UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE: HOLOCAUST VICTIM ASSETS LITIGATION	Case No. CV 96-4849 (ERK)(MDG) (Consolidated with CV 96-5161 and CV 97-461)
This Document Relates to: All Cases	

SPECIAL MASTER'S PROPOSED PLAN OF ALLOCATION AND DISTRIBUTION OF SETTLEMENT PROCEEDS

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I. GOVERNING PRINCIPLES AND SUMMARY OF PROPOSAL 1

A. INTRODUCTION 1

B. THE SPECIAL MASTER'S OBLIGATIONS 5

C. SUMMARY OF SPECIAL MASTER'S PROPOSAL 10

1. The Deposited Assets Class 10

2. The Looted Assets, Slave Labor Class I, Slave Labor Class II and Refugee Classes 16

(a) General Principles 16

(b) Specific Recommendations for Looted Assets, Slave Labor and Refugee Classes ... 21

(i) Looted Assets Class 21

(ii) Slave Labor Class I 27

(iii) Slave Labor Class II 31

(iv) Refugee Class 35

II. THE CONSOLIDATED CLASS ACTION LAWSUIT AND ITS HISTORICAL CONTEXT 39

A. HISTORICAL CONTEXT 40

1. Early Efforts to Recover Assets 41

2. Recent Efforts to Recover Assets 48

(1) The Volcker Committee 52

(2) The Eizenstat Report 62

(3) The Bergier Commission 63

(4) The Swiss Humanitarian Fund 66

(5) The Slave Labor Lawsuits 68

B. THE CLASS ACTION COMPLAINTS 71

C. THE MOTIONS TO DISMISS OR STAY PROCEEDINGS 75

D. THE SETTLEMENT AGREEMENT 82

E. THE REFERRAL ORDERS 85

F. THE NOTICE PLAN 86

G. AMENDMENT NO. 2 TO THE SETTLEMENT AGREEMENT 87

H. THE FINAL APPROVAL ORDER 89

III. DETAILED ALLOCATION AND DISTRIBUTION RECOMMENDATIONS FOR THE FIVE SETTLEMENT CLASSES 90

A. DEPOSITED ASSETS CLASS 90

1. Class Definition: 90

2. Allocation Principles 91

3. Distribution 94

4. Mechanism of Distribution 99

(a) The Unique Strengths of the CRT 101

(b) Recommended CRT Procedures 104

B. LOOTED ASSETS CLASS 110

1. Class Definition 110

2. Allocation Principles 111

3. Distribution 117

4. Mechanism of Distribution 119

(a) Assistance to Needy Jewish Survivors 119

(i) Former Soviet Union 122

(ii) Israel, North America, Europe (Non-Former Soviet Union) and the Rest of the World 130

(b) Israel 131

(c) North America 133

(d) Europe and the Rest of the World 134

(iii) Funding Principles 135

(e) Assistance to Needy Roma, Jehovah's Witness, Homosexual and Disabled Survivors 138

C. SLAVE LABOR CLASS I 142

1. Class Definition 142

2. Allocation Principles 143

(a) German Use of Slave Labor 144

(b) German — Swiss Financial Relationships 145

3. Distribution 148

4. Other Distribution Considerations 157

D. SLAVE LABOR CLASS II 159

1. Class Definition 159

2. Allocation Principles 159

3. Distribution 161

4. Mechanism of Distribution 163

Proposed Slave Labor Class II Rules 164

E. REFUGEE CLASS 167

1. Class Definition 167

2. Allocation Principles 167

3. Distribution and Mechanism 170

(a) Claims Concerning Detention, Mistreatment or Abuse 170

(b) Claimants Concerning Denial of Entry Into or Expulsion From Switzerland 172

(i) Initial evaluation of refugee claims 174

4. Review of claims not recommended for payment 175

5. Proposed rules for initial review and appeal: 176

IV. ADDITIONAL RECOMMENDATIONS 179

A. COMMUNICATING WITH THE CLASSES 179

B. TAX TREATMENT AND LEGISLATION 181

V. CONCLUSION 183

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SPECIAL MASTER'S PROPOSED PLAN OF ALLOCATION AND DISTRIBUTION OF SETTLEMENT FUND

I. GOVERNING PRINCIPLES AND SUMMARY OF PROPOSAL

A. Introduction

Pursuant to Rules 23 and 53 of the Federal Rules of Civil Procedure, and the Order of the United States District Court for the Eastern District of New York (Korman, C. J.), dated March 31, 1999, appointing Judah Gribetz as Special Master and directing the Special Master to prepare and file a proposed Plan of Allocation and Distribution with respect to the settlement proceeds in this action, as modified by Orders dated June 4, 1999, December 23, 1999, March 14, 2000 and August 11, 2000 (collectively, the "Referral Orders"), the following is the proposed Plan of Allocation and Distribution of the Special Master (the "Proposal"). This Proposal incorporates the Special Master's findings of fact and conclusions of law.

The Settlement Agreement directs the Special Master to employ "open and equitable procedures to ensure fair consideration of all proposals for allocation and distribution."[1] Since his appointment, the Special Master has met or spoken with dozens of individuals and has reviewed many formal proposals submitted from around the world. Letters to the Court and to the Special Master, primarily from survivors of the Holocaust, have numbered in the thousands.

Although the suggestions to the Special Master for allocation and distribution have been diverse, they share common themes: that the task before the Special Master and, ultimately, the Court, is daunting; that the settlement of the litigation against the Swiss banks represents, in some small fashion, another historic opportunity in the attempt to redress the indescribable wrongs that have been wrought against the victims of the Holocaust; and that the allocation and distribution of the $1.25 billion settlement fund should be meaningful, with some lasting impact upon class members.[2] Those who have communicated with the Special Master, especially the survivors, also have made it clear that they consider this settlement to be a further step along the often tortuous path toward accountability and remembrance.

The Special Master believes that the Proposal described below allocates and distributes an historic, yet limited, settlement fund in a manner which is fair, equitable and consistent with governing legal principles. He is ever mindful, however, that no amount of money could begin to compensate the millions of victims of Nazi persecution for the horrors they suffered during the Holocaust, that no amount of money could restore the generations that

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[1] *See* Settlement Agreement, Section 7.1 (attached hereto, together with its amendments, as Exhibit 1).

[2] A summary of the proposals submitted to the Special Master is attached hereto at Annex A.

were lost, and that no amount of money could right the injustice perpetrated by Nazi Germany that has been termed "one of the greatest thefts by a government in history."[3]

While mindful of these irrefutable facts, the Special Master also recognizes, as we all must, that this Proposal arises out of the settlement of a consolidated, class action lawsuit, that the plaintiffs in the lawsuit do not include all those who suffered at the hands of the Nazis, and that the defendants (and other Releasees) are not the Nazis who inflicted the innumerable atrocities the term "Holocaust" brings to mind. Rather, this lawsuit was brought and settled on behalf of a circumscribed group of class members who have or may have claims against Swiss banks and other Swiss governmental and business entities for specific wrongs allegedly committed by those banks and other entities in connection with events surrounding World War II. It also must be recognized that this suit primarily concerns assets — assets which actually or allegedly were deposited into Swiss banks by victims of Nazi persecution and never returned to their rightful owners, and assets which either were looted by the Nazis or derived from the slave and forced labor to which they subjected their victims and which actually or allegedly were deposited into or transacted through Swiss banks and other entities. Taking all of the foregoing into account, as well as the numerous factors discussed in more detail below, the Special Master has endeavored to present a Proposal that is not only fair and equitable, but also as meaningful as possible given the number of potential claimants and the limited sum to be divided among them.

* * * *

[3] U.S. and Allied Efforts to Recover and Restore Gold and Other Assets Stolen or Hidden by Germany During World War II - Preliminary Study (May 1997) (hereinafter, the "Eizenstat Report"), coordinated by then-Under Secretary of Commerce for International Trade Stuart E. Eizenstat and prepared by William Z. Slany, Department of State Historian, Foreword by Stuart E. Eizenstat, at iii. Mr. Eizenstat currently serves as Deputy Secretary of the Treasury and Special Representative of the President and Secretary of State for Holocaust Issues.

This Proposal is divided into several sections. Section I provides an overview of the governing principles which have guided the Special Master, and also broadly outlines the allocation and distribution recommendations. This Section, I(A), introduces the Proposal. Section I (B) discusses the Special Master's dual obligation to consider the concerns and suggestions of the class members, and at the same time to adhere to the requirements of the Settlement Agreement and United States law. Section I(C) summarizes the recommendations.

Section II describes the class action lawsuits giving rise to this Proposal, including the historical context in which the lawsuits were brought, the claims and defenses thereto asserted by the parties, the pertinent provisions of the Settlement Agreement and the Referral Orders, the Notice Plan that was implemented in this action, and the Court's July 26, 2000 Memorandum and Order, as corrected August 2, 2000, approving the class action settlement (the "Final Approval Order").[4]

Section III discusses the details of the Proposal for each of the five classes: the Deposited Assets Class (Section III(A)), the Looted Assets Class (Section III(B)), Slave Labor Class I (Section III(C)), Slave Labor Class II (Section III(D)), and the Refugee Class (Section III(E)). For each of the five classes, the Special Master describes the class definition, the allocation principles which have informed the Special Master's recommendations (based upon historical, factual and legal research summarized in Sections II and III and discussed in greater detail in several "annexes" accompanying this Proposal),[5] and the details of the proposed allocation to the class as well as the mechanism for distribution.

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[4] In re Holocaust Victim Assets Litigation, 96 Civ. 4849 (ERK) (MDG), slip op. (E.D.N.Y. July 26, 2000, corrected August 2, 2000).

[5] These annexes are as follows: Summary of Allocation Proposals (Annex A); Legal Principles

(continued on next page)

Finally, the Special Master's additional recommendations and conclusions are set forth in Sections IV and V below.

B. The Special Master' s Obligations

The Special Master has been guided by two paramount responsibilities. The first of these, as noted previously, has been the duty to employ "open and equitable procedures to ensure fair consideration of all proposals for allocation and distribution," as required under the Settlement Agreement.[6] As the Court noted in its Final Approval Order: "Under the Settlement Agreement, the Special Master, as a neutral third party, is to consider all suggestions regarding allocation and distribution directly from the class, without relying upon intermediating representatives, such as settlement class counsel or settlement class representatives …. The appointment of a Special Master here … obviates the concern that hypothetical conflicts among class members relating to allocation and distribution would require separate representation, and thus call into question the adequacy of the representation. This is so because the class members represent themselves on this key issue, and have direct access to the Special Master and to me [the Court]."[7]

In accordance with this mandate, the Special Master has sought "to consider all suggestions regarding allocation and distribution directly from the class," to provide "direct

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Governing Distribution of Class Action Settlements (Annex B); Demographics of "Victim or Target" Groups (Annex C); Heirs (Annex D); Holocaust Compensation (Annex E); Social Safety Nets (Annex F); the Looted Assets Class (Annex G); Slave Labor Class I (Annex H); Slave Labor Class II (Annex I); the Refugee Class (Annex J); and the Swiss Humanitarian Fund (Annex K).

[6] Settlement Agreement, Section 7.1.

[7] In re Holocaust Victim Assets Litigation, at 16, 17 (emphasis in original). The Court also noted that the "adequacy concerns that informed the Supreme Court's decisions in Ortiz v. Fibreboard Corp., 527 U.S. 815, 119 S. Ct. 2295 (1999), and Amchem Products, Inc. v. Windsor, 521 U.S. 591, 117 S.

(continued on next page)

access" to those who have wished to communicate with him or with the Court, and to maintain a transparent and fair process throughout his tenure.[8]

The Special Master's other duty is to ensure that the Proposed Plan of Allocation and Distribution comports with both the Settlement Agreement and with United States law. Because the $1.25 billion settlement (the "Settlement Fund") has its genesis in a class action lawsuit, the proposal for allocation and distribution necessarily must comply with class action law — an obligation which renders this Settlement Fund fundamentally different from the recently finalized German slave labor agreement, which also arose from litigation but ultimately was superceded by a complex negotiation conducted at the highest levels of the United States and German governments. The Swiss Confederation, by contrast, was not a party to the negotiations that produced this settlement, nor to the Settlement Agreement itself. The settlement is not a treaty, nor is it legislation (as is the German agreement). It is, instead, a contract between the plaintiff class members and the two defendant Swiss banks, governed by basic contract law but also subject to the stringent due process requirements of a procedural device apparently unique to the United States: the class action lawsuit. These requirements are

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Ct. 2231 (1997), are therefore absent from this case"). *Id.* at 17.

[8] To that end, in the fall of 1999, the Special Master requested expansion of the Internet site established as part of the notice process, "www.swissbankclaims.com," to post a representative sampling of the proposals for allocation and distribution which have been submitted from around the world. As of September 7, 2000, there had been approximately 316,000 contacts with the Internet site. *See* Letter of Notice Administrator to Special Master, September 7, 2000 (hereinafter, "September 7, 2000 Notice Administration Letter") (on file with Special Master). The approximately 564,000 Initial Questionnaires that have been received thus far from 109 countries likewise show the impact of this unprecedented global outreach upon the Holocaust survivor community. *See* Summary Reports of Initial Questionnaire Data Entered as of August 30, 2000 (hereinafter, "Initial Questionnaire Data"), at Table 1, p. 1; September 7, 2000 Notice Administration Letter. *See also* "Geographic Distribution of Initial Questionnaires by Claimant Country," attached hereto as Exhibit 3. Additional Initial Questionnaires continue to be received by the Notice Administrators, who will continue to update their Summary Reports as needed.

intended to protect the interests of all class members, but may have the unfortunate effect of delaying distribution of the Settlement Fund to those who, by now, have been waiting for more than two years — and in the case of claimants to Swiss bank accounts, more than fifty years — to receive payments.[9]

The starting point of the legal analysis is the Settlement Agreement itself, signed on January 26, 1999, operative as of March 30, 1999 following execution of written "Organizational Endorsements" of the agreement by 17 major worldwide Jewish organizations, and amended as recently as August 9, 2000, largely in response to concerns expressed by class members and other interested persons.

The Settlement Agreement created five specific classes of claimants: the "Deposited Assets Class," the "Looted Assets Class," "Slave Labor Class I," "Slave Labor Class II" and the "Refugee Class." With the exception of "Slave Labor Class II," a class member must be a "Victim or Target of Nazi Persecution." That term is defined as "any individual, corporation, partnership, sole proprietorship, unincorporated association, community, congregation, group, organization, or other entity persecuted or targeted for persecution by the Nazi Regime because they were or were believed to be Jewish, Romani, Jehovah's Witness, homosexual, physically or mentally handicapped." (Settlement Agreement, Section 1).

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[9] As the Court pointed out in its Final Approval Order, however, it is not only class action legal requirements which have delayed distribution of the Settlement Fund. *See* In re Holocaust Victim Assets Litigation, at 27 (describing the "inordinately long and unexplained delay of four months" on the part of the Swiss Federal Banking Commission prior to issuing a recommendation crucial to the resolution of bank account claims, as discussed in much greater detail below); *id.*, at 46 ("the principal reason for tolerating extended negotiation on the modifications [to the Settlement Agreement; *see infra*] was my [the Court's] belief that a fair and efficient claims distribution mechanism can best be accomplished by accommodation rather than conflict. The defendant banks now force me to choose between reasonable accommodation and my duty to protect the class beneficiaries. I choose the latter.").

As noted, claimants also must fall within at least one of five classes, defined in the Settlement Agreement as follows:

- "The **Deposited Assets Class** consists of Victims or Targets of Nazi Persecution and their heirs, successors, administrators, executors, affiliates, and assigns who have or at any time have asserted, assert, or may in the future seek to assert Claims against any Releasee for relief of any kind whatsoever relating to or arising in any way from Deposited Assets or any effort to recover Deposited Assets." (Settlement Agreement, Section 8.2(a)).
- "The **Looted Assets Class** consists of Victims or Targets of Nazi Persecution and their heirs, successors, administrators, executors, affiliates, and assigns who have or at any time have asserted, assert, or may in the future seek to assert Claims against any Releasee for relief of any kind whatsoever relating to or arising in any way from Looted Assets or Cloaked Assets or any effort to recover Looted Assets or Cloaked Assets." (Settlement Agreement, Section 8.2(b)).
- "The **Slave Labor Class I** consists of Victims or Targets of Nazi Persecution who actually or allegedly performed Slave Labor for companies or entities that actually or allegedly deposited the revenues or proceeds of that labor with, or transacted such revenues or proceeds through, Releasees, and their heirs, executors, administrators, and assigns, and who have or at any time have asserted, assert, or may in the future seek to assert Claims against any Releasee for relief of any kind whatsoever relating to or arising in any way from the deposit of such revenues or proceeds or Cloaked Assets or any effort to obtain redress in connection with the revenues or proceeds of Slave Labor or Cloaked Assets." (Settlement Agreement, Section 8.2(c)).
- "**Slave Labor Class II** consists of individuals who actually or allegedly performed Slave Labor at any facility or work site, wherever located, actually or allegedly owned, controlled, or operated by any corporation or other business concern headquartered, organized, or based in Switzerland or any affiliate thereof, and the individuals' heirs, executors, administrators, and assigns, and who have or at any time have asserted, assert, or may in the future seek to assert Claims against any Releasee other than Settling Defendants, the Swiss National Bank, and Other Swiss banks for relief of any kind whatsoever relating to or arising in any way from such Slave Labor or Cloaked Assets or any effort to obtain redress in connection with Slave Labor or Cloaked Assets." (Settlement Agreement, Section 8.2(d)).
- "The **Refugee Class** consists of Victims or Targets of Nazi Persecution who sought entry into Switzerland in whole or in part to avoid Nazi persecution and who actually or allegedly either were denied entry into Switzerland or, after gaining entry, were deported, detained, abused, or otherwise mistreated, and the individuals' heirs, executors, administrators, and assigns, and who have or at any time have asserted, assert, or may in the future seek to assert Claims against any Releasee for relief of any kind whatsoever relating to or arising in any way from

> such actual or alleged denial of entry, deportation, detention, abuse, or other mistreatment." (Settlement Agreement, Section 8.2(e)).

These class definitions potentially encompass millions of people. The estimate of Jewish survivors of Nazi persecution alone ranges from 832,000 to 960,000, a number increased by the varied estimates of Roma, Jehovah's Witness, disabled and homosexual survivors.[10] Moreover, each of the five classes includes, among others, "heirs," a term undefined in the Settlement Agreement but governed by New York law (*see* Settlement Agreement, Section 16.3). New York law does not limit "heirs" to children, spouses or even near relatives. Rather, the definition of "heirs" extends well beyond even great-grandchildren of grandparents — and, moreover, must be determined at the time of the decedent's death. Under this definition, the Special Master believes that heirs of Nazi victims, all apparently class members, easily number in the millions.[11]

To be a class member, however, such a person or entity also must have an identifiable connection to a "Releasee," a term which, as defined by the parties in the Settlement Agreement, includes all Swiss banks, all Swiss governmental bodies, and virtually all Swiss business entities.[12]

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[10] *See* Annex C ("Demographics of 'Victim or Target' Groups"); Notice Plan, at 6.

[11] The Notice Plan placed the number of heirs at approximately 2,000,000. Notice Plan, at 6. That number, however, is a significant underestimation, because the Notice Plan defined "heirs" as *children of survivors only*. As described above, New York law imposes no such limitation — nor does the law of Germany, Israel or, for that matter, the Talmud — and so under the Settlement Agreement, the classes include many millions of individuals. *See* Annex D ("Heirs").

[12] *See* Settlement Agreement, Section 1. The Settlement Agreement also defines many other significant terms, such as "Asset," "Deposited Asset," "Matched Asset," "Looted Asset," "Cloaked Asset," "Slave Labor," "Releasee," "Settling Defendants," "Other Swiss Banks," and "Nazi Regime." In addition, several of these terms are defined elsewhere in this Proposal or in the Annexes.

The Special Master has been ever mindful of the language of the Settlement Agreement, as drafted and amended by the parties and approved by the Court, while considering carefully the concerns and suggestions that have been voiced by class members and others in their thoughtful proposals.

The Special Master also has been guided by class action allocation and distribution principles set down by the courts of the United States. Among other things:

- the allocation and distribution plan must be equitable;
- a lengthy and cumbersome process of individual eligibility determinations must be avoided;
- a remedy other than direct monetary distributions to individual class members — a "*cy pres*" remedy providing for participation of certain class members in selected programs designed to address specific needs — is appropriate in certain circumstances;[13] and
- administrative expenses must be minimized, particularly where, as here, the settlement fund is limited and the class members are numerous.[14]

C. Summary of Special Master's Proposal

1. The Deposited Assets Class

The allocation and distribution of the Settlement Fund must reflect the unique historical background against which this lawsuit arose and upon which it was settled: the allegation that Swiss banks failed to return thousands of bank accounts that had been opened primarily by Jewish victims of the Nazis who attempted to shield some of their financial assets

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[13] "*Cy pres*" means the "next best" alternative. "Typically, the court employs *cy pres* where class members cannot be located or where individual recoveries would be so small as to make distribution economically impossible." In re Matzo Food Products Litigation, 156 F.R.D. 600, 605 (D.N.J. 1994); In re "Agent Orange" Product Liability Litigation, 818 F.2d 179, 185 (2d Cir. 1987) ("[a] district court may, in order to maximize 'the beneficial impact of the settlement fund on the needs of the class,' set aside a portion of the settlement proceeds for programs designed to assist the class").

[14] These legal principles are more fully described at Annex B ("Legal Principles Governing

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from the Third Reich. Because virtually all of these accounts were owned by people who were killed in the Holocaust, by definition, the "Deposited Assets Class" that seeks the return of these accounts is comprised almost entirely of heirs. More than three years after the complaints were filed in this lawsuit, the unprecedented forensic accounting investigation conducted by the Independent Committee of Eminent Persons ("ICEP," also known as the "Volcker Committee" after its Chairman, Paul A. Volcker), concluded that some 54,000 Swiss bank accounts are "probably" or "possibly" related to Holocaust victims, and, accordingly, that these accounts can be returned to their proper owners, virtually all of whom by now are the original owners' heirs. [15]

When the parties first began to negotiate the specific terms of the Settlement Agreement in August 1998, and finalized them in January 1999, they recognized that the Volcker Committee's then-ongoing forensic accounting investigation of Swiss banks, when brought to completion, would be of vital significance to a final allocation and distribution of the Settlement Fund. The parties to the Settlement Agreement provided for that possibility by according the "Deposited Assets Class" priority among the five settlement classes.[16] Under the terms of the

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Distribution of Class Action Settlements").

[15] The Volcker Committee, its report of December 6, 1999 (hereinafter, the "Volcker Report"), and related subsequent events, are described in greater detail in Sections II and III(A) of this Proposal, as well as in the Final Approval Order. As the Court explained, the Volcker Committee has since made a modest adjustment to its initial finding of 54,000 accounts: "On February 23, 2000, the Volcker Committee announced that a review of the approximately 54,000 accounts identified as 'probably' or 'possibly' related to victims of Nazi persecution resulted in the elimination of certain accounts because they were duplicates or because of other technical factors, reducing the total number of such accounts to between 45,000 and 50,000. *See* Volcker Committee Press Release (Feb. 23, 2000)." In re Holocaust Victim Assets Litigation, at 19-20.

[16] The Settlement Agreement as originally executed provided as follows: "the ICEP and the Claims Resolution Tribunal will continue, at certain Releasees' expense, in a manner that is appropriate in light of this Settlement Agreement" and that "Settling Defendants shall pay Matched Assets [i.e., those determined by ICEP or the CRT to belong to particular claimants] to rightful claimants as and when determined by the ICEP or the Claims Resolution Tribunal," with such payments "deemed to be included in, and part of, the Settlement Amount" (*see* Settlement Agreement, Sections 4.1 and

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Settlement Agreement, repayments to bank depositors are to be deducted first from the Settlement Fund.[17] The remainder of the Settlement Fund is to be distributed among the other four settlement classes.[18]

As the Court so pointedly observed, the Volcker Report "provided legal and moral legitimacy to the claims asserted here on behalf of the members of the Deposited Assets Class."[19] The priority accorded under the Settlement Agreement to bank account claimants likewise is legally and morally appropriate. A person who placed money in a Swiss bank must be able to retrieve his or her assets from the bank entrusted with its safekeeping.[20] If that person was murdered by the Nazis, or has died since, then that person's heirs likewise are entitled to be paid the sums that Swiss banks have been holding for them for more than half a century.[21]

4.2). Although the parties have since negotiated certain amendments to the Settlement Agreement which, among other things, have resolved a dispute concerning the banks' duty to pay for the Deposited Assets Class claims resolution process, they have left no doubt that the bank account claims still are accorded priority. Amendment No. 2 to Settlement Agreement, dated August 9, 2000 (hereinafter, "Amendment No. 2") and the parties' Memorandum to the File, dated August 9, 2000 (included as part of Exhibit 1 hereto) address the manner in which the Volcker Committee's recommendations as to deposited assets will be implemented. *See, e.g.*, Amendment No. 2, pp. 3-7; Memorandum to the File, ¶ D ("It is the intent and agreement of the parties that all payments that the CRT and the CRT-SD have determined or will determine should be paid shall continue to be distributed promptly, without regard to any provisions in the Settlement Agreement or in Amendment No. 2 to the Settlement Agreement referring or relating to the 'Settlement Date' or the 'Final Judgment and Order'").

17 *See* Settlement Agreement, Section 5.2; *id.* Section 5.3; Amendment No. 2, pp. 3-7; Memorandum to the File.

18 It should be noted that no part of the $1.25 billion settlement amount will revert to the defendant banks or to any other Swiss entities. *See, e.g.*, Referral to Special Master for Development of Plan to Allocate and Distribute Settlement Proceeds, March 31, 1999, at ¶ 3 ("The proposed Plan shall include a recommendation of where residual funds, if any, remaining after distribution to eligible members of the Settlement Classes (as defined in the Settlement Agreement) shall be distributed").

19 In re Holocaust Victim Assets Litigation, at 23.

20 The same, of course, is true for a corporate, communal or institutional entity with a traceable Swiss bank account.

21 By contrast, the two Slave Labor Classes and the Refugee Class assert claims of a more personal and

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To that end, as the Court has made clear, the findings of the Volcker Committee now must be acted upon. They are not merely for the history books. "A fair and efficient claims process in connection with the Deposited Assets Class must build on the fact that the Volcker Committee's auditors, despite the massive destruction of relevant records over the past 60 years, were able to identify the approximately 54,000 Swiss bank accounts discussed above."[22] The Court and plaintiffs' counsel agree — as does the Special Master — that

> in order to continue the work of the Volcker Committee, it will be necessary to establish a deposited assets claims process designed to (i) notify potential claimants of the existence of the 54,000 accounts referred to in the Volcker Report [as subsequently adjusted; *see above*]; (ii) determine whether the original owners of such accounts are or were targets or victims of Nazi persecution, as defined in the Settlement Agreement; (iii) ascertain their heirs, if necessary; (iv) determine the amounts attributable to each account; (v) explore the circumstances surrounding the closing of certain of the accounts; and (vi) distribute the appropriate amounts to the current owners.[23]

As the Court further observed, the "instrumentality for the administration of the claims process contemplated by the Settlement Agreement is the Claims Resolution Tribunal [CRT] established by the Swiss Bankers Association, the Swiss Federal Banking Commission and the Volcker Committee to arbitrate claims arising from the 1997 publication of 5,570 foreign accounts in Swiss banks. Modifications in procedures and personnel will be required and the

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less tangible nature, while the Looted Assets Class seeks compensation for the value of stolen property, rather than the return of the property itself (the vast majority of which cannot now be specifically traced to Switzerland in any event, if ever it could, *see* Annex G ("The Looted Assets Class")).

[22] In re Holocaust Victim Assets Litigation, at 24.

[23] *Id.* at 24-25; Supplemental Declaration of Lead Settlement Counsel Burt Neuborne, June 26, 2000, ¶ 19. The Court also noted that "a fair claims process must provide a mechanism to enable any person with a potential claim to have names matched against the database of 4.1 million accounts for which records exist," in addition to the matching of claims against the database of accounts "probably" or "possibly" belonging to victims or targets of Nazi persecution. In re Holocaust Victim Assets Litigation, at 24; Volcker Report ¶ 76.

[CRT] will operate under guidelines and criteria established with [the Court's] approval, in consultation with the Volcker Committee …. The purpose of the [CRT] is to administer a fair and efficient claims process."[24]

Having worked closely with representatives of the Volcker Committee and the CRT for more than a year, and having visited the CRT's Zurich offices and observed firsthand the dedication and experience of its staff, the Special Master shares wholeheartedly the Court's faith in the CRT. It is the CRT that can best assure that the tens of thousands of claims expected to be filed against Swiss bank accounts are resolved speedily, equitably and accurately.[25]

A claims process for the Deposited Assets Class may begin as soon as possible following publication of the recommended 26,000 accounts and consolidation of accounts databases, a process expected to commence promptly after the Court issues an order granting final approval of a plan of allocation and distribution.[26]

As more fully discussed below, because a substantial number of the accounts characterized by the Volcker Committee as "probably" or "possibly" related to victims of Nazi persecution are closed, and thus of unknown value, the Court must determine the amounts that

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[24] In re Holocaust Victim Assets Litigation, at 24-25.

[25] Of the approximately 562,000 persons for whom data from their Initial Questionnaires has been entered thus far, 80,610 have indicated their intention to assert a Deposited Assets claim. *See* Initial Questionnaire Data, Table 1, p. 3; September 7, 2000 Notice Administration Letter. Most of these questionnaires were returned, as requested, by mid-October, 1999, prior to the December 6, 1999 release of the Volcker Report. Accordingly, many more thousands of people also may be expected to file claims against the approximately 26,000 accounts recommended for publication by the Volcker Committee.

[26] *See, e.g.*, Amendment No. 2, at ¶ 3.2 (referring to anticipated "expeditious publication" of account information, to "occur as soon as feasible after the Court issues an order approving a plan of allocation and distribution"); *id.* ¶ 3.3 at p. 4 (referring to anticipated "expeditious centralization" of bank account data "as soon as feasible after the Court issues an order approving a plan of allocation and distribution"); Memorandum to the File, ¶ D (referring to parties' "intent and agreement" that bank deposit payments "shall continue to be distributed promptly").

should be awarded to claimants of such accounts. Based upon his analysis of the Volcker Report and the Final Approval Order, and upon consultation with representatives of the Volcker Committee, the Special Master estimates that the value of all bank accounts that will be repaid is within the range of $800 million. Therefore, it is recommended that a total of $800 million should be allocated to the Deposited Assets Class to (1) repay members of the Deposited Assets Class the full amounts of their respective deposits (adjusted for interest, inflation and fees), where such amounts are known, and (2) appropriately compensate other members of the Deposited Assets Class, where the actual value of the original deposit no longer is ascertainable from bank records. Approximately $450 million will remain from the Settlement Fund to pay claimants to insurance policies, if a claims process is established by the parties, [27] as well as to pay members of the Looted Assets Class, Slave Labor Class I, Slave Labor Class II and the Refugee Class, and fees and administrative expenses, with perhaps additional funds remaining after the Deposited Assets claims process is completed.[28]

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[27] As a result of certain objections made at the Fairness Hearing, the parties reached agreement on a separate mechanism for resolving insurance claims. *See* Amendment No. 2, pp. 7-12. Insurance claims are to be treated either as "Looted Assets Claims" or as "Policy Claims," *id.* p. 7. "The Court or its designee will determine whether Policy Claims are valid pursuant to criteria to be established within sixty days from the date of court approval of the settlement by agreement acceptable to the parties and the Participating Insurance Carriers." *Id.* p. 7. "Policy Claims" will be payable both from the Settlement Fund and from a $50 million payment to be added to the $1.25 billion Settlement Fund by "Participating Insurance Carriers," while "Looted Assets Claims" will be payable exclusively from the Settlement Fund. *Id.* p. 9. In accordance with the parties' agreement, procedures for insurance claims are to be "included in the Court's plan of allocation and distribution of the Settlement Fund" (*id.*); *i.e.*, the parties will be recommending such procedures to the Court in a forthcoming submission, and, if deemed acceptable, the procedures will be incorporated in the Court's order granting final approval of a plan of allocation and distribution.

[28] *See also* Volcker Report Annex 4, ¶ 43 ("claims of victims can be met within the amount specified in the agreed class action settlement now being contemplated in U.S. District Court, with funds from that settlement available for distribution to others covered by the settlement").

2. The Looted Assets, Slave Labor Class I, Slave Labor Class II and Refugee Classes

(a) General Principles

In contrast to the Deposited Assets Class, the Settlement Agreement precludes distributions to claimants in the Looted Assets, two Slave Labor and Refugee Classes until all appeals in this litigation have been exhausted.

Under Section 7.5 of the Settlement Agreement:

> Commencing on the **Settlement Date,** and pursuant to the Court's supervision, Settling Plaintiffs may distribute the Settlement Fund in accordance with the plan of allocation and distribution finally approved by the Court. (Emphasis added).

The "Settlement Date" is a term defined in the Settlement Agreement:

> **Settlement Date** means the date on which all of the following have occurred: (1) the entry of the Final Order and Judgment without material modification; (2) the achievement of finality for the Final Order and Judgment by virtue of that Order having become final and non-appealable through (a) the expiration of all appropriate appeal periods without an appeal having been filed (not including any provision for challenging the Final Order and Judgment pursuant to Rule 60 of the Federal Rules of Civil Procedure) (b) final affirmance of the Final Order and Judgment on appeal or final dismissal or denial of all such appeals, including petitions for review, rehearing, or certiorari or (c) final disposition of any proceedings, including any appeals, resulting from any appeal from the entry of the Final Order and Judgment, and (3) the expiration of any right of withdrawal or termination under Section 15 of this Settlement Agreement.[29]

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[29] *See* Settlement Agreement, Section 1. The term "Final Order and Judgment" is defined in the Settlement Agreement (*id.*) as follows:

Final Order and Judgment means the order to be entered by the Court, in a form to be mutually agreed upon by the parties, approving this Settlement Agreement without material alterations, as fair, adequate, and reasonable under Fed. R. Civ. P. 23, confirming the certification of the Settlement Classes under Fed. R. Civ. P. 23, and making such other findings and determinations as the Court deems necessary and appropriate to effectuate the terms of this Settlement Agreement. For purposes of this Settlement Agreement, such order shall not become the Final Order and Judgment unless and

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In a matter as far-reaching, complex and emotionally charged as this one, it is likely that one or more appeals will be filed. Any such appeals must run their course, a process that the parties undoubtedly will make every effort to expedite but which nevertheless will require some further period of litigation.[30] The Special Master's recommendations for the Looted Assets, two Slave Labor and Refugee Classes therefore must be tempered by the recognition that the proposed payments may not commence for some time.[31]

Assuming, however, that any appeals will be denied, it is recommended that distributions from the Settlement Fund to the Looted Assets Class, Slave Labor Class I, Slave Labor Class II, and the Refugee Class should be made in two stages. **With the exception of bank account claimants, the first payments ("Stage 1") should be made to Nazi victims only, either in cash or, in some instances, "in kind," primarily through food packages, medical aid and winter relief.** As more fully discussed below, this "two–track" payment scheme is necessary because the bank account claims, while as yet incapable of precise calculation, are likely to be substantial, and could vary within a range of several hundred million dollars. Representatives of the Volcker Committee have advised the Court and the Special Master that a preliminary assessment of bank account claims is expected to be completed within

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until the Settlement Date occurs.

30 For example, in the seminal class action case in this Circuit, In re "Agent Orange" Product Liability Litigation, 689 F. Supp. 1250, 1252 (E.D.N.Y. 1988), Judge Weinstein noted in the last published opinion regarding the settlement of that litigation that "[a]fter three and a half years of appeals, the distribution of the settlement fund is at hand."

31 A claimant may be a member of more than one settlement class. Thus, at least some claimants will have the more immediate benefit of repayment on their bank accounts even while awaiting the "Settlement Date" on other claims. For example, a refugee denied entry into Switzerland may have owned a Swiss bank account, and can have that account returned to him or her without regard to the "Settlement Date." Conversely, a claimant to a bank account eventually also may be eligible for compensation from programs designated to serve needy members of the Looted Assets Class (*see infra*).

six months following commencement of the Deposited Assets Class claims process. At that time, it may be possible to preliminarily assess whether a second stage of payments from the Settlement Fund can be made.

During the first stage of payments to members of the Looted Assets Class, the two Slave Labor Classes and the Refugee Class, the Special Master further recommends that there be **no payments from the Settlement Fund for the benefit of heirs, with two limited exceptions:** (a) certain heirs will be eligible for payments if the former slave laborer or refugee to whom the heir is related died after February 15, 1999;[32] and (b) all class members, including heirs, will be benefited by a payment of $10 million to a Victim List Foundation, the objective of which is to compile and make widely accessible, for research and remembrance, the names of all Victims or Targets of Nazi Persecution. During "Stage 1," there should be **no other payments to institutions for funding programs other than those providing direct relief to needy elderly**

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[32] This limited exception is intended to track the recent German legislation establishing a fund of approximately $5 billion to make payments to slave and forced laborers and certain property owners. As more fully discussed below, the Special Master recommends that distributions to members of Slave Labor Class I be made via the same mechanisms adopted in the German legislation. In the absence of the German agreement, the Special Master would have recommended that certain direct heirs be eligible to receive payments as part of the Slave Labor and Refugee Classes if the former slave or refugee had died after March 30, 1999 (when the Settlement Agreement became effective after all "Organizational Endorsers" had formally endorsed the agreement), or, alternatively, July 26, 2000 (when the Court issued its Final Approval Order). However, for administrative efficiency, and to err on the side of over-inclusiveness, the Special Master instead recommends that the German legislation date, February 15, 1999, be used. The Special Master further recommends that the same categories of heirs specified in the German legislation should be eligible to receive "slave labor" or "refugee" payments from the Swiss banks $1.25 billion Settlement Fund: "In a case where the eligible person [*i.e.*, actual Nazi victim] has died after February 15, 1999 …, the surviving spouse and children shall be entitled to equal shares of the award. If the eligible person left neither a spouse nor children, awards may be applied for in equal shares by the grandchildren, or if there are no grandchildren living, by the siblings. If no application is filed by these persons, the heirs named in a will are entitled to apply." *See* Law on the Creation of a Foundation "Remembrance, Responsibility and Future" ("*Gesetz zur Errichtung einer Stiftung 'Erinnerung; Verantwortung und Zukunft'*"), July 17, 2000, informal translation prepared by the United States Embassy in Berlin, available at http://www.usembassy.de/dossiers/holocaust (hereinafter, "German Fund" or "German Fund

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Holocaust survivors (*see* Section III(B)). This is so for all "institutional" proposals, whether memorial, educational, religious, or cultural, whether for the recognition of the "heirless" who did not survive the Holocaust or for any other laudable purpose.

This is not to suggest that heirs of Nazi victims, particularly surviving members of the immediate family, have not themselves suffered. Nor does the Special Master overlook the immeasurable losses sustained by educational, religious and other communal institutions at the hands of the Nazis. However, with a $1.25 billion Settlement Fund and millions of potential claimants[33] — surely all of whom can point to material losses and, therefore, to potential class membership, particularly in the Looted Assets Class — the Special Master is compelled to recommend essentially a "triage" method of allocation and distribution. At the very head of the long line of individuals and groups who continue to suffer from the devastation inflicted upon their families and communities, stand the elderly survivors who lost "all but their lives," to paraphrase one former slave laborer's account of her family's tragedy.[34]

In the event that any portion of the $1.25 billion Settlement Fund remains after "Stage 1" payments, which includes Deposited Assets claims, distributions to surviving Nazi victims who are members of the Looted Assets, Slave Labor I and II, and Refugee Classes, and fees and administrative expenses, a second round of payments then can be made. During such a "Stage 2" of payments (if any), there can be additional distributions to surviving Nazi victims, and perhaps also to needy spouses and children of deceased Nazi victims. At that time, it also

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Legislation"), Section 13(1).

[33] *See* Annexes B, C and D, discussing, respectively, legal principles concerning the distribution of class action settlements, demographic data concerning surviving victims of the Nazis, and heirs.

[34] Gerda Weissman Klein, All But My Life (New York: Hill and Wang 1957).

may be possible to allocate a portion of the remaining Settlement Fund to some of the proposed cultural, memorial or educational projects that have been submitted to the Special Master. To that end, the Special Master recommends that the Court review institutional proposals once an evaluation of the bank account claims, as well as the claims submitted by members of the other four classes, is completed.[35]

For the Looted Assets, Slave Labor I and II, and Refugee Classes, the Special Master makes one further general recommendation. The claims processes for each of these classes should be as straightforward, cost-effective and, most significantly, as "painless" — if ever that term can be applied to anything associated with the Holocaust — as possible. Therefore, none of the survivors should be asked to compete with one another for the limited funds available to them. It would be a great disservice to Nazi victims, most of whom are elderly and many of whom are in ill health, to place before them yet another obstacle by requiring them to prove that they lost more or were enslaved for longer periods or by more brutal entities than other survivors. As so aptly described by Lead Settlement Counsel Professor Burt Neuborne,[36] the allocation and distribution of the Settlement Fund must avoid at all costs

> the adverse social and psychological consequences of … a formal division of Holocaust victims into rival interest groups squabbling over a settlement fund that all agree is inadequate to provide full compensation to the victims. The members of the plaintiff classes are elderly victims of an unparalleled human catastrophe. At the close of their lives, it would be socially and psychologically irresponsible to pit one group of Holocaust

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[35] For a more detailed discussion of these proposals, *see* Annex A ("Summary of Allocation Proposals"). Representative proposals also appear in their entirety at http://www.swissbankclaims.com.

[36] Professor Neuborne is the John Norton Pomeroy Professor of Law and Faculty Director of the Brennan Center for Justice at New York University Law School. In addition to being Lead Settlement Counsel, he is a founding member of the plaintiffs' Executive Committee and serves as co-counsel for all plaintiffs herein.

victims against another in an unseemly battle for a larger share of a limited settlement fund that cannot do real justice to all.[37]

(b) Specific Recommendations for Looted Assets, Slave Labor and Refugee Classes

In addition to the bank account claimants — who have been awaiting the return of family deposits for over half a century, whose claims form the core of this settlement, and whose allegations now have been "provided legal and moral legitimacy" as a result of "what is likely the most extensive audit in history"[38] — the Special Master further recommends that the neediest elderly Nazi victims should receive the highest priority. As discussed below, they are all presumed to be members of the Looted Assets Class. Surviving Nazi victims who were Slave Laborers (whether "Class I" or "Class II") or Refugees likewise should receive distributions from the Settlement Fund during the first stage of payments.

(i) Looted Assets Class

Under the Settlement Agreement, a member of the Looted Assets Class is defined as a "Victim or Target of Nazi Persecution" who "ha[s] or at any time ha[s] asserted, assert[s], or may in the future seek to assert Claims against any Releasee." In other words, there must be a connection between the looted asset and a Swiss entity — a "Releasee." The definition of "Releasee" includes virtually every governmental and business entity in Switzerland. The Settlement Agreement therefore indicates that only those "Victims or Targets of Nazi

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[37] Declaration of Burt Neuborne, Esq., November 5, 1999, ¶ 33, at page 20. For the same reasons — to avoid unnecessarily complicating distributions to class members — the Special Master also recommends that a survivor's status as a "Victim or Target of Nazi Persecution" should be based upon self-declaration. In any event, for the four classes for which "Victim or Target" status is relevant, the claims process likely will confirm whether a claimant who seeks to participate in the settlement was, in fact, "persecuted or targeted for persecution because [he or she was or was] believed to be Jewish, Romani, Jehovah's Witness, homosexual, physically or mentally handicapped." Settlement Agreement, Section 1.

