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Settler's Remorse

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FOREWORD: SETTLER'S REMORSE

*Floyd Abrams**

INTRODUCTION

Who can quarrel with the notion that settling civil cases is generally a good thing? Litigation is expensive, time-consuming, preoccupying, and often personally destructive. Our courts are overburdened and, in any event, imperfect decision-making entities. It may even be true that, more often than not, "the absolute result of a trial is not as high a quality of justice as is the freely negotiated, give a little, take a little settlement."¹

But not every case should be settled. Many are worthless. The settlement of others could too easily lead to a torrent of unwarranted litigation. Sometimes, as Professor Owen Fiss has observed, parties "settle while leaving justice undone."² While few of the settlements I have been involved with can be so described,³ one has plagued me since I participated in negotiating it twenty-five years ago. Now, in light of very recent and deeply disturbing revelations, it plagues me still more.

I. WANTED!

The case involved a claim of libel. In January 1977, Quadrangle/The New York Times Book Company ("Quadrangle") published *WANTED! The Search for Nazis in America*.⁴ Written by Howard Blum, a former *New York Times* reporter, the book focused on a number of government agents who had sought to collect evidence about four people who had entered the United States after World War II, and whom they suspected of having committed war crimes.

The book described first the investigative efforts of two men on behalf of the U.S. government. One, Anthony DeVito, was an investigator for the Immigration and Naturalization Service (INS). The other, Reuben Fier, was

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1. Hubert L. Will et al., *The Role of the Judge in the Settlement Process*, 75 FR.D. 203, 203 (1978).

2. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984).

3. I may, in fact, have negotiated fewer settlements than have many other seasoned lawyers since a number of media entities that I have represented have no-settlement policies in libel and related cases.

4. HOWARD BLUM, *WANTED!: THE SEARCH FOR NAZIS IN AMERICA* (1977).

an investigator for the Social Security Administration. Both examined the activities of Tschirim Soobzokov. DeVito's attentions centered on allegations that Soobzokov had committed war crimes in Russia and elsewhere in Eastern Europe during World War II. Fier's investigation focused officially on allegations that Soobzokov had demanded and received illegal cash payments in connection with the reimbursement of certain disbursements of Social Security benefits, and unofficially on allegations of war crimes.

A resident of Paterson, New Jersey, since 1955, Soobzokov was a naturalized American citizen and a leader of the local Circassian community of several thousand people. Circassians, predominantly adherents of Islam, are natives of a mountainous area in the southern part of the former Soviet Union, near the Black Sea.

According to the book, Soobzokov had been an *Obersturmfuehrer* in the Waffen SS, the military arm of the State Security Forces of the Nazi regime, during World War II. He was, the book claimed, "the equivalent of a first lieutenant in a Nazi mobile killing unit that had participated in the murder of 1,400,000 Jews on the Eastern Front."⁵ The book quoted a number of sources who accused Soobzokov of war crimes.⁶ One alleged eyewitness, Kassim Chuako, recalled the following:

"When Germans came he went to secretary of police and asked to join. We all talk about him. We saw him going into the villages with the Germans and rounding up people—Communists and Jews. I saw him with the SS troops that took people away. In 1943, I saw him again in SS uniform in Rachovich in White Russia. He was talking to secretary of refugee camp, telling him that he wanted to take his relatives out. When the secretary said no, he pulled his gun out of the holster and led his family out by gunpoint."⁷

Another survivor of the German invasion of the Soviet Union, identified in the book as Mahimid Neguch, recalled the following:

"Soobzokov's father-in-law introduced me. And then Soobzokov walks up, head high, and he is in full uniform, an SS uniform. Then I see him weeks later. He is with a group of SS men taking prisoners from two towns in the Caucasus, Edepsuikay #1 and Edepsuikay #2. Three boys were killed from that town and Soobzokov was there with the group that executed them. We were all witnesses."⁸

5. *Id.* at 31.

6. Membership in the SS was itself determined to be a war crime in the 1946 Nuremberg Trials. 22 INTERNATIONAL MILITARY TRIBUNAL, TRIALS OF THE MAJOR WAR CRIMINALS NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, at 516–17 (1948), available at <http://www.yale.edu/lawweb/avalon/imt/proc/09-30-46.htm> (last visited Jan. 25, 2007).

7. BLUM, *supra* note 4, at 57.

8. *Id.* at 58.

Six other witnesses were referred to in the book as having seen Soobzokov in an SS uniform. One of them, Issa Hoket, described Soobzokov in June 1944, standing in an SS uniform, telling Circassian refugees that the Germans had appointed him to form a new unit to fight alongside the Nazis. When Hoket told him that he would not fight with the Germans, two German SS officers stepped forward to tell the Circassians that Soobzokov had been chosen to be their "fuehrer."⁹

Read as a whole, the book left little doubt that the author and the sources he relied upon viewed Soobzokov as a Nazi war criminal.

