UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE:	MASTER DOCKET NO. CV. 06-983 (ERK)
HOLOCAUST VICTIM ASSETS LITIGATION	**OBJECTIONS OF CLASS MEMBERS TO REQUEST BY LEAD SETTLEMENT COUNSEL FOR ATTORNEYS FEES AND REQUEST FOR HEARING**
FEE APPLICATION OF BURT NEUBORNE	

Objectors-class members David Schaecter, Leo Rechter, David Mermelstein, Alex Moskovic, Esther Widman, Fred Taucher, Jack Rubin, Henry Schuster, Anita Schuster, Herbert Karliner, Lea Weems, Israel Arbeiter, Sam Gasson, "G.K.," "L.K.," "F.K.," "D.B.," and "J.R," Nesse Godin, and the Holocaust Survivors Foundation-USA, Inc. (HSF) (henceforth referred to as "Objectors" or "US Survivor class members"),[1] through undersigned counsel, pursuant to Federal Rules of Civil Procedure 23, 54, and Local Rule 23.1, object to the fee request submitted by "Lead Plaintiffs Settlement Counsel" Burt Neuborne. The U.S. Survivors also urge the Court to hold a public hearing at which class members can speak and the attorneys can present legal argument on these issues.

INTRODUCTION

[1] "G.K.," "L.K.," "F.K.," "D.B.," and "J.R." are Holocaust Survivors who receive subsidized social services through Jewish social service agencies in South Florida, whose benefits are inadequate to meet their prescribed medical and other service needs.

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The U.S. Survivors note in connection with this filing, that Mr. Neuborne has already received $4.5 million from the German Slave Labor/Foundation litigation, an amount reported to be double his "lodestar," for work which overlapped significantly with the period of time covered by this fee request. The U.S. Survivors object to his requested compensation not only for the reasons set forth below, but because his $4.1 million request, which exceeds the $3,000,850 received by all U.S. Survivors in the Looted Assets class to date, punctuates the frustration and inequity experienced by Looted Assets class members in the U.S. throughout this case. The Objectors urge the Court to deny Mr. Neuborne's request in its totality.

Further, despite comments in past proceedings questioning the Objectors' motives for opposing Mr. Neuborne's fee request, the Court may not ignore the reality that these objections are filed on behalf of Holocaust Survivors, who are class members and who have the explicit right under the Federal Rules of Civil Procedure to object to the request (Rule 23(h)((1)) and make adversarial submissions (Rule 54(d)(2)(C)).[2] Indeed, the Court has acknowledged its awareness of widespread opposition from Holocaust Survivors to Mr. Neuborne's fee request. No amount of demeaning references to U.S. Survivors' motives or that of their counsel has any bearing on several facts which Mr. Neuborne cannot dispute. First, he is seeking fees from the pool of funds available to the class he publicly, in court filings and elsewhere, purported for over 8

[2] Mr. Neuborne's prior filings contain a number of personal attacks on the U.S. Survivor Objectors' counsel. These comments were obviously designed to divert the Court's attention from the facts which bear on his entitlement to attorneys' fees in any amount, let alone at the unprecedented hourly rate which he seeks.

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years to represent on a "pro bono" basis. Second, his time records reflect claims for services that he has publicly, in court filings and elsewhere, declared are non-compensable. Third, he has filed a claim for time performed as to which his time records, on their face, establish that some of the work he allegedly performed was not contemporaneously recorded, and that some of the work he allegedly performed was in fact not performed for the class he purported to represent. Fourth, he seeks inflated compensation for work as to which the benefits claimed, or his direct role in obtaining, are questionable. Fifth, he seeks compensation at an extraordinarily high hourly rate of $700 per hour, even though he is a tenured law professor with a full time salary, no overhead or other expenses, and no financial risk.

ARGUMENT

I. Procedural Issues

A. Notice of Mr. Neuborne's Fee Request Must be Directed to the Class in a Reasonable Manner Under Rule 23(h).

Mr. Neuborne opposes the application of Rule 23(h)(1) so as to require reasonable notice to the class of his fee request. Letter from Samuel Issacharoff to the Honorable Edward R. Korman, February 10, 2006. However, under the rules, notice of class counsel's fee request must be "directed to class members in a reasonable manner." The Court does not have the discretion to ignore the rule as Mr. Neuborne suggests. Rule 23(h) provides:

> (1) **Motion for Award of Attorneys Fees.** A claim for an award of attorneys fees and nontaxable costs must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision, at a time set by the court. *Notice of the motion must be*

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> *served on all parties, and for motions by class counsel, directed to class members in a reasonable manner.*

(Emphasis supplied).[3] Subdivision (h) was added in 2003. It is mandatory.

The Class members have the right to rely on the duly enacted Rules of Civil Procedure, without regard to Mr. Neuborne's preferred construction. As the Supreme Court held in *Amchem Products, Inc., v. Windsor*, 521 U.S. 591 (1997):

> [C]ourts must be mindful that the Rule as now composed sets the requirements they are bound to enforce. Federal Rules take effect after an extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commenters, the judicial Conference, this Court, the Congress. See 28 U.S. C. Section 2073, 2074. *The text of the rule thus proposed and reviewed limits judicial inventiveness. Courts are not free to amend a rule outside the process Congress ordered, a process properly tuned to the instruction that rules of procedure 'shall not abridge any substantive right."* Section 2072.

Id., at 620. (Emphasis supplied).

Mr. Neuborne argues that Rule 23(h)(1) does not apply because the case was initiated prior to the adoption of the 2003 amendments, and because one notice has already been made to the class. He says he is aware of "no case that has followed" the "exceedingly formal reading of amended Rule 23" advanced by the U.S. Survivors and by the Class.[4] However, there are in fact a number of recent decisions applying Rule 23(h)(1) to class

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[3] The Advisory Committee Notes to the 2003 Amendments state, in relation to Rule 23(h)(1): "Because members of the class have an interest in the arrangements for payment of class counsel whether that payment comes from the class fund or is made directly by another party, notice is required in all instances." The right of class members to object is also made explicit in subsection (h)(2): "A class member, or a party from whom payment is sought, may object to the motion."

[4] Letter from Robert A. Swift to the Honorable Edward R. Korman, February 9, 2006.

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counsel fee requests in cases filed before its effective date. These cases were catalogued in *Cobell v. Norton*, 2005 WL 3466712 (D.D.C. Dec. 19, 2005)(no internal page citations available). In *Cobell*, the Court held, in a case filed in 1996, tried to judgment in 1999 and affirmed on appeal in 2001, that class counsel's motion for attorneys fees was subject to Rule 23(h)(1) and was required to be directed to the class in a reasonable manner.

Like Mr. Neuborne, Plaintiffs' counsel in *Cobell* opposed giving notice to the class of their fee request, arguing "the notice requirements of Rule 23(h)(1) do not apply to the Interim Fee Petition because the rule only became effective on December 1, 2003 – long after the initiation of this litigation . . . ." *Id.* The Court rejected that argument:

> Plaintiffs' argument is unpersuasive as it overlooks the fact that Rule 23(h), as a procedural rule, may be "applied in suits arising before their enactment without raising concerns about retroactivity." [citation omitted]. *Keeping faith with this principle, courts have consistently applied Rule 23(h) to litigation initiated before its enactment. See, e.g. In re Livent, Inc., Noteholders Securities Litig.*, 355 F.Supp.2d 722 (S.D.N.Y. 2005)(Securities Class Action Complaint filed on Oct. 09, 1998); *In re WorldCom, Inc., ERISA Litig.*, 2004 WL 2338151 (S.D.N.Y. Oct. 18, 2004)(ERISA class action filed on June 21, 2002); *Latino Officers Ass'n City of New York, Inc. v. City of New York*, 2004 WL 2066605 (S.D.N.Y. Sept. 15, 2004)(Title VI action filed in September 1999).

(Emphasis supplied).[5]

The court in *Cobell* examined the issue of what notice was "reasonable" under the circumstances. It held that the notice must provide "class members with sufficient

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[5] The Chief Justice's transmission of the 2003 Amendments to the Rules of Civil Procedure in accordance with section 2072 of Title 28, United States Code, states that the 2003 amendments "shall take effect on December 1, 2003, and shall govern in all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings then pending." 215 F.R.D. 158 (March 27, 2003).

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information to question objectionable fee requests and to scrutinize any potential conflicts of interest that arise from certain payment scenarios." *Id.*, quoting *Cobell v Norton*, 229 F.R.D. 5, 21 (D.D.C. 2005). It concluded that Rule 23(h)(1) would be satisfied by posting the fee request on the class counsel's website (which had been used throughout the litigation the primary vehicle to communicate with the trust beneficiaries), and publishing the fee petition in the three most widely read periodicals serving the Native American community.

Similarly, the Third Circuit held the 2003 amendments to Rule 23 applied to a case filed before the effective date of the rule. *In re Rite Aid Corp. Securities Litig.*, 396 F.3d 294 (3d Cir. 2005). *Rite Aid*, a securities class action, was filed in 1999, settled in 2000, appealed in 2001, renegotiated, and re-approved in May of 2003 after a notice to the class which included class counsel's request for fees of 25% of the settlement. The court cited the 2003 amendment (Rule 23(e)(4)(A)) as supporting a class member's standing to object to and appeal the fee award. It also noted the applicability of other provisions of the 2003 amendments, including provisions of Rule 23(h).

Accordingly, the U.S. Survivors submit that Mr. Neuborne's complete fee request, including all time entries, should be posted on the Court's website, www.swissbankclaims.com, and that a notice be published informing class members of the availability of the entire fee application and opposing filings on the website in major periodicals serving the Holocaust survivor community. That notice should also include a summary of the request, including the key elements such as the total payment requested, the

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period of time covered, the number of hours claimed by year, and the hourly rate claimed.[6] The notice should inform class members of their right to object or comment on the fee request, the address for submitting their comments, a deadline for submissions, and the date, time, and place of the hearing. Such a notice program could be effected for a relatively reasonable amount, probably in the range of $50,000. The proposal would not only have the benefit of complying with Rule 23(h) and Rule 54, but it would accord the class members their due respect by informing them of the requested payment from the settlement fund and allowing them to voice their support or objections.

Mr. Neuborne also argues that Rule 23(h)(1) does not apply because the original settlement notice provided for a cap on attorneys fees that would exceed the sum already awarded to other class counsel, as well as the sum he currently seeks. This argument also fails, based solely on the terms of the Class Notice he relies upon. That Notice states: "The court appointed attorneys as Settlement Class Counsel, ... Certain attorneys will apply to the Court for reimbursement of their costs, up to about .2% of the Fund. Certain Plaintiffs' attorneys will also apply for fees, up to at most 1.8% of the Fund. The Court may award a lower amount. *Most attorneys will not apply for fees*, . . ." *See* Issacharoff Letter of February10, 2006 (Emphasis supplied).

The Notice on which Mr. Neuborne relies states that "most attorneys will not apply for fees." At the time of that notice, which was approved by the Court in May of

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[6] According to the Advisory Committee Notes to the 2003 Amendments to Rule 23(h)(2): "[t]he rule does not specify a time limit for making an objection. In setting the date objections are due, the court should provide sufficient time after the full fee motion is on file to enable potential objectors to examine the motion."

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1999,[7] Mr. Neuborne had unqualifiedly proclaimed himself to be one of the attorneys who was not applying for fees. *See* Memorandum of Law Submitted by Burt Neuborne, June 16, 1997 (Exhibit F to Fee Petition); Declaration of Burt Neuborne, November 5, 1999 at 17-21 (Docket No. 367)("Neuborne November 1999 Declaration"). This Court echoed Mr. Neuborne's status as a "pro bono" lawyer for the class. *In re Holocaust Victim Assets Litig.*, 270 F.Supp.2d 313, 322 (E.D.N.Y. 2002); *In re Holocaust Victim Assets Litig.*, 105 F.Supp.2d 139, 146 (E.D.N.Y. 2000). According to the Court and Mr. Neuborne's subsequent declarations, the other lawyers whose firms were not seeking fees were Melvyn Weiss and Michael Hausfeld. *Id.*

The reading of the 1999 notice Mr. Neuborne advances would simultaneously render the notice itself to be false. The notice states that "most attorneys will not apply for fees." Yet Mr. Neuborne, one of the three lawyers in the case who did not previously apply for fees, is now seeking them. And Mr. Weiss, one of the other two lawyers whose firm did not seek fees, has now declared his intention to seek fees as well for post settlement work. Therefore, under Mr. Neuborne's theory, the very notice that apprised the class that "most lawyers would not seek fees" can now be interpreted by the Court to mean that *all but one* of the lawyers in the case will seek fees.

Mr. Neuborne also argues that the notice established a "cap" on the total amount of fees which in effect obviates the need for a new notice because his requested fees would not exceed the "cap." Yet, the same notice also says, in conjunction with the statement that

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[7] Order Appointing Notice Administrators, Approving Forms of Notice and Notice Plan, Scheduling Exclusion Requests and Objection Deadlines, and Scheduling Final Fairness Hearing, May 10, 1999 (Docket No. 277).

most lawyers are not going to seek fees, that "[t]he Court may award a lower amount." Clearly, the cap on fees stated in the old notice does not create a legal entitlement on Mr. Neuborne's part to recover fees without a notice to the class of his request as required by Rule 23(h)(1). Mr. Neuborne cannot simply read out inconvenient provisions of the prior notice and rely on those that might give credence to his current opposition to following the rule.

Finally, the authorities cited by Mr. Neuborne's counsel do not support the argument that Rule 23(h)(1) is inapplicable to the current fee request. They are cases relating to the notices required by the Private Securities Litigation Reform Act of 1995 ("PSLRA") when plaintiffs who sought to be named lead plaintiffs in accordance with the provisions of the statute, changed their application for that appointment. The statute is silent on the point. The cases cited have no applicability to the question before this Court, which involves the plain application of the clear terms of Rule 23(h) to Mr. Neuborne's fee request.

B. Hearing Requested

As noted above, the U.S. Survivor Objectors request that this Court hold a full hearing on Mr. Neuborne's fee request, at which class members have the opportunity to address the Court and the attorneys can present legal arguments. Under Local Rule 23.1 of the Rules of the Eastern District of New York, "[f]ees for attorneys or others shall not be paid upon recovery or compromise in a derivative or class action on behalf of a corporation or class except as allowed by the court after a hearing upon such notice as the court may direct." Therefore, the Court has no discretion about the necessity of a hearing on Mr. Neuborne's fee request. The fact that the Court may be aware of the opposition of the

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overwhelming majority of class members who are aware of the request does not justify denial of those class members' right to speak before the Court in a public courtroom about their opposition. The amendments adding Rule 23(h) and the Committee Notes thereto leave no doubt that the class members' rights to object to fee requests are a vital part of the class action process today, and the local rule requiring a hearing is not optional.

II. Substantive Objections

A. Mr. Neuborne's fee request is barred by judicial estoppel.

1. Neuborne relied on his "pro bono" status to defend the settlement and the allocations process and courts cited that status in their rulings.

Mr. Neuborne has repeatedly represented that he is serving as "Lead Plaintiffs' Settlement Counsel" on a "pro bono" basis, or "without fee," or having "waived fees." Those representations were made in this Court, in the Second Circuit Court of Appeals, in the U.S. District Court for the Southern District of Florida, and in numerous publications.[8] Those representations have been integral to Mr. Neuborne's arguments

[8] *See, e.g.* Declaration of Burt Neuborne Concerning the Award of Attorneys Fees, February 22, 2002; Letter from Burt Neuborne to Leo Rechter, President of the National Association of Jewish Holocaust Survivors (NAHOS. Inc), July 9, 2002; Letter from Burt Neuborne to Alex Moskovic, President, Child Survivors/Hidden Children of the Holocaust, Inc., July 10, 2002; "Students Help Holocaust Victims Recover Funds," *University of Virginia Law School*, www.law.virginia.edu/home2002/html/news/2001/holocaust.htm; "Lawyers Want Millions as Cut of Holocaust Settlement," *The Plain Dealer*, August 15, 2000; Joseph Berger, "Creative Counsel," *New York University Law School Magazine*, Autumn 2004, www.law.nyu/pubs/edu/magazine/autumn 2004, at 19; Lead Settlement Counsel's Brief Opposing the Holocaust Survivor Foundation USA, Inc.'s Opposition to the District Court's Allocation of the Settlement Fund, in *Friedman v. Union Bank of Switzerland*, Case No. 04-1898 and 1899 (CON) in the United States Court of Appeals for the Second Circuit ("*Swiss Bank Allocation Appeal*"), at 14, 61-62; Lead Settlement Counsel's Brief

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justifying the entire settlement scheme, including the current allocation, and his opposition to the U.S. Survivors' efforts to obtain a greater allocation of Looted Asset Class settlement funds in this case. Mr. Neuborne is barred from recovering any fees in this case because he previously represented in this Court and in the Second Circuit Court of Appeals that he was acting on behalf of the Plaintiff-Class *pro bono,* and both courts accepted his position.

Moreover this Court, in rejecting Objectors' attorney's application for attorneys fees and expenses incurred in representing the interests of various class members including the U.S. Survivors and Survivor groups and Thomas Weiss, M.D., explicitly cited and relied upon Mr. Neuborne's status (among other lawyers) as acting "pro bono" or "without fee."[9]

In Opposition to Samuel J. Dubbin's Request for Attorney's Fees and Expenses, *Friedman v. Union Bank of Switzerland*, Case No. 04-1898 and 1899 (CON) in the United States Court of Appeals for the Second Circuit, at 4, note 3; Filing of Burt Neuborne on behalf of Hungarian Objectors, "Reservations Concerning Attorneys Fees," in *Rosner v. United States of America*, Case No. 01-1859, in the United States District Court for the Southern District of Florida (*"Rosner")* July 21, 2005, at 5 and footnote 4; Transcript of Fairness Hearing in *Rosner*, September 26, 2005, at 28-30; November 5, 1999 Declaration of Burt Neuborne; June 26, 2000 Supplemental Declaration of Burt Neuborne in Support of Fairness of the Settlement; February 20, 2004 "Affirmation of Burt Neuborne; Brief of Plaintiffs-Appellees in Response to Appellants Julia Becker Lenini, et al. and the Estate of Nathan Katz in *Lenini v. Friedman*, Appeal Nos. 00-9217, 9593, 9595, 9612, 9613 (CON) in the United States Court of Appeals for the Second Circuit, June 15, 2001, at 22, note 51, available at 2001 WL 34117787; Reply Brief of Burt Neuborne in *Zeisl and Neuborne v. Watman*, Appeal No. 01-9229 (CON) in the United States Court of Appeals for the Second Circuit, February 28, 2002, at 30, note 28.

[9] *See In re Holocaust Victim Assets Litig.*, 270 F.Supp.2d 313 (E.D.N.Y. 2000). *See also* Lead Settlement Counsel's Brief In Opposition to Samuel J. Dubbin's Request for Attorney's Fees and Expenses, *Friedman v. Union Bank of Switzerland*, Case No. 04-1898 and 1899 (CON) in the United States Court of Appeals for the Second Circuit, at 4, note 3, and citations therein.

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The Court similarly relied on Mr. Neuborne's supposed pro bono status in its fee decisions for other counsel in the case.

Throughout this litigation, before this Court and the court of appeals, Mr. Neuborne argued that due to his lack of any financial interest in the outcome, the settlement and allocation process satisfied Federal Rule of Civil Procedure 23, due process requirements, and applicable ethical considerations. This Court relied explicitly on Mr. Neuborne's "pro bono" status and his articulated role as the class representative for all classes without a financial interest in a "fair allocation process" in upholding the settlement and allocations.[10] Mr. Neuborne's brief relied on the "unique" allocation process in which "pro bono" class counsel including himself represented "the class" without any economic interest or conflict. The Second Circuit cited Mr. Neuborne's "pro bono" status in its decision affirming the Looted Assets Class allocations challenged by U.S. Survivors.[11]

Mr. Neuborne is judicially and equitably estopped from now seeking to be *personally* compensated from the very settlement funds which he so adamantly opposed being used to benefit class members – poor Holocaust Survivors in need of basic life supporting services – who live in the United States. If the Court awards Mr. Neuborne the sum he is allegedly seeking, he would have *personally* received more money per year ($700,000) from the Swiss settlement fund for his "labor on behalf of the Plaintiff-Class," as

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[10] *In re Holocaust Victim Assets Litig.*, 302 F.Supp.2d 89, 92 (E.D.N.Y. 2004). *In re Holocaust Victim Assets Litig.*, 105 F.Supp.2d 139, 146 (E.D.N.Y. 2000); *In re Holocaust Victim Assets Litig.*, 2000 WL 33241660, *1, *4 (E.D.N.Y. Nov. 22, 2000).

[11] *In re Holocaust Victim Assets Litig.*, 2005 WL 2175955, *3 (2d Cir. Sept. 9, 2005).

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a reward for opposing the rights and interests of American Survivors, than the average annual amount of funds allocated by the Court (which Neuborne supported and defended) for *all Survivors in the Looted Assets class living in the United States* who are elderly, sick, and too poor to provide for their basic life-sustaining needs. ($600,000 including funds for Canada).

The U.S. Survivors have, since Mr. Neuborne failed to honor the commitment he made to them to induce the withdrawal of their original allocation appeal in May of 2001, been perplexed at the numerous, and conflicting roles he has been playing. He claimed to represent the entire class but vigorously opposed the efforts of approximately 30% of the class (and 20% of the world Survivor population) to receive a fair share of the Looted Assets Class funds.[12] He claimed to represent the "Plaintiff-Class" but opined on several occasions that he was bound to defend the Special Master's recommendations and the Court's decisions if they were "within their discretion," regardless of the harm inflicted on his "clients" by such recommendations or decisions.[13] As part of the Second Circuit Court proceedings, this Court acknowledged that in fact Mr. Neuborne actually was not representing any plaintiffs,

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[12] In so doing he also opposed the rights of Israeli Survivors who comprise a substantial percentage of the Looted Assets Class some 45% of the world Holocaust Survivor population.

Objectors note that the Court's comment during the March 3, 2006 phone conference that the "Israeli survivors" are "represented" by the Arnold and Porter law firm is not accurate. Arnold and Porter represent the Government of Israel. It is true that the Government of Israel opposes the Court's allocation formula because it is damaging and unfair to Survivors who live there. But that is not the same as being a legal representative of the class members themselves.

[13] Letter from Burt Neuborne to the Hon. Edward R. Korman, September 14, 2004.

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but was representing the Court itself.[14] This came as no surprise to the Objectors but clearly belies Neuborne's various claims to be an advocate for Holocaust survivors in the class, and to claim compensation for representing class members.

In now reversing course, Mr. Neuborne is barred by the doctrine of judicial estoppel from recovering fees from the settlement fund. *Simon v Satellite Glass Corp.*, 128 F.3d 68, 71 (2d Cir. 1997)("Judicial estoppel prevents a party in a legal proceeding from taking a position contrary to a position the party has taken in an earlier proceeding."); *AXA Marine and Aviation Ins. Ltd. v. Seajet Ind.*, 84 F.3d 622, 628 (2d Cir. 1996)(party who advanced an inconsistent factual position in a prior proceeding that "was adopted by the first court in some manner" is barred from changing positions.). Clearly, the elements of judicial estoppel are present because this Court has frequently cited Mr. Neuborne's "pro bono" status in its decisions and statements. S*ee, e.g. In re Holocaust Victim Assets Litig.,* 105 F.Supp.2d 139, 146 (E.D.N.Y. 2000); *In re Holocaust Victim Assets Litig.*, 270 F.Supp.2d 313, 322 (E.D.N.Y. 2002); Transcript of January 5, 2001 Hearing, at 11. So did the Second Circuit Court of Appeals. *In re Holocaust Victim Assets Litig.*, 2005 WL 2175955, *3 (2d Cir. Sept. 9, 2005).

In November 1999, several months *after* Mr. Neuborne now claims he had stopped working "pro bono," he defended the settlement structure, including the procedure for allocations, on the basis that he personally had "waived all attorneys fees." He argued that

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[14] Chief Judge Edward R. Korman Memorandum dated September 13, 2004, Docket No. 2426. 2004 WL 3710212 (E.D.N.Y. Sept. 13, 2004).

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the class would be protected by the presence of class counsel who lacked any financial stake in the decisions due to their "pro bono" status. As he explained:

> 28. [T]he structure and mechanics of the settlement agreement assures absent class members the undivided loyalty of dedicated and competent counsel, and a Court-appointed Special Master devoted to achieving the fairest possible result for members of the plaintiff classes, while avoiding unseemly and psychologically destructive formal divisions between and among victims of the Holocaust at the close of their lives. [citation omitted]. The principal structural impediment to undivided loyalty in certain recent class actions has been the potential conflict between and among entrepreneurial counsel, who may have a financial interest in fees generated by an expeditious settlement; the defense bar intent on assuring a global settlement; and the interests of absent class members in continued litigation. Similarly, ***concerns have been expressed that the financial interests of entrepreneurial class counsel may cause counsel to favor certain class members at the expense of others in setting the terms of any settlement. Such a "divided loyalty" structural concern is completely absent from this case. Key members of the plaintiffs' Executive Committee who negotiated the settlement are providing their services on a pro bono basis,*** at most requesting that in lieu of attorneys fees payments be made to law schools to endow Holocaust Remembrance Chairs in honor of class members who failed to survive, and to foster international human rights law designed to prevent future human tragedies. ***Numerous lawyers, including Lead Settlement Counsel, have waived all attorneys fees. . . . No possibility exists, therefore, of a significant financial conflict of interest between counsel and any class member.***

Declaration of Burt Neuborne, November 5, 1999 (Docket No. 367)("Neuborne November 1999 Declaration"), at 17-18 (emphasis supplied).

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Mr. Neuborne stated, in the present tense, that "key members" of the plaintiffs' Executive Committee "*are* providing their services on a pro bono basis," and that *he* specifically had "waived *all* attorneys fees." (Emphasis supplied). He did not differentiate between a time prior to February 1, 1999 and the future, nor could any construction of his words otherwise so conclude. This Court adopted Mr. Neuborne's position and cited Mr. Neuborne's pro-bono status frequently. *In re Holocaust Victim Assets Litig.*, 270 F.Supp.2d 313, 322 (E.D.N.Y. 2002); *In re Holocaust Victim Assets Litig.*, 105 F.Supp.2d 139, 146 (E.D.N.Y. 2000).

It was equally clear that Mr. Neuborne touted his "pro bono" status as being central to the allocation phase of the case as well to the settlement itself:

> 33. Even more important than the practical impediments to using separate counsel to represent each subclass and generation, were the adverse social and psychological consequences of such a formal division of Holocaust victims into rival interest groups squabbling over a settlement fund that all agree is inadequate to provide full compensation to the victims. The members of the plaintiff classes are elderly victims of an unparalleled human catastrophe. At the close of their lives, it would be socially and psychologically irresponsible to pit one group fo Holocaust victims against another in an unseemly battle for a larger share of a limited settlement fund that cannot do real justice to all. Instead, ***freed from any structural conflict of interest caused by financial self-interest, each plaintiffs' counsel pledged to assist the Special Master by making all relevant factual material, and by providing any necessary legal assistance in an effort to be fair to all class members. If the Court approves the settlement agreement, the process of allocation will then go***

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> ***forward in a scrupulously fair, but non-adversarial manner that respects the rights and dignity of class members.***
>
> 34. ***While such an effort to temper the formal adversary process by imposing overlapping, non-adversary responsibilities on counsel may not be appropriate in other settings, under the unique circumstances of this litigation, the fourfold safeguards of (a) dedicated pro bono lawyers pledged to assist in the development of the fairest plan of allocation;*** (b) a Special Master appointed to assure the development of the fairest possible plan; (c) careful procedures encouraging participation by class members in shaping the final plan of allocation and distribution; and (d) a knowledgeable District Judge who participated fully in the negotiations, and who will ultimately pass on the fairness of any allocation plan, ***satisfies Rule 23, the commands of due process, and the ethical demands of this unique effort to invoke the class action mechanism on behalf of elderly Holocaust victims who lack the resources to assert legal claims of their own.***

Neuborne November 1999 Declaration, at 20-21(emphasis supplied).

Mr. Neuborne has repeated or referenced this argument throughout the litigation, before this Court and the Second Circuit, in defense of the Special Master's recommended allocations and in defense of the Court's approval of the Special Master's recommendations. Supplemental Declaration of Burt Neuborne in Support of An Application for an Order Pursuant to Rule 23(e) Approving The Settlement Agreement As Fair, Adequate, and Reasonable, June 26, 2000 (Docket No. 632), at 7, paragraph 12; Supplemental Declaration of Burt Neuborne in Response to Objections to the Special Master's Interim Report and Recommendation Filed by Samuel J. Dubbin, Esq., November 14, 2003 (Docket No. 1866), at 31 and note 23; February 20, 2004 Affirmation of Burt Neuborne; Lead Settlement Counsel's Brief Opposing the Holocaust

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Survivors' Foundation USA, Inc.'s Opposition to the District Court's Allocation of the Settlement Fund, *Friedman v. Union Bank of Switzerland*, Case No. 04-1898 and 1899 (CON) in the United States Court of Appeals for the Second Circuit ("*Swiss Bank Allocation Appeal*"), at 6, 13-14, 21, 27, 49, 52, 60-62; Lead Settlement Counsel's Brief In Opposition to Samuel J. Dubbin's Request for Attorney's Fees and Expenses, *Friedman v. Union Bank of Switzerland*, Case No. 04-1898 and 1899 (CON)(Attorneys Fee Appeal) in the United States Court of Appeals for the Second Circuit, at 4, note 3.

Today, it is clear that the basic premise underlying Mr. Neuborne's defense of the settlement and allocation structure is false, and was false at the time he filed his various declarations and submissions. It now appears from the documents filed in support of his fee petition that Mr. Neuborne had been expecting all along to be paid from the same settlement fund in which he formerly claimed no financial interest, and that he would expect such compensation to be approved by the same district court whose rulings he has claimed he is bound to defend if "within the Court's discretion."[15] Although shocking to the Objectors, the current fee petition, and the expectation of compensation Mr. Neuborne has evidently harbored for his efforts in defense of the Special Master and the Court, suggest that the class members have been profoundly and cynically defrauded. So have the courts and the public.

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[15] Among the startling facts the Court must confront in this present motion is that while Mr. Neuborne was asserting in court that he was "waiving all fees" and acting pro bono on behalf of "the class" in filings such as his November 5, 1999 Declaration in Support of the Settlement Agreement, he was, according to his current declarations, keeping his time with the intention of seeking compensation for that very work. *See, e.g.* time entries for October 23-November 5, 1999.

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3. Neuborne's explanations are totally inconsistent with his in-court and out-of-court statements including statements in court as recently as September 200.

Mr. Neuborne now defends his fee request on the ground that he intended all along to seek fees after February 1, 1999, citing a footnote in an article he allegedly "circulated widely" (no dates given) which was published in a law review in late 2002. Supplemental Neuborne Declaration, at 4-5. However, this obscure reference does not constitute a judicial statement, nor could it supersede all of his inconsistent prior and subsequent judicial statements which refer to his "pro bono" status in the litigation.

The Objectors, and the class, had every right to rely on Mr. Neuborne's numerous record representations that he was representing 'the class" on a "pro bono" basis. After all, he has a duty of candor to the tribunal, the parties, and the judicial system. *Board of License Comm'rs of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985)("It is appropriate to remind counsel that they have a continuing duty to inform the Court of any development which may conceivably affect the outcome of the litigation."); *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975)(Burger, C.J., concurring)("This Court must rely on counsel to present issues fully and fairly, and counsel have a continuing duty to inform the Court of any development which may affect an outcome."); *Cleveland Hair Clinic, Inc., v. Puig*, 200 F.3d 1063, 1068 (7th Cir. 2000); *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994); *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 452, 462 (4th Cir. 1993); *Martinez v. Barasch*, 2004 WL 1555191, *4 (S.D.N.Y. July 4, 2004). *See also* 22 NYCRR 1200.3, New York State Code of Professional Responsibility, DR-1-102 ("A lawyer shall not . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.").

Mr. Neuborne also now argues that "[t]he documents clearly distinguish Mr. Neuborne [sic] pre-settlement role from his post-settlement role as Lead Counsel," and other arguments advanced in his Supplemental Declaration of January 31, 2006, is simply not substantiated by the record.[16] The inferences he now would ask the Court and Holocaust survivors to indulge are totally inconsistent with all of his court filings in this case and in the Second Circuit Court of Appeals. Considering Mr. Neuborne's numerous claims on the record of "pro bono" status, if he intended seek fees at some time in the case, he had a duty to say so forthrightly, on the record, contemporaneously in this litigation. He never did.[17] As numerous courts have held, a lawyer's omission of a critical fact violates the duty of candor no less than an affirmative misrepresentation. "An attorney may breach the fiduciary duty of candor through silence as well as through an affirmative misrepresentation." *Hartsell v. Source Media*, 2003 WL 21245989, *6 (N.D. Tex. Mar. 31, 2003), quoting *Am. Int'l Adjustment Co. v. Galvin*, 86

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[16] When the Court appointed Special Master Gribetz on March 31, 1999, and Special Masters Volcker and Bradfield on December 8, 2000, its Orders spelled out the basis on which they would be eligible for compensation. These Orders were entered more than two months (in Gribetz's case) and eighteen months (in Volcker and Bradfield's case) after Mr. Neuborne now contends he changed hats, but no similar order was ever entered acknowledging the agreement Mr. Neuborne now claims he had with the Court.

Objectors' counsel has sought clarification regarding the alleged understanding between Mr. Neuborne and the Court from Mr. Neuborne's counsel, i.e. whether it was memorialized in writing, transcribed, etc. Letter from Samuel J. Dubbin, P.A., to Samuel Issacharoff, February 9, 2006. Counsel responded: "There are no documents, transcripts or writings on conversations referenced in the Dubbin letter of 2/9/06. We do not have any record of when such conversation(s) occurred, only that these comments arose during the innumerable interactions between Mr. Neuborne and the Court." Email dated February 10, 2006 from Samuel Issacharoff to Sam Dubbin.

[17] Mr. Neuborne's Supplemental Declaration makes no effort to explain his failure to update court filings referring to his "pro bono status."

F.3d 1455, 1460 (7th Cir. 1996). *See also United States v. Gotti*, 322 F.Supp.2d 230, 237 (E.D.N.Y. 2004); *Schindler v. Issler & Schrage*, P.C., 262 A.D.2d 226, 229; 692 N.Y.S.2d 361, 362 (1999); *Guardian Life Ins. Co. v. Handel*, 596 N.Y.S.2d 304; 190 A.2d 57 (1993)(where officer of the court has a duty of candor to the tribunal, silence may constitute fraudulent concealment); *Gum v. Dudley*, 202 W.Va. 477; 505 S.E.2d 391 (1997).

Mr. Neuborne's last-ditch justification of his newly announced position is based on the transcript of a hearing on January 5, 2001 at which several attorneys from the case discussed the framework for making fee applications. He argues that the Court's reference to the difference between pre-settlement and post-settlement work and reference to work that Mr. Neuborne did post-settlement, somehow qualifies as an official, in-court statement that *he would be seeking fees for "post settlement" work notwithstanding all of his prior representations*, that he was acting pro bono and had "waived all fees" and lacked "any financial interest" in the settlement or the allocations. This argument also fails.

First, the January 5, 2001 transcript is completely lacking in any affirmative statement that Mr. Neuborne would personally be seeking compensation for post-settlement work. There is no valid reason for him not to have made such a definitive declaration to that effect except, perhaps, his desire to conceal his economic motives while continuing to reap the acclaim he avidly courted and received as the "pro bono" counsel for the Swiss bank class. If his status had changed, he had a duty to say so, at the earliest possible time. And, since Mr. Neuborne has declared that he changed status as of February 1999, his sudden reliance on the January 5, 2001 hearing transcript fails to explain why the two-year delay in "announcing" his change. Clearly, he is grasping at straws.

Moreover, all but one of the attorneys who applied for fees after the January 5, 2001 hearing included their time incurred after the settlement, in most cases all the way through the end of 2000. But Neuborne did not file for any "post settlement" work which by that time had covered a period of nearly two full years. If the hearing "established" a framework for pre- and post-settlement work in connection with counsel fee requests, by what standard or principle did Neuborne choose to exempt himself from seeking fees for his post-settlement work, the same way all other class counsel did?

It is very telling that none of Mr. Neuborne's colleagues from the Plaintiffs Executive Committee, including those who have filed declarations supporting his fee request, would state that they learned from footnote 22 of the 2002 law review article, or from the January 5, 2001 hearing, or from any other statement, that Mr. Neuborne informed them he would be seeking fees for "post settlement" work. Instead, not surprisingly since many of the statements are made under oath, they state, using double negatives, that they had no reason to believe Mr. Neuborne would not seek fees for his "post settlement" work. *See* Declaration of Morris Ratner at 2; Declaration of Melvyn Weiss at 1-2. *See also* Declaration of Irwin B. Levin and Richard Shevitz, at 1-2, paragraph 3. Moreover, even if these gentlemen or other colleagues provided affirmative support of Mr. Neuborne's current claim, that would not overcome his own previous contrary assertions in and out of court.

It is apparent that the purpose of the discussion of "pre-settlement" and "post-settlement" phases was designed to address the multipliers or enhancements to counsel's lodestars that might be sought. It is common in class actions settlements for courts to apply

enhancements to pre-settlement work but not post-settlement work, which entails less risk. The Court's opinion addressing the appropriate multiplier for Mr. Swift addresses this very point.

Mr. Neuborne's current filings make no effort to explain his failure to update court filings referring to his pro bono status. Nor do they explain his continued references – in 2001, 2002, 2003, 2004, and 2005 – to his "pro bono" representation of the Swiss bank class (and/or his "lack of financial interest in the case) long after, as he now claims, he changed that status. *See* footnote 8, *supra*. *See also* Brief of Plaintiffs-Appellees in Response to Appellants Julia Becker Lenini, et al. and the Estate of Nathan Katz in *Lenini v. Friedman*, Appeal Nos. 00-9217, 9593, 9595, 9612, 9613 (CON) in the United States Court of Appeals for the Second Circuit, June 15, 2001, at 22, note 51, available at 2001 WL 34117787; Reply Brief of Burt Neuborne in *Zeisl and Neuborne v. Watman*, Appeal No. 01-9229 (CON) in the United States Court of Appeals for the Second Circuit, February 28, 2002, at 30, note 28.

In February 2002, a full year after the January 2001 hearing, when he was defending his $4.5 million fee from the German Slave Labor arbitration, Mr. Neuborne not only reiterated his "pro bono" status in the Swiss bank litigation to the Second Circuit, but he professed only to have sought fees in *that* matter because it would have "a minimal impact on funds available to Holocaust victims." He said:

> Neuborne, who had appeared pro bono in both the Swiss bank litigation and the German slave labor cases, initially declined to submit an application for fees in connection with his work in establishing the German Foundation. When colleagues pointed out the under the unique/ceiling nature of the arbitration agreement, an award would have a minimal impact on funds available to Holocaust victims, Neuborne filed a fee application.

