UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ENTESAR OSMAN KASHEF, *et al.*, Plaintiffs, -against- BNP PARIBAS S.A., BNP PARIBAS S.A. NEW YORK BRANCH, BNP PARIBAS NORTH AMERICA, INC., and DOES 2-10, Defendants.	Civil No. 1:16-cv-03228-AJN Hon. Alison J. Nathan

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

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FOREIGN LAW

I. PRELIMINARY STATEMENT

This case arises out of the horrific injuries inflicted on Plaintiffs and the Class as a result of BNP Paribas's years-long criminal conspiracy with the brutal regime in Sudan to violate U.S. Sanctions. BNP Paribas pled guilty to knowing that the Government of Sudan was perpetrating human rights atrocities during the years it was violating the Sanctions, that the Sanctions were intended to interdict Sudan's ability to carry out such atrocities, and that BNPP's illegal transactions were massively consequential to Sudan, comprising by 2007 a quarter of all Sudan's exports, a fifth of all imports and, along with some smaller illicit transactions for Iran and Cuba, as much as $190 billion in total.[1]

Plaintiffs' injuries and BNP Paribas's criminality are uncontested facts. This case seeks common law remedies and compensation for the victims of BNPP's crimes. It does not allege any federal private rights of action. The core questions before this Court are simply if it is plausible—more than "a sheer possibility"[2]—that the atrocities of the genocidal Sudanese regime were a foreseeable result of BNP Paribas's criminal violation of Sanctions designed to prevent those very atrocities; and if it is plausible that BNP Paribas's criminal role—in enabling the regime to enrich itself by obtaining higher prices for its oil than it otherwise could have without access to U.S. dollars—was substantial assistance in facilitating Sudan's atrocities? The extensive and specific allegations of the Complaint in light of BNP Paribas's admissions of guilt make clear that the answer to each of these questions is yes.

II. SUMMARY OF ARGUMENT

Defendant BNP Paribas Bank, S.A. is a convicted felon under New York and U.S. law, and it is on probation, under monitoring, and is still being investigated by both New York and

[1] Second Amended Complaint (ECF No. 49) ("SAC") ¶¶ 1, 106, 198, 500-01.

[2] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

the FBI.[3] In addition to the two criminal guilty pleas, BNP Paribas entered into two cease and desist orders, a settlement agreement, and a consent order.[4] In all, BNP Paribas paid criminal forfeitures of approximately $8.9 billion, among the largest of all time.[5]

The facts to which BNP Paribas pled guilty are properly before the Court—and not just because they are incorporated into the Complaint. The plea agreements anticipate "civil proceedings brought by private parties" against BNP Paribas, such as the present suit, and judicially establish the facts therein.[6] Any contradiction of those facts is a material breach of the plea agreements.[7]

A. The Sanctions Were Intended to Protect Sudanese Civilians

The U.S. Congress and Presidents Clinton and Bush enacted broad Sanctions intended to protect Sudanese civilians, including the members of the Class, from violence by the Government of Sudan, its military, and its militias, by curtailing Sudan's oil development and exports and cutting off access to the U.S. financial system:

- In 1997, President Clinton issued Executive Order 13067 imposing broad sanctions prohibiting, *inter alia*, the provision of various financial services with the government of Sudan and its agencies, instrumentalities, and controlled entities (collectively, the "GOS") because of the prevalence of human rights violations in Sudan.[8]

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[3] *See* SAC, Exs. A-I (ECF Nos. 49-1 to 49-9); Request for Judicial Notice ("RJN"), Declaration of Matthew P. Rand, Exs., 1-3 (ECF Nos. 79, 79-1 to 79-4). Notably, guilty pleas like BNP Paribas's are highly-negotiated compromises. Presumably, there is more damning evidence that has not been disclosed.

[4] This action asserts claims against BNP Paribas and its affiliates BNP Paribas S.A. New York Branch and BNP Paribas North America, Inc. ("BNPP") based on the plea agreements and related documents.

[5] SAC ¶¶ 19-20, 191-92. "As reported by the Wall Street Journal's Editorial Board, BNPP '***got off easy in its plea deal with U.S. authorities***.'" SAC ¶ 20 (emphasis added) (footnote omitted).

[6] SAC, Ex. B (Federal Plea Agreement, ECF No. 49-2) at 8; Ex. D (State of New York Plea Agreement, ECF No. 49-4) ¶¶ 7, 22.

[7] SAC, Ex. B at 8 ("Any such authorized or approved contradictory statement by BNPP, its present or future attorneys, partners, agents, or employees shall constitute a material breach…"); SAC, Ex. D ¶ 22.

[8] SAC ¶ 89 (citing Exec. Order 13067, 62 Fed. Reg. 59989 (Nov. 3, 1997)).

- In 2002, Congress passed the Sudan Peace Act and recognized that the GOS's continued, barbarous actions constituted genocide as defined by the Convention on the Prevention and Punishment of the Crime of Genocide.[9] Congress found "***that the GOS 'has repeatedly stated that it intends to use the expected proceeds from future oil sales to increase the tempo and lethality of the war against the areas outside of its control***.'"[10] "[T]he Act instructed the President to 'take all necessary and appropriate steps . . . to deny the [GOS] access to oil revenues to ensure that the [GOS] neither directly nor indirectly utilizes any oil revenues to purchase or acquire military equipment or to finance any military activities.'"[11]

- In 2004, observing an escalation of human rights abuses, Congress passed the 2004 Comprehensive Peace in Sudan Act, which recognized the role of oil in fueling the genocide in Darfur.[12]

- In 2006, President Bush signed the Darfur Peace and Accountability Act, which required that the sanctions imposed by Executive Order 13067 remain in effect until the President certified to Congress that the GOS, *inter alia*, (1) implemented the Darfur Peace Agreement, (2) disarmed and demilitarized the various militias it supported, (3) fully implemented the Comprehensive Peace Agreement for Sudan, and (4) withdrew its forces from Southern Sudan;[13] shortly thereafter, President Bush issued Executive Order 13412, prohibiting "'all transactions by United States persons relating to the petroleum or petrochemical industries in Sudan.'"[14]

Thus, Congress and the Executive recognized the causal connection between the development and exploitation of oil to human rights violations against disfavored civilians in Sudan, the exact causal connection at issue here.[15] BNPP has admitted to this causal connection.[16] Thus, BNPP's attempts to decouple its Sanctions violation from the human victims is unavailing.

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[9] SAC ¶ 91 (citing Sudan Peace Act of 2002, Pub. L. 107-245 § 2(10), 50 U.S.C. § 1701 note).

[10] SAC ¶ 91 (quoting Pub. L. 107-245 § 2(8) (emphasis added)).

[11] SAC ¶ 91 (quoting Pub. L. 107-245 § 6(b)(2)(C)).

[12] *See* SAC ¶ 93 (citing Pub. L. 108-497 §§ 3(6), 4(a), 8(a)(1)).

[13] *See* SAC ¶ 95 (citing Pub. L. 109-344 §§ 4(1), 7(a)); Darfur Peace and Accountability Act of 2006, Pub. L. 109-344, 50 U.S.C. § 1701 (2016); *see* SAC ¶ 93; Comprehensive Peace in Sudan Act of 2004; Pub. L. 108-497, 118 Stat. 4012 (2004).

[14] *Id.* ¶¶ 95-96 (quoting Exec. Order 13412, 71 Fed. Reg. 61369 (Oct. 17, 2006)).

[15] SAC ¶ 141.

[16] SAC ¶¶ 152-69; Ex. E (State of New York Factual Statement, ECF No. 49-5), ¶¶ 4, 19, 20.

B. BNPP's Acts Were Criminal Violations of U.S. Sanctions, Not Ordinary Financial Services

BNPP violated the U.S. Sanctions. Yet BNPP makes light of its crimes, arguing that its activities were mere "provision of financial services." The conduct BNPP euphemistically describes, throughout its Motion, as mere "commercial banking services," "processing financial transactions," or "doing business" was in fact criminal conduct.[17]

BNPP hopes to reframe its conduct to align itself with the defendant in *Presbyterian Church of Sudan v. Talisman Energy*.[18] But *Talisman* is no refuge. The Second Circuit's concern was imposing civil liability under international law on otherwise ***lawful*** commercial activity.[19] *Talisman* and the other cases about lawful commercial activities that BNPP repeatedly invokes have no application here.

