CLAIMS RESOLUTION TRIBUNAL

In re Holocaust Victim Assets Litigation
Case No. CV96-4849

Certified Award and Award Amendment[1]

to Claimant [REDACTED 1],

to the Estate of Claimant [REDACTED 2],[2]

and to Claimant [REDACTED 3]
also acting on behalf of the Estate of [REDACTED 4][3]
and [REDACTED 5]

in re Account of Victor Portheim

Claim Numbers: 500665/BW;[4] 500891/BW; [5] 501199/BW[6,7]

Original Award Amount: 162,500.00 Swiss Francs

Award Amendment Amount: 913,125.00 Swiss Francs

This Certified Award and Award Amendment is based upon the claims of [REDACTED 1] ("Claimant [REDACTED 1]"), [REDACTED 2], née [REDACTED] ("CLAIMANT [REDACTED 2]"), and [REDACTED 3], née [REDACTED] ("Claimant [REDACTED 3]")

[1] On 31 March 2005, the Court approved an award to [REDACTED 1] ("Claimant [REDACTED 1]") [REDACTED 2], ("CLAIMANT [REDACTED 2]") and [REDACTED 3] ("Claimant [REDACTED 3]") (together the "Claimants") for the account of Victor Portheim (the "March 2005 Award"), which is the subject of this Award Amendment.

[2] The CRT was informed that CLAIMANT [REDACTED 2] passed away on 16 September 2008.

[3] The CRT was informed that Represented Party [REDACTED 4] passed away on 23 September 2004.

[4] Claimant [REDACTED 1] submitted two additional claims, which are registered under the Claim Numbers 500540 and 500664. In separate decisions, the CRT awarded the accounts of Emil Portheim and the account of Max Portheim to Claimant [REDACTED 1]. See *In re Accounts of Emil Portheim* (approved on 9 March 2005) and *In re Account of Max Portheim* (approved on 15 November 2007).

[5] CLAIMANT [REDACTED 2] submitted two additional claims, which are registered under the Claim Numbers 500890 and 500892. In separate decisions, the CRT awarded the accounts of Emil Portheim and the account of Max Portheim to CLAIMANT [REDACTED 2]. See *In re Accounts of Emil Portheim* (approved on 9 March 2005) and *In re Account of Max Portheim* (approved on 15 November 2007).

[6] Claimant [REDACTED 3] submitted one additional claim, which is registered under the Claim Number 501112. In a separate decision, the CRT awarded the accounts of Emil Portheim to Claimant [REDACTED 3]. See *In re Accounts of Emil Portheim* (approved on 9 March 2005).

[7] Represented Party [REDACTED 5] submitted one additional claim, which is registered under the Claim Number 501517. In a separate decision, the CRT awarded the accounts of Franziska Maass-von Portheim to Represented Party [REDACTED 5]. See *In re Accounts of Franziska Maass-von Portheim* (approved on 14 December 2005).

(together the "Claimants"), to the published account of Victor Portheim (the "Account Owner"), at the Zurich branch of the [REDACTED] (the "Bank").

All awards and award amendments are published, but where a claimant has requested confidentiality, as in this case, the names of the claimants, any relative of the claimants other than the account owner, and the bank have been redacted.

Procedural History

On 31 March 2005, the Court approved an Award to the Claimants for the Account Owner's custody account (the "March 2005 Award"). At the time of that award, the bank records available to the CRT did not contain information regarding the value of the awarded custody account. The Bank recently made available to the CRT additional information, which includes documentation regarding the assets held in the custody account and which show the existence of a demand deposit account not addressed in the March 2005 Award. In this Award and Award Amendment, the CRT adopts and amends its findings set out in the March 2005 Award based upon this additional information recently forwarded to the CRT by the Bank.

The March 2005 Award

In the March 2005 Award, the CRT determined that the Account Owner owned one custody account. The CRT further determined that the Claimants plausibly identified the Account Owner, that they plausibly demonstrated that they are related to the Account Owner, and that they made a plausible showing that the Account Owner was a Victim of Nazi Persecution. Additionally, the CRT determined that it is plausible that the Account Owner did not receive the proceeds of his custody account. The CRT noted that the Bank's records did not indicate the value of the account, and therefore presumed that its value was 13,000.00 Swiss Francs ("SF"), and the March 2005 Award amount was SF 162,500.00. Finally, the CRT determined that Claimant [REDACTED 3] was entitled to one-half of the total award amount, and that the represented parties [REDACTED 4] and [REDACTED 5] were each entitled to one-fourth of the total award amount.

