



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

March 4, 2010

Paul S. Berger, Esq.
Arnold & Porter LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004-1202

Kent A. Yalowitz, Esq.
Arnold & Porter LLP
399 Park Avenue
New York, NY 10022

Dear Mr. Berger and Mr. Yalowitz:

I write in response to your Motion of February 13, 2009 (“Motion by the State of Israel for Access to Documents, Data and Information Examined or Utilized as Part of the Junz Recommendation, and for an Interview with Special Master Junz”), and your letter of February 16, 2010, in which you “confirm [your] request that the Court rule on the State of Israel’s uncontested motion....”

As you are aware, on October 1, 2009, Judge Korman denied the motion without prejudice, in light of “pending settlement discussions.” Based upon your February 16, 2010 letter, it now appears evident that those discussions have borne no fruit, and that the Court has been asked to issue a substantive ruling. It is, however, inaccurate to characterize the State of Israel’s motion as “uncontested.” In accordance with my duties as court-appointed Lead Settlement Counsel, I find it necessary to oppose your motion.

Special Master Junz’ several detailed reports, particularly her March 31, 2009 report in which she responded to the State of Israel’s queries concerning her analyses and methodology, appear to resolve the State of Israel’s concerns as set forth in the motion. Nevertheless, as a courtesy, I provide you with additional information concerning the ten items to which “the State of Israel respectfully requests access to.”

As a preliminary matter, I note that the ten-point list refers in certain instances to a so-called "sample." See, e.g., Item 2 ("The AHP [sic]¹-plus sample of known value accounts ..."); Item 5 ("A list of accounts included in the AHP [sic]-plus sample ..."). Special Master Junz already has explained that she analyzed 6,945 known-value accounts in the Accounts History Database ("AHD")-plus; i.e., all known-value accounts in ICEP Categories 1, 2, and 3, as well as accounts added to the AHD by the CRT during the course of the claims resolution process (labeled for administrative purposes as Categories 5 and above); she also analyzed ICEP Category 4 accounts.² Accordingly, her recommendations were not premised upon a "sample." They were based on all of the account valuation information that is available to the CRT:

"[A]nything more than a cursory perusal of the material reviewed by [Charles] Mullin [on behalf of the State of Israel], should have given him the explanation of the nature and structure of the CRT's data base, including how it relates to the ICEP [Independent Committee of Eminent Persons, or "Volcker Committee"] data. *The point is that the data the CRT works with are not a sample drawn from a much larger data base (such as employed by the US Census), but to all intents and purposes are all that is available.*"³

To date, of the 6,945 known-value accounts that Special Master Junz analyzed (i.e., with the exception of "Category 4," the totality of known-value accounts which exist in the AHD-plus), a total of 1,550 known-value accounts have been awarded. In addition, another 164 known value Category 4 accounts and 2,891 accounts with unknown values also have been awarded, for a total of 4,605 accounts awarded to date. Of these 4,605 accounts, 1,028 (over 22%) had not been reported by the ICEP auditors at all. Rather, these accounts were located, their assets returned to victims of the Holocaust and their heirs, and their values taken into consideration in determining the appropriate average values for Holocaust-era Swiss bank accounts, only through the diligence of Special Master Junz and the CRT.

I also note at the outset that, as detailed repeatedly in Special Master Junz' reports, the presumptive values currently in use were derived during the course of the ICEP audit and are based upon information about the approximately 54,000 accounts that had been identified by the auditors at that time. During the scrubbing process, which was also detailed repeatedly in previous submissions, the number of accounts was decreased from 54,000 to approximately 36,000. At the beginning of the claims resolution process, and in accordance with the CRT Rules, the auditors presented the AHD, which contained only the approximately 36,000 accounts remaining after scrubbing, to the CRT. Accordingly, neither the CRT, nor Special Master Junz, nor the Court, had access to bank records for the original 54,000 accounts upon which the

¹ I believe the Motion intended to reference the "AHD" -- Accounts History Database -- rather than the "AHP."

² For reasons previously explained by Special Master Junz, after analysis of these accounts as well as the AHD-plus, Special Master Junz agreed that the auditors properly had excluded Category 4 accounts in determining average values.

³ See Dr. Junz' Letter to the Court, March 31, 2009, at 3 (emphasis added).

current presumptive values are based. Thus, no information is available for all or portions of the following requested items: Item 1 (“The Volcker Committee sample of known value accounts (personal identifying information could be removed)”); Item 3 (“A list of accounts included in the Volcker Committee’s sample that were excluded from the AHP [sic]-plus sample, as well as an explanation for why they were excluded”); Item 4 (“A list of accounts included in both samples for which the known information has been update [sic] in the AHP [sic]-plus sample, as well as an explanation for why the information was updated”); and Item 7 (“An explanation for why the Volcker Committee chose the mean instead of the median as its measure of central tendency”).

