New York City. Slave labor claims by non-Jewish claimants (Sinti-Roma, Jehovah's Witnesses, gays and the disabled) were and are processed by the International Organization on Migration (IOM) headquartered in Geneva.

The claims programs in connection with the Deposited Assets, Slave Labor I, Slave Labor II, and Refugee classes have been remarkably successful, enabling the Swiss bank settlement to have distributed more than \$660 million, to date, (exclusive of the \$205 million distributed or firmly allocated to social agencies by the Looted Assets class, and the \$10 million to the Victims' List Foundation) on the basis of individualized consideration of eligibility – an astonishing achievement given the 60 years that have elapsed since WW II, and the wholesale destruction of bank records by the Swiss banks.¹¹ (App M).

¹¹ The approximate distribution figures as of April 24, 2006 are: Deposited Assets - \$375 million; Slave Labor I and II - \$275 million; Refugee - \$11 million; Looted Assets - \$205 million; and Victims' List Foundation/Yad Vashem and the United States Holocaust Memorial Museum - \$10 million to establish a definitive list of Holocaust victims. (App M).

One class defied individualized administration. The Special Master reported to the Court in September, 2000 that it would be impossible to determine which items of Nazi loot had been knowingly “fenced” by Swiss entities, and which had been disposed of through German or other entities, rendering it impossible to engage in an individualized Looted Assets claims process. See *Special Master's Proposed Plan of Allocation and Distribution* (September 11, 2000)(available on line at www.swissbankclaims.com). Accordingly, the Special Master urged the Court to consider *cy pres* distribution of the looted assets funds for the relief of the poorest Holocaust survivors throughout the world. *Id.* The District Court adopted the recommendation. *In re Holocaust Victim Assets Litig.*, 2000 WL 33241660 (EDNY November 22, 2000) (adopting allocation formula) (App. C). The Second Circuit affirmed. 413 F.3d 183 (2nd Cir. 2001)(App D).

The Special Master engaged in an intensive investigation, with the active cooperation of class members and demographic experts, in an effort to determine the whereabouts of the poorest Holocaust survivors in the greatest need.¹² Pursuant to the investigation, 10% of the looted assets fund (or \$20.5 million) was allocated for relief of impoverished non-Jewish survivors residing in Eastern Europe under the auspices of the IOM. The remaining 90% (or \$184.5 million) was allocated for the relief of impoverished Jewish survivors residing throughout the world. Based on exhaustive studies of the geographical distribution of the poorest Jewish survivors, the Special Master recommended – and the District Court approved - a distribution of 75% of the Jewish *cy pres* funds to the Joint Distribution Committee's *Chesed* program for the relief of

¹² See n. 3, *supra*.

135,000 identifiable Holocaust victims living in utter destitution in the former Soviet Union. The remaining Jewish *cy pres* funds were allocated on the basis of the number of similarly destitute persons requiring immediate assistance with the basic necessities of life residing in each country: 12.5% to Israel; 4% to the United States; 4% to Eastern Europe; 3% to Western Europe; and 1% to the rest of the world. *In re Holocaust Victim Assets Litig.*, 2000 WL 33241660 (EDNY November 22, 2000) (adopting allocation formula) (App. C).

Samuel Dubbin, counsel of record for petitioners herein, acting on behalf of the individuals who eventually formed HSF and who appear as petitioners herein, challenged the Jewish *cy pres* allocation formula, claiming that it short-changed survivors residing the United States. On September 8, 2000, Mr. Dubbin filed an appeal from the District Court's fairness order, which had been entered on August 9, 2000. On December 21, 2000, Mr. Dubbin filed an appeal from the District Court's allocation order which had been entered on November 22, 2000. However, on May 15, 2001, confronted with a Second Circuit order directing him to file his brief and appendix by May 15, 2001, or suffer the dismissal of his appeals, Mr. Dubbin moved for leave to withdraw both appeals. On May 30, 2001, leave to withdraw both appeals was granted and the appeals were dismissed. (App J).

On July 26, 2001, in a parallel appeal prosecuted by other class members with the assistance of court-appointed counsel, the Second Circuit explicitly affirmed the Special Master's plan of allocation among the classes, including the decision to allocate up to \$800 million to the deposited assets class, and the decision to utilize the *cy pres* doctrine to permit distribution of funds allocated to the looted assets class for the relief of the poorest survivors. *In re Holocaust Victim*

Assets Litig., 413 F.3d 183 (2d Cir. 2001) (App D). No appeal was taken from the Second Circuit's decision.

