**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF NEW YORK**

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| In Re:<br><br>HOLOCAUST VICTIM ASSETS LITIGATION | Case No. 09-160 (ERK)(JO) |
| THIS DOCUMENT RELATES TO:<br><br>In Re: CONSIDERATION OF SPECIAL MASTER HELEN JUNZ'S RECOMMENDATION FOR ADJUSTMENT OF DEPOSITED ASSETS CLASS PRESUMPTIVE VALUES | (Consolidated with CV 96-4849, CV 96-5161 and CV 97-461) |

# OBJECTIONS BY THE STATE OF ISRAEL TO SPECIAL MASTER GRIBETZ'S APRIL 9, 2009 REPORT

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June 9, 2009

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The State of Israel ("Israel"), as *parens patriae* for all class members living in Israel, respectfully submits the following Objections to Special Master Gribetz's April 9, 2009 Report (the "April Report"), which endorses and attaches as Exhibit A Special Master Junz's March 31, 2009 letter response (the "Junz Response") in further support of her Recommendation to increase the presumed values that have been used to establish awards for accounts as to which no balance information is known, or for which balance information is known but believed to be below average.

The State of Israel previously identified a number of flaws in the Junz Recommendation. *See* Objections by the State of Israel to Special Master Gribetz's December 19, 2008 Report (filed February 13, 2009) ("Israel's First Objections"). The April Report and the Junz Response do not address those problems. Adopting the proposed recomputation of unknown value accounts on the record before the Court would be error.

## I. THE SPECIAL MASTERS FAIL TO ACKNOWLEDGE THE ACTUAL POLICY ISSUE CONFRONTING THE COURT

Although wrapped in the dry prose of statistics, the Junz Recommendation and the Report by Special Master Gribetz endorsing it actually propose a radical policy shift. Yet these reports fail to acknowledge the policy issue before the Court: What should be done with funds in bank accounts that remain unclaimed some 64 years after the end of the Shoah? The Plan of Allocation adopted by the Court after notice and comment anticipated that unclaimed funds would remain, and that the settlement fund might not be exhausted by the claims of members of the Deposited Assets Class. To say that there are unclaimed bank account funds above and beyond the amounts actually claimed by members of the Deposited Assets Class says nothing about the total aggregate amount of money actually misdirected by the Swiss Banks those many years ago—the world will probably never know the total amounts. But the *total* amount is

*irrelevant* to the issue before the Court—which is what to do with the funds in the many, many accounts that have gone unclaimed. The Plan of Allocation adopted by the Court after a massive class notice, a searching public hearing, and careful appellate review provided that such funds would be distributed to organizations serving the needs of the neediest survivors—members of the Looted Assets Class. Now, the Special Masters have urged the Court to abandon the Plan of Allocation and instead to distribute unclaimed funds to members of the Deposited Assets Class who filed claims through the "revaluation" of unknown value accounts.

To be clear, Israel's disagreement with the Junz Recommendation does not stem from the *size* of the settlement fund—that is, we do not question at this late stage that $1.25 billion may not have reflected the entire aggregate potential damages, nor even the entire aggregate amounts deposited in the defendant Swiss Banks. Indeed, the record suggests that, at the time the settlement was negotiated, the parties believed that the $1.25 billion settlement in all likelihood *understated* the damage caused by the Defendants.

Rather, Israel disagrees with the recommended *reallocation* of the unclaimed funds. It is now clear that a great number of accounts have lain unclaimed, despite the best efforts of the Court and those who have assisted it in identifying members of the Deposited Assets Class. This fact cannot be surprising, given the extraordinary nature of the case confronting the Court, including a Genocide, the wholesale murder of entire families, the systematic destruction of records by the defendant Swiss Banks, the massive dislocations following the end of World War II, and the mere passage of more than six decades.

The Court built in a mechanism for allocating the settlement funds by reserving for the Deposited Assets Class an amount greater than was anticipated to be needed to pay *actual*

*claims*, with a commitment to reallocate the remainder to the neediest members of the Looted Assets Class.