C. The Atrocities in Sudan Were Foreseeable

BNPP maintains that the atrocities against Plaintiffs had nothing to do with its Sanctions violations.[20] This is both wrong and inconsistent with BNPP's admissions. BNPP not only pled to the elements of its crimes but also stipulated that the Sanctions were aimed at curtailing the "'prevalence of human rights violations'" in Sudan, the "'violations of human rights and international humanitarian law in the Darfur region,'" and the "'failure of the Government of Sudan to disarm Janjaweed militiamen.'"[21] Plaintiffs' injuries were not only a foreseeable

[17] MTD at 2-5, 15, 20, 24-29, 31, 33, Exs. A-J.

[18] *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009).

[19] The facts here support the elements of international law violations in many jurisdictions. Given current Second Circuit law which does not permit jurisdiction over corporate defendants for such claims, Plaintiffs have not brought them and, contrary to Defendants' implication, need not have. *See Schepis v. Local Union No. 17, United Bhd. of Carpenters & Joiners*, 989 F. Supp. 511, 514 (S.D.N.Y. 1998).

[20] *See* MTD at 1.

[21] SAC, Ex. C, ¶¶ 3, 4 n.1; SAC, Ex. E, ¶¶ 3, 4 n.1.

"humanitarian catastrophe" but *actually foreseen* by BNPP.[22] "BNPP's central role in providing Sudanese financial institutions access to the U.S. financial system, despite the Government of Sudan's role in supporting terrorism and committing human rights abuses, was recognized by BNPP employees."[23]

In addition, the link between oil and human rights abuses was internationally notorious due to (1) extensive media coverage, (2) official reports by the United Nations, the governments of the United States and Canada, the ICC, and NGOs, and (3) well-publicized public pressure on oil companies to divest from Sudan due to its use of oil revenues to fund atrocities.[24]

Thus, BNPP decided to "do business," and continued to "do business," in knowing, systematic violation of the Sanctions for years, while the widely-reported atrocities continued.[25] BNPP cannot feign disbelief that it caused the very wrongs the Sanctions sought to prevent.

The Plaintiffs here suffered as a result of the "humanitarian catastrophe" that BNPP knew it was causing.[26] Plaintiffs Tingloth, Majuc, Ulau and Marjan were victims of Sudan's use of oil revenues to clear land for oil infrastructure; Majuc and Jane Doe were victims of the violence caused by the new weapons the GOS imported, such as Antonov aircraft and attack helicopters; Kashef, Abdalla, Mosabal, Hamad, Abbo Abakar, Omar, Jane Doe, Hassan, Khalifa, and Ahmed suffered torture, and had family members killed or raped, by the GOS-funded Janjaweed and other militia; Kashef, Jane Doe, Lual, Jane Roe, Lukudu, Adam, Judy Doe, Marjan, and Khalifa survived torture and detention in the GOS's "ghost houses"; and Jane Doe, Jane Roe, Judy Doe,

[22] SAC ¶¶ 14, 17, 91, 95-96, 141, 159-60, 162, 174-90; Ex. C at ¶ 20.

[23] SAC, Ex. C, ¶ 20; *see also* ¶ 17.

[24] *See* SAC ¶¶ 144, 152-69, 170-83.

[25] *See, e.g.*, SAC ¶¶ 14, 17, 91, 95-96, 159-60, 162, 174-90; SAC, Ex. C at ¶ 20 (BNPP Paris executive warns that no one would understand why BNPP '"persists"' in Sudan given situation in Darfur; it could be interpreted as '"supporting the leaders in place."').

[26] *See, e.g.,* SAC, Ex. C at ¶ 20.

Khalifa, and Shafika survived raped by GOS-backed militias."[27]

D. BNPP's Criminal Conspiracy Is an Incontestable Fact

BNPP asserts that "[t]he Complaint's conspiracy allegations fail to fulfill any" of the requirements for pleading conspiracy.[28] But BNPP has admitted that it engaged in a deliberate criminal conspiracy "to violate the U.S. embargo by providing Sudanese banks and entities access to the U.S. financial system."[29] Its plea establishes the agreement, scienter and "perfidious purpose" elements of civil conspiracy.[30] The only remaining civil conspiracy element is for Plaintiffs to allege that it is plausible that the harm Plaintiffs suffered was a foreseeable consequence of the conspiracy. As set forth herein, Plaintiffs do so.

Rather than defending what it cannot dispute, BNPP mischaracterizes the claims, contending that it did not agree to '"engage [] in a persistent campaign of terrible atrocities"' and denying that it "shared a common goal with Sudan to commit the alleged abuses."[31] That is not what Plaintiffs allege.[32] Rather, Plaintiffs allege that BNPP conspired to provide the Government of Sudan and its agencies, instrumentalities, and controlled entities (the "GOS") with illicit financial resources that the GOS would not have otherwise have had, knowing and accepting that the GOS was using and would continue to use those resources to commit atrocities.

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[27] *See* SAC ¶¶ 30-50, 146.

[28] MTD at 23.

[29] *See* SAC, Ex. C ¶¶ 14-17, SAC, Ex. A (Information, *U.S. v. BNP Paribas*, ECF No. 49-1), ¶¶ 1-5; SAC, Ex. E, ¶¶ 14-17; SAC, ¶¶ 17, 101, 193, n.124.

[30] See *Williams v. Sidley Austin Brown & Wood*, No. 600808/05, 2006 WL 2739013, at *3, (N.Y. Sup. Ct. Sept. 22, 2006) ("The deferred prosecution agreement supplies the element of scienter and a shared 'perfidious purpose' found lacking in plaintiffs' amended complaint.").

[31] MTD at 4.

[32] *See* SAC ¶ 152.

E. BNPP's Criminal Conduct Proximately Caused Plaintiffs' Injuries

BNPP does not challenge the fact of Plaintiffs' injuries. Instead, BNPP challenges the plausibility of the causal link between its criminal conduct and those injuries. Under a conspiracy theory, to hold BNPP liable for the underlying torts, Plaintiffs must only show that the conduct of BNPP's co-conspirator the GOS was foreseeable.[33] BNPP never engages this element. Under an aiding and abetting theory, to hold BNPP liable for the underlying torts, Plaintiffs must show that BNPP rendered "substantial assistance" to the GOS in connection with its commission of the underlying torts.[34] Under the primary torts, Plaintiffs must show proximate cause, where "the most significant inquiry in the . . . analysis is often that of foreseeability."[35]

As alleged and as will be established by lay and expert testimony, BNPP's massive involvement in Sudan's economy proximately caused Plaintiffs' injuries.[36] The Sanctions were intended to reduce materially the GOS's revenues from its oil exports, its only significant source of revenue. Oil is priced and traded on the global marketplace in U.S. dollars ("petrodollars"). By depriving Sudan of access to U.S. financial markets, where U.S. dollar-based transactions must ultimately be cleared, the Sanctions were designed to prevent Sudan from exporting oil in exchange for U.S. dollars.[37] Historical and economic data establish that, without that access, Sudan would have had to barter its oil or sell it in other less-desirable currencies on much less favorable terms. For the same reasons, without BNPP, the GOS would have been hindered in its

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[33] *Lindsay v. Lockwood*, 625 N.Y.2d 393, 398 (N.Y. Sup. 1994).

[34] *See Duran v. Bautista*, No. 654261/2012, 2015 WL 1567020, at *14 (N.Y. Sup. Ct. Apr. 7, 2015).

[35] *Hain v. Jamison*, 28 N.Y.3d 524, 530 (N.Y. 2016); *see Tutrani v. Cty. of Suffolk*, 10 N.Y.3d 906, 908 (N.Y. 2008); *Derdiarian v. Felix Contracting Corp.*, 51 N.Y.2d 308, 315 (N.Y. 1980).

[36] See, e.g., SAC ¶ 106 ("One state-owned Sudanese bank's deposits at BNPP 'represented about 50% of Sudan's foreign currency assets during this time period.'") (footnote omitted).

[37] SAC ¶¶ 6, 63, 74-82, 89-100.

ability to import goods if it did not have access to U.S. dollars.[38] Thus, effective Sanctions would have resulted in a substantial contraction in the resources available to the GOS for militarization and human rights abuses.[39] BNPP's criminal conduct thwarted that purpose.