Information Available in the Bank's Records

As detailed in the March 2005 Award, the Bank's records indicate the name and address of the Account Owner, and indicate that the Account Owner held a custody account numbered 31013. The Bank's records further indicate that a transfer of SF 2,000.00 in assets was made from the account on 29 July 1938 to the *Oesterreichische Credit Anstalt - Wiener Bankverein* in Vienna; that the account was subsequently blocked on 28 November 1939; that the Account Owner was deceased as of 29 November 1939; that access to the account was to be determined by the Bank's legal department; and that the account was closed on 9 September 1941, with an unknown value.

As noted above, the Bank recently provided the CRT with additional documents regarding the custody account numbered 31013. These documents, described in detail below, contain information on the securities held in the custody account, the value of a related demand deposit account, as well as correspondence and internal file notes concerning the disposition by the Bank of the assets of the Account Owner. The following relevant additional documents were received, with summaries provided below in chronological order:

1) a deposit slip, signed in Vienna on 16 November 1930 by Victor Portheim, which indicates he deposited SF 80,000.00 3½% *Anleihe der Schweizerischen Bundesbahn von 1910* into his account at the Bank;
2) a letter, dated 23 November 1939, from Dr. Vinzenz Jussel, an attorney in Vienna, to the Bank, which indicates Dr. Jussel informed the Bank that he was appointed by the District Court (*Amtsgericht Innere Stadt*) of Vienna (the "Vienna District Court") with the task of compiling an inventory of the assets of Victor Portheim, who died on 8 August 1939,[8] and asked the Bank to provide account and deposit statements of the Account Owner;
3) a letter from the Bank to Dr. Jussel, dated 28 November 1939, which indicates the Bank informed Dr. Jussel that his letter was received, and directed his attention to an enclosed notice leaflet regarding the Bank's duty to share information with third parties, which indicates that the Bank would not consider the question of whether a duty to share information with a third parties exists, with respect to foreign clients, heirs, or executors, until presented with properly notarized and authenticated documents;
4) an internal Bank memo, dated 28 November 1939, which indicates the Bank had been informed of the death of the Account Owner, and directed each department within the Bank to certify whether any assets were held by the Account Owner and to freeze them internally;
5) a letter from the Vienna District Court to the Bank, dated 7 March 1940, which indicates that the Bank was requested to provide the court with a statement of the value of the depot numbered 31013 and any other assets of the Account Owner, as of 8 August 1939;
6) an internal Bank note to file, dated 8 April 1940, which indicates that on behalf of the Zurich Circuit Court (*Bezirksgericht Zürich*) (the "Zurich Circuit Court") a police soldier (*Polizeisoldat*) had delivered a letter to the Bank from the Vienna District Court, and further makes notation of the Bank's position that they were under no obligation to share information with the Vienna District Court at that point, but that the obligation to share information would arise if the Vienna District Court presented the properly authenticated request to the Zurich Circuit Court that indicated an heir had come forward with a qualified claim for the inheritance and the request to share information was based on that claim;
7) a letter from the Bank to the Vienna District Court, dated 8 April 1940, indicating that the Bank had received the letter of 7 March 1940, and further stating that in the protection of banking secrecy the Bank could only comment on such questions, regardless of whether the answer is positive or negative, if a legally binding requirement to share information exists, which in the current situation did not;

[8] The CRT notes that according to information provided by the Claimants and as detailed in the March 2005 Award, Victor Portheim was persecuted by the Nazis, and committed suicide in Bad Ischl, Austria on 8 August 1939 after his position in Vienna became untenable.