The Court should not waiver from that Plan. The unclaimed funds should now be allocated to the neediest survivors within the Looted Assets Class, consistent with the *cy pres* principles originally recommended by Special Master Gribetz, embodied in the Plan of Allocation adopted by this Court, and approved by the Second Circuit. As we demonstrate below, there is no data in the record that would provide a reliable basis to conclude that the "true" average among unknown-value accounts for which claims were submitted should be adjusted upward. The detailed evidence necessary to test the Recommendation before the Court is not in the record because the Special Masters have not put it in the record or provided access to it to the State of Israel. Moreover, the summary evidence that is in the record strongly suggests serious methodological flaws in the Junz Recommendation—flaws that, when unmasked, undermine that the conclusions reached by Special Master Junz. The Special Master has recommended that the Court reallocate unclaimed funds to members of the Deposited Assets Class who came forward. The State of Israel cannot support that Recommendation.

## II. THE METHODOLOGICAL FLAWS IN THE JUNZ RECOMMENDATION ARE UNRESOLVED

In Israel's First Objections, we identified a number of methodological flaws in the Junz Recommendation. *See* Israel's First Objections, at 18-25. These problems have not been rectified by the Junz Response. We reiterate that our ability to thoroughly assess the Junz Recommendation is impaired to the extent that the data set and methodology upon which Special Master Junz rests her assertions have not been made available for review.[1] Nevertheless, as was

[1] At least three additional sets of information should be made available in order to allow for an objective review of the Junz Recommendation: (1) a thorough explanation of the data-generating process that has produced the sample for analysis; (2) a discussion of the assumptions used in order to extrapolate from the analysis sample to the

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the case in Israel's First Objections, certain flaws remain apparent. These problems relate primarily to data-selection methods as well as the decision to include accounts from Categories 3 and 5-Plus in the Junz recomputation.

### A. The Junz Response Does Not Adequately Address the Unreliability of the Data-Generation Processes, and Further Supports the Inference That Higher-Value Accounts Drew More Claimants and Generated More Documentation Than Lower-Value Accounts

We previously have pointed out to the Court that the varying methods of data-generation from the original AHD as compared to the AHD-Plus data set has likely biased the Junz sample and rendered it unreliable and unrepresentative. *See* Israel's First Objections, at 21. This issue remains unresolved in the Junz Response. However, the additional information in the Junz Response tends to support the State of Israel's conclusion that the set of accounts for which additional information is provided appears skewed towards high-value accounts, which makes them an inappropriate source for calculating presumptive values.

The additional data provided in the Junz Response support the inference that higher-value accounts drew more claimants than lower-value accounts. For example, Special Master Junz reports that the average value of *claimed* accounts of known value was $13,104. In contrast, the average value of *unclaimed* accounts of known value was only $4,184. *See* Mullin Supp. Decl. at ¶ 6. The average value of a claimed account with a known value is more than triple the average value of an unclaimed account with a known value. *Id.*

The same concept was observed with regard to accounts that were reclassified as a result of the scrubbing process. There were about 3,000 accounts of known value but "unknown" account type before the scrubbing process. About half of those were reclassified. The half with

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population of interest; and (3) an assessment of the reliability of the resultant extrapolation. *See* June 8, 2009 Supplemental Declaration of Charles H. Mullin, Ph.D. ("Mullin Supp. Decl.") at ¶ 3 (attached hereto as Exhibit A).

new information, however, comprised about 80% of the funds. The average value of these accounts was approximately $6,563, compared to an average value of only $1,414 for the known-value accounts with no new information. *Id.* at ¶ 7. Thus, the average value of accounts with relevant new information was more than four times that of those accounts lacking such information. *Id.*[2] Once again, higher value accounts generated more useful information than lower-value accounts.