Persecution" who were looted, *and* whose stolen assets "were taken by or transacted through a Swiss entity," are entitled to recover from the Settlement Fund.[39]

Yet with limited exceptions, the historical record on looting, which continues to be expanded by new research and by newly-accessible archives, still remains incomplete. "There has not yet been a comprehensive study of the Third Reich's looting and its consequences on all segments of the population in German-occupied areas. Neither has the plundering of Jewish victims been sufficiently researched."[40] As discussed in detail elsewhere in this Proposal,[41] on the one hand, recent investigations on behalf of the governments of Switzerland, the United States and Great Britain confirm that a considerable amount of loot, particularly gold, eventually found its way to Switzerland. On the other hand, there is relatively little information concerning the source of this loot. Moreover, not all of the loot ended up in the Reich's coffers or in Switzerland. Rather, many plundered goods found their way into the offices, homes or pockets of the local population or Nazi administrators, with or without the Nazi government's permission. As the Matteoli Commission recently concluded following its three-year investigation into Holocaust-era looting in France:

> We do not … claim to have analysed [sic] the subject exhaustively …. [T]here are many uncertain aspects that require more analysis …. We should not labour under any illusions however. Even if all the archives were available, if no file had been lost, it would be a vain attempt to trace, almost two-thirds of a century after the events, what actually happened

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38 In re Holocaust Victim Assets Litigation, at 19, 23.

39 Settlement Agreement, Section 8.2(b). *See also* Initial Questionnaire, Item F(9) ("Do you have any evidence that your assets were taken by or transacted through a Swiss entity?"); *id.* Item F ("Looted Assets Claim Against Swiss Persons or Entities").

40 Switzerland and Gold Transactions in the Second World War - Interim Report (Bern 1998) (hereinafter, "Bergier Gold Report"), at 30.

41 *See* Section II *infra*; *see also* Annex G ("The Looted Assets Class").

> down to the finest detail. We must resign ourselves to the fact that many points will remain imperfectly explained.[42]

Like the Matteoli Commission, the Special Master does not claim to have analyzed the subject of looted assets exhaustively. Yet even with unlimited time and funds to conduct further research, it will never be possible to recreate what was stolen or to retrace its path through Europe.[43] Therefore, the Special Master's recommendation for the Looted Assets Class recognizes the unprecedented scope of the Nazi theft, coupled with the virtual impossibility of analyzing or even nominally compensating the material losses suffered by the Jewish, Roma, Jehovah's Witness, disabled and homosexual victims and communities plundered across wartime Europe. This is particularly so where, as here, there are literally hundreds of thousands of surviving Nazi "Victims or Targets" and millions of heirs who may claim membership in the Looted Assets Class, since it may be presumed that all were looted but very few if any can prove that their property is linked to a Releasee.[44]

The Special Master therefore recommends that to compensate the Looted Assets Class, the Court make two *cy pres* payments: one, to benefit the neediest survivors of Nazi persecution, and the other to benefit all members of this class as well as all other classes.

For the neediest members of the Looted Assets Class, a *cy pres* allocation can have a significant concrete impact upon the lives of many thousands of elderly survivors. One of the bitterest of ironies is that those who were robbed of the least, in a material sense, ultimately

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[42] *See* Summary of the Work of the Study Mission on the Spoliation of Jews in France, April 17, 2000 (available at http://www.ladocfrancaise.gouv.fr) (hereinafter, "Matteoli Report, April 17, 2000 Summary"), at 14.

[43] For a more detailed discussion of the scope of the Nazi plunder, the role that may have been played by Switzerland, and the difficulties in tracing the loot, *see* Annex G ("The Looted Assets Class").

[44] *See* Annex C ("Demographics of 'Victim or Target' Groups"); Annex D ("Heirs"); Annex G ("The

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may have lost the most. Elie Wiesel has observed that it was "not only the big fortunes, palaces and art treasures" that were destroyed by the Nazis. "Let us remember also the less wealthy families: the small merchants, the cobblers, the peddlers, the school teachers, the water carriers, the beggars. The enemy robbed them of their poverty."[45] The enemy also robbed them of their future. Not only did they lose all that they had, but many have since lived for decades in destitution, unable to obtain even modest financial recompense.

For the most part, these are the Nazi victims who have been called the "double victims" — those currently living in once-communist nations:

> Serious inequities developed in the treatment of victims depending upon where they lived after the War. Those Holocaust victims who met the applicable definitions were assisted in resettlement, and if they emigrated to the West or to Israel, they have received pensions from the German Government. But the "Double Victims," those trapped behind the Iron Curtain after the War, have essentially received nothing.[46]

The Special Master has compiled considerable data concerning various Holocaust compensation programs.[47] The vast majority of such programs have been directed at those who have lived in the West,[48] whether during the Holocaust itself or following emigration after World War II. The Special Master is well aware of the many limitations associated with these programs. The compensation that has been provided to many Nazi victims in the West may have been nominal, at best, particularly among members of the non-Jewish "Victim or Target" groups.

Looted Assets Class").

[45] Elie Wiesel, *Opening Remarks*, in Proceedings of the Washington Conference on Holocaust-Era Assets (December 1998), at 16.

[46] *See* Eizenstat Report, Foreword, at x.

[47] *See id.*; *see also* Annex E ("Holocaust Compensation").

[48] The Special Master uses the term "the West" to encompass Israel, Western Europe, the Americas and Oceania.

Nevertheless, many thousands of Nazi victims living in the West have been receiving monthly pensions, most commonly from Germany, but in some instances from other nations and, through German reparations payments, Israel. In sharp contrast, the great majority of Nazi victims still living in Central and Eastern Europe and the former Soviet Union have been excluded from virtually all indemnification and restitution programs. Yet it is also many of these very same people who continue to live in abject poverty. Adding insult to injury in their declining years, they now have also lost the "safety nets" that their governments provided during the Cold War era.[49] Because there are many in the West who also are desperately needy, the Special Master recommends that these survivors similarly should receive immediate priority in the distribution of the "looted assets" portion of the Settlement Fund.

The total amount recommended for distribution to the Looted Assets Class is $100 million, 90% of which should go to Jewish class members and 10% of which should go to Roma, Jehovah's Witness, disabled and homosexual class members, based upon historic precedent and current demographics.[50]

For needy elderly Jewish members of the Looted Assets Class, the Special Master recommends that actual distributions should be managed, with the consultation and cooperation of local community representatives and Nazi survivors, and upon the Court's approval and ongoing supervision, by two organizations with unrivaled expertise in the assistance of needy survivors: the American Jewish Joint Distribution Committee (the "JDC") and the Conference on Jewish Material Claims Against Germany, Inc. (the "Claims Conference"). It is

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[49] For a more detailed discussion of "safety net programs," *see* Annex F ("Social Safety Nets").

[50] *See infra*, Section III(B), discussing the Paris Reparations Agreement and the Swiss Fund for Needy Victims of the Holocaust/Shoa; *see also* Annexes C ("Demographics of 'Victim or Target' Groups")

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recommended that $90 million be set aside for up to ten years to help fund the humanitarian assistance programs described below and in greater detail at Section III(B). Up to 75% ($67.5 million) of the "looted assets" allocation for Jewish Holocaust survivors should be designated for the augmentation of the JDC-Claims Conference "*Hesed*" program, which provides food packages, medical care, winter relief and other direct assistance to impoverished and ill elderly Nazi victims in the former Soviet Union. The remaining 25% ($22.5 million) of the recommended "Stage 1" allocation to needy Jewish members of the Looted Assets Class should be designated for the augmentation or, in certain instances, creation of several comparable programs which provide direct emergency relief to needy Holocaust survivors in other parts of the world, particularly in Israel (the "Foundation for the Benefit of Holocaust Victims in Israel"), in North America (the "Holocaust Survivor Emergency Assistance Program"), and in Europe, Australia and South America. It is important to note here that the JDC and the Claims Conference are to serve as *conduits* to the needy elderly survivors, who can best and most quickly be reached by already-existing humanitarian programs.

For needy elderly Roma, Jehovah's Witness, disabled and homosexual members of the Looted Assets Class, the Special Master recommends that distributions likewise be made through humanitarian programs. Under the German Fund, the International Organization for Migration (the "IOM") has been allocated the sum of DM 24 million (approximately $12 million as of August, 2000) for the administration of a humanitarian fund for the benefit of Sinti and Roma. Upon consultation with the IOM,[51] the Special Master recommends that from this "Swiss

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and K ("Swiss Humanitarian Fund").

[51] The IOM has agreed to establish such programs upon Court approval and with the Court's supervision, as well as to perform other responsibilities in connection with administering this

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banks" Settlement Fund, $10 million be allocated to the forthcoming IOM program for targeted aid to needy survivors of Nazi persecution within the Roma community, as well as within the Jehovah's Witness, disabled and homosexual communities.[52]

As noted previously, it is also proposed that a separate allocation of $10 million be designated for the benefit of other members of the Looted Assets Class, as well as the members of all five classes, including heirs, to fund a Victim List Foundation to compile and preserve the names of all of the "Victims or Targets of Nazi Persecution," those who survived and those who perished. In this way, perhaps some benefit of the settlement can be preserved not only for the victims and their families, but also for future generations. The Special Master recommends that the Court consult with experts and interested parties to establish and implement the Victim List Foundation.

(ii) Slave Labor Class I

Like the Looted Assets Class, under the terms of the Settlement Agreement, members of Slave Labor Class I must demonstrate some connection to a Swiss releasee. In other words, former slave laborers who are "Victims or Targets of Nazi Persecution" must have

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settlement. *See* Letter from Brunson McKinley, IOM Director General, to Judah Gribetz, Special Master, September 8, 2000 (annexed hereto as Exhibit 4). The Claims Conference likewise has agreed to perform a similar administrative role, upon Court approval and with the Court's supervision.

[52] In response to the Special Master's request, Watch Tower Bible and Tract Society of Pennsylvania, on behalf of the Jehovah's Witness community, has provided a proposal supplementing that filed in October 1999, which outlines a thoughtful plan for assisting needy Jehovah's Witness survivors of Nazi persecution (including those who may have been persecuted or targeted as members of other "Victim or Target" groups who have subsequently become Jehovah's Witnesses). Moreover, representatives of the Roma community recently have requested that the Special Master recommend that the IOM establish and oversee humanitarian aid programs to needy Nazi victims. In its letter to the Special Master, the IOM confirmed that it intends to consult with Watch Tower, and with other interested survivors' representatives and advocates, to coordinate programs and outreach for needy non-Jewish "Victims or Targets of Nazi Persecution."

performed such labor "for companies or entities that actually or allegedly deposited the revenues or proceeds of that labor with, or transacted such revenues or proceeds through, Releasees"; *i.e.*, Swiss entities.[53] As more fully discussed below, and as set forth at Annex H ("Slave Labor Class I"), scholarship only recently has begun to focus in depth upon Germany's use of slave labor, and much remains unknown — although historians agree that the use of slave labor was pervasive, extending to every corner of Europe conquered by the Third Reich.[54]

Hundreds of public and private entities that used slaves had financial relationships with Swiss entities. The Special Master has obtained from the Swiss Federal Archives and from the Volcker Committee lists of German assets frozen in Switzerland pursuant to a Swiss Federal Council decree of February 16, 1945.[55] A comparison of the "frozen assets lists" to lists of German companies known, from sources such as the International Tracing Service of the International Committee of the Red Cross,[56] to have used slave labor, demonstrates that hundreds of such companies held Swiss bank accounts or other Swiss assets at the time of the asset freeze. Also significant are the bank accounts and Swiss gold transactions of the Nazi government, which exploited slaves and also reaped profits from private companies' use of slaves.[57]

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[53] Settlement Agreement, Section 8.2 (c).

[54] *See* Section III(C); *see also* Annex H ("Slave Labor Class I").

[55] *See* Annex H. The Special Master wishes to express his appreciation to the Swiss Federal Archives and the Volcker Committee for providing these lists.

[56] *See* International Tracing Service, Records Branch, Documents Intelligence Section, Catalogue of Camps and Prisons in Germany and German-Occupied Territories, Sept. 1, 1939 – May 8, 1945 (International Tracing Service: Arolsen, Germany, July 1949/April 1950/March 1951) (hereinafter, the "Catalogue"), in Martin Weinmann, (Hgg.), Das nationalsozialistische Lagersystem (3d ed.) (Frankfurt: Zweitausendeins, 1998).

[57] *See* Annex H ("Slave Labor Class I") and its exhibit, the "Slave Labor Class I List"; *see also* Annex G ("The Looted Assets Class").

Many former slaves do not know the name of the entity for which they performed their labor. Few, if any, can link their exploiter to the Swiss economy. The Special Master's research justifies the legal presumption for Slave Labor Class I that virtually *all* German slave labor-using entities are likely to have "deposited the revenues or proceeds of that labor with, or transacted such revenues or proceeds through, Releasees" (Settlement Agreement, Section 8.2(c)).[58]

In Chief Judge Korman's words, this "presumption … simplif[ies] the administration of Slave Labor Class I by making it unnecessary for each claimant to prove a link between the German company for which slave labor was performed and a Swiss bank"[59] — thus relieving the elderly members of this class of the burden of demonstrating precisely which entity enslaved them and whether and how that entity channeled revenues or proceeds of their slave labor through a Swiss entity. Therefore, **all persons who performed slave labor for private entities, entities owned or controlled by the state or by Nazi authorities, or by the concentration camp or ghetto authorities, are members of "Slave Labor Class I."** A "Victim or Target of Nazi Persecution" who was a slave laborer, regardless of where or when, should receive a distribution from the Settlement Fund.

Significantly, the German foundation formalized in Berlin on July 17, 2000, the Foundation "Remembrance, Responsibility and the Future," is expected to compensate these individuals. Approximately 140,000 Jewish, and thousands of Roma, Jehovah's Witness,

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[58] As more fully discussed in Section III(C) below and in Annex H, that a slave labor-using entity may have transacted some portion of profits from the use of slave labor through a Swiss bank or other Swiss entity, is not meant to suggest that the Swiss entity had knowledge that some of the funds may have been derived from the use of slave labor, or that the Swiss entity necessarily was aware that the depositor made use of slave labor.

disabled and homosexual former slave laborers, are expected to receive from the German Fund a payment of up to DM 15,000 (up to approximately $7,500) each. Approximately 30,000 Jewish former forced laborers, as well as thousands of Roma, Jehovah's Witnesses, disabled and homosexual forced laborers, are expected to receive from the German Fund a payment of up to DM 5,000 (up to approximately $2,500) each.

The Special Master recommends that each Jewish, Roma, Jehovah's Witness, disabled and homosexual former slave laborer who receives a payment from the German Fund (whether as a "slave" or "forced" laborer) also should receive *an additional payment* from this "Swiss Banks" Settlement Fund. Certain heirs of Slave Labor Class I members who died after February 15, 1999 also should be eligible for payment. Each eligible claimant in Slave Labor Class I should receive an equal payment of up to $1000 per person (and in no event less than $500 per person). There should be an initial payment of $500 (50% of the recommended amount); after all claims are processed, a second payment of up to an additional $500 (the remaining 50%) may be made. It is currently estimated that approximately 200,000 Jewish, Roma, Jehovah's Witness, disabled and homosexual former slave laborers will be eligible to receive payments from the German Fund (and so also from the "Swiss Banks" Settlement Fund).[60] If, however, many more eligible former slave or forced laborers make claims, then the Court may have to reconsider the amounts recommended here.

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[59] In re Holocaust Victim Assets Litigation, at 39.

[60] In addition to the estimate of claims to be made to the German Fund, it should be noted that approximately 205,000 people have filed Initial Questionnaires in this "Swiss Banks" action, indicating that they intend to assert slave labor claims. *See* Summary Sheets for Class Members (Annex C, Exhibit 3).

The Special Master has consulted with the two organizations charged, under the terms of the German Fund legislation, with distributing payments to many of the former slave and forced laborers: the Claims Conference and the IOM.[61] Although the German Fund distribution details are not yet finalized, it is the strong intent both of the Claims Conference and the IOM to minimize administrative burdens for the Nazi victims who will be receiving payments from the German Fund, such as by actively seeking out potential claimants, based upon German, Israeli and other compensation archives.

In light of the overlap between Slave Labor Class I and the German Fund, and the extensive preparations already under way to make distributions from the German Fund, the Special Master believes that the Claims Conference and IOM distribution mechanisms will be the most rapid, efficient and cost-effective for Slave Labor Class I.

(iii) Slave Labor Class II

Slave Labor Class II is not limited to "Victims or Targets of Nazi Persecution," in contrast to the other four settlement classes. Rather, under the terms of the Settlement Agreement, Slave Labor Class II applies more broadly to "individuals" who performed slave labor for a Swiss entity, defined as "any facility or work site, wherever located, actually or allegedly owned, controlled, or operated by any corporation or other business concern headquartered, organized, or based in Switzerland or any affiliate thereof…."[62]

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[61] In addition to the Claims Conference and the IOM, five foundations also will be handling German Fund distributions for slave and forced laborers living in Eastern Europe. The foundations are located in Poland, Russia, Ukraine, Belarus and the Czech Republic. *See infra*. However, as more fully discussed at Section III(C), the Claims Conference and the IOM respectively have agreed to take charge of distributions to all Slave Labor Class I claimants from this Settlement Fund, under the Court's supervision, regardless of the claimant's place of residence, which will further streamline the distribution process, reduce administrative costs and enable the Court to maintain greater control.

[62] Settlement Agreement, Section 8.2(d).

As set forth in the Final Approval Order, little information exists concerning Swiss companies or affiliates that may have used slave labor:

> The Special Master has expressed concern over the ability to administer Slave Labor Class II in the absence of information concerning the identities of persons who performed slave labor for a Swiss company or its affiliates during World War II. When this class was included in the Settlement Agreement, the defendant banks represented that Slave Labor Class II consists of an extremely small number of persons who may have performed slave labor directly for an extremely small number of Swiss companies during World War II. Since then, they have backed off of this representation …. In the absence of information concerning the identities of the Slave Labor Class II members, it will prove extremely difficult to notify claimants that they may have a right to recover from the settlement fund. Indeed, because the Slave Labor Class II releasees consist almost entirely of affiliates or subsidiaries of Swiss entities that were incorporated in Germany and elsewhere, members of the class — *e.g.*, those who were forced to perform slave labor for a Swiss company in Germany or elsewhere, but who had no reason to know at the time that the company was Swiss — may not be aware that they are in the class even if they have notice of the settlement. Moreover, without information as to the numbers of slave laborers, it will not be possible for the Special Master to make an intelligent allocation of the proceeds of the settlement fund.[63]

As the Court further noted, the Special Master has consulted with representatives of the Swiss Federal Archives,[64] who have confirmed that although "indirect and scattered evidence could be found with time consuming research," it is "difficult to identify records on forced labor in German branches of Swiss firms in the existing file groups of the EPD [Swiss Federal Department of Foreign Affairs]"; the Archives could not readily identify "tangible

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[63] In re Holocaust Victim Assets Litigation, at 39-40.

[64] The Swiss Federal Archives, and particularly Prof. Dr. Christoph Graf and Mr. Guido Koller, have provided the Special Master with certain data, including a preliminary research report conducted at the request of the Special Master as well as excerpts from French and German publications addressing certain of the issues pertinent to Slave Labor Class II. The Swiss Federal Archives also has provided data relating to the Slave Labor I and Refugee Classes.

information reflecting the situation of forced labor workers in German branches of Swiss firms" and "a systematic search for such evidence would be very time consuming."[65]

Because the data is scarce, and in recognition of defendant banks' assertion that the "Bergier Commission's [forthcoming] report will presumably shed some light on this aspect of Switzerland's history,"[66] the Court asked for the good faith cooperation of the entities which seek to be released from claims under Slave Labor Class II. "[T]hose Swiss entities that seek releases from Slave Labor Class II" were "directed to identify themselves to the Special Master within 30 days of the date of" the Court's July 26, 2000 memorandum and order; the failure of such entities to identify themselves "will result in the denial of a release and permit those who have claims against those entities to pursue such claims independently of this lawsuit."[67] The Court further observed that "it seems reasonable to conclude that the small number of Swiss companies who the defendant banks suggested utilized slave laborers have good reason to know who they are."[68]

As of the date of this Proposal, a number of Swiss companies have identified themselves to the Special Master, and sought releases for hundreds of their wartime subsidiaries. The companies coming forward range from relatively small businesses to some of Switzerland's largest industrial conglomerates. Information provided to the Special Master indicates that

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65 *See* Swiss Federal Archives, Forced Labor in Swiss Controlled Firms in NS Germany; Records in the Swiss Federal Archives; Preliminary Overview (April 10, 2000), at 2 (hereinafter, "Forced Labor in Swiss Controlled Firms") (on file with the Court and the Special Master); *see also* In re Holocaust Victim Assets Litigation, at 40.

66 In re Holocaust Victim Assets Litigation, at 39.

67 *Id.* at 41.

68 *Id.* at 44.

several thousand persons are likely to be members of Slave Labor Class II.[69] The names of many of these former slave laborers have been provided to the Special Master or may soon become available.

Because Slave Labor Class II appears to be of manageable size, and because the names of many class members are or may soon be known, the Special Master recommends an individualized claims process, to be administered by the IOM. The IOM should evaluate all claims submitted to it by potential members of Slave Labor Class II: persons who performed slave labor for one of the Swiss entities which have identified themselves to the Special Master, as directed by Chief Judge Korman, and complied with their good faith obligation to provide the names of all former slave laborers in their possession or control.

The Special Master recommends that the names of these Swiss companies should be published following the Court's final approval of a plan of allocation and distribution. **Claimants who plausibly demonstrate, through documents, a statement or otherwise, that they performed slave labor for a company appearing on the published list should receive a payment, identical in amount, of up to $1000 (and in no event less than $500), the same amount recommended to be paid to members of Slave Labor Class I.** Like Slave Labor Class I, payments to members of Slave Labor Class II should be made in two stages: an initial payment of $500 (50% of the recommended payment), followed by a second payment of up to an additional $500 (the remaining 50%) after all claims have been processed. Also like Slave Labor Class I, only certain heirs of Slave Labor Class II members who died after February 15, 1999 are recommended to be paid. As noted above, based on the data provided to the Special Master,

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[69] *See* Roderick von Kauffungen, *Firms with Swiss Capital and Forced Labor in Germany*, National Swiss Press Agency, Aug. 24, 2000.

several thousand persons are likely to be members of Slave Labor Class II. If, however, many more eligible former slave laborers for companies on the published list make claims, then the Court may have to reconsider the amounts recommended here.

As the Court observed in the Final Approval Order, persons who performed slave labor for a company that they believe was Swiss-owned or controlled, but is not on the published list, can assert independent claims against those companies, since they are not released under this Settlement Agreement.[70]

(iv) Refugee Class

A number of events have shed new light upon the status of refugees in Switzerland and upon the current ability to locate and compensate members of the Refugee Class. These developments include the December 10, 1999 release of a comprehensive study conducted by the Independent Committee of Experts (hereinafter, the "Bergier Commission") and sponsored by the Swiss government concerning that nation's World War II-era policies toward refugees;[71] at least two Swiss monetary awards to refugees who were expelled from Switzerland; and extensive communications between the Special Master and representatives of the Swiss Federal Archives, which have resulted in the production of names of thousands of refugees for the Court's use as part of the claims administration process.[72]

The Bergier Refugee Report takes note of the unique pressures facing Switzerland before and during the War years, particularly in comparison to other countries equally unwilling

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[70] In re Holocaust Victim Assets Litigation, at 41.

[71] *See* Independent Commission of Experts Switzerland – Second World War, Switzerland and Refugees in the Nazi Era (Bern 1999) (hereinafter, the "Bergier Refugee Report").

[72] These developments are discussed more fully in Section III(E), *infra*, as well as in Annex J ("The Refugee Class").

to accept refugees, but is nevertheless critical of the Swiss response to those in flight from the Nazis.[73] The Bergier Refugee Report also provides significant statistical information about the potential membership of the Refugee Class, and has served as a basis for communications among the Court, the Swiss Federal Archives, and the Special Master. As a result, the Special Master has been provided with two types of information: a list of approximately 50,000 persons registered as admitted into Switzerland as refugees and assigned to labor camps, homes, Swiss families or schools (the "List of Refugees Admitted into Switzerland"), and a database as well as additional lists which together contain the names of approximately 4,000 individuals registered by Swiss authorities before they were turned away from the Swiss border or expelled from Switzerland (the "List of Refugees Expelled From or Denied Entry into Switzerland").[74]

The existence of considerable — if incomplete — personal data regarding refugees, the recent decisions of Swiss judicial and political bodies in favor of at least three expelled refugees (one of whom, Charles Sonabend, is a named plaintiff in this litigation), and the comparatively limited number of surviving members of the Refugee Class, persuade the Special Master to recommend an individualized claims process for this class. Additionally, because those who survived the Holocaust by finding refuge in Switzerland generally fared far better than those who were denied entry into or expelled from that nation, the Special Master further recommends that claimants alleging "detention" (or, as stated in the Initial Questionnaires, "jail"), "mistreatment" or "abuse," as those terms are used in Section 8.2(e) of the

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[73] *See generally* Bergier Refugee Report.

[74] In light of the databases that have now been provided to the Court, and with the promise of the further assistance of the Swiss Federal Archives in the event that additional information becomes available, the Special Master believes that a fair claims process can commence, subject to any determinations the Court may make in the future concerning the releasees' compliance with their

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Settlement Agreement, should receive compensation more limited than that allocated to those whom Switzerland expelled or turned away.

Claimants who plausibly demonstrate, through documents, a statement or otherwise, that they were admitted into Switzerland as refugees and were detained, mistreated or abused there, *and* whose names are matched against the List of Refugees Admitted into Switzerland, should receive a payment, identical in amount, of up to $500 (but in no event less than $250). Based upon data in the Initial Questionnaires, approximately 3,000 people are expected to make a claim of this nature.[75] If, however, there are many more eligible claimants than currently anticipated, then the Court may have to reconsider the amount recommended here.

Claimants who plausibly demonstrate, through documents, an interview or otherwise, that they were denied entry into or expelled from Switzerland, should receive payments, identical in amount, of up to $2500 (but in no event less than $1250). One of the ways that claims will be evaluated will be to compare them to the List of Refugees Expelled From or Denied Entry Into Switzerland, which the Swiss government has authorized for publication.[76] Former refugees expelled or denied entry whose names do not appear on the list also may make a claim, since information other than the published list also will be evaluated;

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obligation to act in good faith. *See* In re Holocaust Victim Assets Litigation, at 31-33, 38, 41, 43-46.

[75] *See* Summary Sheets for Class Members (Annex C, Exhibit 3).

[76] As more fully discussed below, to comply with Swiss legislation protecting certain personal data from disclosure, the Court has assured the Swiss Federal Archives that potential members of the Refugee Class will be provided the opportunity to exclude their names from publication. Since the Special Master does not recommend publication of the List of Refugees Admitted into Switzerland, but only of the much more limited List of Refugees Expelled from or Denied Entry into Switzerland, it is unlikely that many individuals will seek to remove their names from the list recommended for publication, although they certainly are free to do so.

indeed, based upon data in the Initial Questionnaires, approximately 17,000 people are expected to make a claim of expulsion or denial of entry.[77] If, however, there are many more eligible claimants than currently anticipated, then the Court may have to reconsider the amount recommended here.

For both categories of refugee claimants, an initial payment of 50% of the recommended amount should be made; after all claims have been processed, eligible claimants then may be able to receive a second payment of up to the remaining 50%. Payments should be limited to former refugees or certain heirs of refugees who died after February 15, 1999.

The agencies to be charged with responsibility for initial evaluation of these claims should be the Claims Conference, for Jewish class members, and the IOM, for Roma, Jehovah's Witness, disabled and homosexual class members. The Claims Conference and IOM also can undertake research on behalf of the claimants, examining governmental compensation files and other available resources. Each agency will act under Court order and with ongoing judicial supervision. Claims not recommended for payment during the initial evaluation may be reviewed by an officer, appointed by the Court and independent of the IOM and the Claims Conference.

This proposal therefore takes into account the current availability of certain refugee data, but also acknowledges the serious gaps in the archival records, as described by the Bergier Commission,[78] and the obvious fact that most Nazi victims are unlikely to have escaped the camps or ghettos with their Swiss refugee paperwork intact.

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[77] *See* Summary Sheets for Class Members (Annex C, Exhibit 3).

[78] *See* Section III(E) and Annex J ("The Refugee Class").

These are the broad outlines of the Special Master's Proposal. The detailed allocation and distribution recommendations for each of the five classes are discussed at Section III below.

II. THE CONSOLIDATED CLASS ACTION LAWSUIT AND ITS HISTORICAL CONTEXT

The first of the class action lawsuits giving rise to this Proposal (the "Lawsuits") was filed in October 1996. Weisshaus v. Union Bank of Switzerland, No. 96 CV 4849 (E.D.N.Y., filed October 3, 1996). On August 12, 1998, an agreement in principle to settle the Lawsuits was reached in the chambers of Judge Edward R. Korman, now Chief Judge of the United States District Court for the Eastern District of New York. The Settlement Agreement was executed as of January 26, 1999 (and amended as of November 14, 1999 and again as of August 9, 2000). The Settlement Agreement was contingent upon the formal endorsement thereof by 17 major worldwide Jewish organizations[79] and, accordingly, a related agreement providing for such endorsement was executed as of March 30, 1999. By Order dated March 31, 1999, the Special Master was appointed.

Although the Lawsuits were commenced and resolved within the past few years, the claims asserted in the Lawsuits, as all are aware, arise out of events occurring more than 50

[79] These organizations are: Agudath Israel World Organization, Alliance Israelite Universelle, the American Gathering/Federation of Jewish Holocaust Survivors, the American Jewish Committee, American Jewish Congress, the JDC, the Anti-Defamation League, B'nai B'rith International, the Centre of Organizations of Holocaust Survivors in Israel, the Claims Conference, the Council of Jews from Germany, the European Council of Jewish Communities, the Holocaust Educational Trust, the Jewish Agency for Israel, the Simon Wiesenthal Center, the World Jewish Congress, and the World Zionist Organization. Several organizations representing each of the other groups participating in this settlement also endorsed the Agreement, in written submissions as well as in two fairness hearings the Court held in New York and Tel Aviv.

years ago. One may be tempted to ask why there is currently so much interest in events that occurred long ago. The May 1997 Eizenstat Report provides one answer to this question:

> Why the sudden surge of interest in these tragic events of five decades ago? There are a variety of explanations. The end of the Cold War gave us the chance to examine issues long pushed to the background. Some previously unavailable documents have been declassified, and made publicly available. As Holocaust survivors come to the end of their lives, they have an urgent desire to ensure that long-suppressed facts come to light and to see a greater degree of justice to assuage, however slightly, their sufferings. And a younger generation seeks a deeper understanding of one of the most profound events of the twentieth century as we enter the twenty-first.
>
> But the most compelling reason is the extraordinary leadership and vision of a few people who have put this issue on the world's agenda: the leadership of the World Jewish Congress, Edgar Bronfman, Israel Singer and Elan Steinberg; a bipartisan group in the U.S. Congress, in particular, the early tenacious and important role of Senator Alfonse D'Amato of New York; and President Bill Clinton, who has insisted on our establishing and publishing the facts.[80]

Before considering the details of this Proposal, including its legal and factual underpinnings, it is important to understand the historical context in which these Lawsuits were commenced. It also is important to understand the particular claims asserted in the Lawsuits and the defenses thereto, as well as the pertinent provisions contained in the Settlement Agreement and the Referral Orders by which the Special Master is bound.

A. Historical Context

Those who have observed closely the sometimes tortuous proceedings before the Court are well aware that these Lawsuits are not the first attempt to recover assets deposited in Switzerland which rightfully belong to victims of Nazi persecution or their heirs. Rather, the

[80] Eizenstat Report, at iv.

Lawsuits are part of a continuing series of efforts commenced immediately after World War II to recover assets deposited by or stolen from victims of Nazi persecution and held in Switzerland.

1. Early Efforts to Recover Assets

Following World War II, the United States, Great Britain and France (the "Allies") sought the return of monetary gold and other assets the Nazis had looted and deposited in neutral countries, including Switzerland.[81] On January 14, 1946, as a result of the Paris Reparations Conference, eighteen countries entered into the Agreement on Reparation from Germany, Establishment of Inter-Allied Reparation Agency, and Restitution of Monetary Gold (hereinafter, the "Paris Reparations Agreement").[82] The Paris Reparations Agreement provided for, among other things: (i) restitution on a sharing basis of monetary gold looted by Nazi Germany; (ii) allocation of all nonmonetary gold[83] found in Germany to the relief and resettlement of surviving Nazi persecutees; (iii) establishment of a $25 million fund (out of German external assets located in neutral countries) for the rehabilitation and resettlement of Nazi persecutees; and (iv) the establishment of organizational structures, including the Inter-

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[81] *See* Eizenstat Report, at 62-118; Seymour J. Rubin, *The Washington Accord Fifty Years Later: Neutrality, Morality, and International Law*, 14 Am. U. Int'l L. Rev. 61 (1998) (hereinafter, "Rubin"); *see also* Seymour J. Rubin and Abba P. Schwartz, *Refugees and Reparations*, Symposium on War Claims, Duke Univ. J. of Law and Contemporary Probs. (Summer 1951) (hereinafter, "Rubin and Schwartz"), reprinted in The Eizenstat Report and Related Issues Concerning United States and Allied Efforts to Restore Gold and Other Assets Looted by Nazis During World War II: Hearing Before the House Comm. on Banking and Fin. Servs., 105th Cong., 1st Sess. (June 25, 1997) (hereinafter, "June 1997 House Hearing"), at 271. Rubin was deputy negotiator for the United States delegation which negotiated the Washington Accord (discussed below).

[82] The eighteen nations that entered into the Paris Reparations Agreement on January 14, 1946 were: Albania, Austria, Belgium, Canada, Czechoslovakia, Denmark, Egypt, France, Greece, India, Luxembourg, the Netherlands, New Zealand, Norway, South Africa, Great Britain, the United States and Yugoslavia. Paris Reparations Agreement, Jan. 14, 1946, 555 U.N.T.S. 69. *See* Rubin, at 64-65 and n.2.

[83] "Nonmonetary gold included not only [rings], bracelets, and dental inlays, but other essentially unidentifiable objects of value such as gold coins without numismatic value, silver plate, *objets d'art*

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Allied Reparations Agency, to effectuate the Agreement.[84] Pursuant to the Paris Reparations Agreement, Allied representatives "were instructed to take possession of German external assets in neutral countries (such assets in Allied nations were to be taken by the Allied nations themselves)" and to "'request' that neutrals turn over 'heirless assets' or their proceeds to the persecutees, for relief and resettlement."[85]

After the Paris Reparations Agreement was entered into force, the Allies engaged in a series of negotiations with, among other countries, Switzerland, in an effort to implement the Agreement. As a result of these negotiations, on May 25, 1946, Switzerland and the Allies entered into the Accord on the Multilateral Liquidation of German Property in Switzerland (hereinafter, the "Washington Accord").[86] Pursuant to the Washington Accord, Switzerland agreed to transfer approximately $58 million in gold and 50% of liquidated German assets located in the country to the Allies who would then use such funds both to reconstruct devastated areas of Europe and to assist stateless Nazi victims.[87] Switzerland also agreed, via a side letter, to "examine sympathetically" the means by which to place the assets of heirless Nazi victims found in Switzerland at the disposal of the Allies for purposes of refugee relief and rehabilitation.[88]

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and the like." Rubin, at 65 n.3.

84 *Id.* at 64-66; *see also* Eizenstat Report, at xxxvi.

85 Rubin, at 66; *see also* Eizenstat Report, at xxv.

86 The Washington Accord was entered into force on June 27, 1946. 13 U.S.T. 1118. *See* Rubin, at 69 and n.7; Eizenstat Report, at xxvii, 62-83.

87 *See* Eizenstat Report, at xxvi-xxvii, 82-83.

88 *See* Letter from Walter Stucki, head of the Swiss delegation, to the Chiefs of the Allied Delegations, 25 May 1946, RG 59 (on file with Records of the Department of State, NARA); *see also* Eizenstat Report, at xxvii, 82-83, 193; Rubin, at 68-69; Rubin and Schwartz, at 387.

Switzerland paid approximately $58 million in monetary gold to the Tripartite Gold Commission (the "TGC")[89] pursuant to the Washington Accord.[90] According to the Eizenstat Report, however, Switzerland did not comply fully with its obligation under the Washington Accord to liquidate German assets and to pay 50% thereof to the Allies: the Swiss raised numerous objections, argued over exchange rates and refused to recognize an exemption for assets of surviving or heirless German Jews, maintaining that such assets were subject to liquidation.[91] A compromise was reached in 1952 whereby Switzerland paid $28 million in German assets.[92]

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[89] The TGC was created by the Allies on September 27, 1946 and was responsible for distributing to countries with claims against Germany a "gold pool" comprised of monetary gold found in Germany and other countries to which Germany may have transferred monetary gold obtained through looting. *See* Eizenstat Report, at 57, 181-85. Between 1958 and 1996, the TGC distributed to ten European nations a total of 329 metric tons of gold with a value of $379,161,426. *Id*. at 183. On February 3, 1997, the Allies agreed to freeze distribution of the final $68 million amidst allegations that monetary gold looted from central banks was intermingled with gold belonging to Nazi victims (including gold taken from victims' teeth). *See, e.g.*, Foreign & Commonwealth Office, General Services Command, History Notes, Nazi Gold: Information from the British Archives: II, (Historians, LRD No. 12) (May 1997) (hereinafter, "British Archives Report II"); David E. Sanger, *3 Nations Agree on Freezing Gold Looted by Nazis*, N.Y. Times, Feb. 4, 1997, at A1, A11. Subsequently, several nations decided to allocate their respective portions of the gold pool to charitable causes intended to help surviving Nazi victims. In December 1997, in conjunction with the "Nazi Gold" conference held in London, the International Nazi Persecutee Relief Fund was established. The major pledges to the Fund were: the United States ($25 million over three years), the Netherlands ($9.4 million), Austria ($7.7 million), Italy ($7.1 million), France ($3.2 million), Spain ($1.7 million), Great Britain ($1.6 million), and Sweden ($1 million). *See* Marilyn Henry, *Half of Nazi Victims Aid Funds Not Yet Distributed*, The Jerusalem Post Internet Edition, June 5, 2000 (*available at* http://www.jpost.com/Editions/2000/06/04/JewishWorld/JewishWorld.7753.html). Several of these nations thus far have allocated several million dollars to the Claims Conference, specifically for the benefit of needy survivors of Nazi persecution living primarily in Central and Eastern Europe. *See* Section III(B), *infra*, and Annex E ("Holocaust Compensation").

[90] The United States Treasury and State Departments at the time estimated that the Swiss National Bank held $185 million - $289 million in gold that had been looted by the Nazis. *See* Eizenstat Report, at vii, 70.

[91] *See id*. at vii, 95-99, 102-03; *see also* Rubin, at 72-73.

[92] Agreement Concerning German Property in Switzerland, Aug. 28, 1952, 13 U.S.T. 1131 (entered into force on Mar. 19, 1953); *see* Eizenstat Report, at vii. According to the Eizenstat Report,

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To comply with the side letter concerning dormant, unclaimed assets referenced in the 1946 Washington Accord, the Swiss Bankers Association ("SBA") in 1947 requested that each of its member banks report the unclaimed ("heirless") assets of Nazi persecutees in its possession.[93] Very little information, however, was revealed:

> The 1947 Survey did not produce a great deal of information. It was a relatively informal survey ignored by some banks and not taken seriously enough by others. The survey reported assets with a total of only SFr. 482,000.[94]

Meanwhile, the Swiss bank secrecy laws, enacted in 1934, made it extremely difficult for heirs of Nazi victims to obtain access to essential bank records and files, often resulting in their inability to trace the whereabouts of the accounts of their now deceased relatives.[95] Other rules also hindered heirs' attempts to recover their rightful assets. For

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estimates of German assets in Switzerland at the time ranged from $250 million to $750 million. *See id.* at vii.

[93] *See* Volcker Report, ¶¶ 26-28.

[94] *Id.* ¶30. Pursuant to a June 25, 1949 Agreement between Switzerland and Poland, the SBA initiated further surveys in the 1950s focused on identifying dormant accounts that belonged to Polish nationals residing in Poland as of September 1, 1939 who had not been heard from since May 9, 1945. *Id.* ¶¶ 31-33. A notable aspect of the 1949 Swiss-Polish agreement was that the assets of Polish citizens who died without heirs were transferred to Poland and then used to compensate Swiss citizens who had claims against Poland for expropriation of their assets. *See* Eizenstat Report, at viii, 200; *see also* Peter Hug & Marc Perrenoud, Assets in Switzerland of Victims of Nazism and the Compensation Agreements with East Bloc Countries, Jan. 17, 1997, pt. II, reprinted in The Disposition of Assets Deposited in Swiss Banks by Missing Nazi Victims: Hearing Before the House Comm. on Banking and Fin. Servs., 104th Cong., 2d Sess. (December 11, 1996) (hereinafter, "December 1996 House Hearing"), at 322; Annex G ("The Looted Assets Class"). According to the Eizenstat Report, by 1975, Switzerland transferred to Poland SFr. 480,000 pursuant to the 1949 agreement. Eizenstat Report, at 200; *see also* December 1996 House Hearing, at 39 (testimony of Swiss Ambassador Thomas Borer).

[95] *See* Anita Ramasastry, *Secrets and Lies? Swiss Banks and International Human Rights*, 31 Vand. J. Transnat'l L. 325, 339-42, 355-56 (1998) (hereinafter, "Ramasastry") (discussing Swiss bank secrecy laws); Jodi Berlin Ganz, Note, *Heirs Without Assets and Assets Without Heirs: Recovering and Reclaiming Dormant Swiss Bank Accounts*, 20 Fordham Int'l L.J. 1306, 1318-1325 (1997) (hereinafter, "Ganz") (same); *see also* Rubin, at 75-76; Amos Elon, *Switzerland's Lasting Demon*, N.Y. Times Magazine, April 12, 1998, section 6, at 40 (hereinafter, "Elon").

example, the banks generally required heirs to provide official documentary proof of the victims' death and called for heirs to demonstrate their right of inheritance.[96] Not surprisingly, formal documentation usually was unavailable.[97]

Jewish humanitarian organizations pressed for special legislation, particularly compulsory registration laws, to remedy the problem of dormant accounts and heirless assets.[98] The SBA objected to the passage of any such laws[99] and initiated another survey in 1956.[100] This survey requested banks to report those assets belonging to known or suspected Nazi persecutees who had no known heirs.[101] The scope of the survey, however, was "quite narrow" with ill-defined reporting categories.[102] Moreover, the motivation behind the survey all but dictated the results, as discussed in the Volcker Report:

> A most interesting aspect of the 1956 Survey is the manner in which it was initiated; the SBA apparently understood that the threatened legislation would not be enacted if the survey showed that the value of

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96 *See* Rubin and Schwartz, reprinted in June 1997 House Hearing, at 284 n. 47 (quoting a letter from the SBA, dated June 7, 1950, responding to requests to help claimants locate bank accounts of deceased Nazi victims, in which the SBA "stated that it would be glad to help 'within the limits of possibility,' but that first the claimant would have to: 1. prove 'on the basis of official and authenticated documents' the death of the original owner; 2. establish, on the same basis, claimant's right of succession; and 3. give exact details about the banks in which the accounts exist"); December 1996 House Hearing, at 180 (statement of Edgar M. Bronfman, President of the World Jewish Congress and World Jewish Restitution Organization, recounting one survivor's attempt to locate her deceased relative's account); *see also* Rubin, at 75-76; Ramasastry, at 355-56; Ganz, at 1324-25; Elon, at 42.

