

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

received
in chambers
March 9, 1996

D-7

IN RE HOLOCAUST VICTIMS'
ASSETS LITIGATION

Master Docket No. CV-96-4849
(ERK) (MDG)
(Consolidated with CV-96-5161
and CV-97-461)

MEMORANDUM FOR APPOINTMENT OF CLASS COUNSEL

Under the principles of Rule 23 of the Federal Rules of Civil Procedure, a court has the authority and obligation to appoint counsel for the class at the time of certification. See Manual for Complex Litigation (3d ed.) §30.16 at 221. This necessity arises out of the unique nature of the class mechanism in pursuing similar claims by similarly situated unnamed members of the class. See Newberg on Class Actions §15.02 at 15-5 (3d ed. 1992). Counsel for the class assume the responsibility of a fiduciary both to the class and to the court in this type of representation. Id. at §15.03, p. 15-9. Selection of class counsel is based on the principles that counsel will vigorously and adequately protect the interests of the entire class and work for the class in a manner consistent with counsel's fiduciary obligations to the class as a whole. Id.

The undersigned counsel believe that, with the exception of Edward Fagan, the members of the Executive Committee have exhibited those qualities and adhered to those principles. It is respectfully requested that they be appointed by the Court as class counsel.

However, the undersigned counsel cannot recommend that Mr. Fagan be selected as class counsel. His conduct generally throughout the course of the litigation has ranged from non-

cooperative to vehemently antagonistic. He has at times conducted himself in a manner which placed him directly at odds with the interests of the class. On other occasions he has been an embarrassment to the profession and has established a public image which demeaned his responsibility to the class.

From the inception of the litigation, Mr. Fagan always publicly proclaimed that he represented individuals. He assiduously disassociated himself from any connection with Jewish organizations or other groups that sought to represent the interests of the members of the class sought to be certified. See Address at Whittier Law School, April, 1998, at p. 3 of 6, attached hereto as Exhibit 1. In Executive Committee meetings he repeatedly threatened to pull his clients from the class if he personally disapproved of particular strategies. Matters between him and the Executive Committee became so contentious that Bob Swift insisted that a particular Executive Committee meeting be recorded by a court reporter. At that meeting, which occurred on November 2, 1998, almost three months after the Agreement in Principle was reached with the defendants, Mr. Fagan stated, on the record, that he might object to including the SNB as a releasee in the Agreement. See Transcript of Meeting, 11/2/98 at p. 50, attached hereto as Exhibit 2.

In an earlier instance, the Executive Committee voted to hold the line in negotiations with the Swiss at \$1.5 billion.¹ Without any prior notification and expressly contrary to the position of the Executive Committee, Mr. Fagan held a unilateral press conference at a critical juncture of the negotiations where he announced a willingness to break the line with the Executive

¹At that time, the Executive Committee functioned on a consensus basis. Despite one vote to the contrary, it was the consensus that the entire Executive Committee would adopt and adhere to this position.

Committee and reopen the negotiations with the banks at lower amounts. See Press statement issued by Ed Fagan at 7/15/98 press conference; see also "News Advisory" issued by Ed Fagan, 7/14/98, attached hereto as Exhibit 3. This not only undermined the position of the Executive Committee in the negotiations, but also jeopardized the working relationship of the Committee with those other individuals outside the litigation who were attempting to support the Committee's position.

The success of this litigation was in large part dependent on the coalition of interests outside of the litigation that was sought and held together by the Executive Committee. The role and relationship of Jewish organizations to the interests of the heirless claims of members of the class was an obvious reality. Mr. Fagan took the position, however, that these organizations had no say in the issues in litigation. Although the Executive Committee as a whole was not shy in taking positions which differed from those of the organizations, the Committee maintained a healthy respect for the right of the organizations to assert those positions. Mr. Fagan, on the other hand, was so "disgusted" with these organizations that he urged his "entire team to start openly attacking those pigs." See Memorandum from Edward Fagan to Co-Counsel, Sept. 15, 1998, attached hereto as Exhibit 4. That type of characterization and attitude strained necessary working relationships to an unnecessary breaking point.

