UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

In re Holocaust Victim Assets Litigation (ERK) — CV 96-4849

SUPPLEMENTAL DECLARATION OF BURT NEUBORNE

BURT NEUBORNE, an attorney duly admitted to practice before this Court, hereby affirms under penalty of perjury:

1. I make this declaration in response to objections filed by Robert Swift and Samuel Dubbin to my application for an award of attorneys' fees in connection with my service as Lead Settlement Counsel.
2. I have served as court-appointed Lead Settlement Counsel for the past seven years. Prior to my work in that capacity, I served for two years as one of the principal lawyers in achieving this settlement, work for which, as both Mr. Swift and Mr. Dubbin note, I waived compensation of several million dollars.
3. Once the parties had reached an agreement in principle for the creation of a Settlement Fund of $1.25 billion on August 12, 1998, I considered my work in the case to have been substantially

completed. Accordingly, I withdrew from active participation in the case, and did not play a role in the drafting of the settlement agreement.

4. After the formal settlement agreement was executed on January 26, 1999, it quickly became clear that implementation of the settlement would require substantial legal expertise and an enormous commitment of time and energy. At that point, I was urged by the Court and by my co-counsel to agree to serve as Lead Settlement Counsel. It was clear to me, and to everyone involved, that implementing a class action settlement of this unprecedented nature and scope would require an enormous expenditure of energy, time and commitment by highly competent counsel. I did not seek the appointment, and reluctantly accepted it only after urging the Court in writing to appoint Mr. Swift, Mr. Weiss and Mr. Hausfeld as co-Lead Settlement Counsel, and only after being urged to accept the responsibility by the Court and by my co-counsel.

5. The settlement classes' interests were fully protected in connection with my appointment, since the appointment was made at the urging of the Court pursuant to its supervisory authority under

Rule 23(c) and (d), with the Court's express understanding that I would receive hourly lodestar compensation similar to the compensation payable to a Special Master in return for accepting a very substantial responsibility that would require me to abandon much of my other professional and personal activities for a period of years.

6. There was a clear distinction between my *pro bono* service to the class in achieving the settlement, and my reluctant acceptance of the Court's designation as Lead Settlement Counsel. More than five months elapsed between my *pro bono* service to the class in connection with achieving the settlement, and my acceptance of the Court's request that I serve as Lead Settlement Counsel under the same financial terms as the Special Masters. I completed my *pro bono* work in connection with achieving the settlement on August 12, 1998, the date the parties agreed to a $1.25 billion settlement in principle. I played no further active role in the case until the signing of the settlement agreement on January 26, 1999. I played no role in drafting the settlement agreement, and had withdrawn from active participation in this case in order to devote my energies to the German slave labor cases that I argued in

February, 1999. I did not sign the settlement agreement because I played no role in drafting it.

7. I have made no secret of my intention to seek compensation for my work as Lead Settlement Counsel. Chief Judge Korman's initial request that I serve as Lead Settlement Counsel was accompanied by an assurance that I would be eligible for hourly lodestar compensation on the same terms and conditions as a Special Master. I explicitly accepted the Court's financial terms. As the Court knows, I would not have expended seven years of grueling labor as Lead Settlement Counsel without the prospect of reasonable compensation. In my widely circulated *Interim Report on Holocaust Litigation in United States Courts*, I expressly noted that I would seek hourly fees for implementing the settlement. That report is hardly a secret to anyone in this case. It was published as *Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts,* 80 Wash. Univ. Law Q. 795 (2002), a copy of which was mailed to the Court and to all counsel herein. The *Interim Report* was subsequently cited by both the majority and dissent in the Supreme Court's decision in *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003). In the

published and widely circulated *Interim Report*, I expressly noted that I would seek hourly fees for implementing the settlement. *See* 80 Wash. Univ. Law Q. at 804 n. 21 ("Hourly payments for post settlement work needed to administer the fund will be sought").

8. When relevant, I have noted that I waived fees for achieving the settlement to make clear that I had no economic stake in the allocation of funds under the settlement that might create a conflict with any segment of the class. I have referred to my *pro bono* work on behalf of the class in achieving the settlement, not only because I was proud of it, but because my *pro bono* status in achieving the settlement was important in avoiding an economic conflict of interest that had doomed the complex settlement in *Amchem Products Inc. v. Windsor*, 521 U.S. 591 (1997) and had concerned the Second Circuit in *National Super Spuds, Inc. v. New York Mercantile Exchange,* 660 F.2d 9 (2d Cir.1981). *See In re Holocaust Victim Assets Litigation,* 424 F.3d 150, 156 (2d Cir. 2005).