97 *See* note 96; *see also* Peter Gumbel, *Heirs of Nazis' Victims Challenge Swiss Banks on Wartime Deposits*, Wall St. J., June 22, 1995 (hereinafter, "Gumbel"), at 1.

98 *See* Jacques Picard, Switzerland and the Assets of the Missing Victims of the Nazis, § 4.4 (1993) (hereinafter, "Picard Report") (discussed *infra*), reprinted in December 1996 House Hearing, at 247-49; *see also* Ramasastry, at 358-59.

99 Picard Report, § 4.4, reprinted in December 1996 House Hearing, at 247; Volcker Report, ¶ 48.

100 Volcker Report, ¶¶ 35-38.

101 *Id.* ¶ 35.

102 *Id.* ¶ 36.

> accounts was below SFr. 4 million. Thus, the SBA seemed to have a motivation to keep the numbers as low as possible. In fact, a letter from the SBA to its board members dated June 7, 1956, which included a discussion of the survey, stated "[a] meager result from the survey will doubtless contribute to the resolution of this matter in our favor."
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> Not surprisingly, the results of this survey were quite modest. Only four accounts were reported as being dormant accounts pertaining to known victims of Nazi persecution, while 82 dormant accounts pertain to assumed victims of Nazi violence. Only six cantonal banks[103] participated in the survey; they reported a total of 14 accounts. Only one private bank reported accounts, and it reported only two accounts. The total value for the 86 accounts was SFr. 862,410. These results led the SBA to state in a letter to the Swiss President that the problem "by no means [had] the significance which the other side is constantly attempting to ascribe to it."[104]

The Swiss government's first legislative attempt to ensure the lawful return of unclaimed assets deposited in its banks by Nazi victims was made with the passage by the Swiss Parliament of the Federal Resolution of December 20, 1962 (the "1962 Resolution").[105] This statute preempted the bank secrecy laws and required individuals and institutions "administering, possessing, holding in safe keeping or overseeing" the assets in Switzerland of "foreign nationals or stateless persons about whom no reliable information has been received since 9 May 1945 and who are known or presumed to have fallen victim of racial, religious or political persecution," to register any such unclaimed assets with a central registration office inside the Federal Justice Ministry.[106] Persons were given five years to make claims for such funds and the

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[103] The Swiss Confederation is comprised of twenty-six cantons, which are considered autonomous states. Each canton is independent and self-sufficient. *See id.* ¶¶ 7-10.

[104] *Id.* ¶¶ 37-38.

[105] Federal Resolution on the Assets in Switzerland of Foreigners or Stateless Persons who have been Victims of Racial, Religious and Political Persecution, reprinted in December 1996 House Hearing, at 264; *see also* Volcker Report, ¶ 39; Picard Report, §4.6, reprinted in December 1996 House Hearing, at 251.

[106] 1962 Resolution, arts. 1(1), 3, and 7, reprinted in December 1996 House Hearing, at 264-65; *see also*

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entire process was to last ten years.[107] Fewer than one-third of the accounts initially considered were actually reported, however, and, ultimately, only 1,374 accounts with a total value of SFr. 9.8 million were registered with the central office.[108] Of the reported assets (which ultimately amounted to SFr. 11.2 million due to interest, revaluation and application of charges), SFr. 3.5 million were determined to be outside the scope of the decree, thereby remaining with the asset managers or banks, and identifiable heirs received only SFr 3.7 million.[109] SFr. 2.1 million and SFr. 1.1 million were distributed to the Swiss Federation of Jewish Communities and the Swiss Central Office for Refugee Aid, respectively, and SFr. 464,000 and SFr. 325,000 were distributed to the Polish and the Hungarian Unclaimed Asset Funds, respectively.[110]

Critics have since pointed out the shortcomings of the 1962 Resolution, including the absence of any meaningful enforcement mechanism to compel the banks' compliance, exclusion of many potential claimants residing in Eastern Europe,[111] and loose rules, some of which exempted company accounts and deposits of those who died after World War II ended.[112]

Volcker Report, ¶¶ 39-43; Picard Report, §4.6, reprinted in December 1996 House Hearing, at 251.

[107] 1962 Resolution, arts. 12 and 16(3), reprinted in December 1996 House Hearing, at 260, 267; Picard Report, §4.6, reprinted in December 1996 House Hearing, at 251-52. The 1962 Resolution was officially enacted on September 1, 1963 and was to remain in force until August 31, 1974. *See* Picard Report, §6, reprinted in December 1996 House Hearing, at 253-57.

[108] Volcker Report, ¶¶ 44-45.

[109] *Id.* ¶ 45.

[110] *Id.*

[111] Article 8 of the 1962 Resolution provided that the process of declaring an account owner missing or presumed dead "shall not be set in motion if there are grounds for believing that such a process would cause unpleasantness or difficulties for the persons sought." Accordingly, the declaration process was not implemented with respect to many claimants behind the Iron Curtain who might have been exposed to "unpleasantness" on account of their assets located in Switzerland. *See* Picard Report, §4.5, reprinted in December 1996 House Hearing, at 249.

[112] *See e.g.*, December 1996 House Hearing, at 96 (opening statement of Rep. James A. Leach, Chairman, House Committee on Banking and Financial Services); Picard Report, §6.1, reprinted in

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As noted in the Volcker Report, the Swiss adopted restrictive interpretations of the law, particularly with respect to the definition of "'victim of racial, religious, or political persecution,'" including only those persons who "'died a violent death or were missing because of the reasons for persecution as specified in the law.'"[113]

After the process authorized by the 1962 Resolution was completed, historians and archivists continued to investigate the issue of dormant Swiss bank accounts. This issue came under renewed public scrutiny in the mid 1990s.

2. Recent Efforts to Recover Assets

In late 1992, Jacques Picard, a Swiss historian, published a report entitled Switzerland and the Assets of the Missing Victims of the Nazis.[114] The Picard Report raised numerous questions about Switzerland's treatment of assets in the country belonging to victims of racial, religious and political persecution following World War II.[115]

Shortly thereafter, media reports began recounting cases of Swiss banks dismissing seemingly legitimate claims of elderly, impoverished Holocaust survivors. Journalist Peter Gumbel, for example, wrote one article describing such cases which appeared on the front pages of The Wall Street Journal on June 22, 1995.[116] Gumbel stated that, "[f]or 50 years, since the end of the war, [Swiss] banks … have cast a dismissive blanket of silence over the question

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December 1996 House Hearing, at 253-54; Ramasastry, at 360-62; Ganz, at 1331; Gumbel, at A10.

[113] Volcker Report, ¶ 41.

[114] *See* Picard Report, reprinted in December 1996 House Hearing, at 236-269.

[115] *See id*. Picard later published a book entitled Die Schweiz und die Juden 1933-1945 [The Swiss and the Jews 1933-1945] (Zurich 1993).

[116] *See* Gumbel.

of what they did with accounts opened by Jews and others who were then persecuted, and often murdered, by the Nazis."[117]

Amidst this media coverage over bank accounts, Swiss President Kaspar Villiger brought to light an additional concern: he publicly stated that Switzerland must apologize to the Jewish community for refusing entry into the country to thousands of Jewish refugees from Nazi Germany both before and during World War II. This public statement also gained international media attention.[118]

The Union Bank of Switzerland and the Swiss Bank Corporation in 1995 acknowledged the possibility that they still retained unclaimed assets of Nazi victims.[119] The SBA agreed to establish a working group to conduct another survey[120] and issued its own guidelines that relaxed certain documentary requirements with which heirs generally had to comply to obtain the return of their deceased relatives' assets.[121]

The 1995 survey consisted of two parts: a preliminary survey and a main survey. The results of the preliminary survey were reported by the SBA in September 1995 and revealed

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117 *Id.* at A10.

118 *See, e.g.*, Alfred Defago, *Swiss are Coming to Terms with a Mixed Past*, Int'l Herald Tribune, Aug. 25, 1997, at 8; John Parry and Nicholas Moss, *Gold Loses Its Luster*, European, Oct. 30, 1997, at 32.

119 Eizenstat Report, at iv.

120 Volcker Report, ¶ 46.

121 Ramasastry, at 362-63; Ganz, at 1350. Under the new guidelines, the SBA established the Contact Office for the Search for Dormant Accounts Administered by Swiss Banks, headed by Hans-Peter Hani, the Swiss Banking Ombudsman. Ganz, at 1350. In November 1996, the Ombudsman reported that assets belonging to eleven claimants (out of 1,055 applicants who returned completed questionnaires) worth a total of SFr. 1.6 million had been located and that, of those eleven claimants, only three were Nazi victims with assets in the total amount of SFr. 11,000 (approximately $8,000). *Id.* at 1351. The Central Contact Office attributed the meager results to several factors: (i) the prior registration and relinquishment of Holocaust victims' assets under the 1962 Resolution; (ii) the discovery of worthless World War II era bonds and securities; and (iii) a lack of bank documentation. *Id*. at 1351-52.

a total of 893 dormant accounts with a value of SFr. 40.9 million. The results of the main survey were reported in February 1996 and revealed a lower amount due to certain restrictions placed on that survey. The main survey resulted in a total of 775 accounts with a value of SFr. 38.7 million (approximately $32 million).[122] Some Jewish organizations, however, believed and argued that additional dormant accounts existed amounting to far more than $32 million, perhaps as much as $7 billion.[123]

According to the Volcker Report, the SBA board minutes pertaining to the 1995 survey suggest that there may have been a bias inherent in the survey which contributed to the lower-than-expected results.[124] The purpose of the 1995 survey, as set forth in the SBA board minutes, was to demonstrate:

> that the [1962] Survey…was done in a thorough fashion and to show that speculations which say that huge amounts were held back is at most a rumor…so that these partly unfounded press speculations can be refuted through a coordinated public affairs campaign.[125]

While these efforts by the Swiss to locate dormant accounts belonging to Nazi victims were proceeding, members of the World Jewish Restitution Organization (the "WJRO") and the World Jewish Congress (the "WJC")[126] were negotiating with the SBA regarding the

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122 Volcker Report, ¶¶ 46, 49.

123 *See, e.g.*, William Drozdiak, *Swiss Confront Collaboration with Hitler: Bank Inquiry Jolts Country's Conscience*, Chi. Sun-Times, Nov. 3, 1996, at 42. According to Elan Steinberg, Executive Vice President of the World Jewish Congress, the estimated $7 billion included a substantial amount of money from upaid life insurance policies. *See* Stewart Ain, *Policy of Deceit? Survivors of Holocaust Victims Claim Swiss are Cheating Them of Life Insurance Benefits*, Jewish Week, Jan. 17. 1997, at 18.

124 Volcker Report, ¶ 47.

125 *Id*.

126 The WJC is an international federation of Jewish communities and organizations whose membership includes more than 100 communities organized by the regions of North America, Latin America, Europe, Euro-Asia, Israel and the Asia-Pacific. The WJC has offices in New York, Jerusalem, Paris,

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restitution of Jewish assets and property. In December 1995, dissatisfied with the progress of the negotiations, WJRO/WJC President Edgar M. Bronfman[127] and WJC Executive Secretary Dr. Israel Singer enlisted the support of Senator Alfonse D'Amato of New York, Chairman of the United States Senate Banking, Housing, and Urban Affairs Committee.[128]

Senator D'Amato held hearings on April 23, 1996 to inquire about dormant Swiss bank accounts possibly belonging to Nazi victims.[129] Following the Senate Committee hearings,

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Buenos Aires, and a United Nations liaison office in Geneva. The WJC, among many other activities, has been instrumental in launching and organizing efforts for the restitution of Jewish property in Europe. In 1992, several prominent world Jewish organizations — including the Jewish Agency for Israel, the World Zionist Organization, the WJC, the JDC, the Claims Conference, B'nai B'rith International, the American Gathering of Jewish Holocaust Survivors, and the Centre of Organizations of Holocaust Survivors in Israel — in coordination with the government of Israel, established the WJRO. Two other organizations — Agudath Israel World Organization and the European Council of Jewish Communities — later joined the WJRO. The WJRO is an umbrella organization whose primary purpose is to coordinate the efforts of its members in their attempts to recover Jewish assets which belonged to Holocaust victims in all countries where such assets are located except Germany and Austria (in which compensation efforts are coordinated by the Claims Conference, as discussed in Annex E ("Holocaust Compensation")) and to arrange for compensation for Holocaust survivors from those countries. In May 1996, the WJC and the WJRO entered into an agreement with the SBA to establish the Volcker Committee. *See* generally World Jewish Congress – Machon – Forum, *available at* http://www.wjc.org.il/what.html; World Jewish Restitution Organization – Who We Are, *available at* http://ja-wzo.org.il/wjro/whoweare.html.

[127] By letter to Bronfman dated September 10, 1995 (attached to the Volcker Report as Appendix B, at A-3), Israeli Prime Minister Yitzhak Rabin stated that, as President of the WJRO, Bronfman "represent[ed] the Jewish people and the State of Israel" with respect to issues "of restitution of Jewish assets deposited in Switzerland, along with the issues of restitution of Jewish property…in countries of Central and Eastern Europe." By letter to Bronfman dated September 8, 1995, President William J. Clinton similarly expressed his "support [of] the efforts of the World Jewish Restitution Organization and the World Jewish Congress to help resolve the question of Jewish properties confiscated during and after the Second World War." Thereafter, by letter dated May 2, 1996, President Clinton reiterated his "continuing support in the area of restitution of Jewish property….[including] the return of Jewish assets in Swiss banks." *See* Letters from William J. Clinton, President of the United States, to Edgar Bronfman, President of the WJRO/WJC, dated September 8, 1995 and May 2, 1996 (on file with Special Master).

[128] *See* Gregg J. Rickman, Swiss Banks and Jewish Souls (New Brunswick: Transaction Publishers 1999), at 40-41 (hereinafter, "Rickman").

[129] *See* Banking Deposits of WWII Jews in Swiss Banks: Hearings Before the Senate Committee on Banking, Housing and Urban Affairs, 104th Cong., 2d Sess. (April 23, 1996) (hereinafter, "April 1996 Senate Hearing"); *see also* Rickman, at 51-53. The witnesses testifying before the Senate

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several significant and historic events occurred as part of the ongoing efforts to explore Switzerland's role during World War II and to provide restitution to victims of Nazi persecution. These events are relevant to the Special Master's Proposal and are described briefly below, as well as in Section III.

(1) The Volcker Committee

In a Memorandum of Understanding dated May 2, 1996, the SBA, the WJRO and the WJC agreed to establish the ICEP (also known as the Volcker Committee), headed by Paul A. Volcker, former Chairman of the United States Federal Reserve Board.[130] In addition to Volcker, ICEP consists of three members and two alternates appointed by the WJRO and three members and two alternates appointed by the SBA, as well as legal counsel and a special consultant.[131] ICEP's main objectives, as described in the Volcker Report, were:

> (a) to identify accounts in Swiss banks of victims of Nazi persecution that have lain dormant since World War II or have otherwise not been made

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Committee included Eizenstat, Bronfman, Hans J. Baer (Chairman of Baer Holding Ltd. and Bank Julius Baer) on behalf of the SBA, and Greta Beer, a Holocaust survivor. *Id*.

130 *See* Volcker Report, Appendix A.

131 ICEP members Ruben Beraja (former President of Banco Mayo Coop. Ltdo.), Avraham Burg (Knesset Chair and former Chairman of the Jewish Agency for Israel) and Ronald S. Lauder (Chairman of RSL Communications, Ltd.), and alternates Zvi Barak (Chairman of the Board of Trustees, ICC Jerusalem Convention Center) and Israel Singer (WJC Secretary General) were appointed by the WJRO. ICEP members Curt Gasteyger (Professor at the Graduate Institute of International Studies in Geneva, Switzerland), Klaus Jacobi (former State Secretary for Foreign Affairs of Switzerland and Swiss Ambassador to the United States) and Peider Mengiardi (former Chairman of the Board of Directors and Chief Executive Officer of ATAG Ernst & Young), and alternates Hans J. Baer (former Chairman of the Board of Directors of Bank Julius Baer) and Rene Rhinow (Professor of Law at the University of Basel and Senator in the Swiss Parliament) were appointed by the SBA. Michael Bradfield (partner) and Pamela Sak (associate) of Jones, Day, Reavis & Pogue were appointed as legal counsel to ICEP, and Ian Watt (former Head of the Special Investigations Unit of the Bank of England) was appointed as Special Consultant. Volcker Report, Annex 1, at 25.

> available to those victims or their heirs; and (b) to assess the treatment of the accounts of victims of Nazi persecution by Swiss banks.[132]

To accomplish its objectives, ICEP employed five major auditing firms. "ICEP's investigation covered a period of more than 60 years" and included a review of "[a]ll available records" relating to the 1933-1945 time period from "some 254 Swiss banks existing in 1945."[133] The banks examined "represent[ed] 82 percent of the Swiss banking system in 1945 and nearly all deposits of foreign account holders, and include[d] all banks most likely to have attracted significant deposits from Holocaust victims."[134]

At the outset of the ICEP investigation, the Swiss banks pledged their cooperation and support. At hearings held before the House Committee on Banking and Financial Services on December 11, 1996, for example, Dr. Georg Krayer, Chairman of the SBA, stated that:

> First, the SBA, its members and the Swiss bank supervisors are committed to providing their full support and cooperation to the [ICEP] audit and abiding by its results…. Second, the auditors will have full access to all relevant information. Third, because of this access, the audit findings will represent the best attainable results and therefore must be accepted as conclusive by all responsible parties.[135]

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[132] Volcker Report, ¶ 3. As explained in the Volcker Report (at 1, n.1), "'[d]ormant accounts' is defined broadly for the purposes of the ICEP investigation to mean those accounts with respect to which there has been no withdrawals or additions by, and no correspondence or other contacts with the accounts holders or their representatives or with the beneficiaries since at least the end of 1945 as well as accounts that should have been dormant as described above but for the fact that the funds in the account are unavailable for reasons other than their return to the original depositors or their legal representatives." *See also* December 1996 House Hearing, at 56 (testimony of Paul A. Volcker, Chairman, ICEP) (stating that ICEP's goal was to identify "not only all the accounts now dormant…, but…[also] accounts, in effect, that should be there and should be dormant, …if they themselves had not been illicitly invaded….").

[133] Volcker Report, ¶ 16.

[134] *Id.*

[135] December 1996 House Hearing, at 69.

Consistent with Dr. Krayer's statement, on January 22, 1997, the Swiss Federal Banking Commission (the "SFBC") declared the ICEP audits as "official special audits" under the Swiss Banking Act of 1934 and the Swiss Banking Ordinance of 1972.[136] This declaration empowered the SFBC to compel the banks' cooperation with the ICEP investigation, and ensured that the ICEP auditors would have "full and unfettered access" to relevant bank files, including customer files protected by bank secrecy legislation.[137]

In a further effort to support the ICEP process, the SFBC and the SBA agreed with ICEP in June 1997 to establish a claims resolution process ("CRP") for dormant accounts in Swiss banks dating from prior to the end of World War II. According to a Joint Press Release issued by the SFBC and ICEP on June 27, 1997, the CRP was to have the following elements, among others:

- "An SFBC circular letter to Swiss banks requiring them to report the accounts of residents and non-residents of Switzerland that have been dormant since 1945";
- "Publication of the names and other information on these accounts, with additional names publications to follow when other dormant accounts are identified by the Swiss banks or the ICEP process"; and
- "An independent and objective international claims resolution panel to definitively and equitably decide claims, operating under liberal rules of evidence, with its decisions, in the form of written opinions, taken after due consideration of the representations of the claimants."[138]

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[136] *See* Letter of Support from Dr. Kurt Hauri, Chairman, and Daniel Zuberbuhler, Director, of the SFBC to Paul Volcker, Chairman of ICEP, dated January 29, 1997 (attached to the Volcker Report as Appendix G, at A-29-30); *see also* Volcker Report, ¶¶ 61-62.

[137] Volcker Report, Appendix G, at A-30.

[138] Joint Press Release of Kurt Hauri, Chairman of the SFBC, and Paul Volcker, Chairman of ICEP, dated June 25, 1997 (attached to the Volcker Report as Appendix D, at A-9). On September 4, 1997, ICEP endorsed the establishment of an Independent Claims Resolution Foundation to sponsor the claims settlement process and, on September 29, 1997, ICEP announced the appointment of three of

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Tight deadlines were set for implementation of the CRP, including a deadline of July 23, 1997 for worldwide publication of the first list of dormant accounts belonging to foreign residents or nationals and a deadline of October 20, 1997 for publication of a second list of domestic dormant accounts.[139] It was agreed that "[p]ublication of additional dormant accounts [would] be made promptly as the information becomes available to Swiss banks or to ICEP …."[140] Consistent with these public statements, and with the encouragement of ICEP, the SFBC conducted yet another survey, instructing all Swiss banks to report to ATAG Ernst & Young all accounts opened before May 9, 1945 which remained dormant since that time.[141] At the conclusion of the 1997 survey, 5,570 foreign accounts with an aggregate value of approximately

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its members – Paul Volcker, Israel Singer and Rene Rhinow – as members of the Board of Trustees of the Foundation. *See* ICEP Press Releases dated September 4, 1997 and September 29, 1997 (attached to the Volcker Report as Appendix D, at A-10). On October 31, 1997, ICEP announced the appointment of Hans Michael Reimer (Professor of Private Law at the University of Zurich) as Chairman of the Claims Resolution Tribunal (the "CRT"), a group formed to adjudicate expeditiously and inexpensively the claims to dormant Swiss bank accounts. *See* ICEP Press Release, dated October 31, 1997 (attached to the Volcker Report as Appendix D, at A-10-11). ICEP also announced the establishment of a Panel of Experts on Interest Fees and Other Charges (the "Kaufman Panel," after its Chair, Henry Kaufman), and the approval of the Charter, By-laws and Rules of Procedure for the Claims Resolution Process. *Id.* A more detailed description of the CRT, its rules of procedure and activities to date is set forth in Section III(A) and Exhibit 5 (the CRT's proposed rules).

139 Joint Press Release of Kurt Hauri, Chairman of the SFBC, and Paul Volcker, Chairman of ICEP, dated June 25, 1997 (attached to the Volcker Report as Appendix D, at A-9).

140 *Id.*; *see also* June 1997 House Hearing, at 149 (statement of Paul A. Volcker, Chairman, ICEP) (announcing that the SFBC "has agreed to a framework for facilitating the reconciliation of claims against dormant accounts," that "the names (and addresses, when available) of *all* dormant accounts originating before 1945 in Swiss banks will be published," and that, "[i]n the interest of assuring full disclosure, the account names will be revealed whether or not there is any presumption that the account is in fact related to Holocaust victims or other persecuted persons") (emphasis in original).

141 Volcker Report, ¶ 50.

SFr. 72.3 million were reported and published in newspapers internationally and on the Internet.[142]

ICEP's comprehensive investigation continued for three years. The direct costs of the investigation, borne by the Swiss banks, were in the range of SFr. 300 million.[143] The Swiss banks also incurred substantial internal costs in connection with the ICEP investigation, including costs of staffing and costs of collecting, processing and analyzing documents.[144] According to ICEP, however, its investigation could have been obviated had the SBA and its member banks agreed to publish the names of dormant account holders in the aftermath of World War II. As stated in the Volcker Report:

> The Swiss commitment to bank secrecy and a concern about maintaining the integrity of that secrecy — ironically in part a response to foreign exchange controls in Germany and their use to persecute Jews there — were undoubtedly factors in the decision not to publish the names of the dormant account holders after World War II. Switzerland had an informed and vigorous debate extending over a number of years on this subject. Banks were also concerned that too liberal a regime for processing claims to dormant accounts would result in payments to the wrong parties and double liability for the banks. Unfortunately, the banks and their Association lobbied against legislation that would have required publication of the names of such so called 'heirless assets accounts,' legislation that if enacted and implemented, would have obviated the ICEP investigation and the controversy of the last 30 years. An historic opportunity was missed.[145]

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[142] *Id.* ¶¶ 12, 50-55; Table 2. A total of 1,883 accounts with an aggregate value of SFr. 66,169,152 were published in July 1997, and an additional 3,687 accounts with an aggregate value of SFr. 6,179,180 were published in October 1997. *Id.* Table 2. An additional 10,758 accounts of Swiss and unknown domicile were made publicly available in Switzerland, and 63,738 accounts with balances under SFr. 100 were reported to ATAG Ernst & Young but were not published or otherwise made available. *Id.* ¶¶ 12, 50. The accounts reported and published as part of the 1997 survey included only a portion of the accounts later identified as a result of ICEP's investigation. *Id.* ¶¶ 56-57.

[143] *Id.* ¶¶ 17, 55-59, Table 1.

[144] *Id.* ¶ 17.

[145] *Id.* ¶ 48.

On December 6, 1999, ICEP released its final report containing the results of its three-year investigation. The Volcker Report, among other things:

- described the auditors' review of still-existing Swiss records for approximately 4.1 million Holocaust-era accounts (constituting approximately two-thirds of the total number of accounts actually in existence during the period from January 1, 1933 to December 31, 1945);[146]

- concluded that 53,886 accounts have a "probable or possible relationship to victims of Nazi persecution";[147]

- noted that the auditors "reported no evidence of systematic destruction of records of victim accounts, organized discrimination against the accounts of victims of Nazi persecution, or concerted efforts to divert the funds of victims of Nazi persecution to improper purposes";[148] and

- determined that there is "confirmed evidence of questionable and deceitful actions by some individual banks in the handling of accounts of victims, including withholding of information from Holocaust victims or their heirs about their accounts, inappropriate closing of accounts, failure to keep adequate records, many cases of insensitivity to the efforts of victims or heirs of victims to claim dormant or closed accounts, and a general lack of diligence — even active resistance — in response to earlier private and official inquiries about dormant accounts."[149]

As discussed more fully in Section III(A) of this Proposal, ICEP divided the 53,886 accounts into four categories and provided estimates of the total value of each category. Because, as noted above, the valid holders of these accounts are given priority under this

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[146] *See id.* ¶ 20. According to the Volcker Report, no records exist for approximately 2,757,950 accounts out of approximately 6,858,116 accounts opened in Swiss banks between 1933 and 1945. The Volcker Committee matched the names of account holders against the names of victims of Nazi persecution with respect to approximately 2.25 million accounts, approximately one-third of the total. The matching process was not undertaken regarding 1,065,630 domestic Swiss accounts and 784,791 small savings accounts in the interests of speed and manageability. *See id.* Annex 4. Accordingly, as stated by the Volcker Committee, "the total of the number and value of accounts with some presumption of involvement with victims of Nazi persecution identified by the [ICEP] investigation is clearly conservative." *Id.* ¶ 58.

[147] *Id.* ¶ 30.

[148] *Id.* ¶ 41(a).

[149] *Id.* ¶ 41(b)

Proposal, as contemplated by the Settlement Agreement, the total value of the accounts has a direct and substantial bearing on the Proposal set forth herein. ICEP has concluded, however, based on numerous considerations, that "claims of victims to identified accounts can be met within the amount specified in the agreed class action settlement now being considered in U.S. District Court, with some part of [the] funds from that settlement available for distribution to others covered by the settlement."[150]

In addition to reporting its conclusions, ICEP made several key recommendations in the Volcker Report regarding procedures to be followed prospectively.[151] These recommendations were described by Chairman Volcker in his February 9, 2000 prepared statement before the House Committee on Banking and Financial Services:[152]

- "The SFBC should promptly authorize consolidation of the existing but scattered auditor workpapers and databases (established during the ICEP investigation) relating to 4.1 million accounts open in the 1933-1945 period, and assembly of them into a central archive that can be used in a claims resolution process."
- "The SFBC should authorize publication of the names of holders of approximately 25,000 accounts having the highest probability of a relationship to victims of Nazi persecution."[153]
- " Any person with a claim to a dormant account of a victim, whether or not the name is published, should be provided facilities for resolving such claims through the CRT. Existing claims compiled by the New York State Holocaust Claims Processing Office[154] and others should be matched against the centralized database of accounts, and resolved by the CRT";[155]

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150 *Id.* ¶ 37; *see also id.* Annex 4, ¶ 43.

151 *See id.* ¶¶ 65-80.

152 Restitution on Holocaust Assets: Hearing Before the House Comm. on Banking and Fin. Servs., 106th Cong (Feb. 9, 2000) (statement of Paul A. Volcker, Chairman, ICEP) (hereinafter, "Volcker Prepared Statement").

153 As noted in Section I, the number of accounts identified as "probably" or "possibly" related to victims of Nazi persecution has since been modestly adjusted.

154 On June 25, 1997, Governor George E. Pataki authorized the creation of the Holocaust Claims

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- "To provide a fair return to victims (and their heirs), whose accounts became *de facto* illiquid, individual account values should be adjusted on the basis of long-term Swiss rates of interest, involving multiplying 1945 account values by 10 times."[156]

On the same day that the Volcker Report was released, December 6, 1999, the SFBC issued its own press release stating that it is "solely responsible for decisions on publishing further lists of accounts," it "will analyze individual ICEP recommendations on archiving data, further publication of unclaimed assets, and handling of claims," and it "will decide on the ICEP recommendations in the first quarter of 2000 after consulting other parties concerned."[157]

On March 30, 2000, the SFBC announced that it had "authorized"[158] the Swiss banks to: (i) "publish 26,000 accounts that are deemed by the Volcker Committee to have a probability of being related to victims of the Holocaust"; and (ii) "create a central data base containing 46,000 accounts that the Volcker Committee considers to be probably or possibly related to Holocaust victims."[159] The SFBC declined to adopt the Volcker Committee's recommendation to create a central database for all 4.1 million accounts that existed in Swiss

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Processing Office of the New York State Banking Department (the "HCPO"). The purpose of the HCPO is to (i) assist individuals of all backgrounds in seeking to recover assets deposited in Swiss banks before and during World War II; (ii) assist individuals of all backgrounds seeking to recover funds never paid in connection with insurance policies issued by a European insurance company before and during World War II; and (iii) assist in the recovery of lost or looted assets, including works of art. *See* Holocaust Claims Processing Office (*available at* http://www.claims.state.ny.us).

155 Volcker also stated that "the thrust and spirit" of the ICEP effort "strongly suggests substantial Swiss bank participation" in the continued funding of the CRT. Volcker Prepared Statement, at 8.

156 *Id.* at 6-7.

157 *See* SFBC Press Release, dated December 6, 1999 (on file with Special Master).

158 Earlier SFBC rulings concerning the ICEP investigation "mandated," as opposed to "authorized," the banks' compliance therewith. *See* In re Holocaust Victim Assets Litigation, at 27.

159 SFBC Press Release, dated March 30, 2000 (on file with Special Master).

banks in the 1933-1945 period, stating that such a large central database was "neither necessary nor meaningful" because "ICEP itself had, after a very thorough investigation, no reason to believe that these accounts were in any way related to victims of the Holocaust."[160]

Following the issuance of the March 30 Press Release by the SFBC, the parties to this action continued to negotiate, among other issues, the Swiss banks' implementation of the Volcker Committee's recommendations. As noted by the Court in its Final Approval Order, the two defendant banks — Union Bank of Switzerland and Credit Suisse — acting pursuant to the SFBC's March 30 authorization, have agreed to:

- "cooperate in assembling information concerning their portion of the 26,000 'probable' accounts referred to in the SFBC's March 30 order … to permit expeditious publication of names and other identifying information associated with those accounts after approval of a final plan of allocation and distribution";

- "cooperate in achieving an earlier publication date if approval of the allocation and distribution plan encounters substantial delays, if it is possible to assemble the information needed for publication prior to such approval and if an adequate court-approved claims process is in place to assist claimants";

- "create a centralized electronic database relating to their share of the [approximately 46,000] accounts referred to in the Volcker Report" as "probably" or "possibly" related to Holocaust victims;

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[160] *Id.* at 2. As the Court observed in its Final Approval Order, ICEP Chairman Volcker later clarified in a letter to SFBC Chairman Hauri that "the exclusion of millions of small savings accounts and Swiss address accounts from the ICEP analysis in the interest of speedy and manageable results does not, and cannot, mean that none of those accounts were Holocaust related." In re Holocaust Victim Assets Litigation, at 27, quoting Letter from Paul A. Volcker, ICEP Chairman, to Dr. Kurt Hauri, SFBC Chairman, dated April 12, 2000 (hereinafter, "Volcker Letter"), at 3. Volcker concluded that "'there will be some limited but significant number of Holocaust related accounts to be found among the millions of savings and Swiss address accounts that [were] arbitrarily excluded from [ICEP's] research…. [and that,] [t]o the extent that such accounts can be practically and expeditiously identified, which is what the test experiment suggests is entirely feasible, the effort should be done to put this matter to rest.'" *Id.* at 26, quoting Volcker Letter, at 3.

- "permit the personnel of the Claims Resolution Tribunal established under the Settlement Agreement to have convenient access to the centralized database of the [approximately 46,000] accounts and to the Volcker Committee's auditors' paper files in connection with such accounts";

- "assist[ ] in the matching of claims to accounts that claims personnel have a reasoned and satisfactory basis for concluding may be listed under a Swiss address (including accounts opened in the names of intermediaries) against existing bank databases containing 2.1 million accounts opened during the relevant period"; and

- "'consider in a spirit of cooperation requests for further assistance in any particular cases where there is a reasonably strong likelihood that further assistance would provide probative information and where the costs of such further assistance do not outweigh the potential benefits.'"[161]

The defendant banks also agreed to amend the Settlement Agreement to provide for, among other things, the acceleration of certain settlement payments and modification of the flow of funds between the Escrow Fund and the Settlement Fund established under the Settlement Agreement in order to generate approximately $23-27 million in additional interest payments payable to the Settlement Fund which may be used to fund the continued functioning of the CRT.[162] This agreement resolved a dispute between the parties as to whether the defendants were obligated to continue funding the administrative costs of the CRT.[163]

As discussed more fully below, the Court expressed concern regarding the "failure of the private and cantonal banks [who are non-party releasees under the Settlement Agreement] to voluntarily comply" with the Volcker Committee's recommendations and the

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[161] In re Holocaust Victim Assets Litigation, at 28-29 (quotations and citations omitted); *see also* Amendment No. 2, at 3-4; Memorandum to File, ¶¶ A - C.

[162] *See* In re Holocaust Victim Assets Litigation, at 45 (quotations and citations omitted); *see also* Amendment No. 2, at 4-6; Memorandum to File, ¶ D.

[163] *See* In re Holocaust Victim Assets Litigation, at 45-46.

"unwillingness of the SFBC to mandate" such compliance.[164] The Court stated that such conduct "is inconsistent with the spirit of the Settlement Agreement" and "amounts to nothing less than a replay of the conduct that created the problems addressed in this case."[165] The Court concluded |that, if the private and cantonal banks wish to be released under the Settlement Agreement, they must "comply with the Volcker Committee's recommendations to the same extent as the defendant banks have agreed to comply."[166] In other words, if these banks do not cooperate by providing needed information to the plaintiff class members, they will not be afforded the protection of a release from liability.

It is unclear which, if any, Swiss private and cantonal banks will cooperate, to the same extent as the defendant banks, in implementing the Volcker Committee's recommendations described above.

(2) The Eizenstat Report

In late 1996, President Clinton commissioned a special inter-agency task force, under the supervision of Stuart E. Eizenstat — then-Under Secretary of Commerce for International Trade and Special Envoy for Property Restitution in Central and Eastern Europe, now Deputy Secretary of the Treasury — to investigate and prepare a report describing the Allied efforts to recover and restore Nazi looted gold and other assets after World War II.[167] The

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[164] *Id.* at 30. These banks' refusal to permit publication of or access to information relating to some or all of their accounts "is estimated to affect between 200 - 250 of the 26,000 accounts that are 'probably' related to Holocaust victims," and "as many as 3,500 of the 20,000 remaining accounts in these non-party banks that the Volcker Committee identified as being 'possibly' related to Holocaust victims." *Id.* at 29.

[165] *Id.* at 29-30.

[166] *Id.* at 32.

[167] *See* Eizenstat Report, *supra*.

Eizenstat Report, released in May 1997, provides a detailed analysis of Switzerland's relationship with Nazi Germany and its handling of looted gold and other assets.[168] As set forth in the Eizenstat Report:

> Switzerland was Nazi Germany's banker and financial facilitator, taking and transferring German gold — most of it looted — and providing Germany with Swiss francs to purchase needed products. Switzerland also supplied Germany with key war materials such as arms, ammunition, aluminum, machinery and locomotives.[169]

The Eizenstat Report concluded that "acceptance of the stolen gold in exchange for critically important goods and raw materials helped sustain the Nazi regime and prolong its war effort."[170]

The Swiss Federal Council criticized the Eizenstat Report as being "one-sided" and containing "unsupported" conclusions and "political and moral judgments that go beyond the historical report."[171]

(3) The Bergier Commission

On December 13, 1996, the Swiss Parliament passed a decree establishing Bergier Commission,[172] which thereafter, on December 19, 1996, received a mandate from the Swiss

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168 *See id*. The task force led by Eizenstat released a second report in June 1998, entitled U.S. and Allied Wartime and Postwar Relations and Negotiations With Argentina, Portugal, Spain, Sweden, and Turkey on Looted Gold and German External Assets and U.S. Concerns About the Fate of the Wartime Ustasha Treasury (Supplement to Preliminary Study on U.S. and Allied Efforts to Restore Gold and Other Assets Stolen or Hidden by Germany During World War II).

169 Eizenstat Report, at xxi.

170 *Id*. at iii; *see also id.* at v (concluding that the assistance to Nazi Germany provided by Switzerland and other neutral countries "had the clear effect of supporting and prolonging Nazi Germany's capacity to wage war"). A more detailed discussion of the findings contained in the Eizenstat Report regarding the role of certain Swiss entities in handling looted gold and other assets is set forth in Annex G ("The Looted Assets Class").

171 William Drozdiak, *Swiss Defend Wartime Policy, Reject Criticism; Bern Calls U.S. Report "One-Sided" Judgment*, Washington Post, May 23, 1997, at A31; Marilyn Henry, *Swiss Slam Eizenstat Report*, Jerusalem Post, May 25, 1997, at 12; *see also* June 1997 House Hearing, at 45-48 (testimony of Swiss Ambassador Thomas G. Borer regarding Eizenstat Report).

Federal Council to "examine the period prior to, during, and immediately after the Second World War."[173] The Bergier Commission consists of ten members, including distinguished scholars from Switzerland, the United States, Israel and Poland.[174]

The Bergier Commission has so far released two reports. The first, released in July 1998, was a preliminary assessment of wartime gold transactions between Switzerland and Germany.[175] The Bergier Gold Report concluded that the Swiss National Bank (the "SNB"), an institution "supervised by the Swiss government," played a significant role in handling Reichsbank gold, and that the commercial banks played a less significant, but equally noteworthy, role.[176] As set forth in the Bergier Gold Report:

> During World War II, Switzerland was the most important conduit for gold originating from countries occupied or controlled by the Third Reich. Roughly 79 percent of all gold shipments from the Reichsbank to other countries was routed through Switzerland. In terms of volume, the SNB accounted for 87 percent of this bar, with Swiss commercial banks handling the remaining 13 percent …. [T]he value of the gold delivered by the Reichsbank to the SNB was between SFr. 1.6 and SFr. 1.7 billion.[177]

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172 *See* Federal Decree Concerning the Historical and Legal Investigation of the Fate of Assets Which Reached Switzerland as a Result of National Socialist Rule, December 13, 1996 (the "1996 Federal Decree") (attached to the Volcker Report as Appendix F, at A-21-28).

173 Bergier Refugee Report, at 9.

174 Jean-Francois Bergier (a Swiss historian) was appointed as Chairman of the Bergier Commission. The other nine members of the Bergier Commission are: Wladyslaw Bartoszewski (Poland), Linus von Castelmur (Switzerland), Saul Friedlander (Israel), Harold James (United States), Georg Kreis (Switzerland), Sybil Milton (United States), Jacques Picard (Switzerland), Jakob Tanner (Switzerland) and Joseph Voyame (Switzerland).

175 *See* Bergier Gold Report.

176 *Id.* at 191-93.

177 *Id.* at 191.

Notwithstanding the significant gold transactions engaged in by the SNB with Nazi Germany, the Bergier Commission found no evidence that the SNB was aware that some of the gold it received from Germany was looted from Nazi victims:

> The total value of the gold shipped by the Reichsbank to Switzerland which is known to have been stolen from the victims of Nazi oppression is SFr. 581,899. Although the subject of gold confiscated from Jewish deportees was discussed by the SNB management in late 1943, there is no indication that those responsible for deciding SNB policy were aware of the origin of such gold shipped by the Reichsbank to Switzerland.[178]

The Bergier Commission did conclude, however, that the SNB knew that much of the gold it received from Germany was looted from occupied countries, and that the SNB did not act in good faith in engaging in gold transactions with the Nazis:

> From today's perspective, the SNB's claims that it acted in good faith and that Switzerland's neutrality obliged it to accept the gold offered by Nazi Germany are clearly not justified …. SNB officials became aware while the war was still in progress that the precious metal being shipped by the Reichsbank to Switzerland included gold that had been looted. Swiss neutrality in no way obliged the country to accept stolen gold …. [E]conomic deterrence [of an alleged possible German invasion] was an argument cobbled together *a posteriori* to justify the previous gold policy.[179]

The Bergier Commission released its second report, the Bergier Refugee Report, on December 10, 1999. This Report addresses Switzerland's refugee policy in the period before, during and after World War II, and condemns the Swiss decisions to (1) encourage Germany to mark the passports of Jewish persons with a "J" stamp in 1938; and (2) seal its borders to

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178 *Id.*

179 *Id.* at 193. With respect to commercial banks, although the Bergier Commission noted that "no reliable statement can be made about the banks' profits from gold commerce," *id.* at 164, it also observed that "[i]n the first two years of the war, the Reichsbank carried out its gold transactions in Switzerland primarily through commercial banks." *Id.* at 191. Further details regarding the Bergier Gold Report are presented in Annex G ("The Looted Assets Class").

