UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE AUSTRIAN AND GERMAN BANK HOLOCAUST LITIGATION		Master File No. 98 Civ. 3938 (SWK)
THIS DOCUMENT RELATES TO: ALL ACTIONS		**MEMORANDUM OPINION AND ORDER**

SHIRLEY WOHL KRAM, U.S.D.J.

In re Austrian and German Holocaust Litigation consolidates ten separate actions arising out of the Nazi era against German Bank defendants. See generally Report of Special Master Charles A. Stillman, dated December 28, 2000 ("Stillman Report") at 4-10 (discussing procedural history of the litigation and nature of plaintiffs' claims). On October 23, 2000, the Court received a motion (the "Motion"), pursuant to Federal Rules of Civil Procedure 41(a) and 23(e), from all named plaintiffs[1] in Watman v. Deutsche Bank, 98 Civ. 3938 (SWK), to dismiss the Consolidated Class Action Complaint (the "Complaint"). The Motion seeks an order approving the voluntary dismissal of the Complaint with prejudice as to the

[1] The movants who are named plaintiffs in Watman v. Deutsche Bank are Harold Watman, Ruth Abraham, and Michal Schonberger. In addition, the Motion is made on behalf of Rudolfine Schlinger and Ernestine Schwarz Wasyl, who are named plaintiffs in paragraphs 41 and 43 of the Consolidated Class Action Complaint. Initially, Ms. Abraham refused to consent to the requested dismissal, but she has since agreed to the requested dismissal.

named plaintiffs.[2] To date, all named plaintiffs in the other actions against German Bank defendants, except for one, have also joined in the Motion and moved for dismissal of the Complaint.[3] For the reasons set forth below, the Court denies the Motion at this time.

---

[2] The Motion initially sought an Order approving the voluntary dismissal of the Complaint subject to compliance with four conditions. See Plaintiffs' Notice of Motion. The four conditions were: (1) full funding of the Foundation, "Remembrance Responsibility and the Future" (the "Foundation"), formed under German federal law and funded by the Federal Republic of Germany and various German companies, in the amount of DM 10 billion; (2)implementation of a reasonable publication and community outreach program intended to inform potential beneficiaries of the Foundations's existence, purpose, and claims procedure; (3) finalization of the Executive Agreement between Germany and the United States relating to the Foundation; and (4) preservation of the right of the Austrian Bank settlement class members to prosecute the Assigned Claims against German defendants. See Plaintiff's Notice of Motion; Court's Order dated October 23, 2000, at 1-2. By an "Amended Motion" dated October 31, 2000, plaintiffs withdrew the request to condition approval of the requested dismissal on the third and fourth conditions. Subsequently, by a letter to defense counsel dated November 10, 2000, plaintiffs apparently withdrew the first and second conditions, on the basis of certain representations and information provided by other counsel. See Defendants' Memo. Concerning Voluntary Dismissal With Prejudice, dated November 14, 2000, at 1; Declaration of Kenneth A. Caruso, dated November 14, 2000 ("Caruso Decl."), Ex. 1.

[3] The only named plaintiff who does not consent to the proposed dismissal is Stanley Garstka. Mr. Garstka is one of ten named plaintiffs in Duveen, et al. v. Deutsche Bank AG, et al., 99 Civ. 388, one of the putative class actions that is part of this consolidated case. For the sake of clarity, this opinion will refer to the various motions to dismiss as "the Motion," as all are premised on the same facts and legal arguments.

BACKGROUND

The history of Holocaust litigation in the United States is extensive. For the sake of brevity and clarity, this opinion assumes familiarity with the procedural history of the various actions against German Bank defendants that are before this Court and are the subject of the instant Motion. See generally Stillman Report at 4-10 (discussing procedural history of the litigation and nature of plaintiffs' claims). Of critical and immediate importance is the fact that plaintiffs seek dismissal of the Complaint to effectuate the terms of a non-judicial, inter-governmental agreement (the "Compact")[4] which, inter alia,