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Hence, Mr. Neuborne not only failed to inform the Second Circuit that his "pro bono" work had ceased *three years previously* (as he now contends), but professed he only sought fees in the German case because they would not come at the expense of Survivors.[18]

As recently as September 26, 2005, in an open courtroom, in the presence of numerous Holocaust survivors who are class members in this case, Mr. Neuborne represented: "I served without fee in the Swiss case. I am the Lead Settlement Counsel in the Swiss case in which I served without fee for almost seven years." Transcript of Fairness Hearing in *Rosner v. United States of America*, Case No. 01-1859 in the U.S. District Court for the Southern District of Florida, at 28-29, attached as Exhibit 10 to Objectors' January 19, 2006, Notice of Filing. *See also* "Reservations Concerning Attorneys Fees," at 5, attached as Exhibit 9 to Objectors' January 19, 2006 Notice of Filing. His alleged service "without fee" in the Swiss bank class action was central to the premise of his initial objections to Class Counsel's fee request in Rosner, i.e. that there is a "Holocaust market" for lawyers who are willing to prosecute restitution cases for "sub-market" rates. He claimed to be one of the exemplars of this market based on his representation of the Swiss bank class "without fee."

When Judge Seitz asked Mr. Neuborne about his $4.5 million fee from the German Foundation Agreement, he answered in character by re-asserting that the only reason he ever

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[18] In his "confidential" application for fees to the German Foundation, Mr. Neuborne stated, in response to Objectors' inquiry, that he disclosed that he would be seeking compensation for post-settlement work in the Swiss bank case. Assuming the accuracy of the representation (Mr. Neuborne's counsel said he was quoting from a document he did not produce), it is outrageous that Mr. Neuborne would tell the German arbitrators in a *confidential filing* something he would not tell the class members in this case, or the Second Circuit Court of appeals in several *subsequent* filings. Yet this revelation is consistent with Mr. Neuborne's concealment of this vital information.

asked for fees in the German case was because they would not come at the expense of Survivors. *See* Transcript of September 26, 2005 Fairness Hearing in *Rosner v. United States*. Less than six weeks later, Mr. Neuborne filed his current fee request seeking over $4 million in funds that would, if granted by this Court, would indisputably come at the expense of the Survivor class, most of whom have received no benefits from the settlement.

4. Payment from settlement funds is improper because Mr. Neuborne chose to represent the Special Master and the Court, not the class.

In May of 2001, some of the Objectors herein (and others) withdrew their appeals of the original allocation plan when Mr. Neuborne agreed, in writing, to support greater allocations for the U.S. Survivor community in the Looted Assets class in subsequent distributions. The secondary distributions, Mr. Neuborne stated, "will be pursuant to scrupulously fair and transparent procedures, and will, I anticipate, be presided over by Judah Gribetz as a Special Master, and ultimately by Judge Korman." May 15, 2001 Letter from Burt Neuborne, Esquire to Samuel J. Dubbin, Esq. (Docket No. 989). Mr. Neuborne's failure to abide by his commitment to support greater funding for US Survivors was difficult enough for Objectors to accept on the obvious level that they believed Mr. Neuborne broke a promise on which they relied. Mr. Neuborne's subsequent explanation of his position, in which he defended the Special Master and the Court's decisions rather than advocate for his "clients," centered around his alleged responsibility as Lead Plaintiffs Settlement Counsel acting pursuant to a "unique" and "historic" settlement and allocation construct elaborately and repeatedly described throughout these

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proceedings, including the appeals, premised in large measure on his "pro bono" status, and the absence of economically conflicted lawyers acting "on behalf of the class."

The results and current fee request leave little doubt that Mr. Neuborne abandoned a substantial part of his "clientele" for the money he previously said would not influence his actions. To highlight this point, Mr. Neuborne's time records reflect hundreds of hours in consultation with the Special Master and the Court, during times when the allocation issues affecting Objectors were being decided – and not in public hearings. In many cases the time records explicitly reflect discussions between Mr. Neuborne and the Special Master, or with the Court, addressing open issues of vital concern to Objectors and other class members. Those issues had been raised in public court filings and were supposed to be handled under "scrupulously fair" and transparent procedures.[19] Unfortunately, these protections were denied Objectors and thousands of their fellows in the Looted Assets Class, in violation of Rule 23, due process, and Mr. Neuborne's ethical obligations to the class and to the judicial system.

B. Reasonable Hourly Rate If Fees Are Not Precluded

The U.S. Survivor Objectors' initial submission dated January 12, 2006 adopted Mr. Swift's arguments in opposition to the hourly rates and calculation of the lodestar asserted by Mr. Neuborne. At the March 3, 2006 phone conference, the Court requested further briefing on an appropriate hourly rate and stated that he would refer other factual issues arising out of the

[19] *See, e.g.* time entries for the following dates: June 21, 26; August 20; November 19; December 9, 1999; May 19; July 7, 12; August 9, 10, 2000; June 1, 29, 2001; June 6, 8, 11, 13, 26; July 9, 21; August 2, 3, 4, 17, 22, 25; September 14, 16, 17, 26; October 1, 2, 4, 9, 10, 2002; February 22, 23, 25; March 1, 2, 10, 24; April 25; May 23; July 24; September 14, 15, 23, 25; October 22; November 14, 24; December 4, 19, 2003, March 11, 2004.

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enumerated time and work to Magistrate Ornstein. For the following reasons, and without prejudice to their argument that Mr. Neuborne is precluded from any recovery, the U.S. Survivors submit that a "reasonable" hourly rate for Mr. Neuborne, a tenured law professor with a New York University Law School salary and no overhead or expenses, is between $200 and $310 per hour.

There are many reasons why Mr. Neuborne's effort to charge Survivors $700 per hour because that is what top New York City big firm lawyers charge, is outrageous on its face. These include his lack of overhead and other expenses, his full-time academic salary, and the lack of any risk undertaken by Mr. Neuborne. Further, very few if any senior partners would be paid $700 an hour by normal clients for a case to which a lawyer billed 1,500 hours per year for 6 years. Clients would expect many of the tasks in such a matter to be handled by lower-cost partners and associates and paralegals, and most firms discount their rates for exceedingly time consuming arrangements, i.e. give clients discounted rates for a higher volume of work.

In *In re Agent Orange Product Liab. Litig.*, Judge Weinstein held that a reasonable hourly rate for a law professor seeking compensation from a common fund in a class action settlement is half-way between the rates recognized for law firm partners and law firm associates. This holding was affirmed by the Second Circuit. *Agent Orange*, 611 F. Supp. 1296, 1330 (E.D.N.Y. 1984), *aff'd* 818 F.2d 226, 230 (1987). In so holding, Judge Weinstein distinguished the same case relied on here by Mr. Neuborne, *Blum v. Stenson*, 465 U.S. 86 (1984), on several grounds.[20] One reason was that "the Blum Court's decision was based on

[20] Objectors note that Blum allowed the "prevailing market rate" without any reductions for the lower overhead or lack of actual billing experience for public interest lawyers under a federal fee-shifting statute, and noted the public policy embodied therein

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legislative intent, a ground that is absent in common fund cases." *Id.*, at 1330. It added that use of a lower rate for professors "reflects the practical differences between the situation of the professors and those of private attorneys. Involvement in this case from the law professors' point of view presented relatively little risk. Professors do not depend on practicing law for their livelihood. . . . Professors do not need the kind of bread and butter work that a practicing lawyer requires." *Id.*

In addition, the court held that the lower rate takes into account the fact that professors, unlike the other attorneys, did not have substantial overhead costs during the five-year period of this litigation. . . . [C]ertain costs of running a law office . . . must be absorbed into the lawyers' hourly rate." It added that the difference between the professors' rate and that of the private attorney "reflects this reality." *Id*, at 1330.

Therefore, one measure of a "reasonable rate" is the mid-point between partners and associates at private law firms. Indulging Mr. Neuborne's claim that he should be paid like the best private lawyers in New York City, the applicable rate would be in the range of $300 per hour. According to prominent law firm management authority Altman-Weil, the ninth decile (highest) standard hourly billing rate for partners with over 31 years experience in New York State as of January 1, 2005 is $490 per hour. According to the New York State Bar Association publication *Economics of Law Practice in New York State*, 2004, equity partners in large New

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that Congress wanted victims of discrimiation not to be limited in their choice of counsel. Further cases recognize that in fee-shifting statutes, paying academics or public interest or government lawyers at lower rates than private attorneys due to their lower cost structure would create a windfall for defendants who engage in the wrongful conduct, contravening the remedial purpose of those underlying laws and the fee-shifting provisions put there to give victims an opportunity for vindication.

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York City firms with over 35 years experience in the 95th decile charge $510 per hour. According to Altman-Weil, the top rate for a 4-5 year associate in New York is $270 per hour; it is $270 per hour in New York City according to the bar survey. Hence, under *Agent Orange*, the maximum hourly rate Mr. Neuborne could receive in a class case is in the range of $300-$310 per hour.

Clearly, Mr. Neuborne's lack of comparable New York City overhead or other expenses is fatal to his claim of $700 per hour. According to the 2005 law firm financial benchmarking survey performed by RSM McGladrey, a leading law firm accountant and consultant in New York, net income as a percentage of fees collected by law firms in the Northeast United States in 2004 was 35.8%. Consesquently, accepting Mr. Neuborne's assumption that he should be compared to lawyers in private practice who charge $700 per hour, and assuming (unrealistically) that clients would pay a top partner at that rate for 1500 hours per year for 6 years, the adjusted hourly rate should be 35.8% of $700, or $250 per hour.

Finally, this Court has analogized Mr. Neuborne's services in this case to the situation in which a district judge is provided with private counsel by the Administrative Office of the U.S. Courts. Transcript at 9-11,citing Court's September 13, 2004 Memorandum.[21] Under this contstruct, the maximum hourly rate that is "reasonable" is the maximum rate actually paid by the Administrative Office in such situations – $200 per hour. According to its regulations, the maximum amount the AO may pay private attorneys in a mandamus action, for example, is the maximum rate payable by the Department of Justice for private counsel, which

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[21] Presumably, the Magistrate will make a recommendation as to what amount of Mr. Neuborne's time falls into this category.

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according to AO General Counsel Robert Deyling is $200 per hour. That limitation, according to Mr. Deyling, is not published outside DOJ, and is not even published in writing for the AO. But Mr. Deyling stated, from personal experience, that $200 is the maximum hourly rate payable by DOJ.

More fundamentally, Objectors reject the extraordinary representational structure whereby the Court suggests Mr. Neuborne may undertake a number of different roles, some of which are adversarial to the class, and still be paid from class funds. Had the Court secured representation from the AO for any of Neuborne's numerous defenses of its rulings for which he now seeks $700 per hour, the agency's budget would have paid Mr. Neuborne, not the cllass. There is no legal or moral reason to tax plaintiff class members for funds to pay a lawyer to oppose their rights and interests, especially one who betrayed those very plaintiffs and spent years and buckets of ink defending his adversarial stance on the grounds that it was justified by his "pro bono" role and his lack of financial interest in the settlement outcomes. Such fiction now exposed, cannot be rewarded, even if it was acquiesced in by the Court itself.

C. Responses to Specific Time Entries and Categories of Work

If Mr. Neuborne is not barred or estopped from recovering fees, Objectors herein address certain concerns raised by the records produced to date.[22] These concerns include questions about the number of hours claimed, the services performed, the value of the benefits

[22] Mr. Neuborne's claim to compensation on the ground that this matter made it "impossible to continue [his] private consulting practice and limited [his] scholarly and pro bono activities" is untenable. Why should Holocaust survivors in the class pay to compensate Mr. Neuborne for his "lost" academic or pro bono opportunities?

conferred, or the contemporaneousness of time entries.[23] In any event, these and other claims of Mr. Neuborne will, Objectors understand, be more fully developed before the Magistrate who will make recommendations to the Court if the parties do not agree.

1. Questionable Entries.

a. Mr. Neuborne seeks compensation for time on September 22, 2003: "Kingsboro – 2 hrs – describe settlement to community." The problem with this entry is that undersigned counsel (and some of the Objectors) attended the Kingsboro Community College Forum on Holocaust restitution and litigation on that date. Mr. Neuborne, although confirmed as an attendee and expected by participants, rather famously failed to appear. The organizer of the forum announced after the lunch break that Mr. Neuborne had called at the last minute to say that he would not in fact appear. Declaration of Samuel J. Dubbin, February 17, 2006, Exhibit 4.

b. Between December 3, 2004 and February 22, 2005, Mr. Neuborne claims 26.5 hours for a "Bazyler piece." This presumably means he was reviewing an article Professor Michael Bazyler was writing, or he was drafting an article for a publication of Mr. Bazyler's.

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[23] As noted in the Objections filed on behalf of the Class, Mr. Neuborne's time records depict an extraordinary amount of time during certain periods, especially for a law professor with full time teaching responsibilities who also serves as legal director of the Brennan Center at New York University Law School, and who was handling other demanding engagements such as the German slave labor/German Foundation litigation and the McCain-Feingold Campaign Finance Law litigation. To address these questions, Objectors requested information from Mr. Neuborne pertaining to the time he devoted to his other consulting engagements and academic duties during the time period for which he seeks fees here.

Objectors are seeking more information than Mr. Neuborne is willing to provide voluntarily, i.e. his declaration in support of his fee request to the German Foundation arbitrators, and time entries in the German case for periods that overlap with the time for which fees are sought in this case. *See* Letter from Samuel J. Dubbin to Samuel Issacharoff, February 17, 2006.

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There is no conceivable justification for the class to pay for time Mr. Neuborne chose to devote to assist an academic colleague or to enhance his own publication resume.

c. After logging 11 hours on December 26, 1999 on "Weiss, Dunaevsky, Wolinsky, objections" for "review and analysis of pending objections likely to be pursued," and 12 hours on December 27, 1999 for "review settlement structure in light of likely objections," Mr. Neuborne claims to have devoted *two hours* on December 30, 1999 to "Dubin let. – review letter, analyze likely objection." The letter from Mr. Dubbin consisted of three sentences, and simply informed the Court that he would shortly be filing written objections to augment his comments at the November 29, 1999 Fairness hearing.

d. On December 22, 2000, soon after the filing by US Survivors of a simple Notice of Appeal of the Court's November 22, 2000 allocation decision, Mr Neuborne claims 2 hours for "Dubbin appeal – review appeal on allocation." But no issues had been presented at that time; The US Survivors did not file their Forms C and D listing the issues raised in the appeal until several days later – January 4, 2001. On the same date (December 22, 2000), Mr. Neuborne claims two hours each to review the "Schonbrun appeal" and the "Romani appeal."

e. On February 28, 2001, Mr. Neuborne claims 11 hours to "research re HSF allocation appeal/cy pres history/late night." This entry was made the same day he logged 9 hours to "research issues raised by Katz appeal/IOM process." Aside from the fact that 20 hours of work in one day is unusual, the problem with this time entry is that the U.S. Survivors' appeal was filed on December 22, 2000 in the names of several individuals and the Holocaust Survivor groups that they represented. The Notice of Appeal makes no mention of the organization "HSF." In his time records for December 2000 he claims to have entered the term "HSF" into

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his billing report, even though he denied any knowledge of the organization three years later. The Special Master will have to resolve whether this and other entries were made contemporaneously.

f. On August 23, 2002, Mr. Neuborne claims 3.5 hours for "conv Dubbin re allocation/discussion of his objections" and 6.5 hours "review Dubbin's objections/discuss with other counsel/Mel." That is a total of 10.0 hours on August 23, the day the undersigned sent a four (4) paragraph letter to the Court objecting to the Special Master's recommendation for the first supplemental distribution of interest on the settlement fund for the looted assets class. Although counsel called Mr. Neuborne upon his unexpected receipt of the Special Master's recommendation, the conversation certainly did not last 3.5 hours. Nor is it understandable how Mr. Neuborne spent 6.5 hours reviewing and discussing a letter which barely exceeded one page in length. (Docket No. 1341).

2. Speeches and lectures. Mr. Neuborne seeks compensation for numerous speeches to organizations or groups such as the "AJC," "ADL," "community leaders," or various judicial or academic audiences (e.g. NYU, Columbia, UVa., Millersville). Under standards previously urged by Mr. Neuborne, these hours are not compensable from the class. In 2003, he said: "it is unclear whether the members of the Swiss bank classes are an appropriate source of involuntary compensation for [counsel's] public activities on behalf of his clients' vision of the most appropriate way to seek restitution for Holocaust victims. I have expressed similar concerns to the Court in response to earlier fee applications premised on contact with the media and discussion of Holocaust-related issues with the interested community. I continue to believe that such activities are important and praiseworthy, but I question whether they qualify for an award

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of fees from the plaintiff class, especially a hourly rates of $425 per hour that are designed to provide compensation for legal expertise, not public relations." *See* Supplemental Declaration of Burt Neuborne in Response to the Amended Application of Samuel Dubbin, Esq. For Counsel Fees, July 21, 2003. ("Neuborne July 2003 Declaration").[24] Yet today, Mr. Neuborne is now seeking tens of thousands of dollars, at *$700* per hour, from the class for similar "non-legal" work.

3. Evaluation of other attorneys' fee requests. Mr. Neuborne seeks compensation for time spent reviewing other attorneys' fee requests. However, all indications were that Mr. Neuborne's services in this regard were "pro bono" as well. *In re Holocaust Victim Assets Litig.*, 270 F. Supp.2d 313, 314 (E.D.N.Y. 2002)("This case is different from other cases because some of the leading members of the class action bar agreed to prosecute the case without fee, thus altering the considerations that typically underlie the determination of an appropriate fee. Moreover, one of them, Professor Burt Neuborne, has undertaken to carefully review the fee applications of those attorneys who provided services and seek fees."). Hence, it is improper for Mr. Neuborne now to seek compensation for this time.

4. Negotiations concerning deposited assets disclosure and claims processes. Mr. Neuborne seeks compensation for hundreds of hours devoted to negotiations and court filings addressing various contours of the Deposited Assets Claims resolution (CRT) process which has yielded little in incremental dollars or information disclosure to class members. He has made no

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[24] Mr. Neuborne made that assertion even though no request for such compensation was actually at issue in July 2003; only Counsel's request for compensation for insurance-related work was pending because the request for compensation for allocations-related work had been deferred by agreement. *See* Neuborne July 2003 Declaration, at 2.

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effort to quantify the monetary benefits resulting from this work. According to the standards previously urged by Mr. Neuborne in evaluating other fee requests, services rendered are not compensable from class settlement funds unless they produce a material benefit for the class. Neuborne July 2003 Declaration, at 7-8. The Court adopted this standard. *In re Holocaust Victim Assets Litig.*, 311 F.Supp.2d 363, 376, 381, 382 (E.D.N.Y. 2004)("Not all work is entitled to be compensated, even when that work is done in the context of a lawsuit.").[25]

Unfortunately, the settlement itself contained severe limitations in the ability of class members to obtain information about deposited assets from Defendants, and on the Court's ability to sanction Defendants for denying the CRT access to adequate information to maximize recoveries by class members. The fact is that despite these many hours of negotiations and the filings, most applicants remain stymied by an opaque and frustrating process for recovering deposited assets. These frustrations and shortcomings have been described in several court orders, the Special Master's April 16, 2004 Interim Report, and filings by Mr. Neuborne. *E.g. In re Holocaust Victim Assets Litig.,* 319 F.Supp.2d 301 (E.D.N.Y. June 1, 2004); Letter from Chief Judge Edward R. Korman to Diana L. Taylor, New York State Superintendent of Banks,

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[25] Mr. Neuborne stated previously: "I do not contest the fact that [counsel] has expended substantial time on Holocaust-related issues, including the scope of the insurance releases in this case. I do not believe, however, that the plaintiff-class can be turned into in involuntary client with an obligation to pay [counsel] more than the economic value of [counsel's] services merely because [counsel] has expended time." Letter from Burt Neuborne, Esquire, to Hon. Edward R. Korman, September 9, 2003.

Objectors would ordinarily support reasonable compensation for lawyers' work that opened the door for potential recovery and enhanced the historical record and the transparency of restitution efforts, even if monetary benefits did not immediately result. *See, e.g., Koppel v. Wien,* 743 F.2d 129 (2d Cir. 1984). However, Mr. Neuborne is judicially estopped from having a different standard apply to his fee request than the one he urged for others and which this Court adopted.

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August 1, 2005 (Docket No. 2785); Letter from Burt Neuborne, Esquire, to the Honorable Edward R. Korman, April 19, 2005 (Docket No. 2870). However long the hours worked by Mr. Neuborne or well-intentioned the goals of this endeavor, by his standards and the one adopted by the Court, monetary benefits from the added work are slight or nonexistent and the time is therefore not compensable from the class's funds.

5. Negotiations regarding insurance releases and claims program. Mr. Neuborne seeks compensation for time expended renegotiating the insurance releases that were initially agreed to by Plaintiffs and preliminarily approved by the Court, and fashioning a "modest insurance claims program." Neuborne Fee Petition at 5. Again, based on the standards he urged and the Court has applied, this request should be denied.

Mr. Neuborne's current petition states that the value of the insurance claims program negotiated after the modification of the settlement is approximately $1 million. To date, available information shows approximately $300,000 in successful insurance payments from the process negotiated by Mr. Neuborne.[26] Objectors contend that the potential recovery from Swiss insurers and reinsurers was far greater and his negotiations represent a major failure.[27] By

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[26] There is little available information about the full results of Mr. Neuborne's negotiations with the Swiss or the current status of the insurance program.

[27] Sidney Zabludoff, the insurance economist whose credentials in the field of Holocaust era insurance this Court recently praised, *see* Letter from Chief Judge Edward R. Korman to Diana L. Taylor, New York State Superintendent of Banks, August 1, 2005 (Docket No. 2785), estimated the value of unpaid assets from Jewish Holocaust victims in the hands of Swiss insurers and reinsurers not excluded from the original settlement to be *in excess of $2 billion* (including $427 million in direct insurance and $1.7 billion in reinsurance). *See* Declaration of Sidney J. Zabludoff, Exhibit to Modified Fee Request of Dubbin & Kravetz, LLP, March 30, 2004, cited at 311 F.Supp.2d at 377.

This Court observed in its March 31, 2004 Order that Mr. Zabludoff's estimate was not practical because it was "impossible" to sue the companies for which the releases

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the standards previously applied in this case, he does not qualify for compensation for work done in connection with such a result.

At the time Mr. Neuborne was negotiating with the Swiss insurers and reinsurers, he had the benefit of filings which provided considerable insight into the culpability of and possible avenues of recovery from Swiss insurers and reinsurers. His time records reflect several hours reviewing those filings.[28] Yet, in negotiating a claims process for Swiss insurers and reinsurers, Mr. Neuborne did not employ any insurance or reinsurance experts, or even any translators in the effort. Nor did he obtain any expert assessment of the aggregate value of possible Swiss insurance claims at any time, relying instead on defendants' representations. Class members have requested, and deserve, a more robust and transparent effort through which to pursue insurance assets from Swiss companies.

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were modified. The existence of litigation against some of these insurers in the U.S. calls that assumption into question. *E.g. Ward-Thg., Inc., v. Swiss Reinsurance Co.*, 1997 WL 83204 (S.D.N.Y. Feb. 27, 1997).

The point for this discussion, however, is that Mr. Neuborne's renegotiation of the insurance releases was not carried out in a way that would be expected to yield the best outcome for the class.

[28] Counsel's suggestions for a more effective mechanism to harvest insurance assets (September 1, 2000 letter) were not adopted. Counsel urged the publication of names of policy holders by any insurer or reinsurer who sought a release from the settlement, the establishment of an electronic database of class members to facilitate the matching of names and policies, and more. *See* September 1, 2000 letter. *Cf. In re Holocaust Victim Assets Litig.*, 319 F. Supp.2d 301, 327 (E.D.N.Y. 2004)(claims process is more successful where the survivors and heirs can respond to published bank account holder names rather than file blind claims in hope of a match.). Rejection of these proposals was unfortunate, especially considering that reinsurers concededly retained data about underlying policies they reinsured. *See* November 20, 2000 Letter from Burt Neuborne to the Honorable Edward R. Korman, Docket No. 813.

6. Any Fees Should Be Limited to Work Expended which Actually Generated A Financial Benefit. If Mr. Neuborne were not estopped from seeking fees for reasons explained above, then under the standards he urged for other lawyers he is would be entitled to compensation only for the work that actually yielded the claimed dollar enhancements. His alleged major financial enhancements are $5 million for litigation before Judge Block regarding compound interest, $22.5 million (plus $2.5 million) in additional interest from the "accelerated payment of $334 million to the settlement fund," and $25 million in tax savings from legislation passed as a result of his efforts with co-Plaintiffs' counsel Melvyn Weiss. *See* Supplemental Neuborne Declaration, January 31, 2006, at 11-12. His time records show that Mr. Neuborne devoted no more than 100 hours (and probably less) to the "accelerated payment" negotiations and the tax legislation. His time on the compound interest dispute is more difficult to discern, but appears relatively modest based on his narrative description of the tasks. In any event, Mr. Neuborne should receive, if anything, compensation for the time expended for the specific work generating a monetary benefit -- an amount that is orders of magnitude lower than the sum he now claims.

Further, Mr. Neuborne has the burden of proving a real financial benefit as a result of his work. His current filings are inadequate for that purpose and the record as a whole refutes his claims for mammoth financial benefits for the class. For example, he claims a benefit of $22.5 million in additional interest from the "accelerated payment of $334 million to the settlement fund." This figure is not supportable on its face, much less upon scrutiny. According to Amendment 2, the final tranche of $334 million was paid on November 23, 2000 instead of November 23, 2001. Compare Amendment 2, Section 3.4 with Settlement Agreement, Section

5.1. Therefore, the gross benefit to the class of this advanced payment was one year's interest on the $334 million. Since there has been no accounting made public of the interest earned on the settlement fund at all much less during this period, it is difficult to evaluate the facial accuracy of Mr. Neuborne's claim. However, based on a relatively liberal standard of the interest rate paid on one month CDs during that time period, the average interest rate would have been 4.3%, yielding a gross "benefit" in accelerated interest of $14.4 million.

However, it is also likely that the class lost value overall as a result of Mr. Neuborne's negotiations. . In October 2003, he stated that under Amendment 2, "in return for acceleration in the payment of the full settlement amount, the settlement fund would bear the expenses of the claims process." Declaration of Burt Neuborne in Support of Interim Report of the Special Master, October 13, 2003, paragraph 26. Although the Court has never published a detailed accounting of the Settlement Fund expenses despite Section 7.;1 of the Settlement Agreement, it is clear that the expenses of the claims process have greatly exceeded either the $14.4 million likely generated by the advanced payment, or even the $22.5 (plus $2.5) million claimed.

According to CRT Special Master Michael Bradfield, "the total budgeted expenditures for Claims Resolution Process for the 19 months from January 2001 through July 2002 . . . amount to $19, 436,470. Letter from Michael Bradfield to the Honorable Edward R. Korman, July 26, 2002. (Docket No. 1307). Monthly invoices from the CRT after that date appear to average at least $500,000. If those invoices are representative of the average amount paid from the Settlement Fund for the claims process in the succeeding forty-four months, then a minimum of $41.4 million would have been expended as a result of Neuborne's negotiation,

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clearly a net loss. And that sum does not include amounts paid in recent years to the Claims Conference for claims administration, of which the latest invoice approved by the Court totals $6,155,387 for 2005 and 2006. See Order Approving Dormant Account Class Disbursement of Funds for Administrative Expenses, March 15, 2006.

A further question raised is that Mr. Neuborne now claims credit for the Congressional action making the interest on the settlement fund accumulate tax free. However, prior filings and Court orders credit Melvyn Weiss with the lions share of the credit in persuading Congress to pass that legislation. Based on Mr. Neuborne's time records, his role appeared to be technical in nature, more as a draftsman than one whose efforts were instrumental in achieving the result. It is certainly not appropriate to suggest his few hours of drafting and discussions with legislative staff people warrant extraordinary compensation from class funds.

Conclusion

Mr. Neuborne was instrumental in engineering the "unique and historic" settlement and allocation structure premised in large part on the leadership of "pro bono" attorneys without any financial interest in decisions, and justified the settlement and allocation mechanisms to the Court of Appeals on that basis. Based on these numerous representations, in this and other courts, over a period of nearly 8 years, Mr. Neuborne should not be allowed to change his status after the fact. Even if he is deemed not to be disqualified based on his prior representations, his fee request is excessive. At best, he should receive compensation at a fraction of his $700 per hour request for the few hundred hours he worked that generated actual benefits which are far less than the amount he claims to have created. Remarkably, he instead seeks more money for

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himself from the class – $4,088,500 – than the U.S. Survivors in the Looted Assets class have received to date from those very allocations – $3,000,850. His request in the face of the desperate needs of thousands of indigent survivors in the United States who cannot afford their rent, food, medicines, or even someone to come to their home to give them a bath or prepare meals, and who have been turned away repeatedly by Mr. Neuborne and the Court for their due recovery under this class action settlement – requires the U.S. Survivors to urge this Court to reject Mr. Neuborne's fee petition.

Respectfully submitted,

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By: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail upon Samuel Issacharoff, Esquire, counsel for Burt Neuborne, 40 Washington Square South, New York City, New York, 10012 this 17th day of March, 2006.

By: _____
Samuel J. Dubbin, P.A.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE:	MASTER DOCKET NO. CV. 06-983 (ERK)
HOLOCAUST VICTIM ASSETS LITIGATION	**NOTICE OF FILING DOCUMENTS SUPPORTING CLASS MEMBERS' OBJECTIONS TO REQUEST BY LEAD SETTLEMENT COUNSEL FOR ATTORNEYS FEES**
FEE APPLICATION OF BURT NEUBORNE	

The following class members in this case, through undersigned counsel, David Schaecter, Leo Rechter, David Mermelstein, Alex Moskovic, Esther Widman, Fred Taucher, Jack Rubin, Henry Schuster, Anita Schuster, Herbert Karliner, Lea Weems, Israel Arbeiter, Sam Gasson, "G.K.," "L.K.," "F.K.," "D.B.," and "J.R.," Nesse Godin, and the Holocaust Survivors Foundation- USA, Inc. (HSF) (henceforth referred to as "Objectors" or "US Survivor class members"), hereby give notice of filing documents cited in their March 17, 2006, Objections to "Lead Plaintiffs' Settlement Counsel" Burt Neuborne's Fee Petition. These documents are enumerated below:

1. Declaration of Burt Neuborne Concerning the Award of Attorneys Fees, February 22, 2002.

2. Letter from Burt Neuborne to Leo Rechter, President of the National Association of Jewish Holocaust Survivors (NAHOS. Inc), July 9, 2002.

3. Letter from Burt Neuborne to Alex Moskovic, President, Child Survivors Hidden Children of the Holocaust, Inc., July 10, 2002.

4. Joseph Berger, "Creative Counsel," *New York University Law School*

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Magazine, Autumn 2004, www.law.nyu/pubs/edu/magazine/autumn 2004.

5. Students Help Holocaust Victims Recover Funds," *University of Virginia Law School*, www.law.virginia.edu/home2002/html/news/2001/holocaust.htm.

6. "Lawyers Want Millions as Cut of Holocaust Settlement," *The Plain Dealer*, August 15, 2000.

7. "Lead Settlement Counsel's Brief Opposing the Holocaust Survivor Foundation USA, Inc.'s Opposition to the District Court's Allocation of the Settlement Fund," in *Friedman v. Union Bank of Switzerland*, Case No. 04-1898 and 1899 (CON) in the United States Court of Appeals for the Second Circuit ("*Swiss Bank Allocation Appeal*") (Excerpts).

8. "Lead Settlement Counsel's Brief In Opposition to Samuel J. Dubbin's Request for Attorney's Fees and Expenses," in *Friedman v. Union Bank of Switzerland*, Case No. 04-1898 and 1899 (CON) in the United States Court of Appeals for the Second Circuit (Excerpts).

9. Filing of Burt Neuborne on behalf of Hungarian Objectors, "Reservations Concerning Attorneys Fees," in *Rosner v. United States of America*, Case No. 01-1859, in the United States District Court for the Southern District of Florida ("*Rosner*") July 21, 2005.

10. Transcript of Fairness Hearing in *Rosner*, September 26, 2005 (Excerpts).

11. Chief Judge Edward R. Korman Memorandum Order dated September 13, 2004, Docket No. 2426.

12. Letter from Burt Neuborne to Hon. Edward R. Korman, September 14, 2004.

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13. Dubbin-Issacharoff correspondence.

14. Declaration of Samuel J. Dubbin, February 17, 2006.

15. Correspondence between Alex Moscovic, et. al. and Burt Neuborne

16. Excerpts, from Altman-Weils, *How To Manage Your Law Office*, December 15, 2005.

17. Excerpts, New York State Bar Association, *The 2004 Desktop Reference on the Economics of Law Practice in New York State.*

18. Excerpts, RSM McGladrey, *Law Firm Financial Benchmarking Survey.*

19. Regulations Governing Legal Representation at Government Expense of Judges of the United States and Court Officials and Employees Sued in their Official Capacities or on Account of their Performance of Official Duties.

20. November 2000-November 2001, One Month Certificate of Deposit Rates - - Federal Reserve Board.

21. Memo to Judge Korman from Gideon Taylor Conference on Jewish Materials Claims Against Germany, Inc., January 31, 2006.

22. Excerpts from Brief of Plaintiffs-Appellees, in *Lenini vs. Friedman*, Nos. 00-9217, 9593 (CON), in the U.S. Second Circuit Court of Appeals, June 15, 2001.

23. Excerpts from Brief of Burt Neuborne in *Zeisl and Neuborne v. Watman,* Appeal No. 01-9229 (CON), in the U.S. Second Circuit Court of Appeals, February 28, 2002.

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This Notice and attachments are being sent to Mr. Neuborne's counsel. The Notice of Filing alone is being sent to the other counsel who will apparently receive under the new electronic filing rules of this Court notification of the filing and a link to the PDF copy of the Notice and attachments. If any of these attorneys request a copy of all attachments directly, counsel will send them a set.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail upon Samuel Issacharoff, Esquire, counsel for Burt Neuborne, 40 Washington Square South, New York City, New York, 10012 (with attachments), and the other counsel on the attached service list (without attachments), this 17th day of March, 2006.

By: Samuel J. Dubbin, P.A.
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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

In re Holocaust Victim Assets Litigation	Master Docket No. CV-96-4849 (ERK)(MDG)
	Consolidated with CV-96-5161 and CV-96-461
This Document Relates to All Actions	

Declaration of Burt Neuborne Concerning the Award of Attorneys' Fees

1. My name is Burt Neuborne. I have served since February 1, 1999, as Court-appointed Lead Settlement Counsel in this proceeding. At the Court's request, I have reviewed the several applications for awards of attorneys fees herein, and make this declaration recommending an award of attorneys fees for work expended by counsel in achieving the $1.25 billion settlement of this action that was agreed to between the parties on August 12, 1998. At the Court's suggestion, I have deferred filing an application authorizing payment of attorneys fees until all legal objections to the settlement have been resolved, and until substantial payments have been made to members of the plaintiff-classes. I am pleased to report that all legal objections to the settlement have either been withdrawn, or have been definitively rejected by the Courts. I am also pleased to report that substantial progress has been made in distributing funds to members of the plaintiff class. Slave Labor I and II funds have been distributed to 75, 000 Holocaust victims, with an additional distribution to 15,000 persons expected within a short time. Thus, by the time the Court considers the fee issue, distributions of approximately $90 million to 90,000 Holocaust slave labor victims will have taken place. In addition a commitment of $100 million to support the poorest surviving Holocaust victims over the next 10 years has been completed, with the first annual contribution of $10 million having been disbursed, and the actual assistance plans fully in

place. Significant progress has been also been made in identifying and paying the modest number of identifiable persons falling into the refugee class. Finally, after the publication of information concerning 21,000 accounts deemed by the Volcker Report to have a probable relationship with Holocaust victims, and the establishment of a partial data base of 46,000 accounts deemed to have a probable or possible connection with Holocaust victims,[1] substantial progress has been made in returning Deposited Assets to their rightful owners. In the wake of the publication of the 21,000 accounts, 32,000 applications have been filed with CRT II in Zurich. When matched against the partial data base of 46,000 accounts, 12,000 computer matches have been recorded. Intensive investigation of the 12,000 claims is now underway. Two awards of approximately $3 million and $1 million have already been made, with approximately 100 awards either distributed or ready for distribution. At the present time, Deposited Assets awards are averaging over $150,000 per award. Accordingly, at the present rate, distributions will approach, if they do not exceed, the $800 million allocated to the deposited assets class. It is appropriate, therefore, to consider an award of attorneys' fees at this time.

2. At the Court's suggestion, in February, 1997, I assisted in organizing the plaintiffs' Executive Committee, and, with the consent of all parties, agreed to serve as co-counsel for all plaintiffs in prosecuting this litigation. In connection with my efforts to establish an Executive Committee of counsel capable of prosecuting this action with efficiency and excellence, I

[1] I characterize the data base as partial because the Volcker Report urged the creation of a more extensive data base that would have included information on all 4.1 million accounts opened during the Nazi period for which records exist. The Swiss banks insisted upon a much smaller data base consisting of accounts deemed by the Volcker Report to have a probable or possible connection with Holocaust victims. The smaller data base excludes a large number of accounts with Swiss addresses, even though Holocaust victims undoubtedly used Swiss addresses to open accounts. Amendment 2 to the settlement agreement, and the accompanying memorandum to files, sets forth a process to deal with Swiss address accounts, although their inclusion in the data base would have been far more effective.

observed and participated in discussions among counsel, and between counsel and the Court, concerning the role of attorneys' fees in connection with this litigation. Once the Executive Committee was established, I participated fully as a member of the Executive Committee in the formulation and presentation of plaintiffs' legal position, and in the negotiations that culminated in the settlement herein. At the Court's request, I serve as Lead Settlement counsel, and have been intensively involved in the post-settlement efforts to implement the settlement herein. I have personally observed the efforts of counsel throughout these proceedings, and make this declaration concerning attorneys fees on the basis of personal knowledge.

3. This litigation was vigorously prosecuted by able and dedicated counsel, whose efforts helped to bring about a successful resolution resulting in a payment from defendants of $1.25 billion for distribution to the members of the plaintiff-classes. Were this an ordinary class action litigation, under governing law in this Circuit, plaintiffs' counsel would be entitled to a substantial common fund fee award of between 15%-20% of the benefits generated by their efforts. Thus, were this an ordinary litigation, plaintiffs' counsel could expect to receive fee awards of between $200-$300 million.

4. Given the extraordinary subject matter of this litigation, however, which is designed to provide certain Holocaust survivors with a modicum of compensation after 55 years, counsel agreed among themselves (and with the Court) at the outset of this litigation that the ordinary legal rules governing class action compensation should not apply in these proceedings. One group of lawyers - Melvin I. Weiss, Michael Hausfeld, and Burt Neuborne - whose efforts ultimately proved crucial in achieving this settlement, determined that it would be inappropriate to accept fees from members of the plaintiff-class in connection with the efforts needed to bring about the settlement herein, and informed the Court at the outset of this litigation that they were prepared to undertake the case on a pro bono basis. The remaining counsel, recognizing that the ordinary class action fee rules do not apply to cases where highly competent counsel are prepared to undertake the case on a pro bono basis, agreed to waive the prevailing fee rules, and agreed to

accept fees for hours actually worked that advanced the litigation, despite a realization that the resulting fees would be far lower than fees calculated under the ordinary rules.[2]

5. Whatever the ultimate award of fees herein, I believe that the lawyers who prosecuted this litigation have exhibited extraordinary generosity and commitment to the plaintiff-class by foregoing literally hundreds of millions of dollars in fees in an unprecedented effort to demonstrate that no evil, not even the unspeakable abomination of the Holocaust, is completely beyond the boundaries of law. I stress this point because press accounts have mis-reported the reality of counsels' approach to fees. Repeated, inaccurate press reports stressing lawyers feuding over fees have irresponsibly fostered the stereotypical image of greedy lawyers seeking to profiteer at the expense of Holocaust victims. I urge the Court to make it clear that this litigation is an example of counsels' unselfish commitment, not an exercise in greed.