In February 1977, shortly after publication of the book, Soobzokov commenced a libel action in the Supreme Court of the State of New York against Blum, Quadrangle, and various sources cited in the book including Chuako, Neguch, and Hoket.¹⁰ A second action was filed shortly thereafter against Quadrangle, Blum, and others in the United States District Court for the Southern District of New York.¹¹ When the softcover edition of the book was published in 1978, containing charges similar to those set forth in the hardcover version, Soobzokov commenced a new libel action in federal court against Quadrangle and Blum.¹² Quadrangle and Blum retained my firm to represent them in the cases.

According to Soobzokov, all the relevant allegations against him were false. He had, his complaint alleged, "led a group of Circassian and other Russian refugees comprised of men, women and children through various countries in Europe [during World War II,] seeking to avoid both the advancing Russians and the retreating German troops, whom they abhorred equally."¹³ While leading the refugee group in November 1944, he had been arrested by the Germans in Hungary, and had been tortured and beaten by the Nazis. He traveled "from Hungary to Germany to seek protection and aid against the Germans."¹⁴ There, a Circassian General provided him with protection, issuing him "[an] identity card and [a German army] uniform as a disguise."¹⁵ To protect him further, Soobzokov maintained, the Circassian

9. *Id.* at 56.

10. Verified Complaint, *Soobzokov v. Blum*, Index No. 1927/77 (N.Y. Sup. Ct. Feb. 10, 1977).

11. Complaint, *Soobzokov v. CBS, Inc.*, No. 78 Civ. 4908 (S.D.N.Y. Oct. 18, 1978) [hereinafter Complaint (S.D.N.Y.)].

12. There were some changes in the paperback version of the book. Omitted was a statement that Soobzokov's name had been included in a list of fifty-nine individuals identified by the World Jewish Congress as Nazi war criminals living in the United States. The error in the original text was of little moment, however, since there was no disagreement about the fact that the INS had itself prepared and publicly released in 1974 a list of alleged Nazis that included Soobzokov's name. *Id.* ¶ 28. In 1976, the INS terminated an investigation it had commenced about Soobzokov without taking any action against him.

13. *Id.* ¶ 10.

14. *Id.* ¶ 12.

15. *Id.* ¶ 14.

general caused Soobzokov's name "to be enrolled on a roster of [a] non-operational Caucasian Waffen SS organization, approximately two months before the end of the war."¹⁶

Soobzokov's own summary of his activities was unequivocal: he had never actually served as a Waffen SS officer; he had never participated in any Waffen SS organization; he had worn the SS uniform only briefly towards the end of World War II as a disguise, "for the sole purpose of protecting and shielding his group of refugees from the Germans";¹⁷ he had committed none of the specific war crimes the book attributed to him; and, in fact, he had committed no war crimes at all.

What of the statements published in the book from the supposed eyewitnesses? The first, from Kassim Chuako, described Soobzokov "rounding up people—Communists and Jews," and leading the family of the secretary of the refugee camp "out by gunpoint." Blum's notes from his interview with Chuako fully supported the text.¹⁸ The second statement, from Mahimid Neguch, described Soobzokov taking prisoners and killing three boys. Blum had

16. *Id.* ¶ 15.

17. *Id.* ¶ 16.

18. A portion of the notes reads as follows:

"Sure we talk about
 People saw he [unknown]
 —went in village
 looking for people
 ([unknown])
 —1st time saw in SS uniform
 in White Russia—
 Rackovich—sitting in
 office by chief of refugee
 camp & he came
 with big cap with SS
 and on collar.
 Secretary of ref
 camp & Soob want
 to take relatives—Chief
 says no—Soob reached
 for gun—pulled out
 of holster—& taken
 relatives out—1943. . . ."

Affidavit of Howard R. Blum in Support of Defendants' Motion for Summary Judgment ¶ 17, *Soobzokov v. CBS, Inc.*, No. 78 Civ. 4908 (S.D.N.Y. Jan 18, 1982) [hereinafter Blum. Aff.] (referencing Deposition of Howard Blum, Plaintiff's Ex. 25, at 3, *Soobzokov v. Blum*, Index No. 1927/77 (N.Y. Sup. Ct. Mar. 22, 1978) [hereinafter Pl.'s Ex.]).

not only notes to support what he had been told and had published,¹⁹ but corroboration of the events from another source.²⁰

Soobzokov responded by maintaining that all the sources had either been misquoted or had lied. He argued that Blum had mistaken Kassim Chuako for his brother Mischuest, an error Blum acknowledged but

19. A portion of Blum's notes read as follows:

"boys taken
from town
and killed"

Id. ¶ 15 (referencing Pl.'s Ex. 34, at 1).

