IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Melvin H. ROSEN and Ethel Blaine MILLET, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	**Case No. 01C 6864**
	)	**Hon. Blanche M. Manning**
JAPAN,	)	
Defendant	)	

PLAINTIFFS' OPPOSITION TO UNITED STATES'S MOTION TO FILE A STATEMENT OF INTEREST

The United States has filed UNITED STATES OF AMERICA'S MOTION TO FILE A STATEMENT OF INTEREST IN EXCESS OF THE PAGE LIMIT AND MEMORANDUM IN SUPPORT, pursuant to 28 U.S.C. § 517. Plaintiffs oppose this Motion on the following grounds:

1. Interests of the United States

Although 28 U.S.C. § 517 must be construed to give a wide latitude to the Attorney General in defining "the interests of the United States," it cannot be extended to situations that would present an unavoidable conflict of interest. *See* In the Matter of Securities and Exchange Commission – Reimbursement of Legal Expenses, 58 Comp. Gen. 613 (1979), 1979 WL 14985. In that case, the S.E.C. found possible merit to

misconduct charges initially made by a private third person and thereupon appointed a hearing examiner. The examiner ultimately determined that the misconduct allegations were without merit. The S.E.C. thereupon wanted to reimburse the employee for legal expenses incurred in defending the charges before the hearing examiner. In holding that the legal expenses were not reimbursable, the Comptroller General articulated an important legal principle governing the interpretation of the phrase "the interests of the United States" in 28 U.S.C. § 517. The Comptroller General reasoned that if the expenses had been reimbursable by the S.E.C., then the Civil Division of the Department of Justice could have chosen to represent the employee. But if the employee lost the case and then brought a civil action challenging the results of the proceeding, the Department of Justice would have to represent the S.E.C. in that action. Having previously represented the employee against the S.E.C., an "unavoidable conflict" would be created for the Department of Justice. The phrase "the interests of the United States" in 28 U.S.C. § 517 therefore must be construed just narrowly enough to ensure that in the normal course of expected action "unavoidable conflicts" will not arise.

An exactly analogous situation arises in the present case. The United States takes the position in its proffered Statement of Interest that the plaintiffs should not be allowed to enforce their war claims against Japan. But if the plaintiffs in a separate action were to succeed in obtaining just compensation from the United States for the value of their claims against Japan that were taken by the United States in the San Francisco Peace Treaty of 1951, then an "unavoidable conflict" will be created for the Department of Justice. For then it will be clearly in the interests of the United States to have the plaintiffs mitigate their claims against the United States by obtaining compensation

directly from Japan. Accordingly, the phrase "the interests of the United States" of 28 U.S.C. § 517 cannot be construed to include both denial and affirmance of the plaintiffs' right to obtain damages from Japan. The proffered Statement of Interest would create an unavoidable conflict and therefore should be disallowed.

2. The "Pregnant Omission"

Nowhere in the proffered Statement of Interest does the United States mention or allude to Hair v. United States, 52 Fed.Cl. 279, on appeal to the Court of Federal Claims (2002), the companion case to the present case. Yet the attorneys for the United States must know that the present Court can hardly decide whether to accept the Statement of Interest if kept in the dark about the Hair case. Although the plaintiffs did fully describe Hair to this Court in its Motion for Appointment of Lead Counsel for Plaintiffs' Class, it is unlikely that the Department of Justice knew about it because the class-action question has been preempted by Japan's rush to get the case dismissed. Indeed, as the Department of Justice should realize by virtue of its extensive litigating experience, it is highly unlikely that a busy Court would have read the plaintiffs' submissions regarding class action since that issue has not yet come up. Hence it is hard to avoid the conclusion that the Department of Justice may have decided to keep this Court in the dark by omitting reference to the Hair case in its motion to submit a Statement of Interest.