9. As the Court may recall, in planning the implementation of this extraordinarily complex settlement, involving five classes and five victim groups, the decision was made to avoid pitting elderly

survivors against each other in an adversary allocation proceeding. Efforts were also made to avoid any conflicts that may have arisen as a result of the fee considerations of various counsel. The Court decided to ask a neutral Special Master to propose a plan of allocation, aided by a Lead Settlement Counsel with no economic stake in any particular allocation. Since I had waived fees for obtaining the settlement, I had no economic stake in any particular allocation, and was willing and able to play that neutral role. I have taken great care to make clear in documents filed with the Court, letters to interested parties, and press reports that my pro bono work in this case was restricted to my pre-settlement activities.[1] The documents filed by Mr. Dubbin are consistent with my representations to this Court and to the class.

10. My request for hourly, market rate fees is exactly what the Supreme Court has defined as a standard mechanism for attorney

[1] For examples of declarations in which I carefully delineate my *pro bono* service as limited to achieving the settlement, see, eg., my declarations dated February 22, 2002 (Swift fee application; describing my *pro bono* role in achieving the settlement); April 10, 2002 (opposing the initial Dubbin fee application); August 22, 2002 (describing compound interest payments, tax benefits and my waiver of fees for achieving the settlement); November 6, 2002 (description of Fagan fee award); July 11, 2003 (opposition to amended Dubbin fee request); October 2, 2003 (letter to Dubbin re role of Lead Settlement Counsel); October 13, 2003 (describing role of lead settlement counsel); February 18, 2004 (allocation issues; description of role of lead settlement counsel); April 1, 2004 (allocation issues); August 23, 2004 (Lead Settlement Counsel's Brief in 04-1898 at 14, 49, 59-62).

compensation: "[t]he 'lodestar' figure has, as its name suggests, become the guiding light of our fee-shifting jurisprudence." *Burlington v. Dague*, 505 U.S. 557, 562 (1992). Moreover, as the Supreme Court noted in *Blum v. Stenson*, 465 U.S. 886 (1984), the appropriate lodestar rate is the hourly rate payable in the relevant marketplace, without regard to the attorney's cost structure. I do not believe that there can be a serious dispute over the fact that lawyers of my experience, reputation and competence in the New York market routinely charge considerably more than my $700 hourly billing rate, to say nothing of my discounted rate in this case of $500 per hour. See the accompanying declarations of Frederick A.O. Schwarz (Cravath, Swaine & Moore); James E. Johnson (Debevoise & Plimption); and Joshua Rosenkranz (Heller Ehrman). Indeed, in my current practice, I charge clients $700 per hour.[2]

11. At all times in this litigation, I have taken the position that lawyers seeking fees should be paid lodestar rates for their hourly work on this case. I have opposed a percentage of the fund/risk multiplier

[2] While my private practice has been significantly curtailed by my work as Lead Settlement Counsel., I am currently charging $700 hour in connection with a private representation in the United States Supreme Court.

basis for compensation because of the availability of at least three highly competent lawyers willing to litigate the case to a successful conclusion on a *pro bono* basis. For example, in making a recommendation concerning an award of fees to Mr. Swift, I recommended full payment for his lodestar time, plus a modest multiplier for the quality of his work. I opposed only a risk multiplier on the grounds that the presence of several highly competent volunteer counsel eliminated the need for a risk multiplier, or for an award of a percentage of the fund as an inducement. What is striking about Mr. Swift's opposition to my requested fee award (and Mr. Dubbin's echoes of the argument) is that it disregards the findings of this Court on just this point, which constitute the law of this case. *See In re Holocaust Victim Assets Litigation,* 270 F. Supp. 2d 313, 319-20 (E.D.N.Y. 2002). I note that no similar ready supply of *pro bono* counsel existed to undertake the grueling and time-consuming task of Lead Settlement Counsel.

12. At all times, I have sought to resolve the difficult problems of implementation of the settlement as inexpensively as possible. I minimized the cost to the class by avoiding the use of multiple

lawyers. In fact, given the huge task of, *inter alia,* developing a theoretical basis for the settlement, dealing with the massive notice issues, including publication of Swiss bank accounts, re-negotiating large portions of the original, defective settlement agreement, assisting in developing an allocation process covering five classes and five eligible victims groups, helping to design multiple claims programs for all five classes, defending the settlement and allocation plan against waves of legal attack, enforcing the settlement's terms against the banks, supervising implementation of the claims programs and disbursement of settlement funds, monitoring investments and invoices, and providing daily advice on a myriad of issues to all layers of the settlement process, as well as hundreds of beneficiaries, my time expenditure is extremely modest. Were these tasks to have been performed by the usual use of multiple lawyers, the time expended would have, at a minimum, doubled. Moreover, the unprecedented nature of this settlement rendered delegation impossible. This is among the most complex and unorthodox class settlements ever undertaken. Delegation to less experienced counsel (let alone to completely inexperienced law students) was not an option.