### B. The Junz Response Fails to Set Forth a Sound Rationale for the Inclusion of the Category 3 and Category 5-Plus Accounts

The dramatic shift in average values driven largely by the inclusion of Categories 3 and 5-Plus also underscores the importance of making the underlying data available for review by the State of Israel. Special Master Junz reports that the scrubbing process resulted in an increase in the average value of Custody accounts to $19,876 from $13,000. *Id.* at ¶ 11. The jump in the average balance of the Custody accounts appears due in large part to the assignment of previously unknown account type balances to Custody accounts. *Id.* The recategorized accounts comprise more than 30% of the balance in the Post-Scrubbing AHD Custody accounts. *Id.* at ¶¶ 11-12. The substantial impact of these recategorized accounts further highlights the need to examine the methodology of the scrubbing process. *Id.* at ¶ 12.

The substantial impact on average values from the addition of Category 5-Plus and Category 3 accounts also highlights the need for a reliable, verifiable assessment of selection bias. While Special Master Junz bristles at this need, it appears that she is conflating different

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[2] Dr. Mullin notes that there are two possible explanations for these results and the substantial effect on the average values: first, it is possible that the additional information was obtained through a substantially different data generating process than was the original information and that different process has skewed these additional accounts towards high-value balances. *Id.* at ¶ 9. Second, it may be that the two sets of accounts were generated through a similar data-gathering process, but the underlying variability inherent in the process is so great that, the two sets of accounts do not provide a reliable basis from which to draw conclusions. *Id.* Both are equally plausible explanations, and they reinforce the importance of having the data set and underlying methodology available for a review and assessment of their validity.

senses of the word "bias." We do not mean to suggest that Special Master Junz had any prejudgment or judicially improper motives. Rather, "selection bias" refers to a distortion of the result of a statistical sample based on the manner in which the data were collected. Here, it is undisputed that the data were not collected in a statistically reliable way. Rather, the data were collected as a byproduct of the claims-resolution process. Determining whether that process created "selection bias" is not a personal criticism of the Special Master. It is a necessary prerequisite to judicial review of her *sua sponte* Recommendation, made without putting the relevant information into the record of the case.

In this regard, the Junz Response fails to adequately address why the Category 3 data is considered statistically reliable for present purposes as compared to the Volcker Committee's decision to exclude it. The percentage of Category 3 known values remains at 7.5%, which is *below* the 10.6% of Category 3 known values that led the Volcker Commission to call it "no[t] reliable," "inaccurate," and "misleading." Volcker Committee Report Annex 4 at 72, 75, Table 20, n. **.

In her Response, Special Master Junz appears to suggest that additional data post-scrubbing in Categories 1 and 2 have made *those* categories *less* reliable, and that the *diminished* reliability of the data for Categories 1 and 2 ameliorates the infirmities of the Category 3 data identified by the Volcker Committee. Junz Response at page 12.[3] We find the conclusion that the Special Master draws from this information mystifying. The new data seem to suggest that *none* of the average values are statistically reliable, undermining the integrity of the entire data

[3] According to the Rubenstein and Carter Report (attached as Exhibit C to the April Report), the scrubbing process "changed dramatically" the percentage of unknown values in the ICEP categories. Rubenstein and Carter Report, at 12. For example, the authors report that in the ICEP data set of 53,886 accounts, approximately 70% of Category 1 accounts and 80% of Category 2 accounts had known values. *Id.* Post-scrubbing, however, only 37% of Category 1 accounts and 64% of Category 2 accounts had known values.

set. Such a conclusion would not support *altering* the average values based on the receipt of better information. Rather, it would support leaving the Volcker Committee's findings where the Court found them.

Whatever the actual reliability of the data set may be, the State of Israel has been precluded from making a methodical assessment of the evidentiary support for the Junz Recommendation because the full data set has not been made available to it for review. We reiterate our request that the Court not make its decision on an incomplete record and without providing the State of Israel a reasonable opportunity to evaluate the data underlying the conclusion that Special Master Junz has reached.