6. The decision to waive prevailing fee rules was made by the plaintiffs' Executive Committee at its first meeting at NYU Law School in February 1997. Several members of the Committee, who had agreed to serve without fee, argued that receipt of fees from the plaintiff-class would be inappropriate in this case. Accordingly, they urged that any lawyer seeking a fee should be excluded from the case. I argued that, while I was in a position to take the case on a pro bono basis because of my academic appointment at NYU, it was unfair to exclude counsel from participating in an extraordinary effort at achieving a modicum of delayed justice solely because their individual financial circumstances made it impossible for them to

[2]The fee standard adopted by the plaintiffs' Executive Committee at my suggestion at its first meeting is consciously modeled on the standards governing awards in civil rights cases under 42 U.S.C sec. 1988. I understand that certain counsel dispute the accuracy of my recollection of the fee standards adopted by the Executive Committee. I am prepared to testify under oath to my recollection of the Executive Committee's determination. In any event, given the undeniable fact that highly competent lawyers were willing to prosecute the case without fee, it is clear that normal fee rules could not be applied to this case.

waive all fees. Instead, I suggested that counsel who could not afford to waive fees should agree to accept fees for time actually expended that actually advanced the litigation, the fee standard utilized in civil rights cases under 42 U.S.C. sec. 1988. My notes from that meeting indicate that no objection was raised to that formulation. The discussion did not raise the issue of possible multipliers. Multipliers have been awarded in cases such as this for two reasons: to reward genuinely excellent work; and to provide a needed inducement for lawyers to undertake the risky and often unrewarding task of representing plaintiffs in certain class actions. In the unique context of this case, however, where able and dedicated counsel were available to prosecute the action without fee, it would be inappropriate to award a multiplier as a market enhancement, since no such enhancement was necessary. Thus, I believe that if a multiplier is to be awarded in this case, it should be solely to reward genuinely excellent legal work that provided benefit to the plaintiff-class.

7. Applying the fee standard adopted by plaintiffs' Executive Committee, as supplemented by my belief concerning the appropriateness of awarding a multiplier herein, I make the following recommendations concerning the several applications for attorneys' fees filed herein:

(A) Michael Hausfeld - Cohen, Milstein, Hausfeld & Toll, PLLC

Michael Hausfeld served as co-chair of plaintiffs' Executive Committee. His work was instrumental in conceiving the litigation, and advancing it to its final breadth. Mr. Hausfeld devoted very significant resources to factual research, and to the exploration of newly available material in European archives. He conceived imaginative theories linking defendants' behavior to violations of customary international law. Ably assisted by his colleague, Paul Gallagher, Mr. Hausfeld was deeply involved in developing plaintiffs' legal position, and in negotiating the settlement herein. Mr. Hausfeld made a crucial presentation to the Court and to counsel concerning the factual support underlying plaintiffs' position that was, in my opinion, extremely important in achieving the settlement herein. Mr. Hausfeld has declined to seek fees in

connection with achieving the settlement. If he had chosen to seek fees at traditional levels, Mr. Hausfeld would have been entitled to a fee award of many millions of dollars. If he had sought fees under the stringent standard adopted by plaintiffs' Executive Committee, he would, in my opinion, have been entitled to a multiplier for excellence.

The disbursements expended by Mr. Hausfeld, his firm, and his associates should be reimbursed in full.

(B) Robert A. Swift - Kohn, Swift & Graf, P.C.

Robert Swift served as co-chair of plaintiffs' Executive Committee. He was involved in every aspect of the litigation. He served as an informal liaison with Deputy Secretary Stuart Eizenstat. Under ordinary class action fee standards, Mr. Swift would have been entitled to seek a multi-million dollar fee. Utilizing the stringent standards applicable to this proceeding, I have reviewed the time charges submitted by Mr. Swift in connection with his fee application. I find the time charges warranted, and well within the range of reasonable staffing. Indeed, they are quite modest. Accordingly, I recommend acceptance of the modest lodestar request of $783,897.50. I do not believe, however, that the requested multiplier of 2.29% is appropriate. As I have stated, I do not believe that a multiplier is necessary in this case to provide market inducement, since able and dedicated counsel were available to carry on the litigation at no cost to the plaintiff-class. In my opinion, however, a modest excellence multiplier is warranted for Mr. Swift's personal contribution. Accordingly, I recommend a fee award of $1.125 million.

Mr. Swift's request for reimbursement for disbursements of $143,119.10 appears justified. Mr. Swift's request for a special disbursement payment of $1 million attributable to a payment to Christoph Meile should be amplified to assure transparency. While I believe that such a payment to Mr. Meile is justified, and should be forthcoming from the settlement fund, principles of transparency require that such a payment should not be couched as a lawyer's disbursement without further explanation.

Christoph Meile was a security guard at UBS who witnessed the destruction of potentially

relevant historical documents by the bank in violation of Swiss law and a commitment made to the Court that no documents of possible relevance to this litigation would be destroyed. When Mr. Meile publicly disclosed what he had witnessed, he was dismissed, subjected to threats of criminal prosecution, and forced to emigrate from Switzerland to the United States.

Subsequent to his emigration to the United States, Mr. Meile commenced a damage action against UBS in the United States, alleging that he had been the subject of unlawful retaliation. During the negotiations that culminated in an agreement in principle to settle this litigation for a payment of $1.25 billion to the settlement class, the defendant banks insisted, as a condition of going forward with the settlement, that Mr. Meile release the banks from any claim for liability. Mr. Meile's counsel, Edward Fagan, offered to execute such a release if the settlement fund agreed to pay Mr. Meile $1million in compensation for the value of his claim against the defendant banks.

Settlement counsel, after considering Mr. Fagan's demand on behalf of Mr. Meile, decided to recommend payment from the settlement fund for two reasons.

First, the payment represents a reasonable effort to estimate the value of the cause of action against the defendant Swiss banks that Mr. Meile released in order to permit the settlement agreement to go forward. Counsel for the defendant banks made it clear that unless Mr. Meile agreed to release the banks from liability for their actions against him, the $1.25 billion settlement could not go forward. The banks' position forced plaintiffs' counsel to request Mr. Meile to withdraw his claims against the defendant banks. Since it appeared that Mr. Meile's claims against the banks were substantial and non-frivolous, it would have been unfair to insist that Mr. Meile release his valuable claims for nothing. During a recess in the settlement negotiations with the banks, Mr. Meile's counsel, Edward Fagan (who was also serving as one of the plaintiffs' counsel), valued Mr. Meile's claims against the banks at $1 million, and insisted upon an agreement to compensate Mr. Meile at that amount. Although the amount was substantial, remaining plaintiffs' counsel recommended acceptance of the payment in order to

permit the settlement agreement to go forward. The details were disclosed to Judge Korman, and the commitment was entered into to pay Mr. Meile $1 million in return for his agreement to release his claims against defendant banks. Payment to Mr. Meile was deferred pending final judicial approval of the settlement.

Second, several counsel to the plaintiffs, who would not have agreed to the $1 million payment to Mr. Meile in the abstract, believed that he had rendered substantial service to the plaintiff class by revealing the unlawful destruction of documents by the banks, and that Mr. Meili and his family had suffered greatly as a consequence of his forthright actions. Accordingly, several plaintiffs' counsel acknowledged an obligation to Mr. Meili that, when added to the release of his legal claims, rendered it appropriate for the plaintiff class to pay substantial compensation to Mr. Meili for the release of his claims, and for the losses that he suffered in an effort to tell the truth.

Since the settlement agreement is now final, and since beneficiaries are now receiving substantial payments under the settlement, I believe that it is appropriate to make the promised payment to Mr. Meili. I ask leave, therefore, to carry out the August 12, 1998 agreement between Mr. Meili and the plaintiff class by transferring up to $1 million to Mr. Meili as a special lawyers' disbursement. I propose to transfer $667,000 directly to Mr. Meili immediately, and to ascertain whether some or all of the remaining amount must be transferred to third-persons. No further transfers in connection with Mr. Meili will be made without Court approval.

(C) Melvyn I. Weiss - Milberg, Weiss, Bershad, Hynes & Lerach, PPLC

Melvyn I. Weiss was a founding member of the plaintiffs' Executive Committee, and one of its unquestioned leaders. Mr. Weiss served as Liaison Counsel, and was the plaintiffs' principal negotiator, devoting enormous time, energy, and resources to the prolonged negotiations that finally resulted in the settlement herein. He was instrumental in the formulation of strategy, and in the coordination of counsels' activities with parallel efforts by federal, state, and local government officials to seek a just resolution of this controversy. Mr. Weiss organized

the informal governing board of community organizations to which plaintiffs' Executive Committee turned for guidance and advice. He worked closely with representatives of the World Jewish Restitution Organization to assure coordination between counsel and non-governmental organizations representing victims of Nazi oppression. Ably assisted by his colleagues, Joseph Opper and Deborah Sturman, Mr. Weiss was fully involved in the development of plaintiffs' legal position, and was a crucial force in the negotiation of the settlement. Mr. Weiss has declined to seek fees in connection with achieving the settlement. If he had chosen to seek fees at traditional levels, Mr. Weiss would have been entitled to a fee award of many millions of dollars. If he had sought fees under the stringent standard adopted by plaintiffs' Executive Committee, he would, in my opinion, have been entitled to a multiplier for excellence.

Mr. Weiss' request for reimbursement of disbursements in connection with the litigation is warranted, and should be granted.

(D) Burt Neuborne, Esq.

I am the John Norton Pomeroy Professor of Law at New York University School of Law, where I have taught Constitutional Law, Civil Procedure and Federal Courts since 1974. I am also an experienced civil rights lawyer, having served as National Legal Director of the American Civil Liberties Union from 1982-86, and as Legal Director of the Brennan Center for Justice at NYU Law School since 1997. In December, 1996, I was initially requested to advise the legal team headed by Robert Swift on issues associated with class action remedies. When disagreements between and among counsel in overlapping class actions threatened to impede the progress of the litigation, I accepted the Court's invitation to attempt to organize a plaintiffs' Executive Committee that would permit unified and effective prosecution of the litigation. With the cooperation of Mr. Hausfeld, Mr. Weiss, and Mr. Swift, plaintiffs' counsel organized themselves into a 10 person Executive Committee that was vested by the Court with authority to prosecute the consolidated actions. At the request of the Court, and with the consent of all parties, I agreed to serve on the plaintiffs' Executive Committee in a "neutral" capacity, and

agreed to serve as co-counsel for all plaintiffs. Once plaintiffs' Executive Committee was formed, virtually all counsel cooperated in developing plaintiffs' legal position, developing factual data crucial to the litigation, and developing a sophisticated and coherent negotiation strategy. Despite the occasional friction that is unavoidable in such a difficult litigation, most members of plaintiffs' Executive Committee worked well together, and provided plaintiffs with extraordinarily able, effective and dedicated legal representation.

I concentrated my efforts on developing the legal theories underlying plaintiffs' case. I prepared amended complaints designed to remove any technical issues from the case. I worked closely with counsel in drafting plaintiffs' legal briefs, and submitted a lengthy declaration summarizing plaintiffs' legal position and refuting the position of defendants' experts. I presented oral argument for the plaintiffs in connection with defendants' Rule 12 motions to dismiss, and participated in the negotiations that culminated in this settlement. At the Courts' request, I agreed to serve as Lead Settlement Counsel, and have been intensively involved on a daily basis in the formulation and implementation of the mechanics designed to carry out the settlement, as well as in the defense of the settlement in the Second Circuit.

I have declined to seek fees in connection with achieving the settlement. I believe that if I choose to seek fees at traditional levels, I would be entitled to a fee award of many millions of dollars. Under the stringent standard adopted by plaintiffs' Executive Committee, I would, in my not-so-modest opinion, be entitled to a multiplier for excellence. I request that I be awarded $50,000 in costs to permit me to reimburse New York University School of Law for the administrative support, including secretarial services, telephone and copying facilities, that it has generously made available to me in connection with this litigation.

(E) Elizabeth Cabraser/Morris Ratner/ Robert Lieff - Lieff, Cabraser, Heimann & Bernstein, LLP

Robert Lieff was a founding member of plaintiffs' Executive Committee. Elizabeth Cabraser and Morris Ratner provided important legal assistance to the prosecution of plaintiffs' case. During the early phases of the litigation, the firm, under the direction of Mr. Lieff and Ms.

Cabraser, provided helpful, in depth legal research on a number of issues.

Once the settlement was reached, Morris Ratner undertook the difficult task of formulating and implementing the notice program, and working with the Special Master to develop a plan of allocation and distribution. His work has been invaluable. Lieff Cabreser initially was one of the firms seeking fees herein. After consideration, Lieff Cabreser has asked that its fee award be donated to Columbia Law School to establish a chair in memory of victims of the Holocaust. If the firm had chosen to seek fees at traditional levels, it would have been entitled to a fee award of many millions of dollars, and a multiplier for excellence. Instead, Lieff Cabreser has requested a modest fee award of $1.1 million to be donated to Columbia Law School. I recommend that the application be granted, together with a $400,000 multiplier for excellence that would permit the full endowment of a Holocaust Remembrance chair. I recommend payment of the firm's disbursements.

(F) Irwin Levin/Richard Shevitz - Cohen & Malad

Irwin Levin and Richard Shevitz shared a seat on plaintiffs' Executive Committee. Their firm, Cohen & Malad, provided thoughtful legal research of great assistance during the formulation of plaintiffs' legal position. They each played helpful roles in developing plaintiffs' negotiation strategy, and consistently worked effectively to foster collegial relationships between and among counsel. Given their significant contributions, they would each have been entitled to a fee substantially in excess of one million dollars under ordinary fee calculations. Instead they have sought a modest lodestar award of $884,000. I recommend that their application be granted, together with a modest excellence multiplier that would bring the total award to $1 million. Reimbursement of their claimed disbursements is also justified.

(G) Steven A. Whinston - Berger & Montague, PC

Steven A. Whinston shared a seat on plaintiffs' Executive Committee with Mel Urbach. Both represented the World Council of Orthodox Communities, a communal association of certain Orthodox Jewish congregations. Mr. Whinston participated constructively in the

development of plaintiffs' legal position, and was an active participant in the negotiations that culminated in the settlement. Accordingly, he is clearly entitled to a substantial fee. Indeed, under ordinary fee calculation rules, he would be entitled to fees in substantial excess of one million dollars. Viewed on an hourly basis, however, a significant proportion of Berger & Montague's lodestar appears to have been expended in client conferences with its communal client and in communication with members of the plaintiff-class. While reasonable client contacts should qualify for fees, the combined time requests of Mr. Whinston and Mr. Urbach have the result of asking the plaintiff-class to subsidize non-legal activities made necessary by the unique demands of their individual clients. Thus, while I do not question the actual expenditure of time by Berger & Montague, I do not believe that, under the stringent standards applied to this litigation, all of it qualifies as necessary to advance this litigation. In the absence of more specific allocation of time, I recommend a lodestar fee award of $1.1 million to Mr. Whinston. I recommend reimbursement of the firm's disbursements.

(H) Edward D. Fagan - Fagan & D'Avino, LLP

Edward Fagan was a founding member of plaintiffs' Executive Committee, and one of the first lawyers to seek redress against defendants on behalf of Holocaust survivors. Given Mr. Fagan's role in helping to launch this litigation, he is entitled to a fee award. I wish it were possible for me to support his application for a substantial award of attorneys fees in excess of $1.5 million. Unfortunately, Mr. Fagan provided limited legal assistance to plaintiffs. His original complaint was seriously defective, and, in my opinion, would not have withstood a motion to dismiss. Under the stringent fee criteria adopted by plaintiffs' Executive Committee, counsel may seek fees only for time actually expended that advanced the interests of the plaintiffs. Mr. Fagan's fee application, which fails to describe the nature of his activities, makes it extremely difficult, if not impossible, to determine the nature of the work performed. Given the ambiguity of his time records, and my first-hand knowledge of his legal contribution, I do not believe that his time qualifies for legal fees in the amount requested. While it is often important

to explain legal issues to the general public, public education activity cannot justify a fee award in the amounts sought by Mr. Fagan. Accordingly, I recommend an award to Mr. Fagan of $350,000. I recommend payment of Mr. Fagan's documented disbursements that are shown to have been incurred in connection with legal activity associated with this case.

(I) Mel Urbach, Esq.

Mel Urbach shared a seat on plaintiffs' Executive Committee with Steven Whinston. He represented the World Council of Orthodox Communities. Mr Urbach played a constructive role in articulating the moral basis of plaintiffs' claims, but played almost no role in developing plaintiffs' legal or factual position. He played a secondary role in the negotiations that led to this settlement. A significant portion of Mr. Urbach's lodestar appears to involve communications with his communal client, and non-legal interactions with certain class members. While this case required significant expenditure of resources to assure that members of the plaintiff-class understood the litigation, an award of almost one million dollars in legal fees for such activity seems excessive, especially since Berger & Montague has sought significant fees for similar activity. I believe that an award of $450,000 to Mr. Urbach is appropriate. I recommend payment of his documented disbursements.

(J) Michael Witti

Michael Witti is an attorney practicing in Germany who has expended substantial efforts on behalf of Holocaust victims. He played a secondary role, however, in the legal, factual and negotiating aspects of the Swiss bank litigation. Given the generous treatment of Mr. Witti by the arbitrators in connection with the award of fees associated with the establishment of the German Foundation, I do not believe that an award of additional fees from the Swiss settlement fund is appropriate. Documented disbursements should be reimbursed, if they have not already been reimbursed by the German Foundation.

(K) Samuel Dubbins, Esq.

Samuel Dubbins, who represented several objectors to the settlement agreement, has

expressed an intention to apply for an award of legal fees based on a claim that his efforts in opposing the settlement have assisted the plaintiff class. Consideration of the fee issue has been delayed to permit him to complete an application. Despite repeated postponements, no application has yet been filed on behalf of Mr. Dubbins.

8. Accordingly, because of the extraordinary generosity of counsel, I am able to recommend a total award of $5.625,00 in attorneys fees attributable to the successful resolution of this litigation resulting in the establishment of a settlement fund of $1.25 billion. Such an award would total less than one-half of one percent (.05%) of the settlement fund. Of the award, $1.5 million in fees is being donated to Columbia Law School in remembrance of Holocaust victims, and $4.125 million is payable to counsel. I am confident in asserting that this is the lowest fee structure ever adopted in a case of comparable complexity and success.

Dated: February 22, 2002
New York, New York

Burt Neuborne

JA-6534

D+R

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Burt Neuborne
John Norton Pomeroy Professor of Law
Legal Director, Brennan Center for Justice

July 9, 2002

Mr. Leo Rechter
President, NAHOS, Inc.
P.O. Box 670125
Station C, Main Street
Flushing, New York 11367

96 CV 4849

Dear Mr. Rechter:

Judge Korman has forwarded your letter dated July 1, 2002 to me, and has asked me to reply because it is more appropriate for counsel to respond to your concerns. I serve as lead settlement counsel in the Swiss Bank case, having been appointed by Judge Korman on February 1, 1999. Before that, as you may know, I served without fee as one of the principal lawyers in the case.

I begin by expressing my appreciation for your many years of work on behalf of Holocaust survivors. Those of us who have come late to the task are awed by the remarkable spirit of the generation of Holocaust survivors you represent. In that spirit, I hope to explain the distribution of the settlement funds, and to seek your support and understanding.

The first, and most prevalent, misconception about the Swiss Bank settlement is that it is not a charitable fund for the benefit of Holocaust survivors generally. Rather, as I noted at the November 20, 2000 hearing on the Special Master's Proposed Plan of Allocation and Distribution of Settlement Proceeds, the fund is the result of the settlement of a lawsuit involving precisely defined legal claims against Swiss banks. In working out a plan of allocation and distribution, Judge Korman, Special Master Gribetz and I are under a legal duty to attempt to distribute the funds to persons who have valid legal claims against the

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Swiss bank defendants. We have attempted to cast that net widely in order to benefit as many persons as possible, but the process is not without limits.

In defining eligible beneficiaries, the Settlement Agreement identified five categories of victims: (1) holders of Swiss bank accounts; (2) two categories of slave laborers whose agony was made possible by Swiss financing or complicity; (3) refugees who were expelled from or denied entrance into Switzerland, or who were admitted into Switzerland but mistreated; and (4) persons whose assets were looted and transacted through Swiss banks. We are under a legal duty to make every effort to distribute the Settlement Funds to persons who fall into those categories before expending settlement funds for the general relief of poor Holocaust survivors.

Thus far, we have identified approximately 95,000 surviving Jewish slave laborers, each of whom has received payment from the Swiss settlement fund. Approximately 10,000 additional Jewish slave laborers are expected to receive payment from the Swiss fund within the next two weeks. Our data indicates that another 70,000 to 80,000 Jewish slave laborers, and as many as 40,000 non-Jewish surviving slave laborers, may qualify for slave labor payments from the Swiss fund. Eventually, we anticipate that approximately 200,000 slave laborers will receive payments from the Swiss settlement fund.

In addition, approximately 3,000 to 4,000 refugees have been identified who may qualify for payments for having been expelled from or denied entry into Switzerland, or admitted but mistreated while in Switzerland.

Special Master Gribetz correctly determined that it was impossible to distribute funds to the Looted Assets Class on an individual basis because it was impossible to determine whose assets were transacted through Swiss banks and other Swiss entities, and whose assets were disposed of directly by the Nazis through German and other sources. Moreover, given the scale of the looting, it was impossible to determine on an individual basis the value of the assets that had been stolen from virtually every Jew in Europe, as well as from the non-Jewish victims or targets of Nazi persecution who also comprise the "Looted Assets Class." Accordingly, Special Master Gribetz recommended, and Judge Korman agreed, that funds on behalf of the Looted Assets Class should be distributed by what is called *cy pres* (Norman French for "as close as possible"). The Looted Assets funds were to be used to aid the neediest Holocaust survivors. As you are aware, $100 million has been allocated for that purpose, and has been committed to groups working directly with the poorest survivors to provide them with food, medicine and shelter.

Finally, Judge Korman, Special Master Gribetz and I all agreed that the strongest claim, legally and historically, was the demand by Holocaust victims for the return of Swiss bank accounts. Given the strength of this claim, we were under a legal duty to set aside adequate funds to assure the payment of qualifying bank account claims. Following the advice of Paul Volcker, Special Master Gribetz allocated up to $800 million to the

repayment of bank account owners or their heirs. As you probably are aware, that determination has been upheld by the United States Court of Appeals for the Second Circuit, which, on July 26, 2001, held that the "existence and estimated value of the claimed deposit accounts was established by extensive forensic accounting. In addition, these claims are based on well-established legal principles, have the ability of being proved with concrete documentation, and are readily valuated in terms of time and inflation. By contrast, the claims of the other four classes are based on novel and untested legal theories of liability, would have been very difficult to prove at trial, and will be very difficult to accurately valuate. Any allocation of a settlement of this magnitude and comprising such different types of claims must be based, at least in part, on the comparative strengths and weaknesses of the asserted legal claims."

Unfortunately, as you know, the Swiss banks have destroyed a substantial number of the relevant records, leaving us with the difficult task of determining the validity of 32,000 claims for Swiss accounts. We have established an institution in Zurich, the Claims Resolution Tribunal, operating under Court supervision, to make the necessary determination. Thus far, approximately 170 claims, averaging more than $100,000 per account, have been validated. In an effort to speed up the process, significant changes to the CRT process and personnel are underway. I anticipate that during the next six months, significant progress in processing bank account claims will have been made. At that point, it will be possible for us to make accurate predictions concerning the full amount to be distributed to bank account claimants. I continue to believe that, given the destruction of many of the relevant bank records, a significant sum may be available for a secondary distribution to other class members, and for the benefit of Holocaust victims generally. Until that time, however, I cannot recommend that funds that may belong to specific Holocaust victims be shifted to general relief projects, no matter how worthy they may appear.

I hope that you understand, therefore, that the Swiss settlement fund cannot be converted into a general relief fund. Even if we wanted to shift funds from one category of Holocaust victim to another in a search for moral justice or a response to pragmatic need, we would be violating our legal duties to attempt such moral triage. None of us doubt that there are people in need, and that many praiseworthy uses can be found for the Swiss settlement funds. If, as I believe, it proves impossible to find the owners of a significant number of Swiss bank accounts, a secondary distribution process can take place during which morality and pragmatic need will play a significant role.

Finally, I feel it necessary to comment briefly on Mr. Dubbin's suggestion that Swiss settlement funds be distributed to permit health care or other needed social services to be delivered to residents of South Florida, or other particular locations. One important principle that cannot and will not be compromised by the Swiss settlement fund is a promise of equal treatment for all Holocaust survivors. We simply cannot aid Holocaust victims in one part of the country, while ignoring similarly situated victims elsewhere. I should also

comment on the suggestion that home health care or other health benefits be provided to Holocaust survivors through the Swiss settlement. As you know, I strongly support such a plan if it is financially and administratively feasible, and if it is equally available to Holocaust survivors generally. You should know that despite my repeated requests, I have never received a serious proposal for health care delivery. In fact, no effort at developing a serious plan appears to have taken place. Rather, Mr. Dubbin appears to have settled on a strategy of advocating such a plan in the abstract without seeking to make it work. It is classic political showmanship with no substance whatever. You, of all people, should not be taken in by such demagogic grandstanding.

Indeed, the only document of substance that I have ever received from Mr. Dubbin is an elaborate attorneys fee request for approximately six million dollars on behalf of Mr. Dubbin and his client, Dr. Thomas Weiss. I will oppose Mr. Dubbin's request for fees payable from the survivors' money because, in my opinion, neither he nor Dr. Weiss have provided any benefit to the Swiss settlement class. In fact, their behavior delayed the payment process by at least six months. The final decision on fees is, of course, up to Judge Korman.

Mr. Dubbin's and Dr. Weiss's demand for a six million dollar attorneys fee payable from the survivors' money is greater than the total of all attorneys fees likely to be awarded to those lawyers whose work actually created the Swiss settlement fund. The three principal lawyers who litigated the Swiss bank case and led the negotiations, Melvyn Weiss, Michael Hausfeld, and myself, have declined to seek attorneys fees for having obtained the $1.25 billion settlement. Several other lawyers who worked on the case have requested an award of fees. I have recommended awards totaling less than $5 million, much of which is pledged to Holocaust-related charity. Given that background, I find it difficult to contain my contempt for Mr. Dubbin's and Dr. Weiss's efforts to raid the settlement fund for their own benefit.

I would, of course, be pleased to respond to any questions or comments you may have.

Sincerely yours,

Burt Neuborne

cc: Judge Edward R. Korman
Special Master Judah Gribetz
Sam Dubbin, Esq.

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Burt Neuborne
John Norton Pomeroy Professor of Law
Legal Director, Brennan Center for Justice

July 10, 2002

Alex Moskovic
President
Child Survivors/ Hidden Children of the
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7529 SE Bay Cedar Circle
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Dear Mr. Moskvic:

Judge Korman has forwarded your letter dated July 1, 2002 to me, and has asked me to reply because it is more appropriate for counsel to respond to your concerns. I serve as lead settlement counsel in the Swiss Bank case, having been appointed by Judge Korman on February 1, 1999. Before that, as you may know, I served without fee as one of the principal lawyers in the case.

The first, and most prevalent, misconception about the Swiss Bank settlement is that it is not a charitable fund for the benefit of Holocaust survivors generally. Rather, as I noted at the November 20, 2000 hearing on the Special Master's Proposed Plan of Allocation and Distribution of Settlement Proceeds, the fund is the result of the settlement of a lawsuit involving precisely defined legal claims against Swiss banks. In working out a plan of allocation and distribution, Judge Korman, Special Master Gribetz and I are under a legal duty to attempt to distribute the funds to persons who have valid legal claims against the Swiss bank defendants. We have attempted to cast that net widely in order to benefit as many persons as possible, but the process is not without limits.

In defining eligible beneficiaries, the Settlement Agreement identified five categories of victims: (1) holders of Swiss bank accounts; (2) two categories of slave laborers whose agony was made possible by Swiss financing or complicity; (3) refugees who were expelled

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from or denied entrance into Switzerland, or who were admitted into Switzerland but mistreated; and (4) persons whose assets were looted and transacted through Swiss banks. We are under a legal duty to make every effort to distribute the Settlement Funds to persons who fall into those categories before expending settlement funds for the general relief of poor Holocaust survivors.

Thus far, we have identified approximately 95,000 surviving Jewish slave laborers, each of whom has received payment from the Swiss settlement fund. Approximately 10,000 additional Jewish slave laborers are expected to receive payment from the Swiss fund within the next two weeks. Our data indicates that another 70,000 to 80,000 Jewish slave laborers, and as many as 40,000 non-Jewish surviving slave laborers, may qualify for slave labor payments from the Swiss fund. Eventually, we anticipate that approximately 200,000 slave laborers will receive payments from the Swiss settlement fund.

In addition, approximately 3,000 to 4,000 refugees have been identified who may qualify for payments for having been expelled from or denied entry into Switzerland, or admitted but mistreated while in Switzerland.

Special Master Gribetz correctly determined that it was impossible to distribute funds to the Looted Assets Class on an individual basis because it was impossible to determine whose assets were transacted through Swiss banks and other Swiss entities, and whose assets were disposed of directly by the Nazis through German and other sources. Moreover, given the scale of the looting, it was impossible to determine on an individual basis the value of the assets that had been stolen from virtually every Jew in Europe, as well as from the non-Jewish victims or targets of Nazi persecution who also comprise the "Looted Assets Class." Accordingly, Special Master Gribetz recommended, and Judge Korman agreed, that funds on behalf of the Looted Assets Class should be distributed by what is called *cy pres* (Norman French for "as close as possible"). The Looted Assets funds were to be used to aid the neediest Holocaust survivors. As you are aware, $100 million has been allocated for that purpose, and has been committed to groups working directly with the poorest survivors to provide them with food, medicine and shelter.

Finally, Judge Korman, Special Master Gribetz and I all agreed that the strongest claim, legally and historically, was the demand by Holocaust victims for the return of Swiss bank accounts. Given the strength of this claim, we were under a legal duty to set aside adequate funds to assure the payment of qualifying bank account claims. Following the advice of Paul Volcker, Special Master Gribetz allocated up to $800 million to the repayment of bank account owners or their heirs. As you probably are aware, that determination has been upheld by the United States Court of Appeals for the Second Circuit, which, on July 26, 2001, held that the "existence and estimated value of the claimed deposit accounts was established by extensive forensic accounting. In addition, these claims are based on well-established legal principles, have the ability of being proved with concrete documentation, and are readily valuated in terms of time and inflation. By contrast, the

claims of the other four classes are based on novel and untested legal theories of liability, would have been very difficult to prove at trial, and will be very difficult to accurately valuate. Any allocation of a settlement of this magnitude and comprising such different types of claims must be based, at least in part, on the comparative strengths and weaknesses of the asserted legal claims."

Unfortunately, as you know, the Swiss banks have destroyed a substantial number of the relevant records, leaving us with the difficult task of determining the validity of 32,000 claims for Swiss accounts. We have established an institution in Zurich, the Claims Resolution Tribunal, operating under Court supervision, to make the necessary determination. Thus far, approximately 170 claims, averaging more than $100,000 per account, have been validated. In an effort to speed up the process, significant changes to the CRT process and personnel are underway. I anticipate that during the next six months, significant progress in processing bank account claims will have been made. At that point, it will be possible for us to make accurate predictions concerning the full amount to be distributed to bank account claimants. I continue to believe that, given the destruction of many of the relevant bank records, a significant sum may be available for a secondary distribution to other class members, and for the benefit of Holocaust victims generally. Until that time, however, I cannot recommend that funds that may belong to specific Holocaust victims be shifted to general relief projects, no matter how worthy they may appear.

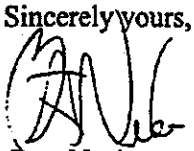
I hope that you understand, therefore, that the Swiss settlement fund cannot be converted into a general relief fund. Even if we wanted to shift funds from one category of Holocaust victim to another in a search for moral justice or a response to pragmatic need, we would be violating our legal duties to attempt such moral triage. None of us doubt that there are people in need, and that many praiseworthy uses can be found for the Swiss settlement funds. If, as I believe, it proves impossible to find the owners of a significant number of Swiss bank accounts, a secondary distribution process can take place during which morality and pragmatic need will play a significant role.

Finally, I feel it necessary to comment briefly on Mr. Dubbin's suggestion that Swiss settlement funds be distributed to permit health care or other needed social services to be delivered to residents of South Florida, or other particular locations. One important principle that cannot and will not be compromised by the Swiss settlement fund is a promise of equal treatment for all Holocaust survivors. We simply cannot aid Holocaust victims in one part of the country, while ignoring similarly situated victims elsewhere. I should also comment on the suggestion that home health care or other health benefits be provided to Holocaust survivors through the Swiss settlement. As you may know, I strongly support such a plan if it is financially and administratively feasible, and if it is equally available to Holocaust survivors generally. You should know that despite my repeated requests, I have never received a serious proposal for health care delivery.

Indeed, the only document of substance that I have ever received from Mr. Dubbin is an elaborate attorneys fee request for approximately six million dollars on behalf of Mr. Dubbin and his client, Dr. Thomas Weiss. I will oppose Mr. Dubbin's request for fees payable from the survivors' money because, in my opinion, neither he nor Dr. Weiss have provided any benefit to the Swiss settlement class.

I would, of course, be pleased to respond to any questions or comments you may have.

Sincerely yours,

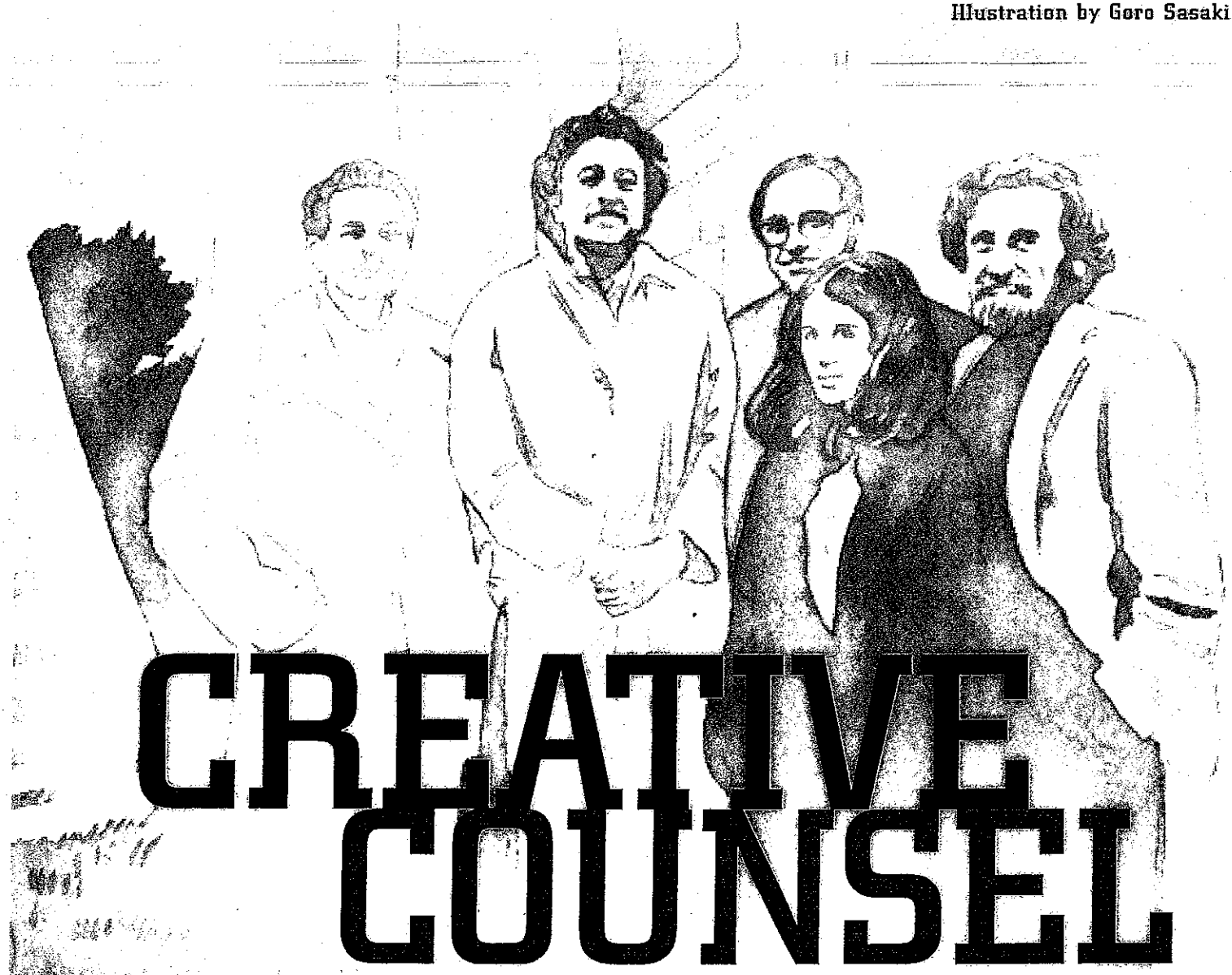


Burt Neuborne

cc: Judge Edward R. Korman
Special Master Judah Gribetz
Sam Dubbin, Esq. ✓

Burt Neuborne
is a litigating academic,
a pragmatic liberal,
and an inquisitive teacher.
He sees himself, simply,
as an imaginative lawyer.

Illustration by Goro Sasaki



CREATIVE COUNSEL

BY JOSEPH BERGER

To understand how Burt Neuborne has managed to win so many watershed constitutional cases and harvest billions of dollars for families of Holocaust survivors around the world, all while being a faculty star at the New York University School of Law, it helps to reach back to his days as a gangly youngster on the postwar streets of Jamaica, Queens. As dusk would fall, young Burt would be out playing stickball with the rest of the neighborhood kids and the receding light would make the spaldeen (as the pink Spalding rubber ball was known) hard to pick out. His less relentless buddies were ready to call it a day. Not Neuborne.

"When it would get dark and I was losing, I would always say, 'We can play another inning,' " he remembers.

Now fast-forward to the Vietnam War era to roughly 1970, when Neuborne, a lawyer for the New York Civil Liberties Union, was defending an artist who had been arrested for sewing a 7 1/2 foot-long American flag into the shape of a penis, stuffing it, and displaying it near the window of

a Madison Avenue gallery. A three-judge criminal court panel convicted the artist of desecrating the flag and a seven-judge New York State Court of Appeals affirmed that ruling. But displaying his legendary doggedness, Neuborne twice took the case all the way to the United States Supreme Court and eventually got a lower court federal judge—the 37th judge to rule on the matter—to declare the flag-desecration statute in violation of the First Amendment's right of free speech. Exhausted prosecutors called it a day, and Neuborne had won the game in extra innings.

It's 1973, and this time, in a more momentous case, Neuborne displayed even more fevered persistence. Now assistant legal director at the American Civil Liberties Union, he was defending American bomber pilots in Thailand who were facing courts-martial for refusing to carpet-bomb Cambodia. To Neuborne's astonishment, Federal Judge Orrin Judd of the Eastern District in New York upheld his argument—that the pilots could not be punished since Congress had not authorized the war. But the Second Circuit Court of Appeals stayed Judd's ruling, allowing the bombing to continue. It was summer, so Neuborne could not appeal to the full Supreme Court, and the circuit justice, Thurgood Marshall, despite his anguished personal misgivings, declined to step in. But Neuborne knew that there was at least one more inning he could play.