BNPP has admitted that its violations "significantly undermin[ed] the U.S. embargo and provided the Sudanese government and Sudanese banks with access to the U.S. financial system ***that they otherwise would not have had***," and that ***without its criminal conduct, Sudan would not have had access to the U.S. financial markets***.[40] As the U.S. Deputy Attorney General stated, BNPP was acting "as a de facto central bank for the Government of Sudan."[41]

BNPP's illegal assistance to Sudan is quantifiable as—and in fact represented—a substantial percentage of Sudan's entire economy.[42] It enriched the GOS, vitiated much of the Sanctions' impact, and enabled a massive expansion of GOS military resources. "Between 1997 and 2006, GOS military spending grew nearly ten-fold: from $282 million in 1997 to $2.7 billion in 2006, and, as a share of GDP, went from less than 1% to nearly 3.4%."[43] The GOS could and did expand oil development by using its military and militias to commit ethnic cleansing or violently displace entire villages living on or near oil rich regions, to buy and to manufacture weapons, to fund its militias, and to carry out the campaign of ethnic cleansing causing

[38] *See* SAC ¶ 12.

[39] SAC ¶¶ 107-09.

[40] SAC, Ex. C ¶¶ 18-20, 41; SAC, Ex. E ¶¶ 19-20 ("BNPP's Critical Role in the Sudanese Economy and in Providing Sudan Access to the U.S. Financial System").

[41] SAC ¶ 106 (quoting Remarks by Deputy Attorney General Cole at Press Conference Announcing Significant Law Enforcement Action, Justice News, June 30, 2014, 2014, https://www.justice.gov/opa/speech/remarks-deputy-attorney-general-cole-press-conference-announcing-significant-law.)

[42] See SAC ¶ 121.

[43] SAC ¶ 121 (footnote omitted).

Plaintiffs' injuries.[44] BNPP's criminal acts were a substantial cause of these activities.

BNPP argues that Plaintiffs have not alleged "a single banking transaction processed by the BNPP Defendants for Sudanese banks that purportedly provided funds that were actually used to perpetrate the alleged torts against Plaintiffs."[45] This assertion assumes an incorrect causation standard and is irrelevant. BNPP was the "central banker" for Sudan and dollars are fungible. Judge Weinstein has emphasized that money "need not be shown to have been used to purchase the bullet that struck the plaintiff."[46] Moreover, the notion that money needs to be traced, as in money laundering, misunderstands the effect of undermining Sanctions. BNPP's criminal conduct greatly increased the resources available to the GOS. Further, Plaintiffs make sufficient allegations about the impact of the increased resources on military and weapons spending. "The GOS could otherwise not have funded the military at the nearly same level without BNPP's Sanctions violations."[47] As the Peace Act itself states, "(8) The Government of Sudan has repeatedly stated that it intends to use the expected proceeds from future oil sales to increase the tempo and lethality of the war against the areas outside of its control."[48]

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BNPP raises myriad other arguments. None has merit. First, there is no statute of limitations bar: Plaintiffs include minors for whom the statute of limitations is concededly tolled,

[44] SAC ¶¶ 2, 11, 90, 136-37, 140 & n.69, 143, 158-59, 161-62, 166. For example, "In 1997, Sudan produced 9,000 barrels of oil per day. [B]y 2006, Sudan's oil production had exploded to 331,000 barrels per day." SAC ¶ 116 (footnote omitted); *see also* SAC ¶¶ 103-05, 117.

[45] MTD at 5 (emphasis in original); *see also id.* at 25.

[46] *Gill v. Arab Bank, PLC*, 891 F. Supp. 2d 335, 367 (E.D.N.Y. 2012).

[47] SAC ¶¶ 120, 126-34.

[48] The Sudan Peace Act, Pub. L. 107-245 at § 2(8), 116 Stat. 1504 (2002) (codified at 50 U.S.C. § 1701 note); SAC ¶ 91; *see also* SAC ¶ 123 ("The U.S. Embassy in Khartoum recognized the extent of Sudan's military spending: In 2007, Sudan's 'budget allocate[d] substantial revenue to military and security expenditures, leaving relatively small amounts available for development, health and education.'") (footnote omitted); SAC ¶¶ 92-100, 120-51.

and the statute has not run for any adults because New York has a broad seven-year statute of limitations for crime victims. Second, the act of state doctrine does not apply because Plaintiffs' claims do not require adjudication of claims against the GOS or of the validity of any official act in Sudan. The GOS's genocidal crimes do not quality as "official" acts of state that the doctrine addresses. Third, squarely applicable Second Circuit precedent holds New York law applies to financial misconduct perpetrated by a bank in New York, even if the injuries flowing from that New York misconduct are felt abroad. Fourth, even if Swiss or Sudanese law were to apply, Plaintiffs have meritorious claims. Lastly, BNPPNA and BNPPNY are proper defendants.

III. ARGUMENT

A. The Complaint's Allegations Are Plausible

A court may not dismiss a complaint if the plaintiff alleges "enough facts to state a claim to relief that is plausible on its face."[49] "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[50] The plausibility standard is "context-specific," requiring a district court to assess allegations of wrongdoing in light of the specific factual setting in which they arise.[51] It "does not impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal [behavior]."[52] Even if some of the specific details of a defendant's wrongdoing are not known to

[49] *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007).

[50] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

[51] *Iqbal*, 556 U.S. at 679; *see also Twombly*, 550 U.S. at 548-49 (complaint must contain "some factual context suggesting [illegal] agreement").

[52] *Twombly*, 550 U.S. at 556. Here, Plaintiffs have endeavored to obtain evidence from the governmental investigations of BNPP through FOIA and FOIL requests. However, all agencies, even though they have "***terabyte[s]***" of data and "***thousands and thousands***" of documents, have denied the requests, citing *inter alia*, agreements with BNPP and ***ongoing investigations***. *See, e.g.,* RJN, Exs. 1-3 (emphasis added);

a plaintiff at the threshold of litigation, a complaint may "survive a motion to dismiss" if it contains "circumstantial factual allegations" from which the court "may reasonably infer" culpable behavior by the defendant.[53] A court must "draw on its judicial experience and common sense" to determine whether the factual context mapped out by the complaint presents "more than the mere possibility of misconduct,"[54] such that the allegations of wrongdoing cross "the line from conceivable to plausible."[55]

Here is the ***factual context*** that the Complaint sets forth against which the plausibility of Plaintiffs' claims must be measured:

- BNPP was criminally convicted of a years-long conspiracy to violate U.S. Sanctions that sought to deprive Sudan of its oil revenue.[56]
- The U.S. Sanctions were designed to deprive Sudan of those funds to prevent and punish Sudan's commission of human rights abuses.[57]
- As a result of its willful criminal violation of U.S. sanctions, BNPP enabled Sudan to bypass Sanctions and sell its oil in U.S. dollars at higher prices than it otherwise would and buy imports with dollars, thereby providing funds that represented a substantial percentage of Sudan's total GDP throughout the period.[58]
- During the same period when BNPP was facilitating these massive sums for the Government of Sudan, Sudan undertook a huge expansion of its military and used its military and its militias to commit widespread atrocities. These atrocities included the infliction of severe physical, emotional, and economic harm.[59]

Thus, "the factual contentions …. will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." *See* F.R.C.P. Rule 11(b)(3).

[53] *Pension Ben. Guar. Corp. v. Morgan Stanley Inv. Mgmt.*, 712 F.3d 705, 718 (2d. Cir. 2013) (applying these principles to a claim of breach of fiduciary duty under ERISA).

[54] *Iqbal*, 556 U.S. at 679.

[55] *Twombly*, 550 U.S. at 570.

[56] SAC, Ex. B; SAC, Ex. D.

[57] SAC ¶¶ 9-10, 13,15, 89, 109.

[58] SAC ¶¶ 101, 106,108-09, 113, 116-18, 121, 185.

[59] SAC ¶¶ 120-21, 123, 126-51.

Measuring plausibility ***against this factual context***, it is therefore more than merely conceivable that BNPP actions were a substantial and foreseeable contributing cause to Plaintiff's injuries. As Plaintiffs allege, BNPP enabled Sudan to sell its oil for U.S. dollars, substantially increasing the funds available to Sudan and giving it the money to carry out its declared intent to persecute its own population.[60] BNPP also enabled Sudan to buy imports with U.S. dollars, substantially increasing its buying power, giving it the money to buy weapons.[61] It is more than merely conceivable that BNPP was aiding and abetting Sudan because BNPP actually "knew of the underlying harm" being perpetrated and the magnitude of illegal funds constituted "substantial assistance."[62] Finally, it is more than merely conceivable that BNPP foresaw, or should have foreseen, that its admitted co-conspirator would use those funds to increase exponentially its violence against its disfavored peoples, including Plaintiffs.[63]

BNPP makes no real effort to argue that these inferences of culpability are not plausible. Instead, BNPP insists that the Complaint relies on "conclusory allegations" as though that assertion constitutes a sufficient response.[64] It is wrong twice over.

