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9 March 2004

Special Masters Judah Gribetz & Shari C. Reig
Holocaust Victims Assets Litigation
P.O. Box 8300
San Francisco, CA 94128-8300

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LEGAL SERVICES

Re: Proposals for the Distribution of Excess and Residual Funds

This Court has invited comments on the proposals that have been submitted for the distribution of excess and residual funds. I hope that the following comments may be of assistance in the challenging task that the Court faces in selecting between the various proposals.

The opinions expressed herein are my own and not those of the University of Miami nor its School of Law. I am aware of some of the work of Samuel Dubbin on behalf of the South Florida Holocaust survivor community. I am not affiliated with Mr. Dubbin.

(1) Of Bricks and Mortar

Distributions of excess and residual funds must be done through programs "that are consistent with . . . the judicial function." In re "Agent Orange" Product Liability Litigation, 818 F.2d 179, 186 (2d Cir. 1987). This imposes strict limits on the court, especially in a case such as this that involves a class identified by religion. By limiting distributions to programs providing essential survival services, the Court has avoided many entanglements inconsistent with the judicial function.

Some of the proposals suggest that the excess and residual funds be used for the purchase or construction of buildings in which to provide services to survivors. I suggest that these proposals create debilitating entanglements. Consider just two questions. Who owns the building after the survivors have died? For what purposes may the building be used?

(2) Remembrance Projects

Some of the proposals request funding for projects that honor the victims and survivors. The Special Master has asked the court to consider "a modest distribution to . . . remembrance . . . programs." Interim Report at 13 n. 14.

These proposals, I believe, confuse a gift that we would give to a previous generation, with the gift that generation gives to us. The traditional cy pres remedy asks what is the next best use of funds to that named by the testator.

It is appropriate that we expend our funds to remember the class. It is appropriate that legal fees be so expended.

I think it is inappropriate to claim that the class would expend its funds (that the Court holds in trust) to remember itself. I have two reasons. First, it doesn't honor the class to ascribe to it this self-serving charitable intent, even when it is dressed up in the garb of anti-Holocaust education. Second, expending funds for such purposes disrespects the Ashkenazic Jewish tradition of not building memorials to oneself. Ashkenazi Jews do not name buildings, programs or children after themselves.¹

(3) Double Victimizations

The Special Master's recommendation presents two different motives for distribution and for justifying the 75/25% split between survivors in the FSU and elsewhere. The first motive is that of need. Distributing the sums to satisfy basic needs is appropriate. The second motive is that victims or targets in the FSU are "double victims."

This double victimization motive is disrespectful of the class. A basic belief of the class is that the Holocaust is incomparable.

The concept of "double victimization" does not come from survivors. Rather, it derives from how representatives of governments that won the Cold War perceive members of the class. See Draft Plan of Allocation, September 2000, E – 125 n. 405 (ascribing phrase to Ambassadors Stuart E. Eizenstat (U.S.) and Louis Amigues (France)). When a U.S. court decides that the next best use for the Settlement Funds is to compensate for the injuries of communism, it opens itself to charges of donning Cold War blinders.

¹ It is in accord with Ashkenazic tradition for the lawyers to donate their fees to memorialize the dead. See, *In re Holocaust Victims Assets Litigation*, 105 F. Supp. 2d 139, 146 (E. D. N. Y. 2000).

Many arguments can be raised against the concept of "double victimization." It fundamentally ignores the harms done to members of the class by Western governments and countries (including the U.S.). Even if those who eventually became U.S. or EU citizens ought to ignore such victimizations, why should other survivors? Can't survivors in Israel argue that they were victimized by Israel's diversion of social services due to Soviet Cold War arming of Arab countries? Wasn't the second victimization done on a nation by nation basis, when it fell to communism? If so, then compensation is being given to crimes against nations. But, this litigation doesn't compensate for crimes against nations. *Weisshaus v. Swiss Bankers Ass'n (In re Holocaust Victims Asset Litigation)* 225 F 3d 191, 193 (U.S.C.A. 2d., 2000). And so on.