"racially" persecuted refugees in 1942.[180] Although the Report notes that many refugees were granted asylum by Switzerland during the War,[181] it also finds that "Switzerland declined to help people in mortal danger," and that "[a] more humane policy might have saved thousands of refugees from being killed by the Nazis and their accomplices."[182] The Bergier Refugee Report ultimately concludes that the exact number of refugees refused entry into or expelled from Switzerland cannot be determined, but that there is verifiable proof that approximately 24,500 refugees were turned away at the border or expelled between January 1940 and May 1945, and that approximately 14,500 entry applications were rejected.[183]

(4) The Swiss Humanitarian Fund

On February 26, 1997, the SBA announced the formation of the Swiss Fund for Needy Victims of the Holocaust/Shoa (the "Swiss Humanitarian Fund" or the "Fund").[184] The Fund was established "to support persons in need who were persecuted for reasons of their race,

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180 Bergier Refugee Report, at 270-71. The Bergier Refugee Report deals primarily with Jewish refugees; the Commission has stated that it "will take up the topic of Switzerland's policy towards Gypsies (Roma and Sinti) persecuted by the Nazi regime at a later point in time." *Id.* at 10 n.5.

181 *See, e.g., id.* at 24, 146 n.273, 263.

182 *Id.* at 271.

183 *Id.* at 20, 129, 263. Additional details regarding the Bergier Refugee Report are presented in Section III(E) below and in Annex J ("Refugees").

184 *See* Alan Cowell, *3 Swiss Banks Plan to Establish Fund for Nazis' Victims*, N.Y. Times, Feb. 6, 1997, at A1; Marilyn Henry, *A Divisive Legacy*, Jerusalem Post, Feb. 28, 1997, at 8. The Fund was established following a hearing held before the Banking and Financial Services Committee of the U.S. House of Representatives on December 11, 1996 (chaired by Congressman James A. Leach). *See* December 1996 House Hearing. WJRO/WJC President Edgar M. Bronfman testified at the December 11th hearing and suggested that the Swiss create a humanitarian fund as a "good faith financial gesture" until the issues surrounding Jewish assets in Swiss banks could be resolved. *Id.* at 36 (prepared statement of Edgar M. Bronfman).

religion or political views or for other reasons, or otherwise were victims of the Holocaust/Shoa, as well as to support their descendants in need."[185]

The Swiss Humanitarian Fund was originally provided an endowment of SFr. 100 million by the defendant Swiss banks — Union Bank of Switzerland, Credit Suisse and the Swiss Bank Corporation[186] — supplemented by SFr. 100 million contributed by the Swiss National Bank, SFr. 65 million contributed by other Swiss businesses, and an additional SFr. 8 million raised by appeals to the Swiss public. With interest, the Swiss Humanitarian Fund ultimately raised SFr. 294,892,293 (approximately $172,954,329 at current exchange rates).[187]

The Fund allocated 88% of its assets to benefit needy Jewish Holocaust victims, and the remaining 12% to benefit other Nazi victims, among them, the Roma, Jehovah's Witnesses, homosexuals, persons with disabilities, political prisoners, and others.[188] Of the 88% allocated to Jewish victims, 35% was apportioned, on a priority basis, to the "double victims" of Central and Eastern Europe and the nations of the former Soviet Union, all of whom were presumed to be needy. When the Fund finishes distributing its assets in late 2000 or early 2001, it will have made grants to over 300,000 surviving Nazi victims around the world.[189]

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185 *See* Task Force of Switzerland, "Executive Ordinance Concerning the Special Fund for Needy Victims of the Holocaust/Shoa," Mar. 1 1997 (visited Jan. 13, 1999) http://www.switzerland.taskforce.ch/S/S1/a2_e.htm. Although the Executive Ordinance establishing the Fund authorized payments to needy descendants of Nazi victims, the Fund ultimately decided not to make payments to descendants. *See* Annex K ("Swiss Humanitarian Fund").

186 Union Bank of Switzerland and the Swiss Bank Corporation merged while this litigation was pending.

187 *See* Overview on Finances, Payments and Pending Applications, Swiss Fund for Needy Victims of the Holocaust/Shoa, July 10, 2000, at 1 (Annex C, Exhibit 2).

188 *See* Swiss Fund for Needy Victims of the Holocaust/Shoa, Fund Auditors Report for the Period Ending Dec. 31, 1999 (hereinafter, "Fund Auditor's 1999 Report"), Mar. 10, 2000, at 1, 7; *see also* Section III(B), *infra.*

189 Fund Auditor's 1999 Report, at 6. *See also* Annex K ("Swiss Humanitarian Fund").

(5) The Slave Labor Lawsuits

While these Lawsuits were pending, numerous additional lawsuits were filed in several courts throughout the country against an array of German and Austrian companies, as well as an American company, arising out of these companies' use of and profit from slave labor during the World War II era (collectively, the "Slave Labor Lawsuits").[190] The first of the Slave Labor Lawsuits was a class action brought on March 8, 1998 in the United States District Court for the District of New Jersey by plaintiff Elsa Iwanowa (on behalf of herself and others similarly situated) against Ford Motor Company, the American automobile manufacturer, and its German subsidiary, Ford Werke A.G (collectively, "Ford").[191] Shortly thereafter, four more class action lawsuits were filed in the same federal court, two each against Degussa AG and Siemens AG, German manufacturing companies which also were alleged, among other things, to have used and profited from slave labor.[192]

Each of these defendants filed motions to dismiss, in which they argued, among other things, that: (1) the court lacked jurisdiction to hear the cases; (2) alternative resolution mechanisms existed which were better suited to resolve the disputes; (3) the United States court was an inconvenient forum; (4) plaintiffs' claims were barred by applicable statutes of limitations; (5) the complaints failed to state a claim upon which relief could be granted; and (6) plaintiffs' claims were not justiciable because they raised political issues which are not

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190 *See generally*, Michael J. Bazyler, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. Rich. L. Rev. 1, 191-236 (2000) (discussing Slave Labor Lawsuits).

191 *See* Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999).

192 *See* Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248 (D.N.J. 1999).

properly addressed by a court.[193] On September 13, 1999, defendants' motions to dismiss were granted.[194]

Judge Joseph Greenaway, Jr. dismissed the Iwanowa lawsuit in a 120-page opinion addressing each of Ford's arguments. Although Judge Greenaway rejected defendants' jurisdictional arguments,[195] he nevertheless found that most of plaintiffs' claims had been brought too late and were barred by applicable statutes of limitations.[196]

The court also considered defendants' challenge to the complaint on grounds of nonjusticiability and international comity. Judge Greenaway agreed with defendants that plaintiffs' slave labor claims raised political issues which were beyond the court's purview and should instead be addressed by the political divisions of government, that is, the Executive Branch and Congress.[197] The court also concluded that abstention was appropriate because "principles of international comity dictate that a court not interfere with a foreign sovereign's pronouncement of its law," noting that "[t]he German Federal Government has taken the position

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193 *See* Iwanowa, 67 F. Supp. 2d at 434; Burger-Fischer, 65 F. Supp. 2d at 250. The defendant Swiss banks in this case made the same arguments. *See* Section II(C), *infra*.

194 *See* Iwanowa, 67 F. Supp. 2d at 491; Burger-Fischer, 65 F. Supp. 2d at 285.

195 *See* Iwanowa, 67 F. Supp. 2d at 440, 446.

196 *Id.* at 461-69 (addressing claims under international law), 470-76 (addressing claims under U.S. law), 476-82 (addressing claims under German law). Judge Greenaway held that the only claims that were not time-barred — plaintiffs' claims against Ford Werke for violations of the international law of nations — were nonetheless subject to dismissal on the ground that such claims could only be pursued by government level negotiations and not through private litigation. *Id*. at 469. Judge Greenaway also noted that, even if plaintiffs' claims under German law were timely, two recent German court decisions, which denied slave labor claimants the right to sue private companies in German courts, would in any event have precluded plaintiffs from suing under German law. *Id.* at 482-83 n.83.

197 *Id.* at 483 (citing Baker v. Carr, 369 U.S. 186, 210 (1962)).

that foreign citizens [such as Iwanowa] may not assert direct claims for war-time forced labor against private companies."[198]

Judge Dickinson R. Debevoise, before whom the cases against Degussa and Siemens were pending, dismissed these cases on only one ground: nonjusticiability.[199] According to the court:

> The critical issue, the resolution of which is dispositive of these cases, is whether in light of post World War II diplomatic history the plaintiff victims, and representatives of victims of the Nazi regime[,] can bring an action in this Court against private German corporations which participated in and profited from the atrocities committed against plaintiffs and those they seek to represent.[200]

Judge Debevoise ultimately ruled that the Degussa and Siemens class actions raised political and policy issues which were outside the court's mandate. After spending a considerable portion of his opinion analyzing the various reparations treaties negotiated between Germany and the Allied powers in the years following World War II,[201] Judge Debevoise observed that, "in effect, plaintiffs are inviting this court to try its hand at refashioning the reparations agreements [entered into by] the United States and other World War II combatants . . . ."[202] Concluding that "this is a task which the court does not have the judicial power to perform,"[203] the court dismissed the complaints.[204]

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198 *Id.* at 490.

199 *See* Burger-Fischer v. Degussa AG, 65 F.Supp.2d 248 (D.N.J. 1999). The court did not address the other issues raised in defendants' motions to dismiss.

200 *Id.* at 254-55.

201 *Id.* at 265-72.

202 *Id.* at 282.

203 *Id.*

204 *Id.* at 285. Chief Judge Korman noted in his Final Approval Order: "I take no position regarding whether [the Slave Labor Lawsuits] were correctly decided, or whether they would even apply here.

(continued on next page)

As discussed elsewhere in this Proposal, following the dismissal of the Iwanowa and Burger-Fischer lawsuits, the Federal Republic of Germany enacted legislation entitled "Remembrance, Responsibility and Future." The legislation establishes a fund of approximately $5.2 billion to compensate those persons who performed slave or forced labor under the Nazi Regime, or who have claims to property looted by the Nazis. The legislation provides for the dismissal with prejudice of all Slave Labor Lawsuits (some of which had not been dismissed and some of which were pending on appeal at the time the legislation was enacted).[205]

B. The Class Action Complaints

On October 3, 1996, in the midst of the public scrutiny over Switzerland's role during the World War II era discussed above, Gisella Weisshaus filed the first class action lawsuit against Union Bank of Switzerland ("UBS") and the Swiss Bank Corporation ("SBC") in the United States District Court for the Eastern District of New York.[206] Weisshaus filed an amended complaint on January 24, 1997, adding three new representative plaintiffs and Credit Suisse ("CS"), the SBA, and the Bank of International Settlements ("BIS") as joint defendants. The Weisshaus Amended Complaint alleged that defendants conspired in failing to identify and

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Instead, I cite them as a reality check for those objectors who believe that strong moral claims are easily converted into successful legal causes of action." In re Holocaust Victim Assets Litigation, at 14.

[205] *See Gesetz zur Errichtung einer Stiftung "Erinnerung, Verantwortung und Zukunft"* [Law on the Creation of a Foundation "Remembrance, Responsibility and Future"], 17.7.2000; *see also* Section III(C), *infra*, and Annex E ("Holocaust Compensation").

[206] Weisshaus v. Union Bank of Switzerland, No. 96 CV 4849 (E.D.N.Y., filed October 3, 1996) (hereinafter, "Weisshaus Am. Compl."). Brought pursuant to Rule 23 of the Federal Rules of Civil Procedure, class actions are lawsuits on behalf of similarly situated claimants asserting common claims for relief. The named plaintiffs, such as Weisshaus, prosecute the action as representatives of the class and any relief granted binds the class, although members sometimes have the legal right to "opt out" of the class before the case is decided, as was true in this litigation. *See* David Herr, Manual for Complex Litigation (Third) § 30.231, at 263-64 (1999).

return assets deposited in the banks by plaintiffs or their ancestors from 1933 to 1945 as a safeguard from the Nazis, and that defendants converted these assets for their own use.[207] The Weisshaus Amended Complaint also alleged that the banks profited by knowingly serving as a depository for property looted by the Nazis.[208] The plaintiffs asserted six causes of action — breach of contract, accounting, breach of fiduciary duty, conversion, conspiracy, and unjust enrichment.[209]

On October 21, 1996, Holocaust survivor Jacob Friedman and four other named plaintiffs filed another class action lawsuit in the United States District Court for the Eastern District of New York against the same three Swiss banks — UBS, SBC, and CS — as joint defendants, and named the SBA as a non-defendant co-conspirator.[210] The Friedman Complaint alleged that the defendant banks conspired and profited from laundering Nazi assets, from knowingly and/or recklessly accepting Nazi looted assets, from knowingly and/or recklessly accepting profits generated by the Nazi use of slave labor, and from intentionally concealing and preventing the recovery of assets deposited in the banks by Nazi victims.[211] The Friedman Complaint specified three separate classes of plaintiffs: "Rightful Owners of Nazi Regime Looted Assets and/or Their Heirs," "Slave Laborers and/or Their Heirs," and "Certain Swiss Bank Depositors and/or Their Heirs."[212] The stated causes of action were Conspiracy to Violate

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207 *See* Weisshaus Am. Compl., ¶¶ 1, 19-23, 36, 38, 40.

208 *Id.* ¶ 42.

209 *Id.* ¶¶ 29-43.

210 Friedman v. Union Bank of Switzerland, No. 96 CV 5161 (E.D.N.Y., filed October 21, 1996) (hereinafter "Friedman Compl.").

211 Friedman Compl., ¶ 1.

212 *Id.* ¶ 2.

and/or Complicity in Violations of International Law, Breach of Fiduciary Duty, Breach of Special Duty, Breach of Contract, Conversion, Unjust Enrichment, Negligence, Violations of Swiss Federal Banking Law, Violations of Swiss Commercial Code of Obligations, Conspiracy, Fraud, and Fraudulent Concealment.[213]

On January 29, 1997, the World Council of Orthodox Jewish Communities ("World Council") filed, on behalf of its members, a third class action lawsuit in the federal district court for the Eastern District of New York, also naming the UBS, SBC, and CS as joint defendants and the SBA as a non-defendant co-conspirator.[214] The World Council's allegations concerning deposited assets, looted assets and slave labor mirrored those asserted in the Friedman Complaint.[215] The plaintiff subclasses and the causes of action asserted in the World Council action were similar to those of the Friedman action; however, the World Council action contained an additional subclass, "Rightful Owners of Nazi Regime Communal Assets and/or Their Heirs,"[216] and did not allege violations of Swiss banking laws or codes of obligation.[217]

On March 7, 1997, Judge Korman consolidated the Weisshaus, Friedman and World Council lawsuits for pretrial purposes under the caption In re Holocaust Victim Assets Litigation. During the extensive motion practice that ensued (as discussed below), on July 30, 1997, plaintiffs amended their complaints, primarily to consolidate the plaintiff subclasses and to cure certain jurisdictional defects. The second amended Weisshaus Complaint was restructured

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213 *Id.* ¶¶ 207-94.

214 World Council of Orthodox Jewish Communities, Inc. v. Union Bank of Switzerland, No. 97 CV 0461 (E.D.N.Y., filed Jan. 29, 1997) (hereinafter, "World Council Am. Compl.").

215 World Council Am. Compl., ¶ 2.

216 *Id.* ¶ 96.

217 *Id.* ¶¶ 102-48.

to allege claims relating solely to the Swiss banks' treatment of deposited assets and dormant accounts. The allegations of international law violations were withdrawn. As plaintiffs were regrouped into different subclasses, the original Friedman Complaint was replaced by the Sonabend and Trilling-Grotch Complaints. All of the plaintiffs named in the Sonabend Complaint were citizens of foreign states, characterized as a looted assets/slave labor class asserting claims under federal common law as it incorporates customary international law.[218] In contrast, while plaintiffs in the Trilling-Grotch action also asserted claims relating to looted assets and slave labor, they were all citizens of the United States and thus could assert complete diversity jurisdiction.[219] By virtue of this reconfiguration, Jacob Friedman himself was now a plaintiff in the Weisshaus action.

On June 29, 1998, plaintiffs' counsel filed another class action lawsuit on behalf of Nazi victims against the SNB in federal district court in Washington, D.C.[220] This lawsuit alleged the bank's knowing acceptance of looted assets, primarily stolen gold, from Nazi Germany.[221]

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[218] *See* Sonabend Am. Compl., ¶¶ 9(a), 20. Under United States law, a case can be brought in federal court (as opposed to state court) only if the lawsuit satisfies the federal court's jurisdictional requirements. One such requirement is that the claims "arise under" federal law and thus present a "federal question." *See* 28 U.S.C. §1331.

[219] "Diversity jurisdiction," the second basis upon which a federal court may assert jurisdiction over a lawsuit, requires that "the matter in controversy exceed[] the sum or value of $75,000, . . . and is between (1) citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state; (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; or (4) a foreign state . . . as plaintiff and citizens of a State or different States." 28 U.S.C. §1332.

[220] Rosenberg v. Swiss National Bank, No. 98 CV 01647 (U.S.D.C., filed June 29, 1998) (hereinafter, "Rosenberg Compl.").

[221] Rosenberg Compl., ¶¶ 1, 49-71.

Just one day later, on June 30, 1998, the same plaintiffs' counsel filed yet another class action lawsuit on behalf of different plaintiffs against the same defendant banks — SBC, CS, and UBS — in state court in San Francisco, California.[222] The California plaintiffs did not assert any allegations regarding deposited assets or dormant accounts, but did once again allege that the banks profited from "knowingly accepting for deposit and concealing the existence of slave labor profits and assets looted by the Nazis."[223] Plaintiffs, however, stated only one cause of action: violation of the California Unfair Competition Act.[224] They alleged that the banks' trafficking and/or concealment of the looted and slave labor assets constituted "unlawful, unfair and/or fraudulent business and/or practices" prohibited by the Act.[225]

C. The Motions To Dismiss Or Stay Proceedings

On May 15, 1997, the defendant banks responded to plaintiffs' complaints by filing several motions to dismiss or, in the alternative, to stay (*i.e.*, postpone) the proceedings. Plaintiffs filed papers in opposition to defendants' motions on June 16, 1997, and defendants countered with reply papers on July 9, 1997.[226] The motions raised many procedural and substantive legal issues. Among defendants' procedural arguments were the following:

Abstention: Defendants first asserted that plaintiffs' claims could be resolved without resort to litigation, through superior, cooperative alternative mechanisms, such as the

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222 Markovicova v. Swiss Bank Corp., No. 996160 (Cal. Sup. Ct., filed June 30, 1998) (hereinafter, "Markovicova Compl.").

223 Markovicova Compl., ¶ 1.

224 *Id.* ¶ ¶ 43-46.

225 *Id.* ¶ 44.

226 The motion papers were so voluminous that both sides also submitted overview memoranda summarizing the arguments made in their briefs.

claims process being conducted by ICEP.[227] Defendants urged the Court to abstain from deciding the merits of plaintiffs' claims or, alternatively, to stay the proceedings until ICEP's work was completed to avoid "[1] interfering with Swiss sovereign interests, [2] encroaching on the conduct of U.S. foreign policy, and [3] impeding superior alternative processes for resolving Holocaust-related claims."[228]

In response, plaintiffs characterized defendants' abstention argument as an improper attempt to control the process by which Holocaust-related claims would be compensated. Plaintiffs emphasized the futility of the efforts already made, for the past 50 years, to obtain redress outside of the courts.[229]

Standing: Defendants next argued that plaintiffs lacked standing to sue because they could not link or trace any profits or revenue from the looted assets or slave labor of an individual plaintiff to any individual defendant Swiss bank.[230] Defendants similarly asserted that plaintiffs could not tie the damages they sought on the looted assets and slave labor claims to any specific plaintiff's injury.[231]

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227 Reply Mem. Of Law in Support of Defendants' Motions to Dismiss on Abstention Grounds and in the Alternative to Stay these Proceedings, at 1-7 (July 9, 1997). *See also id.* at 5 (asserting that "an independent claims resolution body will be established to make claims determinations and to resolve any disputes that may arise during the claims process, such as those between competing claimants").

228 Defendants' Overview Reply Mem., at 22-24 (July 9, 1997); *see also* Defendants' Post-Hearing Reply Mem. Of Law, at 6 (Sept. 12, 1997).

229 Memorandum of Law Submitted by Burt Neuborne (June 16, 1997) (hereinafter, "Neuborne Mem."), at 61-63; 71-72.

230 Defendants' Overview Reply Mem., at 18 (July 9, 1997); Mem. of Law in Support of Defendant's Partial Motion to Dismiss for Lack of Standing to Sue, at 6-15 (May 15, 1997).

231 Defendants' Overview Reply Mem., at 18-19 (July 9, 1997); Mem of Law in Support of Defendants' Partial Motion to Dismiss for Lack of Standing to Sue, at 16-18 (May 15, 1997).

Plaintiffs responded that defendants' standing argument was premature and that discovery might enable them to prove individual linkage.[232] Additionally, plaintiffs argued, equity would permit theories of group entitlement and collective liability to be utilized to prevent the unjust enrichment of the banks.[233]

Diversity Jurisdiction: Defendants argued that the complaints also should be dismissed for lack of diversity jurisdiction due to the absence of complete diversity of citizenship between the parties. Defendants pointed out that the various complaints included both alien (or foreign) plaintiffs and alien defendants as parties.[234]

As noted above, plaintiffs cured this jurisdictional defect by filing amended complaints, one with all named plaintiffs as United States citizens,[235] and one with all named plaintiffs as aliens whereby federal jurisdiction was claimed under the Alien Tort Claims Act ("ATCA"), a federal statute.[236]

Federal Question Jurisdiction: The parties disputed whether claims sounding in customary international law arise under federal common law and thus confer federal question jurisdiction.[237]

Jurisdiction under the Alien Tort Claims Act: The parties also disputed whether the ATCA could confer federal jurisdiction. The ATCA grants original jurisdiction to federal

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232 Neuborne Mem., at 76.

233 *Id*. at 76-77.

234 Defendants' Overview Reply Mem., at 17-18 (July 9, 1997).

235 Weisshaus v. Union Bank of Switzerland, No. CV-96-5161 (filed July 30, 1997).

236 Sonabend v. Union Bank of Switzerland, No. 96-5161 (filed July 29, 1997).

237 Mem. of Law in Support of Defendants' Motion to Dismiss the Complaints for Lack of Subject Matter Jurisdiction, at 35-41 (May 15, 1997); Defendants' Overview Reply Mem., at 19 (July 9, 1997); Neuborne Mem., at 56.

courts over "any civil action by an alien for a tort only committed in violation of the law of nations or a treaty of the United States."[238] While defendants maintained that plaintiffs were not all aliens and that the claims were not purely tort-based, they principally argued that allegations of the banks' commercial activities, even if accepted as true, did not and could not rise to the level of a violation of the law of nations.[239]

Plaintiffs responded by claiming that the Swiss banks knowingly financed the Nazi war efforts, knowingly engaged in transactions with the Nazis that furthered their criminal activities, and knowingly accepted assets that were looted and that resulted from slave labor — all of which constituted violations of recognized international law principles.[240]

Forum Non Conveniens: Defendants argued that the complaints against them also should be dismissed on grounds of *forum non conveniens* (or inconvenient forum). They claimed that Switzerland was a more convenient and appropriate forum to adjudicate plaintiffs' claims, arguing that, among other things, the conduct complained of occurred in Switzerland, most of the evidence remains there, and Swiss law applied to the majority of the claims asserted.[241] Defendants further claimed that Switzerland retained a strong national interest in the

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238 28 U.S.C. § 1350 (1994).

239 Mem. of Law in Support of Defendants' Motion to Dismiss the Complaints for Lack of Subject Matter Jurisdiction, at 42-62 (May 15, 1997); Defendants' Overview Reply Mem., at 16-17 (July 9, 1997).

240 Plaintiffs' Mem. of Law in Opposition to Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction and for Failure to State a Claim Under International Law, at 16-45 (June 16, 1997).

241 Mem. of Law in Support of Defendants' Motion to Dismiss on Forum Non Conveniens Grounds, at 10-39 (May 15, 1997); Reply Mem. of Law in Support of Defendants' Motion to Dismiss on Forum Non Conveniens Grounds, at 7-29 (July 9, 1997).

dispute, while litigation in the United States would create enormous and unnecessary administrative burdens.[242]

In response, plaintiffs contended that much of the relevant evidence is not located in Switzerland, but can be found in the United States Holocaust Memorial Museum and throughout Europe.[243] Moreover, plaintiffs argued that litigating this lawsuit in Switzerland would be a practical impossibility due to Switzerland's refusal to recognize class action lawsuits.[244]

In addition to the procedural arguments described above, defendants also raised numerous substantive grounds for dismissal, including plaintiffs' purported failure to state causes of action for the three basic claims asserted — those relating to dormant accounts, looted assets and slave labor.

With respect to the dormant account claims, defendants argued that such claims failed because most plaintiffs were unable to allege or prove that a specific account belonging to them was held by a specific defendant bank. Under the unusual circumstances presented here — where more than 50 years have passed since the deposits were made — most of the relevant records either have been lost or destroyed or the original depositor is no longer alive to testify.[245] Defendants contended that plaintiffs' dormant accounts claims therefore had to be dismissed due to a lack of evidence.[246]

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242 Reply Mem. Of Law in Support of Defendants' Motion to Dismiss on Forum Non Conveniens Grounds, at 28-29 (July 9 1997).

243 Neuborne Mem., at 72-75.

244 *Id.* at 73.

245 *See* Neuborne Mem., at 15-16.

246 Reply Mem. of Law in Support of Defendants' Partial Motion to Dismiss Common-Law Claims for

(continued on next page)

Plaintiffs contended, as they had before, that discovery might cure any such defects[247] and that, even if they could not link specific accounts to specific banks, defendants still could be held liable collectively under theories of joint and several liability.[248] Plaintiffs argued that a demonstration of the banks' concerted actions to obstruct plaintiffs' tracing of their accounts would provide a sound and compelling equitable basis from which to find the banks collectively liable.[249]

Plaintiffs alternatively asserted a claim for several liability under the "market share" doctrine,[250] contending that each defendant bank could be held liable in proportion to the share of deposits it held. Plaintiffs acknowledged that use of the market share doctrine in this case would be novel, but alleged that any decision resulting in the banks' retention of these deposits would further perpetuate the unjust enrichment of the banks for the last 50 years at the expense of the Nazi victims who were the rightful owners of such funds.[251]

With respect to looted assets and slave labor claims, defendants argued that plaintiffs' inability to link or trace any profits generated from the assets or labor of a particular

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Failure to State a Claim, at 11-12 (July 9, 1997).

247 Neuborne Mem., at 21.

248 Neuborne Mem. at 20-21. Joint and several liability refers to liability that is shared among co-promisors or joint tortfeasors. Liability is said to be joint and several when a plaintiff may demand payment from or sue the liable parties separately or together at the plaintiff's option. *See* W. Page Keeton, *et al.*, Prosser and Keeton on the Law of Torts, at 327-28 (5th ed. 1984) (hereinafter, "Prosser and Keeton").

249 Neuborne Mem., at 20-21.

250 *Id*. The market share doctrine has been used in products liability actions in which the courts do not require a precise link between the harm caused by a defendant and that suffered by a plaintiff. Rather, each defendant may be held liable in proportion to the market share it retains of whatever dangerous product has caused the plaintiff's injury. *See* Sindell v. Abbott Laboratories, 607 P.2d 924, 938 (Cal. 1980); Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069, 1078 (N.Y. 1989); Prosser and Keaton, §103, at 714.

plaintiff to a particular defendant was fatal to such claims.[252] Once again, plaintiffs argued that discovery might provide such links and that, alternatively, equity would permit theories of group entitlement and collective liability to be used to prevent the unjust enrichment of the banks.[253]

Defendants' final principal substantive argument was that plaintiffs' reliance on international customary law to support their looted assets and slave labor claims was inappropriate.[254] The banks asserted that their conduct did not violate international human rights norms.[255] They further asserted that private corporations generally are not subject to liability under customary international law and that, in any event, private commercial transactions with Nazis by banks in neutral countries such as Switzerland did not violate customary international law.[256]

The parties sharply contested this issue. Defendants cited the Nuremberg trial of Karl Rasche, chairman of the Dresdner Bank, and his acquittal of all wrongdoing for his actions as a banker.[257] Defendants contended that, under the Rasche decision, the provision of basic commercial banking services (such as the exchange of cash or credit) did not violate customary international law even where the bank was fully aware that its customer was committing war

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[251] Neuborne Mem., at 20-21.

[252] Defendants' Overview Reply Mem. at 18-19 (July 9, 1997); Defendants' Mem. in Support of Motion to Dismiss for Failure to State a Cause of Action, at 3-4, 19-51 (May 15, 1997).

[253] Neuborne Mem., at 20-21.

[254] Plaintiffs abandoned their initial position that their looted assets and slave labor claims could be pursued under specific international treaties, and instead based these claims entirely on customary international law. Neuborne Mem., at 28-35; 39-45.

[255] Reply Mem. of Law in Support of Defendants' Motion to Dismiss the International Law Claims in Friedman and World Council for Failure to State a Claim, at 8-17 (July 9, 1997).

[256] *Id*. at 36-42.

[257] *Id*. at 22.

crimes.[258] Plaintiffs asserted that, while Rasche may have been acquitted for ordinary commercial banking transactions, he was, in fact, convicted in the Nuremberg trial for knowingly trafficking in looted assets and assisting Nazi war crimes.[259]

D. The Settlement Agreement

On August 1, 1997, Judge Korman heard oral arguments on the massive motions to dismiss. Judge Korman reserved decision on the motions for over one year, while settlement negotiations intensified. Then-Assistant Secretary of State Stuart E. Eizenstat was called upon to serve as a mediator and other public officials also offered to assist in the settlement process.[260]

In May 1998, Credit Suisse agreed to settle separately with Estelle Sapir, one of the most highly publicized dormant account plaintiffs.[261] Classwide negotiations, however, once again stalled. At this point, various state and local officials threatened a series of sanctions against the Swiss banks in the event that an agreement could not be reached.[262]

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258 *Id*. at 26-27.

259 Neuborne Mem., at 32-33.

260 *See* Declaration of Burt Neuborne in Support of Plaintiffs' Motion for Final Approval of Proposed Class Action Settlement, dated November 5, 1999, at 13 (hereinafter, "Neuborne Declaration").

261 *See* David E. Sanger, *Under Pressure, Big Swiss Bank Yields to Daughter of Nazi Victim*, N.Y. Times, May 5, 1998, at B1.

262 On July 3, 1998, New York State Comptroller H. Carl McCall and New York City Comptroller Alan Hevesi announced that, if a settlement was not reached by September 1, 1998, they would prohibit Swiss banks and investment firms from selling state and city debt and would stop any future short-term investment deposits with the Swiss banks. If a settlement was not reached by November 1, 1998, the comptrollers would instruct private investment managers for the state and city to stop trading through Swiss firms. It appeared that other states, including California, were likely to impose similar sanctions. *See* John J. Goldman, *Pressure Rises for Holocaust Fund Pact*, L.A. Times, July 3, 1998, at A31.

By this time, the Court had taken an active role in facilitating a settlement, convening long, intensive negotiating sessions in chambers.[263] On August 12, 1998, the parties reached an agreement in principle to settle the Lawsuits. In consideration for a payment of $1.25 billion originally to be paid in four equal installments,[264] the agreement required a broad release of virtually all Holocaust-related claims against virtually all Swiss business and governmental entities.[265] The cases filed in California state court and the District of Columbia — Markovicova and Rosenberg — also were resolved via the settlement.

The parties did not formally execute the Settlement Agreement, however, until January 26, 1999. This five-month delay was caused, in large part, by disagreements among counsel in defining who should be eligible for compensation.[266] While it was generally agreed that targets of systematic Nazi oppression on grounds of race, religion, and politics should benefit from the settlement,[267] the specification of such groups was fraught with difficulty. The Settlement Agreement ultimately designated as beneficiaries "Victim[s] or Target[s] of Nazi Persecution," defined as any persons or entities "persecuted or targeted for persecution by the

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263 Neuborne Declaration, at 13.

264 The first two installments of $250 million and $333 million were paid into an escrow account by the defendant banks on November 23, 1998 and November 23, 1999, respectively. The remaining installments of $333 million and $334 million each were to be paid on November 23, 2000 and November 23, 2001, respectively. Settlement Agreement, Section 5.1. Pursuant to Amendment No. 2 (discussed below), the parties agreed, among other things, to accelerate the fourth installment payment by one year.

265 Settlement Agreement, Sections 1 (Definition of "Releasees" and "Other Swiss Banks"), 12, Ex. B. Claims against certain Swiss insurance companies explicitly were exempted from the agreement.

266 Henry Weinstein, *Holocaust Survivors, Swiss Banks OK Settlement*, L.A. Times, Jan. 23, 1999, at A13.

267 Neuborne Declaration, at 13.

Nazi regime because they were or were believed to be Jewish, Romani, Jehovah's Witness, homosexual, or physically or mentally disabled or handicapped."[268]

To be eligible for compensation under the Settlement Agreement, a party must fall within one of the five following Settlement Classes (described previously): the Deposited Assets Class, the Looted Assets Class, Slave Labor Class I, Slave Labor Class II, or the Refugee Class.[269] Except for Slave Labor Class II, a claimant must also be a "Victim or Target of Nazi Persecution" to participate in the settlement.[270]

While the Settlement Agreement delineates who is eligible for compensation and sets forth certain terms and conditions pursuant to which the settlement will be implemented, the Agreement does not specify precisely how the $1.25 billion will be allocated and distributed amongst the Settlement Classes. Rather, in accordance with the recommendations of the plaintiffs' Executive Committee, the Settlement Agreement authorizes the appointment of a Special Master to formulate a plan of allocation and distribution. Section 7.1 of the Settlement Agreement provides:

> Settling Plaintiffs shall apply to the Court for appointment of a Special Master within thirty (30) days after Preliminary Approval. The Special Master shall develop a proposed plan of allocation and distribution of the Settlement Fund, employing open and equitable procedures to ensure fair consideration of all proposals for allocation and distribution. The proposed allocation and distribution plan must be approved by the Court before the Settlement Fund may be distributed. Settling Plaintiffs shall implement the Court-approved plan under the Court's supervision. Settling Plaintiffs shall provide the Court and Settling Defendants a quarterly report accounting for expenses paid from the Settlement Fund

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[268] Settlement Agreement, Section 1.

[269] *Id.* Section 8.2.

[270] *Id.* As noted previously, Slave Labor Class II applies to "individuals," and is not limited to "Victims or Targets of Nazi Persecution." *Id.*

> and itemizing the amounts distributed to claimants against the Settlement Fund and other recipients of payments from the Settlement Fund.

By Order dated March 30, 1999, the Court preliminarily approved the Settlement Agreement and provisionally certified the five Settlement Classes. In accordance with Section 7.1 cited above, and Plaintiffs' Executive Committee's unanimous endorsement,[271] Judge Korman appointed Judah Gribetz as Special Master to develop a comprehensive plan of allocation and distribution of the settlement proceeds.

E. The Referral Orders

Judah Gribetz was formally appointed as the Special Master in this case by Order dated March 31, 1999,[272] as modified by Orders altering the schedule of deadlines dated June 4, 1999, December 23, 1999, March 14, 2000, and August 11, 2000. The appointment was "deemed made as of December 15, 1998, the date the parties agreed to his appointment and the date he began to perform informally the duties of Special Master."[273]

Consistent with Section 7.1 of the Settlement Agreement, the March 31 Order directs the Special Master to develop a proposed Plan of Allocation and Distribution of the settlement fund, subject to Court approval. It anticipates that the Plan will provide for the fair and equitable distribution of the settlement fund and include a recommendation for "where

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[271] *See* letter to Hon. Edward R. Korman from Professor Burt Neuborne, dated December 15, 1998 (on file with Special Master).

[272] *See* Referral to Special Master for Development of Plan to Allocate and Distribute Settlement Proceeds, dated March 31, 1999 (hereinafter, the "March 31 Order").

[273] March 31 Order, ¶ 1.

residual funds, if any, remaining after distribution to eligible members of the Settlement Classes (as defined in the Settlement Agreement) shall be distributed."[274]

F. The Notice Plan

A Notice Plan was created to provide members of the Settlement Classes with notice of the certification of the Settlement Classes, the terms of the Settlement Agreement, their rights with respect to the proposed settlement, and the deadline for submitting exclusion requests and objections.[275] The Court adopted the Notice Plan on May 10, 1999, finding it "the best notice practicable under the unique circumstances of this case, taking into account the geographic dispersion of the class, the size of the Settlement Fund, and other relevant factors."[276]

No lists of class members were available for a simple direct mail notice program. Instead, the Notice Plan involved the coordination of several different components including not only direct mail, but worldwide publication, public relations ("earned media"), the Internet, and grass roots community outreach.[277] The elements of the Notice Plan included, among other things:

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[274] *Id.* ¶ 3. To accomplish this task, the March 31 Order, paralleling Rule 53 of the Federal Rules of Civil Procedure, expressly authorizes the Special Master to "conduct hearings and to interview or otherwise communicate with members of the Settlement Classes," to "travel domestically or abroad to conduct such hearings or interviews" and to "discuss any aspect of the allocation and distribution issues." *Id.* ¶ 4. The March 31 Order also authorizes the Special Master to employ "other persons including lawyers, consultants, experts or claims administrators" as he deems advisable to assist him. *Id.* ¶ 6.

[275] *See* Notice Plan, at 3. The Notice Plan was designed to reach more than 1 million Holocaust survivors, and millions of their heirs, throughout the world. *See id.*

[276] Order Appointing Notice Administrators, Approving Forms of Notice and Notice Plan, Scheduling Exclusion Requests and Objection Deadlines, and Scheduling Final Fairness Hearing, dated May 10, 1999 (hereinafter, "Notice Order") at 3, ¶ 8; 4, ¶ 3.

[277] *See* Memorandum of Law In Support of Plaintiffs' Motion For Final Approval of Proposed Class Action Settlement, (hereinafter, "Plaintiffs' Mem. In Support of Final Approval"), at 13.

- placement of the Court-approved Notice in paid publications, including 371 appearances in mainstream newspapers and 622 appearances in Jewish publications, placed in 40 countries;
- press efforts that resulted in additional coverage in at least 552 news articles, and 34 countries;
- an extensive community outreach program;
- a direct mail program, including more than 1.7 million Notice packages sent to potential Class members in 137 countries;
- a voice response system that fielded almost 500,000 calls; and
- an Internet notice effort which resulted in over 316,000 "hits" on the Court-ordered website.[278]

This massive notice program resulted in the return of over 564,000 Initial Questionnaires to the Notice Plan administrators from potential class members throughout the world.[279]

G. Amendment No. 2 to the Settlement Agreement

Following implementation of the Notice Plan discussed above, the Court held a Fairness Hearing on November 29, 1999 in New York, and conducted and presided (by electronic hookup) over a supplemental fairness hearing that was held in Israel on December 14, 1999. The parties agreed to additional modifications to the Settlement Agreement in response to certain objections and comments made at the Fairness Hearings. Specifically, objections were made that the broad scope of the releases initially contemplated in connection with the Looted Assets Class might pose an obstacle to the recovery of artworks and other items of specific

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[278] *See* Plaintiffs' Mem. In Support of Final Approval, at 12-13 (citing reports by Notice Plan administrators); September 7, 2000 Notice Administration Letter.

[279] *See* Initial Questionnaire Data.

property looted by the Nazis and currently in the possession of a Swiss releasee.[280] The defendant banks agreed to modify the original agreement to assure that persons may seek assistance in recovering looted artwork from releasees without any serious impediment created by the Settlement Agreement. The amended releases do not bar actions in the nature of replevin designed to recover specific items or artwork, as long as the actions are brought in the country where the artwork is located, or from which it was looted.[281]

Further objections were made at the Fairness Hearing to the inclusion of certain insurers as "Releasees" under the Settlement Agreement.[282] The objections related to the effectiveness of notice as to claims against released Swiss insurers and the appropriateness of releasing such insurers in the absence of a mechanism to pay valid Holocaust-related claims as part of the distribution of the Settlement Fund.[283] The modifications in response to these objections involve the "*de facto* creation of a sixth class of beneficiaries who would be entitled to file claims against the participating insurance carriers by virtue of (i) those carriers' infusion of an additional $50 million in cash to the settlement fund and (ii) the agreed upon allocation of $50 million of the existing settlement fund to pay such insurance claims."[284]

Additional modifications were made to the Settlement Agreement concerning the Deposited Assets Class. These modifications (discussed at Sections II and III of the Proposal)

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280 In re Holocaust Victim Assets Litigation, at 33.

281 *Id.* at 34.

282 The original Settlement Agreement provides for releases to a number of unidentified non-party Swiss insurance companies, defined broadly to include any insurance company where at least 25 percent of the outstanding stock is owned by a Swiss company. *Id.* at 35.

283 *Id.*

284 *Id.* at 44-45. The modifications also create a mechanism, set forth in Article 4 of Amendment No. 2 to the Settlement Agreement, to evaluate and pay Holocaust-related insurance claims. *See id.* at 35-

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include, among other things, the defendant banks' agreement to cooperate with the recommendations of the Volcker Committee, provisions regarding the payment of Deposited Assets claims, and provisions regarding the continued operation and funding of the CRT.

H. The Final Approval Order

On July 26, 2000, the Court issued an order granting final approval to the Settlement Agreement. The Court observed that Settlement Agreement was reached after "lengthy, well-informed and arm's length negotiations by competent and dedicated counsel who provided loyal and effective legal representation to all parties."[285] The Court also measured the adequacy and reasonableness of the settlement against the "practical alternative to the settlement in the real world … prolonged, complex and difficult litigation, in which plaintiffs' chance of success as a class was uncertain."[286] The Court agreed that "while, in a perfectly just world, plaintiffs should have received a far greater sum, in the real world, a recovery of $1.25 billion in return for broad releases was the best that dedicated and competent counsel could achieve under the circumstances of this case."[287]

In its July 26 Order, the Court directed the defendant banks to advise the Court within seven business days whether they intended to adhere to the as yet unexecuted Amendment No. 2 to the Settlement Agreement, and informed the defendant banks that if they did not so intend, the Court would, at that time, enter a final judgment approving the original Settlement

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36; *see also* Section I, *supra*.

285 In re Holocaust Victim Assets Litigation, at 10.

286 *Id.* at 13.

287 *Id.* at 15.

Agreement.[288] On August 4, 2000, defendants advised the Court that they intended to execute Amendment No. 2[289] and, thereafter, the Court entered final judgment granting approval to the Settlement Agreement as amended.[290]

III. DETAILED ALLOCATION AND DISTRIBUTION RECOMMENDATIONS FOR THE FIVE SETTLEMENT CLASSES

A. Deposited Assets Class

1. Class Definition:

The "Deposited Assets Class" is defined under the Settlement Agreement as "Victims or Targets of Nazi Persecution and their heirs, successors, administrators, executors, affiliates, and assigns who have or at any time have asserted, assert, or may in the future seek to assert Claims, against any Releasee for relief of any kind whatsoever relating to or arising in any way from Deposited Assets or any effort to recover Deposited Assets." (Settlement Agreement, Section 8.2(a)).