The ACLU had a "Douglas watch" to keep tabs on the whereabouts of the Court's most liberal jurist, Justice William O. Douglas, whenever capital punishment and other irreparable-harm cases required emergency stays. Neuborne flew to Washington State, where Douglas was vacationing, and, in a scene evocative of Henry IV's humbling call at Canossa in 1077, he knocked one morning on the door of Douglas's rustic cabin in Goose Prairie. Douglas, unfazed, agreed to hear oral arguments in the Yakima post office.

Douglas, as Neuborne recalls it, was frail and tired at the end of his career. "People sort of knew this was his last hurrah." The canny Douglas found a sly way of warning Neuborne not to be too hopeful, that even his blessing could be futile. "Mr. Neuborne," the judge asked, "what happened when I was asked to intercede 20 years ago?"

Neuborne remembered that Julius and Ethel Rosenberg had been executed in 1953, for spying, a step taken after the full Supreme Court overruled a Douglas stay. But Douglas's pessimism didn't dissuade Neuborne. He anticipated that this time there would not be enough justices lingering in the steamy capital to overrule Douglas.

Douglas indeed ruled in his favor. But the next day the Supreme Court held a conference call to reinstitute the stay. Yet it never heard the case on its merits. The Nixon administration, figuring that a Supreme Court hearing might jeopardize its Cambodia policy, simply arranged to have all the pilots honorably discharged. From Neuborne's point of view, playing after the sun went down paid off once more.

"I verge on the obsessive," Neuborne said, recalling this episode. "My wife has a wonderful quote from Santayana that she adapted: 'My husband is a man who redoubles his efforts once he loses sight of his goals.' "

For a man who supposedly loses sight of his goals, Neuborne, 63 years old, has managed to carve out a life that has been elegantly coherent—of pioneering litigation, teaching, and scholarship that has revolved around a few signature themes like the First Amendment and civil rights. He has argued cases six times before the Supreme Court and briefed some 200 others. His imprint on civil-liberties laws and his ability to analyze the pertinent issues has made him the go-to guy over the years for dozens of journalists and scholars seeking insights on those laws. He shows no signs of slowing down, either. During the last year or so, Neuborne was a key player in two of the seminal cases of our time.

He helped defend the groundbreaking McCain-Feingold campaign-finance reforms, advising the bill's sponsors throughout the process—even helping to craft the legislation. Neuborne also has been deeply immersed in two major Holocaust cases. He is plaintiffs' counsel in a lawsuit against Swiss banks over their handling of Nazi-era bank accounts and was the principal lawyer in a series of Holocaust suits involving compensation for slave laborers of wartime German industry.

> "I'm an unreconstructed ham," he said. "That's why I love being in court, that's why I love teaching. I love the performance, the standing up in front of a group and performing for them. I also love the intellectual challenge of it."

Yet, for the past three decades, the chief institutional anchor of his life has been not an opulent law office but a podium at the New York University School of Law, where he started teaching in 1972 as an adjunct and now has the title of John Norton Pomeroy Professor of Law. There he also serves as the legal director of the Brennan Center for Justice, which was started in 1995 by Supreme Court Justice William J. Brennan's family with a broad mission of trying to clear the hurdles to a more democratic society. The center's most notable Supreme Court victories have been its successful defense of the McCain-Feingold campaign-finance reform bill, where Neuborne wrote the brief, and *Velazquez v. Legal Services Corp.*, where Neuborne briefed and argued a landmark First Amendment challenge to the government's effort to muzzle lawyers for the poor. While juggling these enormously important cases, Neuborne has consistently prepared and inspired NYU School of Law students with his lively Evidence and Procedure lectures.

"Burt has tremendous energy," said Judge Edward R. Korman of Federal Court in Brooklyn, who decided how to distribute the money in the settlement of the Swiss banks case. "While everything's going on he sends me law review articles he's written, he's speaking in various places, he's filing papers in this lawsuit, and in the German lawsuit. I asked him a couple of weeks ago if he was on steroids. He's absolutely brilliant."

Neuborne has the balding, bespectacled look of a stereotypical scholar, but his face is leavened by the kind of chipmunk cheeks that a mother loves to pinch and the springing steps of a long-distance runner who has completed two marathons (New York and Paris) and still jogs five miles a day on the treadmill. His speech has a slight New York inflection and his voice something of a Mel Brooks rasp, yet he has an impressive Professor Higgins-like gift for well-parsed sentences. Any formality, though, is lightened by a ready smile and a puckish sense of humor.

All of these attributes are evidently arrows in his instructional quiver, qualities that in 1990 won him the University's Distinguished Teacher award—almost never given to teachers who confront large lecture classes of 100 or more, as he usually does. "I'm an unreconstructed ham," he said. "That's why I love being in court, that's why I love teaching. I love the performance, the standing up in front of a group and performing for them. But I also love the intellectual challenge of it. There's something splendid about seeing the material each year through the eyes of an idealistic and smart student who asks hard questions about it."

It may seem paradoxical, but as a professor Neuborne has generally avoided the topics that have earned him his legal stripes. He spurns courses on the First Amendment or affirmative action or women's rights, topics that as he puts it are "close to my politics." Rather, he teaches workhorse courses in Evidence.

"If I were to teach affirmative action I'd have to be careful not to teach it as a cheerleader," he explains. "If you're going to be a teacher and not a cheerleader you have to force students to confront, to realize there are reasonable arguments that can go the other way and force students to develop those arguments. And I can do it. But it's not something I try to do."

Indeed, when he does teach a rare constitutional law class he will often take a contrarian position by, say, advocating censorship. "I force them to argue me off of the position they know I don't agree with," he said. "The purpose of the classroom is to exercise their minds, not to find out what I think." He has learned, he said, that "the students have absolutely no fear of me and chase me around the classroom."

A visit to a run-of-the-mill Evidence class in March, when students were just back from their spring break, makes palpable Neuborne's zest as a teacher. Neuborne clips a small microphone to his gray V-necked sweater and spends the first 15 minutes of the two-hour class reacquainting students with the differences between statements made assertively and those made more obliquely or through behavior (an opened umbrella declares it's raining, for example). At trial, it's the nonassertive statements that can avoid being classified as hearsay. As he talks, Neuborne's voice rises to a singsong. The students seem riveted.

"He's the best," said Lauren Smith ('04), who shopped around for teachers by auditing classes. "He's very clear and he has a kindness and a sense of humor that comes through in every lecture. He does a good job of mixing the practical and the theoretical, which not all professors do."

When you ask Neuborne what he likes about teaching, he quotes John Sexton, who was dean of the Law School between 1988 and 2002 before becoming University president. "Sexton used to say when you became a teacher you were blessed because you entered into cyclical time instead of linear time. Everything starts fresh all the time. Each new year is a new beginning. This is at least the twentieth time I've taught Evidence and the novelty is still there. I learn something new every year."

Neuborne tells of modeling himself on Ruth Bader Ginsburg, who was head of the women's rights project at the ACLU at the same time she was a professor at Columbia Law School, arguing six cases before the Supreme Court that changed the way the law treats gender. "I watched how a superb academic could also be a remarkably effective litigator and actually change things," he said. His teaching, he said, is always enhanced by his work as a lawyer. "I'm a good, strong teacher, but I don't think I could be anything like the force I can be in the classroom if I were teaching just abstractions or my reading of what other people did. The fact that I actually do this stuff is what gives me confidence."

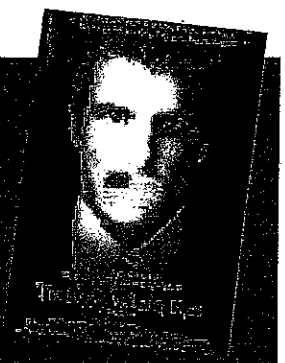
Three or four times a year Neuborne moderates a panel of lawyers and other experts in a role-playing exercise on a controversial issue. In February he ran an Anti-Defamation League-sponsored panel at the Law School on how to handle anti-Semitism on campus. The panel included Tom Gerety, a former president of Amherst who is now the executive director of the Brennan Center, and S. Andrew Schaffer, general counsel of New York University. Neuborne had the panelists pretend they were students, deans, college presidents, journalists, lawyers, and judges handling a mock case where a campus newspaper prints a cartoon of Israeli Prime Minister Ariel Sharon in an SS uniform with a caption: "Stop Israeli Nazi Apartheid."

The mock case raised questions about the parameters of free speech, and as he prowled the stage, Neuborne ratcheted the issue up, probing whether hateful speech can be so extreme that it can incite readers or listeners to violence, discussing differences in speech made on public or private college campuses, asking whether it matters if the offensive newspaper is distributed publicly or on the doorsteps of Jewish students, and considering whether it matters if the president is Jewish or not.

Neuborne certainly doesn't shrink from controversy. The class-action lawsuit against Swiss banks, aside from being astonishingly complicated—some legal papers had to be translated into 16 languages, for example—has also rankled some interested parties. The suit settled for $1.25 billion, almost $700 million of which already has been distributed to descendants of bank account holders, inmates of slave-labor camps financed by Swiss banks, refugees who were turned away from Switzerland, and people whose assets were 'looted by the Nazis and fenced through' Swiss banks. A few American survivors or spokesmen like lawyers Thane Rosenbaum and Samuel J. Dubbin have assailed the settlement for giving the bulk of the looted-assets money to survivors in the former Soviet Union and leaving only a small percentage for U.S. survivors. In an interview, Neuborne (who took on this case pro bono) contended

NEUBORNE GOES HOLLYWOOD

Despite his numerous careers, the unstoppable Burt Neuborne has managed to find time for one more—Hollywood actor.



He appeared on screen for 10 minutes in Milos Forman's 1996 movie *The People vs. Larry Flynt*, playing Norman Roy Grutman, a New York lawyer representing televangelist Jerry Falwell in his lawsuit against the publisher of the skin magazine *Hustler*. The Academy Award-winning Czech-born film director recruited Neuborne after seeing his work as a Court TV commentator on the O.J. Simpson trial. Neuborne accepted, thinking it would highlight the importance of free speech to a mass audience.

The irony in his casting was that Neuborne, as national legal director for the American Civil Liberties Union, had actually filed an amicus brief to the Supreme Court defending Flynt, not Falwell. Falwell contended that he had been the victim of "intentional infliction of emotional distress" because a *Hustler* parody suggested that he had sex with his mother. Neuborne argued that the *Hustler* article fell within the bounds of legitimate parody of a public figure protected by the watershed *New York Times v. Sullivan* case. While a lower court sided with Falwell, the Supreme Court upheld Flynt's First Amendment rights.

But Neuborne the lawyer's political leanings did not stop Neuborne the actor from being terrier-like in his defense of Falwell. Indeed, he recalls that the script had a courtroom cross-examination that fell flat and Forman allowed him and actor Woody Harrelson to ad lib their exchanges in a more aggressive fashion.

"I was behaving the way I behave in court, pressing Harrelson the way I'd press a reluctant witness," Neuborne said.

At one point, Neuborne complained to Forman that the legal arguments his character was making were rather flimsy, giving the philosophical debate within the movie an imbalance. Forman's tart response was: "You've gotten so Hollywood. All you want is more lines for your character."

Clockwise from top left: Neuborne with Melvyn Weiss ('59) and soon-to-be Senator Hillary Clinton; his wife Helen Redleaf Neuborne; teaching at NYU School of Law; inset: as a baby; father, Sam, with Navy frogman unit in WWII; as prosecutor of George III during a mock trial at an ABA meeting in London in 2000; daughter Ellen with her husband, David Landis, and their children, Henry and Leslie, in 2002; late daughter Lauren in front of Sage Chapel at Cornell University where she delivered a sermon at the Alumni Memorial Service in 1996; in Berlin, Germany at the signing of the agreement creating the German foundation "Remembrance, Responsibility, and the Future."

that the needs of elderly American survivors, protected by this country's social safety net, were not as profound as those of 135,000 elderly Soviet survivors, who lack such basics as food, winter fuel, and emergency medical care.

As if that case were not consuming enough, Neuborne also was a principal counsel representing slave laborers owed money by German industry and then became one of two U.S. trustees of the German Foundation, which is now distributing the $5.2 billion in compensation. Both Holocaust cases involved many flights to and from Europe, and Neuborne admitted in a conversation last February that he was tired and "very rundown."

How does he conduct two or three careers at once—lawyer, teacher, writer? Neuborne self-effacingly credits the help of his Brennan Center research assistants and the computer access arranged for him by NYU through which he can connect to relevant databases anywhere in the world. But he also admits that he permits his work to occupy much of what, to another human being, would be free time.

"We can't go to a baseball game because they won't let black people play," Neuborne's father told him. "We don't support that." But Burt remembers fondly that his dad did take him to see a Negro League game between the Homestead Grays and the Cuban X-Giants.

"I work all the time," he said. "I cannot remember a weekend I haven't worked a very substantial part of the weekend. When I'm working on a case that I care deeply about it's the closest thing to me to being creative. I would have given anything in my life to be a writer or a painter, but the talent that was given to me was to be an imaginative lawyer—and I put that imagination at the service of issues I care deeply about."

Even when supposedly relaxing at their summer house in the Hamptons, he and Helen Redleaf Neuborne, his wife of 42 years who is now a senior program officer at the Ford Foundation specializing in poverty work, have what they call "study dates." They will sit in the same room with a fire going and take out their laptops. "And we'll be very happy," he said. "We spend four or five hours together, close the computer, go out to dinner and feel terrific."

He has been able to continue working this hard despite open-heart surgery in 2002 and a tragedy that has cast a shadow over his autumnal years. Lauren, one of his two daughters and a rabbinical student at Hebrew Union College, died suddenly in 1996 at the age of 27. She had a heart condition that required a pacemaker and a misfiring brought on a massive heart shock. For months afterward Neuborne walked the streets of Greenwich Village, crying. Friends told him to take the Holocaust cases to find something to animate him again, and it was more than a coincidence that those cases connected him to his daughter's interest in Judaism. "The reason friends urged me to take this was I was in despair, I was just in despair," he said.

Neuborne's older daughter, Ellen, her husband, David Landis, and two children, Henry, 9, and Leslie, 5, moved from Washington to New York to be near him. "That has been a salvation," he said.

The first of four children, Neuborne was born in the Riverdale section of the Bronx on New Year's Day, 1941, an event he likes to view with a dose of wit. "Even then I was a bad tax planner," he said. "I deprived my father of his tax exemption for 1940." His family soon moved to Greenpoint, Brooklyn, and moved again when he was four years old to Queens.

Young Neuborne was close to his maternal grandfather, Louis Danovitch, an immigrant from Odessa, Ukraine, who taught him how to read the stock tables and gave him a taste for intellectual seriousness. He also gave Neuborne's father, Sam, a tailor, a job managing his sportclothes factory loft.

Sam, who died five years ago, was clearly the strongest influence in Neuborne's life. He was the kind of principled individual who after the atomic bombing of Hiroshima and Nagasaki returned his war medals to the Pentagon. But he was also a more interesting puzzle, a political leftist who at the same time was a crack swimmer and Navy frogman—an underwater demolition specialist—during World War II. In fact, he had a front-row seat at the D-Day invasion, having been sent into Omaha Beach hours before the actual invasion to blow up the spikes Germans had planted underwater to tear the bottoms out of Allied landing craft. Later, he visited a liberated concentration camp and returned from Europe telling Burt that he would "never set foot on the continent of Europe again."

During the war, Neuborne's mother, Sylvia, promised that when his father returned he would take Burt to a Major League baseball game. But when the chance came his father declined. "We can't go to a baseball game because they won't let black people play," he told his son. "We don't support that." But Burt remembers fondly that his father did take him to see a Negro League game between the Homestead Grays and the Cuban X-Giants.

Though his dad believed religion did more harm than good, Burt remembers being bar-mitzvahed in a storefront Conservative synagogue as "an affirmation of the right of Jews to continue to exist." Whatever his political sympathies, he read a wide assortment of writers; some of Neuborne's most indelible memories are of reading Dos Passos, Steinbeck, Hemingway, and Dreiser with his father. Today, Neuborne's taste in books ranges widely, from Gabriel Garcia Marquez to Seamus Heaney to Anthony Trollope. "Till he died there was always a book the two of us were reading together," Neuborne said of his dad. "He also got huge pleasure out of my academic career—when I became a teacher it was a fulfillment of his wish."

His mother, Sylvia, spent her time caring for her home and giving her children a deep sense of affection. "If I had turned out to be a terrorist, my mother would sit on this couch and tell you that terrorism was the right thing to do," Neuborne said. The feminist era did not deter her from her traditional convictions. Neuborne, whose wife, Helen, was the long-time executive director of the NOW (National Organization for Women) Legal Defense Fund, tells of once growing annoyed at seeing his mother fetching his father's food and cutting it up at a wedding.

"I finally said to him, 'You don't have legs? You can't get up and get your own food?' " Neuborne recalled. " 'Helen is going to kill you.' "

His mother shot back: "Shut up. I don't need anybody to tell me I can't get my husband's food." She died at 86 in 2001, and Neuborne thinks that the fact his father died two years before was not irrelevant. "There's a price to having a great marriage," he said. "You're so fused with the other person you can't exist without them."

In his teens, despite the budding concern about the abuse of black civil rights and the excesses of the McCarthy era, Neuborne was not politically active. On Sundays, though, he would take an F-train to Washington Square Park to hear Allen Ginsberg and other Beat poets read at the fountain.

"I thought that was the center of the universe," he recalled. "There were only two places—Washington Square Park and Paris. There's a wonderful sense of closure that I really feel. When I was a boy, if you had told me that I would some day do what I do, I would say it is so far out of my reach that it is utterly incomprehensible. I walk through the park every night when I go home."

His parents had wanted their only son, the first of his family to go to college, to be a doctor, so in 1957 he entered Cornell at age 16 as a pre-med. But by junior year, his mediocre science grades and physical clumsiness made him wonder if medicine was his calling. In a comparative anatomy class, he remembered, he reached for a dead shark specimen in a tank filled with formaldehyde. "I was so nervous and tense about being there that I fell into the formaldehyde. I stank for weeks. No matter what I did I couldn't get the smell off." In organic chemistry, he smashed a glass globe and splashed his eyes with sulfuric acid. "I thought, 'Somebody's trying to tell me something.' "

He finally told his parents that he couldn't be a doctor, but that perhaps he would become a lawyer. "My father said, 'Don't be a lawyer, you'll sell insurance for the rest of your life.' In the Depression, the people he knew who went to law school wound up selling insurance."

He chose law because it was an intellectual field that allowed you "to live like a gentleman"—comfortably but not lavishly. (He points out that he harbored such notions before "the Rolex years" of the 1980s, when the wave of mergers made lawyers wealthy and changed earning expectations.) He met his wife at Cornell; she was a sophomore and he was a junior who belonged to Tau Epsilon Phi. "We were the squarest pegs in the squarest holes," he said. "My fraternity was the last fraternity to serenade a sorority." And, though his contemporaries included fellow New Yorker Andrew Goodman and Cornell classmate Michael Schwerner, who went south to register voters and were slain and buried in Mississippi, Neuborne did not participate in the civil-rights movement in a full-throated way.

Instead, he graduated in February 1961 and joined the Army Reserves, spending seven months at Fort Dix, where he was known as the "college idiot" because he couldn't take his rifle apart. He then entered Harvard Law School while his wife, who had better grades and spoke three languages, went to work as a secretary to support him. "I loved Harvard," Neuborne said. "It was a place of great intellectual excitement."

He then joined a small Wall Street firm, Casey, Lane & Mittendorf, choosing tax work because, he confesses, that was the quickest route to a partnership. It was happenstance that brought him into civil liberties work—a lawyer in his Reserve unit was active in the NYCLU. Neuborne started doing briefs for the NYCLU at night and, by 1967, he realized he was "intrinsically out of place" in his day job. "I was uncomfortable spending all my energy defending very privileged people in ways that reinforced their privilege," Neuborne said. (He took a leave of absence that the firm jokingly extended for 25 years.)

In those days, the NYCLU and ACLU were both located in a building in the Flatiron district honeycombed with left-wing organizations. Aryeh Neier was the NYCLU director. Ira Glasser was associate director. Ruth Bader Ginsburg was a director of the ACLU's women's rights project. "By the second day I knew this was what I was going to do," said Neuborne.

The years between 1967 and 1973, when Neuborne served first as the NYCLU's staff counsel and then as the ACLU's assistant legal director, were heady times and Neuborne talks about them with brio. "It was the Vietnam era, the high point of the egalitarian revolutions, and you couldn't lose. You threw something into court and you won. We used to sketch things out over lunch in the delicatessen. We developed something—I still remember writing it on the napkin—the enclave theory of constitutional justice. What we tried to do was to identify enclaves in American life from which the constitu-

ON-CAMPUS CAMEO:

New ACLU Student Chapter Sponsors Lively Debate

The Law School's newest student group, a chapter of the American Civil Liberties Union, hosted a debate on campaign-finance reform for its inaugural event this spring. Burt Neuborne, the John Norton Pomeroy Professor of Law and legal director of the Brennan Center for Justice, faced off against long-time friend and colleague Joel Gora, a law professor at Brooklyn Law School and general counsel to the New York Civil Liberties Union.

The topic: campaign-finance reform and the First Amendment. Professor Neuborne, a national leader in the effort to reduce the role of money in politics who helped craft the Supreme Court brief in favor of the McCain-Feingold campaign-finance reform bill, argued that America's commitment to political equality requires the government to prevent wealth from distorting democracy. He stressed the risks to democracy if nothing is done to limit the power of money to buy political influence. "People think voting doesn't matter because money talks and they don't think they can have an impact," he said. "If we can't get public funding, we have to have limits ... or we're going to condemn ourselves to a slow erosion of democracy."

Professor Gora, a ground-breaker in the fight against restrictions on campaign funding (which his organization considers a violation of the First Amendment) argued that America's commitment to freedom of speech requires the government to stay out of regulating political communication. He stressed the dangers of allowing government to regulate something as crucial as campaign speech. "What is the best way to run our democracy?" Gora asked. "We differ on whether limiting funding is the way to achieve it. Free speech and funding First Amendment rights are not the enemy of democracy—they're the engine of democracy."

The debate was heated but good-humored. Gora noted that Neuborne had signed the brief in *Buckley v. Valeo* back in 1976, a case in which the lawyers argued there should be no limit on campaign finance. Neuborne countered by reminding Gora that one is never too old to reject past errors. The two old friends closed by agreeing to disagree—and to enjoy their exchanges.

tion had been shut out: prisons, schools, mental institutions, the military. The students' rights cases came off of that napkin. The mental commitment cases. All of the cases dealing with free speech in the military."

He is proudest of the cases that challenged the Vietnam War, because for a long time "they were existential cases: they couldn't be won, but they had to be brought." Neuborne also handled school desegregation cases, writing a Supreme Court amicus brief for the integration of the Charlotte-Mecklenburg, North Carolina, school system. There, too, his father's influence made itself felt. Neuborne can never forget how as a 13-year-old in 1954 he traveled with his father on a business trip to Charleston, South Carolina, and there saw black-bordered newspapers announcing the Supreme Court's ruling in *Brown v. Board of Education*. His father happened to visit a local black minister that night and Neuborne remembers the jubilation.

"You have to look at *Brown* as a symbol," he said. "It sent an enormously important message around the world that the law was not what Marx said. Marx said that law was a device to keep the weak in place, that the dominant economic class would use law as a club to prevent competition. Brown allowed the United States to compete in the Cold War with a different vision of law—that one could actually change the status quo on behalf of the poor and the weak. No one had ever thought about law that way. That set off a legal revolution in this country."

It was in 1972 that he began teaching as an adjunct at NYU, and by 1974 he was asked to teach Evidence full time. The 20-hour workdays of the previous few years—the Vietnam War and civil rights cases and briefs flowing out of Nixon's impeachment—helped spur his decision. So did his wife's graduation in 1974 from Brooklyn Law School. Neuborne hoped that teaching law would allow him more time with his two young daughters while Helen launched her career as a Legal Aid lawyer for poor children. He took another leave of absence. "I didn't tell them about my history of leaves," he said.

Although he returned to the ACLU as national legal director from 1982-86, teaching became the center of his work life and has remained so.

"I love this place," he said. "It has tolerated what is a quirky career. I don't have a traditional academic career in that I don't spend my time in my office writing law review articles. I actually go into court and try to put my ideas into practice. Very few schools would have tolerated that. I would have been told by many of my peers to make a choice."

Neuborne has been fortunate that during his 30 years at NYU, the Law School has been on an upward spiral. The school acquired the pasta-making company C.F. Mueller in 1947, and in the late 1970s sold it for $115 million, netting a nice portion of the profit, even after the University got its share. The Law School's administration wisely used the money to provide scholarships for top students, reward deserving faculty, improve its tuition subsidies and loan forgiveness program, and build more inviting housing. The fact that New York became a nicer place to live has not hurt. And NYU benefited by being among the very first law schools to be genuinely open to women.

"When five percent of the Harvard class was women, we were making it known in the 1970s that we were happy to have a 50-50 class," Neuborne said. "We mined that vein of enormous talent of women who had missed the boat when it wasn't possible for them to get into law school."

Neuborne is not the reflexive liberal that he may appear to be, nor is he as convinced as he once was of the sweeping power of a legal decision that squares with his ideology. As a young lawyer, he was champing at the bit to challenge every wrong that came down the pike, but experience has taught him that even a favorable decision doesn't always work out the way one hopes. *Brown*, he said, ended state-supported apartheid in many areas, but it also showed the limits of the law. "You can't say that it successfully led to school integration," he said. We're still a society where by and large people are educated with their own race. It's housing patterns that do it now. So *Brown* was a lesson about what law can't do, the limits of the law."

He also takes some nuanced views on more recent issues. In a conversation last winter just after the Massachusetts Supreme Court said that the state would have to marry gays equally with heterosexuals, Neuborne did not leap to praise the ruling. "I think I'm getting old," he confided. "I think you must provide some form of relationship for gays that is identical to marriage—in terms of property and any kind of legal formulation. Whether you have to call it marriage is a different story. It may be that marriage has a religiously based connotation. Marriage was a sacrament before it was law. And the notion that the law will now turn marriage into something that historically it was not simply to achieve equality strikes me as at least problematic."

"When five percent of the Harvard class was women, we were making it known in the 1970s that we were happy to have a 50-50 class," Neuborne said.

Neuborne doesn't look back with regret at not having built a career as a fulltime lawyer. The panel discussion on anti-Semitism drew powerful lawyers from Wall Street and midtown, yet Neuborne seemed completely in his element. "I'm certainly not intimidated," he said. "My career as an academic has also included so much litigation, so much actual lawyering that I move very easily in that world. That's a world where I think people respect me and I respect them. They know I know how to do what they do."

His major regret, he said, is "the unwritten scholarship." He has written perhaps 50 papers, and the piece he is proudest of was one in 1977 about "The Myth of Parity," that business between federal and state courts shouldn't be allocated randomly since each set of courts has certain advantages. But overall, he describes his scholarship as "adequate—I give it a B plus, not in quality, but in quantity."

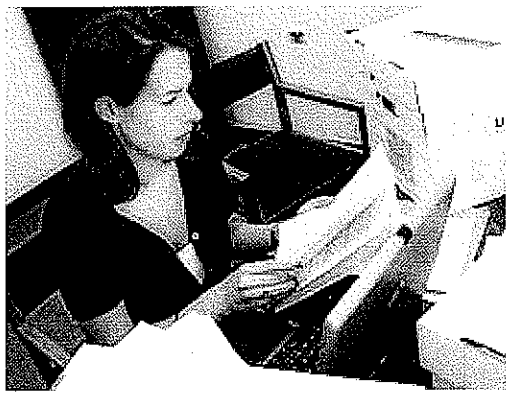
"For all my talk about being a litigating academic I still believe that the principal and irreducible responsibility of an academic is to produce scholarship," he said. "Our major role is to comment critically on the world in which we live."

"I question whether my litigation victories are more ephemeral than hard thinking would have been, and whether putting my energy into the production of serious thought would have changed things more than winning the lawsuits." Still, such musings don't diminish his retrospective savoring of his career as a law professor. "To be at NYU during the years I've been here," he said, "is like being on a roller coaster that only goes up."

JOSEPH BERGER HAS BEEN A REPORTER AT *The New York Times* FOR MORE THAN 20 YEARS. BERGER IS ALSO THE AUTHOR OF *Displaced Persons: Growing Up American After the Holocaust* (SCRIBNER, 2001).

ILLUSTRATION: NEUBORNE FROG-HUNTING WITH HIS GRANDSON, HENRY; AS A CHILD IN UNIFORM DURING WORLD WAR II; WITH BRUCE SEVERY, KURT VONNEGUT, JUDITH RESNIK ('75), AND ALAN LEVINE IN NORTH DAKOTA IN 1975 ON THE EVE OF TRIAL. NEUBORNE REPRESENTED SEVERY, A HIGH SCHOOL TEACHER, WHO HAD BEEN FIRED FOR TEACHING VONNEGUT'S *Welcome to the Monkey House*.

Students Help Holocaust Victims Recover Funds



First-year law student Robin Zimmerly trained and coordinated volunteers for the project.

In an empty office now used by the Public Service Center for storage, first-year law student Robin Zimmerly shuffles through a mass of paperwork that she has volunteered to help process. There are 2000 forms in all, some of which Zimmerly will enter into an online database; the work can be tedious, but the content of the forms rarely is. The papers are questionnaires filled in by Holocaust survivors, and they represent the latest step in the settlement of several class action lawsuits first filed against Swiss banks in late 1996 and early 1997 in an effort to recover victims' assets. The Holocaust Reparations Pro Bono Project, as students and Public Service Center staff have dubbed the local pro bono effort, has given students a chance to work on a case that has international and historical implications.

"When you learn about something like the Holocaust, six million people is kind of hard to get your mind around." said first-year law student Jen Linker, a volunteer who estimates that she has entered information from 250 forms into the database so far. "It's definitely a more personal look at the Holocaust."

The lawsuits alleged that Swiss banks knowingly retained and concealed assets of Holocaust victims and helped the Nazis by accepting and laundering illegally obtained loot and slave labor profits. The banks agreed to settle the lawsuit in 1998, guaranteeing $1.25 billion for the plaintiffs and class members in exchange for waiving future legal claims against Swiss banks and most Swiss business and government entities. Since then, lawyers and firms involved in the case have advertised the result of the suits and have gathered information from Holocaust survivors now living in the United States through initial questionnaires.

Close to 600,000 questionnaires were filled in by survivors or their heirs, 2000 of which made their way to the Law School after Zimmerly saw the project listed on a Public Service Center email. In February, she contacted Deborah Sturman, who was appointed Special Liaison Counsel by the Court. Sturman asked Zimmerly to train and coordinate students at Virginia to work on the project; first, Zimmerly made a trip to Washington D.C. in February to pick up the eight boxes of paperwork. Once she and other students started working on the project, they realized the forms often told dramatic tales of Holocaust survivors.

"These are people that are sharing stories that otherwise you'd never hear," Zimmerly said. "It's almost like reading history."

While many questionnaires include survivors' narratives of their experiences during the Holocaust or descriptions of their stolen assets; other forms have little information because the survivors were too young to remember the years in question. Linker called the forms a "testimony to what happened. It's a dying generation that went through it."

One survivor's questionnaire made an impact on first-year law student Doug Plante. The woman grew up in Poland, where her father owned a shoe store. He and her brother were killed by the Nazis, and the family's possessions were stolen.

"It's not something you can compensate them for—it's so much more traumatic than assets in a bank," said first-year law student Jen Linker, a volunteer for the project. Linker said the project offered students flexibility because volunteers could work on it whenever they had access to a computer.

"What made the most impact was that she included copies of pictures of her family from when she was a little girl," Plante said. "It's difficult to see the pictures of the happy family before the war, and to know that their life would be torn apart just a few years later. The narrative was much more vivid and unsettling by the inclusion of the pictures, and it made something so incomprehensible seem more real."

Students working on the project review the questionnaires to determine what category a survivor belongs in: Deposited Assets, for those who have unrecovered funds or valuables in Swiss banks; Slave Labor Class I, for those who worked involuntarily for little or no pay under the Nazi regime; Slave Labor Class II, for those who worked involuntarily for little or no pay for Swiss-owned or controlled companies; Refugees, for those who attempted to flee Nazi persecution but were denied entry to Switzerland or were admitted but abused or mistreated; or Looted Assets, for those whose assets were stolen by Nazis and later transacted through Switzerland. Victims or targets of the Nazis who have insurance claims against some Swiss entities are also included in the claim. In addition to categorizing each form's claim, students also enter any information that could help verify the survivors' assets or accounts. Those with verifiable accounts will receive money from the settlement first. About $800 million of the settlement has been allocated to account-holders.

"There's a sense of satisfaction in knowing that people who deserve money are getting compensated for some of their losses," Zimmerly said.

Sturman said 30 law schools are or were involved in processing the forms, in addition to a number of individual law students and attorneys. At least four law firms, NYU Professor Burt Neuborne and several others have been deeply involved in the case, she said. All worked pro bono.

Sturman expects that the entire project will not be finished by the end of the year; about 50,000 forms have been entered into the database so far. Students at the Law School have devoted over 80 hours to the project, but Zimmerly expects she alone will devote 50 to 70 more hours after exam finals, when her schedule clears.

First-year Law student Rina Kushner said working on the case has helped her realize the scope of what lawyers working on the case have accomplished.

"It's giving these people a voice who might not necessarily have had a voice on their own," she said.

▫ REPORTED BY M. WOOD

Law Grounds News Index

THE PLAIN DEALER

Lawyers want millions as cut of Holocaust settlement

Tuesday, August 15, 2000

By STEVE CHAMBERS
NEWHOUSE NEWS SERVICE

On April 12, 1997, Arthur Bailey, one of the dozens of lawyers who helped negotiate a $1.25 billion settlement finalized last month between Swiss banks and **Holocaust** survivors, bought a copy of the book "Nazi Gold" by Tom Bower and spent 8.6 hours reviewing it.

Cost to plaintiffs: $2,365, or $275 an hour.

The item is one of hundreds included in a $13.5 million request for legal fees now before the federal judge overseeing the settlement. That price tag does not include $3 million that attorneys who volunteered their services have asked to be funneled to specific charities, or the $12 million spent to locate plaintiffs.

Some **Holocaust** survivors and Jewish leaders say they are outraged at such requests. They argue that chasing clients and fees in the wake of one of mankind's worst atrocities degrades the memories of the victims.

"We said from the beginning that the lawyers should be acting **pro bono,"** without compensation, said Elan Steinberg, executive director of the World Jewish Congress. "No one should profit from the **Holocaust.** But even more troubling to us than the application for fees are some of the outrageous charges they have made."

In addition to Bailey's time spent reading books, other lawyers' requests include compensation for a 30-minute interview with the Washington Post, a nearly $90,000 bill for photocopying, and billings for lengthy telephone consultations between lawyers.

Many of the attorneys who are working **pro bono** are upset, also, that colleagues would accept money for pursuing what may be the most clear-cut human rights case in the history of the courts.

"They think they get up in the morning and think about the case in the shower and someone should pay them for it," said **Burt Neuborne,** a New York University law professor who headed the settlement team assembled at the behest of the judge.

But some of the same lawyers who have expressed indignation in the case, including Neuborne, will share $50 million being set aside for fees in a separate case, the $4.8 billion settlement with the German government over its use of slave labor during the war.

The legal maze began with the start of negotiations between world Jewish organizations and the Swiss banks in 1995 over reparations for survivors. Jewish leaders were livid about decades of stonewalling by Swiss bankers, who sometimes demanded to see death certificates for those lost in the concentration camps before they would consider heirs' claims to family fortunes.

As these negotiations grew heated, the Clinton administration declassified and released reams of documents that helped detail the looting of Jewish assets during the war and the Swiss purchase of Nazi gold - some of it obtained by melting down the dental fillings of Jewish victims.

Lawsuits apply pressure Ensuing recriminations touched off a flurry of lawsuits on behalf of survivors by at least 27 American lawyers. Those lawsuits begat other lawsuits: against top German companies that had employed slave labor during World War II, insurance companies that refused to pay off policies on **Holocaust** victims, various European governments and other alleged profiteers.

Under mounting pressure, the Swiss proposed the settlement in 1998, helping spur other settlements. It was made final last month, although the legal fees and a disbursement plan are still outstanding.

Many of the same lawyers and plaintiffs are involved in several cases, some still pending, so it is difficult to determine precisely who will benefit in the end.

Several lawyers involved in these ongoing talks defended the legal fees, saying that people seeking justice unsuccessfully for more than five decades are finally ready to realize it.

"Who will get justice in the future if we expect everyone to work for nothing?" asked Edward Fagan of Livingston, N.J., whose $4 million request for fees is the largest in the Swiss bank case.

On July 17, at a ceremony in Germany announcing the slave-labor settlement, Deputy U.S. Treasury Secretary Stuart Eizenstat, a key negotiator in the case, credited lawyers with winning justice for hundreds of thousands of survivors.

Many survivors, relieved that someone is finally being made to pay for the theft of Jewish fortunes, express heartfelt gratitude that lawyers not only listened but were able to squeeze concessions from the bankers and governments of Europe. But others term the settlement funds "blood money" and argue it shouldn't be shared by anyone other than survivors.

Several people involved in the case said they don't expect U.S. District Judge Edward R. Korman to be generous when it comes to legal fees. The judge is expected to hold a

hearing in Brooklyn sometime this fall to address fees. He also has to rule on a plan being devised by a court-appointed "special master" for disbursing the money.

"Objections regarding attorneys' fees are premature," the judge said in a one-paragraph reference in his 55-page decision. "Although fee applications have been filed [and do not appear to exceed 1 percent of the total recovery if the applications are granted in their entirety], I have not yet made any decision regarding those applications."

Sorting the claims Like other class-action suits, the Swiss banks' case and its accompanying **Holocaust**-era cases have presented logistical nightmares. Korman, faced with sorting out countless competing actions, asked Neuborne to put together a settlement team that included 10 lawyers.

Even some who are highly critical of Fagan - whose frequent news conferences and combative personality alienated most of his fellow lawyers - concede that his high-profile behavior might have served to put pressure on the banks.

Not everyone agrees, however, that it was brilliant legal strategizing that led to the settlement.

Steinberg credits sanctions threatened by then-Sen. Alfonse D'Amato, New York Republican, and New York City Comptroller Alan Hevesi with forcing the issue. The banks settled days before the sanctions were to take effect.

Regardless of how much money goes for legal fees, the problem of disbursing the remainder is no easy matter. The number of heirs expected to make a case for money deposited in Swiss banks is expected to number in the tens of thousands. But there are half a million more prospective plaintiffs, from slave laborers to people rejected entry into Switzerland during the war.

The legal team already spent $12 million - more money that comes out of the settlement and already approved by the judge - to advertise the settlement worldwide and process roughly 600,000 questionnaires from potential plaintiffs.

The judge's special master, Judah Gribetz, has until Sept. 1 to finish work on his distribution proposal, and the judge has stressed that he wants to begin distributing money to aging survivors as quickly as possible.