"town—Edepsuikey #1.
—1 boy killed
and Ed. #2
—2 boys killed
in this group
Soob—
Soob killed
—told last year.
Unus Hahcek
tells story of
3 boys killed
—Soob in group."

Id. ¶ 15, Ex. 8, at 3 (excerpting Pl.'s Ex. 34, at 6).

20. Blum's notes of his interview with Mahmoud Chich read as follows:

"heard Soob volunteered
for Ger army.
only one people
knew.
2 people killed
from village
Edepsukay II
—Chich village,
Soob part of
group that rounds
people up
Soob with gun in
hand went into attic looking for
[unknown]—actively
participating in affair"

Id. ¶ 15 (excerpting Pl.'s Ex. 41, at 2–3).

dismissed as inconsequential.²¹ Mischuest Chuako in turn flatly denied personally having seen Soobzokov participate in any SS atrocities on the Eastern Front.²² Likewise, Neguch testified in his deposition that he had not been in Edepsuikay #1 or Edepsuikay #2 during the war,²³ that he “couldn’t” have told Blum that Soobzokov was at Edepsuikay #1 and Edepsuikay #2,²⁴ and that he did not, in any event, make any such statement.²⁵

After years of discovery, we moved in 1983 for summary judgment, arguing that Soobzokov was both a public official and a public figure and that he could not prove that the book had been published with actual malice.²⁶ The stark disagreement between the parties regarding the truth of the charges against Soobzokov made the legal determination by the courts as to whether he was a public official or public figure²⁷ all the more important. If Soobzokov were to be so designated by the courts, he could not recover unless he proved by clear and convincing evidence that the book had been written and published with actual malice—actual knowledge of its falsity or a high degree of awareness of its probable falsity.²⁸ If he were a private figure, the issue of actual malice would not arise with respect to the determination of liability.²⁹

Depending upon the legal definitions of the terms “public official” and “public figure,” the court could have deemed Soobzokov both or neither. He was certainly a public official in that he was the Chief Purchasing Inspector of Passaic County, New Jersey. He had served on the Paterson Zoning Board, ultimately becoming vice chairman. But whether those positions involved enough responsibility to warrant the designation of “public official” as required by governing law was less than clear. Soobzokov was also a public figure in the sense that he was a—maybe *the*—leading figure in the

21. Affidavit of Tschirim Soobzokov in Opposition to Defendants’ Motion for Summary Judgment, ¶ 33, *Soobzokov v. CBS, Inc.*, No. 78 Civ 4908 (S.D.N.Y. May 5, 1982) [hereinafter *Soobzokov Aff.*].

22. *Id.* ¶ 34, Ex. V (referencing Deposition of Mischuest CHAUAKO, 126:2–14, 157:19–158:6, *SOOBZOKOV v. CBS, INC.*, No. 78 Civ. 4908 (S.D.N.Y. May 5, 1982)).

23. *Id.* ¶ 25–26, Ex. P (referencing Deposition of Hadjmet Neguch, 45:3–20, *Soobzokov v. CBS, Inc.*, No. 78 Civ. 4908 (S.D.N.Y. May 5, 1982) [hereinafter *Neguch Dep.*]).

24. *Id.* ¶ 25–26, Ex. P (referring to *Neguch Dep.* at 50:11–19).

25. *Id.* ¶ 25–26, Ex. P (referring to *Neguch Dep.* at 45:25–46:24).

26. In the years in which intensive discovery in the case transpired, Soobzokov’s overall legal situation took a turn for the better when, in 1980, the Office of Special Investigation of the Department of Justice (OSI) dropped a denaturalization case it had commenced against him. OSI had based the case upon his alleged nondisclosure of past Nazi ties after being advised by the CIA that in 1952 Soobzokov had disclosed his SS membership on a printed State Department form he had completed.

27. The distinction between a public official or public figure and a private citizen is introduced in *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

28. *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).