---

[4] The Compact is embodied in several documents. See generally Stillman Report at 21-33. First, on July 17, 2000, the United States and Germany entered into an Executive Agreement providing for the creation of the Foundation. See Agreement between the Government of the Federal Republic of Germany and the Government of the United States concerning the Foundation (the "Executive Agreement"), attached to Plaintiffs' Notice of Motion as Exh. "A." On the same day, the United States, Germany, Russia, Ukraine, Poland, Belarus, the Czech Republic, and Israel, together with plaintiffs' counsel, German Industry, and the Conference on Jewish Material Claims Against Germany, Inc., executed a Joint Statement containing many of the terms essential to the Compact. See Joint Statement on Occasion of the Final Plenary Meeting Concluding International Talks on the Preparation of the Foundation (the "Joint Statement"), attached to Plaintiffs' Notice of Motion as Exh. "B." Three (3) supplemental "side letters" to the Joint Statement were subsequently filed. See Side Letters, attached to Plaintiffs' Notice of Motion as Exh. "C." Finally, on August 12, 2000, the German Bundestag passed legislation creating the Foundation to compensate persons who suffered human rights abuses

recognizes a German Foundation as the exclusive forum for the resolution of all labor and property claims against German entities arising during World War II. See generally Stillman Report at 21-33 (discussing the nature and terms of the Compact). The negotiations leading to the Compact began in early February 1999, with talks involving the United States and Germany. See id. at 35. Significant multi-party negotiations, including the first meetings attended by both German companies and class action attorneys, began in May 1999 and continued throughout 1999 and the first half of 2000. See id. at 37-64 (detailing multi-party negotiations and discussing progress on key issues). These meetings culminated in the signing of the agreements constituting the Compact on July 17, 2000. See Stillman Report at 64-66 (discussing finalization of the Compact).

On October 27, 2000, the Court appointed Special Master Charles Stillman to assist the Court in determining whether the Court should approve the requested dismissal of the Complaint. See Order dated October 27,2000. Specifically, the Court asked Special Master Stillman to make findings and recommendations to the Court

---

or property loss during World War II. See A Law on the Creation of a Foundation, "Remembrance, Responsibility and Future," attached to Plaintiffs' Notice of Motion as Exh. "D." Together, these documents constitute the Compact.

in connection with four inquiries related to the proposed dismissal. See id. at 5. The four inquiries are:

> 1. Are any claims compromised between the plaintiffs and defendants?
>
> 2. Have the named plaintiffs or the attorneys used the class action device for their private benefit and to the detriment of absent class members?
>
> 3. Does the Compact prejudice absent class members in any way?
>
> 4. Is there any evidence of collusion between plaintiffs and defendants?

On December 28, 2000, the Special Master filed his Report with the Court. The Special Master's findings are presented in pages 79 through 120 of his Report. The Special Master found and concluded, inter alia, (1) that the named plaintiffs and their attorneys have not used the class action device for their own private benefit and to the detriment of absent class members; (2) that the Compact creates certain limited disadvantages to absent class members, such as the detrimental Statement of Interest,[5] the possibility that

---

[5] Pursuant to the terms of the Compact, the United States Government will file a "Statement of Interest" in all future Nazi-era cases against German companies, including any such actions brought by absent class members. See Stillman Report at 96-98. Essentially, the Statement of Interest will assert that dismissal of such litigation would be in the United States' foreign policy interests and that the Foundation provides a fair remedy for

property claims could be excluded or their recovery limited, and an uncertainty about the claims process, but that the Compact, as a whole, benefits absent class members more than it disadvantages them; and (3) that there is no evidence of collusion between plaintiffs and defendants. See Stillman Report at 79-120. The Special Master's Report also presented recommendations to the Court regarding the Motion. See id. at 121-23. The Special Master recommended that the Court grant the Motion, but that the Court expressly decree that a named plaintiff or absent class member could seek to vacate the dismissal, pursuant to Federal Rule of Civil Procedure 60(b), "in the event that material terms of the Compact are not fulfilled." Id. at 121.

On January 24, 2001, the Court held a hearing to determine whether to approve the requested voluntary dismissal. See Transcript of Hearing Held on January 24, 2001 ("Hr'g Tr."). Subsequent to the hearing, the Court ordered the parties to supply additional information on certain specified topics, and to answer open questions. See Order dated January 29, 2001. Specifically, the parties were ordered to supply information pertaining to:

---

victims of Nazi-era wrongs. See id. The Statement of Interest will recommend dismissal of such actions on any valid legal ground. See id. The Statement of Interest is discussed in greater detail below.