13. It was impossible to delegate to Mr. Swift, who disagreed with the core structure of the Settlement allocation protocols and who, at each turn, challenged them before this Court and on appeal. Delegation to Mr. Swift would have been particularly unwise, first, because he is a vociferous critic of the Court's effort to develop individualized claims programs wherever possible, including an effort to return of all possible bank accounts; and, second, because much of my work has been attributable to shortcomings in the original settlement agreement drafted in large part by Mr. Swift, such as the failure to provide for access to information needed to administer claims programs, failure to establish an insurance program, failure to provide for the recovery of looted art, failure to clarify responsibility for funding the claims programs, failure to define membership in the Slave Labor II class; and failure to clarify the interest payable on funds in the escrow account. Similarly, delegation to Mr. Dubbin was out of the question, both because his competence was in serious question, and because he sought to profiteer at the settlement's expense. This formulation is deliberately mild given that this Court has already found Mr. Dubbin to have attempted to engage in "blackmail" and

"extortion" in this case. *In re Holocaust Victim Assets Litigation,* 311 F. Supp. 2d 363, 375 (E.D.N.Y. 2004). Those findings were upheld on appeal and now also constitute the law of the case. *See In re Holocaust Victim Assets Litigation,* 424 F.3d 150 (2d Cir. 2005)

14. I believe that my fee request is justified, not only in terms of the more than 8,000 hours expended in dealing successfully with the complex issues posed by the settlement's implementation over the past seven years, but in light of my success in increasing the value of the settlement fund. The record reflects that my efforts as Lead Settlement Counsel have resulted in a net increase of more than $50 million to the settlement fund. For example, my litigation before Judge Block resulted in the payment of $5 million in additional interest on funds held in the escrow fund. *In re Holocaust Victim Asset Litig.,* 256 F. Supp.2d 150 (EDNY 2003). My negotiation of Amendment 2 to the settlement agreement not only provided access to information needed to administer the bank account claims program, but provided for the accelerated payment of $334 million to the settlement fund, resulting in the immediate payment of $22.5 million in additional interest to the settlement

fund, with an additional $2.5 million accrued over the life of the settlement. See *In re Holocaust Victim Asset Litig.*, 105 F. Supp.2d 139 (EDNY 2000). Finally, my efforts, in close cooperation with Mel Weiss, persuaded Congress to enact a private bill retroactively exempting the settlement fund from federal income tax, a net benefit to the settlement fund of at least $25 million. *Economic Growth Tax Relief Reconciliation Act of 2001*, Sec. 803; H.R. Conf. Rep. No. 1836 (June 2001). Since I do not yet know the amount of successful insurance claims that will be made by the class, I cannot estimate the additional funds that will flow from the insurance claims program that I negotiated. I note that Mr. Dubbin valued it for the purposes of his fee application at the ridiculous figure of $50-$100 million. *In re Holocaust Victim Asset Litig.*, 424 F.3d 150 (2nd Cir. 2005). I value it as closer to $1 million. Thus, conservatively valued, my efforts have added $56 million to the settlement fund.

15. Under prevailing norms in this Circuit, even if one ignores the value of seven years of service to the settlement class, a fee of $4 million for generating at least $56 million in additional hard cash benefits to a settlement class (or 7% of recovery) is clearly

justified. Indeed, I note that Mr.Dubbin and his colleagues, in connection with the Hungarian Gold Train litigation, sought and received fees equal to 14% of the recovery to Holocaust victims, and congratulated themselves on the modest nature of the award.[3] I also note that the attorneys' fees provisions inserted in the notice to the class at the insistence of Mr. Swift anticipated payment of up to $18 million in attorneys' fees, or 15% of recovery. In fact, as a direct result of my work as class counsel, attorneys fees have been calculated on an hourly lodestar basis, and have been limited to $7 million. Even after the addition of my fee, attorneys' fees will remain far below the estimate in the notice to the class.

16. Out of the thousands of hours billed and the hundreds of entries over seven years, Mr. Swift seeks to disparage my efforts by questioning the accuracy of my record keeping. As I made clear in my initial submission, my time charges are based on contemporaneous records of my activities in the case, cross-checked against my dated computer files of documents produced and emails sent and received. My custom, from years in practice, is to record time continuously from the time I begin working on a

[3] Mr. Dubbin has helpfully placed the *Rosner* transcript in the record demonstrating his 14% fee award.

project on a given day until I stop working on it, and to assign the continuous bloc of time to the day on which I began working. This can result in the anomaly that when (as was often the case) I was forced to work through the night or late into the night, the hours after midnight were billed to the prior calendar day. The result, as Mr. Swift notes, is that on several occasions a particular day could have an entry for more that 24 hours, reflecting my continuous labor into a new day.