04-1898(L), 04-1899(CON)-cv

To be heard in tandem with 04-2466-cv, 04-2511-cv

United States Court of Appeals

for the

Second Circuit

Samuel J. Dubbin,

Plaintiff-Appellant,

Pink Triangle Coalition, Karl Lange and Pierre Seel,

Interested Parties-Cross-Appellants,

-v.-

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

LEAD SETTLEMENT COUNSEL'S BRIEF OPPOSING THE HOLOCAUST SURVIVORS FOUNDATION USA, INC.'S OPPOSITION TO THE DISTRICT COURT'S ALLOCATION OF THE SETTLEMENT FUND

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COUNTER-STATEMENT OF THE CASE

A. THE NATURE OF THE SWISS BANK LITIGATION

While the Swiss Bank litigation has involved powerful moral, political and emotional elements,[7] the case was a carefully crafted exercise in the rule of law. Recognizing that crucial fact is the key to understanding Chief Judge Korman's meticulous administration of the Swiss bank settlement.[8]

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[7] The effort has been chronicled in numerous books and a host of articles. *See, e.g.* Michael J. Bayzler, *Litigating the Holocaust*, 34 U. Rich L. Rev. 1 (2000); Burt Neuborne, *Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts,* 80 Wash. U. L. Q. 795 (2000); Michael J. Bayzler, *Holocaust Justice: The Battle for Restitution in America's Courts* (2003); Stuart E. Eizenstat, *Imperfect Justice* (2003); Jane Schapiro, *Inside a Class Action: The Holocaust and the Swiss Banks* (2003); John Authers and Richard Wolffe, *The Victim's Fortune: Inside the Epic Battle Over the Debts of the Holocaust* (2002). The allocation issue before the Court in 04-1898 was the subject of an exchange between Lead Settlement Counsel and Professor Thane Rosenbaum in an issue of *The Jewish Week*, Vol.216, No.49, May 7, 2004, 1, 18.

[8] Reported opinions in the Swiss banks case include: *In re Holocaust Victim Assets Litig.,* 1998 U.S. Dist. LEXIS 18014 (E.D.N.Y. Oct. 7, 1998)(joint stipulation describing settlement in principle); *In re Holocaust Victim Assets Litig.,* 105 F. Supp. 2d 139 (E.D.N.Y. 2000)(upholding fairness of settlement); *In re Holocaust Victim Assets Litig.,* 225 F.3d 191 (2d Cir. 2000)(upholding class definition); *In re Holocaust Victim Assets Litig.,* 2000 WL 33241660 (accepting Special Master's recommendation on allocation); *In re Holocaust Victim Assets Litig.,* 14 Fed. Appx. 132 (upholding plan of allocation); *In re Holocaust Victim Assets Litig.,* 282 F.3d 103 (2d Cir. 2002)(dismissing appeal from Slave Labor II self-definition requirement; vacating Slave Labor II class definition for additional proceedings – resolved on remand by stipulation); *In re Holocaust Victim Assets Litig.,* 270 F. Supp. 2d 313 (E.D.N.Y. 2002)(denying risk multiplier; setting attorneys' fees); *In re Holocaust Victim Assets Litig.,* 256 F. Supp. 2d 150 (E.D.N.Y. 2003)(requiring payment of compound interest on escrow fund); *In re Holocaust Victim Assets Litig,.* 302 F. Supp. 2d 89 (E.D.N.Y. 2004), *reh'g denied,* 311 F. Supp. 2d 363

of looted art; (2) the scope of insurance releases; and (3) the means of obtaining information needed to administer the Deposited Assets claims process. Accordingly, at the close of the fairness hearings, Chief Judge Korman directed Lead Settlement Counsel to re-open negotiations on those issues. *See In re Holocaust Victim Assets Litig.*, 311 F. Supp. 2d at 370.

Over the next seven months, the parties hammered out Amendment 2 to the Settlement Agreement dealing with the return of looted art,[11] the availability of information needed to resolve Swiss bank account claims, and a modest insurance claims program involving two Swiss insurance companies. JA651-670. Once Amendment 2 to the settlement agreement had been signed, Lead Settlement Counsel moved for an order declaring the settlement fair and reasonable within the meaning of Rule 23(e). JA497-520, 527-530, 616-642.

Chief Judge Korman upheld the settlement's fairness on July 26, 2000. *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139 (E.D.N.Y. 2000). The District Court found that the settlement agreement was the result of vigorous arms-length bargaining and, citing this Court's opinion in *In re "Agent Orange" Products Liability Litigation,* 818 F.2d 145, 170 (2d Cir. 1987), held that the proposed bifurcated structure was appropriate because the complexity of any allocation and

[11] Replevin actions in the country where the art is currently found, or from where it was looted were exempted from any release.

distribution process made it impossible to inform individuals of the precise amounts they would receive from the settlement prior to the opt-out date.

Moreover, the District Court found that the procedure for determining allocation in this unique proceeding involving more than one million Holocaust survivors and heirs was fair and reasonable because no structural conflicts relating to economic self-interest prevented Lead Settlement Counsel, who had waived fees in connection with obtaining the settlement, from assisting all members of the class in communicating directly with the Court and the Special Master.

3. Development of the Plan of Allocation and Distribution

On March 31, 1999, Chief Judge Korman appointed Judah Gribetz as a Special Master and directed him to develop such a plan. JA4944 - 4947.

Over the next 18 months, Special Master Gribetz conferred broadly with every interested person who wished to discuss the allocation issue and conducted an intense investigation into the facts and circumstances surrounding plaintiffs' allegations. On September 11, 2000, Special Master Gribetz released a two volume report summarizing the legal and factual bases underlying the claims of each settlement class, and recommending a plan of allocation and distribution. *See generally* JA671-1742. The Special Master found that the claims of the Deposited Assets/Bank Account class were legally and factually considerably stronger than the claims of the remaining four settlement classes. *See* JA729-730, 809-812.

Looted Assets class for *cy pres* relief of the poorest survivors to a total of $205 million.

The tax exempt interest also permitted the Court to increase individual payments to approximately 165,000 surviving slave laborers from $1,000 to $1,450, and also to increase payments to surviving refugees (from $500 or $2,500 to $725 or $3,625, depending on whether the refugee was admitted and mistreated or expelled).

Plaintiffs' court-awarded counsel fees were limited to approximately $6 million, much of which was donated to charity or transferred to individual survivors. *See In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d at 146; *In re Holocaust Victim Assets Litig.*, 270 F. Supp. 2d at 322 (E.D.N.Y. 2002); *In re Holocaust Victim Assets Litig.*, 302 F. Supp. 2d 89, *reh'g denied*, 311 F. Supp. 2d 363 (E.D.N.Y. 2004)(denying fee application).

The core of the implementation process has, however, been the District Court's efforts to distribute settlement funds to members of the class in accordance with their legal claims.

A. The Deposited Assets Class

The Deposited Assets claims program has made heroic efforts to return the $800 million allocated for payment of claims to Holocaust-era Swiss bank accounts to their true owners. CRT II has published information relating to 21,000

organizations listed in the caption,[20] they lack standing to object to the District Court's *cy pres* allocation orders. *In re Holocaust Victim Assets Litig.*, 225 F.3d 191 (2d Cir. 2000); *In re Holocaust Victim Assets Litig.*, 302 F. Supp. 2d at 115-17. Allowing advocacy organizations like HSF to file allocation objections on behalf of unidentified class members simply encourages ideological and entrepreneurial lawyers to treat the Rule 23 process as a political forum or an economic opportunity. *See Id.* at 115-16.

Most of the organizational appellants in 04-1898 (HSF) do not even attempt to meet the minimum test for organizational standing established in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977) by demonstrating on the record that (1) identifiable individual class plaintiffs exist who are members of the organization in question; and (2) circumstances exist rendering it appropriate for the advocacy organization to act as a surrogate for the individual class member. The lack of standing is particularly dramatic in connection with HSF, which consists solely of other organizations in a baroque configuration that requires a telescope to find a flesh and blood person in the layers

[20] The caption in the three related appeals before the panel include at least 34 advocacy groups purporting to appear as appellants.

*1 (S.D.N.Y. Feb. 22, 2001), *aff'd* 42 Fed. Appx. 511 (2d Cir. 2002), stand for the proposition that a lawyer with a substantial economic stake in achieving a settlement cannot bargain away the legal rights of a segment of the class without consideration. In this case, no one's rights are being bargained away by an economically conflicted lawyer. Quite the contrary, the Circuit has already recognized that no member of the Looted Assets class possesses a legally cognizable individual stake in Looted Assets class funds because the enormous size of the Looted Assets class and the difficulty of administering an individualized claims program rendered it impossible to provide payments on an individualized basis. *In re Holocaust Victim Assets Litig.*, 2000 WL 33241660 (E.D.N.Y. Nov. 22, 2000), *aff'd* 14 Fed. Appx. 132 (2d Cir. July 26, 2001). Most importantly, the *cy pres* allocation formula at issue on this appeal was not developed by an economically conflicted lawyer, but by a Special Master and a District Judge engaged in an agonizing effort to allocate scarce funds to those who need them most. In fact, since American survivors have already received more than $125 million in distributions, and since the poorest American survivors will continue to receive between $700,000-800,000 for life, HSF cannot claim that survivors residing in the United States are completely excluded, as in *Super Spuds* and *Auction Houses*. HSF simply wants more at the expense of other, needier survivors.

it can hardly argue that American survivors have been shut out of any aspect of the Swiss bank settlement.

IV.

APPELLANTS' EFFORTS TO CHALLENGE THE BASIC FAIRNESS AND PROCEDURAL GROUND RULES OF THE SETTLEMENT ARE UNTIMELY, DISINGENUOUS, AND DEVOID OF MERIT

A. HSF'S CHALLENGE TO THE FAIRNESS OF THE SETTLEMENT'S STRUCTURE IS BARRED BY PRINCIPLES OF LACHES AND DIRECT ESTOPPEL

During the past three years, over $625 million has been distributed or committed pursuant to the existing ground rules in this extremely complex case. It would invite chaos to entertain HSF's belated challenge to the fairness of those ground rules, especially when the challenges are brought by parties and lawyers who unconditionally withdrew the identical objections more than three years ago, and who now seek to renew the objections only because the scrupulously fair allocation process they agreed to respect has not yet yielded results to their liking.

Thus, even in the absence of a more focused estoppel bar, under the doctrine of laches, it is simply too late to pose a challenge to the basic fairness of the settlement's structure. No objector can wait for three years while approximately $625 million is distributed or committed pursuant to a settlement agreement, and then decide to interpose fundamental fairness objections to the settlement's basic structure.

on whose behalf HSF purports to speak. In any event, the argument is untenable on the merits.

In *Hansberry*, the Supreme Court ruled that a single plaintiff could not adequately represent a class made up of persons with adverse interests. *See also Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). In *Amchem*, the Supreme Court held that when class counsel has a huge economic stake in achieving a broad class action settlement at the expense of one segment of the plaintiff class, Rule 23 forbids such an economically conflicted class counsel from compromising the interests of the disfavored segment of the class.

Distinguishing *Amchem*, Chief Judge Korman explicitly found that it would be possible to administer the Swiss bank settlement fairly without the undesirable social and economic consequences that would inevitably have flowed from pitting each category of elderly Holocaust survivor against the others in a war of all against all designed to allocate the proceeds of the settlement through classic adversary litigation. *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d at 150-151; JA497-520, 527-530, 616-642. Chief Judge Korman noted that, unlike *Amchem*, no structural conflict of interest existed between class counsel and any category of victims because Lead Settlement Counsel had no economic motive to favor one or another category of victims, or to sacrifice the interests of any group

of survivors in order to achieve a financially advantageous settlement. *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d at 146, 150-151.

Accordingly, the District Court requested Lead Settlement Counsel, with the assistance of other *pro bono* members of plaintiffs' Executive Committee, to serve the interests of all members of the plaintiff-classes without adopting an adversary posture towards any group of survivors.

The District Court appointed a neutral Special Master to prepare recommendations concerning allocation and distribution that would be subject to full consideration and discussion by the plaintiffs and an open hearing prior to adoption by the Court. JA4944-4947. Lead Settlement Counsel was instructed to facilitate the ability of all class members to be heard by the Special Master prior to the recommendation of any plan. Most importantly, the members of the plaintiff-classes were asked to pre-commit themselves to the results of such a fair process without knowing the results in advance. *Uhl v. Thoroughbred Tech. & Telecommunications, Inc.*, 309 F.3d 978 (7th Cir. 2002)(upholding class action settlement where class members pre-commit to allocation process without knowing the amounts they will receive). Those persons unwilling to pre-commit themselves to the results of such a fair process were given the opportunity to opt out. *See Phillips Petroleum, Co. v. Shutts,* 472 U.S. 797 (1985).

Such a scrupulously fair process, devoid of structural conflicts of interest between lawyer and client, voluntarily accepted by the class members, and calculated to provide the fullest consideration of the allocation issues by two tiers of neutral arbiters aided by a Lead Settlement Counsel with a duty to assist all class members in communicating directly with the Court and Special Master, is the very epitome of due process under the unique circumstances of this historic settlement. *See generally, In re Austrian & German Bank Holocaust Litig.*, 317 F.3d 91, 102 (2d Cir. 2003); *In re "Agent Orange,"* 818 F.2d 179 (2d Cir. 1987); *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581, 589-90 (3d Cir. 1999); *In re Corn Derivatives Antitrust Litig.*, 748 F.2d 157, 165 (3d Cir. 1984)(Adams, J., concurring). Geoffrey P. Miller, *Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard*, U. Chi. Legal F., vol. 281 (2003); John C. Coffee, *Class Action Accountability: Reconciling Exit, Voice and Loyalty in Representative Litigation*, 100 Colum. L. Rev. 370 (2000); David L. Shapiro, *The Class as Party and Client*, 73 Notre Dame L. Rev. 913 (1998).

CONCLUSION

For the above mentioned reasons the appeal in 04-1898 (HSF) should be dismissed. In the alternative, the thoughtful exercises of discretion by the District Court should be affirmed in all respects.

Dated: New York, New York
August 23, 2004

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04-1898(L), 04-1899(CON)-cv

To be heard in tandem with: 04-2466-cv, 04-2511-cv

United States Court of Appeals

for the

Second Circuit

Samuel J. Dubbin,

Plaintiff-Appellant,

Pink Triangle Coalition, Karl Lange and Pierre Seel,

Interested Parties-Cross-Appellants,

v.

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

LEAD SETTLEMENT COUNSEL'S BRIEF IN OPPOSITION TO SAMUEL J. DUBBIN'S REQUEST FOR ATTORNEY'S FEES AND EXPENSES

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application, Mr. Dubbin sought approximately $3.6 million in legal fees, of which $600,000 were attributable to the insurance issue, and $3 million to his efforts to influence the Looted Assets allocation formula. *In re Holocaust Victim Assets Litig.*, 311 F. Supp. 2d 363. In addition, Dr. Weiss, a founder of HSF-USA (the principal appellant in 04-1898(L)), sought approximately $2.3 million in fees for research involving the WW II activities of European insurance companies. *Id.*

When the District Court reacted with incredulity to such a blatant effort to profiteer at the expense of the Swiss bank settlement, both Dr. Weiss and Mr. Dubbin reconsidered their respective positions. On March 25, 2004, Dr. Weiss, having obtained new counsel and having had an opportunity to review the District Court's March 9, 2004 opinion denying fees to Mr. Dubbin, withdrew his claim for $2.3 million for insurance-related research work. JA 7960.

On or about June 14, 2003, after the District Court had pointed out that Mr. Dubbin's original application for $5.9 million almost equaled the total fees paid to plaintiffs' counsel in this unique case,[3] Mr. Dubbin submitted an amended

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"SPA.HSF." Appellees have filed a Supplemental Appendix, cited as "SA," that includes relevant record material omitted from the Joint Appendix.

[3] The modest fee structure governing this case is described in *In re Holocaust Victim Assets Litigation,* 270 F. Supp. 2d 313 (E.D.N.Y. 2002). To date, plaintiffs' counsel fees have totaled approximately $6 million, with almost $2 million of that sum donated to charity or transferred to Holocaust victims. *See, e.g.*, JA 5981; 6141; 6156; 6466; 6680.

application, purportedly more in keeping with the settlement's modest fee structure, seeking approximately $550,000 for the purported value of legal services provided to Dr. Weiss in connection with the renegotiation of releases available to Swiss insurance companies. *See* JA 6695, 6699, 6708.

Mr. Dubbin's touted willingness to file an amended fee application more in keeping with the modest fee structure of this case turned out to be bombast. His amended fee application sought $550,000 for insurance-related work, just $50,000 less than the $600,000 sought in the original, bloated application. Moreover, Mr. Dubbin never formally withdrew his original request for $3 million for allocation-related services.

On March 9, 2004, the District Court rejected the portion of Mr. Dubbin's March 15, 2002 application seeking $3 million in fees for work on the allocation issue, finding that Mr. Dubbin's allocation-related work had not conferred a benefit on the plaintiff-classes. The Court promised an opinion on the insurance-related fee application in the near future. *In re Holocaust Victim Assets Litig.*, 302 F. Supp. 2d at 117.

On March 31, 2004, while Chief Judge Korman was completing work on the promised opinion dealing with Mr. Dubbin's amended application for $550,000 for insurance related services, Mr. Dubbin faxed yet a third version of his fee application to the Court, this time for $309,000, plus costs, in connection with his

CONCLUSION

For the above described reasons, the decision of the District Court should be affirmed.

Dated: New York, New York
August 23, 2004

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Counsel for Appellees

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

.....x

ROSNER et al. v. UNITED STATES

No. 01-1859-CIV
(SEITZ)

.....x

The undersigned, acting at the request of numerous members of the plaintiff-class residing in Hungary (hereafter "the Hungarian objectors"),[1] hereby submits this objection to the terms of the proposed settlement agreement:

(1) questioning the fairness of the proposed allocation formula adopted in connection with the settlement herein; and

(2) questioning the size of the pending attorneys' fee applications.

1. **Reservations Concerning the Proposed Allocation Formula**

The parties have determined that distribution of the settlement fund to persons whose property was located on the so-called Hungarian Gold Train is administratively unworkable because, at this time, it is impossible to ascertain their identities and to quantify their actual losses. Instead, the parties propose to distribute the settlement fund on a *cy pres* basis to aid surviving needy Jewish Nazi victims from Greater Hungary. No objection is asserted herein concerning the size of the settlement fund, or the thoughtful decision to devote the settlement fund to needy Jewish Nazi survivors from Greater Hungary. Nor is any objection raised to the proposal to provide modest awards to the named-plaintiffs whose efforts made this settlement possible.

[1] Written authorizations on behalf of eleven class members residing in Budapest are annexed hereto.

Unfortunately, however, the parties appear to have presented the Court with a flawed allocation formula that fails to effect an equitable worldwide allocation of the settlement fund. The proposed settlement agreement purports to allocate the settlement fund on the basis of raw population figures, based solely upon the estimated number of Jewish Nazi victims from Greater Hungary currently residing in each country throughout the world.[2] Such an exclusively population-driven allocation formula overlooks the fact that needy Hungarian Jewish survivors are not randomly distributed throughout the world on the basis of raw population figures. Rather, they are disproportionately clustered in countries such as Hungary where surviving Jewish Nazi victims have experienced particularly severe economic deprivation. Thus, to the extent that poverty among elderly Jewish Nazi victims is more intense and widespread in Hungary than in the United States and other developed countries, the raw population figures should be modified to account for the disproportionately high concentration of needy class members in Hungary. Otherwise, a disproportionate share of the settlement fund will be allocated to relatively prosperous nations like the United States with large Hungarian Jewish survivor populations, but relatively fewer Hungarian Jewish Nazi victims in great need. See *In re Holocaust Victim Assets Litig.*, 302 F. Supp.2d 89, *reh'g denied*, 311 F. Supp.2d 169 (EDNY 2004) (rejecting national population quotas as basis for allocating *cy pres* funds to needy members of the class).[3]

[2]The settlement agreement currently before the Court proposes the following national allocation based solely on the number of Jewish Nazi victims from Greater Hungary residing in each country: Israel (42.5%); Hungary (22.7%): United States (20.1%); Canada (6.1%); Australia (2.5%); Rest of World (6.1%).

[3]One of the class counsel herein, Mr. Dubbin, has challenged Chief Judge Korman's refusal in the Swiss bank litigation to adopt a worldwide distribution formula based on raw national population quotas. Instead, Chief Judge Korman has allocated the $205 million in *cy pres* funds

In order to avoid unnecessary delays in distributing the settlement funds, the Hungarian objectors suggest that the bulk of the settlement funds be immediately distributed in accordance with the proposed allocation plan, but that a portion of the funds be retained under Court supervision pending an investigation by the Jewish Conference on Material Claims Against Germany (Claims Conference) into the actual whereabouts of the needy members of the class. If, as the Hungarian objectors believe, there is at least a 10% deviation between needy Jewish survivors residing in Hungary and the raw population figures, the portion of the settlement fund retained by the Court should be re-directed to the support of needy Jewish Nazi victims residing in Hungary.

Counsel respectfully suggests that unless such corrective action is taken, the settlement appears to violate *Amchem Prods. v. Windsor*, 521 U.S. 591 (1997), by permitting settlement counsel for a heterogeneous class to subordinate the interests of one segment of the class - surviving needy Jewish Nazi victims residing in Hungary - to the interests of class members residing in other countries.

2. **Reservations Concerning Attorneys' Fees**

While much of the necessary factual investigation had been made public by the United States prior to this litigation, and while, in a more perfect world, the United States would have agreed to make an *ex gratia* payment in connection with the loss of the Gold Train assets without incurring costs incident to litigation, the fact remains that it was this litigation that succeeded in inducing the settlement payment. Moreover, it appears that

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designated to help the poor in the Swiss bank case on the basis of where the needy actually reside. See *In re Holocaust Victim Assets Litig.*, 302 F. Supp.2d 89, *reh'g denied*, 311 F. Supp.2d 169 (EDNY 2004) (rejecting national population quotas as basis for allocating *cy pres* funds to needy members of the class). An appeal prosecuted by Mr. Dubbin on behalf of survivors residing in the United States is pending before the Second Circuit. See Docket Nos. 04-1898/99 (2nd Cir.).

plaintiffs' counsel performed admirably in inducing the United States to settle this case. Accordingly, plaintiffs' counsel are clearly entitled to an award of attorneys' fees under the "common fund" doctrine.

A disagreement exists, however, over the appropriate size of the common fund award. Plaintiffs' attorneys correctly note that the Eleventh Circuit has adopted a percentage of recovery theory in calculating common fund class action fees. They argue that the appropriate percentage of recovery in this case is found in the Eleventh Circuit cases awarding between 20%-30% of a settlement fund as attorneys' fees and costs in garden variety commercial litigation. Since plaintiffs' attorneys seek approximately 14% of the settlement fund in fees and costs, they argue that they are well within the common fund fee guidelines in this Circuit.

In response, the Hungarian objectors observe that litigation over Holocaust reparations is not a garden variety commercial exercise. Rather, because of the powerful moral and emotional attributes of Holocaust-related cases, a number of highly qualified lawyers have agreed to press Holocaust-related cases at sub-market rates, establishing a governing fee structure in Holocaust-related litigation that is lower than in the ordinary commercial case. Since the purpose of a common fund fee calculation is to reflect the relevant market for a lawyer's services in a particular case, where, as here, the relevant market is not the usual commercial market, class members are entitled to a fee calculation based on the more advantageous market available to them. In short, since highly qualified lawyers were available to prosecute this case pursuant to a sharply reduced fee schedule, it would be inequitable to saddle the Hungarian Gold Train class with a higher commercial fee structure.

No reported fee in a Holocaust-related case has exceeded 5% of the recovery. Indeed, in most cases, the attorneys' fees have been far lower. For example, in the $1.25 billion Swiss bank settlement, the three principal lawyers worked without fee.[4] Chief Judge Korman awarded modest fees to a number of additional lawyers in that case totaling less than $7 million (or ½ of 1% of the $1.25 billion settlement fund). Significantly, Chief Judge Korman denied requests for risk multipliers, finding that the availability of capable lawyers willing to handle the case *pro-bono* made it inappropriate to charge the plaintiff class as though the Swiss bank case were an ordinary commercial litigation. See *In re Holocaust Victims Assets Litig.*, 270 F. Supp.2d 313 (EDNY 2002). See also *In re Holocaust Victims Assets Litig.*, 302 F. Supp.2d 89, *rehearing denied,* 311 F. Supp.2d 363 (EDNY 2004)(denying fees). Thus, to the extent the prevailing Eleventh Circuit common fund fee structure of 20%-30% of recovery reflects a risk factor needed to attract competent counsel, it is inappropriate in a setting where such market inducements are demonstrably not necessary.

Similarly, in the German slave labor, insurance and banking cases that were settled by the establishment of a 10 billion DM (approximately $5.2 billion) German Foundation designed to compensate Holocaust victims, the parties established a fee structure of between 1.25%-1% to compensate the more than 50 law firms involved in the litigation. See *In re Nazi Era Cases Against German Defendants Litig.*, 198 FRD 428 (D.N.J.

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[4]Counsel has served since February, 1999 as court-designated lead settlement counsel in the Swiss bank cases. In the interest of full disclosure, one of the class counsel in this litigation - Samuel Dubbin - has represented a number of objectors in the Swiss bank proceedings. See *In re Holocaust Victim Assets Litig.*, 302 F. Supp.2d 89, 117-120, *reh'ing denied*, 311 F. Supp.2d 363 (EDNY 2004)(denying objections and fees). Mr. Dubbin has appealed the denial of fees to the Second Circuit. The issue is awaiting decision.

2000)(describing settlement structure).[5] Two arbitrators appointed with the cooperation of the German government – Kenneth Feinberg and Nicholas deB Katzenbach – awarded fees totaling 119 million DM (approximately $60 million, or 1.2% of the settlement fund) to numerous attorneys on the basis of their relative contributions to the success of the enterprise.[6]

Finally, in the Austrian banks litigation, involving a $40 million settlement fund, plaintiffs' counsel sought costs and fees approximating 5% of the settlement fund. Judge Kram, recognizing the unique nature of the Holocaust-related cases, reduced the costs and fees to approximately 3% of recovery. *In re Austrian and German Holocaust Litigation*, 2003 U.S. Dist. LEXIS 2440 (February 21, 2003).

In this case, with a settlement fund of $25.5 million, the Hungarian objectors believe that an award of costs and fees in excess of 5% of recovery would impose an unfair burden on the settlement class by permitting plaintiffs' attorneys to recover costs and fees in excess of the prevailing rates governing Holocaust-related cases. The Hungarian objectors note that an award of 5% of recovery, as opposed to 14% of recovery, would free sufficient assets to provide needy surviving Jewish Nazi victims residing in Hungary with the funds needed to close the gap between an allocation based on raw population figures and an allocation based on the actual number of needy persons residing in each country.

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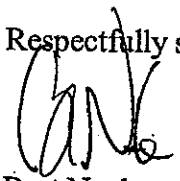
[5]Counsel herein has served since August 30, 2000 as the United States lawyer-appointee to the Board of Trustees of the German Foundation.

[6] Counsel was awarded a fee of DM 10 million for work in connection with the litigation and negotiation that brought the Foundation into being. See *Zeisl v. Watman*, 317 F.3d 191 (2nd Cir. 2003)(upholding fee awards).

Accordingly, counsel, on behalf of the Hungarian objectors, respectfully urges the Court to condition approval of the proposed settlement on: (1) an agreement that at least 10% of the settlement fund be held under the Court's supervision pending a determination by the Claims Conference as to whether a disproportionate number of needy Jewish Holocaust survivors reside in Hungary requiring a modest re-allocation of the settlement fund to provide additional funds to qualifying class members residing in Hungary ; and (2) an agreement to limit the award of costs and attorneys fees herein to not more than 5% of the settlement fund. If it is not possible to condition the settlement's approval on such terms, the Hungarian objectors formally lodge an objection to the proposed settlement

Dated: July 21, 2005
New York, New York

Respectfully submitted,



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Courtesy Copies To:

Cuneo Waldman Gilbert & LaDuca, LLP
Hagens Berman Sobol Shapiro, LLP
Dubbin & Kravetz, LLP

Meghatalmazás

Alulírott, aki 1939 és 1945 között bizonyos időszakban Magyarország 1944-es határain belül éltem, és családi vagyonomat, amely a magyar aranyvonatra kerülhetett, az 1944. évi 1600-as rendelet, vagy az 1944. évi 8306-os rendelet, valamint egyéb hasonló magyar jogszabály, eljárás, vagy gyakorlat alapján a magyar kormány lefoglalta, elkobozta, vagy ellopta, és aki a Miami Florida Szövetségi Bíróság előtt folyó „Magyar Aranyvonat" ügyben a felperes társak keresetéhez csatlakozok

meghatalmazom

Burt Neuborne (John Norton Pomeroy Professor of Law Director, Brennan Center for Justice, New York University School of Law Vanderbilt Hall 40 Washington Squere South, Room 307 New York, NY 10012-1099, Telephone: (212) 998-6172, Email:burt.neuborne@nyu.edu) professzort, hogy a „Magyar Aranyvonat" egyezség alapba kerülő összeg méltányosabb felosztásával és az ügyvédi díj mérséklésével kapcsolatosan engemet képviseljen, illetve eljárjon.
Tudomásul veszem, hogy Neuborne professzor ellenkérelmet nyújt be az ügyben tervezett megállapodással szemben.

Budapest, 2005. július 13.

Név – Name: **Veres György**

Lakcím -Address: **H- 1092 Budapest**
Köztelek u. 4/b

Authorization

I, above mentioned person, who affirm that I lived in the 1944 borders of Hungary sometime between 1939 and 1945 and my family had property seized, confiscated or stolen by the Hungarian government pursuant to Decree 1600 of 1944, Decree 8306 of 1944, or other similar Hungarian law, policy or practice that could have been on the Hungarian Gold Train and who would be joined member of the plaintiff class in the Hungarian Gold Train case pending in federal court in Miami, Florida,

I authorize

Burt Neuborne (John Norton Pomeroy Professor of Law Director, Brennan Center for Justice, New York University School of Law Vanderbilt Hall 40 Washington Squere South, Room 307 New York, NY 10012-1099, Telephone: (212) 998-6172, Email:burt.neuborne@nyu.edu) to represent me in connection with an effort to obtain a fairer allocation of the Hungarian Gold Train settlement funds, and a lower attorneys' fee in that case.

I understand that Professor Neuborne intends to file appropriate objections to the proposed settlement agreement.

July 13, 2005 Budapest

.....

Meghatalmazó aláírása

-----Original Message-----
From: Sam Dubbin
Sent: Friday, January 13, 2006 12:40 PM
To: Sam Dubbin
Subject: transcript

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

IRVING and ANA ROSNER, ET AL. Case No. 01-1859-CV-PAS

v. MIAMI, FLORIDA
September 26, 2005
VOLUME I

PAGE 1 TO 167

U.S.A.

FAIRNESS HEARING
BEFORE THE HON. PATRICIA A. SEITZ, J.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription(CAT).

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(Court convened at 10:05 a.m.)

MS. WEBB: Case number 01-1859 civil, Irving Rosner, et al. versus United States of America.

Counsel, please state your appearance the.

MR. DUBBIN: Samuel J. Dubbin, Your Honor, for plaintiffs. Class counsel.

MR. CUNEO: Jonathan Cuneo for plaintiffs. Class counsel.

MR. WALTON: Brent Walton, for plaintiffs, class counsel.

MR. KRAVETZ: Jeffrey Kravetz, for plaintiffs, class counsel.

MR. STANLEY: Jeffrey Stanley, for plaintiffs, class counsel.

THE COURT: Good morning, Mr. Stanley. I got your letter about the need for a possible Hungarian interpreter, which we will have at 10:30 beaming in from Washington, D.C.

MR. MERON: Good morning, Your Honor. Daniel Meron United States Department of Justice, for the United States.

THE COURT: Good to see you, Mr. Meron.

MR. SMITH: Good morning, Your Honor. Jeffrey Smith, United States Department of Justice, for the United States.

MR. NEUBORNE: Judge, do you want to note the appearances for counsel for the objectors at this point, or do you want to wait until later?

THE COURT: Well, I will take everyone down now.

Everyone can have a seat. And if anyone wants to announce their appearance, they can do so now.

MR. NEUBORNE: Burt Neuborne, on behalf of the 12 Hungarian objectors.

THE COURT: Anyone else? I see Congresswoman Ross-Layton here this morning. Good morning Congresswoman.

MR. CUNEO: Judge, we would either be pleased to read Mr. Sessler's statement into the record, or to continue with Professor Neuborne.

THE COURT: What I thought we would do is continue with the Professor, and then when he is finished we will read Mr. Sessler's letter into the record. And then we will hear from Mr. Lichtman.

Is Miss Lazar here? (No response.)

And Mr. Schwarz -- Oh, his daughter is here. Okay.

What about Gabriella Lazar, is she here? I don't see any hands.

Okay, Professor.

MR. NEUBORNE: Thank you, Your Honor. Good morning. My name is Burt Neuborne. I represent 12 class members residing

in Budapest, and I believe, although obviously it is not official, that they speak on behalf of the great bulk of the Hungarian Jewish community in accordance with the representations to the Court made by Mr. Sanbar.

THE COURT: Can you please tell me the names of the individuals you represent?

MR. NEUBORNE: I am going to read them to you.

THE COURT: Just so the record is clear; and my Court Reporter can have a heart attack.

I think I have a list of who you represent someplace, but it would certainly be of great assist --

MR. NEUBORNE: Of course. I should have brought the list myself. I filed a notice of appearance on it.

I'm afraid --

Would you mind, Your Honor, if I just handed them to your Court Reporter? I'm really afraid I would make an impossible job of reading them.

THE COURT: And my Court Reporter would love it if you simply gave him the printed list of the 12.

MR. NEUBORNE: Your Court Reporter is ahead of us, Your Honor. He has the list.

THE COURT: Then we have to give credit to my law clerk. She was putting together a list of all of the individuals that we needed to make sure we had their names down correctly.

MR. NEUBORNE: May I begin, Your Honor, by on what I

hope is a positive note, by stating the positions of the settlement that my clients, and I believe the Hungarian Jewish community, supports wholeheartedly. First, the acceptance of responsibility in this settlement is an extraordinary achievement. I know from personal knowledge that acceptances of responsibility in other Holocaust cases have been very difficult to achieve and often have not been achieved. So this is a substantial achievement, and I congratulate the lawyers and the United States for the acceptance of responsibility statement.

The amount seems fair, and we have no quarrel with the amount.

The thoughtful decision of the parties to recognize that this cannot be distributed on a per capita basis to the class and, therefore, using the cy pres doctrine that it should be distributed to the poorest members of the Hungarian survivor community again strikes me and my clients as a thoughtful and excellent resolution.

And, finally, because I appear here as an objector, I want to state for the record how thoughtful and I think excellent the legal work has been on both sides. Plaintiffs' attorneys I think did a splendid job, and the government lawyers did a wonderful job, and as you pointed out at the beginning of the morning, was an excellently lawyered case, and my clients appreciate it.

The only quarrel that we have with the settlement is

the allocation formula, the ultimate allocation formula.

THE COURT: So you are withdrawing the question about the legal fees?

MR. NEUBORNE: If you don't mind, I will mention that at the very end. Representations have been made to me this morning that indicate that I should not go forward on that. But I'll deal with that, if you don't mind, at the end.

THE COURT: Okay. I'm just trying to find out -- It sounded to me like your objections were being narrowed, and I just wanted to make sure I understood how narrow they were. You are telling me that they are not quite as narrow.

MR. NEUBORNE: I will do the fees first, Your Honor.

THE COURT: Okay.

MR. NEUBORNE: As you know, my objection to the fees was based on an effort to apply the common fund rules to this. And the common fund rules essentially try to mimic what the market would be for this type of activity. And this is activity that often requires a risk multiplier, it often requires inducements to see to it that lawyers will take whatever risks and invest whatever time and capital is necessary to have cases like this brought.

And my only concern was, not with the actual fee application here, which I thought was rather modest compared to what it might have been under Eleventh Circuit standards, but with whether or not it actually mimicked the market in Holocaust fees,

because I know from my own experience fees in other cases have been considerably lower. And I know of no case in which it has gone above five percent. So my concern was, was there another --

THE COURT: Excuse me. Didn't you receive 4.4 million yourself in another case?

MR. NEUBORNE: Yes, I received a very generous fee in another case. It was part of a settlement award, Your Honor, of 1.25 percent. The recovery in that case was 5.2 billion dollars. And so --

THE COURT: And it covered a much larger class.

MR. NEUBORNE: Yes. It was a very, very large class.

THE COURT: In fact, about ten times the size of this class.

MR. NEUBORNE: Perhaps more. It covered all surviving Holocaust victims, including Eastern European victims who don't fall into the usual category of victim. Virtually everybody living. It covered Poles, it covered Romanians. So it was a very, very large class.

As long as we are going to put that on the record, Your Honor, I have no quarrel with that. But I would like the record to reflect that I initially -- I served without fee in the Swiss case. I am the lead settlement counsel in the Swiss case in which I served without fee now for almost seven years. That is a 1.25 billion dollar recovery. I was the principal lawyer who put the class together, the theories together, I argued the case,

participated in the negotiations, and lead settlement counsel, and have received no fees in that case at all.

I initially --

THE COURT: I just raise the question --

MR. NEUBORNE: Well, Your Honor, as long as you raise it, I think I have to put it on --

THE COURT: You had made some comment that just triggered --

MR. NEUBORNE: I just want to make sure that the record was clear, Your Honor, if you raised it. I did not seek fees in the German case. In fact, I declined to seek fees in the German case, the case you mentioned, until it was pointed out to me that the fee structure in that case was a maximum minimum, and that the number of applications that had been filed were so huge that it was clear that the maximum was going to be hit. Therefore, if I would have filed, it would not in any way adversely affect money that would go to Holocaust survivors. And when that was pointed out to me with great clarity, I then realized that my application competed solely against the other lawyers and not against the Holocaust victims. And that is why I filed an application. And the two arbitrators in that case, Kenneth Feinberg and Nicholas deB Katzenbach, after looking at the various work that the lawyers had done, found that my work was quite important in that case and were very generous in giving me a fee that I did not expect. But I accepted it, I am grateful to

have it, and that's the full story of how it came to pass.

The plaintiffs' lawyers -- and what I was concerned about in this case is that we not alter the market in Holocaust cases, which has been about somewhere between 1 percent, never more than 5 percent in a fee case, and that this would take the fee structure higher than it has ever been before.

And I questioned whether or not there was an artificial market in Holocaust cases that enabled lawyers who handle these case at considerably submarket rates, in which case the class was entitled to the lowered market, not the actual market.

Counsel represented to me that they attempted to induce lawyers who had been handling these cases pro bono to take these cases, and this case, and they failed. Now, if that's -- And I accept that. That is a representation that was made to me this morning. I accept that representation. If that is true, then there wasn't some other market out there that they failed to tap into. They had to do this on their own, and having done this on their own I have no quarrel with the size of the fee they are seeking.

If there was not another market out there that they should have tapped into that they didn't, then the size of this fee is modest, the size they are seeking is modest and it seems to me appropriate. And so I have no quarrel with it, accepting the representations that were made to me this morning, that efforts

were made to find lawyers who could do this for less.

THE COURT: Okay. So then based upon what you are saying, and I don't want to put words in your mouth, but I want to make sure I understand what you are saying, then you only have one objection --

MR. NEUBORNE: Yes.

THE COURT: -- and that is the allocation.

MR. NEUBORNE: Yes.

THE COURT: So my initial assumption that there wasn't an objection to the fees is correct, based upon your understanding --

MR. NEUBORNE: That's right. Based upon the representations that were made to me this morning.

THE COURT: Okay.

MR. NEUBORNE: The allocation formula, though, is something that I think cannot be ignored because the allocation formula purports to allocate these assets on the basis of national population figures, not on the basis of need, on the basis of where the needy are.