1. The standards the Commission[6] will use to evaluate property claims.

2. The precise auditing and oversight mechanism that the Foundation will employ to monitor funds paid to partner organizations.

3. The form and mechanics of the appeal process for property claims rejected by the Commission.

4. The schedule for full funding of the Foundation, including a specific cut-off date by which all funding must be accomplished.

5. The number of non-German companies that are deemed to be German companies for purposes of claims covered by the Foundation, and the estimated amount of Foundation funds that will be used to pay claims against non-German companies.

6. The steps taken to ensure that there was no conflict of interest for counsel representing both plaintiffs with claims against German banks and members of the Austrian bank settlement class.[7]

---

[6] The Compact provides that property claims are to be determined by a three member Commission. See Stillman Report at 30. Property claims will be processed by one of the Foundation's "partner organizations," the International Organization for Migration. See id. The Compact specifies that the Commission is required to determine claims within a year after expiration of the application deadline. See id. The Compact also appears to require an appeal process for the Commission's determinations, although the precise nature of this appeal process is unclear. See id.

[7] On January 6, 2000, the Court approved the Settlement Agreement with Bank Austria AG and Creditanstalt AG dated March 15, 1999 (the "Settlement Agreement"). See In re Austrian and German Holocaust Litig., 80 F. Supp. 2d 164 (S.D.N.Y.

7. How the Foundation will process and resolve the claims of the plaintiff class that are asserted in paragraph 143 of the Complaint.

The Court reserved decision on the Motion until these matters were addressed. On February 22, 2001 and February 23, 2001, the parties filed materials supplying their responses to these matters. See Plaintiffs' Joint Response to the Court's Request for Additional Information, dated February 22, 2001 ("Pl.'s Joint Resp."); Declaration of Burt Neuborne in Response to the Court's Request for Additional Information, dated February 22, 2001 ("Neuborne Decl."); Defendants' Response to the Order Dated January 29, 2001, dated February 23, 2001 ("Def.'s Resp."). The Court has carefully considered all of these materials in deciding the instant Motion.

DISCUSSION

I. Standard of Law

A. Voluntary Dismissal of a Class Action

Federal Rule of Civil Procedure 41(a)(1) governs voluntary dismissals of actions and permits dismissal as a matter of right prior to the service of an answer or a motion for summary judgment.

2000). The Settlement Agreement provides for, inter alia, the assignment of certain claims of Austrian banks against German banks to and for the benefit of the Austrian Bank settlement class (the "Assigned Claims"). See id. at 171.

See Fed. R. Civ. P. 41(a)(1). Rule 41 states, in relevant part, that "subject to the provisions of Rule 23(e) . . . an action may be dismissed by the plaintiff without order of court . . . by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs." Id. As stated in the rule itself, voluntary dismissal pursuant to Rule 41(a)(1) is subject to Rule 23(e). Rule 23(e) mandates that "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." Fed. R. Civ. P. 23(e). Thus, "Rule 23(e) . . . plainly takes away a class action plaintiff's right under Rule 41(a)(1) to voluntary dismissal merely by filing with the court a notice of dismissal." Goldstein v. Delgratia Mining Corp., 176 F.R.D. 454, 457 (S.D.N.Y. 1997) (citing In re Phillips Petroleum Sec. Litig., 109 F.R.D. 602, 606-07 (D. Del. 1986)).

Court approval of a voluntary dismissal is required because "Rule 23(e) was designed to prevent representative plaintiffs from settling or dismissing cases to the detriment of the absent members of the class." Glidden v. Chromalloy Am. Corp., 808 F.2d 621, 626-27 (7th Cir. 1986). While some courts have held that Rule 23(e)