8) a credit slip, dated 4 May 1940, which indicates the sum of SF 1,036.80 in coupon payments arising from SF 72,000.00 in face value of *3% Schweizerische Bundesbahnen 1938* bonds, was credited to an account of the Account Owner at the Bank;
9) an internal Bank note to file, dated 9 September 1940, regarding a conversation between a representative of the Bank with a lawyer from Vienna named Dr. Indra, a representative of another attorney Dr. Egger, who was representing the heirs due to the death of Dr. Jussel, which indicates that Dr. Indra agreed that Austrian courts have no jurisdiction on Swiss territory and cannot request information through the letters rogatory process, and further indicates that the Bank informed Dr. Indra that the duty to share information arises based on the law of the last domicile of the Account Owner, in this case Austria, upon presentation of all properly legitimized and authenticated documents required under the law of the last domicile of the Account Owner, and finally indicates that Dr. Indra would convey this information to the representative of the heirs, to insure that the Bank receives the legally operative documents required;
10) a letter from Dr. Egger to the Bank, dated 4 November 1940, which indicates that an enclosed decision of the Vienna District Court appointed Dr. Egger as the executor of the estate of the Account Owner and the representative of the heirs, who were [REDACTED] and [REDACTED], and further indicates the Bank was asked for information about the state of the accounts of the Account Owner as of 8 August 1939;
11) a decision of the 30th Department of the Vienna District Court, dated 31 October 1940, which indicates that the Account Owner died on 8 August 1939 in Bad Ischl, Austria, and that according to a will signed on 15 March 1939, his heirs were the German citizens (medical) [REDACTED] and his wife [REDACTED], both of Schöffelgasse 50 in Vienna, that Dr. Ernst Egger was appointed as the executor of the estate and the representative of the heirs, and that according to the heirs, a custody account (*depot*) existed at the Bank which contained the following securities: SF 2,000.00 *3 1/3% Jura-Simplon-Obligationen*, SF 77,000.00 3 ½% *Schweiz. Bundesbahn-Obl.*, 25 units (*Stück*) of *Aktien d.Intern.Ges.f.chem.Unternehmg.Basel*, and further indicates that Dr. Egger was empowered and tasked with acquiring information from the Bank regarding the current status of the account;
12) a letter from Dr. Indra to the Bank, dated 6 November 1940, which referenced the Vienna District Court decision and the letter of Dr. Egger to the Bank of 4 November 1940, and called attention to a conversation in September 1939 between himself and a representative of the Bank, in which it was determined that as the Vienna probate court (*Wiener Verlassenschaftsgericht*) was not qualified to acquire information about the state of the Account Owner's accounts, but that a qualified representative of the heirs (*Erbenmachthaber*) evidenced by authenticated court authorization, as presented, must be qualified, and that Dr. Egger had procured this authorization upon the counsel of Dr. Indra;
13) a letter from the legal department of the Bank to the Zurich Circuit Court, dated 15 November 1940, which indicates that the Bank sent the Zurich Circuit Court a decision from the 30th Department of the Vienna District Court, which the Bank assumed had been mistakenly sent to them;
14) a letter from the Bank to Dr. Indra, dated 21 November 1940, which indicates the Bank received his letter of 6 November 1940, and informed him that the requested account and

custody account statements regarding the assets of the Account Owner had been sent directly to Dr. Egger;