Now, if the needy were randomly distributed around the world, then national population figures would just be a convenient way of distributing the funds in a way that would reach the beneficiaries in an equitable and appropriate way.

But we know. We know. We know because we have administered the Swiss cases, we know because all you have to do

is take a look at the economic data that is in the world. Poor survivors are not randomly allocated around the world. Poor survivors are concentrated in areas that have had serious economic and social dislocation; mostly Eastern Europe. A disproportionately high percentage of the survivors in the Eastern European countries are extremely poor. And if the funds are to be --

THE COURT: And how are you defining "poor"? That has been the biggest difficulty with the whole issue. How do you define who is poor and who is poorer than someone else?

MR. NEUBORNE: It's a calculation that can be made on the basis of investigation into the economic circumstances of the various persons.

A person in Budapest who needs food, clothing, and warmth, is considerably poorer than a person in Dade County who requires assistance. There is no question humanitarian assistance would be helpful in improving the quality of life, but they are not about to starve, they are not about to do without fuel in winter, and they are not about --

THE COURT: Let's not take South Florida, because we don't have the heating issues. Let's take New York. I mean, they have heating issues and there will be significant heating issues given the price of oil.

MR. NEUBORNE: I don't suggest -- Any survivor of Hungarian origin residing in the United States who would meet a

level of want that involved the need for assistance in heating, or the need for assistance in food, or the need for assistance in clothes, should be treated identically with a Hungarian survivor in Budapest. All I'm asking --

THE COURT: And that's my question. How do I, without, A, delaying the settlement, B, using up the funds that should go immediately and promptly to helping people, using up the funds to do an analysis of assessment of needs, how do I do that?

MR. NEUBORNE: I think you do exactly what we did in the Swiss case. We were able in the Swiss case to do an assessment of the relative need of survivors in the Soviet Union and survivors in other parts of the world.

THE COURT: How long did that assessment take? How much did it cost?

MR. NEUBORNE: I can provide the Court with those figures. I can say that it did not take an inordinate period of time and it was not expensive.

THE COURT: How long did it take?

You have to understand, Professor, you filed the objections last July. You know, I'm a lowly trial court. I am the court of rough justice. But I need the facts. Arguments are great.

I respect counsel and the arguments that fine counsel make, but I can't get to the arguments unless I have the facts and the evidence.

MR. NEUBORNE: And I hope I can give you some facts. Can I just start with some law? And the law is I don't think you have a choice. I do not think you have a choice.

THE COURT: Then you are holding up everything if you had these resources to tell me what the costs were back in July, and you have not given me anything here at 11:15 on September 26.

MR. NEUBORNE: Your Honor, I represent 12 people in Budapest. They don't have the resources to do that. The Claims Conference has indicated to me they are prepared to do the assessment. If the Claims Conference will do the assessment, then Your Honor has the data that would be needed to make an allocation on the basis of need and not on the basis of a formula, which certainly overstates the amount --

THE COURT: Professor, share with me why you didn't bring me the data -- Instead of saying that they can give you the data, why didn't you do an assessment and file it with the Court with your objection saying, "This is what it takes, this is how long it will take, this is what the costs will be," and then start talking to others so that when we came in here today we would be that much farther ahead to support your theory?

MR. NEUBORNE: Your Honor --

THE COURT: Just tell me why you didn't do that.

MR. NEUBORNE: Why I didn't do that?

THE COURT: Yes.

MR. NEUBORNE: I don't have the resources to make that

assessment. I telephoned the Claims Conference, asked them whether they could do --

THE COURT: Professor, when did you telephone them?

MR. NEUBORNE: When did I telephone them? A week after -- even before I filed the objections. A week after I filed the objections.

THE COURT: And when you telephoned them, did you say how much time would it take and how much would it cost?

MR. NEUBORNE: I did not.

THE COURT: Why not?

MR. NEUBORNE: I did not because it occurred to me first we had to deal with whether or not the existing formula was going to be changed. If the Court is not going to change the existing formula, then it is a dead-weight loss to go through a long process of assessment --

THE COURT: Professor, how much time would it take in the phone conversation with the Claims Conference to just ask them to give you the estimates of those two things? And then doesn't that provide some beef, so-to-speak, to use the cliche, to your argument to say not only does the law support this, but as a practical matter this is very easy to accomplish, if it is as easy to accomplish as you say?

MR. NEUBORNE: They told me that it was practically doable and that it could be done quickly. Those are the two things they told me. That was enough to satisfy me that we should

go forward and object.

Now, Your Honor --

THE COURT: You have not spent a lot of time cross-examining witnesses.

I mean, do you see why I am frustrated?

MR. NEUBORNE: I know.

THE COURT: You are the person who is raising it, but you are just giving me argument, you are not giving me facts, and you could have pressed them a little harder --

MR. NEUBORNE: Your Honor, Mr. Taylor is in the courtroom today, the head -- the operating head of the Claims Conference. He is here. And if you want to ask him the question of how long it will take and how much it will cost, he is here to tell you that.

THE COURT: But I am just saying, Professor, it would have been a real kindness on your part and very helpful to the Court if you had done the work. But I'll be glad to do the work for you.

MR. NEUBORNE: Well, I appreciate that, Your Honor. I apologize to the Court if I have not fulfilled what you understand my responsibilities to the Court are. Had I thought that --

THE COURT: I expect that the lawyers bring the evidence into the Court. I'm not an investigative body. I have a mighty team, Professor, of my Courtroom Deputy and my three law clerks; and if you want to add my Court Reporter, we can add him,

but he is busy taking everything down as opposed to going out and researching things for me.

I presume that I am generously endowed compared to what a law Professor has in the way of staff, and I accept that. But I need for the lawyers to bring --

MR. NEUBORNE: I accept your criticism, Your Honor. I should have brought you additional facts. My assumption was that it was so clear that using population quotas did not provide an adequate proxy of need.

Your Honor, the United States is the second-largest per capita economy in the world; $40,000 per person. Hungary is $13,900 per person. That is common knowledge. Israel is 46th with $20,800. All one has to do is look at the population figures and the gross amount of money available in each country and it is clear that there is very high likelihood that there is a more-significant incidence of very poor people in Hungary, very poor Hungarian survivors in Hungary, than there are in the United States.

At that point I suggested to the Court what I think -- because I don't want to hold up the settlement. I suggested that the agreement that all the parties had come to, which is to shift ten per cent, ten per cent to Hungary, would approximate, would approximate that differential and would do so in a way that would not slow settlement down, would do so in a way that would not be terribly expensive.

I agree, Your Honor, this is not a case where you want to spend scarce funds doing a person-by-person survey and census of every poor Hungarian victim around the world. That would be, I think, an inefficient use of scarce funds.

THE COURT: And it would be a breach of my fiduciary duty.

MR. NEUBORNE: And that is why I didn't ask them to do it; that is why I didn't spend scarce money doing it myself. But it is clear from the known facts that there is a mismatch between national population quotas and the needy populations of each country.

The creative solution to that is the solution that Mr. Sanbar suggested and which he had the initiative to engineer, and that is to ask the parties to shift ten per cent of the funds. Is that perfect? It is not. I believe that if we did a person-by-person, we would shift much more. But it is acceptable to the Hungarian Jewish community, it is acceptable to the Hungarian Jewish survivors living in Israel. It is close enough given the resources available to the Court that it is I think the fairest way to do it.

May I say, if we don't do it, if we don't do it, if Your Honor believes that either because of my own failure in providing you with enough evidence or with some other justification, Your Honor feels that you are going to go forward with the population allocation as opposed to an allocation that

attempts to link the settlement to need, the settlement is I think vulnerable to collateral attack almost certainly under Amchem, because what you have is, you have class action lawyers essentially bargaining away the rights of Hungarian victims and --

THE COURT: Wait a minute.

MR. NEUBORNE: -- and if they were to challenge that later, they would be able to open the settlement. So I think the only way to make the settlement lock proof and against collateral attack is to try for an approximation of need. And that is what I am urging the Court to do. I am not urging the Court to expend scarce resources; I am not urging the Court to do a person-by-person census. I am urging the Court to recognize that there is a certain mismatch, a virtually certain mismatch between national population quota and need, and to impose a corrective solution of ten percent.

THE COURT: But, Mr. Sanbar tells me he picked ten percent because he picked ten percent. I mean, how do I justify the percentage that I pick, if I, one, choose to change; two, how do I do it at this late stage since I have difficulty since the settlement that we have proposed and that everybody has had a chance to opt out of said one thing and then we are sort of changing horses midstream? I have great difficulties and concerns about that from a due process perspective. So those are two things that concern me.

But I have to tell you, I am a very practical human

being. I took an oath when I took this job to use what God has given me to the very best to do what is right, fair, and just, with, hopefully, compassion and humility. And that's the only reason why I had this little discussion with you.

It is very frustrating for a Court to have lawyers come in, make wonderful arguments but not give me any facts and give them to me in advance so that everyone can see what it is before we come into the courtroom. That's what I look to lawyers to do, particularly in a case that goes back 60 years from the inception of the facts here, and have so many emotions involved that this case does. And, so, it was very important to me, Professor, that this hearing today really be one to bring closure.

I have shared with you my frustration. I have gotten it off my chest and will now move forward.

MR. NEUBORNE: And I will say that the ten percent figure, Your Honor, is a rough approximation, after discussion among the parties, to --

THE COURT: And when you say parties, tell me who.

MR. NEUBORNE: When I say parties, I mean the groups that Mr. Sanbar met with in Israel and in Hungary.

THE COURT: And was there any discussion with class counsel and with the defendants on this to get their input? I mean, you have to admit they have been very creative, they tried to do what is right and fair here, and I sensed a reasonableness, or I have tried to encourage reasonableness, by all persons. And,

so --

MR. NEUBORNE: Your Honor, I filed my objection on August 1. If there was to be discussion, discussion could take place after August 1. No one has suggested a willingness to discuss anything. It was simply a Court Order setting out a schedule to raise an objection. I followed that Court Order.

I'm sorry you don't think that I gave you enough facts. But I simply want to reiterate that I think that the settlement will be vulnerable, vulnerable to an appeal and vulnerable to collateral attack, unless we take some steps.

THE COURT: What is the difference between collateral attack and an appeal?

MR. NEUBORNE: Well, collateral attack would be people that I have nothing to do with who will challenge it at some later point claiming that the settlement was fundamentally unfair because it violated Amchem because the class counsel did not adequately represent the interests of the Hungarian class members, and essentially favored the interest of the United States' participants at the expense of persons living in foreign countries who were not at the table. And that's a serious -- I mean, it is a serious potential flaw. And they would be able under the due process clause to claim that the Court could not provide final determination as to their rights in the absence of fair representation from class counsel. That is what Amchem was all about. They vacated that settlement because there was a part of

the class that had been inadequately represented in their relationships with the rest of the class. That's all I mean, Your Honor.

THE COURT: Professor, tell me what you teach at law school.

MR. NEUBORNE: I teach first-year procedure, evidence, federal courts, and constitutional law. I have been on the NYU faculty for 35 years.

THE COURT: May I just ask you when teaching your civil procedure course that you share with your students one of the things that the judges find most helpful, and that is, although we are an adversary system, often times it is more helpful if lawyers keep in mind that what lawyers need to do is help their clients resolve and avoid conflict, and that lawyers wear not only the hat of the advocate but also the hat of counselor and the advisor.

So I appreciate very much that you are trying to help me make sure that I do the right thing, and I want to thank you for that.

MR. NEUBORNE: You are welcome. Your Honor, I take as implicit your criticism that I should have done something earlier. I accept it and I will take it to heart.

THE COURT: And I just wish that all the parties, when you had filed the objection -- and I will share with you one of the nice things about being the Judge is that you to a certain

extent are above the fray and you can see human issues that are woven through any dispute before the Court, not only the human issues that the clients raise, but also the human issues and the interdynamics that are created by counsel.

One of my desires always is to promote professional relations between lawyers. Clients come and go. We don't make the facts that our clients give us. We do the best that we can to present them so they have a fair opportunity. And so what my desire is always is that counsel recognize that even though they have differences of opinions as to how things can be resolved, that it is very helpful to the Court if they will attempt to have a professional dialogue before they come in and really develop an ability to hear what the other person is saying so that we can attempt to seek to understand before we seek to be understood.

MR. NEUBORNE: I appreciate that, Your Honor. You realize, of course, it was very difficult to speak before the proceeding because of the pendency of the Second Circuit appeal on the identical issue in the Swiss case. Counsel have pursued separate theories of distribution in both the Swiss case and this case, and the Second Circuit decision was not decided until September 9. That means that discussion while that Second Circuit decision was pending, while it might have been interesting, struck me as being futile, because no ruling could be made until the Circuit had decided the case.

And, of course, as you know from looking at that

Opinion, the Circuit strongly, strongly, disapproves the national quota settlement as opposed to some effort to find a mechanism of taking need into account. And the mechanism that Mr. Sanbar suggested, the mechanism that I suggest, is a rough justice mechanism. It is not a mechanism that will cost money or take additional time. It is simply an acknowledgment that the population figures are not an accurate proxy and that a ten percent reapportionment will get closer to an ideal that it is simply too expensive and too difficult to attain. And that's the argument that I make to you. That is why I didn't come here with an enormous record.

You are right. It would unnecessarily spend resources, shifting a relatively small amount of money. We are only talking about a shift of approximately 2, 2 and-a-half million dollars. It is wrong to spend vast amounts of resources on an issue of that size. But a shift of two and-a-half million dollars, a shift of approximately ten percent, recognizes the existence of the problem, shows a good-faith effort to achieve it, and does so in a reasonable way given the resources and the time available. And I represent to you with all my heart that is all I was trying to do here.

THE COURT: And just to follow up, what you are saying is that is also consistent with the fact that part of the original discussion of the United States with former Communist-controlled Hungary, and the successor governments following World War II, was

that there would be some type of accommodation back to those continuing to live in Hungary. So that they should, in addition to the need issue, there is a certain --

MR. NEUBORNE: Kind of an implicit promise that still has not been kept. I had not thought of that, Your Honor. But I think that is exactly right. Thank you.

THE COURT: Okay.

Shall we have Miss Schwarz?

MR. WALTON: Might I remind Your Honor about reading of Mr. Sessler's letter?

THE COURT: Yes.

Miss Schwarz, before you begin, if we could just read Mr. Sessler's --

Do we know how he is?

DtF
dM

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE: HOLOCAUST VICTIM ASSETS LITIGATION	Case No. CV-96-4849 (ERK)(MDG) (Consolidated with CV-99-5161 and CV-97-461)
This Document Relates to: All Cases	**MEMORANDUM**

KORMAN, Chief Judge:

Several appeals from decisions I have issued in this case are currently pending before the Second Circuit, and Professor Burt Neuborne has filed briefs defending the positions I have taken. When Professor Neuborne sought to file his briefs, however, he was asked by the Clerk of the Court for the Second Circuit what standing he had to file briefs and whom he represents in the appeals. The Clerk of the Court was under the impression that Professor Neuborne did not represent anyone. I file this memorandum to clarify the role that Professor Burt Neuborne plays in this lawsuit and in the current appeals.

As an initial matter, I agree that Professor Neuborne does not represent any party in the context of the current appeals. By submitting briefs, Professor Neuborne is simply providing an adversarial defense of my position for the benefit of the Second Circuit. In this sense, his current role is analogous to that of a lawyer who might be appointed to defend a judge's decision after a writ of mandamus. In the typical case where a writ of mandamus is sought, the party to the case that benefitted from the underlying ruling will defend the judge's position on appeal. At times, however,

there is no such party. For example, in a case where I decided to transfer a wiretap application to a magistrate judge for authorization, the United States Attorney sought a writ of mandamus, arguing that a magistrate judge would lack the power to order a warrant. See In re United States, 10 F.3d 931 (2d Cir. 1993). Because of the ex parte nature of the wiretap application, there was no opposing party. Indeed, if the subject of the wiretap had been a party, he may have taken the same position as the United States Attorney. Thus, I received permission to retain counsel to be paid by the Administrative Office of United States Courts to provide an adversarial defense of my position in the Second Circuit. A similar situation arose recently for Judge Kram in the Southern District of New York, who had a party seek a writ of mandamus after she made certain rulings in the Austrian bank litigation—she appointed David Boies to defend her position on appeal. See In re Austrian, German Holocaust Litigation, 250 F.3d 156 (2d Cir. 2001). While the current appellants do not seek a writ of mandamus, the same need for an adversarial defense of my position in the Second Circuit exists. Currently, Professor Neuborne is simply performing that service. Although his role in the appeals is thus limited, I do not wish to diminish the other roles that Professor Neuborne has played in this lawsuit.

Professor Neuborne played a vital role in achieving the historic settlement in this case. As I have already written:

> Professor Neuborne was a founding member of the Plaintiff's Executive Committee where he was the glue that held it together, and he was intimately involved in every significant aspect of the case. After the preliminary approval of the proposed settlement and the provisional certification of the class, he was designated lead plaintiffs' counsel.

In re Holocaust Victim Assets Litigation, 270 F. Supp. 2d 313, 316 (E.D.N.Y. 2002).

Professor Neuborne has also played a vital role since the settlement. He has continued to represent the plaintiff class in post-settlement litigation involving the bank defendants. See In re

Holocaust Victim Assets Litigation, 282 F.3d 103 (2d Cir. 2002) (where Professor Neuborne represented plaintiffs in dispute over definition of the Slave Labor II class); In re Holocaust Victim Assets Litigation, 256 F. Supp. 2d 150 (E.D.N.Y. 2003) (where Professor Neuborne represented plaintiffs before Judge Block arguing that the defendants had to pay compound interest on settlement funds placed in escrow). He has continued to represent the plaintiffs in negotiations with the banks regarding increased access to bank records. See In re Holocaust Victim Assets Litigation, No. 04-CV-1786 (E.D.N.Y. 2004). And he has represented the plaintiffs against the attempt of non-party intervenors to diminish the stake of the plaintiff class. See In re Holocaust Victim Assets Litigation, 225 F.3d 191 (2d Cir. 2000) (where Professor Neuborne represented plaintiffs in dispute over whether the definition of Victims of Nazi Persecution had to be extended to include ethnic Poles). Professor Neuborne's efforts in these matters have resulted in tangible and substantial benefits to the class of plaintiffs as a whole.

On other issues, Professor Neuborne acts as something of a general counsel to the administration of the settlement fund. He provides an invaluable administrative service of helping people gain access to me and to the Special Master. He also provides advice as amicus curiae. Professor Neuborne has submitted many insightful declarations and, because of his long involvement in this case, his opinion is one that I respect. In this capacity, however, Professor Neuborne's recommendations have never been binding on me. In fact, in the context of the various appeals now pending before the Second Circuit, on more than one issue I decided to exercise my discretion in a manner different from that suggested by Professor Neuborne.

In sum, because this case resulted in a settlement fund that now needs to be administered, I have a fiduciary duty to the plaintiffs to ensure that any resulting distribution is fair and that any award of counsel fees is justified. See Reynolds v. Beneficial Nat. Bank, 288 F.3d 277, 279-80 (7th

Cir. 2002); Maywalt v. Parker & Parsley Petroleum Co., 67 F.3d 1072, 1078 (2d Cir. 1995). Various organizations and individuals who have been dissatisfied with my decisions are represented by their own counsel on their appeals. Professor Neuborne is providing an adversarial defense of my rulings where the principal beneficiaries of them do not have the resources to appear, as in the appeal involving Holocaust Survivors Foundation-USA, or where the detriment to any particular class member may not be of sufficient magnitude to warrant the cost of appearing, as in the remaining appeals.

Dated: September 15, 2004
Brooklyn, New York

Edward R. Korman
United States District Judge

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John Norton Pomeroy Professor of Law
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September 14, 2004

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

Re: *In re Holocaust Victim Assets Litig.*,
CV-96-4849

Your Honor:

I write in response to your order dated September 13, 2004 describing my role in defending the current appeals pending the United States Appeals for the Second Circuit in 04-1898; 04-1899; 04-2466; and 04-2511. I am honored to appear in defense of your orders, and have no quarrel with your description of my role in assuring that the Second Circuit is provided with a full adversary defense of the challenges to your orders.

I do, however, take issue with your statement that I do not represent any party in the context of the appeals. You may recall that in January, 1997, at your request, all counsel appointed me as co-counsel for the numerous named-plaintiffs. Moreover, in the eight years that I have worked on this case, I have established close personal relationships with many, many members of the plaintiff-class who rightfully view me as their lawyer. Most importantly, on February 1, 1999, when I accepted your request that I agree to serve as Lead Settlement Counsel, I entered into an intense attorney-client relationship with the class that continues to this day. Thus, when I appear in defense of your rulings, I do not appear solely as a functionary of the Court, but as Lead Settlement Counsel for the plaintiff-classes with a duty to defend your rulings as long as they are supported by law, or rest within your discretion.

As a practical matter, we reach the same conclusion. But I think it important to place on the record my conception of my role as Lead Settlement Counsel. As you point out in

your order, in most contexts, I play a classic adversary role in defending the plaintiff-classes against efforts to dilute the settlement fund or to place obstacles in the administration of one or more of the plaintiff classes. In addition, during the day-to-day administration of the settlement fund, I seek to provide the Court with legal counsel concerning the innumerable decisions that must be made in an undertaking of this magnitude. In each of those settings, I function as a lawyer for the plaintiff classes.

Given the extraordinary nature of this class action, I accept a responsibility, as well, for defending the mechanism chosen by the class to develop a plan of allocation and distribution of the assets. As you know, the class opted for a bifurcated process under which you initially upheld the fairness of the settlement and provided for a fair mechanism for developing a plan of allocation and distribution. The plan calls for the appointment of a neutral Special Master who would confer widely with the class before recommending allocation and distribution decisions to you for final resolution after an appropriate hearing. As you recall, we asked the class to opt for such a process to avoid the plunging elderly Holocaust survivors into an adversary war of all against all in an effort to maximize shares in a limited settlement fund. Any member of the class who was unwilling to commit in advance to respect the outcome of such a fair process was given the right to opt out at the fairness hearing. Fewer than 300 persons opted out. At least 564,000 persons expressed approval of the mechanism.

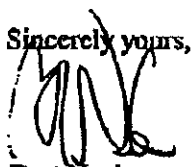
In the almost five years that I have functioned as Lead Settlement Counsel I have viewed my role as implementing the class's overwhelming decision to opt for such a fair allocation process. As you note, I have sought to facilitate open communication between any member of the class and the Special Master, as well as the Court. I have advised class members on the best way to present their concerns to the Court. I have provided the Court with personal views on allocation and distribution decisions. But, most of all, I have committed myself to defending the results of the process, even when I do not wholly agree with the outcomes.

In my view, the key to the success of the Swiss bank settlement was the willingness of the class to bind themselves in advance to respect the results of a fair allocation and distribution process. I consider myself to have made the same commitment. Indeed, since I urged others to make the commitment, I accept a special responsibility to defend the results of the fair process, as long as they are in accordance with law or rest within the parameters of the Court's discretion.

Thus, as applied to the pending Second Circuit appeals, we come out in the same place - a firm duty on my part to defend your judgments. You appear to view the duty as flowing from your appointment of me as your lawyer. I view my duty as flowing from my duty as Lead Settlement Counsel to defend the outcomes of the fair decisional processes that make the administration of the settlement possible.

If I believed that your rulings were not in accordance with law, or were an abuse of your very broad discretion, I would not defend them. Indeed, if I believed you were acting unlawfully, as Lead Settlement Counsel for the class, I would oppose your orders. If you removed me as Lead Settlement Counsel, I would oppose the orders on behalf of the numerous individuals who view me as their lawyer. While, given my deep respect for you, I do not believe that such an eventuality is even remotely likely, it is important that my understanding of my status be placed on the record.

Sincerely yours,



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sdubbin@dubbinkravetz.com

February 1, 2006

VIA REGULAR MAIL AND FAX

Mr. Samuel Issacharoff
New York University
40 Washington Square South
New York, New York 10012

Re *In re Holocaust Victim Assets Litigation*
Civ. 96-4849 (ERK)

Dear Mr. Issacharaoff:

Thank you for sending me Mr. Neuborne's original filing. I received your January 20, 2006 letter to Judge Korman this past Monday, and wanted to note the following.

First, notwithstanding your citation to *Hensley*, FRCP 23(h)(1)) requires any claim for attorneys fees to be "directed to class members in a reasonable manner." The Advisory Committee Notes to the 2003 amendments state, regarding Rule 23(h)(1): "Because members of the class have an interest in the arrangements for payment of class counsel whether that payment comes from the class fund or is made directly by another party, notice is required in all instances." To date, this rule has not been satisfied.

Further, considering the notice requirement in subsection (1) and the right of class members to object in subsection (2), a February 3, 2006 cutoff for opposing filings is premature. *See* Committee Notes to Rule 23(h)(2).

Finally, for the reasons stated in Bob Swift's Declaration of December 29, 2005, we are asking for you to supply Mr. Neuborne's time records from other engagements for the time period that overlaps with his request in this case, such as the German Slave Labor/German Foundation litigation, the McCain-Feingold Campaign Finance law litigation, and other consulting and academic commitments. *See* Committee Notes to Rule 23(h)(2).

Mr. Swift and I would like to arrange a conference call with you at your earliest convenience to discuss these matters.

Sincerely,

Samuel J. Dubbin, P.A.

Samuel J. Dubbin, P.A.

cc: Chief Judge Edward R. Korman
Robert Swift, Esquire

Sam Dubbin

From: Samuel Issacharoff [issacharoff@juris.law.nyu.edu]
Sent: Friday, February 10, 2006 1:59 PM
To: Sam Dubbin; rswift@kohnswift.com
Subject: Further information

Please accept this e-mail as a response to factual questions raised during our conference call and in Sam Dubbin's letter of February 9, 2006.

1) The total number of hours worked by Burt Neuborne on the German cases in 2000 is 627.

2) There are no documents, transcripts or writings on conversations referenced in the Dubbin letter of 2/9/06. We do not have any record of when such conversation(s) occurred, only that these comments arose during the innumerable interactions between Mr. Neuborne and the Court.

I believe this satisfies all the requests for information outstanding.

Samuel Issacharoff
Reiss Professor of Constitutional Law
NYU School of Law
40 Washington Square South
New York, N.Y. 10012
(212) 998-6580
Fax: 212-995-4590
e-mail: si13@nyu.edu

DUBBIN & KRAVETZ LLP

SAMUEL J. DUBBIN, P.A.
DIRECT (305) 357-9004
sdubbin@dubbinkravetz.com

February 9, 2006

VIA REGULAR MAIL AND FAX

Mr. Samuel Issacharoff
New York University Law School
40 Washington Square South
New York, New York 10012

Re *In re Holocaust Victim Assets Litigation*
Civ. 96-4849 (ERK)

Dear Mr. Issacharaoff:

In connection with Burt Neuborne's Fee Petition, I am writing for clarification regarding Mr. Neuborne's and the Court's alleged understanding about his compensation for services as Lead Plaintiffs Settlement Counsel.

His initial Declaration begins with the statement that "the Court has determined that Lead Settlement Counsel should be compensated at the conclusion of his service on a lodestar basis on the same terms and conditions as a Special Master." His Supplemental Declaration states "Chief Judge Korman's initial request that I serve as Lead Settlement Counsel was accompanied by an assurance that I would be eligible for hourly lodestar compensation on the same terms and conditions as a Special Master. I explicitly accepted the Court's financial terms."

Are there any details you can supply regarding the exchange? On what date did it occur? Was it memorialized in writing? Was it transcribed? Were any other witnesses present at the time?

I look forward to your response.

Sincerely,

Samuel J. Dubbin, P.A.

Samuel J. Dubbin, P.A.

701 BRICKELL AVENUE • 16TH FLOOR • MIAMI, FLORIDA 33131-2847
TELEPHONE (305) 357-9036 • FAX (305) 371-4701

DUBBIN & KRAVETZ LLP

SAMUEL J. DUBBIN, P.A.
DIRECT (305) 357-9004
sdubbin@dubbinkravetz.com

February 17, 2006

VIA REGULAR MAIL AND FAX

Mr. Samuel Issacharoff
New York University
40 Washington Square South
New York, New York 10012

Re *In re Holocaust Victim Assets Litigation*
Civ. 96-4849 (ERK)

Dear Mr. Issacharaoff:

Although I understand your position to be that Mr. Neuborne need only supply his total number of hours for the year 2000, we are requesting any declarations he filed with the German Foundation fee arbitrators, and his daily time records for 1999 and 2000 (and 2001 if any); i.e. time periods overlapping with this fee request.

We believe these are discoverable. *See* Supplemental Objections, February 17, 2006 and Advisory Committee Notes to 2003 Amendments to FRCP 23(h).

Sincerely,

Samuel J. Dubbin, P.A.

Samuel J. Dubbin, P.A.

cc: Chief Judge Edward R. Korman
Robert Swift, Esquire

701 BRICKELL AVENUE • 16TH FLOOR • MIAMI, FLORIDA 33131-2847
TELEPHONE (305) 357-9036 • FAX (305) 371-4701

Sam Dubbin

From: Samuel Issacharoff [issacharoff@juris.law.nyu.edu]
Sent: Wednesday, February 22, 2006 3:10 PM
To: Sam Dubbin
Cc: rswift@kohnswift.com
Subject: Re: Feb. 17 letter

Mr. Dubbin:

I continue to be at a loss as to your manner of practicing law. You apologise for my misunderstanding that a letter containing a cc to the Court was not in fact filed with the Court. But then you proceed to submit that same letter to the Court the same day as not one but two separate exhibits to your filing of Feb. 17, 2006. What's more, your exhibit one contains a copy of your February 17, 2006 letter with the date removed and backdated to February 1, 2006. I am simply at a loss for what you are doing.

Let me be clear as to our correspondence and telephone communication. I informed you on the telephone that Mr. Neuborne does not have any time records of any litigation during the period in question for any cases other than the present matter and the German Foundation litigation. There are no other records kept that pertain to billing for litigation. I cannot produce that which does not exist, even if I were so inclined. I will not produce his personal records of gatherings with family, friends, doctors, dentists, etc. I understand from your e-mail below that you agree that these are improper areas of discovery. Nor will I produce records of how he spent his time when not working on this matter. I do not know of any authority for discovery on this score and you have provided none.

You now urge that the German Foundation arbitration records may be necessary to see if the arbitrators somehow already compensated Mr. Neuborne for his work in this case. I continue to object to the discovery of materials outside the scope of this litigation, particularly so when it is subject to a confidentiality agreement. You do however raise the possibility that the arbitrators in the German Foundation matter may have thought they were compensating Mr. Neuborne for the Swiss litigation. Without waiving the privilege against production or my objection to the relevancy of this request, I will reproduce for you the entirety of the discussion of compensation for the Swiss bank matter in the German Foundation litigation. In the application itself, filed November 8, 2000, footnote three states:

"I declined to seek fees in connection with achieving a settlement in the Swiss Bank cases for personal reasons. I plan to seek modest hourly compensation for my post-settlement activities as court-appointed lead settlement counsel."

In the schedule of time charges to the same document, footnote one states:

"The time charges reflected in this document are for activities in connection with the litigation and negotiations that culminated in the establishment of the Foundation. I have not included any time attributable to the Swiss bank litigation. When significant travel is involved, I have attempted to subtract pure travel time so as to bill only for time actually expended in the performance of legal tasks. Finally, I have made no effort to bill for the enormous expenditure of time in connnection with efforts to respond to individual inquries from Holocaust victims about the pending litigation, or their right to receive funds from the Foundation or the Swiss settlement fund. As a matter of general practice, I set aside several hous a week to speak to individual Holocuast victims."

Those footnotes are produced in their entirety. I trust that this satisfies your concern about the arbitrators mistakenly assuming they were compensating Mr. Neuborne for the Swiss banks litigation.

Finally, I notice that your First Supplement Objections, which I received only today, carry a request that Mr. Neuborne's fee application be posted on the Court's website. I am not sure if you had the opportunity to check the website prior to filing, but the application is indeed on the website.

Sam Issacharoff

Samuel Issacharoff
Reiss Professor of Constitutional Law
NYU School of Law
40 Washington Square South
New York, N.Y. 10012
(212) 998-6580
Fax: 212-995-4590
e-mail: si13@nyu.edu

>>> "Sam Dubbin" <sdubbin@dubbinkravetz.com> 2/22/2006 12:14 PM >>>

Mr. Issacharoff,

With respect to my letter of Feb. 17, I apologize for any misunderstanding. The letter does indeed show a copy to the Court but I did not in fact fax that letter to Judge Korman. The "cc" reference was my mistake. I did attach the letter as an exhibit to the Survivors' Supplemental Objections which I filed and served, to explain my clients' position concerning the need for other information.

As for the merits, for the reasons expressed in the US Survivors' Feb. 17 Supplemental Objections, I believe it is appropriate to obtain the information requested in the letter. Mr. Neuborne's declarations to the German Foundation arbitrators may have been confidential for that proceeding but if he referred to his pro bono status in the Swiss case in his declaration supporting his request for compensation from the German arbitrators, that would be relevant to his current fee request.

With respect to other time requested, the advisory committee notes say that discovery is within the court's discretion, and the circumstances here warrant such discovery. For example, in June 2001, in a news report about the German Foundation fees, Mr. Neuborne was reported in the New York Times as saying "There wasn't a day in the last four years that I haven't worked hard on this case." Those four years would have overlapped significantly with the periods for which fees are sought here. That, as well as the discrepancies in Mr. Neuborne's Swiss time records such as those noted in my clients' Supplemental Objections, make my request reasonable under the circumstances.

The request does not seek personal information, only time charged to the German case and other professional engagements for time periods overlapping with this request.

Sam Dubbin

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE: HOLOCAUST VICTIM ASSETS LITIGATION	MASTER DOCKET NO. CV. 96-4849 (ERK) (MDG) (Consolidated with CV-96-5161 and CV-97-461

DECLARATION OF SAMUEL J. DUBBIN

1. My name is Samuel J. Dubbin, and I am over eighteen years of age. This Declaration is based on my personal knowledge and is made under penalty of perjury under the laws of the United States.

2. On September 22, 2003, I attended a Conference held at Queensboro Community College in the New York City area which dealt with Holocaust restitution and litigation. I was invited and attended as a participant on one of the panels due to my work representing individual survivors and heirs, as well as survivor groups such as the Holocaust Survivors Foundation USA, Inc., in restitution related litigation and advocacy. The audience consisted primarily of survivors, children of survivors, and students. I attended the entire conference that day. The audience included may who were critical of many aspects of the restitution process and who expressed their criticisms at the conference.

3. The keynote Speaker was Alan Hevesi, the former New York City official who had been instrumental in the original efforts to remove City business from Swiss banks due to questions about their handling of Jews' money during and after World War II. Other participants in the forum included Gideon Taylor, Executive Vice

President of the Conference on Jewish Material Claims Against Germany, Inc. ("Claims Conference"); Professor Michael Bazyler, of Whittier Law School; Monica Dugas, an attorney who worked for the New York State Banking Office assisting Holocaust victims and heirs with looted art claims; Eva Fogelman, a child of survivors who is also a psychologist well-known in the Holocaust survivor community for her work with survivors and second generation patients, and Martin Stern, an individual who resides in Israel and Great Britain, whose family initiated some of the earlier litigation against Assicurazioni Generali, S.p.A, and recovered a settlement in the process. There were other participants who I cannot recall.

4. Burt Neuborne, Esquire, was scheduled to appear at the forum. However, after lunch the forum organizer announced to the participants that Mr. Neuborne called and said he would not in fact be attending. Indeed, Mr. Neuborne did not speak at the Queensboro forum that day.

DATED: February 17, 2006
Miami, Florida

Samuel J. Dubbin

Professor of Law Mr. Burt Neuborne,
New York University School of Law
40 Washington Square
New York, N. Y. 10012-1099

January 29,2006

Dear Mr. Neuborne,

David Mermelstein, Alex Moskovic and Jack Rubin survivors, read the article from the Forward by Nathaniel Popper dated January 13, 2006. The article stated that you have filed an application for fees on December 19, 2005 requesting $4.1 million for 8,178 hours of work since 1999 for the Swiss Bank Settlements.

On September 26, 2005 the three of us were at the Miami Court House as witnesses testifying on the final day of the settlement on the Hungarian Gold Train issue. We listened to your dialogue with Judge Seitz; Mr. Neuborne:" but I would like the record to reflect that I initially- I served without a fee in the Swiss case. I am the lead settlement counsel in the Swiss case, in which I served without a fee now almost seven years. That is 1.2 billion dollar recovery. I was the principal lawyer who put the class together, the theories together, I argued the case, participated in the negotiations, and lead settlement counsel, and received no fees in that case at all."

What made you change your mind between September 26,2005 and December 19, 2005 when you filed the application?

We had no idea that you ceased working pro bono after the settlement of the fund, and if you did why wasn't it disclosed during your dialogue with Judge Seitz on September 26, 2005?

Mr. Neuborne, you as the lead settlement counsel in the Swiss case, who has gained respect and prominence for refusing to take any fees, had a change of heart, we the survivors would like a detailed explanation, as to why? It seems unconscionable to renege on your promise.

The survivors of the Shoah deserve to know why.

Respectfully,

David Mermelstein,
Alex Moskovic,
Jack Rubin

New York University
A private university in the public service

School of Law

40 Washington Square South, Room 307
New York, New York 10012-1099
Telephone: (212) 998-6172
Fax: (212) 995-4341
Email: burt.neuborne@nyu.edu

Burt Neuborne
Inez Milholland Professor of Civil Liberties
Legal Director, Brennan Center for Justice

February 17, 2005

Mr. Alex Moskovic
7529 SE, Bay Cedar Circle
Hobe Sound, FL 33455

Dear Mr. Moskovic:

In response to your query, you apparently misunderstood my remarks to the Miami Court. We were talking about fees for obtaining the settlement. I was comparing my *pro bono* work in achieving the Swiss bank settlement with counsel's request for 14% of the Hungarian Gold Train settlement as a fee for obtaining the settlement. I never intended to suggest that I was serving as Lead Settlement Counsel without fee. If my remarks were garbled, I apologize for the confusion.

It is true that I waived fees of many millions of dollars for achieving the Swiss bank settlement. I remain proud of that fact. But, from the date of my appointment in April, 1999 as Lead Settlement Counsel, it was understood by Judge Korman and by my co-counsel that no one could be expected to serve for many years as Lead Settlement Counsel without reasonable compensation. My intensive legal work for the class not only made possible the successful administration of the settlement, which has now distributed almost $840 million to victims, it actually added more than $50 million to the settlement fund. I am asking for 7% of the additional funds that my work added to the settlement fund. I am curious about why you had no objection to a fee of 14% in the Hungarian Gold Train case.

I wish you and your colleagues well. As leaders of the movement for Holocaust reparations, and as survivors who have had the remarkable courage to re-build your lives despite the Nazis, you deserve the respect and admiration of my generation. I am genuinely sorry that you are disappointed in my decision to ask for a reasonable fee for seven years of intensive effort as Lead Settlement Counsel.

Sincerely yours,

Burt Neuborne

Professor of Law Mr. Burt Neuborne
New York University School of Law
40 Washington Square South, Room 307
New York, N.Y. 10012-1099

March 7, 2006

Dear Professor Neuborne,

This is a reply to your letter dated February 17, 2006. I did not misunderstand your remarks on September 26, 2005 at the Miami Court House. David Mermelstein, Jack Rubin and others heard the same dialogue as I did. During the phone conferences with the survivors I was told you said that you were working pro-bono on the Swiss Bank Settlements. Is this also a misunderstanding?