applies only to certified class actions,[8] the majority view interprets Rule 23(e) to apply to pre-certification dismissals as well. See Diaz v. Trust Territory of Pacific Islands, 876 F.2d 1401, 1408 (9th Cir. 1989); Glidden v. Chromalloy Am. Corp., 808 F.2d at 625-28; Kahan v. Rosenstiel, 424 F.2d 161, 169 (3d Cir. 1970); Anderberg v. Masonite Corp., 176 F.R.D. 682, 688-90 (N.D.Ga. 1997); Gassie v. SMH, Ltd. & SMH, No. 97 Civ. 1786, 1997 WL 466905, at *2 (E.D. La. Aug. 1, 1997); Caston v. Mr. T's Apparel, Inc., 157 F.R.D. 31, 33 (S.D. Miss. 1994); see also 7B C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 1797 (2d ed. 1986) (noting that courts generally agree that actions filed as class suits are within the scope of Rule 23(e) even though they have not been formally certified). Therefore, "Rule 23(e) presumptively applies to all complaints containing class allegations, including proposed class actions not yet certified by the district court." Baker v. America's Mortgage Servicing, Inc., 58 F.3d 321, 324 (7th Cir. 1995) (internal citation omitted); see also In re Towers Fin.

---

[8] The minority view has been expressed by the Fourth Circuit, which has held that Rule 23(e) applies only after a class has been certified. See Shelton v. Pargo, Inc., 582 F.2d 1298, 1303 (4th Cir. 1978). Even under this view, however, the district court has a duty to examine the proposed settlement to determine whether there has been abuse of the class action device or prejudice to putative class members. See id. at 1303-04, 1314-15.

Corp. Noteholders Litig., No. 93 Civ. 0810, 1998 WL 64151, at *1 (S.D.N.Y. Feb. 17, 1998).

In determining whether to grant dismissal of a pre-certification class action, courts have focused on two inquiries: (1) whether the dismissal is the product of collusion between plaintiffs and defendants or their counsel; and (2) whether the dismissal would prejudice absent class members.[9] See, e.g., Shelton v. Pargo, Inc., 582 F.2d at 1314; Diaz v. Trust Territory of the Pac. Islands, 876 F.2d at 1408; Chichilnisky v. Trustees of Columbia Univ., 1993 WL 452526 at *1 (S.D.N.Y. Nov. 3, 1993). When engaging in this two-pronged inquiry, courts have historically found it unnecessary to perform the sort of substantive oversight required when reviewing a settlement of a certified class because "the dismissal was not res judicata against the putative class." Shelton v. Pargo, Inc., 582 F.2d at 1311; see also Diaz v. Trust

---

[9] The Second Circuit has not yet addressed the considerations governing approval of a pre-certification class action dismissal. Courts in this district, however, have adopted the collusion/prejudice inquiry. See e.g., Chichilnisky v. Trustees of Columbia Univ., No. 91 Civ. 4617, 1993 WL 452526, at *1 (S.D.N.Y. Nov. 3, 1993) ("If the dismissal is not collusive and the potential class members will not be prejudiced by it, notice is not required and the court may approve the dismissal."); Jaen v. New York Tel. Co., 81 F.R.D. 696, 697 (S.D.N.Y. 1979) (expressly applying collusion and prejudice inquires in approving pre-certification voluntary dismissal).

Territory of the Pac. Islands, 876 F.2d at 1408.

1. The Collusion Inquiry

In the past, courts have focused primarily on the first inquiry, the possibility that the pre-certification compromise was the product of collusion. See Shelton v. Pargo, 582 F.2d at 1314 n.55 (citing Magana v. Platzer Shipyard, Inc., 74 F.R.D. 61, 67 (S.D.Tex 1977)). In assessing the possibility of collusion, the cases instruct that a court must evaluate the terms and conditions of the proposed dismissal and settlement. See Diaz v. Trust Territory of the Pac. Islands, 876 F.2d at 1408; Shelton v. Pargo, 582 F.2d at 1315. A court must carefully consider the amount paid to the plaintiffs to compromise the claim. Shelton v. Pargo, 582 F.2d at 1315. This inquiry is necessary to insure that "under the guise of compromising the plaintiff's individual claim, the parties have not compromised the class claim to the pecuniary advantage of the [named] plaintiff . . . ." Id.

Also subject to careful scrutiny is the compensation that plaintiff's counsel is to receive. In an attempt to protect classes from abuse, courts have "become increasingly attentive to the reasonableness of the fee to be recovered by plaintiff's counsel as part of the proposed compromise of a class action." Magana v. Platzer Shipyard, 74 F.R.D. at 72.