To respect the survivors, to preserve the uniqueness of the Holocaust, the Court ought to base distributions on current need and not on communism's wrongs. A 75/25% split is justifiable only after determining need.

(4) On Preventing Intra-class Divisiveness.

The Court has wisely sought a plan of distribution that would satisfy "a desire to spare Holocaust survivors from being forced into an adversarial relationship that would have required them to squabble over a settlement fund that, while substantial, is necessarily insufficient to do full justice to all member of the plaintiff class." *In re Holocaust Victims Asset Litigation* 2000 U.S. Dist. Lexis 20817, *5 (E. D. N. Y. Nov 22, 2000).

The Special Master's recommendations will not prevent squabbling because "need" is not adequately defined. Squabbling will result as questions are raised about why legal services are being provided to one group before psychiatric services to another or why home health care insurance is not being provided to one group but geriatric institutions are being built for another.

The Court has ordered distributions of excess and possible unclaimed residual funds "to provide sustainable levels of targeted essential social services" (Order 2 at 2003 Dist. LEXIS 20686, *5). The Courts has provided as examples of "survivor needs" those of "medication, food, [and] nursing care." (Order 3(a) at *5.)

By contrast, the Special Master characterizes the Looted Asset Class cy pres remedy as "the provision of food, medicine, shelter *and other necessities of life* to the most needy Nazi victims wherever they may reside." Special Master's Interim Report on Distribution and Recommendation for Allocation of Excess and Possible Residual Funds, October 2, 2003 at 3 n.3. As a result a "variety of critical services" have been provided with the funds. *Id.* at 12. Words like "basic," "essential," or "critical" are too vague. From my viewpoint, religious, educational, and artistic needs are as necessary as the air I breathe.

It is difficult to determine from the Interim Report what other than "medication food, [and] nursing care" has been funded, directly or indirectly. The Special Master does report that legal, financial and social support has been provided through the Looted Asset distributions. Id. at 103. The Conference on Jewish Material Claims Against Germany, Inc. (The "Claims Conference") begins by speaking of the psychological needs of survivors, but ends up speaking about dentures. Compare Id. at Ex. 11-8 with 11-21. In approving this proposal, Id. at Ex. 11, did the Court approve expending sums for survivor needs of coping with the "problems of depression, anxiety, sleep disturbance, and intellectual functioning"? Id. at Ex. 11-8.

To prevent intra-class squabbling, the Court needs to create a hierarchy of need. For example, the Court decides that it will fund all programs to provide food that will increase the survival of victims or targets. Then the Court decides that it will fund all health programs that will increase the survival of victims or targets. Then the Court decides that it will fund all shelter programs that will increase the survival of victims or targets. And so on.

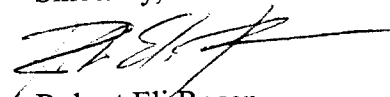
(5) Home Based Health Care

As you are aware, U.S. survivors have requested funding for insurance for home based health care. As the Court has approved funding for health care for survivors, the Court must address the question of whether home based health care is a special privilege.

I would suggest that survivors have been institutionalized enough and that the ability to avoid further institutionalization is a basic class demand. The demand is one that flows directly from the nature of the Nazi persecution. Fascism is a regime of totalizing institutions. Not just concentration camp survivors, but all survivors lived and escaped from total institutions. As the Claims Conference has told the Court, "Institutionalization is the least desirable option for elderly Nazi victims for it evokes a loss of independence that can trigger traumatic wartime experiences." Interim Report, Ex. 11-8.

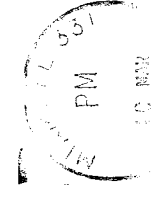
I hope these reactions to the proposals will be of some assistance.

Sincerely,



Robert Eli Rosen
Professor of Law

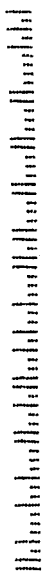
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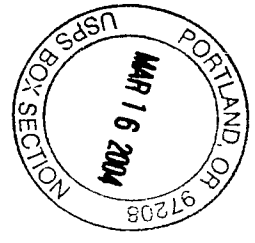
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