Professor Neuborne you keep bringing up percentages of fees that you are asking for compared to other attorneys. As Judge Seitz said " percentages do not pay our bills". When I, as a victim who work pro bono on the Advisory Committee for Jewish Family Services in Palm Beach County in Florida, look at a fee of $4 million, here's what I see: " home care for a needy victim is $13.00 per hour, for an average of eight hours per week = 13x 8hours equals to $104.00; multiply this by 52 weeks equals to $5408 per year, now lets divide this amount into $4 million that equals 740, to me it means that 740 victims can receive home care for a year. Perhaps you should come down to one of our meetings and see for yourself what is happening in the trenches, you will see our concern.

I have been involved in the Hungarian Gold Train case since 2001, by going to the hearings in Miami (I live a hundred miles from Miami each way and do not receive any compensation for mileage) and was in consultation with Mr. Dubbin , Mr. Cuneo and Mr.Walton till the fruition of the settlement. During this period I became aware of the hours and devotion given by the three sets of attorneys in this case. Therefore I did not look at the percentages, my consideration was the hours spent by all the attorneys and the involvement of the small group of Hungarian victims, and the final outcome of the settlement where the numbers were not as great as your settlements. However, I did not see you or any other attorneys willing to be involved in the Hungarian Gold Train Case. Perhaps you felt that there was no chance of getting any settlements from the U.S. government for the looting the U.S. Army did to the Hungarian Victims' possessions on the 24 train cars. Now that the attorneys in the Hungarian Gold Train case were successful you were there to criticize the fees and on the final day of the hearing, you showed up in Miami representing 13 victims who live in Hungary (out of a total of 62,000 plaintiffs) you did not even know their names when you were asked. Then you asked for victims in Hungary for an additional 10% of the funds that was allocated to the Hungarian victims in the U.S.A. and Israel. I call this type of behavior "chutzpah".

I'm not against an attorney earning a living, if the fees are agreed upon up-front and disclosed and not kept secret till years later. Why the deception? What I and other survivors are against is a $700.00 hourly rate when a large portion of this work could have been done by others whose rate for this type of work is substantially less. This exorbitant rate is unconscionable. And, while you were charging those rates to the "entire class," what were you actually doing to assist the poor Looted Asset class members in the U.S., Israel, and elsewhere outside the FSU?

I also resent any individual of patronizing all the survivors for having remarkable courage for re-building our lives after the Shoah despite the loss of our families . Yes we deserve the respect and the admiration of your generation, and after sixty years we should be treated with dignity, understanding, equality, and not by being charged exorbitant undeserved attorney fees and unrealistic administrative fees.

At the meeting on January 20 ,2006 with Judge Korman and Judah Gribetz, the survivors present asked for an accounting of the administrative fees for the Swiss Bank Settlements . Now here we are into March and we were promised but have not yet received the above requested accounting. Action speaks louder than empty promises.

Sincerely,

Alex Moskovic, a' Last Generation Survivor'

7529 SE Bay Cedar Circle
Hobe Sound , Fl. 33455

cc: Judge Edward R. Korman

Professor of Law Mr. Burt Neuborne
New York University School of Law
40 Washington Square South, Room 307
New York, N.Y. 10012-1099

March 6, 2006

Dear Professor Neuborne,

This is a reply to your letter dated February 17, 2006. I did not misunderstand your remarks on September 26, 2005 at the Miami Court House. David Mermelstein, Jack Rubin and others heard the same dialogue as I did. During the phone conferences with the survivors I was told you said that you were working pro-bono on the Swiss Bank Settlements. Is this also a misunderstanding? Representing the entire class, how did your action benefit the Looted Asset Class to receive a fair share?

Professor Neuborne you keep bringing up percentages of fees that you are asking for compared to other attorneys. As Judge Seitz said " percentages do not pay our bills". When I, as a victim who works pro bono on the Advisory Committee for Jewish Family Services in Palm Beach County in Florida, look at a fee of $4 million, here's what I see: " home care for a needy victim is $13.00 per hour, for an average of eight hours per week = 13x 8hours equals to $104.00; multiply this by 52 weeks equals to $5408 per year, now lets divide this amount into $4 million that equals 740, to me it means that 740 victims can receive home care for a year. Perhaps you should come down to one of our meetings and see for yourself what is happening in the trenches, you will see our concern.

I have been involved in the Hungarian Gold Train case since 2001, by going to the hearings in Miami (I live a hundred miles from Miami each way and do not receive any compensation for mileage) and was in consultation with Mr. Dubbin , Mr. Cuneo and Mr.Berman till the fruition of the settlement. During this period I became aware of the hours and devotion given by the three sets of attorneys in this case. Therefore I did not look at the percentages, my consideration was the hours spent by all the attorneys and the involvement of the small group of Hungarian victims, and the final outcome of the settlement where the numbers were not as great as your settlements. However, I did not see you or any other attorneys willing to be involved in the Hungarian Gold Train Case. Perhaps you felt that there was no chance of getting any settlements from the U.S. government for the looting the U.S. Army did to the Hungarian Victims' possessions on the 24 train cars. Now that the attorneys in the Hungarian Gold Train case were successful you were there to criticize the fees and on the final day of the hearing, you showed up in Miami representing 13 victims who live in Hungary (out of a total of 62,000 plaintiffs) you did not even know their names when you were asked. Then you asked for victims in

Hungary for an additional 10% of the funds that was allocated to the Hungarian victims in the U.S.A. and Israel. I call this type of behavior "chutzpah".

I'm not against an attorney earning a living, if the fees are agreed upon up-front and disclosed and not kept secret till years later. Why the deception? What I and other survivors are against is a $700.00 hourly rate when a large portion of this work could have been done by others whose rate for this type of work is substantially less. This exorbitant rate is unconscionable.

I also resent you and others of patronizing all the survivors by having remarkable courage for re-building our lives after the Shoah despite the loss of our families . Yes we deserve the respect and the admiration of your generation, and after sixty years we should be treated with dignity, understanding, equality, and not by being charged exorbitant undeserved attorney fees and unrealistic administrative fees. At the meeting on January 20 ,2006 with Judge Korman and Judah Gribetz, the survivors present asked for an accounting of the administrative fees for the Swiss Bank Settlements . Now here we are into March and we were promised but have not yet received the above requested accounting. Action speaks louder than empty promises.

Sincerely,

Alex Moskovic, a' Last Generation Survivor'

7529 SE Bay Cedar Circle
Hobe Sound , Fl. 33455

FILING INSTRUCTIONS

YH 12-15-05

How To Manage Your Law Office

Publication 356 Release 32 November 2005

Check As Done

- ☐ 1. Check the Title page in the front of your present Volume 1. It should indicate that your set is filed through Release Number 31. If the set is current, proceed with the filing of this release. If your set is not filed through Release Number 31, DO NOT file this release. Please call Customer Services at 1-800-833-9844 for assistance in bringing your set up to date.
- ☐ 2. This Release Number 32 contains only White Revision pages.
- ☐ 3. Circulate the "Publication Update" among those individuals interested in the contents of this release.

Check As Done	*Remove Old Pages Numbered*	*Insert New Pages Numbered*

For faster and easier filing, all references are to right-hand pages only.

VOLUME 1

Revision

☐	Title page thru xxv	Title page thru xix
☐	4-1 thru 4-15	4-1 thru 4-16.1
☐	4-65 thru 4-73	4-65 thru 4-93
☐	5-7 thru 5-45	5-7 thru 5-46.1
☐	5A-1 thru 6A-37	5A-1 thru 6A-21
☐	6B-1 thru 6B-19	Material not replaced
☐	7-1 thru 7-25	7-1 thru 7-25

VOLUME 2

Revision

☐	Title page thru xiii	Title page thru vii
☐	App B2-1 thru App B3-3	App B2-1 thru App B3-3
☐	App E-1 thru App E-7	App E-1 thru App E-7
☐	I-1 thru I-31	I-1 thru I-31

STATE BY YEARS OF LEGAL EXPERIENCE
STANDARD HOURLY BILLING RATES
As of January 1, 2005

State/Years of Experience		Number of Offices	RATE					
			Number of Lawyers	Average $	Lower Quartile $	Median $	Upper Quartile $	Ninth Decile $
NY	Under 2 Years	16	60	163	131	160	190	213
	2 or 3 Years	14	51	198	165	195	230	240
	4 or 5 Years	13	37	206	175	195	225	270
	6 or 7 Years	16	45	222	183	225	250	285
	8 to 10 Years	17	53	247	210	235	275	335
	11 to 15 Years	19	79	257	220	245	295	350
	16 to 20 Years	18	72	289	235	275	350	423
	21 to 30 Years	20	148	322	250	300	350	475
	31 or More Years	18	74	333	260	350	360	490
OH	Under 2 Years	24	119	147	135	145	155	175
	2 or 3 Years	25	140	166	150	165	180	190
	4 or 5 Years	27	129	181	160	185	200	215
	6 or 7 Years	26	123	189	170	190	215	228
	8 to 10 Years	25	164	208	185	215	235	260
	11 to 15 Years	27	167	240	210	245	275	300
	16 to 20 Years	26	142	265	235	275	305	329
	21 to 30 Years	29	288	289	250	295	329	360
	31 or More Years	24	153	294	255	300	340	380
OK	Under 2 Years	6	14	148	--	160	--	--
	2 or 3 Years	8	17	159	143	165	175	185
	4 or 5 Years	7	14	177	--	178	--	--
	6 or 7 Years	6	14	159	--	173	--	--
	8 to 10 Years	6	16	194	--	195	--	--
	11 to 15 Years	7	18	204	171	210	230	253
	16 to 20 Years	7	29	218	208	225	240	250
	21 to 30 Years	9	49	246	215	245	280	325
	31 or More Years	8	23	258	181	250	305	385

(continued on next page)

POPULATION SIZE
STANDARD HOURLY BILLING RATES
As of January 1, 2005

Population Size/Status		Number of Offices	RATE					
			Number of Lawyers	Average $	Lower Quartile $	Median $	Upper Quartile $	Ninth Decile $
Less than 250,000	Equity Partner/Shareholder	100	630	229	190	225	265	315
	Non-Equity Partner	48	134	227	194	220	250	308
	Associate/Staff Lawyer	95	445	163	135	160	188	210
250,000 - 999,999	Equity Partner/Shareholder	215	2,572	269	215	260	300	350
	Non-Equity Partner	110	426	238	205	240	270	305
	Associate/Staff Lawyer	202	1,892	174	143	170	195	230
1 Million or More	Equity Partner/Shareholder	275	3,869	313	260	305	360	425
	Non-Equity Partner	203	1,268	272	216	270	320	375
	Associate/Staff Lawyer	282	4,548	197	155	180	225	276

INDIVIDUAL LITIGATION SPECIALTIES
STANDARD HOURLY BILLING RATES
As of January 1, 2005

Specialty/Status		Number of Offices	RATE					
			Number of Lawyers	Average $	Lower Quartile $	Median $	Upper Quartile $	Ninth Decile $
Other Litigation	Partner/Shareholder-Equity/Non-Equity	84	271	261	213	260	300	340
	Associate/Staff Lawyer	71	265	182	145	180	205	232
Multiple Litigation	Partner/Shareholder-Equity/Non-Equity	272	1,384	294	225	280	340	450
	Associate/Staff Lawyer	243	1,329	197	155	185	225	275

THE 2004 DESKTOP REFERENCE ON THE
ECONOMICS OF LAW PRACTICE
IN NEW YORK STATE

Benchmarks and Referents for Law Practice Management

Survey Conducted by:
Spectrum Associates Market Research
Farmington, CT

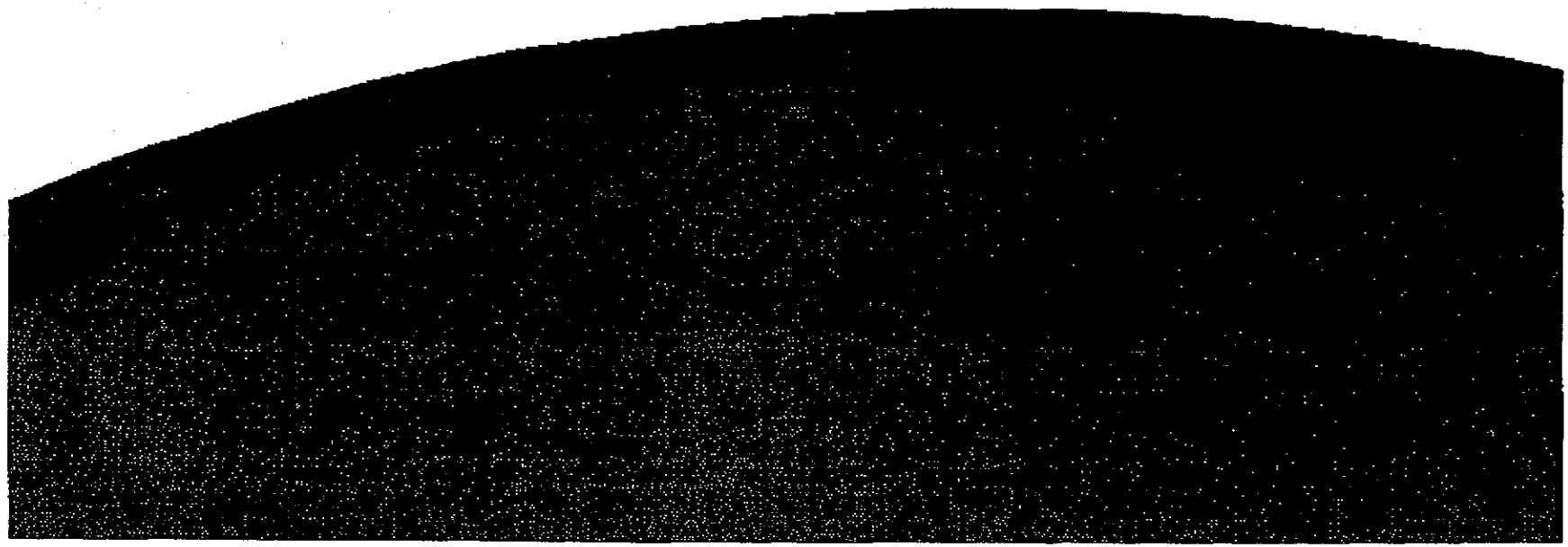
Figure F7
Average Attorney Billing Rates
For Law Firm Equity and Non-Equity Partners by Size of Law Firm

			Base	Percentile 25	Median	Percentile 75	Percentile 95	Mean
Equity Partners	**Region**	Solo	104	$210	**$250**	$300	$375	$261
		2 - 9	64	$250	**$300**	$350	$450	$307
		10 - 34	14	$280	**$343**	$395	$550	$331
		35+	8	$338	**$436**	$487	$512	$405
		Total	190	$225	**$250**	$300	$400	$268
	NY Totals	Solo	449	$175	**$230**	$275	$350	$233
		2 - 9	271	$175	**$250**	$320	$400	$251
		10 - 34	56	$175	**$270**	$335	$400	$268
		35+	15	$300	**$385**	$473	$512	$370
		Total	791	$175	**$240**	$295	$375	$236
Non-Equity Partners	**Region**	Solo	-	-	-	-	-	-
		2 - 9	21	$175	**$250**	$275	$475	$246
		10 - 34	12	$191	**$275**	$363	$395	$271
		35+	6	$300	**$375**	$425	$460	$352
		Total	39	$180	**$250**	$330	$475	$262
	NY Totals	Solo	-	-	-	-	-	-
		2 - 9	106	$150	**$175**	$250	$350	$202
		10 - 34	41	$150	**$220**	$300	$375	$231
		35+	11	$250	**$374**	$425	$460	$334
		Total	158	$150	**$200**	$250	$375	$213

Figure F8
Average Attorney Billing Rates
For Non-Partner Attorneys by Size of Law Firm and Experience

			Base	Percentile 25	Median	Percentile 75	Percentile 95	Mean
10 + Years Experience	**Region**	2 - 9	40	$250	**$300**	$325	$395	$290
		10 - 34	15	$225	**$325**	$360	$400	$295
		35+	8	$243	**$300**	$380	$395	$298
		Total	63	$250	**$300**	$350	$395	$292
	NY Totals	2 - 9	186	$175	**$250**	$300	$350	$241
		10 - 34	49	$175	**$250**	$325	$395	$257
		35+	15	$225	**$300**	$373	$395	$278
		Total	250	$175	**$250**	$300	$375	$244
5 - 9 Years Experience	**Region**	2 - 9	36	$175	**$245**	$250	$315	$228
		10 - 34	13	$185	**$250**	$275	$290	$230
		35+	9	$225	**$250**	$285	$309	$244
		Total	58	$175	**$250**	$270	$309	$230
	NY Totals	2 - 9	120	$150	**$200**	$250	$300	$201
		10 - 34	53	$150	**$185**	$250	$285	$198
		35+	16	$175	**$245**	$285	$309	$231
		Total	189	$150	**$200**	$250	$300	$203
1 - 4 Years Experience	**Region**	2 - 9	30	$160	**$175**	$200	$250	$182
		10 - 34	15	$165	**$190**	$225	$230	$186
		35+	9	$165	**$196**	$215	$236	$192
		Total	54	$160	**$175**	$200	$250	$184
	NY Totals	2 - 9	128	$125	**$150**	$190	$250	$163
		10 - 34	57	$125	**$160**	$195	$230	$161
		35+	16	$160	**$194**	$215	$236	$183
		Total	201	$125	**$160**	$200	$250	$164
< 1 Year Experience	**Region**	2 - 9	9	$125	**$130**	$175	$200	$142
		10 - 34	8	$125	**$135**	$160	$215	$143
		35+	5	$145	**$145**	$160	$165	$151
		Total	22	$125	**$140**	$170	$200	$144
	NY Totals	2 - 9	42	$100	**$130**	$160	$200	$133
		10 - 34	40	$100	**$125**	$135	$215	$125
		35+	11	$140	**$145**	$160	$165	$140
		Total	93	$100	**$130**	$150	$200	$131

2005 Law Firm Financial Benchmarking Survey



Survey Background

- Administered to firms nationwide.
- All data submitted for use in this survey are kept completely confidential.
- 'Attorneys' refers to all attorneys/lawyers, including equity partners, non-equity partners and associates. Paralegals are excluded from this category.
- 'Administrative' refers to all support functions, excluding paralegals.
- Data for 2002, 2001 and 2000 represents responses from prior editions of the survey.

Respondent Breakdown

- Respondent information was broken into the categories below based for analysis.
- Northeast respondent data (36 firms)
  - <151 attorneys = 25
  - 151+ attorneys = 11
- Other Northeast Demographics:
  - Multi-office = 28
  - Single-office = 8
  - General practice = 27
  - Specialty practice= 9

Respondent Breakdown

- Respondent information was broken into the categories below based for analysis.
- National respondent data (209 firms)
  - <50 attorneys = 94
  - 51-150 attorneys = 70
  - 151+ attorneys = 45
- Office Type:
  - Multi-office = 134
  - Single-office = 75

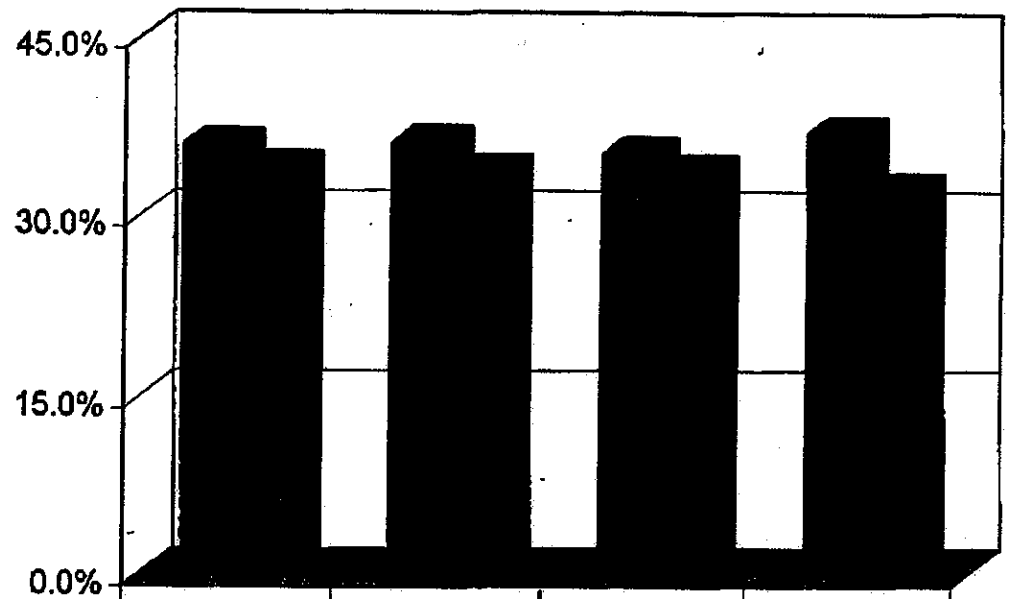
Respondent Breakdown

- Practice Type
  - General = 149
  - Specialty = 60
- Specialty:
  - Insurance Defense = 11
  - Intellectual Property/Patent = 11
  - All Other Specialties = 38

Survey Demographics

- Regional Breakdown
  - West (AK, AZ, CA, CO, HI, ID, MT, NM, NV, OR, UT, WA, WY) = 24
  - Midwest (IA, IL, IN, KS, ND, MI, MN, MO, NB, NE, OH, SD, WI) = 104
  - South = (AL, AR, FL, GA, KY, LA, MS, NC, OK, SC, TN, TX) = 28
  - Mid-Atlantic (DC, DE, MD, VA, WV) = 17
  - Northeast (CT, MA, ME, NH, NJ, NY, PA, RI, VT) = 36
- Largest Obstacles for Firms
  - Increase revenue
  - Improve profitability
  - Succession planning

Net Income as a % Fees Collected



	2004	2003	2002	2001
Northeast - <151 Attorneys	36.2%	36.4%	35.4%	37.2%
Northeast - 151+ Attorneys	34.4%	34.0%	34.1%	32.5%

Net Income as a % Fees Collected

		2004	2003	2002	2001
National - All		38.8%	38.7%	38.5%	38.2%
Regional	West	35.7%	35.8%	35.2%	32.9%
	Midwest	38.4%	38.0%	37.8%	37.2%
	South	42.1%	41.7%	41.4%	41.1%
	Mid-Atlantic	42.9%	41.9%	39.5%	41.0%
	Northeast	35.8%	35.6%	34.8%	35.9%
Firm Size	<50 Attorneys	39.2%	39.3%	39.2%	39.2%
	50-150 Attorneys	37.4%	37.6%	37.7%	37.2%
	151+ Attorneys	36.7%	36.4%	35.5%	35.0%
Practice Type	General	39.0%	39.0%	38.3%	38.0%
	Specialty	38.8%	38.5%	38.9%	39.5%
Specialty	Insur. Defense	35.0%	32.7%	36.5%	30.4%
	IP	28.0%	28.1%	31.9%	29.6%

FACSIMILE TRANSMISSION

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20544

Date: 3-15-06

To: Sam Dubbin

Fax No.: 305-371-4701

From: Bob Deyling

Fax. No.: 202-502-1033 Tele. No.: 202-502-1100

NUMBER OF PAGES WITH COVER: 16

Message: Regulations as we discussed.

See Section 3E

THIS FACSIMILE MESSAGE IS CONFIDENTIAL AND MAY CONTAIN ATTORNEY-CLIENT, WORK PRODUCT OR OTHER PRIVILEGED COMMUNICATIONS OR INFORMATION INTENDED ONLY FOR THE RECIPIENT NAMED ABOVE.

CHAPTER 11: CLAIMS

Part D. Regulations Governing Legal Representation at Government Expense of Judges of the United States and Court Officials and Employees Sued in Their Official Capacities or on Account of Their Performance of Official Duties.

CONTENTS

Exhibits:
D-1 Decision Letter of the Comptroller General of the United States (No. B-178360, Oct. 31, 1973).
D-2 Personal Request By Officer or Employee of the Federal Judiciary for LegalRepresentation.
D-3 Supervisor's Certification That Employee Was Acting in Official Capacity.

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1. General Information

A. Statement of Purpose.

The following regulations are issued pursuant to the authority accorded to the Director of the Administrative Office of the United States Courts by section 463 of title 28, United States Code (as added by section 116 of the Federal Courts Improvement Act of 1982, Public Law No. 97-164, 96 Stat. 25, 32, effective on October 1 1982).

B. Statutory Authority.

It is provided by 28 U.S.C. § 463 that the Director may pay the costs of legal defense for justices and judges of the United States and other officers and employees of the courts of the United States who are sued in the judicial or official capacity, or are otherwise required to defend actions taken or omissions occurring in such capacity, when the services of an attorney for the government are not reasonably available for this purpose through the resources of the Department of Justice or the United States Attorney for the applicable judicial district. It is further required by section 463 that the Director shall prescribe regulations for such payments, subject to the approval of the Judicial Conference of the United States.

C. Application.

These regulations apply to situations of Federal or state court litigation naming as defendants, in their respective judicial or official capacities, or in their individual capacities on account of the performance of their official duties, judges, officers, and employees of the courts of the United States, including, but not limited to, the following: (1) judges of the United States (as defined at 28 U.S.C. § 451), judges of the United States Court of Federal Claims, United States bankruptcy judges, United States magistrate judges, and judges of territorial courts; (2) law clerks and other staff assigned directly to judges enumerated in subsection (1) above; (3) clerks, deputy clerks, probation officers, court reporters, and staff of the United States court of appeals, the United States district courts the United States bankruptcy courts, the United States Court of International Trade, the United States Court of Federal Claims, and the territorial courts; (4) circuit executives and their staff, and (5) Federal Public Defenders and their staff. The above does not necessarily constitute a complete and exhaustive list of the situations in which the Director may have authority to pay the costs of legal defense.

D. Issuance and Amendment Procedures.

These regulations may be amended or rescinded by the Director, under the authority vested in him through 28 U.S.C. § 604(f), at such times as he may deem necessary in the performance of his duties and with the approval of the Judicial Conference.

E. Critical Incidents.

These regulations shall also apply to the provision of emergency interim legal representation for judicial officers and employees of the United States, including, but not limited to, those listed in section 1C, in the aftermath of a "critical incident," i.e., a shooting or other use of force causing serious bodily injury in which the judge, officer, or employee was involved, or is or may be alleged to have been involved, in the course of the performance of official duties.

2. Procedure Upon Service of Process

A. Judges or Judicial Officers.

A judge or judicial officer, as listed in subsection (1) of section 1C of these regulations, who is served with civil process or who has received notice that a civil action has been filed (or who has a staff member so served or notified) based upon an episode occurring or action taken in the judicial capacity, and who desires legal representation under the auspices of the Department of Justice or otherwise at the expense of the United States, should transmit by mail the summons and complaint or other process served, together with a personally signed cover letter specifying the date and manner of service and explicitly requesting the assumption of legal representation, to the following address:

Office of the General Counsel
Administrative Office of the United States Courts
Suite 7-290
One Columbus Circle, N.E.
Washington, D.C. 20544

A copy of such communication should also be transmitted to the United States Attorney for the judicial district in which the case has been filed. Special note should be made to the United States Attorney of (1) the answering date specified in the summons if it does not conform with Rule 12(a), Federal Rules of Civil Procedure, affording an officer or employee of the United States 60 days to respond to civil process arising from the official capacity, or (2) the fact that the case has been filed in a state or local court, necessitating the prompt commencement of removal proceedings under 28 U.S.C. § 1446.

B. Judicial employees.

A circuit executive, clerk of court, probation officer, or other court official who is served with civil process or who has received notice that a civil action has been filed based upon the exercise of his or her official duties (or who has a staff member so served or notified), and who desires legal representation under the auspices of the Department of Justice or otherwise at the expense of the United States, should transmit the summons and complaint or other process

served with individual covering letters signed by all named defendants, in the same manner described in section 2A of these regulations with respect to judges and judicial officers, and should similarly communicate with the United States Attorney in the judicial district where the case is pending.

C. Administrative Office Procedure.

Upon receipt of a request for legal representation submitted in accordance with sections 2A or 2B of these regulations, the Office of the General Counsel in the Administrative Office will promptly transmit such request to the Department of Justice (addressed to the appropriate Branch of the Civil Division), together with a letter from the General Counsel or his designee recommending whether representation should be authorized by the Department. This procedure recognizes the role of the Justice Department under 28 U.S.C. §§ 516-519 as attorney for the United States and its agencies or officers in any litigation to which they are official parties. The recommendation of the General Counsel for the Justice Department on the undertaking of representation is offered in accordance with the regulation of the Department at 28 C.F.R. § 50.15(a), which requires the "employing agency" of an officer or employee of the United States who is sued in that capacity to recommend whether the assumption of representation by the Department of Justice would be in the interest of the Government. The basis for this recommendation by the General Counsel shall be (1) whether the named defendants were acting within the scope of their employment at the time of the acts or events alleged as the basis of the lawsuit, and (2) whether the assumption of representation would otherwise appear to be consistent with the best interests of the United States (including the desirability to assert and uphold any applicable judicial or official immunity available to the defendants as an affirmative defense to the claims asserted).

D. Department of Justice Procedure.

Upon receipt of a communication from the General Counsel of the Administrative Office in accordance with section 2C of these regulations, the Civil Division of the Justice Department will determine under its regulations whether legal representation shall be authorized and will communicate its decision to the appropriate United States Attorney and to the Administrative Office. If representation authority is granted, the Department will normally delegate to the United States Attorney for the applicable judicial district the function to enter an appearance for the defendant and to undertake his or her substantive legal defense pursuant to 28 U.S.C. §§ 519 and 547, although the Department may perform such representation directly where it deems such procedure appropriate.

E. Mandamus Actions.

Where application is made to the United States court of appeals for a writ of mandamus or prohibition directed to a court under Rule 21, Federal Rules of Appellate Procedure, no request for legal representation by the trial-court judge is required unless and until the court of appeals should issue an invitation or order pursuant to Rule 21(b), Federal Rules of Appellate Procedure, that the judge may address the petition. Where the judge believes that the submission of an answer is critical to upholding the judicial act that is the subject of

the mandamus petition and that the parties to the underlying lawsuit will not adequately do so, a request for the services of the Department of Justice in submitting such answer may be made to the General Counsel of the Administrative Office in the same manner as provided by sections 2A and 2C of these regulations. Similar principles will apply where application has been made to the Supreme Court of the United States, a United States district court, or any other Federal or state court for a writ of mandamus or prohibition directed to a court or to a judicial officer or employee, except to the extent that in such proceedings it may not be the court's practice to issue an invitation or order of the sort referred to in Rule 21(b)(4), Federal Rules of Appellate Procedure.

F. Federal Public Defenders.

No request for representation of a Federal public defender or his or her staff sued in the official capacity shall normally be submitted to the Department of Justice, in view of the Department's prosecutorial role and its consequent apparent disqualification to represent a public defender against whom it prosecutes criminal cases. Instead, the General Counsel of the Administrative Office, in consultation with its Defender Services Division, shall make alternative arrangements for the legal defense of a public defender and his or her staff by the Federal public defender of another judicial district or, where necessary, by private counsel in accordance with section III of these regulations. Submission to the Department of Justice of a request for representation of a Federal public defender or his or her staff nonetheless may be appropriate where the need for representation does not arise from, or relate to, the public defender's defense of a criminal defendant, and the public defender has requested such submission.

G. Critical Incidents.

A judicial officer or employee of the United States who has been involved, or is or may be alleged to have been involved, in the course of the performance of official duties, in a "critical incident," i.e., a shooting or other use of force causing serious bodily injury, need not await service of process or the filing of a complaint or other legal process in order to request representation. A judicial officer or employee in that position may request representation immediately following the critical incident, in recognition that such an officer or employee may be threatened with civil and/or criminal liability and any action or statement following the incident could affect the officer's or employee's potential civil and/or criminal exposure. The Office of the General Counsel will request representation by the Department of Justice under standards and policies set out in these regulations.

3. Compensation of Private Counsel by Government

A. In General.

Where the Department of Justice communicates its unavailability to represent a judge or other court official, either directly or through the United States Attorney, because of considerations of conflicting interests or for any other reason, the Director of the Administrative

Office shall then consider the exercise of his authority under 28 U.S.C. § 463 to pay the costs of such legal defense by private counsel. The Director shall similarly consider the exercise of such authority, upon receipt of a representation request submitted under section 2A of these regulations, in circumstances where the Justice Department would clearly be placed in a conflict-of-interest position if it were to accept the representation and the submission of a representation request to the Department is thus deemed to be inappropriate.

B. Availability of Funds.

In determining whether to apply the appropriated funds of the Judiciary to the payment of legal representation expenses by private counsel, the Director shall be guided by the decision of the Comptroller General of the United States (No. B-178360, October 31, 1973), published at 53 Comp. Gen. 301 (1973) and attached to these regulations as Exhibit D-1. In this opinion the Comptroller General held that judicial appropriations may be applied to the payment of attorneys' fees and litigation expenses incurred in representing judges and other court officials, where the resources of the Department of Justice are unavailable to do so and where the entry of an appearance for the judicial defendants is found to be necessary to protect their legal interests or to uphold their immunity in an action for personal damages.

Top

C. Collateral or Mandamus Proceedings.

Consistent with the guiding decision of the Comptroller General referenced in section 3B, the appropriated funds of the Judiciary shall not be applied to legal representation in circumstances where the lawsuit in question is not a personal damage action but instead constitutes a collateral attack upon a judicial act or court judgment, which should appropriately be defended by the private party in the underlying litigation to whose benefit the judgement or order at issue has inured. In mandamus proceedings against a court under Rule 21, Federal Rules of Appellate Procedure, judicial appropriations shall not be expended for private legal representation unless the court of appeals has invited or ordered the trial-court judge to address the petition pursuant to Rule 21(b) and the judge finds, with the approval of the Director, that an answer is necessary to apprise the court of appeals regarding the legal considerations surrounding the judicial order or action at issue. Similar principles will apply in mandamus proceedings brought against a court or a judge or judicial employee in the Supreme Court of the United States, a United States district court, or any other Federal or state court, except to the extent that in such proceedings it may not be the court's practice to issue an invitation or order of the sort referred to in Rule 21(b)(4), Federal Rules of Appellate Procedure.

D. Selection of Private Counsel.

Where the Director, or the General Counsel acting on his behalf, finds that legal representation is essential to protect the interests of a judge or other court official, that the resources of the Justice Department are not available to furnish such representation, and that the expense of such representation should properly be borne by the Government under the guiding decision of the Comptroller General, the General Counsel shall so advise the judicial defendant in writing (or by

telephone where time constraints so require). The judicial defendant shall be authorized to select and designate private counsel to perform the representation and shall promptly advise the Administrative Office of the name and business address of the attorney so designated. The Administrative Office may require that counsel be selected from the geographical area surrounding the place of holding court where the entry of appearance is anticipated, in order to conserve funds to be expended for the attorney's travel in the course of the representation.

E. Maximum Hourly Fees.

The rate of compensation to be allowed to private counsel from appropriated funds for time devoted to the legal defense of a judge or court official shall be fixed on an hourly basis by the Director, with the advice of the General Counsel, to reflect (1) the overall difficulty of the representation, (2) the proportion of time spent in court appearances, research, and the drafting of pleadings, briefs or memoranda of law, and (3) the complexity of legal issues involved in the lawsuit. In view of the Comptroller General's determination that the expenses of litigation to be defrayed from judicial appropriations shall include only "minimal fee" to private attorneys (page 5 of Exhibit D-1 to these regulations), a maximum hourly rate of compensation to private counsel shall be established by the Director and may be adjusted by him periodically as necessary. This maximum rate shall not exceed the highest rate of compensation currently payable by the Department of Justice to private counsel retained pursuant to its regulations.

F. Allowable Expenses.

Private counsel undertaking the representation of a judge or other court official under 28 U.S.C. § 463 and these regulations shall be entitled, in addition to the payment of fees at an hourly rate established under section 3E hereof, to be reimbursed for reasonable and necessary expenses incident to the representation. Such expenses must be itemized in the attorney's billing and may include, but shall not necessarily be limited to, long-distance telephone calls, photocopying costs, transcript fees, the taking of depositions, and travel expenses necessitated by court appearances or depositions.

G. Critical Incidents.

As stated in section 2G, there will often be a need for immediate representation following a critical incident, since any action or statement following the incident could affect the judicial officer's or employee's potential civil an/or criminal exposure. The Department of Justice has stated that it is unavailable to provide emergency interim representation in these situations, even though ultimately the Department may, after giving the matter due consideration, decide to provide representation. As a result, emergency interim representation of a judicial officer or employee involved in a critical incident will be by private counsel under this section 3. Once the Department of Justice has had an opportunity to consider the representation issue, the Department will assume representation of the judicial officer or employee if that should be the Department's decision.

4. Billing and Payment Procedures

A. Frequency of Payment.

The Administrative Office shall ordinarily make payment to a private attorney for services rendered in judicial representation only at the conclusion of the legal proceedings. Where the proceeding is protracted, disbursement may be made periodically in order to alleviate financial hardship to the attorney. Nevertheless, such periodic disbursement shall be made only upon receipt of the attorney's billing statement and shall not take place more frequently than once per month.

B. Submission of Bill.

Private counsel providing representation covered by these regulations shall submit billings for their services on their usual billing forms. The billing statement shall enumerate the amount of time expended in legal services for which compensation is claimed, the dates on which such services were rendered, and the general nature of the work performed on each date. The hourly rate of compensation upon which the claimed fee is based shall be plainly designated and shall conform with the amount allowed by the Director pursuant to section 3E of these regulations. The billing statement shall also set forth any ancillary expenses of representation for which reimbursement is claimed in conformity with section 3F hereof. The statement shall be submitted to the defendant for whom representation services have been rendered or, where there are several such defendants, to the judge who is senior in commission among the defendants or the ranking court official, where no judge is a defendant.

C. Approval for Payment.

When the judicial defendant receives a bill from private counsel under section 4B of these regulations, he or she shall write a covering letter or endorse on the face of the billing his or her acknowledgment that the services for which compensation is claimed have been rendered in a satisfactory manner. If the defendant (or, where there are several defendants, any or the defendants) is a judge of any court other than the Court of International Trade or the Court of Federal Claims, he or she shall then forward the billing to the chief judge of the circuit with the request that the chief judge manifest his or her approval for the payment of the bill, in view of the Comptroller General's requirement (on page 6 of Exhibit D-1) that the ultimate decision on the degree of representation required and the amount of payment justified should be made by someone other than the defendant or respondent involved in the case. If the defendant is a judge of the Court of International Trade or the Court of Federal Claims, or a court official or judicial employee other than a judge, he or she shall submit the attorney's bill to the chief judge of his or her court with the request for approval thereof.

D. Disbursement by Administrative Office.

Following approval by the chief judge of the circuit or of the defendant's court, the attorney's statement shall be transmitted to the General Counsel of the Administrative Office. The General Counsel and his staff shall review the billing to assure that it conforms with these regulations and with the terms upon which counsel was originally retained. The General Counsel shall then refer the billing to

the Office of Finance and Budget, Accounting and Financial Systems Division, for final audit and the disbursement of payment.

5. Indemnification

A. The Administrative Office may indemnify the defendant judiciary officer or employee for any verdict, judgment, or other monetary award which is rendered against such officer or employee, provided that the conduct giving rise to the verdict, judgment, or award was taken within the scope of employment and that such indemnification is in the interest of the United States, as determined by the Director or his or her designee.