Finally, on September 9, 2005, the Second Circuit unanimously upheld the District Court's decision to allocate the looted assets Jewish *cy pres* funds on the basis of worldwide need, not national population quotas, and characterized the administration of the Swiss bank settlement as "exemplary." *In re Holocaust Victim Assets Litig.*, 424 F.3d 132 (2nd Cir. 2005). (App.A). On January 3, 2006, the Second Circuit, without dissent, denied petitioner's application for re-hearing and re-hearing *en banc*. (App I). This petition followed.

REASONS FOR DENYING THE WRIT

Petitioner's narrow quarrel with the District Court's Jewish *cy pres* allocation formula does not present an inter-Circuit conflict, and does not raise significant and recurring issues of law warranting review by this Court. Indeed, the unique nature of the Swiss Bank Holocaust settlement, involving, as it does, five worldwide settlement classes receiving compensation for unique events transpiring in Europe more than 60 years ago, coupled with: (1) the unusually intense judicial supervision of the settlement's administration provided by Chief Judge Korman; (2) the role of the United States in helping to broker the settlement; (3) the undeniable success of the settlement in distributing more than \$875 million to almost 400,000 persons to date; and (4) and the Second Circuit's characterization of the settlement's administration as "exemplary," renders this proceeding an unusually poor candidate for certiorari.

I.

No Legal or Equitable Basis Exists to Question the *Cy Pres* Allocation Formula Recommended by the Special Master, Adopted by the District Court, and Unanimously Affirmed by the Second Circuit

Petitioner "G.K." claims that the District Court's formula, which allocates funds for the relief of the poorest survivors of the Holocaust solely on the basis of relative individual need without regard to national residence, results in too much assistance being provided to 135,000 identifiable destitute Holocaust survivors residing in the former Soviet Union, and not enough to less needy survivors residing in the United States. "G.K." demands an allocation formula keyed to national residence, insisting that limited funds devoted to the relief of the poorest Holocaust survivors throughout the world be initially allocated *per capita* on the basis of the total number of Holocaust survivors residing in each country (whether or not they are needy); and only then be distributed to the poorest survivors residing in each country.

Not surprisingly, given the avowedly parochial nature of HSF as an organization devoted to advancing the interests of Holocaust survivors residing in the United States, such a formula is tailor-made to benefit survivors residing in the United States, which has between 14%-19% of the survivor population,¹³ but which has a much lower proportion of survivors in great need.

¹³ Petitioner's unsupported assertion that 30% of all Holocaust survivors currently reside in the United States is incorrect. In fact, demographic studies conducted under the auspices of Brandeis University reveal that between 14%-19% of the Holocaust survivor population resides in the United States. See *In re Holocaust Victim Assets Litig.*, 302 F. Supp.2d 89, 97 (EDNY 2004)(App. G 13).

In support of such an inequitable allocation formula, petitioner offers several wholly unpersuasive arguments.¹⁴ First, petitioner argues that the District Court's decision to allocate *cy pres* funds on the basis of worldwide individual need, not national population quotas, violates the principle of intra-class equity because it results in the distribution of most of the *cy pres* funds for the relief of 135,000 destitute residents of the former Soviet Union, and only a relatively small amount of the funds to those survivors residing in the United States manifesting a roughly comparable level of need. But, as the Second Circuit noted, such an argument rests on the question-begging assumption that Holocaust survivors residing in the United States enjoy a baseline group entitlement to a *per capita* allocation of the *cy pres* looted assets funds, regardless of economic need. *In re Holocaust Victim Assets Litig.*, 424 F.3d at 148-49 (2nd Cir. 2005), *rehearing and rehearing en banc denied* (January 3, 2006)(App A 28).

In fact, there are no presumptive national shares, just as there are no presumptive shares payable to any group of

¹⁴ Petitioner's purported legal authority for the proposition that the District Court was legally obliged to adopt HSF's inequitable allocation formula is completely irrelevant. Not a single case cited by petitioner involves the *cy pres* allocation of funds to the neediest members of a class. See 424 F.3d at 147-48. (App. A26-27). It is, of course, true that in the absence of a valid *cy pres* decision to confine distribution of a class's assets to the neediest members of the class, it would be improper to distribute assets on the basis of need rather than legal entitlement. That is why deposited assets, slave labor and refugee distributions are calculated without regard to need. But where, as with the looted assets class, a valid and unchallenged decision has been made to devote class assets to the relief of the poorest members of the class, petitioner's authority for allocating funds on the basis of raw population is simply beside the point.