First, including some allegations in a complaint that are not yet in the form of specific factual assertions does not render the complaint infirm—every complaint contains conclusory allegations.[65] Discovering the facts that support a claim is the purpose of discovery, not a requirement of pleading. Second, BNPP fails to address the Complaint's detailed allegations of

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[60] *See, e.g.*, SAC ¶¶ 101-19.

[61] SAC ¶¶ 120-34.

[62] *See Sayles v. Ferone*, 26 N.Y.S.3d 527, 528 (N.Y. 2016); *Duran*, 2015 WL 1567020, at *14; SAC ¶¶ 14, 17, 91, 95-96, 121, 141, 159-60, 162, 174-90; Ex. C at ¶ 20.

[63] *Lindsay*, 625 N.Y.2d at 398; *see infra* notes 21-24, 36-44.

[64] *See* MTD at 2, 4, 22, 24, 32, 35.

[65] *Twombly*, 550 U.S. at 569; *Iqbal*, 556 U.S. at 678.

fact supporting Plaintiffs' claims, factual allegations that are entitled to a presumption of truth.[66] For example, BNPP argues, "[t]here are no non-conclusory allegations that the BNPP Defendants had actual knowledge of the tortious acts that injured Plaintiffs."[67] Although actual knowledge is a factor only for the aiding and abetting claims, the Complaint alleges, among other details, that BNPP knew of the harm that Sudan perpetrated, that BNPP continued its crimes even after knowing, and that BNPP actively took steps to conceal its involvement.[68] These are specific factual allegations, admitted as true in the plea agreements, and they are entitled to a presumption of truth.

If a defendant wishes to argue that a complaint fails the plausibility test, it must identify the allegations that are conclusory in form, analyze those allegations in light of the specific facts set forth in the complaint, and make a context-specific argument about why innocent explanations are so much more likely than culpable explanations that an inference of culpable behavior is not plausible. BNPP has failed to perform this task.

It is unsurprising that BNPP does not argue that its actions were "likely lawful and justified," or that there is a "natural explanation" that would cast them in an innocent light—the type of argument typical in a plausibility analysis.[69] These are not typical defendants.

B. Plaintiffs' Claims Are Timely

Numerous Class members, typified by Plaintiffs Abdalla and Ahmed, were minors when injured and when the Complaint was filed.[70] Others were minors when injured and reached the

[66] *See Chambers v. Time Warner*, 282 F.3d 147, 152 (2d Cir. 2002).

[67] MTD at 4.

[68] SAC ¶¶ 158-60, 162; *see also* SAC ¶¶ 153-69 (detailing the plethora of media sources that reported on the GOS's conduct and its connection to oil); SAC ¶¶ 183-188; Ex. C ¶ 20.

[69] *Iqbal*, 556 U.S. at 682; *Twombly*, 550 U.S. at 568, respectively.

[70] SAC ¶¶ 31, 50, 251.

age of majority during the applicable limitations periods. For these Class members, all claims are timely.[71] As to the others, BNPP contends that the interval between Plaintiffs' injuries and the commencement of the suit means that Plaintiffs' claims are time-barred. This is incorrect.

New York has a ***seven-year*** statute of limitations, N.Y. C.P.L.R. § 213-b, for crime victims.[72] To contend with this lengthy statute, BNPP asserts that the Plaintiffs here are not "victims" of BNPP's criminal acts, arguing that BNPP had nothing to do with causing their injuries. But the Complaint sets out more than sufficient facts to meet not only general proximate causation under New York tort law but also the even more liberal "resulting from" language in § 213-b, which was intended to provide crime victims ample time to bring their claims. Plaintiffs' claims are well within that timeframe.

1. Plaintiffs' Claims Did Not Accrue Under Principles of Equity Until It Was Reasonable for Plaintiffs to Learn the Identity of BNPP and Its Role in Causing Their Injuries

Plaintiffs' injuries occurred from 1997 through at least 2009, the era of BNPP's secret criminal collaboration with Sudan, but no information about BNPP's connection to Sudan and its atrocities was publically known until BNPP's role was revealed in its criminal prosecution and sentencing. The Complaint also alleges, and BNPP does not contest, that it deliberately and successfully concealed its crimes until it was caught.[73] Equity tolls accrual of claims for limitations purposes where necessary to prevent unfairness to a plaintiff who is not at fault for lateness in filing; and equity estops assertion of a limitations bar where a defendant's concealment prevents the plaintiff from knowing the cause of injury, including the identity of the

[71] N.Y. C.P.L.R. § 208; *see also* MTD at 6 n.5 (acknowledging that the minors' claims are not time barred). This portion of the class comprises thousands of individuals, a significant portion of the Class.

[72] As BNPP concedes, New York law governs the statutes of limitations. MTD at 6 n.4; *Abercrombie v. Andrew Coll.*, 438 F. Supp. 2d 243, 262 (S.D.N.Y. 2006).

[73] *See* SAC ¶ 270 and Ex. I (In re BNP Paribas, S.A. New York Branch Consent Order Under NY Banking Law ECF No. 49-9), ¶ 3.

perpetrator.[74] "[A] claim accrues when a plaintiff comes into possession of the 'critical facts that he has been hurt ***and who inflicted the injury***.'"[75] "One example of an 'extraordinary circumstance' meriting equitable tolling may be where plaintiffs can show that it would have been impossible for a reasonably prudent person to learn or discover critical facts underlying their claim. …. Defendants are not entitled to benefit from whatever ignorance they have perpetuated in the plaintiffs. Thus, plaintiffs are entitled to the benefit of equitable tolling."[76]

Plaintiffs are traumatized victims of atrocities, displaced into an unfamiliar legal system.[77] They did not and could not reasonably have discovered information sufficient to trigger a duty to investigate claims against BNPP until, at the earliest, the May 1, 2015 sentencing, when the Department of Justice announced a public outreach for a potential "Victims' Compensation Fund" with money from BNPP's criminal forfeiture.[78] No similar statements accompanied the July 2014 plea or other admissions of liability.[79] Whether Plaintiffs' actual May 2015 discovery of the identity of BNPP as a cause of their injuries was reasonable under the circumstances is a question of fact and is not appropriately decided on a motion to dismiss.[80]

Further, BNPP is equitably estopped from sheltering behind a claims accrual date any earlier than the public disclosures that accompanied its prosecution and sentencing because it

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[74] *See Veltri v. Bldg. Serv. 32B-J Pension Fund*, 393 F.3d 318, 322-23 (2d Cir. 2004) (equitable tolling); *General Stencils v. Chiappa*, 18 N.Y.2d 125, 128 (N.Y. 1966) (equitable estoppel).

[75] *Singleton v. Clash,* 951 F. Supp. 2d 578, 588 (S.D.N.Y. 2013) (*quoting Rotella v. Wood,* 528 U.S. 549, 556 (2000) (emphasis added); *see Twersky v. Yeshiva Univ*., 579 Fed. Appx. 7, 9 (2d Cir. 2014); *see also A.Q.C. ex rel. Castillo v. United States*, 656 F.3d 135, 140 (2d Cir. 2011).

[76] *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 135-36 (E.D.N.Y. 2000) (finding equitable estoppel ***against BNPP's predecessor***); *see also Veltri*, 393 F.3d at 322-23.

[77] *See* SAC ¶¶ 30-50.

[78] *See* SAC ¶¶ 252-55.

[79] *Id*.

[80] *See General Stencils, Inc.*, 18 N.Y.2d at 128-29.

was convicted of felony concealment under N.Y. Penal Law § 175.10 ("Falsifying Business Records in the First Degree").[81] BNPP contests this, arguing that Plaintiffs fail to allege wrongful concealment separate from acts that harmed Plaintiffs. But BNPP's tortious liability is based on its illicit collaboration with the GOS whereas concealment is based on BNPP's secrecy and its conviction under §175.10.[82] Thus, Plaintiffs allege separate "subsequent and specific actions by defendants [that] kept them from timely bringing suit."[83]

BNPP also argues that its concealment should be disregarded because BNPP made no affirmative misstatements to or directed at Plaintiffs. *Veltri*, which BNPP invokes for this proposition, actually contradicts it: "The relevant question is not the intention underlying defendants' conduct, but rather whether a reasonable plaintiff in the circumstances would have been aware of the existence of a cause of action."[84] *Zumpano* and *Twersky*, cited by BNPP for this point, are also inapposite: These cases found equitable estoppel inapplicable where sex abuse victims knew the fact of abuse and the abusers' identities and merely alleged deceptive conduct.[85] Here, Plaintiffs allege, and BNPP admits, actual concealment of its wrongdoing.