As further defined in the Settlement Agreement, "Deposited Assets" are:

> (1) any and all Assets actually or allegedly deposited by the beneficial owner, fiduciary, or other individual or organization with any custodian, including, without limitation, a bank, branch or agency of a bank, other banking organization or custodial institution or investment fund established or operated by a bank incorporated, headquartered, or based in Switzerland at any time (including, without limitation, the affiliates, subsidiaries, branches, agencies or offices of such banks, branches, agencies, custodial institutions, and investment funds that are or were located either inside or outside Switzerland at any time) in any kind of account (including, without limitation, a safe deposit box or securities

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288 *Id.* at 49.

289 *See* "Defendants' Submission Regarding Amendment No. 2 to the Settlement Agreement and the July 20, 2000 Memorandum to the File," dated August 4, 2000 (hereinafter, "Defendants' August 4, 2000 Submission").

290 Additional details regarding the Court's Final Approval Order are discussed in Sections II and III.

> account) prior to May 9, 1945, that belonged to a Victim or Target of Nazi Persecution, including, without limitation, any Assets that Settling Defendants or Other Swiss Banks determine should be paid to a particular claimant because the Assets definitely or possibly belonged to a Victim or Target of Nazi Persecution; and/or (2) any and all Assets that the ICEP or the Claims Resolution Tribunal determines should be paid to a particular claimant or to the Settlement Fund because the Asset definitely or possibly belonged to an individual, corporation, partnership, sole proprietorship, unincorporated association, community, congregation, group, organization, or other entity (including, without limitation, their respective heirs, successors, affiliates, and assigns) actually persecuted by the Nazi Regime or targeted for persecution by the Nazi Regime for any reason. A determination by the ICEP or the Claims Resolution Tribunal to award a special adjustment for interest or fees to a particular claimant pursuant to the guidelines of the Panel of Experts on Interest and Fees and Other Charges shall be deemed to establish that the claimant was persecuted or targeted for persecution within the meaning of subsection (2) of this definition (*see* Settlement Agreement, Section 1).

An additional definition of relevance to this settlement class is that of "Matched Assets," which are defined as "Deposited Assets that the ICEP or the Claims Resolution Tribunal determines belong, and should be paid to, particular claimants." (*See* Settlement Agreement, Section 1).

A total of 80,610 of the approximately 562,000 respondents who returned Initial Questionnaires for which data has been entered thus far, have indicated that they intend to assert a claim to Deposited Assets.[291] That estimate, however, could increase significantly following worldwide publication of approximately 26,000 Swiss bank accounts deemed by the Volcker Committee to have a "probable" relationship to a Holocaust victim.

2. Allocation Principles

As noted previously, the Settlement Agreement as originally executed on January 26, 1999 anticipated that the then-ongoing Volcker Committee forensic accounting investigation

[291] *See* Initial Questionnaire Data, Table 1, p. 3.

would continue to its completion.[292] In evident recognition of ICEP's work, and in contrast to the other settlement classes, the Settlement Agreement made express provision for determination of Deposited Assets claims:

> "ICEP Investigation and Claims Resolution
>
> 4.1. Although the parties anticipate that the ICEP and the Claims Resolution Tribunal will continue, at certain Releasees' expense, in a manner that is appropriate in light of this Settlement Agreement, Releasees shall have no additional financial exposure or additional liability of any kind whatsoever beyond the Settlement Amount on account of the activities or findings of the ICEP, the ICRF, or the Claims Resolution Tribunal, or on account of any cessation of or change in the activities of the ICEP, the ICRF or the Claims Resolution Tribunal, excluding costs associated with the functioning of those entities.
>
> 4.2 Settling defendants shall pay Matched Assets, together with interest and fees as determined pursuant to guidelines established by the ICRF, to rightful claimants as and when determined by the ICEP or the Claims Resolution Tribunal. Such payments of Matched Assets shall be deemed to be included in, and part of, the Settlement Amount and shall in no event cause the Settlement Amount to be increased. . . .
>
> 4.3 Persons receiving payments as determined by the ICEP or the Claims Resolution Tribunal shall not be precluded on account of those payments from receiving a distribution from the Settlement Fund."

Section 5.2 of the Settlement Agreement similarly provided that "[a]ll amounts (including, without limitation, interest and fees) that Settling Defendants and Other Swiss Banks have paid since October 3, 1996, or may pay in the future to Deposited Asset claimants as a result of determinations made by the ICEP or the Claims Resolution Tribunal shall reduce the Settlement Amount and may be credited in full against the installment next due . . . or against any subsequent installment."[293]

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[292] *See* Settlement Agreement, at page 1 ("Settling Plaintiffs and Settling Defendants commit to support and urge the conclusion of the mandates of the Volcker Committee").

[293] Section 5.3 of the Settlement Agreement makes the same provision for payments made to all other

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As mandated by Sections 4 and 5 of the Settlement Agreement, then, the amount of the Settlement Fund to be available for distribution to the Looted Assets, Slave Labor I and II, and Refugee Classes was to be dependent upon the amounts to be distributed to those with claims to Swiss bank accounts.

Although the specific findings of the Volcker Committee were not anticipated by the parties when they entered into the Settlement Agreement,[294] the Settlement Agreement clearly was structured so that the Volcker Committee's ultimate conclusions would be incorporated into any eventual recommendation on allocation and distribution of the Settlement Fund. The parties have since agreed to certain amendments to the Settlement Agreement which, among other things, have modified the language of Section 4.1. Nevertheless, as previously described, "the amendments to the Settlement Agreement that have been negotiated tediously over the last few months with [the Court's] informal approval"[295] continue to reinforce the parties' original agreement to abide by the Volcker Committee's findings, and to give priority to repayment of Deposited Assets.[296]

As noted above, the Court has made clear that a "fair and efficient claims process in connection with the Deposited Assets Class must build on the fact that the Volcker Committee's auditors, despite the massive destruction of relevant records over the past 60 years,

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bank deposit claimants, such as through governmental agencies including the HCPO.

294 *See, e.g.*, In re Holocaust Victim Assets Litigation, at 20 (the informal agreement to settle litigation reached in August, 1998 was made "with knowledge that the Volcker Committee's investigation was ongoing and not likely to be completed for some time").

295 *Id.* at 42.

296 *See* Section II *supra* for a more detailed discussion of the Volcker Committee's conclusions.

were able to identify the approximately 54,000 Swiss bank accounts discussed above."[297]

Further,

> in order to continue the work of the Volcker Committee, it will be necessary to establish a deposited assets claims process designed to (i) notify potential claimants of the existence of the 54,000 accounts referred to in the Volcker Report;[[298]] (ii) determine whether the original owners of such accounts are or were targets or victims of Nazi persecution, as defined in the Settlement Agreement; (iii) ascertain their heirs, if necessary; (iv) determine the amounts attributable to each account; (v) explore the circumstances surrounding the closing of certain of the accounts; and (vi) distribute the appropriate amounts to the current owners.[299]

Like the Court, the Special Master believes that the Volcker Committee's unprecedented investigation and historic findings deserve the utmost respect, and dictate the claims process for the Deposited Assets Class.

3. Distribution

The Volcker Report describes the Committee's identification of many thousands of accounts with "a probable or possible relationship to victims or Nazi persecution."[300] The accounts fall into four categories:

- Category 1: "Category 1 is composed of 3,191 Relevant Period accounts that remain open and dormant, were placed in suspense accounts, or closed after some

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297 In re Holocaust Victim Assets Litigation, at 24.

298 The Volcker Committee initially recommended that approximately 25,000 of these accounts be published; those numbers have since been adjusted to approximately 26,000 accounts recommended for publication of 46,000 "probable" or "possible" accounts. *See id.* at 20.

299 *Id.*, at 24-25; Supplemental Declaration of Burt Neuborne, June 26, 2000, ¶ 19. The Court further observed that "a fair claims process must provide a mechanism to enable any person with a potential claim to have names matched against the database of 4.1 million accounts for which records exist," in addition to the matching of claims against the database of accounts "probably" or "possibly" belonging to "Victims or Targets of Nazi Persecution." In re Holocaust Victim Assets Litigation, at 24; Volcker Report, ¶ 76.

300 *Id.* ¶ 30.

period of dormancy, and matched exactly or almost exactly with names of known Holocaust victims or claimants."[301]

- Category 2: "Category 2 is made up of 7,280 accounts that do not meet the exact or near-exact name matching test, but nonetheless have other characteristics that suggest that there may be a probable or possible relationship between the account holders and victims of Nazi persecution — Relevant Period accounts of people who were resident in an Axis or Axis-occupied country during that Period, that were either inactive for at least 10 years after 1945 or, in some cases, identified by the bank as the account of a victim, or otherwise met certain criteria."[302]

- Category 3: "Accounts in Category 3 are composed of a much larger number of closed accounts — 30,692 — open in the Relevant Period by residents of Axis or Axis-occupied countries, matched exactly or almost exactly to names of victims, and were closed (except for Germany) during or subsequent to the year of Axis occupation of the country of residence of the account holder or after the war. These characteristics are indicators of a probable or possible relationship of these accounts to victims. However, these accounts have no direct evidence of an extended period of dormancy, or of unauthorized closure, important elements of the presumption that there was a relationship to a victim. Nevertheless, 14,716 of these accounts have unique name matches or have confirming factors. Of these accounts, 5,776 matched uniquely to only one name of a victim of Nazi persecution, and 4,283 names matched to two names on the victims list. An additional 4,657 accounts matched to more than two names but had confirming factors, including the families that matched to the same or different victims lists (1,755), and common cities (1,026), and countries (1,851). These 15,980 unique or almost unique matches indicate a significantly higher probability that the relationship of these accounts to victims is not simply a coincidence of common names but are genuine matches between account holders and victims of Nazi persecution."[303]

- Category 4: "Category 4 consists of another 12,723 nominally foreign accounts opened in the Relevant Period that could not be matched to victim names and lacked evidence of a residence by an account holder in an Axis or Axis-occupied country during the Relevant Period. Some 8,400 suspended, unknown and savings type accounts in this Category come from Swiss Volksbank (now a part of Credit Suisse Group) and Banque Cantonale Neuchateloise. Although these banks had a predominantly domestic retail business during the Relevant Period, they also had many contacts with foreigners. All of the accounts in this Category

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301 *Id.* ¶ 32 (footnotes omitted); *id.* Annex 4 ¶ 22. "Relevant Period" is defined as the period from January 1, 1933 through December 31, 1945. *Id.* at A-215.

302 *Id.* ¶ 32; *id.* Annex 4 ¶ 23.

303 *Id.* ¶ 33 (footnotes omitted); *id.* Annex 4 ¶ 25.

> were considered as having a sufficiently possible relationship to Holocaust victims to warrant their inclusion in Category 4."[304]

The Volcker Report makes clear that "[o]n the basis of information now available, no valid estimate can be made of the aggregate value of the accounts due victims of Nazi persecution or their heirs until a claims resolution process has determined which claimants are properly entitled to such accounts."[305] Nevertheless, although precise values cannot yet be assessed, the auditors have developed a range of estimates for many of the accounts. Each estimate has been brought forward to current values by multiplying 1945 values by a factor of 10 (the so-called "Kaufman factor," named for the economist Henry Kaufman who led the panel that studied account values on behalf of the Volcker Committee).[306]

Thus, for Category 1 (of which 70 percent of accounts have known values) and Category 2 (of which 80 percent of accounts have known values), the auditors have estimated that the "total fair current value" of these accounts would be SFr. 411 million using the mean value of known account values, or SFr. 271 million "if the median value" is used (a range of approximately $231,497,127 to $152,641,658 at the September 11, 2000 exchange rate of $1.00

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[304] *Id.* ¶ 34 (footnote omitted); *id.* Annex 4 ¶ 26.

[305] *Id.* ¶ 35. According to the Report, there are "two main obstacles to such an attempt" to determine values. *Id.* First, "identification of an account as 'probably or possibly' related to a victim does not in itself indicate the validity of such a relationship. The identified accounts vary widely in the degree of probability attached to them, and there is now no way of determining the number of accounts that will be claimed or that will be recognized for payment by the claims resolution process. In that connection, more than half the identified accounts have been closed for reasons unknown." *Id.* Second, "for about half the identified accounts there is no information on account values. For accounts with such values, there is little consistency in valuation dates, uncertainty as to fees and charges paid or interest credited, and the proper valuation of securities in custody accounts." *Id.*

[306] *See id.*, Annex 8 ¶¶ 33, 34 ("After considering the Kaufman Panel Report, the Board [of Trustees of the ICRF] agreed to propose that for victims of Nazi or other governmental persecution during the relevant period… the applicable rate of return would be anchored to a market rate of return, namely, an adjustment factor of ten… In February 1999, the Board of Trustees of the Foundation had passed

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to SFr 1.7754).[307] "Because some of these accounts will not, in fact, be resolved in favor of claimants, these estimates are highly likely to be larger than amounts actually due and awarded to victims."[308]

For Category 3, "the projections are substantially more uncertain. Relatively few of those accounts (11 percent) have known values. A large portion of the funds are clustered in relatively few custody accounts. These and all Category 3 accounts have been closed for reasons unknown, adding a further element of uncertainty as to the proper valuation. For those reasons, the Committee felt no reliable projection of current values properly due victims for Category 3 was feasible."[309]

For Category 4, of which 98 percent of accounts have known values, "the estimated value" of these accounts is "SFr. 4.2 million,"[310] or SFr. 42 million when multiplied by the factor of 10 (approximately $23,656,641). For these accounts, however, "the probability of a

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a resolution necessary to implement the Kaufman recommendations").

[307] *Id.*, Annex 4 ¶¶ 38, 41. "Mean" is "a quantity with a value intermediate between the values of two or more other quantities; especially, the average." "Median" is the "middle; intermediate" point in a series of values. Webster's New Twentieth Century Dictionary of the English Language, Second Edition (Cleveland: William Collins Publishers, Inc. 1979). Without the multiplier of ten, the "total estimated book value for all accounts in Categories 1 and 2 is SFr. 31.5 million." Volcker Report, Annex 4 ¶ 38.

[308] Volcker Report, Annex 4 ¶ 41.

[309] *Id.*, Annex 4 ¶ 42 (footnote omitted). However, "[s]ome [ICEP] members point out that by a mechanical projection of the average values for Categories 1 and 2 over the larger number of Category 3 accounts, a present value ranging between SFr. 827 million and SFr. 1.9 billion [approximately $465,810,522 to $1,070,181,368] could be calculated depending upon use of median or mean values. Given the significantly greater uncertainty attached to Category 3 accounts in the light of their closed account character, that range of values for this Category would in all likelihood very substantially exceed awards to victims ultimately determined in a claims resolution process." *Id.* n.23.

[310] *Id.*, Annex 4 ¶ 38.

relationship to a victim is appreciably less, and the average size of the accounts is relatively small."[311]

The Volcker Report acknowledges that the above estimates are inexact, but affirms that "the Committee believes that claims of victims can be met within the amount specified in the agreed class action settlement now being considered in U.S. District Court, with funds from that settlement available for distribution to others covered by the settlement."[312] Therefore, it is the number of plausible claims that will dictate the portion of the Settlement Fund ultimately repaid to the Deposited Assets Class, as well as the amount remaining for further distributions, if any, as part of a "Stage 2" of payments (as described at Section I). Those sums will not be known until after the claims process is completed.

Based upon the Volcker Report, the Final Approval Order and the Special Master's consultations with representatives of the Volcker Committee, the Special Master

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311 *Id.* ¶ 42.

312 *Id.*, ¶ 37; *id.* Annex 4 ¶ 43. As the Court itself has noted, however, "the value of deposited assets held by the Swiss banks could exceed the $1.25 billion settlement amount." In re Holocaust Victim Assets Litigation, at 23, 42. In reaching this assessment, the Court was relying upon the value estimates described in the Volcker Report, particularly as to the closed accounts, which certain "[ICEP] members" had "point[ed] out" could have "a present value ranging between SFr. 827 million and SFr. 1.9 billion," Volcker Report, Annex 4 ¶ 42 n.23, or approximately $465,810,522 to $1,070,181,368. Defendants' August 4, 2000 Submission took issue with the Court's analysis, contending, among other things, that "the record is replete with contrary information." *Id.* ¶ 3. Defendants asserted that "ICEP concluded that of the four categories of accounts that comprise the '54,000' accounts probably or possibly linked to victims of Nazi persecution, categories 1 and 2 may have an extrapolated aggregate current value of up to $247 million (CHF 411 million). *See* ICEP Report, Annex 4, ¶ 41, at 72. The ICEP concluded that any projections for category 3 'are substantially more uncertain' than for categories 1 and 2, and therefore, 'felt no reliable projection of current values properly due victims for Category 3 was feasible.' *Id.* ¶ 42. Similarly, the ICEP made no projection of the values for accounts in category 4. *See id.*" Defendants' August 4, 2000 Submission, ¶ 3. Defendants did not, however, refer to the statement in the Volcker Report indicating that the value of closed accounts could range between "SFr. 827 million and SFr. 1.9 billion." Volcker Report, Annex 4 ¶ 42 n.23. Defendant banks also have not appealed from the Final Approval Order.

estimates that the value of bank accounts that will be repaid is within the range of $800 million. Therefore, it is recommended that a total of $800 million should be allocated to the Deposited Assets Class to repay the claims of depositors, or, far more likely, their heirs.

This recommendation will enable those with accounts of known value to be repaid (for an anticipated total amount, adjusted for current value, of approximately $194,641,658 to 273,497,127 million), while those with accounts of unknown value likewise can be fairly compensated. Owners of accounts of unknown value should initially receive, upon Court evaluation and approval, 35% of the CRT's recommended award (as adjusted for interest and fees). After all claims are processed, claimants to accounts of unknown value thereafter may receive a second payment of up to 65% of the CRT's recommended award.[313]

Even assuming that all of the accounts designated by the Volcker Committee as "probably" or "possibly" related to victims of Nazi persecution are actually claimed — which is highly unlikely, given the passage of more than half a century — under this Proposal, at least $450 million of the $1.25 billion Settlement Fund will remain for distribution to the other four settlement classes, to insurance claimants (if an insurance mechanism is adopted by the parties), and for administrative fees and expenses.

4. Mechanism of Distribution

From the very outset of the ICEP investigation, the parties to this litigation have contemplated not only that the Volcker Committee investigation would continue, but that so, too,

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[313] As more fully discussed at Section III(C) below, the German Fund Legislation sets forth the same payment provision for forced laborers, with 35% of the recommended payment of DM 5,000 to be made initially, and up to 65% of the remaining payment to be made after all forced labor claims have been determined. *See* German Fund Legislation, Sections 9(9) and 11(1).

would the claims resolution process first undertaken three years ago. The Settlement Agreement makes clear that

> Settling Defendants and other Releasees … , have initiated and pursued certain ameliorative measures outside the context of any litigation, such as establishing and supporting … the Independent Committee of Eminent Persons ("ICEP"), chaired by Paul A. Volcker, which was established in 1996 by the Swiss Bankers Association, the World Jewish Congress, and other Jewish organizations to conduct an independent audit of Swiss banks to identify accounts from the World War II era that could possibly belong to victims of Nazi persecution … [and] … the Independent Claims Resolution Foundation ("ICRF"), also chaired by Paul A. Volcker, which was established to oversee an objective, impartial, streamlined process for resolving claims to dormant accounts listed in notifications published worldwide by the Swiss Bankers Association.[314]

In recognition of the parties' intent, and relying upon its own analysis, the Volcker Committee recommended in its December 6, 1999 report that the already existing and experienced CRT continue its work:

> The Claims Resolution Tribunal established in 1997 in Zurich is now approaching the end of its effort to arbitrate claims arising form the 1997 publication of 5,570 foreign accounts in Swiss banks. The claims process, cumbersome at first, now functions with greater speed and effectiveness. The Trustees of the sponsoring foundation are drawn from the membership of ICEP; and the Swiss Chairman and American Vice Chairman of the Tribunal have provided outstanding leadership of an experienced secretariat and a distinguished panel of 15 internationally recognized and seasoned arbitrators.

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[314] *See* Settlement Agreement, at page 1. *See also* Flavio Romerio, "The Relationship Between the Class Action Settlement of *In re Holocaust Victim Assets* and the Claims Resolution Procedure," in The Claims Resolution Process on Dormant Accounts in Switzerland, ASA Special Series No. 13 (Zurich: Swiss Arbitration Association January 2000) (hereinafter "Claims Resolution Process on Dormant Accounts in Switzerland"), at 23 ("The comprehensive settlement of the class action *In re Holocaust Victim Assets* has not put an end to the Claims Resolution Tribunal. Instead, the Settlement Agreement defers to the Tribunal's accomplishments and the distribution procedure established in Switzerland"). Flavio Romerio is counsel to defendant bank Credit Suisse in this proceeding.

> ICEP has consulted with the Tribunal on practical methods of speeding an effective and fair administrative claims process in a manner that is consistent with the policy objectives outlined [in the Volcker Report] ….
>
> On the basis of these facts and proposals, the Committee recommends that claims by victims of Nazi persecution or their heirs to the accounts arising as a result of its investigation be channeled through the Claims Resolution Tribunal. The Committee recognizes that a Federal District Court in the United States is overseeing the settlement of a class action suit against the large Swiss commercial banks. The Committee looks forward to the cooperation of the Tribunal with the Court.[315]

As noted above, as a result of the efforts of the Volcker Committee, over 26,000 Swiss bank accounts have been discovered which are "probably" connected to Holocaust victims; an additional 20,000 accounts are "possibly" connected to Holocaust victims.[316] The Volcker investigation has unearthed real bank accounts, with actual names, addresses, and other identifying data.[317] This information now must be used so that as many of these accounts as possible at last can be returned to their original owners or their heirs.

(a) The Unique Strengths of the CRT

Given the Volcker Committee's careful conclusions, the Special Master's consideration of various distribution mechanisms, the parties' intent as expressed in the Settlement Agreement, and the Court's assessment that the "purpose of the [CRT] is to administer a fair and efficient claims process,"[318] it is clear that bank account claimants must continue to benefit from the CRT's expertise. The CRT should be charged with the resolution of

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315 Volcker Report, ¶¶ 77, 78, 80.

316 These numbers are based upon the Volcker Committee's adjusted statistics. *See* Section II *supra*.

317 The Final Approval Order notes that there "were approximately 6,858,116 accounts that were opened in Swiss banks between 1933-45. Of these, no records existed for approximately 2,757,950 accounts, 'an unfillable gap … that can now never be known or analyzed for their relationship to victims of Nazi persecution.' Volcker Report Annex 4 ¶ 5." In re Holocaust Victim Assets Litigation, at 26.

the Deposited Assets Class claims, under Court supervision, and with the express approval of the Swiss Confederation.[319]

As previously discussed, it is imperative that the plan of allocation and distribution be fair to class members while minimizing administrative expenses. As the Volcker Report observes, the CRT is an already existing administrative body comprised of judges, attorneys, arbitrators and other staff, who now have several years of experience, and are serving under "outstanding leadership."[320] The CRT understands the Swiss banking system; it understands the nature, scope and results of the three-year investigation that has produced approximately 46,000 "probable or possible" Holocaust victims' accounts; it understands this settlement; and, perhaps most critically, it understands the claimants' needs. As recognized by CRT arbitrator Hadassa Ben-Itto, who is also an Israeli judge, the claims process is

> about people, about faceless, not nameless but still almost anonymous, account holders and their survivors, who have waited close to sixty years for this process which is meant to right a historical wrong. Unfortunately, we cannot boast that we are capable of doing full justice. What justice is there when people receive what is rightfully theirs fifty or sixty years too late? Some of them "have known suffering and poverty and are now too old to enjoy this belated windfall." (Citation omitted)
>
> In effect we have thousands of people around the world who … are required to fill out forms which seem too complicated, even though an attempt has been made to make them as clear as possible. These claimants are asked to rummage in old cabinets, seek ancient documents, they are

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318 In re Holocaust Victim Assets Litigation, at 25.

319 The Special Master has been advised by the CRT and by the parties that, under Swiss law, it is a criminal offense to "without authorization, take[] any action in Switzerland for a foreign state which is within the powers of the public authorities." *See* Swiss Penal Code, Article 271. Although it is unclear whether the CRT's activities in implementation of the Settlement Agreement would have been interpreted as an unlawful "action in Switzerland for a foreign state which is within the powers of the public authorities," *id.*, it is expected that formal authorization will be obtained from the Swiss Confederation for the CRT to carry out the duties proposed herein.

320 Volcker Report, ¶77.

> going through emotional upheaval, rekindling painful, sometimes unbearable, memories, examining old letters and photographs, writing to authorities in other countries whose language they no longer speak, asking for old certificates from archives which sometimes no longer exist.
>
> This is the picture we arbitrators at the CRT face, this is what emerges from the individual files, as we are striving to discover the people behind the documents, the families behind the family tree. I saw one family tree, with scores of names, where the claimant, a woman, wrote in matter-of-fact language that she had marked in red the names of all family members who had perished in the Holocaust. There were only three names not marked in red on that family tree.[321]

In addition to its understanding of claimant' needs, the CRT should administer the claims process for a further reason: the SFBC has made clear that, under Swiss law, bank records as well as the account databases and audit workpapers associated with the Volcker Committee investigation must be archived in Switzerland.[322] Indeed, the precise nature and terms of the anticipated access to investigation materials and bank files has been the subject of extensive discussion during the last several months of what the Court observed was the "tedious" negotiation of amendments to the Settlement Agreement.[323] The CRT has had access to the relevant data for the accounts published in 1997, and the defendant banks have committed to continue to make account information available to the CRT in connection with the approximately 46,000 accounts found by ICEP to have been "probably or possibly related to victims of the Holocaust," including their portion of the 26,000 accounts to be published worldwide, and also have pledged their cooperation in researching claims to Holocaust-era accounts other than those

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[321] Judge Hadassa Ben-Itto, "Introductory Remarks to the Panel on Jurisdiction of the CRT and Different Types of Procedures," Claims Resolution Process on Dormant Accounts in Switzerland, at 24-25.

[322] *See* Letters of Dr. Kurt Hauri, Chairman, and Dr. Urs Zulauf, Legal Department, Swiss Federal Banking Commission, April 4, 2000 (on file with Special Master).

[323] In re Holocaust Victim Assets Litigation, at 42.

designated by the Volcker Committee as "probably" or "possibly" connected to a victim of Nazi persecution.[324] Clearly, this data is fundamental to the fair and efficient resolution of class members' claims. Only a Swiss-based claims resolution facility, such as the CRT, can make use of the relevant account and investigation information and thereby return bank accounts to their lawful owners.

(b) Recommended CRT Procedures

The Special Master has had ongoing communications with representatives of the Volcker Committee and the CRT. All have emphasized that the CRT's rules must comport with the special needs of the members of the Deposited Assets Class, many of whom are elderly and have been awaiting the return of family bank deposits for decades.

The claims resolution process for claims arising from the Settlement Agreement, to begin with the forthcoming publication of approximately 26,000 Holocaust-era accounts, will pose a daunting new challenge for the CRT. The Special Master believes that, based on its experience and expertise, the CRT is now fully capable of meeting this challenge.[325] The

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[324] *See* Section II *supra*, describing these pledges in further detail; *see also* In re Holocaust Victim Assets Litigation, at 28-29, 32-33; Memorandum to the File. As noted in Section II, it is unclear which, if any, Swiss private and cantonal banks intend to cooperate with the recommendations of the Volcker Committee concerning publication of accounts, consolidation of accounts databases and access to files. In re Holocaust Victim Assets Litigation, at 29-32.

[325] The Special Master is aware that it has been suggested by some that the CRT should have acted more quickly to adjudicate all claims to the 1997 accounts. An initial lag in reaching optimal processing times is inevitable at the start-up of any large claims resolution facility. For example, as of mid-1990, the Dalkon Shield Trust, established as an alternative to litigation of product liability claims arising from the use of the Dalkon Shield, had a "staff of 280 permanent employees, including 105 in claims evaluation," Kenneth R. Feinberg, "The Dalkon Shield Claimants Trust," in 53 Law and Contemporary Problems No. 4 ("Claims Resolution Facilities and the Mass Settlement of Mass Torts"), Autumn 1990 (hereinafter, "Claims Resolution Facilities"), at 109. Even so, the Trust "face[d] over 80,000 claims but process[ed] claims at the rate of only 15,000 per year." Mark A. Peterson, "Giving Away Money: Comparative Comments on Claims Resolution Facilities," in Claims Resolution Facilities, at 117. *See also* Francis E. McGovern, "The Alabama DDT Settlement

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adjudication by the CRT of the more than 9,000 claims to the 5,570 dormant accounts in Swiss banks from the 1933-1945 period of non-residents of Switzerland that were published in 1997 makes the CRT the expert adjudicative body in this field and has provided a strong foundation on which to build a new claims resolution process.[326] The experience of the CRT in developing

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Fund," in Claims Resolution Facilities, at 76, 77 ("On balance, the allocation and distribution plan has met the needs of its designers. Its implementation" – involving distribution of a $15 million settlement among 13,000 plaintiffs – "has been too slow and costly, however, and it has not been totally satisfactory to the members of the settlement class in terms of public relations"); Harvey P. Berman, "The Agent Orange Veteran Payment Program," in Claims Resolution Facilities (hereinafter, "Berman"), at 55, 56, 60 (in Agent Orange claims process, original deadline for filing of claims was January 1, 1989, although filing deadline subsequently was removed by Court order; as of August, 1990, 48,000 claims had been filed and approximately $68 million in cash payments had been distributed to approximately 21,000 recipients).

Even a comparatively mundane concern such as the need, in this case, to translate many thousands of documents, necessarily slows down the process. *See*, *e.g.*, Dr. Thomas Bauer, "The Search for Dormant Accounts – Publication – Filing of Claims – Third Party Information," in Claims Resolution Process on Dormant Accounts in Switzerland, at 10-11 (in many cases, "…every claim form and … every claim-supporting document (passport copies, family trees, diaries, correspondence etc.) had to be translated into English …. The exact translation of thousands of documents was consuming time, money and operational manpower. But it was the consequence of the multinational presence of the project and an indispensable condition for the further handling of the claims by the banks, the Tribunal and the other involved institutions").

Grievances concerning the timing of payments are even more likely to arise where, as here, the claims facility is responsible for determining issues as complicated and emotionally charged as the ownership of Holocaust victims' bank accounts. It is certainly appropriate for class members to express their concerns about the ability of any claims facility to efficiently and accurately adjudicate the expected tens of thousands of new bank deposit claims. The Special Master believes that the CRT's proposed revised rules, described in greater detail below and annexed hereto as Exhibit 5 -- demonstrate the CRT's commitment to further improving internal procedures that already have been refined since claims adjudication first began in 1998.

[326] According to the Volcker Report, "[i]n July and October 1997, Swiss banks published in the world press (and on the internet) names of 5,570 foreign accounts. In addition, 10,758 accounts of Swiss and of unknown domicile were also made available to the public in Switzerland." Volcker Report ¶ 12 (footnote omitted). The CRT received "9,776 claims to approximately half of the 5,570 accounts of foreign account holders" published in 1997. *Id.* ¶ 50. As of May 31, 2000, the CRT has made final decisions in a total of 9,076 cases. A total of 2,981 cases have been resolved with awards having a book value of SFr. 35 million, reflecting about one-half of the SFr. 72 million book value of the accounts published in 1997. A total of 6,095 claims have been denied as a result of decisions by the Tribunal. "These claimants failed to make a case that they had a relationship to the depositors of the accounts for which they had made a claim. Approximately 80 percent of the claims, resolved or rejected, did not, upon a preliminary review, appear to involve the accounts of Holocaust victims. In

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claims resolution procedures, which took some time to establish, and to train staff and judges to operate efficiently in this entirely new context, will now be of great benefit to guide the resolution of the much larger number of claims that can be expected as a result of the Volcker Committee investigation and as indicated by the potential Deposited Assets claims noted in the Initial Questionnaires.

The Volcker Committee consulted with the CRT on practical methods of speeding an effective and equitable claims resolution process.[327] These consultations focused on how to maintain a fair process, one which provides due process for claimants while at the same time accelerates procedures and controls costs. These early consultations also made clear that the Volcker Committee's intention is to minimize formal procedures; to use objective criteria to make initial determinations as to whether claimants have provided sufficient information; and to resolve more rapidly claims to accounts of lower value.

Following the release of the Volcker Report, at the request of the Board of Trustees of the ICRF, the CRT Secretariat, with the participation of the Chairman and Vice Chairman of the CRT, prepared a draft set of rules incorporating these concepts. The draft rules received the preliminary approval of the Board of Trustees. The Special Master recommends that this initial draft, annexed hereto as Exhibit 5, should form the core of the final Rules of Procedure that are to be developed by the Board for the Court's Approval. These draft rules do

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a study made by the International Tracing Service, approximately 20 percent of the 5,570 names of foreign open dormant or suspended account holders matched to those of Holocaust victims. Unlike the accounts identified in the ICEP investigation, these accounts published in 1997 were accounts of foreigners generally; they were not selected for probable or possible relationships to victims of Nazi persecution. Consequently, the roughly 20 percent share traced to Holocaust victims should not be representative of ICEP's investigation." *Id.* ¶ 51.

[327] Volcker Report, ¶¶ 77, 78, 80.

not yet have the final approval either of the Court or the ICRF Board of Trustees. As the Court made clear in its Final Approval Order, however, the CRT "will operate under guidelines and criteria established with [the Court's] approval, in consultation with the Volcker Committee."[328] Additionally, any recommended awards must be certified to the Court for evaluation for payment from the Settlement Fund.[329]

Some of the key elements of the proposed CRT rules are as follows:

- There will be a deadline for filing claims with the CRT following publication of account holders' names;[330] currently, the CRT recommends that the deadline should be six months.

- There will be an initial decision on the admissibility of claims, to be made by a "Resident Claims Judge," as follows:

  "**Admissible Claims**:

  1. A claim submitted to the [CRT] shall be deemed disqualified for resolution by the Tribunal if:

     a) the Claimant has provided no plausible evidence that the person he or she believes to be the Account Holder was a Victim or Target of Nazi Persecution, or

     b) the claim is based principally on a statement that the Claimant or his or her relative and the Account Holder have the same or similar last name, or

     c) the Claimant has provided no relevant information and/or documentation regarding his or her relationship to the Account Holder, or

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328 In re Holocaust Victim Assets Litigation, at 24-25. Section 7.9 of Amendment No. 2 provides, among other things, that "[a]ny plan for administering this settlement, including any claims resolution process, shall be carried out under the supervision and control of the Court. Among other things, the Court will maintain judicial control over the procedural and substantive rules, all amendments thereto, and the appointment of personnel and staff in connection with any claims resolution process."

329 *See, e.g.*, Settlement Agreement, Section 7.1; Amendment No. 2, Section 7.9.

330 *See* Proposed "Rules of Procedure for the Claims Resolution Process" (hereinafter, "Proposed CRT Rules"), at 4 (Exhibit 5 hereto).

d) the Claimant has not asserted a relationship to the Account Holder which would justify a determination of Entitlement to the Account."[331]

2. A claim that is not disqualified for resolution by the [CRT] … shall be deemed to be an Admissible Claim for resolution by the Tribunal unless the appropriate Claims Judge, based on a preponderance of the evidence, determines that the claim should not be resolved by the Tribunal."[332]

- For accounts of unadjusted book value of greater than SFr. 100 (i.e., an adjusted book value of SFr 1000 or approximately $585), an appeal of a finding of inadmissibility may be made to a Senior Claims Judge.

- **Following a finding of admissibility, a decision as to the claimant's entitlement to an account will be made**, as follows:

- For an account with an unadjusted book value of less than SFr. 100 (or an adjusted book value of less than SFr. 1000), a Resident Claims Judge will decide whether the claimant is entitled to the account. For an account with an unadjusted book value of greater than SFr. 100 (or an adjusted book value of greater than SFr. 1000), a Senior Claims Judge will decide whether the claimant is entitled to the account.

- **A claimant will be found to be entitled to an account if**:

  - the claimant has identified a person with the same name as the account holder; and

  - the claimant has matched unpublished information about the account holder, if such information is available in bank records (i.e., account holder's date of birth, maiden name, spouse, street address, profession, or signature); and

  - the claimant has provided plausible evidence that the account holder was a victim of Nazi persecution; and

  - the relationship between the claimant and account holder is of a nature that justifies entitlement; and/or

  - the Claimant has provided "other equally compelling reasons for his or her Entitlement, as determined by the Claims Judge."[333]

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331 *Id.*

332 *Id.*

333 *Id.* at 7.

- For an account with an unadjusted book value of greater than SFr. 5,000 (adjusted book value of greater than SFr. 50,000, or approximately $29,240, as of September, 2000), a finding that the claimant is not entitled to an account may be appealed to a Senior Appeals Judge.

- **A "relaxed standard of proof" will apply**: "Each claimant shall demonstrate that it is plausible in light of all of the circumstances that he or she is entitled, in whole or in part, to the claimed Account. In making a determination of Entitlement, Claims Judges shall assess all information submitted by the claimant or otherwise available to them. They shall at all times bear in mind the difficulties of proving a claim after the destruction of the Second World War and the Holocaust and the long period of time that has elapsed since the opening of these Accounts."[334]

The Proposed CRT Rules summarized above are an important start to the Deposited Assets Class claims process. It should be noted, however, that Amendment No. 2 to the Settlement Agreement contains important provisions on payment of the costs of the claims resolution process, review of accounts for publication, access to documentation to support adjudication of claims, the establishment of a "reasoned and satisfactory" test for proceeding with the matching and research of claims, and appeal of certain decisions in the claims resolution process to the Court.

Similarly, the CRT and claimants will depend on a proper publication of accounts to initiate the claims process, and full and unobstructed access to the documentation compiled by the Volcker Committee auditors on all relevant period accounts, to make decisions on claims that will meet due process standards. Solutions to these matters, only partially addressed by the Settlement Agreement, as amended, but essential for maintaining due process rights, must be integrated into the Rules. This same reasoning also applies to control by the CRT judges of all aspects of the decision-making process on claims, including the matching and research of claims — another part of assuring essential fairness to claimants and the integrity of the process.

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[334] *Id.* at 10.

Finally, the Rules also should provide for the adjudication of well-supported claims of Nazi victims when an account has been closed but it is unknown who actually received the benefit of the account. In this situation, or in a similar situation when the amounts in accounts are unknown, it is appropriate to rely on presumptions to assist in the adjudication of such claims. For example, it is appropriate to make an award to a claimant of a closed account if the account holder perished in a concentration camp. If the amount in the account is unknown, it is also appropriate to make an award based on the average value of the type of account. As with all other aspects of the claims process, the Court will have the discretion to adjust such awards to assure fairness among all claimants.

The CRT must timely adopt and apply clear and equitable procedures that will provide due process for the benefit of claimants. Accordingly, the Special Master recommends that the Court establish in its Final Plan of Allocation and Distribution of the Settlement Proceeds a date certain by which the Independent Claims Resolution Foundation Board of Trustees shall submit a draft of final CRT rules — addressing the important and still-open issues outlined above — for the Court's review and approval.

B. Looted Assets Class

1. Class Definition

The "Looted Assets Class" consists of

> Victims or Targets of Nazi Persecution and their heirs, successors, administrators, executors, affiliates, and assigns who have or at any time have asserted, assert, or may in the future seek to assert Claims against any Releasee for relief of any kind whatsoever relating to or arising in any way from Looted Assets or Cloaked Assets or any effort to recover Looted Assets or Cloaked Assets. (Settlement Agreement, Section 8.2(b)).[335]

[335] "Cloaked Assets" are defined as

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"Assets" consist of

> any and all objects of value including but not limited to personal, commercial, real, tangible, and intangible property, including, without limitation, cash, securities, gems, gold and other precious metals, jewelry, documents, artworks, equipment, and intellectual property. (Settlement Agreement, Section 1).

"Looted Assets" are defined as

> Assets actually or allegedly belonging in whole or in part to Victims or Targets of Nazi Persecution that were actually or allegedly stolen, expropriated, Aryanized, confiscated, or that were otherwise wrongfully taken by, at the request of, or under the auspices of, the Nazi Regime. (*Id.*).

2. Allocation Principles

The Settlement Agreement indicates that only those who have asserted or may assert claims against a Releasee can claim membership in the "Looted Assets Class," *i.e.*, that only those "Victims or Targets of Nazi Persecution" who were looted, and whose stolen property actually or allegedly was sent to or through Switzerland or Swiss entities, are entitled to participate in this Settlement.

There is scarcely a victim of the Nazis who was not looted, and on nearly an incomprehensible scale.

Assets wholly or partly owned, controlled by, obtained from, or held for the benefit of, any company incorporated, headquartered, or based in Germany or any other Axis country or other country occupied by an Axis country between 1933 and 1946 or any other entity or individual associated with the Nazi Regime (regardless of where such entity or individual was or is located, incorporated, headquartered, or conducting business), the identity, value, or ownership of which was in fact or allegedly disguised by, through, or as the result of any intentional or unintentional act or omission of or otherwise involving any Releasee, including, without limitation, Internationale Industrie und Handelsbeteiligungen A.G. (a.k.a. 'Interhandel'), and its predecessors, successors, or affiliates. (*Id.*).

> The robbery by the Nazis of the Jewish population in Germany, Austria, and Czechoslovakia, and in the countries occupied by the German army during World War II, is unparalleled in history. Finally, the principle was simply to take from the Jews every scrap of material possessions and the means of subsistence; and it was executed with German thoroughness and with a macabre show of legality. Stage by stage their movable and immovable property was confiscated, and they were excluded from all professional and economic life, used as slave labour in the war till they dropped, and then done to death. When the extermination culminated in the gas chambers of Auschwitz, the last bits of clothing, the dentures, and the hair of the victims was duly collected and listed.[336]

Plundered loot took a variety of paths once it had been seized. Considerable attention has been focused upon the involvement of Swiss banking entities in the economy of Nazi Germany, especially Switzerland's receipt of looted gold. To date, the most significant evidence of the Swiss connection to plundered assets remains the relatively recent reports prepared on behalf of the governments of Switzerland, the United States and Great Britain. The findings of the respective governmental commissions have been discussed elsewhere in this Proposal and are summarized at Annex G ("The Looted Assets Class"). In addition, German slave labor-using enterprises also had financial ties to Swiss entities, particularly to Swiss banks, as more fully described in Annex H ("Slave Labor Class I") and its exhibit, the Slave Labor Class I List.[337]

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[336] Norman Bentwich, Nazi Spoliation and German Restitution, 10 Leo Baeck Institute Yearbook, 204 (New York: The American Jewish Committee, and Philadelphia: The Jewish Publication Society of America, 1965). Additional examples of Nazi looting are described in greater detail in Annex G ("The Looted Assets Class").

[337] There is also other evidence of certain Swiss connections to Nazi plundering, such as the receipt by some Swiss entities of looted art and jewelry, although much of the information is anecdotal. *See* Annex G ("The Looted Assets Class"). Looted art has been the subject of certain amendments to the Settlement Agreement. *See* Amendment No. 2, at 1-2; *see also* In re Holocaust Victim Assets Litigation, at 33-35.