## III. THE RIGHTS OF THE LOOTED ASSETS CLASS MUST RECEIVE THE SAME PROTECTION AND CONSIDERATION AS THOSE OF OTHER CLASS MEMBERS

Finally, even if the Junz Recommendation were based on a statistically reliable analysis—which it appears not to be—the Recommendation disregards the duty of this Court to safeguard and protect the rights of the Looted Assets Class. This is an oversight that is intolerable to the State of Israel. The members of the Looted Assets Class overwhelmingly supported the Settlement Agreement and the Plan of Allocation. They traded untested claims for contract rights. Their contract rights are just as legitimate and merit just as much protection as the contract rights of the members of other settlement classes. To accept the suggestion of Special Master Gribetz that "the Deposited Assets Class claims are the heart of the lawsuit" would be a grave misconception of the jurisprudential nature of settlement agreements—not to mention a moral abandonment of tens of thousands of needy survivors who supported the Settlement Agreement and the Plan of Allocation.

As the State of Israel has demonstrated in its earlier submission to the Court, the recommendation before the Court would negatively impact the neediest survivors by almost $200 million. Israel's First Objections, at 27-28. As we have pointed out, the Class includes a large number of extremely elderly Shoah survivors. Many of these class members are unable to meet even the most basic daily needs. *See* Israel's First Objections, at 30. We reiterate only a few disquieting facts about those class members living in Israel:

- As of 2005 some 176,1000 of the destitute class members in Israel live near or below Israel's poverty line;
- 146,000 had insufficient heat in the winter;
- 107,400 had to choose between food and other basic needs;
- 86,000 could not afford the cost of calling or visiting their children.

*Id.* (citing Sergio DellaPergola & Jenny Brodsky, *Health Problems and Socioeconomic Neediness Among Jewish Shoah Survivors in Israel* (April 20, 2005), at 25-27. These class members have a legal and moral claim to the funds that have gone unclaimed that is at least as strong as the claims of members or heirs of the Deposited Assets Class who came forward but, by virtue of the lack of documentation or low-value documented accounts, have received presumed value awards and who may even receive higher awards untethered to need.

The Court has an obligation to ensure fairness among all class members. It is true that the Court has discretion to adjust distributions "to assure fairness among all claimants." Plan of Allocation at 110.[4] But this discretion must be exercised in accordance with the Court's duty to

[4] *See Beecher v. Able*, 575 F.2d 1010, 1016 (2d Cir. 1978) (approving reallocation where supported by the evidence, and where it was "incumbent upon the district court to exercise its broad supervisory powers over the administration of class-action settlements to allocate the proceeds among the claiming class members more equitably"); *compare County of Suffolk v. Long Island Lighting Co.*, 14 F. Supp. 2d 260, 269 (E.D.N.Y. 1998) ("where the applicants' proposed modifications are so detrimental to the rights of some members of the class that the issue takes on constitutional dimensions, there can be little doubt that the district court is constrained in the exercise of its equitable powers.... The court's discretion rarely, if ever, extends to modifications which directly contradict the fundamental expectations underlying the original settlement.").

assure fairness to *all* members of the Class—not to put the interests of one Class above another.[5] And discretion may not be exercised on the basis of facts not in the record or assertions that are not subject to cross-examination. The neediest members of the Class are deserving of protection and fair treatment. What conclusions must we draw when we read nearly 200 pages in support of the Junz Recommendation and not one word about fairness to these class members?

## CONCLUSION

For all of the foregoing reasons, and all of the reasons in the State of Israel's prior submissions to the Court, we respectfully request that this Court reject the recommended upward adjustment to presumed values.

Dated: June 9, 2009
New York, New York

Respectfully submitted,

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[5] *See Beecher v. Able*, 575 F.2d at 1016 ("'a court supervising the distribution of a trust fund has the inherent power and the duty to protect unnamed, but interested persons'") (quoting *Zients v. LaMorte*, 459 F.2d 628, 630 (2d Cir. 1972)); *cf. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 627 (1997) (emphasizing importance of "structural assurance of fair and adequate representation for the diverse groups and individuals affected").