15) an account statement, dated 20 November 1940, which indicates the balance of the custody account numbered 31013 of the Account Owner, as of 8 August 1939, and indicates that the depot held the following securities: SF 72,000.00 *Obl. Schweizerische Bundesbahnen 1938*, 20 *Stamm-Aktien Internationale Gesellschaft für chemische Unternehmungen A.G. (I.G. Chemie) Basel*, and 6 *Stamm-Aktien Internationale Gesellschaft für chemische Unternehmungen A.G. (I.G. Chemie) Basel, à Fr. 500.- nom. mit 50% einbezahlt*;
16) a letter from the Bank to Dr. Egger, dated 21 November 1940, which indicates that the Bank sent him the account statements of the Account Owner and a statement of the custody account numbered 31013, based on the decision of the Vienna District Court of 31 October 1940, which had been certified and authenticated according to the agreement between Germany and Switzerland regarding authentication, and which named Dr. Egger as the executor of the estate of the Account Owner;
17) a decision of the Vienna District Court, dated 12 August 1941, which indicates that Dr. Egger, in his capacity as the executor of the will and representative of the heirs, was empowered to direct the Bank to sell the securities of the Account Owner remaining in the custody account, with the instructions to deposit the proceeds into the account of the *Reichsbankdirectorium Berlin* for the benefit of the heirs of the Account Owner, [REDACTED] and [REDACTED] of Vienna;
18) a letter from Dr. Egger to the Bank, dated 21 August 1941, which indicates the particulars of the decision of the Vienna District Court of 12 August 1941, in which he directed the Bank to sell the securities of the Account Owner and deposit the proceeds into the account of the *Reichsbankdirectorium Berlin* for the benefit of the heirs of the Account Owner, [REDACTED] and [REDACTED] of Vienna, and which also contains a handwritten note by the Bank that the account was frozen internally and that all disposals were to be signed off by the legal department (*Depot intern gesperrt, Verfügungen sind dem Rechtsbureau zu unterschreiben…*), and a further notation that the value of SF 83,089.00 was transferred to the account of the *Reichsbankdirectorium Berlin*;
19) a letter from the Bank to Dr. Egger, dated 25 August 1941, which indicates the Bank received Dr. Egger's letter of 21 August 1941, and was waiting for a confirmation from the Vienna District Court before completing the requested transfer;
20) a letter from Dr. Egger to the Bank, dated 30 August 1941, which indicates Dr. Egger asked the Bank to sell the securities of the Account Owner and deposit the proceeds to the account of the *Reichsbankdirectorium Berlin* at the Bank, to the benefit of [REDACTED] and [REDACTED], and to direct that the equivalent value in Reichsmark ("RM") be made available to the attention of Dr. Egger at the *Creditanstalt Bankverein Wien*, for [REDACTED] and [REDACTED], and requested that the Bank immediately transfer any hard currency assets, without waiting for the sale of the securities to be completed;
21) a letter from the Bank to Dr. Egger, dated 5 September 1941, which indicates that the Bank completed the transaction requested by Dr. Egger;
22) a letter from Dr. Egger to the Bank, dated 12 September 1941, which indicates that Dr. Egger told the Bank that he had been informed per telephone that the equivalent value of the assets had been received at the *Creditanstalt* in Vienna;

23) a letter, dated 5 May 1947, from the legal representative of [REDACTED], who was at that time residing in London, to the Bank, that indicates [REDACTED] was the legal heir to Viktor Portheim, and requested information about the custody account of Viktor Portheim, naming specific securities which were included in the account; and
24) a letter from the Bank to the legal representative of [REDACTED], dated 8 May 1947, which indicates that the Bank stated it would only examine the issue of the estate of the Account Owner if they were presented with an authenticated document naming the legal representative of [REDACTED] as the legal representative of the heirs, and directed his attention to an enclosed circular describing the documents needed to legitimize a claim.

The CRT's Analysis

The Issue of Who Received the Proceeds

A review of the new documents received through Voluntary Assistance indicates that two parties claimed the estate of the Account Owner: the unrelated third party couple identified as beneficiaries of the Account Owner in a will signed on 15 March 1939 (the "Beneficiaries"), and the brother of the Account Owner, the lawful heir to the Account Owner, who contacted the Bank about the custody account of the Account Owner in 1947. According to the Bank's records, in 1941 the Bank credited the assets of the Account Owner to the account of the *Reichsbankdirectorium Berlin* for the benefit of the Beneficiaries, as detailed above.

The new documents indicate that the Bank transferred the assets of the Account Owner pursuant to a decision in a legal proceeding in Austria regarding the estate of the Account Owner. The CRT notes however, that certain details evidenced in the correspondence regarding the development and execution of this proceeding cast a pall over the propriety of the eventual disposition of the assets of the Account Owner by the Bank. Most importantly is the fact that the legal proceedings regarding the Account Owner's estate were commenced more than three months after his death on 8 August 1939; that no mention of the Beneficiaries is indicated in any of the correspondence between the Vienna District Court and its representatives and the Bank in the first year of these proceedings; that a contradiction exists as to the source of the information regarding the existence of the account at the Bank; and the fact that the Bank's records make no mention of the Bank ever having reviewed a copy of the will before paying out the assets of the Account Owner.

At the outset, the CRT notes that the decision of the Vienna District Court of 31 October 1940 indicates that the Beneficiaries, who were especially identified by the court as 'German citizens' (*i.e.*, not Jewish), were appointed in a will signed on 15 March 1939. The CRT also notes that the Beneficiaries were of no ascertainable familial relationship to the Account Owner, who at that time had other relatives living in Austria and abroad.