29. Soobzokov would still be obliged to prove actual malice to recover punitive damages. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

Paterson Circassian community. He was also the president of the Committee for Liberation of North Caucasia in the United States, and the local newspapers had frequently referred to him in that capacity. But whether these factors sufficed to make him a public figure as defined in the case law was also not at all clear. To demonstrate that Soobzokov was a public official, we relied on a case involving a local tax assessor who had been held to be a public official,³⁰ in addition to other cases involving low-level public officials.³¹ For our claim that Soobzokov was a pervasive public figure, we quoted at length from his complaint and his deposition, in which he touted his local fame, and relied on cases involving community leaders whom courts had held to be public figures.³²

Predictably enough, Soobzokov attempted to minimize the import of his official position in his opposition to our motion. He argued that his role "as a purchasing inspector . . . is a low-paid position, of minor importance and is purely clerical."³³ Such a position, he argued, was far from the "hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of government affairs," and thus was insufficient to establish public official status.³⁴ As for the public figure issue, Soobzokov urged that until publication of the book he was "virtually unknown" outside his Paterson neighborhood and that he had never participated in any public controversy concerning Nazi war criminals. He had been involuntarily thrust, Soobzokov argued, into public controversy, and could not be treated as if he had "voluntarily inject[ed] himself or [been] drawn into . . . public controversy."³⁵

While the motion was pending, we took steps to bolster our factual case that Soobzokov had indeed been a war criminal. The U.S. government had been of absolutely no assistance to us. It resisted and then evaded our Freedom of Information Act requests, and offered no informal assistance. Expert witnesses we retained provided only inconclusive assistance. But we received substantial assistance from another, rather surprising source.

30. *Fadell v. Minneapolis Star & Tribune Co.*, 425 F. Supp. 1075 (N.D. Ind. 1976), *aff'd*, 557 F.2d 107 (7th Cir. 1977).

31. *Grzelak v. Calumet Publ'g Co.*, 543 F.2d 579, 581-82 (7th Cir. 1975) (holding a public works department employee was a public official); *Cooper v. Rockford Newspapers, Inc.*, 50 Ill. App. 3d 247 (1977) (accepting the chief deputy clerk in county clerk's office concession that he was a public official); *Hodges v. Okla. Journal Publ'g Co.*, 617 P.2d 191 (Okla. 1980) (holding a tax agent in motor vehicles licensing bureau was a public official).

32. *E.g., Mobile Press Register, Inc. v. Faulkner*, 372 So. 2d 1282 (Ala. 1979).

33. Memorandum in Opposition to Defendants' Motion for Summary Judgment at 12, *Soobzokov v. CBS, Inc.*, No. 78 Civ. 4908 (S.D.N.Y. May 5, 1982).

34. *Id.* at 11 (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966)).

35. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974).

II. SOVIET INVOLVEMENT

The Soviet Union had been ravaged by the savage German invasion of August 1941 that ultimately led to the deaths of over twenty million of its citizens. It was eager to assist the United States in its investigations of Soobzokov and, ultimately, to assist us as well. The USSR made affidavits and other documents from two distinct eras available to the U.S. government. The first era included reports of interrogations conducted in the winter of 1943, after Soviet forces reoccupied the Caucasus. The second involved interrogations during the period of 1976–1978 conducted by the Office of the Chief Procurator of the Krasnodar Area “[i]n connection with the request made by the USA Organs of Justice to render to them our legal assistance in the matter of Soobstsokov, Ch. T.”³⁶

One of the 1943 reports set forth the testimony of Sauchas Bilizovich Tlekhuch. Described in the report as a “barely literate, family man, residing in the Aul Edopsukay 2,”³⁷ Tlekhuch told of the abduction and murder of his son at the hands of local police and the German Punitive Detachment:

In the first half of October of 1942, about 11–12 midnight, once again the Policemen MAKHMUD TSIKU, SOOBTSOKOV, ALI TSIKU SHABAN TSIKUNIB and the Chief of Police SHEUDZHEN entered my house [T]he Police having completed the search of my house, arrested my son BACHIR TLEKHUCH and took him to the Police Station of the Edopsukay Village Administration; they took him away together with VALAGHEI SKHAZHOK whom they had also arrested in our Aul at the same time. They locked them up in a barn. . . . On the next day following the arrest of my son BACHIR TLEKHUCH and VALAGHEI SKHAZHOK the Punitive Detachment shot them to death as activists in the woods next to the Aul Necherezy. On the second day I found my son, he had been shot in the chest, and I buried him. Next to him was lying the body of VALAGHEI SKHAZHOK; their arms were tied in the back.³⁸

Tlekhuch’s story was corroborated by the interrogation testimony of the arrested former police officer Makhmud Zachernevich Tsiku.³⁹ Tsiku admitted that while “serving in the Police of the Edopsukay Village

36. Transcript of Interrogation of Tagir Umarevich Afazishev, in Krasnodar, USSR at 1 (Feb. 21, 1978) (on file with the *Michigan Law Review*). The sometimes inconsistent spelling of Soobzokov’s name and that of other names in this section are as provided by Soviet authorities. Additionally, surnames are often formatted entirely in capital letters in the Soviet transcripts. For the sake of legibility, that formatting has been altered throughout these quotations.