victims.¹⁵ Membership in the settlement classes is not a group phenomenon, but a consequence of the shared individual experience of having been both the target of Nazi lunatics, and the victims of Swiss duplicity. The District Court's *cy pres* allocation formula – a formula that ignores national residence and targets relative individual need on a worldwide basis - treats all survivors equally as individuals, and awards *cy pres* funds only to those extremely poor survivors who meet the principled criteria of great need. To argue, as does petitioner, that such a result is “unequal” because it results in most of the *cy pres* money being spent on the poorest survivors, who happen to reside in the former Soviet Union, is to misunderstand the very idea of equality. The essence of equality is to treat like persons alike, and different persons differently. The District Court's allocation formula achieves precisely that result by applying a principled test that identifies the survivors in greatest need wherever they may live, and deploys the *cy pres* funds for their relief. In fact, as the Second Circuit noted, it is the HSF formula that would violate the equality principle by providing the United States survivor community with an unfair windfall. *In re Holocaust Victim Assets Litig.*, 424 F.3d at 148-49 (2nd Cir 2005), *rehearing and rehearing en banc denied* (January 3, 2006). (App. A 28-29; App. I).

Petitioner argues that in describing the factors that have led to the desperately impoverished condition of Holocaust survivors residing in the former Soviet Union, the District

¹⁵ Similar efforts to assert group-based entitlements to a share of the Swiss bank settlement have been rejected by the District Court and affirmed by the Second Circuit. See *In re Holocaust Victim Assets Litig.*, 424 F.3d 159 (2nd Cir. 2005)(upholding refusal to allocate *cy pres* funds to gay community); *In re Holocaust Victim Assets Litig.*, 424 F.3d 169 (2nd Cir, 2005)(upholding refusal to allocate *cy pres* funds to the disabled community).

Court adopted extraneous allocation criteria having nothing to do with the survivors' underlying legal claims. See *In re Holocaust Victim Assets Litig.*, 302 F. Supp.2d at 144-45; 147, *reh'g denied*, 311 F. Supp. 363 (EDNY 2004)(App G) (explaining basis for denial of HSF objections). But petitioner misunderstands the purpose of the District Court's recitation of the factors leading to the currently desperate condition of Holocaust survivors in the former Soviet Union. The District Court's recitation of the history and current causes of the plight of destitute Holocaust survivors residing in the former Soviet Union was descriptive, not allocative. The sole allocation criteria used by the District Court was relative current need – a criteria that cannot be measured, described or explained without reference to history (especially the inability to have provided reparations to survivors trapped behind the Iron Curtain, the collapse of the Soviet economy, and the exodus of much of the Soviet Jewish community), as well as reference to currently available alternative sources of assistance.

Petitioner also argues that the District Court's allocation formula results in an unlawful failure to provide most members of the looted assets class with any tangible benefit in return for their release of their looted assets claims. It is unclear, however, why the vast bulk of United States survivors would be better off under HSF's formula than under the District Court's formula. In both settings, once a valid *cy pres* decision is made to devote looted assets funds to the relief of the poorest survivors – a decision that HSF does not challenge - the vast bulk of the looted assets class will, of necessity, receive nothing tangible, except the psychic satisfaction of assisting the poorest survivors. Why the psychic satisfaction of survivors residing in the United States would be enhanced by a formula that unfairly reduces the ability to aid destitute survivors residing in the former Soviet Union, while unfairly increasing the ability to aid less

needy survivors residing in the United States, is a secret known only to the leadership of HSF.

Finally, petitioner argues that the District Court's allocation formula does not provide a benefit to the looted assets class as a whole, but privileges a segment of the class. But, once again, it is unclear why the HSF formula would benefit a broader segment of the class. Under both the HSF formula and the formula adopted by the District Court, tangible benefits will flow to only a small proportion of the looted assets class – the portion in greatest need. Indeed, once the judgment was made to devote the looted assets funds to the relief of the poorest survivors – a judgment that HSF does not challenge - it became inevitable that most members of the looted assets class as a whole would not receive tangible benefits from the fund. To be sure, the entire class does receive a psychic benefit from the principled use of the fund to relieve the distress of the poorest members of the class. But why that psychic benefit is dependent on unfairly privileging survivors residing in a survivor's country of residence at the expense of poorer survivors residing elsewhere, is another mystery known only to the leadership of HSF.