2. The 7-Year Limitations Period of New York C.P.L.R. § 213-b Applies to All Claims

Because Plaintiffs are victims of BNPP's crimes, under § 213-b, they had seven years after learning of BNPP's role in their injuries to bring suit. The requirements of § 213-b are

[81] *See Abercrombie*, 438 F. Supp. 2d at 265.

[82] *See* MTD at 8-9; SAC ¶¶ 17, 18, 270; *Corsello v. Verizon N.Y., Inc.*, 18 N.Y.3d 777, 789 (N.Y. 2012) (citation omitted).

[83] *See Corsello*, 18 N.Y.3d at 789 (citation omitted).

[84] *Veltri*, 393 F.3d at 323 (citation omitted); *see also General Stencils*, 18 N.Y.2d at 128 (equitable estoppel where false bookkeeping concealed theft).

[85] *Zumpano v. Quinn*, 6 N.Y.3d 666, 675 (N.Y. 2006), and *Twersky v. Yeshiva University,* 993 F. Supp. 2d 429 (S.D.N.Y. 2014).

satisfied here: (1) BNPP was convicted of a crime covered by § 213-b; and (2) the Plaintiffs' injuries resulted from its criminal conduct.

BNPP was convicted of federal and New York crimes, both of which trigger § 213-b. "CPLR 213-b was intended to be expansive .... *i.e.,* to give relief to more, rather than fewer, numbers of crime victims."[86] In response, BNPP posits that "Plaintiffs are not within the class of statutory victims of the crimes to which BNP Paribas pled guilty."[87] But the Complaint alleges and BNPP's guilty pleas acknowledged that the Sanctions were to protect human rights victims, such as Plaintiffs.[88] And the guilty pleas anticipate civil proceedings by private parties.[89] Moreover, BNPP's interpretation would wrongly limit § 213-b, which courts have broadly construed to cover victims of any crimes committed in New York, regardless of, for example, where the crime was prosecuted and whether or not the crime was a felony.[90]

BNPP also suggests that Plaintiffs have not alleged the requisite causal link between its

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[86] *Elkin v. Cassarino*, 680 N.Y.S.2d 601, 603-04 (N.Y. App. Div. 1998).

[87] MTD at 6-7. BNPP argues that Assistant United States Attorneys confirmed that Plaintiffs were not victims of BNPP's actions and, as a result, cannot invoke § 213-b. This argument is disingenuous. Reading the entire transcript, it becomes apparent that the AUSAs' remarks related to whether certain individuals in the courtroom qualified as victims within the meaning of federal restitution, remission, and restoration. *See* MTD, Grube Decl., Ex. A at 9:15-21, 10:8-15. Plaintiffs were not in the courtroom. The only self-described "victim" in the courtroom was Marilyn Wiederspan, who attempted to enforce a judgment she received in Florida state court against Cuba and certain Cuban leaders for the torture and killing of her father on February 6, 1959. *See id.* at 9:16; *see also Wiederspan v. Republic of Cuba*, No. 15-CV-1983 (VEC), 2017 WL 1102674, at *1-2 (S.D.N.Y. Mar. 23, 2017) (discussing Wiederspan's suit); *United States v. BNP Paribas S.A.*, No. 14 Cr. 460 (LGS), 2015 WL 1962882, at *2 (S.D.N.Y. Apr. 30, 2015) (explaining that Wiederspan's petition for restitution was based on the same operative facts as docket number 15 Civ. 1983). Thus, contrary to BNPP's assertion, the AUSAs were not making a general statement about victims or about whether Plaintiffs were victims within the meaning of New York law. Further, BNPP's arguments inappropriately raise a factual issue that should not be resolved on a motion to dismiss. *See Mandarino v. Mandarino*, 180 Fed. Appx. 258, 261 (2d Cir. 2006).

[88] SAC ¶¶ 83-100 and Ex. C ¶¶ 3-7.

[89] SAC., Ex. B (ECF No. 49-2) at 8; Ex. D (ECF No. 49-4) ¶ 22.

[90] *Hemmerdinger Corp. v. Ruocco*, 976 F. Supp. 2d 401, 409 (E.D.N.Y. 2013); *see also Nat'l Union Fire Ins. Co. v. Erazo*, 721 N.Y.S.2d 720-24 (N.Y. Civ. Ct. 2001); *Dynamic Chemicals, Inc. v. Ackerman Mech. Servs., Inc.*, 867 N.Y.S.2d 820, 822 (N.Y. App. Div. 2008).

crimes and Plaintiffs' injuries.[91] But § 213-b "is to be liberally construed" and "read expansively" in light of its broad remedial purpose.[92] The plausible, causal nexus has been satisfied. On the issue of the limitations period, BNPP has cited no apposite authority. The cases it cites either involve injuries that did not result from the elements of a defendant's acts that made them criminal, or where the defendant was not convicted of a crime.[93]

3. Plaintiffs' Claims Are Timely Under New York's Statutes of Limitations for Personal and Property Injury Actions

Plaintiffs' claims are also timely under N.Y. C.P.L.R. §§ 214 and 215, the generally applicable statutes of limitations for personal and property injury claims. A three-year period under § 215 would apply to all Plaintiffs' tort claims other than intentional torts. Thus, even if § 213-b were found inapplicable and if the non-minor Plaintiffs were on inquiry notice as a result of the July 2014 guilty plea rather than the May 2015 sentencing, all those claims would be timely under the April 29, 2016 Complaint. Only the intentional tort claims for assault, battery, and false imprisonment, which would be subject to a one-year limitations period under § 215, would be untimely under this standard. But, as discussed above, all of Plaintiffs' claims are timely under § 213-b.

C. The Act of State Doctrine Is Inapplicable to Plaintiffs' Claims

The "act of state doctrine" precludes U.S. courts from "sit[ting] in judgment on the acts

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[91] MTD at 6-7. BNPP's suggestion (*see* MTD at 7) that §213-b only applies where there is otherwise a private right of action is unsupported by authority and inconsistent with courts' broad interpretation of it.

[92] *See, e.g., Cavanaugh v. Watanabe*, 806 N.Y.S.2d 848-49 (N.Y. Sup. Ct. 2005).

[93] *E.g., Boice v. Burnett*, 667 N.Y.S.2d 100 (N.Y. App. Div. 1997) (statements fraudulent for other reasons); *Respass v. Dean*, 775 N.Y.S.2d 576 (N.Y. App. Div. 2004) (DWI did not cause injury to motorcyclist rear-ended by another car); *Volt Viewtech, Inc. v. D'Aprice*, 831 N.Y.S.2d 357 (N.Y. Sup. Ct. 2006) (alleged fraud different than defendant's criminal fraud); *Williams v. Congregation, Yetiv Lev*, No. 01CV2030, 2004 WL 2924490 (S.D.N.Y. Dec. 16, 2004) (defendant not the criminal).

of [another] government ... done within its own territory."[94] That doctrine is inapplicable on the facts here and BNPP fails to meet its burden.[95]

As the Supreme Court said in *Kirkpatrick*, "[a]ct of state issues only arise when … the outcome of the case turns upon [] the effect of official action by a foreign sovereign. When that question is not in the case, neither is the act of state doctrine. . . ."[96] *Kirkpatrick* authoritatively set forth the "factual predicate" that must exist for it to be implicated: a claim that would "require[] the Court to declare invalid, and thus ineffective as 'a rule of decision for the courts of this country'…the official act of a foreign sovereign."[97] Here, as in *Kirkpatrick*, the essential factual predicate is missing: The validity of a sovereign's conduct "is simply not a question to be decided in the present suit."[98] As in *Kirkpatrick*, Plaintiffs are "not trying to undo or disregard the governmental action, but only to obtain damages from private parties who had procured it"—damages based on BNPP-enabled GOS atrocities.[99] Even if a determination of this case could involve proof showing that these private actors acted in concert with the GOS (as established by the guilty pleas), which, in turn, acted maliciously or even violated Sudanese or international law, *Kirkpatrick* made clear that the prospect for such a determination does not trigger application of the act of state doctrine.[100]

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[94] MTD at 10-11 (quoting *Underhill v. Hernandez,* 168 U.S. 250, 252 (1897)).

[95] *See Konowaloff v. Metro. Museum of Art,* 702 F.3d 140, 146 (2d Cir. 2012).

[96] *W. S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Intl.*, 493 U.S. 400, 406 (1990).

[97] *Id.* at 405 (citation omitted).

[98] *Id.* at 406.