2. **The Prejudice Inquiry**

The rationale for giving "less weight" to the possibility of prejudice to absent class members in the pre-certification context is that a "pre-certification dismissal does not legally bind absent class members." Shelton v. Pargo, 582 F.2d at 1314; see also Larkin Gen. Hosp. v. American Telephone & Telegraph Co., 93 F.R.D. 497, 501 (E.D. Pa. 1982). Courts have found that at best, the absent putative class members have a mere "reliance interest" in the outcome of the putative class action. See Shelton v. Pargo, 582 F.2d at 1314-15; Magana v. Platzer Shipyard, 74 F.R.D. at 69-70. Reliance may exist because absent class members could have learned about the class action through "publicity or other circumstances," Diaz v. Trust Territory of the Pac. Islands, 876 F.2d at 1408, and thus relied on the named plaintiffs to pursue the case. While the "strength of [a reliance interest] will vary with the facts of the particular case," this interest has been characterized as "at best speculative." Shelton v. Pargo, 582 F.3d at 1315. It is usually limited to actions that are of sufficient interest to have warranted news coverage and, according to some courts, "can occur only on the part of those persons learning of the action who are sophisticated enough in the ways of the law to understand the significance of the class action allegation." Id.

B. Special Master's Report

Federal Rule of Civil Procedure 53(e) provides the applicable standard of review for reports of special masters. See Fed. R. Civ. Pro. 53(e). In general, a district court must accept a special master's findings of fact unless they are "clearly erroneous."[10] Fed. R. Civ. Pro. 53(e)(2). A special master's conclusions of law, however, or conclusions on mixed questions of law and fact, are not entitled to any special deference and are subject to de novo review. See, e.g., Fogel v. Chestnutt, 668 F.2d 100, 116-17 (2d Cir. 1981); In re Continental Vending Mach. Corp., 543 F.2d 986, 995 (2d Cir. 1975); Falkowski v. Demske, No. Civ-80-983E, 1985 WL 5574, at *1 (W.D.N.Y. Nov. 23, 1985). "It is especially important to conduct a de novo review in addressing recommendations resolving dispositive motions." Ross v. Patrusky, Mintz & Semel, No. 90 Civ. 1356, 1997 WL 214957, at *6 (S.D.N.Y. April 29, 1997) (citing Jay v. Secretary of Dep't of Health & Human Servs., 998 F.2d 979, 983 (Fed. Cir. 1993)).

---

[10] The Supreme Court has defined "clearly erroneous" as follows: "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U. S. 364, 395 (1947).

II. Prejudice to Absent Class Members

The Court's decision in this matter rests on three unique aspects of the requested dismissal. These three aspects, when considered together, warrant denial of the Motion. First, the Compact provides that the Foundation is to be the exclusive forum for persons with claims against German banking institutions that arise out of Nazi-era wrongs and atrocities. Second, pursuant to an Executive Agreement that is part of the Compact, the United States has agreed to issue a "Statement of Interest" urging dismissal of any and all new litigation against German entities for Nazi-era claims. Finally, the Foundation is not yet fully funded, and the parties submit that such funding is contingent upon the Court dismissing the instant case. These factors, and their impact on the absent plaintiff class, are discussed below.

Plaintiffs state that "[t]he instant Motion is submitted as part of the compliance mechanism for an historic international compact which settles Germany's civil liability for human rights and other abuses committed before and during World War II." Memorandum of Law in Support of Watman Plaintiffs' Motion ("Watman Memo.") at 1. Indeed, the anticipated scope of the Foundation is extensive. The Foundation is intended "to be the exclusive remedy and forum for the resolution of all claims that have been or may be

asserted against German companies arising out of the National Socialist era and World War II." Joint Statement, Preamble, at 3; see also Executive Agreement, Article 1(1). No party disputes that the Foundation is intended to offer the exclusive remedy for the property claims of both the named plaintiffs and the absent class members in this case.