37. Transcript of Interrogation of Sauchas Bilizovich Tlekhuch, in Aul Ponezhukay, USSR at 1 (Nov. 21, 1943) (on file with the *Michigan Law Review*).

38. *Id.* at 2–3.

39. Transcript of Interrogation of Makhmud Zachernevich Tsiku, in Aul Ponezhukay, USSR at 3–5 (Nov. 30, 1943) (on file with the *Michigan Law Review*).

Administration [he] carried out all directives of the German Authorities."⁴⁰
In particular, Tsiku recalled:

In the same month, in October, a German Punitive Detachment arrived and I with the Chief of Police SHEUDZHEN made a search in the house of VALAGHEI SKHASHOK in the Aul of Edopsukay 2, at 11 o'clock in the evening, and then I and Policeman MOSKHU DETER arrested VALAGHEI SKHASHOK and took him to the house of BACHIR TLEKHUCH. Policeman TETER was then assigned to guard the arrestee SKHASHOK, while I and the Chief of Police and the German Punitive Men entered the house of BACHIR TLEKHUCH and searched it thoroughly after which BACHIR TLEKHUCH was placed under arrest by us as a Soviet activist, a comsomol, and we took him and VALAGHEI SKHAZHOK to the Police.⁴¹

Later in his testimony, Tsiku stated that among the German Punitive Detachment that October were "the traitors of our Fatherland: ALI TSIKU and SOOBTOKOV."⁴²

Although the materials provided by the USSR were in conflict about which unit Soobzokov served in during the abduction and murder of Bachir Tlekhuch and Valaghei Skhazhok, both reports placed him at the scene of Bachir Tlekhuch's arrest. Of the two, the indication in Tsiku's testimony that Soobzokov had been a member of the German Punitive Detachment, rather than the Police unit, might be accorded more weight. As someone serving alongside of Soobzokov in joint actions, Tsiku could be expected to have had better knowledge of Soobzokov's particular position than Tlekhuch could have gleaned from watching the group of men who arrested his son. Regardless of Soobzokov's position and rank, both contemporaneous reports asserted that he was involved in searching for Komosol members and that he personally participated in the abduction and murder of Tlekhuch and Skhazhok.⁴³

Thirty-five years later, Khalid Liovich Mugu, another member of the German Punitive Detachment, testified before Soviet inquisitors that he had

40. *Id.* at 1.

41. *Id.* at 3–4.

42. *Id.* at 5.

43. Tsiku also claimed that Soobzokov personally participated in the murder of a third man, Sagin Zhane:

Well, in the same October of 1942, the Chief of Police and myself and the German Punitive Detachment among whom were also the traitors of our Fatherland: ALI TSIKU and SOOBTOKOV, entered the house of SUL ZHANE; we didn't find his brother in so we proceeded to the house of SAGIN ZHANE, he was home, we arrested him and took him to the Police, and I have personally surrendered him to the German Commanding Officer of the Punitive Detachment and on the next morning the German Punitive Detachment shot them.

Id. at 5–6.

served with Soobzokov in the 800th Battalion of the German Army, known as the National North-Caucasian Legion.⁴⁴ He further testified:

[I]n October 1942 SOOBTSOKOV was a member of a 15 men [sic] punitive detachment, formed by the Germans [four obscured words] took part in arresting and shooting Soviet Activists and Communists in auls Edepsukai-1, Edepsukai-2 and Dzhidzkhihabl, just then when, I know, they have executed the Communist Dzhansh ALIEV whom they had arrested.⁴⁵

Soobzokov's service in the 800th Battalion and the formation of the German Punitive Detachment were corroborated by the testimony of Tagir Umarevich Afazishev, who claimed to have been an officer of Soobzokov's squad in the Battalion but disavowed any participation in the punitive detachment sent to the Edepsuky villages.⁴⁶ Another resident of the same village, Sagid Dolotukovich Djarimok, provided further confirmation.⁴⁷

Additional affidavits supplied by the Soviet Union also included testimony of Yusuf Akhmed Gutchel, a former resident of Paterson, New Jersey, who had since returned to Russia. Gutchel testified that he met Soobzokov in Paterson in 1962, and asserted that he had learned from their conversations that Soobzokov "had served in a German punitive detachment and directly participate[d] in exterminating Soviet citizens."⁴⁸ Gutchel's affidavit stated in part that while they both lived in New Jersey Soobzokov repeatedly told him "that in the village of Edepsukai he took part in the murdering of three local residents."⁴⁹ According to Gutchel, Soobzokov also confessed to other killings:

In the period of the temporary occupation of the Adygey territory, Soobzokov personally shot Garun Zhurabovich Tuguz, a resident of the village of Shaoanokhable. According to Soobzokov, Tuguz had served in the Red Army and had then been confined in a German PW camp on the territory of the Ukraine, in the town of Genichesk. Together with another Adygey (Soobzokov didn't mention his name), Garun Tuguz escaped from the camp. Although I do not know the exact circumstances, but I know that Soobzokov apprehended Tuguz and his friend and shot them to death.⁵⁰

44. Transcript of Interrogation of Khalid Liovich Mugu, in the City of Krasnodar, USSR at 1-2 (Aug. 17, 1976) (on file with the *Michigan Law Review*).