With respect to Item 2 (“The AHP-plus [sic] sample of known value accounts (personal identifying information could be removed”), I note that, as detailed in Special Master Junz’ report of October 10, 2008, her analysis is based upon 6,945 known value accounts contained in the AHD-plus. It would take considerable time and resources for CRT staff to redact the identifying information from these approximately 7,000 accounts, especially at a time when the CRT is closing down its operations. Such a task not only would delay treatment of the claims remaining with the CRT, but also would delay resolution of the State of Israel’s objection to the Special Master’s recommendation, pending the completion of the redaction process. In my opinion, the State of Israel has not provided a sufficiently compelling reason to justify the time and expense of such a redacting exercise or, more generally, for the inspection of these known value accounts. The State of Israel, for example, has not claimed that the ICEP auditors, the CRT staff, Special Masters Volcker, Bradfield and Junz, and the Court, were not competent to make determinations regarding the 1945 historic value of the accounts. The State of Israel also does not claim – nor could it – that its representatives are more competent to make such determinations than are the individuals who have been studying Holocaust-era Swiss bank records and related materials for more than a decade. Since there is no compelling reason to justify the costly redaction and preparation of these accounts, I urge the Court to deny this part – and any other similar parts – of the State of Israel’s request.

Moreover, much of the data requested by the State of Israel, even if redacted, would appear to be prohibited from disclosure under Swiss law and by Court order. See, e.g., Confidentiality Order, June 15, 2004 (Block, J.) (resolving litigation seeking further access to bank files by, *inter alia*, establishing parameters of a New York-based “CRT II facility” to be operated under the auspices of the Conference on Jewish Material Claims Against Germany (Claims Conference); the order provides, among other things, that it applies “equally to Claims Conference personnel, CRT II personnel, and any other claims officials, Special Masters, or persons acting under the supervision or auspices of the Court.... Violations of this Order or of the [related Second Memorandum to the File, June 10, 2004] are punishable as criminal contempt of court or otherwise”).

As I am sure you realize, under existing law, it would have been virtually impossible for the CRT to gain access to Swiss bank data needed to administer a fair bank account claims process without agreeing to conditions on the public availability of the data insisted upon by the Swiss banks. Moreover, under Swiss law, violation of

banking confidentiality in connection with the files made available to the claims process may be subject to imprisonment, penalty or fine. See Art. 161 Swiss Penal Code (insider trading), Art. 162 Swiss Penal Code (breach of manufacturing or business secrecy), Art. 137 Swiss Penal Code (misappropriation), Art. 138 Swiss Penal Code (embezzlement), Art. 139 Swiss Penal Code (theft), Art. 143 Swiss Penal Code (unauthorized procurement of data), Art. 273 Swiss Penal Code (industrial espionage), Art. 47 Banking Act (breach of banking secrecy), Art. 35, Para. 1 Data Protection Act (unauthorized disclosure of personal data which require special protection or personality profiles).

In the interests of providing the State of Israel with non-confidential information that would be germane to its motion, I do note, however, that these 6,945 known value accounts analyzed by Special Master Junz include both accounts whose values were reported by the ICEP auditors, and those whose values were ascertained by the CRT during the claims resolution process. The CRT reviews the values of accounts only in those cases in which an account is awarded.⁴ During the claim resolution process, the CRT either confirms and adopts the auditors' findings regarding the value of accounts, or makes its own determination based upon the information available in the records. Of the 6,945 AHD-plus known value accounts analyzed by Special Master Junz, 1,550 were included in awards approved by the Court to date. These 1,550 accounts include all accounts whose values were either ascertained by the CRT, or whose values as reported by the auditors were confirmed or updated by the CRT. I call your attention to the fact that, upon approval, all awards are published on both the Holocaust Victim Assets Litigation website at www.swissbankclaims.com, and on the CRT's website at www.crt-ii.org. All awards include a section entitled "Information Provided in the Bank Records," which details the type of records available and the information (including value information) they contain.

Therefore, with respect to Item 4 ("A list of accounts included in both samples for which the known information has been update [sic] in the AHP [sic]-plus sample, as well as an explanation for why the information was updated") and Item 5 ("A list of accounts included in the AHP [sic]-plus sample for which no information was previously known, as well as an explanation for how the new information was collected"), such information already is publicly available. For example, the following cases, all decided relatively early in the claims process and typical of the many similar cases subsequently considered (all available on the Internet), indicate quite clearly that information that had not been utilized by the auditors nevertheless was available in the bank records. As has been repeatedly stressed, it would have been inappropriate for Special Master Junz and CRT *not* to take this data into consideration in evaluating the claims specifically, and the overall account values more generally. See, e.g.:

⁴ There is a limited exception: where a match initially is deemed plausible but an award ultimately is not made (for example, where the bank records reveal that the account owner had received the proceeds and thus a payment from the Settlement Fund is not appropriate). Although the account ultimately is not awarded, in analyzing the claim to the account, the CRT occasionally has reviewed and reassessed the account value initially determined by the ICEP auditors, and the value is adjusted accordingly in the AHD-plus.