In short, the legal Rubicon was crossed when all agreed that, pursuant to the *cy pres* doctrine, looted assets funds should be dedicated to the relief of the poorest survivors. At that point, no individual looted assets class member could be said to have retained a legally cognizable individual interest in a *pro rata* share of the looted assets funds. Instead, the class members were entitled to the principled application of an allocation formula designed to identify those members of the class most in need. That is exactly what they have received.

II. No Legal or Equitable Basis Exists to Question the Meticulously Fair Procedures Utilized by the District Court That Have Been Praised as “Exemplary” By the Second Circuit

A. The Petition is Barred by Direct Estoppel and Laches

Petitioner, seeking to pose a belated, jurisdictionally-deficient and wholly unpersuasive challenge to the structure of the Swiss bank settlement, appears to argue that (1) multiple separate counsel were required for each interest group in connection with the allocation process; (2) the opt out process should have been deferred until the completion of the allocation proceedings; and (3) Lead Settlement Counsel failed in his duty of loyalty owed to survivors residing in the United States because he supported the District Court’s allocation formula.

Such a belated effort – fully seven years into the settlement’s administration - to question the basic structure of the Swiss bank settlement is clearly barred by principles of direct estoppel, issue preclusion and laches. Most directly, Mr. Dubbin, counsel of record herein, acting on behalf of the persons who formed HSF and who are pursuing this appeal, raised the procedural concerns in connection with two appeals in September and December, 2000, from the District Court’s August 9, 2000 fairness order, and from the District Court’s November, 22, 2000 order adopting the Special Master’s proposed plan of allocation and distribution (including the very *cy pres* allocation formula he seeks to challenge in this proceeding), only to withdraw both appeals on May 15, 2001, the date his appendix and appellate briefs were due in the Second Circuit. (App J). Accordingly, this proceeding is precluded. *Federated Dep’t Stores, Inc. v.*

Motie, 452 U.S. 394 (1981); *Montana v. United States*, 440 U.S. 147 (1979).¹⁶

In *Federated Dep't Stores*, one of several plaintiffs failed to pursue an appeal to the Ninth Circuit from the dismissal of their anti-trust complaint. When the Ninth Circuit reversed the District Court and ordered reinstatement of the complaint, the non-appealing party sought reinstatement, as well. This Court ruled that having failed to pursue an appeal, the non-appealing party was precluded from continuing to seek relief. In this case, the predecessors and founders of HSF formally withdrew their appeals raising the issues they seek to raise in this petition. (App J). Accordingly, HSF and its members and founders – all represented by Samuel Dubbin – are precluded under *Federated Dep't Stores* from challenging the structure of the Swiss bank settlement fully five years after they abandoned prior appeals raising the issue.

Even in the absence of direct estoppel, petitioner's challenge to the basic structure of the Swiss bank settlement is unquestionably barred by laches. In the five years since Mr. Dubbin abandoned his appeals in 2001, the Swiss bank settlement has distributed more than \$875 million to approximately 400,000 persons. (App M). Although petitioner claims that this challenge is narrowly directed at the *cy pres* administration of the looted assets class,

¹⁶ The abandoned appeal from the fairness order was pursued in the name of Dr. Thomas Weiss, a founder of HSF, and a permanent member of its Board of Directors. The abandoned appeal from the District Court's allocation order was pursued on behalf of a number of HSF's founders, who also appear as petitioners herein. Mr. Dubbin was counsel in both abandoned appeals, as well serving as counsel of record in this proceeding. Under *Montana v. United States*, 440 U.S. 147 (1979), direct estoppel applies to HSF and its privies. (App. J).

petitioner's claim of structural insufficiency and constitutional inadequacy would, if upheld, erode the structural foundation of the entire settlement, leaving legal chaos in its wake, and causing untold harm to the members of the other four settlement classes. It would be inconceivable to permit a member of a class to abandon a timely appeal challenging the structural integrity of a complex settlement, and to wait five years until most of the funds have been disbursed before seeking to raise the identical issues in a new appeal.

