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

**Re: Conflict of Interest that would result from a decision to use
the Claims Conference in the distribution of excess and residual funds**

This Court has invited comments on the Special Master's recommendations from "[a]ny person or organization," In Re Holocaust Victims Assets Litigation, 2003 U.S. Dist. LEXIS 20686, *6-7 (EDNY, November 17, 2003). In response, I suggest that the appointment of the Conference on Jewish Material Claims Against Germany ("Claims Conference") to administer excess funds or possible unclaimed residual funds would be an abuse of discretion because it would create an impermissible conflict of interest.

All the opinions expressed herein are solely mine and do not represent those of the University of Miami or its School of Law.

In 2000, I wrote to Judge Korman regarding this possibility. He forwarded my letter to Lead Counsel Neuborne who replied: "I am confident in assuring you that the Claims Conference will not play an inappropriate role in the determination of stage 2 payments . . . Indeed, the Judge is sensitive to any perceived conflict in allowing individuals to play a role in stage 1 determinations when they have a potential interest in a stage 2 distribution." (Letter from Burt Neuborne, October 25, 2000, attached).

Admittedly, the Claims Conference is not the recipient of funds under the Special Master's recommendation. Rather, it selects recipient non-profits, determines the extent to which recipient programs will be funded, and monitors the use made of the funds. Nonetheless, the Claims Conference has an interest in the excess and residual funds. The Claims Conference has its own agenda – independent of the one adopted by the court (*see* (B)(3) *infra*) - and that agenda is advanced by having recipient programs depend on the Claims Conference's discretionary judgments regarding the distribution of this action's excess and residual funds.

The role the Special Master recommends for the Claims Conference is an inappropriate one, at least, because it taints its Stage 1 eligibility determinations by the appearance that it

“might be interested in increasing the existence of a stage 2 fund.” (Neuborne letter). Stage 1 eligibility determinations continue to be made. Each rejection of eligibility increases excess and residual funds. Each such decision is a conflicted one.

The role the Special Masters recommend for the Claims Conference in regards to the excess and residual funds is a continuation of the one it plays in administering the Looted Asset distributions. By its own actions in this role, as well as by its actions in determining Stage 1 eligibility, the Claims Conference has created an appearance that it has conflicting interests.

(A) Special Masters' Recommendation regarding Claims Conference Breaches Court's Duty to Exercise Care in Selecting Agents

The Court has a duty to exercise prudence and care in selecting agents to administer the settlement. George Gleason Bogert & George Taylor Bogert, *The Law of Trusts and Trustees* § 543(M) (2nd Revised Edition 1993). An ordinarily prudent person would not assign a remainder interest to one who has discretion to determine payments to the life tenant. *Matter of Townsend's Estate* 133 N.Y.S. 492, 143 Misc. 342 (1912). As the Claims Conference determines eligibility for Stage 1 funding, its appointment in regards to excess and residual funds is imprudent if it has interests in the residual funds.

If the Claims Conference has an interest, neither its good faith nor the economic advantages flowing from its selection can prevent the removal of such a conflicted agent. *Bogert & Bogert* §§ 527, 543 n.16, 543(Q).¹

The interests of the Claims Conference that would necessitate its removal may be indirect or incidental. *Id.*, §§ 543 (A) & (Q). Trust law carefully polices both disloyalty and the appearance of disloyalty. For example, a trustee associated with a commercial bank has been forbidden to deposit the trust account in his own bank. *Id.*, § 543(K). Even inaction creating the appearance of disloyalty has been forbidden. For example, a corporate trustee has been forbidden to *retain* its own stock in a trust. *Id.*, § 543(G). The incidental benefits may be slight, nonetheless they still constitute grounds for removal of a trustee or agent. *Bogert & Bogert* § 543(Q). New York courts, in particular, have broadly defined what constitutes an indirect or incidental interest. *Estate of Rothko*, 379 N.Y.S. 2d 923, 84 Misc. 830 (Sur. Ct. 1975), modified on other grounds 392 N.Y.S. 2d 870, 56 A.D. 2d 499 (1977); *Matter of Bruches*, 415 N.Y.S. 2d 664, 67 A.D. 2d 456 (1979).