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**SUPPLEMENTAL DECLARATION OF CHARLES H. MULLIN, Ph.D.**

I, CHARLES H. MULLIN, declare as follows:

1. I submit this Supplemental Declaration to my February 12, 2009 Declaration in support of the Objections by the State of Israel to Special Master Gribetz's December 19, 2008 Report, and the Motion by the State of Israel for access to documents, data and information examined or utilized as part of Special Master Junz's recommendation, and for an interview with Special Master Junz.

2. I have reviewed Special Master Gribetz's April 9, 2009 report regarding the Claims Resolution Tribunal (the "CRT") proposal for adjustment of deposited assets class presumptive values and all attachments.

3. The information contained in these additional filings does not change my prior conclusion. Based upon my review, the information provided remains insufficient to ascertain the merits or lack thereof of the Junz Recommendation. At least three additional sets of information, currently not included, are needed to complete such an assessment: (a) a thorough explanation of the data generating process that produced the sample being analyzed; (b) a discussion of the assumptions being invoked in order to extrapolate from the analysis sample to the population of

interest; and (c) an assessment of the reliability of the resultant extrapolation. A more thorough description of the data generating process and the ability of third parties to directly analyze the data likely would allow for a comprehensive assessment of the Junz Recommendation.

4. Although the data provided in the most recent filings remain insufficient to ascertain the merits or lack thereof of the Junz Recommendation, the additional information that was provided appears to support the concerns I raised in my previous Declaration.

5. Most importantly, the set of accounts for which additional information is found appears skewed towards high-value accounts, which would make them an inappropriate source for calculating the presumptive values. Specifically, (i) as discussed below, the data indicate that potential claimants of high-value accounts are more likely to file claims than the potential claimants of low-value accounts; (ii) previous filings by Special Master Junz indicate that greater research is performed on accounts for which a claim has been filed than on accounts for which claims were not filed; (iii) therefore, high-value accounts are more likely to have greater research performed on them; (iv) further, as discussed below, the data indicate that relevant information is more likely to exist for high-value accounts; (v) thus, high-value accounts are both more likely to have greater research performed on them and more likely to have that research locate relevant information; (vi) as a result, the set of accounts for which additional information is found appears skewed towards high-value accounts, which would make them an inappropriate source for calculating the presumptive values.

6. First, the additional data provided in the April 9, 2009 filings support the hypothesis that potential claimants of high-value accounts are more likely to file claims than the potential claimants of low-value accounts. In particular, among accounts with known value, paid accounts average more than three times the balance of unclaimed accounts ($13,104 v. $4,184). Special Master Junz reports that the AHD-Plus contains 6,945 accounts with known value and that the average value of those accounts is $6,112. She also reports that 1,501 of those accounts have been claimed and paid at an average value of $13,104. Thus, there are 5,444 remaining

unpaid accounts with an average value of $4,184. So, the average value of a claimed account with known value is more three times the average value of an unclaimed account with known value.

7. Second, the additional data provided in the recent filings support the hypothesis that high-value accounts contain more information. Special Master Junz reports that the Original AHD had 3,009 accounts with known value and unknown account type. The average value of those 3,009 accounts is $3,950. The scrubbing process resulted in actionable additional information becoming available with regard to 1,482 of those accounts. Some of those 1,482 accounts were eliminated from the sample, while others had sufficient information to determine their account type. The average value of those 1,482 accounts is $6,563. In contrast, 1,527 accounts with known value and unknown account type remain in the Post-Scrubbed AHD. The average value of these 1,527 accounts is $1,414. So, the average value of accounts with actionable information is more than four times that of those accounts lacking such information.

8. Third, Special Master Junz reports the AHD-Plus contains 1,856 accounts in addition to the 5,089 Category 1 and Category 2 accounts in the Post-Scrubbing AHD. Those 1,856 additional accounts are composed of 821 Category 3 accounts and 1,035 Category 5+ or sub-accounts identified during the claims resolution process. The average value of those 1,856 accounts is $15,114. The average value of the 5,089 accounts in the Post-Scrubbing AHD is $2,829. So, the average value of the additional accounts is more than five times that of the initial sample.