The three month delay

According to the law at that time, there were two procedures available to the Account Owner to create a will: he could have either signed the will in the presence of a judge or notary, whereupon it would have been deposited with the court and kept there until his death, or he could have chosen to hand-write his own will without witnesses, and then either deposit it with the court, hold onto it himself, or give it to a third party.[9] The Account Owner died on 8 August 1939 and the first letter from Dr. Jussel to the Bank in his capacity as a representative of the Vienna District Court occurred in November 1939. The existence of this three month delay argues against the first procedure for the creation of the Account Owner's will, because if the will was in the possession of the court, presumably contact with the Bank would have been initiated by the court much earlier. Given that, then the only remaining procedure for the Account Owner's will to have come into existence was that he wrote his will by hand, and gave it to a third party, presumably the Beneficiaries. However, again, the existence of a three month delay between the death of the Account Owner and the first contact by the court with the Bank seems odd, as the appropriate action was for the third party to give the will to the court immediately upon learning of the death of the Account Owner. Indeed, this was required by the law.[10]

The appearance of the Beneficiaries

Additionally, upon the first contact made with the Bank regarding the assets of the Account Owner occasioned by Dr. Jussel on 23 November 1939, no mention of the Beneficiaries or the existence of a will is made, but rather he informed the Bank that he had been 'appointed by the Court to compile an inventory of the assets of Victor Portheim.' The Bank responded with a form letter indicating that no duty to share information was evidenced, thus no information could be given. A second request was sent four months later from the Vienna District Court directly to the Bank on 7 March 1940, asking for 'an accounting of the depot numbered 31013' of the Account Owner, but again without making any reference to the Beneficiaries or the existence of a will.

Again, according to the law at that time, once a will of a decedent was made available to the court, the proper procedure was for a probate court (*Nachlassgericht*) to open the will, and to inform the heirs.[11] The court would then appoint an executor, if none was provided for in the will, who was responsible for carrying out the instructions of the will. Supposing a will existed at the time Dr. Jussel first approached the Bank in November 1939, it is odd that he did not indicate to the Bank that he was acting on behalf of the heirs, or as the court-appointed executor. Instead, he indicated simply that he was appointed 'to compile an inventory of the assets of the account owner' and asks for statements of the depots and accounts of the Account Owner as of his date of death. The knowledge that the Account Owner held an account at the Bank must have been obtained from somewhere, and indeed, the court's second request to the Bank on 7

[9] §346 Abs. 4-21 GBlÖ 1938/101. Law on the Creation of Wills and Testamentary Contracts from 31 July 1938. (*Gesetz über die Errichtung von Testamenten und Erbverträgen vom 31. Juli 1938.*) as published in Austrian Legal Gazette (*Gesetzblatt für das Land Österreich*) edition 101 in 1938, operative as of 3 November 1938.

[10] §346 Abs. 39 GBlÖ 1938/101.

[11] §346 Abs. 40, 42 GBlÖ 1938/101.

March 1940 asks pointedly for 'an accounting of the depot numbered 31013' of the Account Owner, but again without making any reference to the Beneficiaries, the existence of a will, or the appointment of Dr. Jussel as the executor.

After this second request, the Bank again replied that no duty to share information with the Vienna District Court existed, and no mention of the Beneficiaries is made by either party until the 9 September 1940 conversation between a representative of the Bank and Dr. Indra, regarding the formalities that would have to occur in order to settle the estate of the Account Owner. The CRT notes that according to the note to file regarding this meeting, Dr. Indra was a colleague of Dr. Egger, who was identified as the 'lawyer of the heirs,' and further notes that Dr. Jussel had died. This note to file indicates that the parties discussed the fact that Austrian courts had no jurisdiction on Swiss territory, and could not request information through letters rogatory, which suggests that the attempts to contact the Bank up to that point were considered by the Bank to have been made on behalf of the court, and not on behalf of any heirs. Tellingly, this note further indicates that the representative of the Bank indicated to Dr. Indra that the Bank's obligation to share information about the assets of the estate of the Account Owner would only arise once the Vienna District Court proved to the Zurich Circuit Court with the proper documentation, that an heir had come forward with a qualified claim for the inheritance and that the request to share information was based on that claim.