¹ It is thus irrelevant that the Claims Conference has had the good sense to contribute more than \$1 million to the Museum of Jewish Heritage – A Living Memorial to the Holocaust. 2002 Annual Report of the Museum.

The Claims Conference is not a social service provider. Rather, it advances its agenda by funding social service and cultural projects. It strives to stimulate projects consistent with its agenda. Increasing the funds it can distribute, increases funded organizations' dependence on the Claims Conference. The natural result is that these organizations are shaped both to conform to the Claims Conference's agenda and to not risk projects, social or cultural, inconsistent with the Claims Conference's agenda.

It would be hypocritical for the Claims Conference to deny that indirect and incidental benefits derive from the power to contribute money to organizations. Some of the organizations that constitute the Claims Conference are not democratic, but oligarchies run by major contributors. Major contributors set their own organization's agenda and through the Claims Conference set other organizations' agenda. Individuals sit on the Board of the Claims Conference, giving them a "right" to represent the Jewish community, solely because of their ability to write checks.

Admittedly, there are precedents for ignoring this conflict of interest. Germany has agreed to the Claims Conference both determining who is eligible to receive compensation and distributing compensation "according to the urgency of their [recipients] needs as determined by the Conference." *Revici v. Conference of Jewish Material Claims Against Germany, Inc.*, 174 N.Y.S.2d 825 (N. Y. County Sup. Ct. 1958).

This historical precedent is not a judicial precedent. Germany had little incentive to seriously monitor the Claims Conference. Under the agreement with the Claims Conference, Germany stipulated that the funds "will be used for the relief, rehabilitation and resettlement of Jewish victims of National-Socialist Persecution." *Id.* When the Claims Conference decided that 20% of the funds would go to culture rather than welfare (*see* Draft Plan of Allocation, September 2000, Annex E at 71), Germany did not object (and no one else had standing to object (*Revici, supra*)). This Court surely shall better protect class members than did Germany.

(B) Claim Conference's actions in this litigation create appearance that it has conflicting interests.

(1) Appearance of non-neutrality between beneficiaries

Trustees have duties to be neutral and to appear to be neutral between beneficiaries. Restatement of Trusts 3rd § 183. Imposing unnecessary difficulties to proving eligibility to Slave Labor I or Refugee classes favors the Looted Asset class.

The appearance that applicants were subjected to unnecessary difficulties by the Claims Conference emerges when its procedures are compared to those of the International Organization for Migration (IOM). Consider, for example, differences between the two organization's appellate rules. Appeals Rule 6.1 of Appeals Authority of the Claims Conference requires that "[A]ll decisions shall be conducted on a documents only basis." Special Master's Interim Report on Distribution and Recommendation for Allocation of Excess and Possible Unclaimed Residual Funds, October 2, 2003, Ex. 8-8. IOM Appeals Rule 16(D) is less rigorous, allowing "written information and evidence." *Id.*, Ex. 8-20. *See also* Article 19(B) (iii) and (v). *Id.*, Ex. 8-21.

Readers of the Special Master's Interim Report will learn that "[t]he IOM has coordinated closely with the Special Master and the Court to devise alternate methods of proving that a claim is plausible other than by individualized documentary proof," *Id.* at 64, and that the Claims Conference chose instead to search archives and demand documents from applicants. *Id.* at 63 & Ex. 5-7 – 5-9. The appearance that the Claims Conference favored the Looted Assets class by not similarly coordinating with the Special Master and the Court becomes more striking when it is put next to the Claims Conference having previously advocated that the German Indemnification Law [BEG] permitted adopting evidentiary presumptions similar to those pursued by the IOM. Karen Heilig, *From the Luxembourg Agreement to Today: Representing a People*, BERKELEY J. INTERNATIONAL LAW 176, 183 (2002).

