

April 9, 2010

BY FEDERAL EXPRESS AND ECF

The Honorable Edward R. Korman
United States District Judge
United States Courthouse
Room 918
225 Cadman Plaza East
Brooklyn, New York 11201

Re: In Re: Holocaust Victim Assets Litigation, 09-cv-160-ERK

Dear Judge Korman:

This firm represents the State of Israel in the above referenced action, acting as *parens patriae* for all class members living in Israel. I write in response to Burt Neuborne's letter of March 4, 2010 ("Letter") in which he takes the position that the Court should adjudicate the pivotal question of how settlement resources are allocated across the Plaintiff Class outside of the public eye and without the benefit of public monitoring and scrutiny. In advocating against transparency, his letter promotes a course of action foreclosed by law. The State of Israel urges the Court to make available the documents, data and information used by Special Master Junz in formulating her allocation recommendations.

The ability to monitor the federal courts generates and sustains the public's "confidence in the conscientiousness, reasonableness, [and] honesty of judicial proceedings. Such monitoring is not possible without access to testimony and documents that are used in the performance of Article III functions." *U.S. v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995). For this reason, the Second Circuit recognizes a presumption of access to "so-called 'judicial documents,'" *SEC v. TheStreet.com*, 273 F.3d 222, 231 (2d Cir. 2001), and, indeed, it affords the presumption special weight when such materials play a role in "determining litigants' substantive rights—conduct at the heart of Article III." *Amodeo*, 71 F.3d at 1049. Only by showing "exceptional circumstances" can a party overcome the norm and conceal the bases of an adjudication. *Joy v. North*, 692

ARNOLD & PORTER LLP

The Honorable Edward R. Korman
April 9, 2010
Page 2

F.2d 880, 893 (2d Cir. 1982), *cert. denied sub nom. Citytrust v. Joy*, 460 U.S. 1051 (1983).

By engaging in the core Article III function of allocating settlement resources across the Plaintiff Class, the Court will affect the substantive rights of tens of thousands of Shoah survivors. Second Circuit law thus places the bases of the Court's decision, including the data, documents and information used by Special Master Junz, within the class of judicial documents that the Court must expose to public scrutiny absent exceptional circumstances.

Moreover, a nontransparent course of action affronts the Constitution. The public has a well-established qualified First Amendment right to access certain judicial documents. *Lugosch v. Pyramid Co.*, 435 F.3d 110, 120 (2d Cir. 2006). The Second Circuit extends the right to documents falling within the judicial documents doctrine when transparency will enhance the processes with which the documents are associated. *Id.* The State of Israel has requested a public hearing, but the Court has not scheduled. Where "no hearing is held and the court's ruling is based solely on the motion papers," "access to written documents . . . is particularly important." *Id.*, at 124 (quotation omitted). The empirical bases of the Junz Recommendation fall at the center of the universe of documents protected by a First Amendment right of access. Absent "specific, on-the-record findings that higher values necessitate a narrowly tailored sealing," the Court must not deprive the public of the opportunity to review the relevant data, documents and information.

Engaging in a process that cloaks Special Master Junz's analyses in secrecy not only contravenes the Constitution and Second Circuit law but does so needlessly. As Mr. Neuborne acknowledges in his Letter, the CRT can "redact the identifying information from these approximately 7,000 accounts," eliminating any possibility of sensitive personal information reaching the public. The Second Circuit, in fact, endorses such an approach. See *TheStreet*, 273 F.3d at 231. And while the delay and cost of redacting the remaining data may seem like a dear price in this case, or for that matter any case, in aggregate, it is a pittance for public trust in the system that forms the cornerstone of American justice.

Mr. Neuborne also argues against transparency because "[i]n [his] 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." Letter p.3. Surely an accurate factual record is essential where

ARNOLD & PORTER LLP

The Honorable Edward R. Korman
April 9, 2010
Page 3

the Court proposes, *sua sponte*, to alter fundamental assumptions underlying a billion dollar settlement in a way that will have a profound economic effect on tens of thousands of needy survivors. In any event, Mr Neuborne's argument contradicts squarely Second Circuit law, which considers "motive generally to be irrelevant to defining the weight accorded the presumption of access." *Amodeo*, 71 F.3d at 1050.

Finally, Mr. Neuborne frames an amalgam of Swiss Law and Court orders as an impenetrable screen preventing the public from scrutinizing the basis of an adjudication affecting tens of thousands of lives. Without comment on the validity of any order that might purport to block access to relevant information, I note simply that the State of Israel does not seek "further access to bank files," as Mr Neuborne implies in his description of the Confidentiality Order of June 15, 2004, Letter p.3, or any raw documents gathered directly from the Swiss banks. Instead, the State of Israel seeks access to the unique body of Special Master Junz's analyses and calculations that form the basis of the Court's adjudication. No confidentiality order in this case ensconces such derivative information, especially when redacted to eliminate any potential harm to the privacy interests of the known value account holders.

The Court must make public the documents, data and information used by Special Master Junz, not only to promote fairness in the instant case but to protect the integrity of the judicial system as a whole.

Respectfully yours,



Kent A. Yalowitz

cc: Burt Neuborne