With only limited exceptions, however, the current historical record simply does not permit precise determinations even as to the material losses in total, much less the nature and value of the loot traceable to Switzerland or Swiss entities. In the immediate aftermath of the War, efforts to reconstruct data were frustrating, costly and time-consuming. Even today, primary source materials are scattered throughout Europe (and in some cases throughout the world), and are not fully accessible or only recently have become available. Surveys are incomplete.[338] Although there are still-existing Nazi property "censuses," such as those forced upon Jewish and other victims immediately after the *Anschluss*, these do not reveal the ultimate destination of plundered assets, whether to Switzerland or elsewhere. As the Bergier Commission has pointed out, even in the relatively limited area of gold transactions, "[u]ntil very recently research has generally centered on central banks' gold policies, and there has been scant research on how gold from ghettos, concentration camps, and extermination camps was stolen and disposed of."[339] Stolen gold alone could have taken any number of different paths across Europe.[340] Reconstructing the looting process for other assets, such as family heirlooms, art and household effects, is equally complex and probably unlikely to succeed, in great measure because of the vast range and number of possible beneficiaries of Nazi looting: from the Reichsbank to the victim's next-door neighbor.

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338 Annex G describes in greater detail some examples of the archival resources.

339 *See* Bergier Gold Report, at 17-18.

340 *See id.*, at 36; *see also* Raul Hilberg, The Destruction of the European Jews (New York: Holmes & Meier 1985) (revised ed.) (hereinafter, "Hilberg"), at 959; Bergier Gold Report, at 21 ("it is hard to paint a complete picture of all the Third Reich's gold operations. Numerous Nazi organizations and individuals were involved in the acquisition and selling of victim gold, and these parties generally pursued different goals. The documents available at the moment do not allow us to identify all the players …. The question of how victim gold that found its way to Switzerland was used, also remains unresolved"); *id.* at 30, n.40 (the "standard work by Hilberg is the closest to fulfilling the

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It is neither justifiable nor appropriate to select which looting victims may be entitled to recompense from this $1.25 billion Settlement Fund based entirely upon the happenstance of where the Nazi Regime chose to direct which loot, which records of the plunder happen to survive, and which items one may hazard a guess may have found their way to or through Switzerland. Every surviving "Victim or Target" was looted — many hundreds of thousands of people *excluding heirs*. It is fair to say that every one of them potentially may have some link to a Releasee as set forth under Section 8.2(b) of the Settlement Agreement, since it is well accepted by historians, including those representing Switzerland, that a primary purpose of the Nazi plunder was to transform loot (especially, but not only gold) into foreign currency by marketing these items in neutral nations, including Switzerland. Which particular looted item may have ended up in Switzerland, however, is a far different matter.[341]

As discussed elsewhere in this Proposal, the Special Master must recommend an allocation and distribution plan that does not render payments meaningless. The Special Master has considered, but rejected, two options for allocation and distribution to the Looted Assets Class: the use of a claims resolution facility to determine individual claims on a case-by-case basis, or, alternatively, an equal *pro rata* distribution to each claimant. Each of these options would deplete the Settlement Fund with little, if any, noticeable benefit to class members.

Were the Special Master to recommend that each claim be assessed individually — as in the case of the bank accounts, which still exist in Switzerland in an identifiable form accompanied by documentation — the result would be an unwieldy and enormously expensive

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requirements of a global presentation" concerning Nazi plundering of Jews).

[341] *See* Eizenstat Report; Bergier Gold Report; *see also* Section II *supra*, and Annex G ("The Looted Assets Class").

apparatus to adjudicate hundreds of thousands of claims, for losses which can barely be measured and hardly be documented, and whose connection to Switzerland, or a Swiss entity, if ever it existed, probably no longer can be proven. Further, the administrative expense of such a process would unjustifiably deplete the Settlement Fund.

Conversely, were the Special Master to recommend a pro rata distribution, with each of the approximately 424,000 individuals who have indicated that they are Looted Assets Class claimants (to date)[342] receiving an identical distribution on the presumption that their plundered assets are traceable to Switzerland, or Swiss entities, each "award" would total little more than a few dollars. This is obviously untenable.

Under these circumstances, the Special Master believes that one *cy pres* remedy to benefit the entire class and a second *cy pres* program targeting the neediest elderly members of the class should be adopted.

In researching the number and identities of the members of the Looted Assets and other classes, the Special Master was struck by the lack of a comprehensive list of the names and backgrounds of the victims of the Nazis, living and dead. Partial lists of some Nazi victims exist, but they are scattered, not widely accessible, and only incompletely available to scholars. For many class members, particularly heirs (who, for reasons discussed elsewhere, are too numerous for each to be paid individually), knowledge of their forebears stops at a concentration camp's gates. It would honor the memory of these victims, tangibly benefit all of their heirs and serve as powerful testimony to the horrors of the Holocaust, for a small portion of the Settlement Fund to be set aside to create a comprehensive list, available to all, of all the "Victims or Targets

[342] See Initial Questionnaire Data, Table 1, at p. 4.

of Nazi Persecution", and all of their murdered ancestors. For the benefit of the entire Looted Assets Class — indeed, for the benefit of all members of all five classes who may not receive a cash payment under this Proposal — the Special Master recommends that the Court authorize the creation of a Victims List Foundation to collect and make widely available the names of all "Victims or Targets of Nazi Persecution."[343]

In recommending a second *cy pres* program, the Special Master is aware that while no compensation ever can repay even a small fraction of what was looted in the Holocaust, the Settlement Fund presents an opportunity to provide meaningful assistance to the Looted Asset Class members who are in the greatest financial need. Putting the limited resources of the Settlement Fund at the service of these neediest class members is an act of community that suitably remembers the communities looted and destroyed in the Holocaust.

This priority is both legal and right. Where, as here, a settlement fund is "not sufficient to satisfy the claimed losses of every class member," the Court of Appeals for the Second Circuit has made clear that it is "equitable to limit payments to those with the most severe injuries" and to "give as much help as possible to individuals who, in general, are most in need of assistance."[344] All around the world are professionally managed humanitarian programs

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[343] An appropriate starting point in the work of the Victim List Foundation may be the approximately 562,000 Initial Questionnaires, perhaps the largest survey of Nazi victims ever conducted. Permitting scholars to have access to the irreplaceable data contained in the Initial Questionnaires would contribute vital knowledge to the study of the survivors community, as well as their family members killed by the Nazis. Accordingly, the Special Master recommends that when the Notice Administrator has finished its analysis, the Court direct the conveyance of the Initial Questionnaires and the database already created from them, to the Victim List Foundation. The Court should provide an opportunity for those who filled out Initial Questionnaires to withhold them from the Victim List Foundation if they so choose.

[344] In re "Agent Orange" Product Liability Litigation, 818 F.2d 145, 158 (2d Cir. 1987). The Court of Appeals also has specified that "[a] district court may, in order to maximize 'the beneficial impact of the settlement fund on the needs of the class,' set aside a portion of the settlement proceeds for

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tailored to assist those "most in need of assistance," the hungry, the ill and the isolated victims of the Nazis. Many of these elderly and destitute survivors would have no one else to turn to if these humanitarian programs did not exist. A significant financial infusion from the Settlement Fund may meaningfully improve the day-to-day lives of those whom these programs now reach — and those who they do not.

3. Distribution

The Special Master proposes an initial allocation of $100 million to *cy pres* programs designed to benefit the neediest elderly survivors of the Holocaust — who perhaps would be less in need today had their assets not been looted and their lives nearly destroyed.[345]

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programs designed to assist the class." In re "Agent Orange" Product Liability Litigation, 818 F.2d 179, 185 (2d Cir. 1987. *See also* Agent Orange Special Master Report, at 38 ("The Fund is not large enough to provide meaningful cash compensation to all claimants, but tangible monetary benefits can be targeted to those veterans who are most severely disabled and thus in need of assistance"); Annex B (Legal Principles Governing Distribution of Class Action Settlements").

There is also historic precedent for this recommendation. "Bulk" settlement of Holocaust-related compensation claims, with payments from the resulting settlement funds directed primarily to the needy, dates back to the immediate post-War period, when successor organizations in the United States, British and French military zones utilized the proceeds of sales of apparently heirless or unclaimed properties to resettle and rehabilitate survivors, including the thousands remaining in "displaced persons" camps. *See* Annex E ("Holocaust Compensation"). *See also* Annex D ("Heirs) (describing "bulk settlement" with the United States arising from unclaimed property apparently belonging to Nazi victims; the resulting fund was disbursed by the Jewish Restitution Successor Organization to programs serving needy survivors); Annex E ("Holocaust Compensation") (discussing use of sales from unclaimed and heirless property within the former East Germany primarily to fund programs providing food, medical and winter relief to needy survivors in the former Soviet Union, Israel, North America and elsewhere).

345 This recommendation "'obviate[s] the necessity for particularized proof'" and is a "fair response to the particular difficulties" the Looted Assets Class "would have in gathering and presenting evidence of damages.'" Agent Orange, 818 F.2d at 158 (citation omitted). As has been observed by Kenneth Feinberg, Special Master in the Agent Orange product liability litigation, "[i]n some extreme cases, causation may be excluded from the compensation scheme. Under the Agent Orange distribution plan, for example, claimants are not required to demonstrate any causal relationship between their health problems and exposure to Agent Orange. The court in the Agent Orange litigation determined that requiring proof of individual causation would place an unreasonable burden upon the plaintiffs because the scientific evidence was not sufficiently certain to support a distribution plan that would limit eligibility for compensation to individuals with specific diseases. Accordingly, the distribution

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The Special Master further recommends that, of the $100 million initially to be allocated to the Looted Assets Class, 90% ($90 million) of this amount be directed toward programs directly assisting Jewish Holocaust survivors while 10% ($10 million) be channeled toward forthcoming IOM programs designed to assist Roma, Jehovah's Witness, disabled and homosexual survivors (as described below).

This recommended allocation of the "looted assets" portion of the Settlement Fund is based upon precedent dating back to 1945. As discussed earlier, in the immediate aftermath of the War, the Allies sought to divide the "gold pool" that had been recovered after the defeat of the Third Reich. Ninety percent of the non-monetary or "victim's" gold, along with ninety percent of a separate $25 million fund to be created from proceeds of German assets in neutral countries, and ninety-five percent of "heirless assets" in Germany, Austria and the Nazi-occupied territories (in recognition that the heirless funds were "overwhelmingly Jewish in origin") — was designated for direct assistance programs for the benefit of Jewish Holocaust survivors. The remaining 10% was designated for non-Jewish victims.[346] The proposed

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plan adopted by the court requires only that plaintiffs demonstrate the existence of a disabling disease or death from a non-traumatic source and a probability of exposure." Kenneth R. Feinberg, "The Dalkon Shield Claimants Trust," in 53 Law and Contemporary Problems: Claims Resolution Facilities and the Mass Settlement of Mass Torts (Autumn 1990), at 96. Here, too, the Special Master recommends that "causation … be excluded from the compensation scheme," *id.* An "unreasonable burden" would be placed upon class members - even when limited to the needy, who themselves number in the hundreds of thousands, *see* Annexes C and F ("Demographics of 'Victim or Target' Groups" and "Social Safety Nets") - were they required to demonstrate that their lost assets are traceable to Switzerland. Nor is the historical data "sufficiently certain to support a distribution plan that would limit eligibility for compensation to individuals" with specific, provable losses. *Id.* The needy class members are Nazi victims who were looted, with some portion of the total loot but not individual items, presumably traceable to Swiss entities.

346 *See* Five Power Agreement, Par. E, (attached as annex 3 to the British Archives Report II). The recommended division of funds also has more recent precedent in the Swiss Humanitarian Fund. Although the benefits conferred by the Swiss Humanitarian Fund were not limited to the five "Victim or Target" groups of this Settlement Agreement, and included additional non-Jewish

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allocation also is warranted by current demographics, as Jewish victims now constitute the overwhelming proportion of surviving "Victims or Targets of Nazi Persecution" as defined under the Settlement Agreement.[347]

4. Mechanism of Distribution

(a) Assistance to Needy Jewish Survivors

The Jewish survivor community is concentrated primarily in Israel, the former Soviet Union, North America and Europe, with additional concentrations in other regions including Australia, Argentina and elsewhere. Their post-War experiences have been extraordinarily diverse. In most Western nations, Nazi victims generally have benefited from relatively strong economies and "social safety net" programs intended to assist the needy and the ill.[348] Equally significant, Nazi victims in the United States and Israel, as in most Western nations, have been eligible for a wide range of indemnification and restitution programs intended to provide modest to sometimes significant recompense for the material losses suffered at the hands of the Nazis and their accomplices.[349] However, notably absent from most post-Holocaust compensation programs are the victims of Nazi persecution who remain behind what was once the Iron Curtain.[350]

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survivors, the Fund nevertheless adopted a similar allocation between Jewish and non-Jewish survivors. Eighty-eight percent of the Swiss Humanitarian Fund was allocated toward Jewish victims, while twelve percent was allocated toward non-Jewish victims. *See* Annex K ("Swiss Humanitarian Fund").

347 *See* Annex C ("Demographics of 'Victim or Target' Groups").

348 *See* Annex F ("Social Safety Nets").

349 *See* Annex E ("Holocaust Compensation").

350 *See generally* Annex E. In the 1990s, Germany entered into several "mutual reconciliation agreements" with Central and Eastern European nations, including Russia, Ukraine, Belarus, Poland

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Because their situation is so dire, their number so great, and their half century of virtual exclusion from compensation programs so inequitable, the Special Master recommends that, of the $90 million designated for the Jewish members of the Looted Assets Class, a substantial sum — 75% ($67.5 million) — should be earmarked for programs assisting destitute, elderly Jewish victims of Nazi persecution in the former Soviet Union. The Special Master further recommends that the remaining 25% ($22.5 million) should be allocated to programs in Israel, North America, Europe and other parts of the world which likewise serve the neediest elderly Nazi victims.

"One important goal … is that the court maximize the resources available for service expenditures by operating projects through existing provider organizations rather than by creating a new organization …. In addition, making grants to existing service providers can help strengthen worthy projects already in place, and can prime the pump for programs that will persist and prove useful after the … Settlement Fund is exhausted."[351] Consistent with this objective, it is recommended that the Court appoint the JDC and the Claims Conference to handle day-to-day management, monitoring and/or administration of these programs, subject to the Court's continuing supervision.

Tellingly, when the Allies negotiated the 1946 Paris Reparations Agreement provisions for the assistance of so-called "non-repatriable" Nazi victims, the JDC was one of

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and the Czech Republic, paying each nation the equivalent of several hundred million dollars in post-War reparations. Little public information is available concerning the recipient nations' use of these funds. However, it appears that most of the German reparations have been channeled toward Nazi victims in general, including political prisoners and forced laborers, who, in Central and Eastern Europe, constitute a much greater proportion of Nazi victims than do Jewish survivors. *Id.*

[351] Agent Orange, 689 F. Supp. at 1274. *See also* Annex B ("Legal Principles Governing Distribution of Class Action Settlements").

only two non-governmental organizations to which the Allies assigned responsibility for allocating and distributing the "Jewish" portion of these funds — recognizing, as is true for this Settlement Fund, that it is "essential that the administering agency should not create a large and expensive field organization, but should operate by allocating the funds under its control to public and private organizations which themselves have facilities for operating in the field."[352]

For the past fifty years, the JDC has remained the central agency providing relief to Jewish victims of Nazi persecution in Central and Eastern Europe and the former Soviet Union. Recognizing the growing capabilities of local organizations, the JDC's more recent programs in those nations have been undertaken and implemented upon consultation with local communities with the aid of the Claims Conference. In Israel, North America, Western Europe, Australia, South America and other parts of the world, similar social welfare programs have been funded, and their implementation supervised by the Claims Conference, with the direct input of local survivor communities.[353] Significantly, virtually all of the recommended programs for the

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[352] *See* "Background" Statement to Paris Reparations Agreement, Article 8, "Allocation of a Reparations Share to Non-Repatriable Victims of German Action", Par. G (declassified by the United States National Archives in 1996, Document A 203486) ("With a fund as small as that provided in the present Agreement, it seemed essential that the administering agency should not create a large and expensive field organization, but should operate by allocating the funds under its control to public and private organizations which themselves have facilities for operating in the field. Thus it should be expected that, as a normal matter, the Inter-Governmental Committee will carry out its responsibilities by inviting such agencies as the Friends Service Committee, the various national Red Cross organizations, and the American Joint Distribution Committee to present programs for the resettlement or rehabilitation of particular classes and numbers of persons, and by allocating funds for the support of approved programs").

[353] The JDC and the Claims Conference, between them, have one hundred and fifty years of unmatched expertise in serving the needs of Nazi victims. The Claims Conference was created in 1951 specifically to negotiate with Germany for material recompense on behalf of Jewish Holocaust victims, and has had a singular role in post-Holocaust compensation ever since. Virtually every significant German and Austrian indemnification and restitution program is directly attributable to the Claims Conference's initiative and strenuous negotiations on behalf of hundreds of thousands of Nazi victims. Of equal importance, within the last decade, the Claims Conference has utilized the proceeds of sales of restituted properties in the former East Germany to fund an ever-growing

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needy are already functioning, and will incur no start-up costs and relatively low administrative expenses, a crucial concern in light of the Special Master's duty to minimize such deductions from the Settlement Fund.[354]

(i) Former Soviet Union

The Special Master recommends that the initial "Looted Assets" payment of $67.5 million for the former Soviet Union be allocated wholly to the network of social service programs known as the "*Heseds*," created by the JDC in 1992 to assist destitute, elderly Jewish victims of Nazi persecution still living in the former Soviet Union. Beginning in 1995, the Claims Conference began to contribute significantly to the *Hesed* program, in recognition that many, and often nearly all, program participants are Jewish victims of Nazi persecution.[355] Many

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network of social welfare programs designed primarily for the benefit of needy and ill elderly Jewish victims of Nazi persecution. *See* Annex E ("Holocaust Compensation"). The JDC, in existence since 1914, is a humanitarian agency of equal international renown. In addition to resettling Holocaust victims immediately after the War, the JDC paid more than half the costs of maintaining those Jewish refugees who were admitted into Switzerland during World War II, relieving the overwhelmed Swiss Jewish community, which until then was heavily burdened with these expenses (*see* Bergier Refugee Report, at 196); airlifted Ethiopian Jews for resettlement in Israel; and sent medical aid, food and other supplies to victims of the recent conflicts in the Balkans, Jews and non-Jews alike. *See, e.g.*, "American Jewish Joint Distribution Committee," Encyclopaedia Judaica – CD-ROM Edition (Judaica Multimedia (Israel) Ltd.); Yehuda Bauer, American Jewry and the Holocaust: The American Jewish Joint Distribution Committee, 1939-1945 (Detroit: Wayne State University Press 1981).

The Special Master notes that Section III of the proposal submitted on November 22, 1999 by the WJRO recommends that social service projects on behalf of Jewish Nazi victims should be implemented "by utilizing the existing mechanism established and operated by the Claims Conference …." *See* WJRO's "Proposal to the Court" (October 1999), at www.swissbankclaims.com. As noted above, in Eastern Europe and the former Soviet Union, social service programs for needy Holocaust victims are funded in part by the Claims Conference, and operated by local organizations with the expertise and technical assistance of the JDC.

354 *See* Annex B ("Legal Principles Governing Distribution of Class Action Settlements").

355 By 1999, over half of all funding for the *Hesed* program came from the Claims Conference, targeting services for Nazi victims. As noted previously, the Claims Conference funds are derived from the proceeds of sales of unclaimed property of Nazi victims located in the former East Germany. *See* Annex E ("Holocaust Compensation").

of these victims fled for their lives in advance of the Nazis, served in the Red Army,[356] or lived under occupation, and so have been ineligible for prior compensation programs, most of which have limited payments to survivors who spent specified periods of time in concentration camps or ghettos officially recognized under German law, or lived in hiding for a requisite length of time. Nevertheless, as true for Nazi victims across Europe, Jews in the former Soviet Union who lived in, owned property in, or fled from areas under Nazi occupation lost virtually all of their material possessions to the Third Reich's plunder, which in Eastern Europe was led by the notorious *Einsatzgruppen*, often assisted by the local population.[357]

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[356] In contrast to other combatants, Jewish members of the Red Army were targeted by the Nazis as Jews, per se. As described by Raul Hilberg, "the German regulations against Jewish prisoners of war from the western armies were in no way comparable to the drastic measures that were applied to the Jewish prisoners from the Red Army. The only western Jewish prisoners subject to shooting were the emigrants from the Reich, who were shot immediately upon ascertainment of their identity … prior to the transfer of the prisoners to the permanent Stalags." Hilberg, at 626-7; *see also id.* at 335-36 ("On July 16, 1941, barely four weeks after the opening of the eastern campaign, [Head of Reich Security Main Office] Heydrich concluded an agreement with the chief of the General Armed Forces Office [on the treatment of Soviet prisoners of war] …. On the next day, Heydrich alerted his regional machinery to prepare for the selection (*Aussonderung*) of all 'professional revolutionaries,' Red Army political officers, 'fanatical' Communists, and 'all Jews') (citing Operational Order No. 8, July 17, 1941, NO-3414, and "earlier draft referring to 'all Jews' by RSHA IV-A-1, June 28, 1941, PS-78")), *id.*, n.4; *id.*, at 1026 (war crimes defendant claimed that his "order to remove Jews from Soviet prisoner-of-war battalions in his area" was "'entirely superfluous'" because, "to begin with, there were no Jews among these prisoners, for the selection had already taken place in Germany (*i.e.*, the Jewish prisoners had already been shot as they were shuttled through the Reich)"); Shmuel Krakowski and Yoav Gelber, "Prisoners of War," in Encyclopedia of the Holocaust (New York: Macmillan 1990), at 1189 (Jewish soldiers from Western nations "were treated no differently [by Germany] than other POWs from these countries"; by contrast, German policy for Jews serving in the Red Army "was immediate and total annihilation, with no delay"); Yitzhak Arad, "Soviet Jews in the War Against Nazi Germany," 74 Yad Vashem Studies XXIII (Jerusalem: Yad Vashem, 1993) (Aharon Weiss, ed.), at 83 ("Already in the first months of the war Jewish soldiers realized that the Germans fought against them both as soldiers of the Red Army and as Jews"; "if captured they could expect torture and death").

[357] *See* Annex G ("The Looted Assets Class").

"*Hesed*" is a Hebrew word meaning "acts of loving kindness," and most of the elderly clients served by the program have suffered an absence of *Hesed* for much of their lives. As one scholar has described their condition:

> These Jews, whose lives were largely and demonstrably ruined directly by the Holocaust, have spent their entire postwar lives at the site of "their" part of the Holocaust. Even now, … every daily move is haunted by the relatives, friends and neighbors who "once walked these streets." …. Their ongoing relationship to the Holocaust is incalculably more profound — and immediate — than their counterparts who started new lives elsewhere a half-century ago. Moreover, the forces of history have cruelly conspired against Holocaust victims who still live in their homeland. After Hitler came the worst of Stalinist communism and, more recently, loss of life savings and a series of economic catastrophes that have rendered the state pension woefully inadequate to a minimally dignified old age.[358]

Just as their personal needs were increasing with advancing age, many of these Nazi victims watched as their savings were consumed by the hyperinflation that followed the demise of the Soviet Union, their once adequate pensions dramatically declined in value and often arrived months late if at all, and they no longer had resources sufficient to purchase even basic foodstuffs, clothing, medicines or fuel for heat and cooking.[359]

The *Hesed* program attempts to fill the vacuum by providing elderly Nazi victims with the basic necessities of life through a "network of independent, community-based welfare centers." Major *Hesed* program services include food, medical relief, home care and winter assistance. *Hesed* programs include the provision of services in the home, at local community

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[358] Dovid Katz, *How to Help the Holocaust's Last Victims*, The Forward, September 24, 1999, at 9.

[359] Largely as a result of the Holocaust, moreover, a considerable number of these elderly Nazi victims never married or have lost their spouses, have never borne children or have lost them also. Many of those with families meanwhile have seen them move to Israel, the United States or elsewhere in Europe, leaving their elderly relatives behind and without nearby family to help with their day-to-day care. Nazi destruction and communist restrictions decimated Jewish community institutions, and the Soviet social welfare and health network that partially replaced them is in disintegration. *See* Annex F ("Social Safety Nets").

sites, and at multi-service centers in larger cities where the elderly can receive medical and welfare assistance under one roof. In 1999 alone, more than 190,000 elderly clients, primarily Jewish Nazi victims, were served by the *Hesed* program through 120 centers and 34 *Hesed*Mobiles reaching 1,320 towns and villages.[360]

Food: In 1999, the *Heseds* provided needy elderly persons with approximately 960,000 food packages; over 2,724,000 hot meals were served in communal dining rooms; 11,000 homebound clients received 2,200,000 meals-on-wheels; and 9,000 clients took part in 640 "*Bayit Cham*" ("Warm Home") programs, which met two to three times weekly and at which thousands of hot meals were served every month.[361]

In addition to supplying needed supplementary nutrition, all of these activities are meant to bring together isolated Nazi victims to foster a sense of community and combat loneliness. As described by journalist Marilyn Henry of a "warm home" meal hosted in the Kiev apartment of Kira Begelman, who "remembers . . . a terrifying flight from Kiev to Stalingrad [at age 5], and hunger":[362]

> It is a simple concept with stunning results across the former Soviet Union — hundreds of small groups of older Jews meet regularly in someone's home for hot meals and to celebrate Jewish festivals. These meals, which are subsidized by the JDC, reverse the social isolation and fend off the hunger that imperil these Jews, many of whom are survivors ….
>
> The "warm home" program creates family-like circles. "We help one another. When someone is sick, we get them medicine, take them a

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360 "Snapshots 2000: JDC Activities in the Former Soviet Union" (American Jewish Joint Distribution Committee) (hereinafter, "Snapshots"), at 9. In a few communities in the former Soviet Union, the *Hesed* program is formally known by another name, but it is the intent of the Special Master that such similar programs also be eligible for funding under this proposal.

361 "Snapshots," at 9, 46, 51; *see also* 1999 Claims Conference Annual Report, at 24.

362 Marilyn Henry, *Window on the Former Soviet Union: Warm Homes*, available at www.jdc.org/news/windowfsu.text (visited on January 12, 2000).

> meal," said Paulina Kotsubey. A retired bookkeeper, she lives on a pension of $30 a month, much of which is used to pay her rent. Having lunch in the homey Begelman flat is a comfortable way to get food assistance with dignity and to enjoy the company of [others] ….[363]

Medical and Home Care: In addition to food programs, the *Hesed* program also offers, among other services, medical consultations, medicine and health care equipment, winter relief (including heating and cooking fuel, blankets, warm clothing and home repairs), and home care (such as help with cooking, cleaning, bathing and clothes washing).[364] In 1999 alone, for example, the *Heseds* provided 1,585,000 homecare visits to 18,000 clients; loaned 26,000 pieces of medical equipment; and provided winter relief to 76,000 individuals in hundreds of cities and towns across the former Soviet Union. Additionally, 18,900 elderly patients received medical care and 143,000 medical prescriptions were filled.[365]

The individual *Hesed* centers are umbrella organizations, whose Boards of Directors represents the major components of the local Jewish community. The Board typically is composed of a local rabbi, a representative of the survivor association, heads of existing Jewish social welfare agencies and programs, prominent community leaders and local donors.[366]

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363 *Id.*

364 "Snapshots," at 50 ("The caregivers are members of the community who are paid to look after, shop and cook for people who cannot perform these tasks for themselves and see to it that essential home repairs are carried out. Often, they will bring a Jewish newspaper or a book from the local community library, providing both spiritual and material sustenance, as well as the companionship that so many elderly people lack. In some of the more rural areas of the FSU, homecare includes pumping and carrying water from local wells and chopping wood for heating and cooking"); Spencer Foreman, M.D., Report of findings on annual visits to the FSU, 1996-1999 (December, 1999) (hereinafter, "Foreman"), at 4 (on file with Special Master). Dr. Foreman, President of Montefiore Medical Center, Bronx, New York, traveled to the former Soviet Union in four consecutive years, 1996-1999, to "observe conditions affecting elderly Jews and to assess the JDC's efforts to assist them through its extensive social services network." *Id.* at 1.

365 "Snapshots," at 9, 51; 1999 Claims Conference Annual Report, at 24.

366 *See* December 1999 "List of Board Members of Hesed Welfare Centers in the Former Soviet Union"

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The *Hesed* Boards in some cases make sub-allocations of funds to support other existing welfare programs in the community. In most cases, the *Hesed* boards administer the programs directly; in other cases they provide funding to administrative structures under the *Hesed* umbrella.

The *Hesed* programs make use of volunteers and other communal frameworks (such as Jewish university students and schools) for service provision whenever possible. Many of the volunteers — 10,500 in 1999 alone[367] — are themselves needy Nazi victims and thus receive *Hesed* benefits, including food and medical aid.

Hesed training programs are intended to teach practical concepts of efficient and accountable management and service provision to *Hesed* staff, lay-leaders, and volunteers. The training programs are coordinated by the JDC Rosenwald Institute for Communal and Social Service Workers, with branches in St. Petersburg, Dnepropetrovsk, Kiev, Minsk and Kishinev, Krasnoyarsk and Odessa.[368]

On the local level, each Board of Directors, together with the director of the *Hesed*, is responsible for establishing policy and operational controls, including the supervision of the field workers. JDC representatives monitor balances and expenditures by budget lines and

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(on file with the Special Master). For example, in Kiev ("*Hesed Avot*"), the Board includes, among others, members of the Ukrainian Association of Jewish Organizations and Communities ("VAAD"), a leader of the Ukrainian Association of Concentration Camps and Ghetto Prisoners, members of the Board of the Kiev City Jewish Community, a rabbi, a member of the Ukrainian Jewish Congress, and a university professor. In Minsk ("*Hesed Rechamim*"), the Board includes, among others, the President of the Federation of Jewish Associations and Communities, the Chairman of the Belarus Union of Jewish War Veterans, Partisans and Underground Members, an officer of the Association of Former Concentration Camp and Ghetto Prisoners, a member of the Nazi Victims Memorial Foundation, and a leader of the Jewish People University. The Boards of other *Heseds* similarly are comprised of local community leaders.

367 "Snapshots," at 9.

368 "Snapshots," at 62; JDC Proposal to the Government of the Netherlands Seeking a Distribution from the Nazi Persecutee Relief Fund, November 1999, at 2-3 (hereinafter, "JDC Proposal to the Netherlands") (on file with Special Master).

help *Hesed* directors establish and monitor financial procedures and assess individualized services.[369] On a quarterly basis, the Claims Conference receives financial and programmatic reports from the *Hesed* centers, and on a yearly basis, the international accounting firm Ernst & Young provides independent audits. In addition, a management information system ("MIS") tracks the services provided to *Hesed* clients, enabling the *Hesed* and the JDC to monitor each potential client's level of need and eligibility for assistance, thereby generating lists of clients scheduled to receive medical aid or food packages, or to participate in meals-on-wheels, hot meals and "warm home" programs.[370] For purposes of Claims Conference funding, the client's status as a Nazi victim also is determined.[371]

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[369] For example, the JDC closely monitors such specific items as weight and contents of food packages (which must weigh five to eight kilograms and include a minimum of five items chosen in accordance with the recommendations of a nutritionist); quotes provided by food suppliers (with the minimum requirement that three different companies provide such bids, and that price quotes include contents, weight and prices of each item, total price, including packaging and delivery, and conditions of delivery); contracts with food package suppliers (which terms have been drafted by JDC counsel and are set forth in standardized agreements); manner of food storage (with specificity as to the maintenance of warehouses, including sanitation and security requirements); and delivery of food (with the obligation that the client or a designated recipient sign for delivery). Additionally, "the initial practise [sic] of purchasing food packages centrally … and then sending it to each periphery town has been replaced by a policy of encouraging each community to purchase food packages locally." *See* JDC Internal Controls – FSU Welfare Operations, September 1998, revised October 1999, at 3-4 (on file with Special Master). Similar controls are in place for other *Hesed* services. *See id.* at 4 (describing required contracts for meals-on-wheels suppliers, monitoring of nutritional, quality and sanitation requirements, distribution routes, and other controls), *id.* at 5 (describing review of home care services, providers, and training); *id.* (describing required training of program directors in use of medical equipment, authorization of equipment by program director and, in some instances, by a physician, monitoring by home care workers, and quality and price controls; dispensation of medication by physicians only; and monitoring of winter relief via bidding and analysis of relief provided to individual clients).

[370] *See* JDC Hesed Welfare Model, December 1999, at 2-3 (on file with Special Master).

[371] Exhibit 6 hereto includes a copy of the Questionnaire used by the *Heseds* to gather pertinent client data.

Certain *Heseds* serve a clientele comprised of elderly Jews who, although needy, were not "Victims or Targets of Nazi Persecution." The formal funding requests to be submitted to the Court by the JDC on behalf of the *Hesed* program, discussed in greater detail below, must adhere to the parameters

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Several nations which have contributed to the International Nazi Persecutee Relief Fund — including the United States, Great Britain, the Netherlands and France — have deemed the *Hesed* and comparable programs worthy of support, and have allocated several million dollars to JDC and Claims Conference relief efforts for the benefit of needy elderly survivors in Central and Eastern Europe.[372] With sufficient additional funding — and not only from this

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established in Agent Orange: "Projects funded by [the Settlement Fund] should be designed to benefit the class of persons whose claims are covered by this settlement," 611 F. Supp. at 1433; namely, those whose assets are presumed to have been looted by the Nazis and therefore potentially may have some link to a Releasee as set forth under Section 8.2(b) of the Settlement Agreement. As discussed above and in Annex G ("The Looted Assets Class"), all persons who lived in, owned assets in or fled territories occupied by the Nazis, belong to this class. "Funding should be directed to projects that focus on this class rather than on society as a whole or on the general [Jewish] population, even though indirect benefits may flow to [a] broader group … from the [project's] activities. Some worthwhile projects may not be able to deliver services exclusively to members of the class, but efforts should be made to inform and encourage class members to participate in [settlement]-funded projects. In addition, the claimants – those class members who have filed or will file a claim to participate in the settlement – should be the initial focus of projects that provide intensive services to individuals." 611 F. Supp. at 1433.

[372] *See* Annex D ("Heirs"). In 1998 and 1999, the United States allocated a total of $8.5 million to the Claims Conference for programs in Central and Eastern Europe and the former Soviet Union, much of which was designated by the United States for the *Hesed* program. *See* 1998 Claims Conference Annual Report, at 25; 1999 Claims Conference Annual Report, at 26.

Similarly, in June, 2000, the Netherlands advised the JDC that it will be providing that organization with a total of $2,268,276.60 for the Ukraine, Belarus and Moldova, and $425,301.87 for Romania and Hungary, to fund food relief, medical care and home care programs. The decision followed the JDC's November, 1999 formal proposal to the Dutch government, in which it noted, among other things, that "[a]s an established organization working directly with local Jewish communities to provide relief and welfare to Holocaust survivors, JDC is the ideal agent to implement a professional, fiscally responsible program with funding from the Nazi Persecutee Relief Fund. *The existing social service infrastructure will allow the funding received from the Fund to go strictly towards programs, with no overhead costs incurred. Furthermore, regular audits insure that funding for JDC's programs are spent appropriately.*" JDC Proposal to the Netherlands, at 2 (emphasis in original); *see also* Advisory Report Issued to the Minister of Health, Welfare and Sport of the Government of the Netherlands, June 30, 2000 (on file with Special Master); Announcement of French Contribution to the International Fund for Needy Victims of Nazi Persecution, London, 28 June 2000, confirming funding of ten projects, including a grant of 5 million French francs to the Claims Conference to provide "social and medical work" in Ukraine, Belarus and Moldova (on file with Special Master); British Foreign & Commonwealth Office News, July 15, 1999 (announcing that two-thirds of Britain's "1 million pound contribution to help victims of Nazi persecution" has been allocated to the JDC "for projects providing medical care to needy survivors in Ukraine, Belarus, Russia and Moldova") (*available at* http://www.fco.gov.uk/news).

$1.25 billion Settlement Fund but perhaps in the future from other Holocaust compensation programs — the *Hesed* program can expand its services both geographically and substantively; for example, by providing additional medications, adding more protein-based products to food packages, increasing the frequency of delivery of these food packages, expanding services to needy Nazi victims whom the *Heseds* have not yet been able to reach, and extending the period of time for which these services can be provided.

(ii) Israel, North America, Europe (Non-Former Soviet Union) and the Rest of the World

Many Nazi victims outside of the former Soviet Union have access to government funded social welfare programs, albeit to varying extents. The majority of these Nazi victims today are not considered economically "at risk."[373] However, there still are a sizeable number of Jewish victims of Nazi persecution who face problems meeting basic life needs. Sadly, even in Western countries, funding is required to help some Nazi victims pay for food, medication, medical services, clothing, housing and the like.

The social and economic situation of Nazi victims varies among countries, even among states and regions. The availability of government-funded as well as community-supported programs also varies. Therefore, funding priorities should be tailored and targeted by specific region.

Given the limited amounts available from this Settlement Fund, the assistance should target emergency relief to the neediest victims and not seek to address chronic needs. In the West, there are many social service agencies which administer emergency cash grant programs designed to address the most critical problems of Nazi victims and, crucially, help

[373] *See* Annex F ("Social Safety Nets").

them remain safely in their own homes for as long as possible, often through funding for medications and/or medical equipment not paid for by national insurance systems, eviction prevention and similar programs.

Like the *Heseds*, the emergency assistance programs described below consult with Nazi victims from the local community who aid in outreach and in the review of policy. In addition, as noted previously, by utilizing existing programs and structures, the Court can ensure accountability while minimizing administrative costs.[374]

The initial recommended programs are as follows:

(b) Israel

The Foundation for the Benefit of Holocaust Victims in Israel was founded in 1993. The Foundation provides assistance to Nazi victims, supplemental to that provided by the National Insurance Institute, through individual emergency grants, provision of nursing services, and emergency alert buttons.[375]

The Foundation is governed by a General Assembly composed of representatives of different Holocaust survivor organizations throughout Israel. Further, there is a Board of

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[374] Current monitoring systems include relying upon social service agencies to pay vendors directly, requiring the submission of receipts, and other such controls.

[375] *See, e.g.*, 1999 Claims Conference Annual Report, at 23 ("The Claims Conference … funds the Foundation for the Benefit of Holocaust Victims in Israel that provides substantial amounts of homecare to the most disabled of Nazi victims in Israel …. In addition, one-time emergency grants for the purchase of items not provided under the Israeli national health program, such as implant lenses, dentures, hearing aids or orthopedic shoes, and Emergency Lifeline Alert Systems are provided for Nazi victims. Tens of thousands of Nazi victims are receiving support through this foundation").

Directors elected by the General Assembly which also represents the survivor groups. Currently, 14 different Holocaust survivor organizations are represented in the Foundation.[376]

Since its inception, nearly 40,000 individual Nazi victims have received one-time grants from the Foundation for health-related needs. These grants help vulnerable Nazi victims acquire basic medical and comparable items not provided through national health insurance plans. These grants are often used for the following:

- Dentures
- Basic home equipment
- Eyeglasses
- Medicine
- Medical rehabilitation and equipment
- Hearing aids

Eligibility criteria, including the applicant's annual income, govern the distribution of funds.[377] Requests for assistance are reviewed and evaluated by the professional

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[376] The following groups are represented: Centre of Organizations of Holocaust Survivors in Israel (itself an umbrella organization of nearly 40 survivor organizations); Association of Polish Jews; Association of Jewish Rumanian Immigrants; Invalid Association of Nazi Persecution; Association of Past Nazi Prisoners; Association of Yugoslavian Immigrants; Association of Hungarian Immigrants; Association of Disabled Veterans and Fighters Against the Nazis; Association of Lithuanian Jews; Association in Memory of the Victims of the Concentration Camps Landsberg-Kanpring; Association of Survivors of Concentration Camps of Greek Origin Living in Israel; AMCHA (National Israeli Center for Psychological Support of Survivors of the Holocaust and the Second Generation); Association of Survivors of Forced Labor Groups; and World Conference of Polish Jews.

[377] As of August, 2000, recipients' income was not to exceed NIS 5,200 monthly (approximately $1,300).

staff as well as committees of volunteer Nazi victims. Each application is screened by the survivor committees, which are vested with the final authority of approval.

(c) North America

In 1996, the Claims Conference created the Holocaust Survivor Emergency Assistance Program (HSEAP), which is administered by Jewish social service agencies in communities with significant populations of Nazi victims.[378] The administrative costs of these programs are borne by the social service agencies so that all funds provided by the Claims Conference are distributed directly for the benefit of survivors. The guidelines, eligibility criteria and internal procedures were developed by a committee of representatives from the Claims Conference, social service professionals and Nazi victims from around North America.

Each agency that administers this program is required to establish a local Holocaust Survivor Advisory Committee composed of Nazi victims residing in the community who are responsible for assisting in oversight and outreach.

Some of the purposes for which financial assistance is considered include:

- Emergency rent to prevent eviction
- Emergency relocation
- Funds to prevent utility shut-off

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[378] These agencies include, among others, Jewish Family Services across the United States and Canada, Selfhelp Community Services, Guardians of the Sick Alliance (an alliance of 6 Bikur Cholim agencies throughout New York City), and Blue Card. A complete list of the participating service agencies is attached hereto as part of Exhibit 6. *See also* 1999 Claims Conference Annual Report, at 25; Claims Conference Guide to Compensation and Restitution for Holocaust Survivors (Second Edition), at 34 ("Various programs exist for the benefit of needy Holocaust survivors requiring immediate medical or financial assistance. Such programs, known as Holocaust Survivor Emergency Assistance Programs, are funded by the Claims Conference and run by local Jewish social service agencies. Under these programs, small, one-time, cash grants are given to Holocaust survivors in extreme financial need ([currently] individuals whose income is below 200 percent of the United States Federal poverty level and whose assets do not exceed $10,000)").

- Emergency medical or dental care not paid for by national insurance systems
- Essential medical products such as wheel chairs, hearing aids, special seating or beds, and the like
- Emergency food assistance
- Winter clothing

(d) Europe and the Rest of the World

As in the programs mentioned above, Nazi victims throughout the rest of the world should have access to emergency assistance programs to provide modest, yet meaningful, one-time grants. These grants should be available for purposes such as:

- Emergency medical or dental care not covered by national insurance systems
- Emergency food assistance
- Medicine
- Medical equipment such as wheelchairs, hearing aids and the like
- Dentures
- Winter clothing

Many such programs currently exist throughout the world with funding from the Claims Conference and under the guidance of local survivor communities working together with professional social service agencies. As in the former Soviet Union, Israel and the United States, specific programs have been designed to meet the needs of survivors, including by providing emergency assistance. Such programs currently exist in, among other locations, Great Britain, France, Poland, the Czech Republic and Australia, and comparable programs are being developed in other locations such as Romania, Hungary and Argentina.

It is recommended that the above-described emergency assistance programs — the *Heseds*, the Foundation for the Benefit of Holocaust Victims in Israel, the Holocaust Survivor Emergency Assistance Program, and similar programs in other parts of the world as noted above — should be allocated funds from this Settlement Agreement on behalf of the Looted Assets Class. Each of these programs is designed to reach the greatest number of Nazi victims at the lowest possible administrative expense, with already-existing controls in place to monitor the use of the funds. In addition, each is intended to and, in the Special Master's assessment, does in fact provide a meaningful impact upon individual victims' day-to-day lives.[379]

(iii) Funding Principles

For all of the above-named programs, the allocation and distribution of settlement funds should be guided by the dual objectives of continuity and flexibility.