**B. The Procedures are Scrupulously
Fair**

Petitioner's argument on the merits is equally deficient. The insistence that Lead Settlement Counsel betrayed survivors residing in the United States because he defended the District Court's allocation formula is incomprehensible. The limited funds available for the relief of the poorest survivors did not begin to provide for the legitimate needs of poor survivors throughout the world. Like an inadequate blanket on a winter's night, shifting the limited funds to one set of survivors meant removing support from another set of deserving survivors. As the extraordinary opinion of the District Court demonstrates (App G), the allocation decision – described by the District Court as an “odious” responsibility – was the basis of sustained and principled investigation.¹⁷ Lead Settlement Counsel exercised independent judgment and determined that the allocation formula proposed by the District Court was both equitable and well within its discretionary authority. Accordingly, Lead Settlement Counsel supported it. Why it was the duty of Lead Settlement Counsel to support an inequitable allocation

¹⁷ See n.3 *supra*.

formula that unfairly privileged survivors residing in the United States (who enjoyed separate legal representation) at the expense of destitute survivors residing in the former Soviet Union (who were otherwise unrepresented by counsel) is yet another mystery known only to the leadership of HSF.

Finally, petitioner's belated insistence that under *Amchem Products v. Windsor*, 521 U.S. 591 (1997) and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), multiple separate counsel were required for each settlement class, and the right to opt out should have been deferred until each class member knew the outcome of the allocation process, would have doomed the Swiss bank settlement to certain failure. A settlement agreement involving five victim groups, five settlement classes, and five areas of residence could not possibly assign separate adversarial counsel for each interested group. To have done so would have been economically wasteful, requiring the payment of multiple attorneys' fees from the settlement fund.¹⁸ More importantly, it would have been socially ruinous, pitting the elements of the Holocaust survivor community against each other in a series of adversary exchanges that would have embittered the lives of elderly survivors. Indeed, the divisive activity of HSF in pitting Holocaust survivors against each other is merely an example of the divisiveness that would have been unleashed by turning multiple entrepreneurial lawyers loose in a setting where their fees turned on shifting portions of the settlement fund to their clients at the expense of other Holocaust survivors.

Instead, the District Court adopted a procedure pursuant to which a neutral Special Master was directed to develop a

¹⁸ Attorneys' fees, to date, have been limited to approximately \$7 million for obtaining a \$1.25 billion settlement

proposed plan of allocation after intense collaboration with every segment of the survivor community, aided by a Lead Settlement Counsel free from any financial conflict of interest. 105 F. Supp. 2d 139 (EDNY 2000) (App. B). Most importantly, any class member dissatisfied with the proposed fair allocation procedure was offered the opportunity to opt out in order to pursue an individual claim. *Id.* Given the unique circumstances of this historic settlement, the District Court's thoughtful design of a scrupulously fair allocation proceeding that was not calculated to tear the Holocaust survivor community apart was clearly consistent with the Due Process clause. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

Finally, petitioner's insistence that an absolute Due Process right exists to delay the decision whether to opt out until the completion of the allocation process is untenable under the unique circumstances of the Swiss bank settlement. Given the complexity of the settlement and the fact that the events underlying the claims took place more than 60 years ago, it would have been wholly impracticable to defer resolution of the basic fairness of the settlement until the completion of an allocation process that is still underway six years after the fairness hearing. Instead, unlike *Ortiz v. Fireboard Corp.*, 527 U.S. 815 (1999), which failed to provide for any opt out at all, the District Court's carefully designed fairness opinion offered class members a perfectly lawful choice between committing to a scrupulously fair allocation process, or opting out and pursuing an individual claim. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

In effect, petitioner argues that the Due Process clause guaranties segments of the class the right to exert pressure on the fair allocation process under threat of mass opt out. While such a right to engage in pressure tactics may be attractive to HSF, a well-funded lobby working on behalf of a single

group of survivors, it would have been unfair to the many survivors around the world who lack the resources to pressure the allocation process. Moreover, if survivors in the United States were entitled to threaten mass opt outs in order to pressure the allocation process, every other group of survivors was entitled to threaten a similar mass opt out, dooming the settlement. The pre-commitment alternative posited by the District Court assured the class an orderly method of allocating the settlement under scrupulously fair procedures, while offering a right to opt out to any member of the class unwilling to commit to such a fair allocation process.