- *In re Accounts of Hedwig Bendix* (approved on 31 December 2002). In this case, the auditors reported three accounts of unknown type with unknown value. Upon review of the bank records, the CRT determined that one of the accounts was a demand deposit account with a value of 7,415.00 Swiss Francs ("SF") as of 1939.
- *In re Accounts of Irma Braun and Felix Harry Braun* (approved on 23 January 2003). In this case, the auditors reported two custody accounts and one demand deposit account belonging to Felix Henry Braun (both with unknown value), and no accounts belonging to Irma Braun. Upon review of the Irma Braun's 1938 census records, obtained from the Austrian State Archive, in which she was required to report her assets to Nazi authorities, the CRT determined that Irma Braun held a demand deposit account with a value of SF 5,282.24 as of 1938 at the same Swiss bank that held the accounts belonging to her husband.
- *In re Accounts of Gertrude Boettcher* (approved on 12 September 2003). In this case, the auditors reported a savings account and an account of unknown type, both with unknown values. Upon review of the bank records, the CRT determined that the savings account had a value of SF 30,086.00 in 1938.
- *In re Account of Isidor Koth* (approved on 30 September 2003). In this case, the auditors reported one account of unknown type with unknown value. Upon review of the bank records, the CRT determined that the account had a balance of SF 9,147.00 as of 1945.
- *In re Accounts of Liselotte Löhner and Eva Löhner* (approved on 18 November 2004). In this case, with regard to the accounts held by Eva Löhner, the auditors reported one custody account and one demand deposit account, both with unknown values. Upon review of Eva Löhner's 1938 Census records, obtained from the Austrian State Archive, the CRT determined that Eva Löhner's custody account had a value of SF 20,900.00 and her demand deposit account had a value of SF 384.00, both in 1938.

With respect to Item 6 ("An explanation for how the CRT selected accounts for which they sought additional information through 'voluntary assistance'"), as has been previously explained, "Voluntary Assistance is the process by which the CRT requests the defendant banks to provide the CRT with any additional data that the bank files may contain about particular matched accounts, beyond the data collected as part of the audit."⁵ As detailed in the CRT's Letter to the Court, dated April 8, 2009, in specific

⁵ See Letter to the Court, Mary Carter and Dov Rubinstein, CRT Secretaries General, April 8, 2009, at 14 (Annexed as Exhibit C to the April 9, 2009 Report of Special Master Judah Gribetz and Deputy Special Master Shari C. Reig: "CRT Special Master Junz' Proposal for Adjustment of Deposited Assets Class Presumptive Values; Additional Contextual Analysis of Her Supplemental Report").

sorts of cases in which the auditors determined a likelihood, based upon the source of the record they had accessed, that additional records exist, the CRT was advised by the auditors to ask for additional records. In other cases, as set forth in the April 8, 2009 letter, the CRT's requests for Voluntary Assistance were prompted by questions regarding the identity of the person who owned the account (to determine whether the claimant's relative was the same person as the person who owned the account, or simply shared the same or similar name) and regarding the fate of the assets in the claimed account (to determine whether the account owner or his/her heirs received those assets). In many cases, the additional information revealed value information about the accounts at issue, and this information was added to the account files and to the AHD-plus.

With respect to Item 8 ("The basis by which outliers (extremely high-value accounts) were determined and subsequently excluded from the analysis"), Special Master Junz identified a total of 14 outliers. She explained that all of the outliers that had been excluded from the recalculation of presumptive values were high-value accounts:

The ... outliers were identified on the basis of their impact on the coefficient of skewness and the standard deviation from the mean. Applying these tests, it turned out that all outliers were at the high end of the range. Removal of observations at the lower end in fact would have worsened the results or at best would have left them virtually unchanged, thus ruling them out as outliers. This is not an unexpected result as in this case the data distributions were skewed to the right, meaning that the mass of data was concentrated in the lower value ranges with little or no discontinuities.⁶

With respect to Item 9 ("Copies of reports and analyses of the data sets, including a sensitivity analysis performed in support of [Special Master Junz'] Recommendation"), I note that the reports and analyses have been previously docketed with the Court and have been made available to the State of Israel. A sensitivity analysis is not an appropriate test to analyze Special Master Junz' proposed recommendations. Accordingly, no sensitivity analysis was performed.

Finally, with respect to Item 10 ("An opportunity to interview Dr. Junz regarding her methodologies and conclusions"), as a Court-appointed Special Master, Dr. Junz has filed her reports in accordance with Rule 53 of the Federal Rules of Civil Procedure. The Annotated Manual for Complex Litigation, Fourth - 2009 (David A. Herr), a publication of the Federal Judicial Center (2009 Thompson Reuters), provides, at 167:

"...Rule 53 makes no provision for discovery or cross-examination of special masters, but the parties have access to the special master's report. Rule 53(g)(1), however, requires the court to allow the parties 'an opportunity to be heard' and allows the court to 'receive evidence'

⁶ See Special Master Junz Report dated October 10, 2008, at 12.

before deciding whether to adopt, modify, reject, or resubmit a special master's report."

Since that opportunity has been provided here, no further discovery involving the Special Master is appropriate.

I hope that this information will be useful to the State of Israel.

Sincerely yours,



Ben Neuborne
Lead Settlement Counsel

cc: Judge Korman
Special Master Gribetz
Special Master Junz