Despite the sweeping nature of the Foundation and the Compact, plaintiffs emphasize that the requested dismissal "is without prejudice to absent class members, so that their substantive claims based on Nazi era abuses survive intact." Watman Memo. at 15 (emphasis in the original). A primary component of the Compact, however, is the United States' commitment, upon learning that a complaint asserting a Nazi-era claim against German companies has been filed in the United States, to furnish a "Statement of Interest" to the court handling the case. See Stillman Report at 25; Executive Agreement, Article 2(1). Annex B to the Executive Agreement sets forth the specific components of the Statement of Interest. See generally Stillman Report at 25-26. The Statement of Interest must expressly indicate that it is in the foreign policy interest of the United States for the Foundation to be the exclusive remedy and forum for all Nazi-era claims against German companies, and that the United States believes all such claims

should be pursued through the Foundation instead of American courts. See id. at 25; Executive Agreement, Annex B, ¶¶ 1-2. Furthermore, while the Statement of Interest will not suggest that United States foreign policy interests provide an independent legal basis for dismissal, the Statement of Interest "will reinforce the point that U.S. Policy interests favor dismissal on any valid legal ground." Executive Agreement, Annex B, ¶¶ 3, 7.

If implemented, the Statement of Interest would undoubtedly have a significant impact on the resolution of any new cases brought by absent class members. The Special Master found that the Statement of Interest "creates a detriment to absent class members." Stillman Report at 96. Specifically, the Special Master found that "the Statement of Interest will be a highly compelling and persuasive consideration to a court in favor of dismissal and that a court will give it significant weight." Id. at 97. Existing case law and commentary on the subject, while sparse, support the Special Master's finding that "[t]he Statement of Interest . . . will create a substantial impediment, and a level of 'prejudice,' to a now-absent class member, if that person decides to bring a case in the future." Id. at 98; see also Jackson v. People's Republic of China, 794 F.2d 1490, 1494-96 (11th Cir. 1986) (discussing significance of Statement of Interest, and stating

that, in considering whether "extraordinary circumstances" were present, the lower court "properly gave consideration to the Secretary of State's assessment of the foreign policy implications of the default judgment"). In practical terms, the Statement of Interest "cannot stop a former slave laborer [or property claimant] from filing a lawsuit in the future against a German firm in our courts, [but] the contemplated intervention of the U.S. Government on behalf of any defendant German firm that is sued makes it practically impossible for any such suits to succeed." Michael J. Bazyler, Nuremberg In America: Litigating The Holocaust In United States Courts, 34 U. Rich. L. Rev. 1, 283 (2000).

Thus, while the parties maintain that the requested dismissal is "without prejudice" to the absent class members, an honest assessment of the effect of the Statement of Interest reveals a more complex situation. If the Court grants the instant Motion, then absent class members' only realistic possibility of recovery for their claims will be through the Foundation. Any lawsuit they might bring within the United States would be met with the detrimental Statement of Interest, and most likely dismissed.

Of critical importance to the absent class members, then, is

the status of the Foundation's funding.[11] Pursuant to the terms of the Compact, payments to victims will not occur until the German Bundestag determines "the establishment of adequate legal security for German enterprises." Foundation Law § 17(2). The parties do not dispute that this determination "is keyed to substantial compliance with the language of para. 4(d) of the July 17 Joint Statement requiring dismissal of 'all lawsuits against German companies arising out of the National Socialist era and World War II pending in U.S. courts,'" including the instant case. Pl.'s

---

[11] The plaintiffs' most recent submission states that "[i]n the highly unlikely event that German industry defaults on its obligation to pay 5 billion DM plus appropriate interest to the Foundation, no Statement of Interest will be filed by the United States . . . because German industry will not have fulfilled its obligations under the Joint Statement, the Executive Agreement, and the Foundation Law." Pl.'s Joint Resp. at 7; see also Neuborne Decl., ¶8. There is nothing before the Court, however, to indicate that this assertion is true. Simply put, the plaintiffs cannot make representations as to the course of action the United States Government will take in the event of a breach of an international agreement. Indeed, shortly after the plaintiffs submitted their Joint Response, a trial attorney from the Department of Justice, David O. Bucholz, informed the Court that even the Government cannot forecast how it would react in the event of such a breach. In addition, the Court has scrutinized the Joint Statement, the Executive Agreement, and the Foundation Law, and cannot find language guaranteeing that the United States will not file the Statement of Interest until full funding is achieved. If anything, the Compact indicates that the Statement of Interest will begin to be filed in all future Nazi-era cases as soon as dismissal of the instant case is achieved. Finally, the Court notes that the United States has already filed its Statement of Interest with the Court, and urges the Court to dismiss the Complaint.