III. The Troubling Entrepreneurial Nature of This Petition

The driving force behind this petition is a lawyer residing in Miami, Florida, Samuel Dubbin, who played no role in achieving this historic settlement, but who has repeatedly sought to enrich himself at the expense of the settlement fund.¹⁹

Mr. Dubbin's initial foray was as counsel to Dr. Thomas Weiss, a founder of HSF and a permanent member of its Board of Directors. Mr. Dubbin, acting on behalf of Dr. Weiss, initially challenged the fairness of the settlement in November, 1999. When the District Court approved the settlement as fair on August 9, 2000, Dr. Weiss and Mr. Dubbin asked to meet with the District Court to discuss a proposed appeal from the fairness order. Chief Judge Korman has described the meeting with Dr. Weiss and Mr. Dubbin:

¹⁹ The facts surrounding Mr. Dubbin's prior activities in this case are set forth in *In re Holocaust Victim Assets Litig.*, 424 F.3d 150 (2nd Cir 2005)(upholding denial of fees for Mr. Dubbin) (annexed to this brief in opposition as Appendix L).

After the discussion appeared to be going nowhere, Dr. Weiss asked how much I would pay to prevent them from filing a notice of appeal. Specifically, he wanted me to *provide attorneys' fees* and funds for private research that would assist him in his litigation against [the Italian insurance firm] Generali. This was beyond the pale. I was not going to be blackmailed, particularly with funds that belong to Holocaust survivors.

In re Holocaust Victim Assets Litig., 311 F. Supp.2d 363, 375 (EDNY 2004)(App K)(emphasis added). See also 424 F.3d at 154. (App L).

Mr. Dubbin then filed a notice of appeal from the fairness order that effectively prevented distributions from the settlement fund for six months. When neither the District Court nor Lead Settlement Counsel would succumb to such pressure tactics, Mr. Dubbin finally withdrew his appeals in May, 2001 without ever filing a brief or appendix.²⁰ (App. J).

Mr. Dubbin then re-appeared as the author of a grotesque fee application seeking a total of \$5.9 million - \$3.6 million

²⁰ Mr. Dubbin flagrantly misrepresents the withdrawal of his appeals in May, 2001, mischaracterizing the withdrawals as *quid pro quos* for an alleged promise by the District Court and by Lead Settlement Counsel to provide additional funds to survivors in the United States, even though he was explicitly and repeatedly informed by Judge Korman and by Lead Settlement Counsel no such promise existed. 302 F. Supp.2d at 119-120 (App G50-G54). The Second Circuit's reference to "exemplary" conduct by Lead Settlement Counsel was in response to Mr. Dubbin's repeated public mischaracterizations of the circumstances surrounding the withdrawal of his appeals. 424 F.3d at 149, n. 15. (App. A 30).

for himself, and \$2.3 for Dr. Weiss. 424 F.3d at 155. (App L). Dr. Weiss eventually obtained new counsel and withdrew his request; but Mr. Dubbin insisted on being paid \$600,000 (subsequently reduced to \$309,000) for his alleged services to the class in connection with insurance releases. Mr. Dubbin also sought \$3 million for his activities challenging the *cy pres* allocation formula. Judge Korman denied the fee application in its entirety, characterizing Mr. Dubbin's work as "worthless." *In re Holocaust Victim Assets Litig.*, 311 F. Supp. 363 (EDNY 2004) (App K). The Second Circuit affirmed. 424 F.2d 150 (2nd Cir. 2005) (App. L).

This petition is Mr. Dubbin's last chance to extract an attorneys' fee from the Swiss bank settlement fund. Having persuaded a few elderly Holocaust survivors residing in South Florida that they were treated unfairly by the District Court's painful decision to allocate the bulk of the *cy pres* funds to destitute survivors residing in the former Soviet Union, Mr. Dubbin seeks to topple the District Court's allocation formula in order to enable him to revive his \$3 million fee application for "improving" the allocation formula.²¹

²¹ Mr. Dubbin complains that Lead Settlement Counsel, after waiving all attorneys' fees for having played a major role in achieving the \$1.25 billion settlement, has requested discounted hourly lodestar fees for more than 8,000 hours of service to the settlement classes over the past seven years involving 29 separate legal proceedings, the renegotiation of crucial aspects of the settlement agreement, and the exemption of the settlement's earnings and distribution from federal income taxation. Mr. Dubbin suggests that Lead Settlement Counsel's support of the District Court's allocation formula was motivated by a desire to curry favor with Chief Judge Korman in order to obtain higher fees. *Petition*, p. 28, n 17. In view of Lead Settlement Counsel's 10 years of faithful service to Holocaust victims, the innuendo is beneath contempt. In order to assure absolute propriety in connection with the pending fee application, Chief Judge Korman has referred the matter to another judge.

Conclusion

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

Respectfully submitted

Burt Neuborne
40 Washington Square South
New York, New York 10012
Lead Settlement Counsel
(212) 998-6172