[99] *See id.* at 407. BNPP's cases are distinguishable because the plaintiffs in those cases either sought to adjudicate official acts of a foreign government in its own territory, *see Fed. Treasury Enter. Sojuzplodoimport v. Spirits Int'l B. V.,* 809 F.3d 737, 740-41 (2d Cir. 2016); *Konowaloff*, 702 F.3d at 147; or sought to holds governments, not private actors, liable, *see O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449, 452-53 (2d Cir. 1987); *Mezerhane v. Republica Bolivariana de Venez.*, 785 F.3d 545, 546-47 (11th Cir. 2015).

[100] *W. S. Kirkpatrick & Co.*, 493 U.S. at 406.

Further, BNPP points to no "official" act of state that could potentially be adjudicated.[101] Human rights abuses like genocide, ethnic cleansing, mass rape, torture, killing, and taking of property do not qualify as public acts of state.[102] Indeed, the United States has condemned Sudan's human rights abuses that occurred during the time of BNPP's conspiracy.[103]

Much of BNPP's argument is a misconceived analysis of the *Sabbatino* factors.[104] As the Court said in *Kirkpatrick*, the *Sabbatino* factors are pertinent only in analyzing whether the policies underlying the act of state doctrine justify not applying the doctrine "even though the validity of the act of a foreign sovereign within its own territory is called into question."[105] The doctrine is irrelevant when, as here, a case does not seek or require adjudication of the validity of a foreign sovereign's acts in its own territory. On the contrary, in such a case, an Article III court has a constitutional responsibility to hear and decide the case.[106]

D. Under New York Choice of Law Rules, New York Law Applies

New York law choice-of-law rules apply to a suit brought in diversity in a New York federal court.[107] In a case involving conduct-regulating tort rules, New York applies the law of the place where the misconduct occurred, not the law of the place of injury.[108] New York favors

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[101] *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964) (the doctrine precludes inquiry into validity of "public acts" of foreign sovereign within its own territory).

[102] *See Republic of Philippines v. Marcos*, 806 F.2d 344, 358-59 (2d Cir. 1986); *see also Filartiga v. Pena-Irala*, 630 F.2d 876, 889 (2d Cir. 1980) (doubting whether act violating Paraguay's constitution and laws could be characterized as an act of state); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 73 (2d Cir. 1977) (acts must be "public" and "governmental" for doctrine to apply), *cert. denied*, 434 U.S. 984 (1977).

[103] *See, e.g.*, SAC ¶ 141.

[104] MTD at 11-12 (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964)).

[105] *Kirkpatrick*, 493 U.S. at 409 (emphasis added).

[106] *Id.* at 409-10.

[107] *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941); *Fieger v. Pitney Bownes Credit Corp.*, 251 F.3d 386, 393 (2d Cir. 2001).

[108] BNPP asserts that Sudanese law should apply based on the "location of the alleged torts." MTD at 2. But the location of many of the alleged torts is now in the Republic of South Sudan, a separate country

the state with the greatest interest in having its laws applied,[109] and New York courts have concluded that the state where a tortfeasor commits wrongful acts has the greatest interest in applying its rules of conduct regulation.[110]

New York choice of law distinguishes between rules concerned primarily with regulating conduct and rules concerned primarily with allocating losses.[111] Here, Plaintiffs' claims arise under conduct-regulating rules—U.S. federal and state laws that regulate financial conduct in New York.[112] In such a case, "the law of the jurisdiction where the [alleged] tort occurred will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders."[113] New York's interest in applying its tort law to BNPP's misconduct is strong and tangible. As a result of the misconduct set out in the Complaint, New York authorities prosecuted BNPP and secured a guilty plea, massive fines, and bank restructuring. Even today, BNPP remains on probation and is being monitored and investigated in New York.[114]

The Second Circuit has consistently applied the conduct-regulating rules to financial institutions that commit wrongful acts in New York. In *Licci I*, families of persons killed by terrorist attacks in Israel sued foreign banks that breached New York law by facilitating the

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that seceded from Sudan in 2011. SAC ¶¶ 23-24, 39, 43, 45-46, 48, 140, 146, 224, Exs. N (Map of South Sudan, ECF No. 49-14), O (Map of Sudan, ECF No. 49-15). Therefore, under BNPP's analysis, the proper law to look for the Plaintiffs injured is the law of South Sudan yet BNPP makes no analysis whatsoever of that law.

[109] *Geron v. Seyfarth Shaw LLP*, 736 F.3d 213, 219 (2d Cir. 2013) (citation omitted) ("New York's interest analysis requires that 'the law of the jurisdiction having the greatest interest in the litigation will be applied. . . .").

[110] *Id*. at 220.

[111] *Id*.

[112] *See* SAC ¶¶ 2-3, 6, 10, 16-18, 59-67.

[113] *Cooney v. Osgood Mach., Inc*. 81 N.Y.2d 66, 72 (N.Y. 1993); *see also Schultz v. Boy Scouts of America, Inc*., 65 N.Y.2d 189, 198 (N.Y. 1985).

[114] SAC ¶¶ 16-20, 63-65, Exs. A-K; RJN, Rand Decl., Exs. 1-3 (ECF Nos. 79, 79-1 to 79-4).

transfer of money to terrorist groups that in turn carried out deadly attacks.[115] The Court held that New York had "the greatest interest in regulating behavior within its borders,"[116] even though the alleged injuries were experienced abroad. In *Licci II*, plaintiffs sought rehearing, arguing that *Elmaliach,* a subsequent First Department ruling, called *Licci I* into question.[117] The Second Circuit rejected *Elmaliach* and reaffirmed that New York law governs the New York conduct of financial institutions: "Here, we conclude that it is New York, and not Israel, that "has an overriding interest in regulating" the conduct of banks operating "within its borders."[118]

This rule is now well established. In *AHW*, a recent suit by investors alleging injury in Florida based on negligent misrepresentation and fraud by Citigroup in New York, the Second Circuit applied New York law to the claims: "[T]hese damages rules are conduct-regulating because they define the type of injury that can support a claim of fraud" and thus "New York's rules on fraud damages and negligent misrepresentation apply."[119]

The case for applying New York law is even stronger here than in *Licci* and *AHW*. In those cases, New York had more permissive conduct-regulating rules than the competing jurisdictions. Here, BNPP itself insists that New York law is more demanding than Sudanese or Swiss law.[120] New York thus has a stronger interest in applying its law. Indeed, leading conflicts commentator Symeon Symeonides characterizes such a case as a false conflict altogether: "When the conduct in question violates a conduct-regulating rule of the conduct-state, that rule applies,

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[115] *Licci v. Lebanese Canadian Bank, SAL*, 672 F.3d 155 (2d Cir. 2012) (*Licci I*).

[116] *Id*. at 158*, quoting Cooney*, 81 N.Y. 2d at 72.

[117] *Licci v. Lebanese Canadian Bank*, 739 F.3d 45 (2013) (*Licci II*); *Elmaliach v. Bank of China Ltd*., 971 N.Y.S.2d 504 (N.Y. App. Div. 2013).

[118] *Licci II*, 739 F.3d at 51, quoting *In re Allstate Ins. Co. (Stolarz)*, 81 N.Y.2d 219, 225 (1993).

[119] *AHW Inv. P'ship, MFS, Inc. v. Citigroup*, 661 Fed. Appx. 2, 4-5 (2d Cir. 2016) (summary order); *see also Padula v. Lilarn Props. Corp*., 84 N.Y. 2d 519, 522-23 (1994) (holding that where law is "primarily conduct-regulating," the law of the place of misconduct (Massachusetts) applies).

[120] *See* MTD at 15-16.

even if that conduct would not violate a conduct-regulating rule of the state of injury."[121]

BNPP's near-complete failure to address the controlling authorities is telling. The only financial services case that BNPP invokes is *Elmaliach*, the decision that the Second Circuit expressly rejected in *Licci II*.[122] BNPP barely acknowledges *Licci*, noting the case only in a footnote and then citing to *Benefield* for the proposition that *Licci* does not establish a "bright-line rule."[123] Of course, the *Licci* doctrine is not an absolute rule, as is true of most conflicts doctrines,[124] and *Benefield* is inapposite. The district court applied Georgia law in that case because (1) not only the injury but also much of the defendant's misconduct occurred in Georgia, and (2) the product liability claims concerned the pharmaceutical industry in which "the forum where the product is sold is uniquely qualified to determine the controlling standards."[125]

This case is about criminal conduct that BNPP perpetrated primarily in New York and the foreseeable harms that their crimes inflicted on Plaintiffs, and any policy considerations relate to a financial services industry that has its worldwide nexus in New York.[126] Second Circuit precedent calls for New York law to apply.