The existence of the account

Subsequently, the Bank received the decision of the Vienna District Court of 31 October 1940, which indicated the existence of the will and the Beneficiaries, and further indicated that Dr. Egger was the representative of the heirs and had been appointed as the executor. Of interest is the fact that this decision indicated that the information relating to existence of the custody account, and the specific three securities held within it, was based ***on the report of the heirs*** (*Nach den Bericht der Erben*). As mentioned above, the original contact of Dr. Jussel with the Bank in November 1939, and the subsequent contact by the Vienna District Court with the Bank in March 1940 which asked for an 'accounting of the depot numbered 31013' were considered by the Bank to have occurred on behalf of the court, thus the Bank was unable to reply to their request; and it is only within the text of this decision, a year later, that any mention of the heirs is made. Thus, there appears to be a contradiction regarding the source of the information that led the court to first contact the Bank regarding the assets of the Account Owner. If this information truly originated with the heirs, then there is no apparent reason why the court delayed three months in probating the will of the Account Owner according to the procedure outlined above, and why the court endeavored initially to contact the Bank on its own accord, without the assistance of the executor, who it appears was only first appointed as a result of this October 1940 decision. Taken in another light, the facts of the situation could easily be interpreted that the court was evidently approached by an agent of the Reich, who became aware of the existence of the accounts of the account owner through spurious means, and upon failing to convince the Bank to cooperate with its requests for information outright, quickly 'found' a will and some heirs apparent in order to fulfill the procedural requirements presented to them by the representative of the Bank as discussed with Dr. Indra on 9 September 1940.

A pattern of behavior

The circumstances of this situation are indicative of the larger issue of the Swiss banks' general reaction to the events unfolding in the Reich at the time, and their acquiescence in making questionable transfers which were arguably not in the best interest of their account owners. In its Memorandum and Order of February 19, 2004, the United States District Court for the Eastern District of New York specifically addressed this issue and notes that:

> Swiss banks proved less of a safe haven than many of their customers had hoped. While not every Swiss bank acted in the same way on every occasion, the Bergier Commission's findings reveal that *in general* the banks placed their own perceived economic self-interest ahead of their customers as *a matter of policy*.[12] The most glaring example of this was the practice of engaging in questionable account transfers during the Nazi era. Time and time again, banks completed transfer orders which they knew were requested only because of Nazi persecution, and which they suspected were not in their customers' best interest. […] These banks did not decide to order forced transfers because they thought it would serve their clients well – they did so to "avoid friction and unpleasantness" with their business interests in Germany. Unpleasantness for their clients was not even a consideration. […] [T]he banks had a choice. They could have chosen to adhere to their fiduciary obligation and refused to honor transfers requested under duress. They could have frozen or otherwise blocked transfers as a matter of policy. Their failure to do so is revealing. As study number 15 prepared for the Bergier Commission explained:
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> > An effective protection of customers' assets might have only been possible through a general blockage/freeze. Because public opinion would have likely welcomed a freeze of German and Austrian assets in 1933 and 1938, respectively, and because [Swiss] courts hindered the forced transfers when they were called in to decide such cases, it is very hard to understand today why Swiss politicians and banks did not vehemently take steps against the implementation of the German laws forcing the repatriation of foreign-held assets—either through a freeze or through some other effective intervention.
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> UEK study, no. 15, *Nachrichtenlose Vermögen bei Schweizer Banken*, at 166. It is less "hard to understand" when one considers the premium banks placed on "avoid[ing] friction and unpleasantness" with their interests in Nazi Germany. This also explains their willingness to accede to forced transfers even though "the banks during the Nazi period had considerable leeway in determining their response to the Nazi authorities' demand that they cooperate in making their foreign clients comply with Nazi laws and regulations." Junz, at 2 (citing UED study, no. 15, *Nachrichtenlose Vermögen bei Schweizer Banken*).[13]

[12] See Independent Commission of Experts Switzerland – Second World War, Final Report.

[13] *In re Holocaust Victim Assets Litig.*, 302 F. Supp. 2d 59, 63,64,65 (E.D.N.Y. 2004), *amended*, 319 F. Supp. 2d 301 (E.D.N.Y. 2004).