(2) The Claim Conference's Stage 1 eligibility determinations create the appearance of being driven by interests other than those of putting into effect the Court's order

The Claim Conference's differences from the IOM also suggest that the Claims conference has interests that diverge from the Court's interests in "a fair and compassionate claims procedure," *In re "Agent Orange" Product Liability Litigation* 689 F. Supp. 1250, 1265 (E. D. N. Y. 1988), and in an efficient one.

The consultation between the Special Master, the Court and IOM is in accord with the guidance offered by the Agent Orange Litigation. In that litigation, testimony submitted by those seeking eligibility was accepted unless "records clearly contradict this evidence." *Id.* A much stricter, and less compassionate, eligibility process appears to have been instituted by the Claims Conference (*supra* (B)(1)) without the Claims Conference engaging the Court, as did the IOM, in an effort to make it more in accord with equity.

The court selected the Claims Conference in significant part because of "[t]he efficacy of having one organization process the claims of individuals entitled to recover from both" this settlement and that related to the German Foundation "Remembrance, Responsibility and the Future" 2003 U.S. Dist Lexis 20817 at **4 . The Special Master speaks of the process as having

been designed for "maximizing administrative efficiencies and conserving Settlement Fund expenses." Interim Report at 62.

Recipients of pensions under the German Federal Indemnification Law [BEG] could have been presumed to qualify for Slave Labor Class I. Instead, the Claims Conference decided that it was "required to research each file in the 11 various archives located throughout Germany." Interim Report, Ex. 5-8 Similarly, the Claims Conference could have presumed that "recipients of Israeli Ministry of Finance pensions as a result of Nazi persecution" qualified. Instead, the Claims Conference "reviewed each relevant file." Id. The Claims Conference is to be congratulated on having created an organization that processed many claims, but its actions create the appearance that it has interests other than those of the Court's order to act efficiently and minimize expenses.

(3) The Claims Conference lack of candor with the Court creates the appearance that it has interests other than those of putting into effect the Court's order

In its third proposal to this court, April 2003, the Claims Conference wrote,

Regardless of their financial and health circumstances, most people prefer care at home. Familiar physical and social environments play a major factor in delaying functional disabilities. *Institutionalization is the least desirable option for elderly Nazi victims* for it evokes a loss of independence that can trigger traumatic wartime experiences.

Interim Report, Ex. 11-8 (emphasis added).

As a result, the Claims Conference proposed funding "in-home care services." This proposal is in accord with the goals and plans of the Court. In *Re Holocaust Victims Assets Litigation*, 2003 U.S. Dist. LEXIS 20686, *5 (E. D. N. Y. November 17, 2003)

The Claims Conference did not disclose to the Court that its own agenda is to build institutions. Karen Heilig, Director of International Relations and Staff Counsel at the Claims Conference, wrote in 2002,

Since 1995, the priority of the Claims Conference has been to provide elderly Holocaust survivors with food, shelter and basic medical needs. . . *Current funding priorities include old age homes, senior day care centers, psychogeriatric institutions, basic food and relief programs, medical supplies and equipment . . .*

In addition, 20% of funds have been allocated for projects for the research, education and documentation of the Holocaust.”

Heilig at 189 (emphasis added).

It is the business of the Claims Conference to justify to its funders why its current funding priorities are first for “the least desirable option[s] for elderly Nazi victims.” Interim Report, Ex. 11-8. Especially given the well-known difficulties of designing a nondiversion constraint, see, e.g., Frances R. Hill, Targeting Exemption for Charitable Efficiency: Designing a Nondiversion constraint, 56 S. M. U. L. Rev 675 (2003), the gap between what the Claims Conference told this Court and what one of its spokespersons has enunciated creates the appearance that its distribution of excess and residual funds will be subject to conflicting interests.