It is clear that for any assistance to Nazi victims to be meaningful, the aid should be available on an ongoing basis. To elevate dramatically the level of service in the short-term,

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[379] A number of thoughtful proposals submitted to the Special Master have advocated for establishment of a health care insurance program. *See* Annex A ("Summary of Allocation Proposals"). A similar suggestion was advanced in connection with the Agent Orange settlement, but was not adopted because the settlement fund there was insufficient to support such a program. Even fifteen years ago, when medical expenses generally were far lower than they are now, the Special Master in the Agent Orange action observed that "the Fund could not afford to provide meaningful medical coverage. A program offering comprehensive major medical insurance would be prohibitively expensive." Agent Orange Special Master Report, at 72. "Comprehensive major medical coverage typically costs $1,000-$1,200 per person per year for a normal population. Doubling this figure, to account for the fact that the claimants are a self-selected population with severe medical problems, and multiplying by the 200,000 claims already filed, yields a cost of over $400 million for one year – clearly unaffordable." *Id.* at 72 n. 33. In this case, of course, there are well over 800,000 surviving class members, and comprehensive medical insurance in the United States alone certainly costs much more than the figures quoted in the Agent Orange Special Master Report. The $1.25 billion Settlement Fund would be insufficient to provide such medical coverage even without deductions for repayments of bank accounts.

building expectations among needy survivors, only to remove the funding and thus the assistance, would be a great disservice to those who may grow to depend upon their food packages, medical aid and home visits. Multi-year planning to provide sustainable levels of targeted essential social services is imperative. The funds allocated to the above-recommended programs should therefore be fully spent in diminishing increments over a period of up to ten years.[380]

Along with continuity, however, there must also be flexibility. Social service needs that appear imperative today may diminish in a few years' time, while other demands not yet anticipated — especially with an aging population — may later arise. The functions, mandates or capabilities of the agencies implementing the emergency assistance programs also may change. Therefore, although there should be a presumption that funding of these recommended social service programs will be maintained for a period of up to ten years, each such program also should be reassessed by the Court one year after the initial disbursement of funds, and each year thereafter.

Accordingly, the Special Master recommends that the following program guidelines be adopted:

1. For the former Soviet Union, after consultation with the *Hesed* Boards and the Claims Conference, recommendations for specific programs and detailed budgets should be filed by the JDC with the Court for its review. For Israel, North America, Europe and the rest of the world, recommendations for specific programs and detailed budgets should be filed by the Claims Conference with the Court for its review. For all recommended programs, regardless of geographic location, specifics of social welfare agency budgets should be submitted by a date certain to be established by the Court upon its approval of a Final Plan of Allocation and Distribution of the Settlement Fund. Each proposal should contain an annual budget, describe in detail the services to be funded, including

[380] Specific funding recommendations, per year and per region, are set forth as part of Exhibit 6 hereto.

appropriate data concerning the number, age, and economic needs of the Nazi victims expected to benefit directly from such programs, and provide information concerning the involvement of local communities (and particularly local victims) in all such programs. The Court will consider whether the proposed funding is intended to augment the program by expanding the services provided or by lengthening the period for which services are provided, rather than substituting for existing program funding.[381]

2. The JDC and the Claims Conference should be responsible for monitoring and oversight of the programs in the former Soviet Union. The Claims Conference should be responsible for monitoring and oversight of the programs in other parts of the world. Detailed programmatic, statistical and financial reports must be submitted annually to the Court by the agency responsible for oversight. At the Court's discretion, a percentage of annual funding may be used by the agency responsible for this oversight and monitoring. It is recommended that this amount not exceed 2% of annual funding.

3. Audited financial reports for the specific programs must be provided to the Court annually. Alternative auditing functions should be considered for agencies which receive small grants and for whom full audit reports would be financially prohibitive.

4. All programs approved for funding by the Court as part of the initial allocation and distribution of amounts from the Settlement Fund should be reviewed by the Court on an annual basis. An extensive annual review is advisable given potential changes in any number of factors, such as migration, demographics, social needs, and the availability of other sources of funding, as well as in the functions, mandates and capabilities of the implementing agencies.

5. Upon annual review, the Claims Conference and the JDC may recommend to the Court that the same programs continue to be funded and, if so, file recommendations and detailed budgets with the Court for its review. Alternatively, the Claims Conference and the JDC may recommend that the Court redirect settlement funds to other programs not previously funded. Any such recommended programs should be similar to those described herein; namely, the programs should provide direct social service assistance to Jewish victims of Nazi persecution in need. For any program not previously funded, the Claims

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[381] The Settlement Fund should not be utilized for religious or political purposes, although programs which may provide hunger relief occasionally in the context of a religious holiday celebration, such as the "Warm Homes" gatherings described above, should not be excluded from funding. In general, however, the Second Circuit has made clear that "the proceeds of a court-administered settlement" should not be used for "political advocacy," nor, presumably, for solely religious objectives. *See* In re Agent Orange Product Liability Litigation, 818 F.2d 179, 186 (2d Cir. 1987).

Conference and/or JDC shall file with the Court a detailed proposal containing the same information identified at Paragraph "1" of these program guidelines.

It is further recommended that one of these programs, such as the New York-area Selfhelp program, might honor the memory of rabbinical student Lauren Neuborne. This would be a most appropriate tribute to her father, Lead Settlement Counsel Professor Burt Neuborne, who has donated so much of his time and insight not only to this proceeding but also to the negotiations which led to the creation of the German Fund, and who has helped Holocaust victims navigate what previously was noted as the tortuous path toward accountability and remembrance.

It is possible that after all deposited assets, slave labor and refugee claims have been paid, there may be additional funds available for "Stage 2" distributions to needy members of the Looted Assets Class, as well as to needy spouses and children of Nazi victims. These individuals may benefit either from expansion of the programs described above, or by the allocation of settlement proceeds to programs not funded during "Stage 1." To the extent that any such additional funds become available, the Special Master recommends that the same process outlined for "Stage 1" allocations also be utilized for subsequent allocations.

(e) <u>Assistance to Needy Roma, Jehovah' s Witness, Homosexual and Disabled Survivors</u>

The principles concerning Nazi looting outlined above and in Annex G ("The Looted Assets Class") compel the Special Master to recommend that, for non-Jewish class members, the Settlement Fund likewise be channeled to programs which assist the neediest elderly Nazi victims. However, in contrast to the extensive programs designed to assist Jewish Holocaust victims, some of which are described above, the Special Master is aware of no currently existing humanitarian or non-governmental programs specifically aiding survivors of

Nazi persecution from among the Roma, Jehovah's Witness, disabled or homosexual communities. A central reason for the apparent lack of such programs is that, until very recently, the suffering of these four groups was not well recognized, as evidenced both by the relative absence of scholarship concerning these victims[382] and in the dearth of compensation programs for their benefit.[383]

The German Foundation "Remembrance, Responsibility and Future," established in July, 2000, implicitly recognizes the need for further humanitarian programs to aid the Roma survivor community. The legislation earmarks the sum of DM 24 million (approximately $12 million as of August, 2000) to be "paid over to" the organization charged with distributions to non-Jewish former slave and forced laborers who reside in the West and in certain Central and Eastern European countries, the IOM. The IOM "shall use [the DM 24 million] for social purposes vis-à-vis the … persecuted Sinti and Roma."[384] Therefore, the IOM now has a mandate to establish programs to serve needy Nazi victims within the Sinti and Roma community, the

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382 In recent years, Holocaust scholars such as Sybil Milton, Guenter Lewy and Richard Plant have turned their attention to the plight of these groups. *See, e.g.*, Sybil Milton, "Holocaust: The Gypsies," in Century of Genocide: Eyewitness Accounts and Critical Views 174 (New York: Garland Pub. 1997); Guenter Lewy, The Nazi Persecution of the Gypsies (New York: Oxford Univ. Press, 2000); Richard Plant, The Pink Triangle (New York: Henry Holt and Co. 1986). *See also, e.g.*, Simone Arnold Liebster, Facing the Lion (New Orleans: Grammaton Press 2000); *Spiritual Resistance and Its Costs for a Christian Minority: A Documentary Report of Jehovah's Witnesses Under Nazism* 1933-1945 (Oct. 1999); Horst Biesold, Crying Hands: Eugenics and Deaf People of Nazi Germany (Washington, D.C.: Gallaudet Univ. Press 1999).

383 This is not to suggest that non-Jewish victims have been ineligible for recompense. Persecuted Jehovah's Witnesses and Roma have been eligible for compensation virtually from the inception of these programs, such as Germany's BEG promulgated in the 1950s. *See* Annex E ("Holocaust Compensation"). Nevertheless, compensation to the Roma, Jehovah's Witnesses, disabled and homosexual victims of the Nazis generally has been more limited in scope and beset by difficulties, including continuing prejudice and mischaracterization of the victims. *See id*.

384 *See* German Fund Legislation, Section 9(4)4.

same individuals whom the Special Master recommends compensating as part of the Looted Assets Class.

The Special Master has met with representatives of the IOM and has had additional communications with its officers and staff.[385] In the short time since it was requested to serve as a "partner organization" to the German Fund, the IOM rapidly has familiarized itself with the many complicated issues pertinent not only to the German Fund but also to this "Swiss Banks" settlement. The IOM is determined to establish a meaningful humanitarian assistance program to provide significant relief to the generally elderly and long-neglected Roma survivors of Nazi terror.

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[385] The IOM's mission statement describes the organization's important role in providing "emergency assistance to persons affected by conflict and post-conflict situations. IOM has participated in virtually every emergency involving large-scale movement of people since it was founded in 1951. IOM offers its services to vulnerable populations in need of evacuation, resettlement or return. While such services are often urgent and vital in the initial phases of an emergency, they may become even more relevant during the critical transition from emergency humanitarian relief, through a period of rehabilitation, to longer-term reconstruction and development efforts." IOM Mission Statement, available at http://www.iom.int/iom/Mandate_and_Structure/mission_statement-eng.htm (visited July 10, 2000). IOM has provided humanitarian assistance in a variety of arenas: during 1956-57, it resettled 180,000 Hungarian refugees; organized the 1968 emigration of 40,000 Czechoslovakian refugees; resettled refugees in Southeast Asia during the 1970s; repatriated 165,000 people from the Persian Gulf area in 1990 after Kuwait's invasion by Iraq, at the request of the United Nations; provided support and medical aid to displaced populations in Yugoslavia in 1992; and, since 1996, has coordinated aid to Bosnian refugees outside the former Yugoslavia. *See id.* Among the member states of IOM are Bulgaria, the Czech Republic, France, Germany, Hungary, Israel, Latvia, Lithuania, the Netherlands, Norway, Poland, Romania, Slovakia, Switzerland (where IOM has its headquarters, in Geneva), and the United States. Among the IOM's observer states are Belarus, Bosnia and Herzegovina, the Russian Federation, Ukraine, the United Kingdom and Yugoslavia. A wide variety of international governmental and non-governmental organizations hold observer status with IOM, including numerous United Nations offices, HIAS Inc., Catholic Relief Services and the International Rescue Committee. *Id.* Some of the migration and health services IOM has provided include medical screening of prospective migrants and refugees, immunization programs, HIV counseling, programs for disabled refugees, medical evacuations and similar assistance. *See* http://www.iom.int/med. In addition to its experience in humanitarian relief, IOM also will now be benefiting from the claims processing experience of its legal staff, including the former Chief of the Legal Services Branch of the United Nations Compensation Commission, Dr. Norbert Wühler. *See, e.g.*, Dr. Norbert Wühler, "The United Nations Compensation Commission," in Claims Resolution Process on Dormant Accounts in Switzerland, at 131-147.

The Special Master recommends allocating a sum in addition to that to be allocated by the German Fund for the forthcoming IOM program, so that an even greater number of Roma survivors can be served and more significant humanitarian relief offered. Furthermore, the IOM has agreed to expand this humanitarian program to provide direct assistance to other needy non-Jewish members of the Looted Assets Class: Jehovah's Witnesses, homosexual and mentally or physically disabled survivors of Nazi persecution.[386]

Therefore, for the additional benefit of all non-Jewish "Victim or Target" groups – needy Roma, Jehovah's Witnesses, disabled and homosexual Nazi victims - the Special Master recommends allocating to forthcoming IOM program(s) an additional sum of $10 million. The same general guidelines outlined above with respect to the "*Hesed*" and other programs for needy Jewish survivors also should be applied to the IOM humanitarian programs, with adjustments as needed to enable the IOM also to adhere to the mandates of the German Fund. In particular, the Court should consider whether the programs recommended for funding by the IOM (upon consultation with representatives of survivor groups) are to be augmented by expansion of services, or by lengthening the period for which services are provided, rather than substituting for existing funding. Any allocations to IOM humanitarian programs from this $1.25 billion Settlement Fund should augment, and not substitute for, the DM 24 million designated for the IOM under the terms of the German Fund Legislation.

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[386] As noted previously, the Special Master recommends that Watch Tower, which has submitted a proposal on behalf of needy Jehovah's Witness survivors of Nazi persecution, and representatives of the Roma, who have written to the Special Master to endorse the IOM, should be consulted in connection with implementation of these programs. Other representatives and advocates on behalf of needy, non-Jewish survivors to be assisted by the IOM likewise should be consulted, and the IOM has, in fact, advised the Special Master that it will seek the input of survivor representatives. See Letter of Brunson McKinley, IOM Director General, to the Special Master, September 8, 2000 (Exhibit 4 hereto).

As noted previously, in the event that any portion of the Settlement Fund remains after all bank account claims have been repaid and all other "Stage 1" distributions have been made, the Special Master recommends that the Court consider allocating additional sums to the IOM programs for the further benefit of needy non-Jewish "Victims or Targets of Nazi Persecution," as well as needy spouses and heirs of Nazi victims.

C. Slave Labor Class I

1. Class Definition

"Slave Labor Class I" consists of

> Victims or Targets of Nazi Persecution who actually or allegedly performed Slave Labor for companies or entities that actually or allegedly deposited the revenues or proceeds of that labor with, or transacted such revenues or proceeds through, Releasees, and their heirs, executors, administrators and assigns, and who have or at any time have asserted, assert, or may in the future seek to assert Claims against any Releasee for relief of any kind whatsoever relating to or arising in any way from the deposit of such revenues or proceeds or Cloaked Assets or any effort to obtain redress in connection with the revenues or proceeds of Slave Labor or Cloaked Assets. (Settlement Agreement, Section 8.2(c)).

"Slave Labor" itself is defined in Section 1 of the Settlement Agreement as "work for little or no remuneration actually or allegedly performed by individuals involuntarily at the insistence, direction, or under the auspices of the Nazi Regime."[387]

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[387] Settlement Agreement, Section 1. The term "Nazi Regime" includes not only the Nazi government of Germany, but all "its instrumentalities, agents, and allies (including, without limitation, all other Axis countries), all occupied countries, and all other individuals or entities in any way affiliated or associated with, or acting for or on behalf or under the control or influence of, the Nazi Regime..." (*id.*)

It should be noted that the Settlement Agreement makes no distinction between slave and forced labor. By contrast, the German Fund does differentiate between slave and forced laborers, recognizing the difference in Nazi philosophy toward and treatment of the two groups: "Slave Laborers, Jewish and non-Jewish, who lived in concentration camps while they were forced to work, will receive the highest *per capita* allocation, because they were being worked to death. The Nazis had three methods of extermination: gassing, shooting and slave labor, known in German as 'Vernichtung

(continued on next page)

Of the approximately 562,000 individuals for whom Initial Questionnaires have been analyzed thus far, approximately 205,000 (including survivors as well as heirs) have stated that they intend to assert a claim for slave labor.[388]

2. Allocation Principles

Having performed slave labor in itself does not make one a member of Slave Labor Class I. Under the Settlement Agreement (at Section 8.2(c)), members of Slave Labor Class I must have labored "for companies or entities that actually or allegedly deposited the revenues or proceeds of that labor with, or transacted such revenues or proceeds through, Releasees."

Each of these definitions contains elements difficult to satisfy, in large part because, as many scholars agree, the economic history of the Holocaust remains incomplete.[389] The Special Master is aware of no scholarly research that has yet traced "the revenues or proceeds" of slave labor from a specific slave labor-using entity to its ultimate destination.

Nevertheless, even while the actual proceeds of slave labor have not yet been traced — nor can they be without expending an inordinate amount of the Settlement Fund — certain indisputable factors demonstrate (a) the pervasiveness of slave labor across all of conquered Europe; and (b) the close financial relationships between German public and private slave-labor using entities and Swiss entities, including Swiss banks.[390]

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durch Arbeit,' literally 'extermination through labor.'" Remarks of Stuart E. Eizenstat, Deputy Secretary of the Treasury, Special Representative of the President and Secretary of State for Holocaust Issues, 12th and Concluded Plenary on the German Foundation, Berlin, Germany, July 17, 2000 (available at http://www.usembassy.de/dossiers/holocaust).

388 *See* Initial Questionnaires Data, at Table 1, p. 5.

389 *See* Annex H ("Slave Labor Class I").

390 *See id.*

(a) German Use of Slave Labor

Otto Count Lambsdorff, who represented the German government in the recently concluded negotiations that led to the establishment of the German Fund, has observed that "there was hardly a German company that did not use slave and forced labor during World War II."[391]

The work of leading scholars further confirms that the Nazi Regime exploited the slave labor of hundreds of thousands of "Victims or Targets of Nazi Persecution" in every corner of its realm, and that slave labor not only was integral to Nazi policy goals but also critical to the Nazi war effort, particularly in its later years. Jews and other "Victims or Targets" performed slave labor in a variety of settings: in labor details (clearing rubble, building roads and bridges), in concentration and forced labor camps (constructing and maintaining the camps, working in SSA- and privately-owned entities), and in ghettos (working in municipal workshops and private enterprises), among others. As the War progressed, the Nazis increasingly turned to concentration camp inmates to fill their labor needs in the armaments and other industries, and "external camps" were constructed near factories themselves.[392] Professor Ulrich Herbert writes that "[f]rom the spring of 1944 the number of work detachments in the main camps rose rapidly; the list of German firms that established external camps and used concentration camp labour

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391 Cited in testimony of Deputy Treasury Secretary Stuart E. Eizenstat before the House Banking Committee on Holocaust-Related Issues, September 14, 1999 at 6 (*available at* http:\\www.house.gov/banking/91499see.htm).

392 The pervasive use of slave labor throughout the German wartime economy is evident in the sheer number of concentration camps and external work detachments. The Catalogue is the most comprehensive, but by no means exhaustive, list of camps and prisons in Germany and German-occupied territories. It also lists the names of German entities that used slave labor.

grew longer and longer, and included many well-known companies."[393] A "total figure of about a thousand work detachments with 500,000 to 600,000 prisoners seems realistic for the end of 1944."[394] There is no definitive means to determine the actual number of "Victims or Targets of Nazi Persecution" who were forced to perform slave labor, or who among them survived the War. As the Allies marched through Germany at the end of the War, they liberated prisoners not only from well-known concentration camps (like Auschwitz), but also from hundreds of lesser-known factory work sites, external work detachments, "death marches," and other types of imprisonment and enslavement.

A conservative measure of the number of slave laborers from across Nazi Europe who survive today is the ongoing German Holocaust compensation program. As more fully described at Annex E ("Holocaust Compensation") and Annex H ("Slave Labor Class I"), at least four German-derived indemnification funds continue to pay monthly pensions to some 170,000 survivors, many of whom may be presumed to have performed slave labor.[395]

(b) German — Swiss Financial Relationships

There are at least three distinct types of financial relationships that are known to have existed between Swiss financial institutions and German slave labor using-entities. *First*, most significant German slave labor users had Swiss bank accounts. This conclusion is confirmed by an analysis of data contained in lists provided to the Special Master by the Swiss

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393 Ulrich Herbert, "Labour and Extermination: Economic Interest and the Primacy of *Weltanschauung* in National Socialism," Past and Present, No. 138 (February 1993), at 191.

394 *Id.*

395 This presumption is based upon the fact that these pension programs – the BEG health pensions, Israeli, Article 2 and CEEF– all require a showing of disability, and apply largely to those who were confined, for a minimum period of internment, to a concentration camp or ghetto, where they likely performed slave or forced labor. Further, three of the four programs are limited to needy survivors.

Federal Archives and the Volcker Committee, showing German entities whose assets were frozen by the Swiss Federal Council pursuant to a decree of February 16, 1945.[396] Many of the assets on the lists have nothing to do with slave labor, or even German industry, but the lists — while far from complete[397] — nonetheless include a large number of prominent German entities which used slave labor, as well as many lesser well-known entities. A large number of these held Swiss bank accounts or other Swiss assets as of February 16, 1945, when the asset freeze was implemented, as the Slave Labor Class I List makes clear. *Second*, it is widely acknowledged that many German entities, including a large number of the German corporations that exploited slave labor, established Swiss subsidiaries,[398] and it is not unfair to presume that a Swiss entity would have maintained a domestic bank account or other asset in Switzerland. *Third*, the Nazi Regime itself also employed slave laborers.[399] As described previously, governmental reports analyzing movements of Nazi gold, as well as other scholarship, confirm that the Nazi Regime and Nazi-controlled entities banked in Switzerland, which served as a vital conduit for needed hard currency exchange during World War II. These relationships are all made further apparent by the Slave Labor Class I List as well as in Annex H itself.

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396 *See* Annex H and its exhibit, the Slave Labor Class I List.

397 The lists are incomplete because they do not reflect all German entities with assets in Switzerland during the 1930s and 1940s – only those with Swiss assets as of the precise date that the freeze was implemented, February 16, 1945. *See, e.g.*, Rubin, at 72 ("A full and complete census of German-owned properties was argued [by the Swiss] to be next to impossible, and in fact seems never to have been done – despite the vaunted record-keeping skills of the Swiss (and Germans) …. The lack of importance attached by the Allies to Swiss failure to take a complete count of German assets, and other measures, ranging from bureaucratic delays to what seems to have been complicity in cloaking, impeded or frustrated the implementation of the reparation aspects of the Washington Accord").

398 *See* Annex H ("Slave Labor Class I") and its exhibit, the Slave Labor Class I List.

399 *See* Annex H.

This is not to suggest that the Swiss banks or other entities with which German entities transacted had knowledge that some of these funds may have been derived from the exploitation of slave labor, or that the Swiss entities necessarily were aware that their German depositors made use of slave labor. The available data described below and more fully at Annex H and its exhibit, the "Slave Labor Class I List," indicate simply that known slave labor-using "companies or entities … deposited the revenues or proceeds of that labor with, or transacted such revenues or proceeds through, Releasees," in accordance with the definition of Slave Labor Class I set forth in Section 8.2(c) of the Settlement Agreement.

This information permits the Court to adopt a legal presumption — that all former slaves for German entities should be presumed to be members of "Slave Labor Class I" — to simplify the "administration of Slave Labor Class I by making it unnecessary for each claimant to prove a link between the German company for which slave labor was performed and a Swiss bank."[400]

The elderly members of this class therefore are relieved of the burden of demonstrating precisely which company enslaved them and whether and how that company channeled revenues or proceeds of their slave labor through a Swiss entity. The fortuity that the apparent Swiss banking relationships of many slave labor-using entities has been documented should not prejudice those class members who performed slave labor for enterprises whose financial ties to Swiss entities may not yet have been demonstrated with the present state of research and scholarship. As the Initial Questionnaires make clear, many former slaves cannot

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[400] In re Holocaust Victim Assets Litigation, at 39.

even identify the name of the corporation for which they labored; they know only what they did, where they did it, and the generally sub-human conditions in which they were forced to do so.[401]

3. Distribution

In light of the foregoing, all "Victims or Targets of Nazi Persecution" — whether Jewish, Roma, Jehovah's Witness, disabled or homosexual — who performed slave labor for any private entity, any entity owned or controlled by the state or by Nazi authorities, or the concentration camp or ghetto authorities, are members of Slave Labor Class I.

The recent agreement establishing the Foundation "Remembrance, Responsibility and the Future" — the German Fund, formalized in Berlin on July 17, 2000 — has obviated the need for the Special Master to recommend creation of a free-standing entity to determine claimants and to administer payments to members of Slave Labor Class I. As shown above and as more fully discussed in Annex H, the available data supports the presumption that all surviving slave laborers can show a sufficient link to Switzerland to belong to Slave Labor Class I.

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[401] Even in the years following the War, when memories may have been fresher, former slave laborers did not have access to all of the finer details of their mistreatment. For example, during the 1950s-era compensation negotiations between the Claims Conference and AEG concerning the use of slave laborers by Telefunken, an AEG subsidiary, AEG insisted that "the number of camp inmates who had been employed was insignificant" and demanded that the Claims Conference provide lists specifying names of slaves as well as "the camp in which each person was employed." Benjamin B. Ferencz, Less Than Slaves (Cambridge, Massachusetts: Harvard University Press 1979), at 114. However, "[c]omplying with AEG's request was not as simple as it sounded. Over a hundred persons, for example, writing independently from different parts of the world, swore that they had worked for AEG at 'Ankers,' yet that name did not appear on any map of the region and AEG absolutely denied that it had ever had a plant at such location. The number of claimants was too large for the [C]onference to dismiss the claims as fictitious, and after close interrogation of claimants, the mystery was unraveled. 'Ankers' was neither a town nor a factory but was the German name for a part of a machine – a belt or *Anker* – which was being manufactured by AEG in Riga. The workers only knew that they worked at 'Ankers,' without knowing that it was a thing, not a place." *Id.* *See also* Annex E ("Holocaust Compensation").

Since these individuals are expected to be compensated from the German Fund, The Special Master recommends that each Jewish, Roma, Jehovah's Witness, disabled and homosexual former slave laborer who receives a payment from the German Fund (whether as a "slave" or "forced" laborer) also should receive *an additional payment* from this "Swiss Banks" Settlement Fund. Certain heirs[402] of Slave Labor Class I members who died after February 15, 1999 also should be eligible for payment. Each eligible claimant in Slave Labor Class I should receive an equal payment of up to $1000 per person (and in no event less than $500 per person). There should be an initial payment of $500 (50% of the recommended amount). After all claims are processed, a second payment of up to an additional $500 (the remaining 50%) may be made. It is currently estimated that approximately 200,000 Jewish, Roma, Jehovah's Witness, disabled and homosexual former slave laborers will be eligible to receive payments from the German Fund (and so also from the "Swiss Banks" Settlement Fund).[403] If, however, many more eligible former slave or forced laborers make claims, then the Court may have to reconsider the amounts recommended here.

The Special Master stresses that the recommended payment to slave laborers from this Settlement Fund must augment the amount each such individual is to receive from the German Fund. A payment to a member of Slave Labor Class I should not be used as an offset against the amount that person is to receive under the terms of the German legislation.

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[402] *See* Section I (describing definition of heirs, based upon German Fund).

[403] Approximately 120,000 people have filed Initial Questionnaires indicating that they intend to assert slave labor claims as the "subject" (*i.e.*, the former slave laborer). *See* Summary Sheets for Class Members (Annex C, Exhibit 3).

The German Fund Legislation enacted on July 17, 2000 law is of historic significance. The preamble acknowledges the responsibility of German enterprises for Nazi human rights abuses:

> Recognizing that the National Socialist State inflicted severe injustice on slave laborers and forced laborers, through deportation, internment, exploitation which in some cases extended to destruction through labor, and through a large number of other human rights violations, that German enterprises which participated in the [Nazi] injustice bear a historic responsibility and must accept it …. [and] the German Bundestag acknowledges political and moral responsibility for the victims of National Socialism.[404]

For purposes of Slave Labor Class I, the key elements of the German Fund are as follows:[405]

- The purpose of the German Fund "is to make financial compensation available through partner organizations" to former forced and slave laborers "and to those affected by other injustices from the National Socialist period."[406]

- Payments to former laborers are to be carried out by seven "partner organizations." The partner organizations include five foundations established in Central and Eastern European countries, which are responsible

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[404] *See* German Fund Legislation Preamble. The preamble also notes German concern for legal security from litigation in the courts of the United States: "The German Bundestag understands that this Law, the German-U.S. intergovernmental agreement, the Statement of Interest of the U.S. Government, and the Joint Statement of all involved parties, provide adequate legal security for German enterprises and the Federal Republic of Germany, especially in the United States of America." *Id.* Deputy Secretary Eizenstat acknowledged the important role played by the lawsuits – and the attorneys who filed them – in his July 17, 2000 statement at the Concluding Plenary on the German Foundation. *See* Address of Deputy Secretary Eizenstat at the 12th and Concluding Plenary on the German Foundation, Berlin, Germany, July 17, 2000, *available at* http://www.usembassy.de/dossiers/eiz071700.htm at 3-4. Deputy Secretary Eizenstat also discussed the important role played by other negotiators, including the Claims Conference.

[405] In addition to providing for compensation to former slave and forced laborers, the German Fund also provides for compensation of certain property claims, for the funding of humanitarian programs, and for the creation of a "future fund" designed in part to assist heirs of slave and forced laborers.

[406] German Fund Legislation, Section 2(1).

for payments to former slave and forced laborers (Jewish and non-Jewish alike) living in the nations covered by the respective foundations. The five foundations will make payments to persons living in Poland; Ukraine and Moldova; Russia, Latvia and Lithuania; Belarus and Estonia; and the Czech Republic.[407] For non-Jewish individuals living in the rest of the world, the IOM is designated to make payments. For Jewish recipients living in the rest of the world, the Claims Conference is designated to make payments.[408]

- Payments to former slave and forced laborers are to be made in two stages, with an initial payment of 50% in the case of slave laborers and 35% in the case of forced laborers. Final payments will be made after all applications have been received and the foundations have determined the number of legitimate claimants.[409]

- "Slave laborers" are defined under Section 11(1)1 of the legislation as "persons who were held in a concentration camp as defined [under] the German Indemnification Law [BEG] or in another place of confinement[410] outside the territory of what is now the Republic of Austria or a ghetto under comparable conditions and were subjected to forced labor."[411] Such individuals can receive payments of up to DM 15,000 (approximately $7,500 as of August 2000).[412]

- "Forced laborers" are defined under Section 11(1)2 of the legislation as "persons who were deported from their homelands into the territory of the German Reich (according to the borders of 1937) or to a German-occupied

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407 These are the same five foundations established in the mid-1990s pursuant to bilateral treaties with Germany. Following creation of these foundations, certain indemnification payments were made to Nazi victims living in the nations listed above, but not specifically on the basis of former forced or slave labor. *See* Annex E ("Holocaust Compensation").

408 *See* German Fund Legislation, Section 9(2).

409 *Id.* Sections 9(9) and 11(1).

410 "Specific characteristics of other places of confinement … are inhumane prison conditions, insufficient nutrition, and lack of medical care." *Id.* Section 12(1).

411 *Id.* Section 11(1)1. Slave laborers who performed work within the territory of the Republic of Austria are to receive payments from either the German Fund or the yet to be implemented Reconciliation Foundation.

412 *Id.* Section 9(1).

area, subjected to forced labor in a commercial enterprise[413] or for public authorities there, and held under conditions other than those mentioned [under Section 11(1)1], or were subjected to conditions resembling imprisonment or similar extremely harsh living conditions; this rule does not apply to persons who because their forced labor was performed primarily in the territory of what is now the Republic of Austria can receive payments from the Austrian Reconciliation Foundation."[414] Individuals eligible under this provision can receive payments of up to DM 5,000 (approximately $2,500 as of August 2000).[415]

- "Eligibility shall be demonstrated by the applicant by submission of supporting material. The partner organization shall bring in relevant evidence. If no relevant evidence is available, the claimant's eligibility can be made credible in some other way."[416]

- Payments for slave and forced labor "are strictly personal and individual. As such, they must be applied for in one's own name. In a case where the eligible person has died after February 15, 1999 …, the surviving spouse and children shall be entitled to equal shares of the award. If the eligible person left neither a spouse nor children, awards may be applied for in equal shares by the grandchildren, or if there are no grandchildren living, by the siblings.

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[413] "German enterprises … are those that had or have their headquarters within the 1937 borders of the German Reich or in the Federal Republic of Germany, as well as their parent companies, even when the latter have or had their headquarters abroad. Enterprises situated outside the 1937 borders of the German Reich in which during the period between January 30, 1933, and the entry into force of this Law, German enterprises … had a direct or indirect financial participation of at least 25 percent are also considered German enterprises." *Id.* Section 12(2).

414 *Id.* Sections 11(1)1 and 2. The legislation also allows partner organizations to provide for payments to those who performed other forms of forced labor, including that in agriculture. *Id.* Section 11(1)3.

415 *Id.* Section 9(1).

416 *Id.* Section 11(2). The Commentary to the Legislation ("About the Individual Provisions," at Paragraph 2) notes with respect to evidence, that "[e]xtensive proofs of the fact of persecution and the use of forced labor already exist. These can and must be used. Written testimony can also be used as documentary evidence within the meaning of this provision. However, the affected persons because of their advanced age should not be burdened with unreasonable or protracted evidentiary requirements. A simple entry, for example, as a concentration camp prisoner or as a forced laborer, in the archives of the International Missing Persons Service in Arolsen is to be accepted as sufficient fulfillment of the proof requirement. In the absence of such material evidence, it is the responsibility of the applicant to make the damages claimed credible."

If no application is filed by these persons, the heirs named in a will are entitled to apply."[417]

- "Applications must be made to the partner organizations within eight months after the entry into force of the Law (deadline). By way of exception, a deadline of twelve months is set for [those applicants for which the IOM is responsible]. The Board of Trustees [of the Foundation charged with oversight of the German Fund, or "Kuratorium"] shall be authorized to allow an extension of the application deadline by up to a year for individual partner organizations when justified by circumstances."[418]

- Recipients of payments from the German Fund "shall provide a statement … irrevocably renouncing … any further claim against the authorities for forced labor," among other claims.[419]

- No funds will be allocated to the Foundation charged with oversight of the German Fund until certain "preconditions" are met providing "establishment of adequate legal security for German enterprises" from United States lawsuits that have been or in the future may be filed. "The German Bundestag shall determine whether these preconditions exist."[420]

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[417] German Fund Legislation, Section 13(1). A few of the German companies participating in the German Fund made compensation payments to former slave laborers following negotiations with the Claims Conference, primarily during the 1950s and 1960s, but some more recently. *See* Annex E ("Holocaust Compensation"). The relatively few individuals who received compensation as a result of these earlier agreements are to have such sums deducted from any payments received under the German Fund. *See* German Fund Legislation, Section 15.

[418] *Id.* Section 14. The deadlines for applications to the Claims Conference and the IOM have been extended, as permitted under the legislation.

[419] *Id.* Section 16(2)

[420] *Id.* Section 17(2). The Joint Statement issued by all parties to the agreement makes clear that "payments from the Foundation shall begin once all lawsuits against German companies arising out of the [Nazi] era and World War II pending in U.S. courts … are finally dismissed with prejudice by the courts. The initial portion of the DM 5 billion German Government contribution [to the approximately DM 10 billion Fund] will be made available to the Foundation by October 31, 2000. The remainder of the German Government contribution will be made available to the Federal Foundation by December 31, 2000." *See* Joint Statement, ¶ 4(d).

- "The partner organizations are to create appeals organs that are independent and subject to no outside instruction. The appeals process itself is to be free of charge. However, costs incurred by the applicant are not to be reimbursed."[421]

The Special Master has consulted extensively with the Claims Conference, which will be administering distributions to the surviving Jewish slave and forced laborers under the German Fund (who constitute the vast majority of persons eligible for "Slave Labor Class I" payments). Likewise, the Special Master also has consulted with the IOM, which will be handling distributions to non-Jewish former forced and slave laborers who live primarily in the West (*i.e.*, who do not live in the Eastern European nations which are the province of the Polish, Russian, Ukrainian, Belarusian and Czech foundations). It is clear that allocating additional funds from this "Swiss Banks" settlement to the two principal organizations responsible for distributing the German Fund — the Claims Conference and the IOM — for direct transmittal to Jewish, Roma, Jehovah's Witness, homosexual and disabled former slave and forced laborers, is the most efficient and effective way to compensate surviving members of Slave Labor Class I.

The Claims Conference is establishing an administrative system for persons eligible for compensation from the German Fund. It is estimated that there will be a total of approximately 140,000 Jewish slave laborers and approximately 30,000 Jewish forced laborers under the definitions used in the German legislation.[422] The system will involve processing for

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[421] German Fund Legislation, Section 19.

[422] As has been noted previously, all class members should receive identical payments under Slave Labor Class I, regardless of the "Victim or Target" group to which such persons belong. Moreover, the definitions for forced labor utilized in the German Fund Legislation are not relevant here. The Settlement Agreement defines "slave labor" as "work for little or no remuneration," a definition which does not distinguish between slave and forced labor, between places of enslavement, or otherwise. For purposes of Slave Labor Class I, all "Victims or Targets" who meet the criteria

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those persons whose eligibility can be established through existing databases and files, including those prepared in connection with prior applications to various German indemnification funds such as the BEG, Hardship, Article 2 and CEEF programs.[423] The Initial Questionnaires are another important resource. The processing system will be carried out with the Board of Trustees ("Kuratorium") of the German Fund and will be subject to detailed audit. The Claims Conference will carry out its distribution duties for Slave Labor Class I under the supervision of the Court. Like the other partner organizations, the Claims Conference will establish an independent appellate process, as required under the terms of the German Fund Legislation, which also will operate under the supervision of the Court.

With respect to non-Jewish class members, under the German Fund, the IOM is charged with making distributions to such individuals who reside in nations outside the areas of responsibility designated to the five Central and Eastern European foundations; *i.e.*, the "rest of the world." In addition to determining which individuals are eligible for German Fund payments, it is recommended that the IOM, upon Court order as may be set forth in the Final Plan of Allocation and Distribution, also ascertain whether such a person is a member of "Slave Labor Class I" as a Roma, Jehovah's Witness, homosexual or disabled persecutee.

For administrative efficiency, both the Claims Conference and the IOM also have accepted the Special Master's request, if the Court so orders, to assume responsibility for distributing payments from this Settlement Fund to "Victims or Targets" who reside in the nations within the mandate of the five foundations; *i.e.*, Poland, Ukraine, Moldova, Russia,

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specified under either Section 11(1)1 or Section 11(1)(2) of the German Fund Legislation will be presumed to have met the Settlement Agreement's definition of slave labor.

[423] These programs are discussed at length in Annex E ("Holocaust Compensation").

Latvia, Lithuania, Belarus, Estonia and the Czech Republic. A former slave or forced laborer who receives a German Fund payment from those foundations, and who is a Roma, Jehovah's Witness, homosexual or disabled persecutee, will be able to present a certificate of such payment to the IOM and thereby be entitled to receive the recommended additional payment from this Settlement Fund. Likewise, a Jewish former slave or forced laborer who receives from one of the five Central and Eastern European foundations a payment from the German Fund, will be able to present a certificate of payment to the Claims Conference, entitling that person to the recommended additional payment. Any person who was denied compensation from the five Central or Eastern European foundations but believes he or she nevertheless is entitled to compensation under this Settlement Fund may make a direct application to the IOM or the Claims Conference.[424]

The awards made by the Claims Conference and the IOM to members of Slave Labor Class I will be certified to the Court for evaluation for payment from the Settlement Fund.[425]

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[424] In addition to the responsibilities outlined above, the Claims Conference and IOM, in consultation with the Court, also will arrange for processing and distribution of payments from this $1.25 billion Settlement Fund to members of Slave Labor Class I who labored in Austria, although the German Fund provides for separate procedures for such individuals. *See* German Fund Legislation, Section 11(1)2 ("persons who because their forced labor was performed primarily in the territory of what is now the Republic of Austria can receive payments from the Austrian Reconciliation Foundation"). In connection with the processing of all Slave Labor Class I claims, the Claims Conference, the IOM, and their respective officers, employees, agents and representatives would be serving at the direction of and under the supervision and control of the Court, and therefore would not be liable to any person for acts or omissions in connection with any matter conducted as part of the Slave Labor Class I claims process.

[425] Settling Plaintiffs are charged with responsibility for actual implementation of such payments. *See* Settlement Agreement, Section 7.1 ("Settling Plaintiffs shall implement the Court-approved plan under the Court's supervision. Settling Plaintiffs shall provide the Court and Settling Defendants a quarterly report accounting for expenses paid from the Settlement Fund and itemizing the amounts distributed to claimants against the Settlement Fund and other recipients of payments from the

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4. Other Distribution Considerations

Two further points concerning Slave Labor Class I distributions should be emphasized. First, as previously described, with the limited funds available and the large number of potential claimants, the Special Master cannot now recommend an allocation to heirs of slave laborers other than to those few eligible under the German Fund, *i.e.*, certain relatives of former slaves who have died since February 15, 1999. As noted by Deputy Secretary of the Treasury Stuart E. Eizenstat in a February 16, 2000 speech before the Bundestag, under the German Fund, heirs generally will not receive direct payments "largely for practical considerations, as the number of such heirs would be in the millions and there would simply not be enough money available to make payments to both survivors and heirs."[426] That precise concern applies to this $1.25 billion Settlement Fund, which is considerably smaller than the German Fund to begin with, and will be substantially reduced even further once all Deposited Assets Class claims are repaid.

Second, the Special Master emphasizes that for all surviving slave and forced laborers, the payment must be the same, regardless of the length of time spent as a slave laborer or the nature of the work performed. By contrast, the few German companies that established limited slave labor compensation funds in the 1950s and 1960s required detailed case-by-case inquiries. From the descriptions that have been provided by Nuremberg prosecutor and Claims

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Settlement Fund").

[426] Statement by Deputy Secretary of the Treasury Stuart E. Eizenstat concerning the German Foundation, "Remembrance, Responsibility, Future" before the German Bundestag Committee on Domestic Affairs, Berlin, February 16, 2000, at 16. Deputy Secretary Eizenstat observed that "[i]nstead of receiving direct payments from the Foundation, it was agreed that the Future Fund would "'support projects that serve to benefit the heirs.'" *Id.* A similar program benefiting all heirs (and all other class members), the Victim List Foundation, is recommended here.