9. Although I currently lack access to the data necessary to compute a formal statistical test, the magnitude of the difference in these average values leaves two logical conclusions: (i) the additional accounts were attained through a substantially different data generating process from the Post-Scrubbing AHD accounts that skewed these additional accounts towards high-value balances relative to the Post-Scrubbing AHD accounts or (ii) the two sets of accounts were generated through a similar data generating process, but that underlying variability in the data is so large that, even combined, the two sets of accounts do not provide a reliable basis from which to draw conclusions. With access to the underlying data, I could perform a relatively

straightforward statistical test that would determine which of these explanations was correct. In the absence of access to the underlying data, I am restricted to drawing inferences from the limited summary level information that has been provided. However, even without the formal test, the data are strongly supportive of the former explanation in that the latter explanation would require an extraordinarily high level of variation in the account values.

10. In addition to illuminating the selection issues described above, the additional information provided in the April 9, 2009 filings helps clarify the impact of each step Special Master Junz takes in moving from the original presumptive value of $13,000 for Custody accounts to the proposed value of $31,000. Below I focus on the impact of the scrubbing process, the inclusion of Category 3 accounts, and the inclusion of Category 5+ and sub-accounts.

11. Special Master Junz represents that the scrubbing process itself results in an increase in the average value of Custody accounts from $13,000 to $19,876. Although this change is partially attributable to the removal of accounts during the scrubbing process, it appears that the dominate change is the assignment of previously unknown account type balances to Custody accounts. In particular, the Original AHD contains 397 Custody accounts with an average value of $13,000 for an aggregate balance of $5,161,000. The Post-Scrubbing AHD contains 373 Custody accounts with an average value of $19,876 for an aggregate balance of $7,413,748. Thus, despite eliminating accounts during the scrubbing process, the Post-Scrubbing AHD Custody accounts contain $2,252,748 more dollars than before the scrubbing process began. Therefore, recategorized accounts constitute more than 30% of the dollars in the Post-Scrubbing AHD Custody accounts.

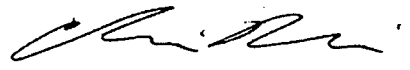
12. The fact that these recategorized accounts have a substantial impact on the average value of Custody accounts underscores the need to assess the potential for selection bias in the recategorization process. The need for this assessment is highlighted by the fact that the average value of accounts which remained of unknown type is substantially lower the account values of those that became known ($1,414 verses $6,563). Thus, a thorough review of these data by parties adversely affected by the inclusion of these accounts appears warranted.

13. Further, both Special Master Junz (page 12) and Special master Gribetz (pages 12, 34) indicate the scrubbing process disproportionately eliminated known value accounts relative to unknown value accounts. No negative inferences should be taken from this fact as this result is the expected outcome. Known value accounts likely contain more information than unknown value accounts. Therefore, the auditors are more likely to possess sufficient information to determine whether or not a known value account should be excluded.

14. Finally, the 1,035 Category 5+ or sub-accounts identified during the claims resolution process, not the 821 Category 3 accounts, underpin the majority of the proposed increase in the presumptive value of Custody accounts. The addition of these 1,035 accounts to the Post-Scrubbing AHD Category 1 and Category 2 accounts raises the average value from $19,876 to approximately $30,000. The inclusion of Category 3 accounts increases the average to $31,000 or by an additional $1,000. The Category 5+ and sub-accounts have such a greater impact than the Category 3 accounts both due to the higher average value of these accounts and due to the greater number of these accounts.

15. The fact that these Category 5+ and sub-accounts have a substantial impact on the average value of Custody accounts underscores the need to assess the potential for selection bias in these accounts. Further, for the reasons described in my February 12, 2009 Declaration, the Category 5+ accounts are the most at risk of selection bias. Thus, a thorough review of these data by parties adversely affected by the inclusion of these accounts appears warranted.

I declare under penalty of perjury that to the best of my knowledge the foregoing is true and correct. Dated this 8th day of June, 2009.



Charles H. Mullin, Ph.D.