17. Mr. Swift's observation that I billed approximately 1,800 hours in 2000 is correct. That was the year I was forced to renegotiate much of the original, defective settlement agreement drafted by Mr. Swift, establish an insurance claims program, draft multiple declarations and briefs in support of the re-negotiated settlement agreement, participate in the drafting of the fairness opinion and order, review requests for attorneys fees, respond to multiple appeals on fairness to the Second Circuit, and help develop and defend the allocation plan.

18. Mr. Swift expresses skepticism that my time in 2000 was devoted solely to the Swiss case, noting that in 2000 I was actively litigating the German slave labor cases. I have reviewed my time

records in connection with the German cases and can attest that no duplicate billing took place. The German time records submitted to Kenneth Feinberg and Nicholas deB Katzenbach are available for the Court's inspection.

19. Finally, Mr. Swift expresses skepticism that conferences and conversations lasted for the several hours noted in my records. In fact, given the multiple personalities and conflicting views present at almost every phase of this case, my conferences and conversations often ranged for many hours, as I canvassed multiple views and sought to harmonize them.

20. Every time record submitted to this Court has been cross checked to the related documentary task or email. I have discounted 200 hours listed in my time records but inadvertently omitted from the total hours reported in connection with the preparation of appellate briefs in the summer of 2004. In addition, I have omitted blocs of time that were either attributable to some other facet of the Holocaust litigation, or were, in my judgment, not the sort of time that would be charged to a fee-paying client. Moreover, in light of the nature of the case, I have further discounted across-the-board my lodestar fee by 25%. I note that the total of all the objections to

the accuracy of my record-keeping, even if they were justified – and they are not justified - does not come close in scope to the size of this sweeping discount.

21. Finally, Mr. Dubbin apparently questions my eligibility for counsel fees from the settlement classes, seeking, yet again, to challenge the structure of the Swiss bank settlement. Throughout the implementation of the settlement, whenever I have refused to accede to demands on behalf of his clients,[4] Mr. Dubbin has responded by challenging my ability to serve as Lead Settlement Counsel for the class. This matter has been resolved by this Court and affirmed on appeal. *See In re Holocaust Victim Assets Litigation,* 413 F.3d 183 (2d Cir. 2001). Mr. Dubbin's efforts to challenge fees on the grounds that I could not, in light of *Amchem,*

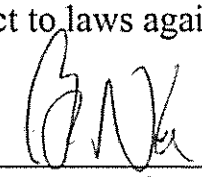
[4] Mr Dubbin, who played no role in achieving the settlement, has represented two set of clients during the implementation phase. His first client, Dr. Thomas Weiss, opposed the fairness of the settlement, but offered to withdraw his objection if the Court agreed to establish a multi-million dollar research institution under Dr. Weiss's control. Needless to say, his offer was firmly rebuffed. Dr. Weiss's appeal challenging the settlement's fairness was eventually withdrawn without the filing of a brief. Dr. Weiss, represented by Mr. Dubbin, then sought a grotesque $2.6 million payment for alleged research assistance to the class. Mr. Dubbin sought $3.6 million of his own in legal fees for representing Dr. Weiss. Needless to say, that effort was firmly rebuffed. Mr. Dubbin's second set of clients were Holocaust survivors residing in the United States who challenged the Special Master's allocation of Looted Assets funds, arguing that too much was being allocated to poor survivors in the former Soviet Union, and not enough to needy survivors residing in the United States. Mr. Dubbin's objections were firmly rejected by the Second Circuit. The courts have found that none of Mr. Dubbin's activities conferred a benefit on the settlement class, although they required a substantial amount of time and energy to rebuff.

serve as class counsel is an effort to circumvent the clear rulings of this Court and the Court of Appeals and should not be countenanced.

22. My actions in this case defending the settlement against objectors represented by separate counsel, such as the dissenting class members represented by Mr. Dubbin and Mr. Swift, are precisely the duties of every lead counsel in a complex case. The obligation of counsel in such cases is to the class as a whole, not to the satisfaction of any particular claim or desire within the class. *See Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581 (3d Cir.1999). All of the activities for which I seek compensation were necessary for the implementation of settlement, and fall within my request for reasonable lodestar compensation for my efforts in successfully implementing this complex settlement agreement.

Dated: January 31, 2006
Zurich, Switzerland and
New York, New York

I declare that the foregoing information is known to me and that it is true and accurate to the best of my knowledge, subject to laws against perjury pursuant to 28 U.S.C § 1746.



Burt Neuborne