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[121] Symeon C. Symeonides, Conflict of Laws, at 248 (Oxford 2016).

[122] *See* MTD at 15-16.

[123] *See id*. at 16-17 n.19 (citing *Benefield Ltd. v. Pfizer Inc.*, 103 F. Supp. 3d 449, 459 (S.D.N.Y. 2015)).

[124] *See Schultz*, 65 N.Y.2d at 196, 198.

[125] *Id*. (citation omitted).

[126] SAC ¶ 62-65. BNPP claims that the Complaint is "riddled with assertions that are false on the face of these descriptions." MTD at 18 n.21. The first example, that Plaintiffs misstated the requirement to move part of its OFAC compliance group to New York, falsely misreads the Complaint, which explicates this requirement. SAC ¶ 205, 205 n.139. The second example, that Plaintiffs wrongly claimed that BNPP structured transactions on behalf of blocked entities, is also false. This allegation is from the Statement of Facts, which quotes a BNPP report: "The main activity of certain BNPP customers is to domicile cash flows in USD on books on behalf of Sudanese banks." SAC, Ex. C ¶ 26. The third example, that Plaintiffs wrongly claim that the transmittal messages were false or fraudulent, is mendacious given its admission to them as "non-transparent" and "deliberately modif[ied to] omit[ ] references to Sudan." *Id.* ¶¶ 16(a), 18.

E. Plaintiffs Properly Allege Claims Under New York Law

1. The Complaint Sufficiently Pleads Concerted Action Claims

a) Plaintiffs Adequately Allege BNPP's Conspiracy

BNPP's arguments about Plaintiffs' conspiracy allegations first posit a straw man: that Plaintiffs are alleging claims based on "private right[s] of action for conspiracy" under the U.S. Sanctions.[127] They are not. The Complaint alleges that ordinary tort principles make BNPP liable for all foreseeable injuries resulting from BNPP's admitted criminal conspiracy with the GOS.[128]

Under New York Law, civil conspiracy requires the plaintiff to "demonstrate the primary tort," which here BNPP does not challenge,[129] plus "four elements: (1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury."[130]

Plaintiffs' allegations about BNPP's admission to a criminal conspiracy sufficiently plead—in fact prove—the first three elements.[131] Yet BNPP asserts that "[t]he Complaint's conspiracy allegations fail to fulfill any of these requirements," referring to the elements for conspiracy. This is audacious. BNPP's admissions estop them from denying the conspiracy.[132]

The fourth element is satisfied by a showing that Plaintiffs' injuries were a foreseeable

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[127] MTD at 22.

[128] SAC ¶ 14, 152-190; *Lindsay*, 625 N.Y.2d at 398.

[129] BNPP does not challenge the primary torts underlying conspiracy and aiding and abetting. It does note that under New York law a conversion action does not lie for real property. *See* MTD at 22 n.24. With respect to real property, Plaintiffs state facts sufficient to establish trespass under New York law. *See Tornheim v. Fed. Home Loan Mortg. Corp*., 988 F. Supp. 279, 281 (S.D.N.Y. 1997).

[130] *World Wrestling Fed'n Entm't, Inc. v. Bozell*, 142 F. Supp. 2d 514, 532 (S.D.N.Y. 2001); *see* MTD at 22.

[131] *See UCAR Int'l Inc. v. Union Carbide Corp.*, No. 00 CV 1338 (GBD), 2004 WL 137073 (S.D.N.Y. Jan. 26, 2004); *See* SAC, ¶¶ 17, 101, 193, n.124; Ex. A, ¶¶ 1-5; Ex. C ¶¶ 14-17; Ex. E, ¶¶ 14-17.

[132] MTD at 23; *see City of New York v. Pollock*, No. Civ. 03 Civ. 0253 (PAC), 2006 WL 522462, at *12-14 (S.D.N.Y. Mar. 3, 2006) (civil defendants estopped from challenging RICO conspiracy violations by criminal guilty pleas).

consequence of BNPP's conspiracy.[133] Plaintiffs have plausibly alleged this element.[134] *Lindsay,* cited by BNPP, in fact demonstrates BNPP's liability: "The effect of a finding of conspiracy ***is to make the conspirators liable for each other's foreseeable acts***."[135]

First, BNPP argues that "plaintiff must 'allege at least some of the facts of agreement or separable acts, if any, of the alleged co-conspirators in order to support the responsibility of each for the acts of all the others."[136] But, again, BNPP has admitted to the illicit agreement and the overt acts in furtherance of the conspiracy to violate sanctions in its guilty pleas. This admission connects the actions of BNPP to its co-conspirator the GOS: "Allegations of conspiracy are permitted [ ] to connect the actions of separate defendants with an otherwise actionable tort."[137] BNPP's other cited case *Bigio* is inapposite: There was no conspiracy at all in *Bigio*.[138]

Second, BNPP contends that the law requires proof that it agreed to the "common goal" to "'engage[] in a persistent campaign of terrible atrocities against Sudanese civilian groups, including genocide.'"[139] That is not the law. Plaintiffs allege that BNPP "knew and accepted" that the GOS engaged in this conduct.[140] In *Kashi*, the Second Circuit held that a defendant who agreed to only part of a fraudulent shipping scheme was implicated in the broader scheme perpetrated by his co-conspirators ***and was "liable for the full extent of [plaintiff's]***

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[133] *See supra* notes.21-27; *see also*, *Lindsay*, 625 N.Y.2d at 398.

[134] *See, e.g,* SAC ¶¶ 14, 152-190.

[135] *See* MTD at 23; *Lindsay*, 625 N.Y.2d at 398 (emphasis added); *see also Regis v. Condoleo*, No. 5914/06, 2008 NYLJ LEXIS 4157, at *16 (N.Y. Sup. Ct. Nov. 7, 2008) (for purposes of concerted action liability, trier of fact must resolve issue of whether co-defendant's setting off smoke bomb using equipment contributed by defendants was "reasonably foreseeable consequence" of defendants' actions).

[136] MTD at 22-23 (quoting *Goldstein v. Siegel*, 244 N.Y.S.2d 378, 382 (N.Y. App. Div. 1963)).

[137] *Treppel v. Biovail Corp.*, No. 03 Civ. 3002 (PKL), 2004 WL 2339759, at *19 (S.D.N.Y. Oct. 15, 2004) (quotation and citation omitted).

[138] *Bigio v. Coca-Cola Co.*, 675 F.3d 163, 176 (2d Cir. 2012).

[139] MTD at 4 (quoting excerpt of SAC ¶152).

[140] SAC ¶ 152.

damages."[141] The defendant's participation was "essential to the very initiation of the scheme" and, after "he knew beyond any doubt" that his co-conspirators were defrauding the victim, he nonetheless "took no steps whatsoever to protect the latter but instead shared in the spoils."[142] Indeed, a "'***conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense***.'"[143] Thus, liability is not conditioned on the defendant's having "complete knowledge of all aims of the conspirators, or [taking] part in each branch of the conspiracy…."[144] Having engaged in a conspiracy with the GOS, BNPP cannot turn a blind eye to its foreseeable consequences and evade liability by contending that its responsibility ends with the specific acts performed. BNPP cites no case to the contrary.

A common motivation to commit the underlying torts is not required for conspiratorial liability. "[T]he fact that [a defendant] might have had different motivations for joining the conspiracy, and was involved in only a portion of it, does not undermine the existence of the conspiracy itself or [the defendant's] role as a participant."[145] Divergent motives of co-conspirators can converge to cause the co-conspirators to join a single conspiracy.[146] That is precisely what occurred here. BNPP confuses motive with the object of the conspiratorial agreement. While a primary GOS motive was to fund its human rights abuses and BNPP purports its motive was "doing business," the agreement was one and the same, and the results were foreseeable. Under New York law, that suffices to establish liability.

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[141] *Kashi v. Gratsos*, 790 F.2d 1050, 1054-55 (2d Cir. 1986) (emphasis added).

[142] *Id*. at 1055.

[143] *See State Farm Mut. Auto. Ins. Co. v. CPT Med. Servs., P.C.*, 375 F. Supp. 2d 141, 151 (E.D.N.Y. 2005) (emphasis added, citations omitted).

[144] *Bedard v. La Bier*, 20 Misc. 2d 614, 617 (N.Y. Sup. Ct. 1959).

[145] *In re Elec. Books Antitrust Litig.*, 859 F. Supp. 2d 671, 690 (S.D.N.Y. 2012).

[146] *Id*.