45. *Id.* at 3.

46. Transcript of Interrogation of Tagir Umarevich Afazishev, in the City of Krasnodar, USSR at 3 (Feb. 21, 1978) (on file with the *Michigan Law Review*).

47. Transcript of Interrogation of Sagid Dolotukovich Djarimok, in the City of Krasnodar, USSR at 2 (July 13, 1976) (on file with the *Michigan Law Review*).

48. Transcript of Interrogation of Yusuf Akhmed Gutchel, in the City of Krasnodar, USSR at 2 (Apr. 26, 1978) (on file with the *Michigan Law Review*).

49. *Id.* at 2.

50. *Id.*

Finally, Gutchel claimed "Soobzokov always bragged about his service for the Germans . . . [and] also about having directly participated in the extermination of Soviet people. He feels proud—these are his exact words—about having [served] in the SS troops during the war."⁵¹

Taken together, and if authenticated in a manner that could make the documents admissible in an American court or embodied in testimony subject to appropriate cross-examination, the Russian testimony obviously could be compelling at any trial. For his part, Soobzokov denied any involvement in the murders, and disavowed knowledge of the affiants or the places and events they described beyond that of what he claimed was his "brief enrollment" in 1945 in a "non-operational" SS unit. Soobzokov's attorney, Michael Dennis, went further, pointing out what I could not deny: the Soviet government had a long record of forging documents to serve its political ends. As one expert had written:

As practiced by the KGB, disinformation is far more complex than the definition implies. It entails the distribution of forged or fabricated documents, letters, manuscripts, and photographs; the propagation of misleading or malicious rumours and erroneous intelligence by agents; the duping of visitors to the Soviet Union; and physical acts committed for psychological effect. These techniques are used variously to influence policies of foreign governments, disrupt relations among other nations, undermine the confidence of foreign populations in their leaders and institutions, [and] discredit individuals and groups opposed to Soviet policies⁵²

What we needed to do, we decided, was to take steps designed to transform the Soviet documents from hearsay to admissible evidence. Accordingly, on January 4, 1983, I met with Badin I. Kuznetsov, the first secretary of the Soviet Embassy in Washington, D.C. I asked him if I could meet with individuals in the Procurator's Office in Moscow that had accumulated the Soobzokov-related documents. I also asked if I could take depositions in the Soviet Union of individuals who had provided information about Soobzokov in 1943 and had survived the war and the intervening years. After telling me that I might be surprised at the willingness of his government to be of assistance in an era in which then-President Ronald Reagan had referred to the Soviet Union as the "evil empire," Kuznetsov told me that the USSR would accommodate both requests. Upon my return to New York, I sought and obtained judicial approval (over the objection of Soobzokov's lawyer) to take videotaped depositions. Plans were made for the depositions to occur in the Soviet Union in May 1983.

51. *Id.*

52. John Barron, *Dezinformatsiya*, in *THE PENGUIN BOOK OF LIES* 420, 422 (Philip Kerr ed., 1990).

III. SETTLEMENT

It was around this time that the subject of settlement first surfaced. From the perspective of a typical corporation that had been sued, the case for Quadrangle to settle was overwhelming. We could not predict how our summary judgment motion (which had been argued months before) would fare in light of the uncertainty as to the legal issues it raised and the hotly disputed nature of many factual issues. Nor could we predict how we would fare on appeal if we should lose the case at trial. As for our chances at trial, while Blum could testify as to the care he had taken in preparing the book and his belief (and the reasons supporting it) in the accuracy of what he had written, and DeVito and Fier could offer such support as they were able, we had no eyewitnesses who were prepared to support the book's thesis about Soobzokov's behavior. Blum had multiple sources and had notes reflecting what they had told him. But his sources were no longer willing to stand behind their statements. We might develop corroborating material in the Soviet Union but certainly could not be sure that we would.

Quadrangle was insured, and to avoid further legal fees and costs, which had already been extensive, let alone the risks of a potentially significant award, the insurer was prepared to put up the amount I estimated would be required to settle the case. Soobzokov's counsel, Michael Dennis, made clear to me that his client was prepared to settle at a figure within that range.