Mr. Fagan made no substantive contribution to the litigation. He did not work on any of the legal pleadings filed in this matter. He participated in virtually no Executive Committee meetings and contributed little, if anything, toward trial or settlement strategy during the course of the litigation. Consistent with his perception of himself as representing individual survivors, he always felt that he had the absolute right, not only to disagree with the Executive Committee, but to unilaterally act on that disagreement. For example, he publicly charged certain members

of the Executive Committee, in particular Melvyn Weiss and Michael Hausfeld, with conspiring to monopolize Holocaust litigation. See Affidavit of Edward Fagan in Opposition to Motion to Withdraw and For Other Relief, Nov. 1998, filed in *Burger-Fischer, et al. v. DeGussa AG, et al.*, attached hereto as Exhibit 5. However, each time Mr. Fagan made such an allegation for the purpose of having counsel disqualified from participating in subsequently-filed Holocaust cases, his attempts were denied by the respective courts. Mr. Fagan's true motive is probably best expressed in his fax to former members of his "team" when he stated:

I suggest one of you figure out a way to shut Burt, Mel and Michael up. If you don't, I will.

See Facsimile from Edward Fagan to Attorneys, Sept. 14, 1998, attached hereto as Exhibit 6. Gregg Rickman, Legislative Director to then Senator Alphonse D'Amato, recalls a conversation he had with Mr. Fagan:

Fagan, long jealous over Hausfeld and Weiss' entry into the lawsuit game expressed anger to me over his colleagues' seeming interference over his 'financial stake' in the settlement. 'I can take care of Hausfeld and Weiss in the press,' Fagan boasted. 'I'm going to get one of Hausfeld's black clients and put him up there to say he'll take money from niggers but not kikes.'

See Swiss Banks and Jewish Souls, Gregg Rickman, (Transaction Publishers, 1999) at 283-5, attached hereto as Exhibit 7.

Mr. Fagan's position, expressed through frequent media events and statements, made settlement far more difficult than it otherwise would have been, and also built erroneous expectations among class members.² His aggrandizement of himself in the public arena on all

²See "Swiss Banks May Offer \$1 Billion Holocaust Settlement," Associated Press, 6/5/98; see also "Swiss National Bank May Soon Feel the Heat in U.S. Dispute Over Nazi Gold," Financial Times, 7/6/98, attached hereto as Exhibit 8.

these issues has created an atmosphere of irresponsibility which has tainted the law, the profession and, most damagingly, the claims of Holocaust plaintiffs. This fact was most dramatically underscored by a conversation between a renowned British political scientist and the Minister of the Chancellery of Germany, Bodo Hombach, a central figure involved in Germany's resolution of the Holocaust lawsuits. In recounting the conversation with Minister Hombach, Dr. Michael Pinto-Duchinsky noted in a communication sent to the U.S. State Department:

The anti-Semitic undertones were especially pronounced when he spoke of Mr. Fagan. Of course, Fagan, whom I have never met, seems to have no friends and is disliked by Jews too. What is disturbing was his (and Niethammer's) insistence that it doesn't matter whether the other lawyers are more reasonable, the image in the mind of the German public is that of Fagan alone and therefore all US lawyers are suspect.

See Letter from Dr. Michael Pinto-Duchinsky to Bennett Freeman, U.S. Department of State, 1/31/99, attached hereto as Exhibit 9.

There are members of the Executive Committee, who although they disapprove and disavow Mr. Fagan's conduct, do not wish to confront the issue in this manner at this time. Their conviction is that the litigation has essentially survived Mr. Fagan's behavior and there is no point in pursuing relief before this Court. These members make clear however, that they have a different position for the future, *i.e.*, they will not tolerate such abuses in the ongoing Holocaust cases. However, the undersigned believe that Mr. Fagan's conduct should be judged in the context of this litigation. He should not receive an automatic appointment as class counsel because he was a member of the Executive Committee merely by virtue of the consolidation of the pending cases, particularly where he has not satisfied the special obligations of a fiduciary to

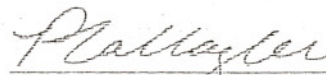
the class and the court. Moreover, a reflexive selection of Mr. Fagan would confer an imprimatur which could be leveraged to create the erroneous impression that his acts are judicially countenanced. In light of the broad -- and largely negative -- image Mr. Fagan has cast across the entire body of Holocaust litigation, silence is not an option. He is seeking a designation as class counsel now. Now is the appropriate time to judge the merit of that request.

For the reasons stated herein, the undersigned respectfully request the court appoint the following individuals as counsel for the class in this matter:

Michael Hausfeld
Arnold Levin
Irwin Levin
Robert Lief
Martin Mendelsohn
Burt Neuborne
Robert Swift
Melvyn Weiss
Stephen Whinston

Dated: 3/8/99

Respectfully submitted,



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