Although the transaction involved in this instance regarded the payment of the assets of an account after the Account Owner's death, rather than a forced transfer of assets of a living account owner, the argument that a freeze on such transactions should have been instituted is nevertheless relevant to the facts of this case. As indicated above, on 5 May 1947 the Bank was contacted by a representative of the brother of the Account Owner, [REDACTED], who had survived the Second World War in London, who informed the Bank that he was the legal heir of the Account Owner, and requested information about the custody account of the Account Owner, naming the specific securities held within it. Had a freeze of assets of Reich-resident Account Owners been in place during the Second World War, the proper resolution of the true heir of the Account Owner could have been reviewed at that time. Instead, the Bank, having already paid the account, replied to the request with a letter which indicated that the Bank would only examine the issue if they were presented with an authenticated document naming the legal representative of [REDACTED] as the legal representative of the heirs, and directed his attention to an enclosed circular describing the documents needed to legitimize a claim. The fact that the Bank chose to reply in such a way, and not inform the brother of the Account Owner that the assets of the Account Owner had already been paid out to the Beneficiaries, is typical of the behavior of Swiss banks in dealing with requests for information about forced transfers effected during the Nazi-era, as detailed in the Court's 2004 Order:

> … Swiss banks were often aware of the fact that they had made improper transfers during the Nazi era and that they could be held liable if they released information. As noted above, the banks' own legal departments had warned them that authorizing a forced transfer could be understood as a breach of their fiduciary duty, and the Swiss courts had repeatedly affirmed this view. *See* Bergier Report, at 276. After the war, many surviving account holders or their heirs approached the banks seeking information about accounts, often with valid legal claims. The banks, which had improperly transferred the funds in the accounts to the Nazis, were afraid that they would be called to account for the breach of their fiduciary duties. *See, e.g., Albers v. Credit Suisse*, 188 Misc. 229, 234, 67 N.Y.S.2d 239, 244 (N.Y. City Ct. 1946) (holding Credit Suisse liable for transferring a client's assets to a German bank pursuant to the client's orders because "above all it knew that the plaintiff was not likely of his free will to transfer property of his located in Switzerland to a bank in German territory controlled by the German government").

The Court's Memorandum notes that, after the Second World War, Swiss banks stonewalled as a matter of course and were of one mind about this. Citing the Bergier Report, the Court notes that:

> In May 1954, the legal representatives of the big banks co-ordinated their response to heirs so that the banks would have at their disposal a concerted mechanism for deflecting any kind of enquiry. They agreed not to provide further information on transactions dating back

> more than ten years under any circumstances, and to refer to the statutory obligation to keep files for only ten years, even if their records would have allowed them to provide the information.
>
> *Id.* At 446. As was the case with the decision to transfer assets when the account holder was making the request under duress, the most noteworthy aspect of this Bergier Commission finding may be the fact that it was such a collective decision by the banks. The banks, as a matter of policy, refused to disclose information regarding accounts, even where they had it.[14]

There is no information in the Bank's records that Victor Portheim's brother was ever given any further information about the assets of the Account Owner. According to information provided by the Claimants, the brother of the Account Owner died shortly thereafter on 21 December 1947.

Given the circumstances outlined above: that the Account Owner was Jewish and lived in Austria after its incorporation into the Reich (the "*Anschluss*") at the time of his death by suicide in 1939; that certain details regarding the development and execution of the legal proceeding regarding the eventual disposition of the assets of the Account Owner by the Bank were questionable, especially the fact that the Bank's records make no mention of the Bank ever having reviewed a copy of the will of the Account Owner before paying out the assets of the account to the Beneficiaries; that there is no indication that these Beneficiaries were relatives of the Account Owner; that the heirs of the Account Owner were not able to obtain information about the accounts of the Account Owner after the Second World War from the Bank due to the Swiss banks' practice of withholding or misstating account information in their responses to inquiries by account owners because of the banks' concern regarding double liability, and given the application of Presumptions (e) and (h), as provided in Article 28 of the Rules Governing the Claims Resolution Process, as amended (the "Rules") (see Appendix A), the CRT concludes that it is plausible that the proceeds of the accounts were not paid to the Account Owner or his heirs. Based on its precedent and the Rules, the CRT applies presumptions to assist in the determination of whether or not Account Owners or their heirs received the proceeds of their accounts.