Should the Court accept the Special Master’s recommendation and use the Claims Conference to administer excess and residual funds, the difference between these two documents suggests that the Court needs to impose two different constraints on the Claims Conference to ensure that the Settlement Fund is used solely to increase funding for the essential needs of Nazi victims. First, the Court needs to ensure that the Settlement Funds are segregated and that no more than 20% of all other Claims Conference funds are expended for research, education, documentation and cultural programs. Second, the Court needs to ensure that the Settlement Funds are not used to permit a shift of funding from food and medicine to bricks and mortar. As this Court knows, and as the Claims Conference told this court, even with distributions of excess and residual funds, needy Nazi victims will still lack sufficient basic supplies.

(C) Not Using the Claims Conference has the Advantages of not Degrading Class Members and Stimulating Innovations in Service Delivery

At Stage 2, the Court sits as a guardian for class members who did not receive Stage 1 Distributions. See, e.g., *In re Matzo Food Products Litigation*, 156 F.R.D. 600, 604 (D. N. J. 1994). Some of these members were slave laborers or rejected refugees who failed to establish themselves as such to the Claims Conference. Some of these will question the Claims Conference’s *bona fides* and others will be hostile to the Claims Conference. Unless it were necessary, the Court should not subject these members to the further indignity of having their Stage 2 services administered through programs selected by the Claims Conference at funding levels set by the Claims Conference.

And, it is not necessary. The Special Master now knows programs that can deliver the services. They are listed in the Interim Report at 96 – 101. Having these programs directly apply to the Court for funding can only stimulate them to think outside the box. The constraints of their relations with the Claims Conference, even if they were just those generated by being in a

letter to Special Masters Gribetz & Reig

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long-term relationship, would not then hamper their designing programs to best effectuate the Court's orders of providing "sustainable levels of targeted essential social services" (Order 2 at 2003 Dist. LEXIS 20686, *5) and meeting "survivor needs" for "medication, food, [and] nursing care." (Order 3(a) at *5.) Not using the Claims Conference as a middleman would also have the advantage of allowing the Court to better effectuate its responsibilities to engage in "direct judicial supervision." In re Agent Orange Prod. Liab Litig., 818 F. 2d 179, 186 (2d Cir.).

Respectfully submitted,



Robert Eli Rosen
Professor of Law

cc: Burt Neuborne



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October 25, 2000

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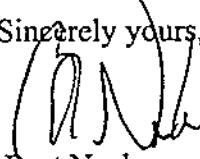
Dear Professor Rosen:

Chief Judge Korman forwarded your thoughtful letters to me in my capacity as lead settlement counsel. While I cannot speak for the Court, I am confident in assuring you that the Claims Conference will not play an inappropriate role in the determination of stage 2 payments, if any. Chief Judge Korman carefully explained the potential conflict to Claims Conference officials more than two years ago when they sought a role as class representative. Indeed, the Judge is sensitive to any perceived conflict in allowing individuals to play a role in stage 1 determinations when they have a potential interest in a stage 2 distribution. That is why he persuaded the CRT to reorganize its structure to remove any person who might be interested in increasing the existence of a stage 2 fund.

I share your concern that the universal nature of the Holocaust be acknowledged. That is why class counsel insisted, over the objections of many people, that the class be broadened to include non-Jews. I lack the expertise to comment on the Special Master's 90%/10% allocation, but I can assure you that the purpose of the Victims List Foundation is to assemble a list of all victims. In addition, I anticipate that substantial stage 2 distributions will go to non-Jewish victims. Finally, please do not overlook the efforts of the German Foundation (the creation of which was driven by the lawyers who brought the Swiss cases), which is slated to distribute far more to non-Jews than to Jews. I estimate that about 25% of the slave/forced labor payments from the German Foundation will go to Jews.

Thank you for taking the time to comment on the Special Master's report. Please let me know if there are additional questions or comments.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Bart Neuborne', written over the typed name below.

Bart Neuborne

cc: Chief Judge Korman



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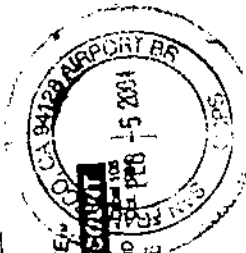
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