Joint Resp. at 5. At the same time, it is also clear that the German companies will not fund the Foundation until all of the cases are dismissed. See id. at 8 (stating that plaintiff's counsel "believe it highly likely" that dismissal of the instant case will "result[] in prompt payment of German industry's contribution"); Neuborne Decl., ¶5 ("I believe that the Bundestag's determination triggers the obligation for full payment by German industry"); Def.'s Resp. at 7 ("[U]ntil the cases pending in various courts, including all of the cases pending in this Court, are finally dismissed with prejudice, the payments by German companies to the Foundation are not due."). In sum, the named plaintiffs ask the Court to voluntarily dismiss their claims, and thus subject all absent class members to the detrimental statement of interest and the other terms of the Compact, even though the absent class members' only source of compensation for their claims has yet to be fully funded.

While the Court recognizes that in most pre-certification dismissals the focus of the Court's inquiry is on the possibility of collusion, in this case, a stronger prejudice inquiry is warranted. The rationale for giving less weight to the possibility of prejudice to absent class members in the pre-certification context stems from the fact that typical pre-certification

dismissals do not legally bind absent class members. In the typical pre-certification case, absent class members have little more than a mere reliance interest in the action, whereas in the instant case, absent class members have much more at stake. Pursuant to the terms of the Compact, granting the instant Motion would effectively block absent class members from pursuing any remedy other than the Foundation, which is not yet fully funded. The Court finds that this element of the Compact, and of the requested dismissal, constitutes unacceptable prejudice to the absent plaintiff class under the unique circumstances of this case. Many of the absent plaintiffs in this case have waited decades to receive compensation for their property claims, and it would be unjust to divert their claims to a forum whose funding remains in question. Accordingly, the Motion is denied at this time.[12]

---

[12] The Court does not dispute the factual findings made by Special Master Stillman in his Report. Indeed, the Court's decision relies upon the Special Master's finding that the Statement of Interest would "create a substantial impediment, and a level of 'prejudice,' to a now-absent class member, if that person decides to bring a case in the future." Stillman Report at 98. For the reasons discussed above, however, the Court disagrees with the Special Master's conclusion that "such prejudice is not unreasonable," id. at 111, and that "the benefits [of the Compact] strongly outweigh any disadvantages." Id. at 110. To the extent that these conclusions may be construed as "findings of fact," the Court notes that, although there is evidence to support these conclusions, the Court, on the basis of the entire record before it, is left with the definite and firm conviction that these

III. The Assigned Claims

While the prejudice discussed above is in and of itself sufficient grounds for denial of the Motion, prejudice to a specific plaintiff sub-class presents an additional and independent grounds for denial of the Motion.[13] Paragraph 143 of the Complaint asserts certain claims of the Austrian banks against German banks that were assigned to plaintiffs who are members of the Austrian Bank Settlement Class (the "sub-class").[14] These claims were

---

conclusions are erroneous. Accordingly, the Court declines to adopt the Special Master's recommendation that the Court grant the Motion subject to an express decree that a named plaintiff or absent class member could seek to vacate the dismissal under Federal Rule of Civil Procedure 60(b) if certain "material terms" of the Compact, including full funding, are not met. See id. at 121-23.

[13] Special Master Stillman did not consider the effect of the Compact on the Assigned Claims sub-class. See Hr'g Tr. at 51.