Conference negotiator Benjamin Ferencz in his seminal work, Less Than Slaves, the bureaucratic and emotional morass into which the survivors were forced in order to meet the settling firms' stringent requirements hardly seems worth the effort:

> No one could foresee that the process of deciding the claims would take as long as it did. The questionnaires, which came from all parts of the world, were often illegible or incomplete. Addresses changed and envelopes were returned unopened. The information received had to be compared with records stored at the International Tracing Service of the Red Cross in Arolsen, where millions of concentration camp dossiers were filed. Screening committees, working after normal working hours, could handle only a limited number of cases at a session. They frequently would ask the claimant to come back with additional evidence or witnesses. . . . Legal forms had to be signed and authenticated. . . . Thousands of claims had to be turned down when the applicant was unable to prove that he had been a concentration camp inmate employed in one of four designated Farben plants at Auschwitz.[427]

Professor Neuborne's point, noted in Section I of this Proposal, bears repeating: at this stage of their lives, surviving victims of Nazi terror should not be forced to compete with one another for a Settlement Fund "that all agree is inadequate to provide full compensation to the victims. The members of the plaintiff classes are elderly victims of an unparalleled human

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[427] Ferencz, at 53-54. The screening committees consisted of "*Kameraden* (old comrades)" who would "interview persons whom no one seemed to remember, and give their opinion whether the claimant had really worked for Farben at Buna. An applicant who did not know when the typhoid epidemic had broken out or where the latrines were located was soon disqualified. Many ineligible claimants conceded that they must have been mistaken and their claims were apologetically withdrawn." *Id.* at 52. Similar difficulties arose in connection with implementation of the German Indemnification Laws. In the words of Danish psychiatrist Henrik Hoffmeyer, who criticized the stringent eligibility requirements under the "damage to health" provisions of the BEG: "After the deportees have risked their health in conditions having no equal in history, they return to a society that attempts to calculate the material restitution they deserve with administrative pedantry. The sick are sent from doctor to doctor …. The results of these examinations are reviewed by a huge, impersonal administrative apparatus that considers itself capable of judging whether a person who has gone through such hell is an 8, 10, or 12 percent invalid …. [T]his method is what often gives the sick person the feeling that he is suspected of being a parasite on society." Christian Pross, Paying for the Past: The Struggle Over Reparations for Surviving Victims of the Nazi Terror (Baltimore: The Johns Hopkins University Press 1998), at 96-7.

catastrophe. At the close of their lives, it would be socially and psychologically irresponsible to pit one group of Holocaust victims against another in an unseemly battle for a larger share of a limited settlement fund that cannot do real justice to all."[428]

D. Slave Labor Class II

1. Class Definition

To be a member of Slave Labor Class II, an individual — not limited to a member of the "Victim or Target" groups — must have worked "at any facility or work site, wherever located, actually or allegedly owned, controlled or operated by any corporation or other business concern headquartered, organized, or based in Switzerland or any affiliate thereof." (Settlement Agreement, Section 8.1(d)).

Of the approximately 562,000 Initial Questionnaires received thus far, approximately 205,000 have indicated an intent to assert a slave labor claim, although the preliminary data entry process does not permit a determination as to whether the claimant is asserting membership in "Slave Labor Class II" or "Slave Labor Class I."

2. Allocation Principles

As set forth above, the Final Approval Order notes the lack of data concerning Swiss companies or affiliates that may have used slave labor, and the attendant difficulties associated with recommending a plan of allocation and distribution for Slave Labor Class II.[429]

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[428] Declaration of Burt Neuborne, Esq., November 5, 1999, ¶ 33. *See also* Women in City Government United v. City of New York, No. 75 Civ. 2868, 1989 WL 153059 at *4 (S.D.N.Y. Dec. 13, 1989) ("[A] formula for allocating the settlement fund in proportion to the precise harm suffered by each plaintiff would entail substantial costs as well as delays in the ultimate distribution of the settlement award. Both the expense and the ease with which settlement distribution schemes operate are relevant factors in the settlement's approval.")

[429] In re Holocaust Victim Assets Litigation, at 39-41.

As the Court noted, the Special Master has consulted with representatives of the Swiss Federal Archives, who have confirmed that although "indirect and scattered evidence could be found with time consuming research," it is "difficult to identify records on forced labor in German branches of Swiss firms in the existing file groups of the EPD [Swiss Federal Department of Foreign Affairs]"; the Archives could not identify "tangible information reflecting the situation of forced labor workers in German branches of Swiss firms" and "a systematic search for such evidence would be very time consuming."[430]

Because the data is scarce, and in recognition of defendant banks' assertion that the "'Bergier Commission's [forthcoming] report will presumably shed some light on this aspect of Switzerland's history," the Court sought the good faith cooperation of entities which seek

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[430] *See* "Forced Labor in Swiss Controlled Firms," at 2; *see also* In re Holocaust Victim Assets Litigation, at 40. The Swiss Federal Archives, did, however, provide certain information to the Special Master that was helpful in beginning the process of identifying the Swiss entities whose former slave laborers are members of Slave Labor Class II. In particular, the Archives forwarded excerpts of two scholarly articles which discussed three Swiss enterprises, Maggi AG, Georg Fischer, and Aluminium Walzwerke, which employed forced laborers and prisoners of war in the German town of Singen. The articles were Sophie Pavillon's *Trois filliales d'enterprises suisses en Allemagne du Sud et leur developpement durant la periode nazie* ("Three Branches of Swiss Enterprises in Southern Germany and their Development During the Nazi Period"), in 23 Studien und Quellen (1997) (hereinafter, "Pavillon") and Wilhelm J. Weibel's *Schatten am Hohentwiel: Zwangsarbeiter und Kriegsgefangene in Singen* ("Shadows on Hohentwiel: Forced Laborers and Prisoners of War in Singen") (Konstanz: Labhard, 1997) (2d ed.) (translations of both articles obtained by the Special Master. The Special Master also asked the Swiss Federal Archives for information relating to the 147 Swiss companies which, according to Pavillon, sought and received "letters of protection" from the Swiss Gvernment in 1944 to protect them from Allied armies which frequently damaged German-owned facilities in areas they occupied. In response, the Archives prepared a list of 64 firms it was able to ascertain had received a "letter of protection," *Schutzbrief für Schweizer Firmen in Süddeutschland* ("Letters of Protection for Swiss Firms in Southern Germany"), and also forwarded a document helping to identify Swiss-owned businesses in the Baden-Baden region of Germany, *Schweizerfirmen in Konsularbezirk Baden-Baden* (Swiss Firms in the Baden-Baden Consular District").

However, without further data concerning the nature of these entities, and particularly whether such entities did or did not make use of slave labor during World War II, the Special Master has no factual basis upon which to conclude whether any of these entities fall within the "Slave Labor Class II" definition prescribed under the Settlement Agreement.

releases under Slave Labor Class II. "[T]hose Swiss entities that seek releases from Slave Labor Class II" were "directed to identify themselves to the Special Master within 30 days of the date of" the Court's July 26, 2000 Final Approval Order; the failure of such entities to identify themselves "will result in the denial of a release and permit those who have claims against those entities to pursue such claims independently of this lawsuit."[431]

Following the Court's order, a number of entities identified themselves to the Special Master as having probably or possibly used slave labor. The Special Master will seek further information from all of them, pursuant to their "good faith obligation" to provide all the names of former slave laborers in their possession or control. Accordingly, Slave Labor Class II will consist of those persons, whether or not "Victims or Targets of Nazi Persecution," who performed slave labor for these entities which have identified themselves to the Special Master and complied with their good faith obligation to provide the names of their former slave laborers in their possession or control. These entities will be identified in a list to be published upon the Court's approval of a Final Plan of Allocation and Distribution of the Settlement Fund, the "Slave Labor Class II List."

3. Distribution

Claimants who plausibly demonstrate, through documents, a statement or otherwise, that they performed slave labor for an entity appearing on the published Slave Labor Class II list should receive a payment, identical in amount, of up to $1000 (and in no event less than $500), the same amount recommended to be paid to members of Slave Labor Class I. Like Slave Labor Class I, payments to members of Slave Labor Class II should be made in two stages:

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[431] In re Holocaust Victim Assets Litigation, at 41.

an initial payment of $500 (50% of the recommended payment), followed by a second payment of up to an additional $500 (the remaining 50%) after all claims have been processed. Also like Slave Labor Class I, only certain heirs of Slave Labor Class II members who died after February 15, 1999 are recommended to be paid. As noted above, based on the data provided to the Special Master, several thousand persons performed slave labor for the entities to be named on the published list. If, however, many more eligible former slave laborers for entities on the published list than anticipated make claims, then the Court may have to reconsider the amounts recommended here.

This recommendation is premised upon the definition of "Slave Labor" set forth in the Settlement Agreement (*see* Section 1), which, as noted earlier, provides that "slave labor" is "work for little or no remuneration actually or allegedly performed by individuals involuntarily at the insistence, direction, or under the auspices of the Nazi Regime." Even if data existed to suggest that the work performed by members of Slave Labor Class II differed from that of Slave Labor Class I — and, based upon the materials provided by the Swiss Federal Archives, it may not — the Settlement Agreement does not permit distinctions to be made between the two slave labor classes.[432]

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[432] Indeed, scholarship provided to the Special Master suggests that at least certain of the Swiss entities which made use of slave labor "treated the forced laborers in the same manner as the Nazis did." Pavillon, at 11 of translation. According to Pavillon, historian "Wilhelm J. Waibel demonstrates, through examined documents and survivors' testimony he gathered in Ukraine, that the directors of three Swiss factories [Maggi AG, Georg Fischer and Aluminium Walzwerke, the subjects of the article], which were regularly visited by the management from the parent-company, treated the forced laborers in the same manner as the Nazis did. Reduced to the status of what Nazis referred to as 'sub-humans', these people were often beaten, living in unsanitary conditions approaching those of concentration camps, and existing on the edge of survival. The barracks where they were placed were under supervision of the Deutsche Arbeitsfront, an organization closely associated with the Nazi Party which was used in the 1930s to destroy the German unions. The camps were surrounded by barbed wire, supervised by armed guards accompanied by watchdogs, with Gestapo intervening

(continued on next page)

Persons who performed slave labor for an entity that they believe was Swiss-owned or controlled, but does not appear on the published list, may be able to assert independent claims against those entities, as those entities are not released under this Settlement Agreement, as explained in the Court's Final Approval Order and described earlier.

4. Mechanism of Distribution

The Special Master recommends that the IOM, one of the partner organizations responsible for handling distributions under the German Fund, should be placed in charge of evaluating claims submitted by potential members of Slave Labor Class II and administering the claims process discussed below. Initially, the IOM should compare the published Slave Labor Class II List to the list of "slave labor" claimants garnered from the Initial Questionnaires to determine the number of claimants who allege that they performed slave labor for one of the Swiss entities which provided information to the Special Master.

Additionally, a number of the entities on the Slave Labor Class II List have provided the names of many of their wartime slave laborers, and are expected to provide more names. The names of all Slave Labor Class II claimants should be compared against this list (the "Slave Labor Class II Name List"). Claimants who appear on the Slave Labor Class II Name List should be presumed to have plausibly demonstrated their membership in Slave Labor Class II, and thus be eligible to receive the proposed payment described above.

A Claimant whose name does not appear on the Slave Labor Class II Name List nevertheless may be eligible to receive compensation, if he or she plausibly demonstrates,

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in case of trouble. Periodically, a laborer would be shot trying to escape." *Id.* at 10-11 of translation.

through documents, a statement, or otherwise, that he or she performed slave labor for one of the entities set forth on the Slave Labor Class II list. The proposed process by which Slave Labor Class II claims should be evaluated by the IOM is more fully set forth below.

Proposed Slave Labor Class II Rules

I. Introduction

After the Court's final approval of a Plan of Allocation and Distribution, the Court shall direct publication on the Internet of the Slave Labor Class II List. Individuals who performed slave labor for such entities are members of Slave Labor Class II. Individuals who performed slave labor for entities not identified on the Slave Labor Class II list may "pursue [slave labor] claims independently of this lawsuit."[433]

Preliminary steps should be taken to ensure that Slave Labor Class II claims are ready to be determined, even in the event that final "approval of the allocation and distribution plan encounters substantial delays."[434] Therefore, at the time of the publication of the Slave Labor Class II List, a public announcement should be made that the IOM will receive all Slave Labor Class II claims ("claims") from individuals who allege that their slave labor was exploited by the entities named on the Slave Labor Class II List. The IOM will **not** entertain claims submitted by individuals who allege that they are heirs of persons who performed slave labor for entities on the Slave Labor Class II List, unless such former slave laborers died after February 15, 1999.

The IOM will, at the time of publication, have the Slave Labor Class II Name List. The Slave Labor Class II Name List will be kept strictly confidential by the IOM. The IOM in consultation with the Court, and upon Court approval, will make all necessary arrangements to receive, process and review all claims submitted in accordance with these Rules. The IOM recognizes the important responsibility of the Court to supervise the distribution of the Settlement Fund.

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[433] Holocaust Victim Assets Litigation, at 41.

[434] *Id.* at 28. *See, e.g.*, Berman ("One problem that arose after the [Agent Orange payment] project was well underway was the disruption caused by the Second Circuit's stay of implementation of the plan in August 1986. Obviously, this was something over which neither Aetna nor the district court had any control. At that point, Aetna had expended significant amounts of money and time to hire and train personnel and purchase equipment, and had reserved space within Aetna facilities to operate the project. During the almost two-year hiatus between the entry of the stay and the Supreme Court's denial of certiorari, it was impossible to retain all of these resources, and it was necessary to start over in some respects in June of 1988. By working as a consultant for the Fund during a portion of the hiatus, however, Aetna was able to continue development of some of the basic tools needed to process claims so that a minimum of additional time was lost from the original implementation schedule").

The administrative costs of the Slave Labor Class II claims process will be funded from the Settlement Fund. The IOM will submit budgets for the claims process to the Court for its prior approval.

II. *Claims Procedures: Filing and Acceptance of Slave Labor Class II Claims*

Slave Labor Class II Claims shall be submitted to the IOM for review by filing a completed and signed Claim Form by no later than a date to be fixed by the Court at the time of its Final Approval of a Plan of Allocation and Distribution, at addresses to be fixed by the Court. The IOM shall prepare the Claim Form, and shall arrange for its translation into such languages as, upon consultation with the Court, it deems necessary.

III. *Claims Procedures: Filing and Acceptance of Slave Labor Class II Claims*

A. Claimants Identified on the Slave Labor Class II Name List

A Claimant whose name appears on the Slave Labor Class II Name List shall be presumed to have made a plausible showing that the Claimant is a member of Slave Labor Class II, and shall thus be eligible to receive compensation as set forth below.

B. Claimants Not Identified on the Slave Labor Class II Name List

A Claimant whose name does not appear on the Slave Labor Class II Name List shall be deemed a member of Slave Labor Class II, and shall thus be eligible to receive compensation as set forth below if the Claimant has plausibly demonstrated to the IOM that the Claimant performed slave labor for one of the entities identified on the Slave Labor Class II List.

To plausibly demonstrate that the Claimant performed slave labor for one of the entities identified on the Slave Labor Class II List, the Claimant shall submit a sworn statement (or the equivalent) explaining the nature of the slave labor performed by Claimant, and all evidence, documentary and non-documentary, that the Claimant may reasonably be expected to possess in view of the circumstances and the years that have elapsed since World War II. If the Claimant does not have documentary or non-documentary evidence of having performed slave labor for an entity set forth on the Slave Labor Class II List, the Claimant may still submit a sworn statement (or the equivalent) providing all details of the slave labor as the Claimant may recall. By way of example only and not limitation, the Claimant's statement may include any of the following:

a. the name and address of the location, if known, where slave labor was performed;

b. the type of work performed;

c. a detailed description of the location where slave labor was performed.

d. a detailed description of the conditions under which slave labor was performed.

e. the dates, if known or approximate, when slave labor was performed.

f. the names, if known, of any other person or persons performing slave labor with Claimant;

g. the names, if known, of any person or persons supervising slave labor at the location where Claimant performed slave labor.

The IOM shall review all statements and evidence submitted by Claimants, and shall evaluate, whether under all the circumstances a Claim is plausible. To the extent the IOM may deem it necessary to contact Claimant personally or by mail to obtain additional information, or to clarify information previously submitted, Claimant shall cooperate with the IOM as a condition to further consideration by IOM of the Claim. Claimants shall not, under any circumstances, be required to travel to IOM's office, or to obtain legal representation, in order to submit a Claim, or as a condition to its further evaluation by IOM. The claimant shall not submit any evidence in support of a claim which the claimant knows is falsified, forged, or materially misleading.

The IOM may assess any other information, not submitted to Claimant, that in the opinion of the IOM, may be relevant to the Claim.

IV. *Form and Content of Recommendations; Review Procedures*

Following initial evaluation of the Claim, the IOM shall prepare a written recommendation. The recommendation shall summarize the relevant facts, the reasons for the recommendation, and the date on which the recommendation was issued, and shall be signed on behalf of the IOM.

For a Claim which is recommended for payment, the IOM shall notify the Claimant by mail that the Claim has been approved, provide the Claimant with a copy of the recommendation, and certify such recommendation for payment to the Court.

All Claimants whose Claims are recommended for payment (initially or by an independent Review Officer) and approved by the Court, shall receive up to $1,000. Payments shall be made in two stages, with an initial payment of 50% ($500) of the award. Final payment of up to the remaining 50% of the award shall be made after all applications have been received, and the IOM has determined the number of legitimate claims filed.

For a Claim which is not recommended for payment following initial evaluation, the IOM shall notify the Claimant by mail that the Claim has not been recommended for payment, and shall provide the Claimant with a copy of the recommendation against payment. The Claimant may seek review of the recommendation against payment within thirty (30) days of receipt of the recommendation by written request to the IOM for such review.

Upon receipt of a request for review, the IOM shall designate an independent Review Officer. The Review Officer will conduct a *de novo* evaluation of the Claim, and will then prepare a written recommendation approving or denying the Claim. The Review Officer

will notify the Claimant and the Court of the determination upon review. Any claim recommended for payment by the Review Officer will be certified to the Court.

V. *Miscellaneous*

These Rules may be amended by the IOM and/or by the Review Officer upon Court approval.

VI. *Exclusion of Liability*

In connection with the claims process discussed above, the IOM, its officers, employees, agents and representatives, and the Review Officer, are serving at the direction of and under the supervision and control of the Court. The IOM, and its officers, employees, agents and representatives shall not be liable to any person for acts or omissions in connection with any matter conducted under these Rules.

E. Refugee Class

1. Class Definition

The Settlement Agreement defines the "Refugee Class" as

> Victims or Targets of Nazi Persecution who sought entry into Switzerland in whole or in part to avoid Nazi Persecution and actually or allegedly either were denied entry into Switzerland or, after gaining entry, were deported, detained, abused, or otherwise mistreated, and the individual's heirs, executors, administrators, and assigns and who have or at any time have asserted, assert, or may in the future seek to assert Claims against any Releasee for relief of any kind whatsoever, relating to or arising in any way from actual or alleged denial of entry, deportation, detention, abuse, or other mistreatment. (Settlement Agreement, Section 8.2(e)).

A total of 17,451 individuals, of the approximately 562,000 who have completed Initial Questionnaires which have been analyzed thus far, have indicated their intention to assert claims as members of the Refugee Class.[435]

2. Allocation Principles

In recommending the amount of the Settlement Fund to be set aside for initial "Stage 1" distributions to members of the Refugee Class, the Special Master has considered the

[435] *See* Initial Questionnaire Data, Table 1, at 6.

conclusions of the Bergier Commission; recent Swiss judicial and political decisions concerning the claims of certain Nazi-era refugees; and the availability of refugee data from the Swiss Federal Archives and other such sources.

As to the Bergier Commission, the Report issued on December 10, 1999 provided a comprehensive and candid assessment of Switzerland's wartime policies toward refugees — much of it critical. The scholars who researched Swiss refugee policies on behalf of the Swiss Confederation have concluded that Switzerland "declined to help people in mortal danger. A more humane policy might have saved thousands of refugees from being killed by the Nazis and their accomplices."[436]

The Bergier Commission's condemnation of Swiss refugee policy, however, is tempered by other factors. *First*, as noted earlier in this Proposal, there was, in fact, no Refugee Class until the lawsuits were settled in principle in August 1998. The Special Master is aware that the refugee claims, if asserted in the complaints, may have been subject to unique defenses.[437] *Second*, as recognized by the Bergier Commission and others, Switzerland was hardly unique among nations in its treatment of refugees.[438] *Third*, even if refugee claims had

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[436] Bergier Refugee Report, at 271; *see also* Annex J ("The Refugee Class").

[437] *See, e.g.*, Declaration of Burt Neuborne, Esq., November 5, 1999, at page 5, n.6 (discussing possible sovereign immunity defenses to certain of plaintiffs' claims); *see also* Bazyler, at 21 n.44 ("The judicially-created Act of State doctrine 'allows U.S. Courts to abstain from deciding a case involving an international transaction on the grounds that one of the actors in the transaction is a foreign state'") (quotation omitted).

[438] *See, e.g.*, Bergier Refugee Report, at 40 (describing the failed Evian Conference of July 1938, which had been called to create a "permanent agency that would be responsible for facilitating the emigration of refugees from Austria and Germany," an "initiative" which "inspired high hopes in Jewish circles" but which "did not, unfortunately, lead to anything much, as most of the thirty-two governments represented were more interested in getting rid of their refugees than in coming to an agreement about their respective capacity for accepting more").

been brought in this action, the Court nevertheless may have accorded some deference to recent Swiss court decisions finding such claims invalid under Swiss law.

The Court also might have noted, however, that the refugee claimants in the Swiss courts — one of whom, Charles Sonabend, is a named plaintiff in this lawsuit — ultimately received from the Swiss government monetary awards in recognition of the moral, if not necessarily legal, validity of the claims.[439] Although the decisions must be regarded on their own merits, and the outcome of any future refugee claims brought in Switzerland is unclear, Swiss authorities evidently have deemed certain refugee claims worthy of compensation.[440]

The final factor considered by the Special Master in recommending a proposal for the Refugee Class is the availability and nature of archival data concerning individual class members.

The Bergier Refugee Report indicates that:

- refugee records are incomplete for the years 1933 to 1939, and that "[m]any expulsions before the fall of 1942 were not even registered;"[441]

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439 Joseph Spring, with his two cousins, had been "turned over to the Germans by the Swiss border guards at the La Cure border checkpoint on November 18, 1943"; only Spring survived the three teenagers' deportation to Auschwitz. Bergier Refugee Report, at 129 n.170. In January, 2000, a Swiss court rejected Spring's claims on legal grounds, but nevertheless awarded Spring damages of approximately $60,000 on "ethical grounds." Bazyler, at 15 n.20. As to the Sonabends, according to the Bergier Refugee Report, the "Jewish Sonabend family was turned back into occupied France from the Jura region on August 17, 1942 and was caught by a German patrol. The parents were deported to Auschwitz and murdered there; the children, Charles and Sabine, survived their persecution." *Id.* at 128-29 n.169. In May, 2000, Charles and Sabine Sonabend accepted an apology and a settlement of approximately $118,000 from the Swiss government. *See* Alexander G. Higgins, *Swiss Make Holocaust Apology*, Associated Press, May 23, 2000; *see also* Annex J ("The Refugee Class").

440 The Canton of Basel also settled an action brought against that canton by former refugee Eli Carmel. *See* Annex J.

441 Bergier Refugee Report, at 20 ("There are hardly any reliable figures available for the years 1933 to 1939"); *see also id.* at 129.

- approximately 50,000 refugees were admitted into Switzerland, of whom approximately 20,000 were Jewish or identified as Jewish, and a list of these individuals still exists;[442] and
- approximately 24,500 refugees were turned away at the border or expelled from Switzerland and another 14,500 individuals were denied entry, although the names of many of these individuals either never were recorded or no longer are maintained.[443]

Although incomplete, considerable information regarding refugees does still exist, and after extensive discussion this data now has been delivered to the Court for use as part of a claims process. The Swiss Federal Archives has provided the Special Master with two types of information: a database listing approximately 50,000 persons registered as admitted into Switzerland as refugees and assigned to labor camps, homes, Swiss families or schools (the "List of Refugees Admitted into Switzerland"); and a database as well as certain other lists which together contain the names of approximately 4,000 individuals whose personal data was recorded before being turned away from the Swiss border or expelled from Switzerland (the "List of Refugees Expelled From or Denied Entry into Switzerland").[444]

Because of the availability of data as well as the comparatively limited number of survivors who could fall within the Refugee Class, the Special Master recommends that the Court adopt a claims resolution process to review individual refugee claims.

3. Distribution and Mechanism

(a) Claims Concerning Detention, Mistreatment or Abuse

The Special Master has tried to refrain from weighing the claims of one Nazi victim against another or ranking the misery of the class members. It is not for the judicial

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[442] *Id.* at 24.

[443] *Id.* at 129; *see also* Annex J.

[444] This data is discussed in greater detail in Annex J.

system to measure a Holocaust victim's grief. However, in the case of the Refugee Class, there is one undisputed distinction among class members which seems to compel a dividing line: some class members survived the War years in Switzerland in relative safety; others did not. Some escaped from the Nazis; others did not. Although the Bergier Refugee Report has made clear that even those who gained entry to Switzerland sometimes were subject to difficult, even harsh conditions, those who were denied entry or expelled from Switzerland surely suffered a far worse fate. In the words of one group of refugees who proclaimed their gratitude to the nation that saved them:

> At the time when physical self-preservation was our dominant daily priority, we have found in Switzerland a haven and a heaven; we are grateful to this country for having admitted us, thus saving our lives, we are grateful to the Swiss people who had understanding and sympathy for us, the refugees, and who shared their restricted food rations with us.[445]

There are undoubtedly many other surviving refugees who likewise consider themselves fortunate to have found refuge in Switzerland, and who may well owe their lives to that nation.

Therefore, it is recommended that persons who were admitted into Switzerland as refugees but who assert that they were detained (jailed), abused or mistreated, as those terms are used in the Settlement Agreement, should receive modest distributions from the Settlement Fund and should not participate in the more extensive claims process described below. This suggestion is intended to maximize the impact of the $1.25 billion Settlement Fund upon the lives of those class members who have suffered the most: surviving refugees who were denied

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[445] Ken Newman, Swiss Wartime Work Camps: A Collection of Eyewitness Testimonies 1940-1945 (Zurich: NZZ Verlag 1999), at 93 (March 15, 1998 letter of Jos Juhn, Alonim, Israel); *see also, e.g., id.* at 113 ("I am grateful to Switzerland and the many people who have helped us, for saving the lives of my parents' and mine, as well as those of thousands of others,' and for the humane treatment") (July 1998 letter of Hedi Lazic geb. Pollak, Bat Yam, Israel).

entry or expelled.[446] As previously noted, the Swiss Federal Archives has made available to the Court its list of approximately 50,000 individuals who were admitted into Switzerland as refugees just before or during the War years, approximately 20,000 of whom are registered as Jewish. Claimants who plausibly demonstrate, through documents, a statement or otherwise, that they were admitted into Switzerland as refugees and were detained, mistreated or abused there, *and* whose names are matched against the List of Refugees Admitted into Switzerland, should receive a payment, identical in amount, of up to $500 (but in no event less than $250). Based upon data in the Initial Questionnaires, approximately 3,000 people are expected to make a claim of this nature.[447] If, however, there are many more eligible claimants than currently anticipated, then the Court may have to reconsider the amount recommended here.

(b) Claimants Concerning Denial of Entry Into or Expulsion From Switzerland

As for the remaining class members — those who were denied entry into Switzerland, or expelled after gaining entry — such claims should be assessed as follows.

First, a Court-appointed agency should perform an initial evaluation of the claim. This evaluation will include an analysis of the claimant's information, the review of the lists

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[446] This does not preclude that person from participating in any of the other distribution mechanisms recommended herein, including the programs intended to benefit needy survivors of Nazi persecution, all of whom are presumed to belong to the Looted Assets Class. Indeed, those who successfully gained entry into Switzerland may well have lost their assets along the way. *See* Bergier Refugee Report, at 214-15 ("Currency and valuables were to be taken from refugees and placed under trusteeship administration"); *id.* at 215, 222 (Swiss Volksbank assumed this trusteeship; however, "[t]owards the end of the war, many refugees left Switzerland without demanding the return of their assets" and the Volksbank was "instructed … to close the accounts and to transfer the amounts to the Federal Treasury and Accounting Office").

[447] *See* Summary Sheets for Class Members (Annex C, Exhibit 3).

provided to the Court by the Swiss Federal Archives for publication, the examination of additional sources of information relevant to the claim, and the initial recommendation as to whether the claimant should receive an award.

Claimants who plausibly demonstrate, through documents, an interview or otherwise, that they were denied entry into or expelled from Switzerland, should receive payments, identical in amount, of up to $2500 (but in no event less than $1250). One of the ways that claims will be evaluated will be to compare them to the List of Refugees Expelled From or Denied Entry Into Switzerland, which the Swiss government has authorized for publication.[448] Former refugees expelled or denied entry whose names do not appear on the list also may make a claim, since information other than the published list also will be evaluated; indeed, based upon data in the Initial Questionnaires, approximately 17,000 people are expected to make a claim of expulsion or denial of entry.[449] If, however, there are many more eligible claimants than currently anticipated, then the Court may have to reconsider the amount recommended here.

For both categories of refugee claimants – those admitted and detained, abused or mistreated, and those denied entry into or expelled from Switzerland — an initial payment of 50% of the recommended amount should be made; after all claims have been processed, eligible claimants then may be able to receive a second payment of up to the remaining 50%. Payments

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[448] As more fully discussed below, to comply with Swiss legislation protecting certain personal data from disclosure, the Court has assured the Swiss government that potential members of the Refugee Class will be provided the opportunity to exclude their names from publication. Since the Special Master does not recommend publication of the List of Refugees Admitted into Switzerland, but only of the much more limited List of Refugees Expelled from or Denied Entry into Switzerland, it is unlikely that many individuals will seek to remove their names from the list recommended for publication, although they certainly are free to do so.

[449] *See* Summary Sheets for Class Members (Annex C, Exhibit 3).

should be limited to former refugees or certain heirs of refugees who died after February 15, 1999.

Claims approved at the initial evaluation level should be certified to the Court for assessment for payment from the Settlement Fund, in a manner to be implemented by the Settling Plaintiffs (*see* Settlement Agreement, Section 7.1). For those refugee claims not recommended for payment, a review, if any, should be conducted by a Court-appointed review officer (the "Review Officer"). In the event that the Review Officer disagrees with the initial recommendation, the Review Officer may then certify the claim to the Court for assessment for payment from the Settlement Fund.

(i) Initial evaluation of refugee claims

Claims submitted in response to names appearing on the List of Refugees Denied Entry into or Expelled from Switzerland will have to be matched against the published lists. Additionally, to the extent that the claims process must go beyond matching, the entities responsible for initially reviewing the submitted claims will need to have a great deal of familiarity with the Holocaust, with a firm grasp of the historical circumstances surrounding those who sought but were denied refuge in Switzerland. To take but one obvious example, the agencies must be familiar with the geography and wartime circumstances that likely would have propelled one person to the Swiss border, and another to the eastern-most regions of the Soviet Union. In such a case, the evaluating agencies should be capable of determining the claimant's original nationality. Likewise, the agencies also should have the ability to assess the plausibility of a claimant's description of the fate that befell him or her after expulsion from, or denial of entry into, Switzerland. Perhaps most significantly, the agencies should be able to meet the

special needs of Nazi victims, maintaining professional objectivity while at the same time providing comfort and reassurance to many traumatized elderly claimants.

In the Special Master's opinion, the organizations ideally suited to this role are the Claims Conference and the IOM. As previously discussed, the Claims Conference already has decades of experience in determining individual Holocaust compensation claims, and, more recently, has been designated, along with the IOM, as one of the agencies responsible for handling distributions under the German Fund. The Special Master has had extensive communications with the Claims Conference throughout his tenure, has been given invaluable assistance from its dedicated staff, and believes that the Claims Conference will efficiently and equitably review refugee claims submitted by Jewish class members. Likewise, the Special Master is confident that the internationally-renowned IOM and its equally committed staff will capably administer the refugee claims process for non-Jewish class members.[450]

4. Review of claims not recommended for payment

For claims not recommended for payment during the initial evaluation, a Review Officer, appointed by the Court and independent of the Claims Conference and the IOM, should review any such claims. The Review Officer also will certify to the Court claims approved for payment, as well as claims recommended for denial (whether or not the claimants have sought formal review).

[450] The Claims Conference and the IOM also should be appointed to handle the largely administrative task of confirming whether those who plausibly attest to "detention," "mistreatment" or "abuse" upon entry into Switzerland appear on the List of Refugees Admitted into Switzerland, and certifying valid claims to the Court for evaluation and payment.

5. Proposed rules for initial review and appeal:

The Special Master recommends that the following proposed Rules be adopted for those members of the Refugee Class who were denied entry into or expelled from Switzerland:

"*I. Introduction*

Upon the Court's final approval of a plan of allocation and distribution, the Court will arrange for publication the List of Refugees Denied Entry Into or Expelled From Switzerland (the "Refugee Denial/Expulsion List"). If class members have provided the Court with a written request to omit their names from the Refugee Denial/Expulsion List, their names will not appear on the published list; however, in the event that class members have requested exclusion from the Refugee Denial/Expulsion List whose names, in the opinion of the Court, are sufficiently common such that other class members may share the same name, the Court will not exclude such names from the published list.

Preliminary steps should be taken to ensure that the refugee claims are ready to be determined, even in the event that final "approval of the allocation and distribution plan encounters substantial delays."[451] Therefore, at the time of the publication of the Refugee Denial/Expulsion List, a public announcement should be made that the Conference on Jewish Material Claims Against Germany, Inc. ("Claims Conference") will receive refugee claims from Jewish persons, and the International Organization of Migration ("IOM") will receive refugee claims from Roma, Jehovah's Witnesses, disabled or homosexual persons who were (1) jailed, abused or mistreated as refugees in Switzerland, or (2) denied entry into Switzerland or admitted but expelled from Switzerland, during the period 1933-1946 (the "Refugee Claims Process").

The Claims Conference and the IOM, respectively, in consultation with and upon Court approval, will make all necessary arrangements to receive, process and review all claims submitted to the Claims Conference and the IOM in accordance with these Rules. The Claims Conference and the IOM recognize the important responsibility of the Court for the supervision of the distribution of the Settlement Fund. In recognition of this responsibility, the Claims Conference and the IOM intend to work closely with the Court and to consult with the Court on all significant decisions affecting the work of the Claims Conference and the IOM during all stages of the review of Refugee Claims.

The work of the Claims Conference and the IOM on behalf of the Refugee Claims Process will be funded from the Settlement Fund, and quarterly budgets from these respective agencies will be submitted to the Court to obtain its approval for proposed Refugee Claims Process costs.

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[451] In re Holocaust Victim Assets Litigation, at 28. *See, e.g.*, Berman, *supra*.

II. Claims Procedures: Filing and Acceptance of Refugee Claims

Refugee Claims shall be submitted to the Claims Conference or the IOM for initial evaluation by filing a completed and signed Claim Form by no later than a date to be fixed by the Court at the time of its Final Approval of a Plan of Allocation and Distribution, at addresses also to be fixed by the Court.

III. Entitlement Criteria

A. Claims for Jail, Abuse or Mistreatment

A claimant who plausibly demonstrates, through documents, a statement or otherwise, that he or she was admitted into Switzerland as a refugee and was jailed, abused or mistreated, and whose name is matched against the List of Refugees Admitted into Switzerland, shall be entitled to an award from the Settlement Fund of up to $500, 50% of which is to be payable upon approval of the claim, and up to the remaining 50% of which is to be payable upon evaluation of all claims.

B. Claims for Expulsion from or Denial of Entry into Switzerland

1. A claimant who matches his or name against the List of Refugees Expelled from or Denied Entry into Switzerland, shall be deemed to have made a plausible refugee claim and shall be entitled to an award from the Settlement Fund of up to $2500, 50% of which is to be payable upon approval of the claim, and up to the remaining 50% of which is to be payable upon evaluation of all claims.

2. A claimant whose name does not match to a name appearing on the List of Refugees Expelled from or Denied Entry into Switzerland, shall be entitled to an award of up to $2500, 50% of which is to be payable upon approval of the claim, and up to the remaining 50% of which is to be payable upon evaluation of all claims, if he or she has plausibly demonstrated that he or she was denied entry into, or expelled from, Switzerland during the period 1933-1946.

a. In making a recommendation that a claimant has made a plausible claim, the Claims Conference and the IOM in their respective initial evaluations shall assess all information submitted by the claimant, and, where possible, may assess other information that in the opinion of the Claims Conference and the IOM may have a direct bearing upon the Refugee Claim. This information may include, but is not limited to, applications previously submitted by the claimant in connection with Holocaust compensation funds established by the governments of the Federal Republic of Germany (West Germany), Germany, Austria and Israel. The Claims Conference and the IOM shall at all times bear in mind the difficulties

of proving a Refugee Claim after the destruction of World War II and the Holocaust and the long period of time that has elapsed since the end of the War.

b. The claimant shall:

i. submit all documentary and non-documentary evidence that may reasonably be expected to be submitted in view of the circumstances and the years that have elapsed since World War II, including but not limited to the history of the claimant and the claimant's family;

ii. disclose whether he or she has applied for, or received, any payment, compensation, reparations or restitution from the governments of the Federal Republic of Germany (West Germany), Germany, Austria and/or Israel, in connection with World War II; and

iii. sign an authorization allowing the Claims Conference or the IOM to obtain information relating to the Refugee Claim from (a) archives of governmental compensation, restitution or indemnification offices, (b) other relevant archives including, but not limited to, Yad Vashem and the United States Holocaust Memorial Museum, and/or (c) the Initial Questionnaire that the claimant has filed or may file in connection with this settlement.

c. The claimant shall not submit any evidence in support of a claim which the claimant knows is falsified, forged, or materially misleading.

d. To the extent that the claimant considers such documents to contain information bearing upon his or her Refugee Claim, the claimant may also provide the Claims Conference or the IOM with other relevant documents.

e. To the extent that the Claims Conference or the IOM believes it necessary to personally contact the claimant, the claimant shall agree to a personal or telephonic interview by the Claims Conference or the IOM in order to assist the claimant in establishing his or her eligibility.

IV. Form and Content of Recommendations; Review Procedures

Following initial evaluation of the claim, the Claims Conference or the IOM will prepare a written recommendation. The recommendation shall specify the relevant facts, the reasons for the recommendation, and the date on which the recommendation was issued, and shall be signed on behalf of the Claims Conference or the IOM.

For a claim which is recommended for payment, the Claims Conference or the IOM shall notify the claimant that his or her claim has been approved, provide the claimant with a copy of the recommendation in favor of payment, and certify such recommendation for payment to the Court.

For a claim which is not recommended for payment following initial evaluation, the Review Officer shall notify the claimant that his or her claim has not been recommended for payment, and shall provide the claimant with a copy of the recommendation. The claimant may seek review of that recommendation within thirty (30) days of the receipt of the recommendation, by written request to the Claims Conference or the IOM.

Upon receipt of a request for review, the Review Officer will conduct a *de novo* evaluation of the Refugee Claim, and will then prepare a written recommendation approving or denying the claim. The Review Officer will notify the claimant and the Court of the determination upon review. Any claim recommended by the Review Officer for payment will be certified to the Court.

V. Miscellaneous

These Rules may be amended by the Court. The Claims Conference or the IOM and/or the Review Officer may request such amendment.

VI. Exclusion of Liability

In connection with the Refugee Claims Process, the Claims Conference, the IOM and their respective officers, employees, agents and representatives, the Review Officer and any employees, agents or representatives of the Review Officer, are serving at the direction of and under the supervision and control of the Court, the Claims Conference, the IOM, and their respective officers, employees, agents and representatives of the Claims Conference, the officers, employees, agents and representatives of the IOM, the Review Officer, and any employees, agents or representatives of the Review Officer, shall not be liable to any person for acts or omissions in connection with any matter conducted under these Rules.

IV. ADDITIONAL RECOMMENDATIONS

A. Communicating with the Classes

Although the recommendations contained in this Proposal set a high priority on making the process of receiving compensation from the Settlement Fund as simple, comprehensible and expeditious as possible, much still remains to be done.

The task of communicating with class members, explaining the Proposal, and helping class members make claims is daunting. As the Special Master for the Agent Orange litigation correctly recognized,

> One critical function in the actual implementation of the disposition of the Settlement fund is to continue to inform the class members of their rights under the Settlement. ... It is also imperative that the details of the distribution of the Settlement Fund be communicated to those class members who have yet to file a claim form so that they can take advantage of the valuable services that will be funded... It is particularly important that this communication effort reach out to those class members who are not in the mainstream of society.[452]

That concern is no less pressing here. Even weeks before this Proposal was due, the Special Master was advised that the Claims Conference was receiving hundreds of telephone calls each day from elderly and traumatized class members eager to learn the details of the Proposal and to be assured that no deadlines were approaching or had passed. The Special Master recommends that interim assistance immediately be made available to the Claims Conference and others to permit them to answer the flood of communications they will surely receive seeking information about the Proposal. Telephone lines and persons to staff them are urgently needed.

The Special Master also recommends that Settling Plaintiffs, who are required by the Settlement Agreement to implement the Plan of Allocation and Distribution upon its final approval by the court, should establish an outreach effort to the classes. More than just money is needed. Volunteers, who were utilized to great advantage all over the world in connection with the Notice Plan, must be recruited immediately and trained.

In the same vein, the Special Master has found the website for this action, www.swissbankclaims.com, to be an enormously valuable tool for communicating with class members. Class members apparently agree: as of this writing, the site has been visited more than 316,000 times. The Special Master recommends that for the remainder of this litigation,

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[452] Agent Orange Special Master Report, at 230.

until the Settlement Fund is distributed, the website continue to be funded from the Escrow Fund. During the period until final approval, and throughout any delays in distribution engendered by appellate review, the website can be useful to keep class members updated, and to advise of significant developments in distribution. One lesson learned from prior Holocaust compensation programs is that the inability to inform survivors promptly of new developments breeds unnecessary trauma in an already fragile class. Continuing funding for the website is a cost-effective and valuable method of minimizing trauma, itself an important objective of the Proposal.

B. Tax Treatment and Legislation

In the Commentary to the German Fund Legislation, it is stated that the intention of the Bundestag is

> that financial awards go to eligible persons exclusively, and without reduction as compensation for the tragic fate that they suffered. These awards, therefore, are not to result in a reduction of other payments to which the eligible persons have a legal right, in particular in the areas of social welfare and health care.[453]

The Special Master agrees. The Proposal makes clear repeatedly that compensation under the Settlement Fund is intended to be meaningful, and is intended to augment existing benefits, not substitute for them. It is unclear how the taxation authorities in the various nations where survivors reside will treat the various benefits the Proposal will confer. Accordingly, the Special Master recommends that the Court authorize the retention of

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[453] *See* "About the Individual Provisions" (German Fund) at About Section 15; *see also* In re "Agent Orange" Product Liability Litigation, 611 F. Supp. 1396, 1448 (E.D.N.Y. 1985) ("An important objective of the distribution plan is to maximize the amounts available for disposition. . . . [I]t is important to minimize the negative impact of federal, state and local income taxes on the earnings and gains realized by the fund. Another important goal is to ensure that payment program awards and class assistance foundation grants are exempt from taxation.")

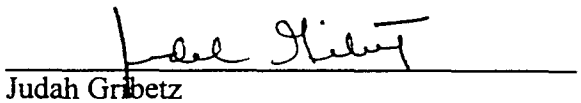
appropriate tax experts with expertise in the taxation systems of the principal nations where survivors live. The experts will assist the Court to structure the compensation the class members will receive in the most advantageous way possible.

To the extent federal or state legislation, or legislation in other nations, is necessary to ensure that class members will not see a reduction in benefits they may otherwise receive, and further to ensure that Settlement Fund benefits are not considered as income or resources when determining eligibility for Supplemental Security Income benefits and other federal, state and local need-based public assistance (and their equivalent in other nations), the Special Master calls for speedy passage of such legislation.

V. CONCLUSION

For the reasons stated above, the Special Master recommends that the Court adopt this Proposed Plan of Allocation and Distribution of the Settlement Proceeds.

Respectfully submitted,



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