B. The Administrative Office may settle or compromise a personal damages claim against a judiciary officer or employee by the payment of available funds at any time, provided the alleged conduct giving rise to the personal damages claim was taken within the scope of employment and that such settlement or compromise is in the interest of the United States, as determined by the Director or his or her designee.

C. Absent exceptional circumstances as determined by the Director or his or her designee, the Administrative Office will not entertain a request either to agree to indemnify or to settle a personal damages claim before entry of an adverse verdict, judgment, or award.

D. To request indemnification to satisfy a verdict, judgment, or award entered against an officer or employee, the officer or employee shall submit a written request, with appropriate documentation including copies of the verdict, judgment, award, or settlement proposal if on appeal, to the General Counsel, who shall thereupon submit the request with a recommended disposition to the Director for decision.

E. Any payment under this section either to indemnify an officer or employee or to settle a personal damages claim shall be contingent upon the existence of adequate appropriated funds available for the operations of the employing court or office. The foregoing regulations are hereby prescribed by authority of 28 U.S.C. § 463 and with the approval of the Judicial Conference at its sessions on September 22 and 23, 1982, September 14, 1988, and March 11 and 12, 1997.

Trans 141 - Last modified by March 29, 2004

PART D: REGULATIONS GOVERNING LEGAL REPRESENTATION AT GOVERNMENT EXPENSE OF JUDGES OF THE UNITED STATES AND COURT OFFICIALS AND EMPLOYEES SUED IN THEIR OFFICIAL CAPACITIES OR ON ACCOUNT OF THEIR PERFORMANCE OF OFFICIAL DUTIES

Exhibit D-1. Decision Letter of the Comptroller General of the United States

B-178360

October 31, 1973

The Honorable Rowland F. Kirks, Director
Administrative Office of the
United States Courts
Dear Mr. Kirks:

Your letter of April 2, 1973, with attachments, requests our decision as to whether appropriations contained in the annual "Judiciary Appropriation Act" for "travel and miscellaneous expenses not otherwise provided for, incurred by the judiciary," are available to pay certain litigation costs, and attorneys fees, incurred in representing or defending Federal judges and other Federal judicial officers or entities in the circumstances considered below. We have had several discussions concerning this matter with members of your staff.

A large, and still growing, number of cases have been brought against individual judges, district courts, and judicial councils and against a variety of judicial officers, including referees in bankruptcy, clerks, United States magistrates, public defenders, court executives, officers of the Administrative Office of the United States Courts and foremen of juries. We understand that the cases causing the most concern involve judges sued, in their official capacity, by a petitioner or by the United States seeking a writ of mandamus pursuant to Rule 21 of the Federal Rules of Appellate Procedure (FRAP) and 28 U.S.C. § 1651, collaterally attacking the judges' rulings in original actions. See, for example, Colgrove v. Battin, 41 LW 5025 (June 21, 1973), and United States v. Ferguson, 448 F.2d 169 (1971). Your General Counsel, in a memorandum dated February 9, 1973, to the Deputy Director of your Office stated:

"Surely it would be unconscionable to expect judges and courts sued in their official capacities to support the defense by private contributions of the judges. It would be equally unconscionable for a judge to have to rely on the attorney of a private litigant to represent him and to pay the considerable cost of transcription, printing and the attorney's travel involved in an appeal on behalf of the court being sued."

The general question you raise, as stated in your letter, is as follows:

"When a Federal judge or other judicial officer is sued in his official capacity and representation is furnished by private counsel on request, rather than by the Department of Justice (pursuant to 28 U.S.C. 516-519, 547(2)), can the expenses of litigation be paid by the Administrative Office of the United States Courts from the Travel and Miscellaneous Expenses appropriation of the Judiciary Appropriation Act?"

In addition, you ask the following specific questions with respect to the representation of judicial officers:

"(1) If we can apply the Judiciary Appropriations to payment of litigation costs in some cases involving judicial officers, what specific categories of cases are involved?

"(2) In addition to general litigation costs, would it be permissible to pay a minimal fee to an attorney representing a judge, court, judicial officer, judicial council, etc., where gratuitous representation is not otherwise available?

"(3) If the Judiciary Appropriation is not available for payment of costs described in questions 1 and 2 above, is there any other source of payment where services of counsel furnished by the Department of Justice are not available either because of a conflict of interest, or for any other valid reason?

"(4) Would the same answers to the above questions apply to suits against Federal public defenders appointed pursuant to 18 U.S.C. 3006A(h) whom the Department has previously declined to represent because of the inherent conflict of interest involved?"

The general rule is that, in the absence of specific statutory authority for departments and establishments of the government to resort to litigation in the courts in the performance of the duties and responsibilities with which they are charged, it is the duty of the Attorney General, as chief law officer of the government, to institute, prosecute and defend actions in behalf of the United States in matters involving court proceedings and to defray the necessary expenses incident thereto from appropriations of the Department of Justice rather than from appropriations of the administrative office which may be involved in the proceedings. See 44 Comp. Gen. 463 (1965) and 46 id. 98 (1966).

In a letter to you of January 31, 1973, the former Attorney General, Richard G. Kleindienst, set forth the circumstances under which the Department of Justice (Department) will assume the burden of representing judicial officers. First, he stated, the Department will provide representation where the acts which are the basis of the suit are within the scope of the defendant officer's authority and where the only relief sought is money damages against the defendant personally. It is his position, however, that when representation is requested in collateral proceedings which are in the nature of appeals to overturn a decision of the judicial officer rendered in favor of one party or another, and the government is not a party to the litigation, the result of the Department's furnishing representation in such a situation amounts to the Department's defending the position of one or the other private litigants. The former Attorney General further stated that:

"In our view, when no personal relief is sought against the judicial officer, such officer is no more in need of a personal defense than he would be if an

appeal were taken from any of his appealable rulings. Nor is there any impropriety in counsel for one of the private litigants representing the judicial officer, as if he were defending an appeal from the officer's ruling."

Accordingly, the Department will not provide representation in such cases. Where a collateral suit against a judicial officer in the nature of an appeal also seeks personal damages against the officer, the Department intends to evaluate the nature of the claim to determine if the money claim is frivolous and make its representation decisions on that basis.

The former Attorney General stated that the Department cannot furnish representation to a judicial officer in a situation where the Department's interests collide with those of the judicial officer, such as in a mandamus action instituted against a judge by the Department. He further stated that the Department could not furnish a special attorney in those cases where it could not on its own represent the judicial officer.

In addition, he stated, however, that the Department will file amicus statements in any type case where it will be helpful to the court to know the government's position or for a relatively impartial statement of what the law is or should be. The former Attorney General stated that whenever the Department furnishes an attorney to represent a judicial officer, it will bear the costs attendant to the representation; however, he concluded that the Department cannot bear the costs of litigation or the fees of private counsel retained by a judicial officer.

We have been informally advised by members of your staff that in those situations, where judicial officers have felt that representation was required, local bar associations were frequently asked to provide attorneys without compensation and that the expenses of such representation, including in some cases attorneys fees, had to be borne by the judicial officers or their attorneys or by the bar associations.

In his memorandum your General Counsel points out that while many of the cases involving the procedure of suing a judicial officer to test collaterally a legal issue arising out of the original litigation are frivolous, some -- such as Colgrove v. Battin, supra., testing the constitutionality and legality of a local rule of court (similar to that adopted by a majority of the Federal district courts) providing for a six-member jury in civil cases -- involve basic and novel issues. Moreover, it is your Office's position that even where the suit is frivolous, some pro forma submission should be made to the court. As we understand it, such a submission is not necessarily required to protect the judicial officer in the Courts of Appeals, since Rule 21 of FRAP provides that the failure of an officer to appear will not result in his losing by default; however, in the absence of an appearance in the Courts of Appeals, the judicial officer is precluded by the applicable rules from appealing an adverse decision to the Supreme Court of the United States. In this connection we suggest your Office may wish to consider proposing a change in the applicable rules which will allow an appeal to the Supreme Court by a judicial officer-defendant without the necessity of an appearance in the Court of Appeals.

In summary, there are numerous cases in which judicial officers are being sued in their official capacities as to which the Department of Justice, for a variety of reasons, has determined that it will, or can, not provide representation. While your Office agrees that many of these suits are frivolous, it has determined that some sort of defense--frequently involving merely a pro forma submission to the Court of Appeals--is necessary in almost every case. Thus, you ask our views as to the availability of

appropriations made to the judiciary to pay the costs of making a pro forma appearance in these cases, and of attorneys fees in those cases--which we have been informally advised will be few in number--which will actually require the personal appearance of counsel for the judicial officers where gratuitous representation is not available.

As noted above, under the provisions of 18 U.S.C. 516-519 and except as otherwise authorized by law, the conduct and supervision of litigation in which the United States, an agency or officer thereof is a party is reserved to the Department of Justice under the direction of the Attorney General. Accordingly, whenever a judicial officer, acting in the scope of his official duties, is named as defendant, the Attorney General should be requested to provide representation for such official. (Of course, a request need not be made in those categories of cases--such as those in which the Department of Justice has instituted a mandamus action against a judicial officer--as to which the Attorney General has stated he will not provide such representation.) Also, 5 U.S.C. 3106 contains a restriction on the employment of attorneys or counsel for the conduct of litigation in which the United States, an agency or employee thereof, is a party, but this restriction is directed to the heads of executive and military departments and does not restrict the right of the judiciary to employ attorneys for the conduct of litigation.

It is clear, however, that if we were to hold that the judiciary's appropriations are not available to pay the costs of providing a defense, with respect to a case in which the Attorney General declines for any valid reason to provide representation, such defense, even though it involves defending actions taken by federal employees in the normal course of their business, might have to be borne by the defendants. It is well established that where an officer of the United States is sued because of some official act done in the discharge of an official duty the expense of defending the suit should be borne by the United States. See Konigsberg v. Hunter, 308 F. Supp. 1361 (W.D. Mo., 1970) and 6 Comp. Gen. 214 (1926). Also, we note that under Rule 21 of FRAP judges are entitled, but not required, to appear in court in mandamus and prohibition proceedings (as well as other extraordinary writ proceedings) and it would be burdensome to require that the expenses of such appearances, when made in the best interest of the United States, be borne by the judicial officers involved. Moreover, the present situation involves having the Attorney General, an official of the Executive Branch of the Government, determine whether and to what extent members of institutions of a coordinate branch of the Government, the Judiciary, are to be represented in litigation in which they are named as defendants or respondents.

With these factors in mind, and subject to the qualifications listed below, it is our view that the above cited provisions of law would not preclude the use of judiciary appropriations to pay the costs of litigation including minimal fees to private attorneys--if you determine the use of private attorneys is necessary--in those cases where it is determined that it is in the best interest of the United States and necessary to carry out the purposes of the federal judiciary's appropriations for the judicial officer or body to be defended or represented in that litigation, and the Department of Justice has declined to provide representation. In connection with the matter generally compare 42 Comp. Gen. 595 (1963), in which litigation costs incurred incident to a trial between private parties were authorized to be reimbursed to private attorneys defending a private party where the United States, though not a party in the case had a beneficial interest in its outcome.

Our approval of the payment of litigation costs including minimal attorney's

fees where gratuitous representation is not available is subject to two further qualifications. First, your Office should, at the first appropriate opportunity, advise fully the appropriate legislative and appropriations committees of the Congress of your plans and the estimated cost thereof.

Second, we strongly feel that the decision in each case as to the necessity for and the amount of representation required, if any, should be made by someone other than the defendant or respondent (i.e., the judicial officer or entity involved) in that case. In other words, we do not feel that the determination as to whether a defense of a judicial officer's ruling or a judicial body's rule is in the best interest of the United States and necessary to carry out the functions of the judiciary, should be made by the judicial officer or body concerned. Such an independent determination made by your Office would be designed to assure, to the extent possible, that appropriated funds are used only to the extent necessary to protect the judiciary's interest in the outcome of the subject litigation, rather than the judicial officer's personal interest in having his decision upheld, and that such funds are not used, in effect, merely to defend a private litigant's position where, as is the case in most appeals of judicial rulings, the judiciary and the United States have no real interest in the outcome of the appeal.

Much of the same reasoning used above may be applied with respect to Federal public defenders who are appointed pursuant to the Criminal Justice Act, as amended, 18 U.S.C. 3006A(h), who are sued for activities undertaken within the scope of their duties. The Department of Justice has declined to represent these defenders because of the inherent conflict of interest involved. Hence, in the absence of the availability of appropriated funds for their defense, such defense would have to be undertaken, out of the public defender-defendant's own private resources. We understand that it is your intention that the defense of the Public Defenders will be handled for the most part by other public defenders.

Appropriations for the public defender service, under 18 U.S.C. 3006A(h) are available to pay the necessary costs of litigation undertaken by the Public Defender Service. We believe that such appropriations are also available to pay litigation costs (including minimal attorney's fees where other public defenders are not available for such purpose) incurred in defending actions undertaken within the scope of the official duties of public defenders where such defense is considered as necessary for carrying out the purposes of the appropriations and in the best interest of the United States. Nonetheless, as in the case above, we feel that the Congress should be advised of the proposed use of appropriate[d] funds.

Sincerely yours,

(signed)

Elmer B. Staats
Comptroller General
of the United States

One Month CD

Source: Federal Reserve Board

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CONFERENCE ON JEWISH MATERIAL CLAIMS AGAINST GERMANY, Inc.
15 East 26th Street, Room 906, New York, NY 10010
Tel.: (646) 485-2046, Fax: (212) 696-9545, E-mail: Gideon.Taylor@claimscon.org

96 CV 4849

TO: Judge Korman
FROM: Gideon Taylor
CC: Judah Gribetz
Burt Neuborne
RE: Swiss Deposited Assets Program Administrative Expenses
DATE: January 31, 2006

In August of 2002, the Claims Conference entered into an agreement, at the request of the Court, which provided for the Claims Conference to assist the Claims Resolution Tribunal ("CRT"), based in Zurich, with technical services.

At the request of the CRT, the Swiss Deposited Assets Program ("SDAP") of the Claims Conference has undertaken work to support the work of the CRT and has been requested by the CRT to continue to do so. At this time, the Claims Conference requests reimbursement from the Court for administrative and other expenses for the period January 1, 2005 through December 31, 2005 and for the first quarter of 2006, as described in the following paragraphs. These sums are the current estimated figures based on the latest data available to date and are subject to year-end closing entrics and audit adjustments.

1. 2005 Publication Notice and Outreach

On January 11, 2005, the Court issued an order approving the 2005 Publication Notice and Outreach Budget. The total approved budget was for $1,359,700 (See attached Administration Budget Expense Report for the year ended December 31, 2005), which included $500,000 for the purchase of paid advertisements in newspapers and periodicals. At that same time, the Court ordered the remittance of $500,000 to the Claims Conference to pay for the advertisements. The total expenses for the 2005 Publication Notice and Outreach are $864,406, including the $499,769 for paid ads. The remaining sum was spent on translations of the claim form and instruction packet, printing and distribution of those documents, worldwide call center, multi-language website, and data entry and scanning of the returned claim forms. At this time, the Claims Conference is requesting the reimbursement for administrative expenses relating to this project in the amount of $364,406.

Approved Budget	$1,359,700
Spending	$864,406
Remitted to Date	$500,000
Request for Reimbursement	$364,406

2. 2005 Administrative Expenses Reimbursement Request

On February 23, 2005 the Court approved the 2005 Swiss Deposited Assets Program ("SDAP") administrative budget of $6,081,180. The Claims Conference SDAP Program was assigned tasks by the Claims Resolution Tribunal ("CRT") in Zurich. In 2005, the Swiss Deposited Assets Program ("SDAP") reviewed over 300,000 matches to account owner names and submitted 65 draft awards to the CRT. Additionally, SDAP reviewed all claims identified as Inadmissible by the CRT, submitted 1,252 claims to Court, and coordinated the mailing to claimants. In its Post-Award function, SDAP processed 27 approved batches consisting of 427 Awards and 409 Denials including managing the payment process of $87.1 million to 925 claimants and paid 15 expedited Life Insurance claims, and maintained the CRT II Awards Database.

The total expenses for 2005 SDAP administration is $4,230,096 (See attached Administration Budget Expense Report for the year ended December 31, 2005). As the Court approved the release of $3,000,000 on February 26, 2005, we are now requesting reimbursement for the remaining sum of $1,230,096.

Approved Budget	$6,081,180
Spending	$4,230,096
Remitted to Date	$3,000,000
Request for Reimbursement	$1,230,096

3. 2006 Administrative Budget

For 2006, the CRT has requested the Claims Conference SDAP Program to accomplish a number of tasks. To that end, we have developed the attached budget based on the 2005 budget and aggregating $6,081,180 (See attached SDAP Proposed 2006 Administration Expense Budget for the period January 1, 2006 through December 31, 2006). In accordance with CRT requests, in 2006, SDAP will process 70,000 new matches to account owner names. These new matches are to accounts that have already been awarded by the CRT and are mainly a result of the matching to the 2005 Publication claims. SDAP will also conduct an initial review of approximately 400,000 matches generated by the computer system, which were introduced due to the 2005 Publication. SDAP will also perform data integrity on 37,000 claims, which is the process of proofing the initial data entry of the claimed account owner and family member names and contact information. Further, SDAP will process approximately 14,000 denials to claims that did not match to the Account Holders Database ("AHD"). Finally, SDAP will continue to perform a secondary review of 20,000 new claims, secondary evaluation of 23,000 new names that were added to the computer system, and move towards completion of the secondary review project. The secondary review process analyzes claims to accounts for which bank records do not exist. In this review, SDAP identifies claims that demonstrate a high likelihood of account ownership even in the absence of bank records.

The Claims Conference is requesting approval of the 2006 SDAP Administration budget and transfer of $1,520,295, for operating the SDAP program from January 1 – March, 2006.

Budget Request	$6,081,180
Request for First Installment	$1,520,295

At this time we are respectfully requesting from the Court the transfer of $3,114,797, consisting of $1,230,096 for reimbursement of the 2005 administrative expenses; $364,406 for expenses under the 2005 Publication Notice and Outreach Budget; and $1,520,295 to fund program expenses for the period January 1 through March 31, 2006.

The Claims Conference respectfully further requests that funding for the period April 1 – June 2006 ($1,520,295) and July – September 2006 ($1,520,295) be disbursed to the Claims Conference on April 1, 2006 and July 1, 2006, respectively. A further request will be submitted to the Court for the funding for September 1 – December 31, 2006 at a later time.

We look forward to continuing to assist the Court, Special Masters, and CRT in achieving our common goal.

Should you require further information, I am, as always, available to you.

Respectfully,

Gideon Taylor
Executive Vice President

Attachments

For opinion see 14 Fed.Appx. 132

Briefs and Other Related Documents

United States Court of Appeals,
Second Circuit.
Julia Becker LENINI, et al.; The Estate of Nathan Katz; Abraham Friedman; Eliezer Bloshteyn and Sofiya Bloshteyn, Objectors-Appellants,
v.
Jacob FRIEDMAN, et al., Plaintiffs-Appellees,
and
UNION BANK OF SWITZERLAND, Swiss Bank Corporation, Credit Suisse and Swiss Bankers Association, Defendants-Appellees.
Nos. 00-9217(L), 00-9593 (CON), 00-9595 (CON), 00-9597 (CON), 00-9612 (CON), 00-9613 (CON).
June 15, 2001.

On Appeal from the United States District Court for the Eastern District of New York

Brief of Plaintiffs-Appellees in Response to Appellants Julia Becker Lenini, et al. and the Estate of Nathan Katz

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Note: Page i missing in original document

TABLE OF AUTHORITIES

FEDERAL CASES

28 U.S.C. § 1332 ... 19

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Introductory Statement

Appellants, claiming to speak on behalf of the Romani community, [FN1] challenge aspects of the order of the District Court, entered on November 22, 2000, approving a plan of allocation and distribution of a $1.25 billion settlement fund established to resolve Holocaust-related litigation against two Swiss bank defendants - UBS and Credit Suisse. [FN2] Invoking principles of abstract justice, but no legal authority, [FN3] appellants insist that a significantly greater proportion of the $1.25 billion Swiss bank settlement fund must be allocated to the many millions of Holocaust victims who suffered looting and loss of life at the hands of the Nazis because, according to appellants, the allocation of the Swiss bank settlement fund must be governed, not by an analysis of the relative strengths or weaknesses of the legal and factual claims leveled against the Swiss bank defendants by varying categories of plaintiffs, but by a moral calculus of the intensity of human suffering and death caused to various categories of victims by the Nazis - regardless of whether that calculus is applicable to the Swiss entities whose behavior is the subject of this litigation.

FN1. A serious threshold question of standing is posed by appellants' claim to speak for Romani Holocaust victims despite the failure of any appellant to have alleged a personal interest in this litigation sufficient to satisfy Article III. *In re Holocaust Victims Assets Litig.*, 225 F.3d 191, 195-97 (2d Cir. 2000). See, e.g., *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93-95 (1998); *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990); *Allen v. Wright*, 468 U.S. 737 (1984). In addition, this appeal is both jurisdictionally defective and unripe because the order appealed from is not final. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981); *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158 (1967). The procedural deficiencies requiring dismissal of this appeal are discussed *infra* at Point I.

FN2. The plan of allocation and distribution adopted by the District Court is set forth in a two volume report of the Special Master, Judah Gribetz, Esq., entitled *Special Master's Proposed Plan of Allocation and Distribution of Settlement Proceeds* (hereafter "the Special Master's Report" or "SMR"), ten copies of which have been lodged with the Court as a part of the Joint Appendix ("JA"). The District Court adopted the Special Master's plan in full on November 22, 2000, after a day-long public hearing at which appellants appeared and presented their objections. The District Court's opinion approving the allocation plan is set forth at JA 12 - 18.
The Special Master's Report is a remarkable achievement. While plaintiffs-appellees submit this brief in support of the Special Master's Report, a careful reading of the Report itself is its own best defense.

FN3. Appellants' 46 page brief fails to cite a single legal authority.

The short and, in this forum, complete answer to Appellants' challenge to the plan of allocation and distribution adopted below is that the District Court was not empowered to allocate the $1.25 billion Swiss bank settlement fund as a personal exercise in righting Nazi-era wrongs, or as a political exercise in income redistribution, but was obliged to consider the relative strengths and weaknesses of plaintiffs' claims in devising a principled plan for allocating the settlement proceeds of a real-world lawsuit brought by real-world plaintiffs against real-world defendants. Whatever weight appellants' appeal to abstract justice and economic populism might have in other settings, it borders on the frivolous to argue that a Special Master and a District Judge committed legal error in attempting to allocate a $1.25 billion settlement fund in accordance with the relative strengths and weaknesses of the various legal and factual claims of the parties. [FN4] Viewed from the twin perspectives of the relative strength of the plaintiffs' legal and factual claims, and the practical administrability of various approaches to allocation, the plan of allocation and distribution recommended by the Special Master and adopted by the District Court is a model of principled decision-making that cannot possibly be characterized as an abuse of discretion. [FN5]

FN4. This Court has held that an assessment of the strength or weakness of the legal claims involved is a central factor in determining both the fairness of a class action settlement under Rule 23(e), and the propriety of a plan of allocation. See *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164 (S.D.N.Y. 2000), *aff'd*, *D'Amato v. Deutsche Bank*, 236 F3d 78 (2d Cir. 2001) (assessing fairness of settlement); *In re Agent Orange Prod Liab. Litig.*, 818 F.2d 179, 183-84 (2d Cir. 1987) (assessing fairness of allocation of settlement proceeds). See also *Beecher v. Able*, 575 F.2d 1010, 1016 (2d Cir. 1978); *In re American Bank Note Holographics, Inc., Secs. Litig.*, 127 F. Supp. 2d 418 (S.D.N.Y. 2001); *In re Prudential Secs., Inc., Ltd. P'ship Litig.*, No. MDL 1005, M-21-67, 1995 WL 798907 (S.D.N.Y. Nov. 20, 1995).

FN5. As noted in the SMR, the standard of review in this Circuit of District Court decisions concerning the allocation of a Rule 23 class action settlement fund is abuse of discretion. See SMR, Vol I, Annex B (detailing legal principles governing allocation and distribution of class action settlements), citing *In re Agent Orange*, 818 F.2d 145; 179 (2d Cir. 1987). See also *Handschu v. Special Sers. Div.*, 787 F.2d 828 (2d Cir. 1986); *SEC v. Wang*, 944 F.2d 80 (2d Cir. 1991). The identical standard is widely applied in other Circuits. *In re Chicken Antitrust Litig. American Poultry*, 669 F.2d 228 (5th Cir. 1982); *Wilson v. Wilson*, 46 F.3d 660 (7th Cir. 1995); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454 (9th Cir. 2000); *Leverso v. Southtrust Bank*, 18 F.3d 1527 (11th Cir. 1994). The Eighth Circuit applies a similarly deferential "clearly erroneous" standard of review. *Nodaway Valley Bank v. Continental Cas. Co.*, 916 F.2d 1362 (8th Cir. 1990).

Statement of the Case

A. *An Overview of the Swiss Bank Litigation*

This appeal arises out of a lawsuit commenced in October 1996, by several sets of

the plaintiff classes, appellants' political opposition to the settlement does not vest them with Article III standing to pursue an appeal. *In re Holocaust Victims Assets Litig.*, 225 F.3d 191 (2d Cir. 2000). See also *Atlantic Mutual Insurance Co. v. Northwest Airlines*, 24 F.3d 958 (7th Cir. 1994) (denying intervention to group that disagreed politically with court's opinion on status of Taiwan). Nor may self-appointed Romani organizational appellants purport to speak for individual Romani class members in the absence of a showing that members of the organization are actual victims of the alleged wrongdoing that underlies this appeal. *In re Holocaust Victims Assets Litig., supra* at 196 (dismissing organizational plaintiff). See also *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). [FN45] Thus, this appeal must be dismissed for want of Article III standing.

FN45. The danger of allowing self-appointed organizational guardians to purport to speak for individual Romani is demonstrated by the repudiation of appellants' arguments prior to this appeal by significant segments of the Romani community. See letters from Romani leaders to the District Court, reproduced at AA 13-16.

B. The Appeal Does Not Challenge a Final Order of the District Court

Appellants appeal from an order of the District Court, entered on November 22, 2000, adopting the Special Master's proposed plan of allocation, but recognizing that the plan is subject to potential reallocation at the close of the individualized claims process. See JA at 12-24. The Special Master's proposed plan established an elaborate individualized claims program in connection with four of the five plaintiff classes in an effort to return the settlement funds to those individual Holocaust victims who actually suffered the injuries alleged in the complaints. As the Special Master's Report makes clear, however, the "individualized" allocations to the Deposited Assets, Slave Labor I and II, and Refugee classes are not written in stone. At the close of the claims process for each "individualized" class, any unexpended funds will be returned to the District Court for re-allocation among the remaining classes, including reallocation to the Looted Assets Class for *cy pres* distribution. SMR, Vol. I at 19-20.

Thus, appellants' challenge to the amount available to the Looted Assets Class, and to Romani institutions within that class, is clearly premature. Whether viewed as a discretionary exercise in ripeness governed by *Toilet Goods Ass'n v. Gardner*, 387 US. 158 (1967), or a jurisdictionally defective effort to appeal from a non-final order, [FN46] the appeal must be dismissed. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981).

FN46. Appellants made no effort to secure Rule 54(b) certification.

C. Appellants, Having Acquiesced in a Fair Process for Developing a Plan of Allocation, Are Estopped From Pursuing an Appeal Merely Because They Disagree With the Outcome of That Process

The District Court recognized that although the $1.25 billion Swiss bank settlement fund is substantial, it cannot provide full compensation to the millions

of persons who qualify for membership in one or more of the five plaintiff classes. [FN47] The District Court recognized, however, that it would be socially disastrous to pit surviving Holocaust victims against each other at the end of their lives in a formal adversary struggle over the inadequate funds. Accordingly, Judge Korman sought to minimize divisiveness among Holocaust survivors over the allocation of inadequate funds by asking the class members to pre-commit to a fair process for developing an allocation plan, instead of fighting over outcomes. The District Court designed a scrupulously fair procedure for producing a plan of allocation that provided all class members with the three essentials of a fair process: exit, loyalty, and voice. [FN48] The District Court then directed the parties to notify class members of the process to be used in formulating a plan of allocation, and permitted persons who opposed the process to opt out. The class overwhelmingly endorsed the proposed procedure, with fewer than 300 persons electing to opt out, and approximately 580,000 positive responses to date.

FN47. Judge Korman discussed the "fairness" of the $1.25 billion settlement figure in his opinion upholding the settlement under Rule 23(e). The opinion is reported at *In re Holocaust Victims Assets Litig.*, 105 F.Supp. 2d 139 (E.D.N.Y. 2000), and is set forth in SMR Vol. I, Exhibit 2 to the plan of allocation.

FN48. See Declaration of Burt Neuborne in Support of Settlement's Fairness, set forth at JA 645-667.

The thoughtful, non-adversarial approach adopted by Judge Korman has made it possible to discuss allocation vigorously with a remarkable absence of rancor. The Court's effort to avoid driving an unnecessary wedge between categories of Holocaust survivors would be seriously eroded, however, if a class member, after having pre-committed to a fair process for developing an allocation plan, is permitted to repudiate his or her pre-commitment to the process by challenging the outcome of that process on appeal. Accordingly, having acquiesced in the scrupulously fair process by which the plan of allocation was adopted, [FN49] appellants may not be permitted to repudiate their agreement merely because they are unhappy with the outcome. See *Agent Orange*, 818 F.2d 145, 170 (2d Cir. 1987) (upholding post-notice plan of allocation developed by Special Master). See also *In re Corrugated Container Antitrust Litigation*, 643 F.2d 195, 223-24 (5th Cir. 1981), cert. denied, 456 U.S. 998 (1982).

FN49. The procedural fairness of the allocation process is discussed *infra* at Point II.

II

APPELLANTS HAVE BEEN TREATED WITH SCRUPULOUS PROCEDURAL FAIRNESS

A. The Decision to Open the Settlement Fund to Romani

All agree that Romani holders of Swiss bank accounts, Romani slave laborers, Romani refugees, and Romani victims of looting should participate in the Swiss settlement fund on an equal footing with other similarly situated victims of Nazi persecution, not because the Romani people are owed special consideration, but

because Romani victims suffered indistinguishably from other victims of Nazi persecution and, therefore, deserve to be treated equally in seeking relief from the Swiss bank settlement fund. [FN50]

FN50. The decision to open the settlement fund to Jehovah's Witnesses, Romani, homosexuals, and the disabled is briefly described in *In re Holocaust Victims Assets Litig., supra,* 225 F.3d at 199-203.

B. The Appointment of Additional Settlement Counsel to Represent the Interests of Romani

Although the District Court found that the presence of key settlement counsel serving without fee and the appointment of a neutral Special Master made it unnecessary to appoint separate counsel for each plaintiff class, [FN51] the District Court appointed a separate settlement counsel for the Romani to assure that the interests of the Romani were adequately represented. Even before upholding the settlement agreement as fair, Judge Korman, with the unanimous support of settlement counsel, appointed Barry Fisher, Esq., as an additional settlement counsel with special responsibility to assure that the interests of the Romani were adequately represented during the allocation and distribution process. [FN52] Mr. Fisher, a long-time advocate for the Romani, has vigorously and responsibly represented the interests of the Romani. Mr. Fisher submitted a plan of allocation to the Special Master seeking to allocate 10% of the settlement fund for the benefit of the Romani. See SMR, Vol. I, Annex A, p. A-32. Mr. Fisher, along with two other lawyers deeply involved in Romani issues, Mr. Sebastian Rainone and Mr. Martin Mendelsohn, endorsed the decision to vest the International Organization for Migration (IOM), headquartered in Geneva, with responsibility for administering funds allocated to needy Romani Holocaust survivors because no Romani institution appeared to exist that commanded the confidence of the entire Romani community. [FN53] See JA at 1075-77. Finally, although Mr. Fisher is committed to the goal of assuring adequate funding of institutions designed to aid the Romani community, Mr. Fisher does not support appellants' challenge to the District Court's order, recognizing that the time for consideration of substantial allocations to Romani institutions must await completion of the effort to distribute funds to individual claimants. See letter from Barry Fisher at AA 12.

FN51. See Fairness Opinion, SMR, Vol. I, Exhibit 2; Neuborne Declaration, JA at 645-67. The District Court found that separate legal representation of the five victim classes was neither advisable nor required by *Amchem Prods. v. Windsor,* 521 U.S. 591 (1997), or *Ortiz v. Fiberboard,* 527 U.S. 815 (1999). SMR, Vol. I, Exhibit 2 (Fairness Opinion). Since key settlement counsel were working without fee, the District Court found that *pro bono* settlement counsel were capable of presenting conflict-free information and legal analysis to the Special Master concerning each class without the highly inadvisable step of pitting categories of elderly Holocaust victims against each other. In the opinion of persons who work closely with Holocaust survivors, it would have been psychologically harmful to force elderly Holocaust survivors to denigrate the suffering of other victims. As noted, no challenges are pending to Judge Korman's "fairness" decision, including his thoughtful decision to forego adversary representation of each class of

Holocaust victims.

FN52. Mr. Fisher requested to be appointed as a settlement counsel on July 23, 1999. Judge Korman immediately granted his application.

FN53. It has been impossible to fill the seat allocated to the Romani on the Board of Trustees of the German Foundation because divisions within the Romani community have blocked the emergence of a candidate with sufficient support. In the absence of a Romani institution, the German Foundation has also turned to the IOM to administer funds allocated to Romani recipients.

C. The Intense Effort to Provide Notice to Romani Claimants [FN54]

FN54. Appellants' challenge to the notice program is not timely. Chief Judge Korman upheld the notice program, including its application to the Romani, in his July 26, 2000 decision upholding the settlement's fairness. The time to appeal from that order has long since expired.

The parties undertook a massive, worldwide notice program of virtually unprecedented intensity designed to inform potential claimants of the $1.25 billion settlement, and of the procedures to be utilized in developing a final plan of allocation and distribution. The elaborate Notice Plan, adopted by the District Court on May 10, 1999, is briefly summarized at SMR, Vol. I, pp. 86- 87. The complete Notice Plan is set forth at JA 215 - 401.

In keeping with the careful effort to treat the Romani with procedural fairness, the Notice Plan contained a specific set of provisions aimed at providing notice to Romani. AA at 17-217. A notice administrator, Kathy Kinsella, was charged exclusively to administer a Roma Outreach Program. She traveled throughout Europe to assure maximum notice to the Romani. See Ms. Kinsella's report in the Supplemental Appendix. [FN55] AA at 17-217.

FN55. The Supplemental Appendix also contains excerpts (pp. 112-21) from the transcript of the allocation hearing on November 20, 2000, at which time Judge Korman explicitly addressed issues of fairness to the Romani.

The success of the Notice Plan is demonstrated by the extraordinary response that it elicited. As of August 30, 2000, approximately 562,000 questionnaires from around the world [FN56] had been returned by potential claimants, including 23,394 questionnaires from self-identified Romani. [FN57] While appellants quibble with the Notice Plan, arguing that only Romani can give effective notice to other Romani, the significant response to the notice plan by the Romani makes it clear the notice plan was remarkably effective in reaching their community. In fact, the notice plan adopted by the District Court is considerably more ambitious than the plan deemed adequate by this Court in *Agent Orange*, 818 F.2d at 167-70 (approving notice, and taking judicial notice of widespread news reporting of settlement).

01-9193(L), 01-9229(CON)

United States Court of Appeals
for the
Second Circuit

IN RE: AUSTRIAN AND GERMAN BANK HOLOCAUST LITIGATION

WALTER STEVEN ZEISL and BURT NEUBORNE,

Plaintiffs-Appellants,

GERARD HAAS, CHARLOTTE HAAS SCHUELLER, GABRIELE HAMMERSTEIN, HELEN NIGHTENGALE, ALICE NIGHTENGALE LUHAN and SIMON BRONNER,

Consolidated Plaintiffs,

– against –

HAROLD WATMAN, on behalf of himself and all other persons similarly situated, RUTH ABRAHAM, on behalf of herself and all other persons similarly situated, MICHAL SCHONBERGER, on behalf of himself and all other persons similarly situated, RUDOLFINE SCHLINGER and ERNESTINE SCHWARZ WASYL,

Plaintiffs-Appellees,

(For Continuation of Caption See Reverse Side of Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF BURT NEUBORNE

BURT NEUBORNE
Attorney for Appellant
40 Washington Square South
New York, New York 10012
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Judge Kram vigorously resisted the applications, retaining David Boies to represent her personally in the Second Circuit, and directing court-appointed counsel, Lawrence Byrne, to appear in the proceeding to protect the rights of holders of the Austrian assignment. JA 0565. On May 17, 2000, the Second Circuit issued a writ of mandamus directing dismissal of the German bank cases, holding that, pursuant to the doctrine of separation of powers, the District Court lacked power to seek to interfere with the activities of the German Foundation. In re Austrian and German Bank Holocaust Litigation (Duveen), 250 F.3d 156 (2d Cir. 2001). JA 0666. On May 18, 2001, Judge Kram entered an order unconditionally dismissing the German bank cases. JA 0673. On May 21, 2001, Judge Kram abandoned the effort to appoint special counsel to enforce the Austrian assignment, noting that the Austrian Ambassador to the United States had expressed doubt over the legal viability of the underlying claims, and that the action of the German Foundation in opening its property compensation fund to Austrian bank claimants had conferred a significant benefit on the Austrian bank settlement class. JA 0680-0688.[26] On May 30, 2001, the German Bundestag

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[26] Judge Kram codified her refusal to permit voluntary dismissal of the German bank cases in two opinions, dated March 7, 2001 and March 20, 2001, respectively. Each opinion is premised on the erroneous assumption that the Austrian assignment claims are legally enforceable, and that the Austrian bank class received no benefit from the German Foundation. On May 21, 2001, Judge Kram retracted her March concerns, granting leave to her court-

announced the achievement of legal peace, paving the way for the speedy transfer of German industry's $5 billion commitment to the Foundation.[27] Distribution of the Foundation's assets to Holocaust victims began virtually immediately. Between June, 2001-January, 2002, the German Foundation distributed more than 2.5 billion DM in connection with payments to 600,000 Holocaust victims.

On June 14, 2001, once payments to victims had been commenced by the Foundation, the arbitrators announced an award of approximately 124 million DM pursuant to the June, 2000 international arbitration agreement.[28] JA 0693; 0695. On June 21, 2001, the Board of Trustees of the German Foundation (with

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appointed counsel to dismiss the effort to enforce the Austrian assignment because the Austrian Ambassador had indicated the legal vulnerability of the claims, and the German Foundation had granted equal access to Austrian bank claimants to the German property fund. JA 0680-88. As far as Zeisl's brief is concerned, Judge Kram's May 21, 2001 about-face never took place.

[27] German industry has competed the transfer to the Foundation of virtually its entire 5 billion DM financial obligation, plus a 100 million DM interest payment. Disagreement exists concerning the obligation of German industry to pay interest of approximately 60-70 million DM on the deferred payment during the period of unforeseen delay occasioned by Judge Kram's refusal to dismiss the German bank cases. Disagreement also exists over payments of approximately 63 million DM to the International Commission on Holocaust Era Insurance Claims (ICHEIC), for which certain German insurance companies claim a credit. The disagreements are currently the subject of negotiations. See JA 1511.

[28] Neuborne, who had appeared pro bono in both the Swiss bank litigation and the German slave labor cases, initially declined to submit an application for fees in connection with his work in establishing the German Foundation. When colleagues pointed out that under the unique floor/ceiling nature of the arbitration agreement, an award would have a minimal impact on funds available to Holocaust victims, Neuborne filed a fee application.