Basis for the Award Amendment

The CRT has determined that an Award Amendment may be made in favor of the Claimants and the represented parties. The CRT previously determined in the March 2005 Award that the claims are admissible in accordance with Article 18 of the Rules Governing the Claims Resolution Process, as amended (the "Rules"), that the Claimants have plausibly demonstrated that that they are related to the Account Owner, and that it is plausible that neither the Account Owner nor his heirs received the proceeds of his account.

[14] *Id.*, at 68-69.

Value of the account in the March 2005 Award

In the March 2005 Award, the Account Owner held one custody account. The CRT noted that the Bank's records did not indicate the value of the account, and therefore presumed that its value was SF 13,000.00, and the March 2005 Award amount was SF 162,500.00.

Amount of the Award and Award Amendment

According to the Guidelines for the Valuation of Securities, circulated to the CRT by Special Master Helen B. Junz, as a general rule, the face value of bonds not in default shall be awarded if the market value was below the face value on the date the account owner is deemed to have lost control over the account. The CRT presumes that the account owner, if able to decide freely, could have opted to hold the respective bond to maturity to avoid a capital loss. The market value of bonds shall be awarded if that value was above the face value on the date the account owner is deemed to have lost control over the account. Stocks are valued at market value.

According to the additional information received from the Bank, the Account Owner held the following securities in the custody account numbered 31013 as of 8 August 1939:

- SF 72,000.00 *Obl. Schweizerische Bundesbahnen 1938.* These bonds were of good quality and were trading at 78.75% on 29 December 1939.[15] Since these bonds were of good quality and had market values below their face value, they shall be valued at their face value of SF 72,000.00;
- 20 *Stamm-Aktien Internationale Gesellschaft für chemische Unternehmungen A.G. (I.G. Chemie) Basel*. These shares were trading at SF 450.00 per share on 29 December 1939, for a total value of SF 9,000.00;[16]
- 6 *Stamm-Aktien Internationale Gesellschaft für chemische Unternehmungen A.G. (I.G. Chemie) Basel, à Fr. 500.- nom. mit 50% einbezahlt*. These stocks were trading at SF 485.00 per share on 28 December 1939, for a total value of SF 2,910.00.[17]

Therefore, the Bank's records indicate the total value of the custody account numbered 31013 was SF 83,910.00. The Article 29 value of SF 13,000.00, which was used in the March 2005 Award, is then subtracted from the actual historic value resulting in a difference of SF 70,910.00.

Additionally, the Bank's records indicate the Account Owner held another account, which received the coupon payment of SF 1,036.80 in coupon payments arising from the SF 72,000.00 in face value of *3% Schweizerische Bundesbahnen 1938* bonds on 4 May 1940, which the CRT considers to be a demand deposit account. This account was not previously awarded in the March 2005 Award. According to Article 29 of the Rules, if the amount in a demand deposit account was less than SF 2,140.00 and in the absence of plausible evidence to the contrary, the amount in the account shall be determined to be SF 2,140.00. Therefore the total uncompensated value of the Account Owner's accounts at the Bank was SF 73,050.00 (SF 70,910.00 for the

[15] The market value for this security was obtained from the *Zürcher Kursblatt*, 30 December 1939.
[16] *Id.*
[17] *Id.*

custody account and SF 2,140.00 for the demand deposit account). The current value of this amount is determined by multiplying the historic value by a factor of 12.5, in accordance with Article 31(1) of the Rules. Consequently, the total Award and Award Amendment amount in this case is 913,125.00 Swiss Francs.

Division of the Award and Award Amendment

As previously noted in the March 2005 Award, Claimant [REDACTED 3] and the parties she represents, have a better entitlement to the account than Claimant [REDACTED 1] and CLAIMANT [REDACTED 2]. According to Article 23(1)(d) of the Rules, if neither the Account Owner's spouse nor any descendants of the Account Owner have submitted a claim, the award shall be in favor of any descendants who have submitted a claim, in equal shares by representation. Accordingly, Claimant [REDACTED 3] is entitled to one-half of the total Award and Award Amendment amount, or SF 456,562.50, and her cousin's children, [REDACTED 5] and [REDACTED 4], who are siblings, are each entitled to one-quarter of the total Award and Award Amendment amount, or SF 228,281.25 each.

Certification of the Award and Award Amendment

The CRT certifies this Award and Award Amendment for approval by the Court.

Claims Resolution Tribunal
17 December 2010