

No. 05-1275

IN THE
Supreme Court of the United States

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

—v.—

UNION BANK OF SWITZERLAND, ET AL.,
Respondents.

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

RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION

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HOLOCAUST SURVIVORS FOUNDATION USA,
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v.

UNION BANK OF SWITZERLAND, ET AL.,

Respondents

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

**RESPONDENTS' SUPPLEMENTAL BRIEF IN
OPPOSITION**

Pursuant to Rule 15.8, Respondents respectfully submit this Supplemental Brief in Opposition in order to bring to the Court's attention a serious anomaly in the Reply Brief in Support of the Petition dated May 31, 2006.

I.

**PETITIONERS HAVE CONSISTENTLY SUPPORTED
THE USE OF THE CY PRES DOCTRINE TO
PROVIDE ASSISTANCE TO NEEDY HOLOCAUST
SURVIVORS**

Petitioners' Reply Brief argues for the first time that even once it became clear that individualized distribution of funds allocated to the Looted Assets class was impracticable, the District Court's exercise of *cy pres* authority to distribute funds for the relief of needy members of the class was unlawful Petitioners' Reply Brief, at 4-6.

As the Second Circuit decision below makes clear, however, while petitioners have challenged the allocation formula pursuant to which the *cy pres* distribution to the needy was carried out, until now, petitioners have supported the District Court's authority to commit Looted Assets class funds for the relief of needy Holocaust survivors. The Second Circuit below accurately summarized HSF's appellate position, as follows:

...the HSF asserts that *needy* Holocaust survivors residing in the United States have received a disproportionately small allocation, relative to the *needy* survivors residing in the former Soviet Union.

In re Holocaust Victim Assets Litig, 424 F.3d 132 (2nd Cir 2005)(emphasis added).

Petitioners' brief to the Second Circuit below began with the following statement:

The members of the class which appellants seek to benefit are *needy* Holocaust survivors, most of whom

are between the 75 and 85 years of age, for whom ultimate relief would be meaningless without expeditious payment of available funds *for their benefit.* (emphasis added.)

Initial Brief of Appellants “GK” et al. in 04-1898(L), at viii, n.1

Petitioners’ September 10, 2003 challenge to the District Court’s Looted Assets allocation ruling explicitly urged that the funds be allocated to the needy “*to meet the human services needs of Class members who are currently being underserved....*” Motion for Immediate Interim Distribution of Swiss Settlement Proceeds, September 10, 2003, p.1. (reproduced in the Joint Appendix in the court below as JA 6869).

Petitioners’ September 10, 2003 motion stated that funds distributed to survivors residing in the United States would be placed in a trust, and that “*the use of such funds would be guided by an assessment of current need, and the likelihood and timing of funds from other sources....*” *Id* at p. 1, n. 1.

Petitioners’ January 30, 2004 submission to the District Court is denominated as a “Plan For Providing Assistance For Needy Nazi Victims in the United States....” (reproduced in the Joint Appendix below as JA 7589-7606)(emphasis added).

Finally, on April 29, 2004, in the course of a hearing in the District Court on potential *cy pres* distributions, the following colloquy ensued between the District Court and Mr. Dubbin, counsel of record herein:

THE COURT: Do you propose to give money to every member of the looted assets class?

MR. DUBBIN: We propose...

THE COURT: That can be answered yes or no.

MR. DUBBIN: No, sir, we do not.

THE COURT: No.

MR DUBBIN: But...

THE COURT: And so the people who you're not giving money to, they will have gotten under your theory, no consideration for their release.

MR DUBBIN: Your Honor?

THE COURT: Isn't that true?

MR. DUBBIN: No, people have a responsibility to stand up and express their position with regard to a case which they're a part of. My clients have done that. They are class members. They have objected. *They have objected to the fact that members of the looted assets class who have needs who live in this country have gotten no benefit from [sic]. That's our position. And that's what the appellate court is going to decide. Transcript of Proceedings, April 29, 2004 at pp. 272-73.*

In fact, the extreme position asserted in the Reply Brief appears to mis-state the position of the leadership of

the HSF, which has consistently urged the District Court to allocate Looted Assets funds for the relief of needy survivors, albeit pursuant to a “national residence quota” formula that would benefit needy survivors residing in the United States. See, eg., Letter, dated January 30, 2004, to District Court from Holocaust Survivors Foundation Board of Directors (urging distribution of Looted Assets funds for the benefit of needy survivors residing in the United States) (reproduced in the Joint Appendix below as JA 7450-7454). Indeed, Mr. Dubbin and the petitioners herein sought and obtained precisely such a *cy pres* distribution solely to the needy in connection with the distribution of the \$25.5 million Hungarian Gold Train settlement. See *Rosner v. United States of America*, Case No. 01-1849- CIV- SEITZ, S.D. Fla., Final Order and Judgment (September 25, 2005).

In short, the suggestion in Petitioners’ May 31, 2006 Reply Brief that petitioners have consistently opposed the use of the *cy pres* doctrine to provide assistance to needy Holocaust survivors is nothing less than an effort to re-write history.

II.

PETITIONERS’ BELATED EFFORT TO CHALLENGE THE DISTRICT COURT’S AUTHORITY UNDER THE *CY PRES* DOCTRINE TO DISTRIBUTE LOOTED ASSETS FUNDS FOR THE RELIEF OF NEEDY HOLOCAUST SURVIVORS IS PRECLUDED BY AN EXPLICIT DECISION OF THE SECOND CIRCUIT

Petitioners’ belated effort to challenge the District Court’s power under the *cy pres* doctrine to allocate Looted Assets funds for the relief of needy class members is

precluded by the Second Circuit's earlier decision in *In re Holocaust Victim Assets Litig*, 413 F.3d 183 (2nd Cir. 2001) (reproduced as Appendix D to the Petition in 05-1275).

In November, 2000, after the District Court had reluctantly determined that it was impracticable to distribute Looted Assets funds on an individualized basis, the District Court directed that Looted Assets funds be distributed for the relief of needy members of the class under the *cy pres* doctrine. *In re Holocaust Victim Assets Litig*, 2000 WL 33241660 (EDNY November 22, 2000) (reproduced as Appendix C to the Petition in 05-1275). A member of the Looted Assets class objected, arguing that the District Court lacked power to distribute settlement funds for the relief of needy class members. After a timely *pro se* appeal was lodged with the Second Circuit, the Circuit appointed counsel for the objector, and the issue was fully briefed and argued before the Circuit. On July 26, 2001, the Second Circuit explicitly found that the challenge to the *cy pres* distribution "lacks legal merit," and affirmed the District Court's allocation of \$100 million for the relief of needy Looted Assets class members. 413 F.3d at 186; (App D at D-5).

Petitioners consciously chose not to prosecute their appeal raising similar issues. See Appendix J to the Brief in Opposition in 05-1275 (withdrawal of petitioners' appeal). Nor did petitioners seek certiorari from the Second Circuit's ruling. Accordingly, they are precluded from seeking to raise the issue belatedly almost five years after the rejection of their position by the Second Circuit.

Conclusion

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

Dated: June 6, 2006
New York, New York

Respectfully submitted

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