[14] Defendants' most recent submission to the Court states that "[n]o claims are asserted in Paragraph 143 of the Consolidated Complaint," because Paragraph 143 "states that plaintiffs 'intend to assert' claims that Creditanstalt and Bank Austria assigned to the Austrian Settlement Class." Def.'s Resp. at 9. Paragraph 143, however, is explicitly labeled as the Complaint's "Ninth Cause of Action." See Complaint, ¶143. Furthermore, while it is true that Paragraph 143 states that plaintiffs "intend to assert" the Assigned Claims, it also states that the Assigned Claims originate from a Settlement Agreement awaiting approval by the Court, and that "Plaintiffs intend to assert any and all such claims against the Defendant Banks if and when that right attaches." See id. The Complaint was filed on March 17, 1999. On January 6, 2000, the Court approved the

assigned to the sub-class pursuant to the Settlement Agreement approved by the Court on January 6, 2000. See In re Austrian and German Holocaust Litig., 80 F. Supp. 2d at 171, 180-81. These Assigned Claims, as they are commonly known, consist of any Nazi-era claims for restitution, indemnification, or contribution that the Austrian Banks may have or have had "against any financial institution or commercial enterprise that may have exercised dominion or control over any of the Austrian Banks." Id. at 171.

Plaintiffs urge the Court to dismiss the Complaint, including the claims asserted in Paragraph 143. Whereas the Foundation is intended to resolve all of the other property claims in the Complaint, however, the Compact does not provide for the resolution of the Assigned Claims. There is no dispute that "persons claiming to enforce legal rights assigned by Austrian banks for wrongs allegedly committed by German banks against Austrian corporations . . . are not within the purview of the German Foundation." Pl.'s Joint Resp. at 15; see also Def.'s Resp. at 10 ("The Foundation . . . does not provide recovery for such claims because it was established to provide relief for injuries suffered by Holocaust

---

Settlement Agreement referred to in Paragraph 143. See In re Austrian and German Holocaust Litig., 80 F. Supp. 2d 164, 171, 180-81 (S.D.N.Y. 2000).

victims, not injuries allegedly suffered by Austrian banks") (emphasis in the original). Thus, plaintiffs seek to dismiss the claims of this sub-class, and subject the sub-class to the detrimental Statement of Interest, while the sub-class receives nothing in return.

This decision is not intended to reflect on the value of the Assigned Claims. Granting the instant motion, however, would unduly prejudice the Assigned Claims sub-class, because plaintiffs' counsel would thus be allowed to use the sub-class's "quid"--i.e., agreeing that the Statement of Interest applies to the Assigned Claims--without any corresponding "quo" for the sub-class whatsoever. In other words, the instant application prejudices the sub-class because plaintiffs' counsel thereby consent to the applicability of the Statement of Interest to the Assigned Claims (a detriment only to the sub-class) in order to achieve a desired result for other plaintiffs, while the desired result (the Compact) excludes the sub-class.

Prejudice to the sub-class is enhanced by the sub-class's heightened reliance interest in this case. Whereas the reliance interest of a typical absent class member is "at best 'speculative,'" Shelton v. Pargo, 582 F.2d at 1315, and normally the result "of publicity or other circumstances," Diaz v. Trust

Territory, 876 F.2d at 1408, the sub-class's reliance interest here stems from a judicially approved settlement. The Court's approval of the Austrian Bank settlement explicitly depended upon the assignment of claims to the sub-class. See In re Austrian and German Holocaust Litig., 80 F. Supp. 2d at 178 (finding the settlement "well within the range of reasonableness," given that "plaintiffs and the Settlement Class are assured recovery of $40 million . . . and an assignment of all claims the Austrian Banks may have as a result of the Nazis' activities."). In short, the Assigned Claims are an integral part of the settlement that was approved by the Court. It would be inequitable and prejudicial to the sub-class to permit their counsel to promote the Assigned Claims as part of a reasonable settlement, only to have the same counsel subsequently impede the prosecution of these claims. Accordingly, and for all the reasons set forth above, the Motion is denied.

CONCLUSION

For the reasons set forth above, the plaintiffs' motion to dismiss the Consolidated Class Action Complaint is denied at this time. Plaintiffs may renew their motion in the event full funding of the Foundation is accomplished, and the prejudice to the Assigned Claims sub-class is eliminated. Absent these

developments, the Court will determine, as expeditiously as possible given the complicated nature of this case, motions to dismiss the Consolidated Complaint that have been sub judice since December 6, 1999. See Stillman Report at 10 (discussing pending motions).

SO ORDERED.

SHIRLEY WOHL KRAM
UNITED STATES DISTRICT JUDGE

DATED: New York, New York
March 7, 2001