There remained the question of whether Quadrangle, a publishing company owned by the New York Times Company, was prepared to settle. I met with Arthur O. Sulzberger, the chairperson of the company, to discuss the matter. Sulzberger listened carefully as I reviewed the course of the litigation and settlement talks with him.

If the insurer was prepared to pay, he responded, and if we (as Blum had rightly insisted) were not obliged to acknowledge that the book was to any degree false, then there was only one question he had: "Was he a Nazi?" Sulzberger asked me. If not, why not settle? If so, how could we agree to settle?

I paused. I did not know—could not know—the answer with any degree of certainty. Blum had done fine work, responsible work, I told Sulzberger. His notes basically supported his writing. So did DeVito and Fier, American officials who had provided Blum with a good deal of information about Soobzokov.

But neither Blum nor the American officials had been eyewitnesses to any of the events the book described that had occurred over thirty years before. Blum's eyewitness sources in the United States, I told Sulzberger, were no longer prepared to support what they had told him. We thus had, at that moment, no one we could bring to court who would vouch for the underlying truth of critical passages in the book. I could not tell Sulzberger, I said, whether those sources had spoken accurately to Blum when he was writing the book or now, after the book's publication. I believed, I said, that they far more likely spoke accurately prior to publication (and whatever pressures may have followed it) than afterwards, but I did not know the answer and

certainly did not know how a jury might assess the situation. At the close of our discussion, I recommended settling.

Sulzberger and I agreed to speak again. After we did so the next day, I had authorization to proceed with settlement, which ultimately was effectuated.⁵³ The court never ruled on our summary judgment motion, I never took the depositions in the Soviet Union, and I never saw Soobzokov or his lawyer again.

Two years later, in 1985, a pipe bomb exploded outside Soobzokov's home as he opened his front door, killing him. The killers were never apprehended.

IV. DENOUEMENT

Twenty-one years passed. Apart from a statement in 1987 by conservative commentator and author Patrick J. Buchanan in a letter to the *New York Times* asserting that Soobzokov had been "proved totally innocent,"⁵⁴ Soobzokov's name faded from public prominence.

On June 6, 2006, the U.S. National Archives and Records Administration announced the CIA had declassified an additional 27,000 pages of government records relating to German and Japanese war crimes beyond what it had already released. One of the people about whom documents were released was Soobzokov. American University Professor Richard Breitman, a distinguished historian who studied the Soobzokov documents for the National Archives, drafted a four-page analysis and summary of the materials and attached to it some of the more telling documents.⁵⁵

The revelations in the documents were stunning. Soobzokov, it turned out, had been recruited by the CIA after World War II and had worked for

53. By agreement, the terms of the settlement were kept confidential.

54. Patrick J. Buchanan, Letter to the Editor, *Dr. Hammer's Role in 'Ivan the Terrible' Trial; Get It Out in the Open*, N.Y. TIMES, Apr. 7, 1987, at A34. Buchanan appears to have concluded that since Soobzokov had revealed at least something of his Waffen SS involvement to U.S. immigration authorities in 1952, leading the OSI to abandon its investigation of him, see *supra* note 26 and accompanying text, he was therefore *innocent* of any wrongdoing. Buchanan's letter did not set forth any explanation of how or why acknowledged membership in the SS, which was itself a crime, see *supra* note 6, should lead to the conclusion that Soobzokov had been "proved innocent" of anything except failing to disclose his membership. A later statement of Buchanan that Soobzokov had been subjected to "vile slander," Patrick J. Buchanan, Letter to the Editor, *Free at Last*, WALL ST. J., Nov. 5, 1999, at A19, was one of a number of defenses he made of individuals accused of Nazi war crimes and attacks on their accusers. In one column, Buchanan went so far as to accuse General (later President) Dwight D. Eisenhower of "war crime[s]" resulting in the deaths of hundreds of thousands of German prisoners of war. Patrick J. Buchanan, Editorial, *Atrocities By Allies Sickening*, THE OREGONIAN, Jan. 11, 1990, at C07. Eisenhower, Buchanan wrote, had created "an American gulag" in which German prisoners of war were housed, in contrast to the exemplary conduct of the "Wermacht follow[ing] the Geneva Convention." *Id.* See generally Anti-Defamation League, BACKGROUND REPORT: PAT BUCHANAN'S UNRELENTING DEFENSE OF JOHN DEMJANJUK (1993), http://www.adl.org/special_reports/pb_archive/pb_demjanjuk_1993.pdf.