The Hair case, as the attorneys for the United States fully realize, could possibly be resolved in a way that creates an unavoidable conflict for the United States, as described above in paragraph 1 of this Opposition brief. The following attorneys have signed both the proffered Statement of Interest and one or more motions or briefs in the Hair case:

Robert D. McCallum, Jr.
Vincent M. Garvey
Amy Allen Ruggeri
James G. Hergen

Because they are intimately familiar with the claims, arguments, and issues in Hair, it is difficult to understand why they omitted mention of that case. The situation is reminiscent of the "pregnant omission" charged to the Department of Justice by Chief Justice Posner in a recent case involving misconduct by an Assistant U.S. Attorney. *See In re* Lightfoot, 217 F.3d 914 (2000). Any possibility of bad faith should warrant denying the motion of the United States to file a Statement of Interest in this case.

3. Uneven Playing Field

The "Statement of Interest" is a barely disguised brief rather than a statement of the interests of the United States. It quotes and responds to the most recent submissions by the plaintiffs, as if it were written by the defendant's attorneys. Moreover, the Motion by the United States to exceed the page limit lists as a reason the fact that this Court has granted leave to the parties to file longer briefs. But the United States is not a party to this litigation, and has not moved to intervene as a party. Thus its reference to the page limits in the briefs of the parties may simply reveal an attitude of brief-writing rather than stating an interest. Indeed, it appears from the Statement of Interest that it was drafted in close collaboration with the defendant's attorneys.

The Federal rules of civil procedure are designed as much as humanly possible to create an even playing field for plaintiff and defendant. If the Department of Justice can barge into a case at the last minute with a 52-page brief taking the unalloyed position of one of the parties, it violates the spirit if not the letter of the rules of civil procedure. The so-called "Statement of Interest" should be rejected for this reason as well.

4. Subordinate to Rule 19 Motion.

In any event, this Court should postpone its decision on the question whether to allow the United States to file its proffered Statement of Interest pending the Court's decision on the Plaintiffs' Motion to Join the United States as Involuntary Co-Plaintiff Under Rule 19. If the United States is joined as a party, then it has no standing to file an additional Statement of Interest.

5. Premature Filing

A case as complex as the present case should not be shoehorned into a consideration of the merits of a Motion to Dismiss. The merits cannot be adequately ventilated without a full trial. The attempt by the defendant to truncate these proceedings by filing a Motion to Dismiss already has resulted in the postponement of the question of class certification which, if it had been properly considered in a pre-trial setting, would have fully brought out the relevance of the Hair case. Instead, the Hair case was not even mentioned by the United States in its overly long (and indigestible) "Statement of Interest." In addition, there are numerous mixed questions of law and fact involved in the present case, including documents which have not yet surfaced in relation to the Stikker-Yoshida exchange and other facets of the complex negotiating history of the 1951 Peace Treaty. Perhaps the most important factual question involves the insistence by the United States in its proffered Statement of Interest that adequate compensation was in fact paid to the plaintiffs in the present case under the War Claims Act. The question whether the compensation was adequate within the meaning of "just compensation" of the Fifth Amendment depends at the very least upon judicial scrutiny of the classification of types of injuries of the plaintiffs. Moreover, what about the plaintiffs who were killed

during World War II and who are represented here by their heirs or next-of-kin? Does compensation in the amount of Zero for these individuals constitute adequate compensation in the view of the United States? The question needs to be litigated; it cannot be decided summarily in the disguise of a question of law.

A full trial of all of these issues will not be prejudicial to the defendant. The legal positions it has taken in its Motion to Dismiss may be fully reinstated at trial. The only prejudice that could occur is to the plaintiffs if they are deprived of their day in court.

Respectfully submitted,

_____
DAVID G. DUGGAN
One of the attorneys for the Plaintiffs

Anthony D'Amato
Room 311
Northwestern Law School
357 E. Chicago Ave.
Chicago, Illinois 60611
(312) 503-8474 phone
(312) 503-1676 fax

David G. Duggan
D'Amato, Keegan & Duggan, LLC
140 South Dearborn Street
Suite 1610
Chicago, IL 60603
ARDC No. 03128581
(312) 551-0670 phone
(312) 443-1665 fax