55. RICHARD BREITMAN, TSCHERIM SOOBZOKOV 1 (2006), <http://www.fas.org/sgp/eprint/breitman.pdf>

that agency for six years, after which he served as a source for the FBI.⁵⁶ He was “severed from CIA in January 1960” after a CIA examiner reviewed his responses to a polygraph test, and concluded that he “was an incorrigible fabricator . . . who could not afford to tell the complete truth about his past without seriously jeopardizing his future.”⁵⁷

The CIA files, Professor Breitman wrote, disclosed that in 1942 Soobzokov had been recruited by the SS or SD (Security Service) “with German forces invading the North Caucasus Mountain region of the Soviet Union.”⁵⁸ He became the chief of police in his hometown and “a member of the Field Gendarmerie.”⁵⁹ He disclosed to the CIA that he was “attached to SS troops.”⁶⁰ Most important, “*under the pressure of repeated CIA polygraph examinations, he also conceded that he had participated in an execution commando and had searched North Caucasian villages for Jews and Komsomol (Young Communist) members.*”⁶¹ This is precisely what Blum had attributed to Kassim Chuako (“We saw him going into the villages with the Germans and rounding up people—Communists and Jews”). It is one of the key statements in the book that Soobzokov had asserted was false in his complaint.⁶² It is flatly at odds with Soobzokov’s deposition testimony.⁶³

Professor Breitman’s ultimate conclusion was that the CIA “showed bad judgment in employing and assisting a man who served as an officer in a

56. *Id.* In his deposition, Soobzokov had testified to the contrary:

“Q Did you ever work with the CIA, Mr. Soobzokov?

A No, sir.

Q Did you ever work for the FBI?

A No, sir.

Q Either as a paid informant or as a voluntary informant, unpaid?

A No, sir.”

Deposition of Tschirim Soobzokov at 644:20–645:3, *Soobzokov v. Blum*, No. 1927/77 (N.Y. Sup. Ct. Feb. 16, 1978).

57. BREITMAN, *supra* note 55, at 2.

58. *Id.* at 1.

59. *Id.*

60. *Id.*

61. *Id.* (emphasis added). Soobzokov’s “admission that his purpose was to look for Jews and Komsomol [Young Communist] members is first mentioned explicitly in a July 19, 1974, memo written by Soobzokov’s former supervisor in the CIA.” *Id.* at 1 n.2.

62. Complaint (S.D.N.Y.), ¶¶ 89, 90(k), *Soobzokov v. CBS, Inc.*, No. 1300-45 (S.D.N.Y. 1978).

63. As Soobzokov put it: “[c]oncerning that I . . . was captured by the Germans, and that [Chuako] saw me in uniform, that—in SS troops, that he saw me rounding up people, Communists, Jews, absolutely lie and false, never it happen.” Deposition of Tschirim Soobzokov, *supra* note 56, at 449:14–18.

criminal organization, admitted having committed some war crimes, and consistently lied about his past.”⁶⁴

Of course, just as we did not have the benefit of cross-examining Soobzokov based on the CIA documents, he did not have the opportunity to respond to them. But the documents revealed enough for me to recall with disheartening clarity Sulzberger's crucial question as he pondered whether to authorize the settlement: “*Was he a Nazi?*” Should we have declined to settle? Should I have advised that we refrain from doing so?

No one can know how we would have fared on our summary judgment motion; what we would have learned if we had proceeded with depositions in the Soviet Union; whether the United States, as trial approached, would have been more amenable to providing us with information about Soobzokov; or whether, if our motion was denied, a jury would have found Soobzokov a credible witness.

Cases are routinely settled precisely because neither side can predict with any confidence how it will fare at trial, and neither we nor Soobzokov were in a position to make any such prediction with confidence. In advising the *Times* about settlement, I had a duty to give my best advice. I did so understanding how little I knew, and ultimately recommending settlement in good part because of that understanding.

Yet the settlement of the case still leaves me unsatisfied, particularly so after the declassification of the CIA documents. I cannot help but ponder whether the settlement I recommended was, at least in retrospect, immoral. I cannot avoid wondering if some appreciable number of settlements undermine the integrity of our legal system, and its truth-seeking functions in particular.

This is a topic on which legal scholars rarely opine, possibly because they have so few of the critical raw materials at hand—depositions, other transcripts, interview notes, and the like—to permit them to offer informed judgments. Perhaps, in any event, we should not look to legal academia alone to speak to such issues but to ethicists or philosophers. What I am sure of is this: while trial lawyers are the best placed and best trained people to advise clients about the likely risks and rewards of litigation, and thus of settlement, they are no more skilled than anyone else in answering the difficult question of what to do when settling may, and then again may not, “leave justice undone.”

64. BREITMAN, *supra* note 55, at 4.