BNPP argues, citing *Talisman,* that Plaintiffs must "plausibly allege" that it acted with the "purpose of supporting the primary offenses."[147] But "purpose" is a pleading requirement for jurisdiction under the Alien Tort Statute, not an element of common-law conspiracy claims, making that approach to pleading inapplicable here.[148] *Stutts*, brought under the Anti-Terrorism Act, and *Ungar*, brought under D.C. law, are inapposite. Plaintiffs in those cases failed to allege the existence of any agreement, much less an admitted criminal conspiracy between the tortfeasors and the defendants.[149]

BNPP cites *Owens,* a case against BNPP also arising out of its Sanctions violations, for the proposition that Plaintiffs must allege that BNPP's criminal acts "were done in furtherance of an agreement to commit torts against Plaintiffs."[150] *Owens*, however, was a case involving an attenuated causal chain: The plaintiffs alleged that BNPP transferred money to Sudan which transferred money to Al Qaeda, which committed the terrorist acts. BNPP admits—and Plaintiffs have alleged—that their conspiracy to violate the U.S. Sanctions was formed directly with the perpetrators of human rights violations: Sudan itself. And under New York law, the agreement between conspirators need not be to commit the underlying torts; co-conspirators are liable for all foreseeable injuries caused by the other.

Third, BNPP argues that Plaintiffs fail to allege a causal connection with "each attack" that resulted in Plaintiffs' injuries.[151] This is the wrong standard for foreseeability under New York conspiracy law, and BNPP cites no New York case for this proposition. *Kiobel*, cited by

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[147] MTD at 23.

[148] *Talisman*, 582 F.3d 244.

[149] *Stutts v. De Dietrich Group*, No. 03-CV-4058 (ILG), 2006 WL 1867060 (E.D.N.Y. June 30, 2006); *Ungar v. Islamic Republic of Iran*, 211 F. Supp. 2d 91 (D.D.C. 2002).

[150] MTD at 24; *Owens v. BNP Paribas S.A.*, No. CV 15-1945 (JDB), 2017 WL 394483 (D.D.C. Jan. 27, 2017), *appeal docketed*, No. 17-7037 (Mar. 2, 2017).

[151] MTD at 24-25.

BNPP, like *Talisman*, was analyzed under the wholly inapposite jurisdictional standard required by the Alien Tort Statute.[152] In contrast, New York law asks whether the torts that injured the Plaintiffs were foreseeable by the co-conspirators. Plaintiffs have sufficiently pled that element.

b) Plaintiffs Adequately Allege BNPP's Aiding and Abetting

The elements of aiding and abetting are: (1) "the existence of a violation committed by the primary party, as opposed to the aiding and abetting party; (2) knowledge of this violation on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in achievement of the violation."[153] BNPP does not contest these elements nor, as mentioned above, challenge that the Complaint sufficiently pleads that Sudan committed the underlying torts.[154]

First, BNPP contends that Plaintiffs do "not adequately plead that the BNPP Defendants had the requisite knowledge of the acts alleged to have caused Plaintiffs' injuries."[155] In fact, the Complaint pleads in detail actual knowledge by BNPP insiders of Sudan's atrocities.[156] Those allegations are plausible in light of the wide-spread contemporaneous reporting of the "human rights crisis" waged by Sudan with oil revenues.[157] In an attempt to cabin BNPP's admissions and the plausible allegations of actual knowledge, BNPP addresses only one email from a BNPP senior compliance officer recognizing that the Sudanese banks with which BNPP dealt "play[ed]

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[152] *Kiobel v. Royal Dutch Petroleum Co*., No. 02-CV-7618, 2004 WL 5719589 (S.D.N.Y. Mar. 31, 2004). BNPP fails to mention that, two weeks earlier, the *Kiobel* court denied the defendants' motion to dismiss the complaint, holding that the allegations were sufficient to state a claim for "joint action" supporting liability under Alien Tort Claims Act. *Kiobel v. Royal Dutch Petroleum*, No. 02 Civ. 7618 (KMW) (HBP), 2004 WL 5719589, at *10 (S.D.N.Y. Mar. 31, 2004). The Second Circuit subsequently dismissed the claims for lack of subject matter jurisdiction. *Kiobel v. Royal Dutch Petroleum Co*., 621 F.3d 111 (2d Cir. 2010), *aff'd* 133 S. Ct. 1659 (2013).

[153] *Duran*, 2015 WL 1567020, at *14 (claim of aiding and abetting conversion).

[154] *See* MTD at 25-28; SAC, Counts IV, VI, VIII, X, XII, XIV, XX.

[155] MTD at 25.

[156] SAC ¶¶ 158-160, 162; *see also* SAC ¶¶ 153-169 (detailing the plethora of media sources that reported on the GOS's conduct and its connection to oil); SAC ¶¶ 183-188; Ex. C ¶ 20.

[157] See SAC ¶¶ 152-190.

a pivotal part in the support of the Sudanese government which . . . refuses the United Nations intervention in Darfur."[158] BNPP asserts this email merely discusses "the GOS's political stance vis-à-vis U.N. intervention."[159] This allegation refers to actual evidence that the Department of Financial Services ("DFS") used to support BNPP's criminal intent. This allegation, in context, plausibly shows BNPP knew that its Sanctions violations supported the GOS's actions in Darfur.

While inapposite on its facts, in *Kirschner*, cited by BNPP, the court stated, "a plaintiff must allege facts "giving rise to a 'strong inference'" of actual knowledge, "or the conscious avoidance of the same."[160] Actual knowledge can also be inferred from allegations of the "surrounding circumstances" alleged in a complaint, which permit "reasonable inference" that defendant actually knew of wrongful conduct or "willingly turned a blind eye to evidence."[161] Plaintiffs' allegations meet this standard.

Second, BNPP persists in casting its criminal actions as akin to "[t]he mere maintenance of a bank account and receipt or transfer of funds."[162] But "'[s]ubstantial assistance . . . occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the [wrongful conduct] to occur.'"[163] Here, the Complaint establishes the

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[158] MTD at 26, quoting SAC ¶ 188 (quotation and citation omitted), quoting Ex. J (DFS Press Release, ECF No. 49-10), p. 2.

[159] MTD at 26.

[160] MTD at 26 (citing *Kirschner v. Bennett*, 648 F. Supp. 2d 525 (S.D.N.Y. 2009)). *Kirschner* involved two distinct schemes by corporate insiders and held that allegations that the defendants knew about one scheme were insufficient to demonstrate their actual knowledge of the other. *See Kirschner*, 648 F. Supp. 2d at 544 (citation omitted).

[161] *AIG Fin. Prods. Corp. v. ICP Asset Mgt., LLC*, 969 N.Y.S.2d 449, 451-52 (N.Y. App. Div. 2012); *see also Landesbank Baden-Württemberg v. RBS Holdings USA, Inc*. 14 F. Supp. 3d 488 (S.D.N.Y. 2014) (a plaintiff may allege actual knowledge generally).

[162] MTD at 26 (citations omitted).

[163] *State of N.Y. Workers' Compensation Bd. v. Wang*, 46 N.Y.S.3d 230, 242 (N.Y. App. Div. 2017). Some cases also reference a need to show that the aider/abettor proximately caused the harm on which the primary liability is predicated. *See Stanfield Offshore Leveraged Assets, Ltd. v. Metro. Life Ins. Co*., 883 N.Y.S.2d 486, 489 (N.Y. App. Div. 2009). As discussed herein, that standard is also met.

critical nature of BNPP's affirmative steps to circumvent the Sanctions to provide the only means by which the GOS could have access to U.S. "petrodollars," thereby enriching the regime and enabling the military aggression against its citizens.[164] The cases BNPP cites are again inapposite. The first three involved defendants that did nothing more than maintain accounts or make wire transfers for organizations alleged to have a relationship to Hamas (the perpetrator of the harms), but did not do banking with Hamas itself.[165] The fourth case is inapposite because it concerns a defendant's inaction in violation of federal law and held that inaction by itself does not constitute "substantial assistance."[166] This is not the case here.

Third, BNPP again asserts that Plaintiffs do not "connect any financial transactions" with "any of the acts that injured Plaintiffs."[167] But that is no more the standard for "substantial assistance" than it is for proximate cause. Notably, BNPP cites no case authority for this argument.[168] BNPP's cites cases where the "substantial assistance" element was not met, but those cases have no bearing on this dispute. In *Bigio*, the court found that Coca-Cola's acquisition of an interest in a bottling plant ***some 30 years*** after the land where the plant was located had been nationalized by Egypt, was "too far removed" to be "generalized assistance."[169] *Owens* and *In re Terrorist Attacks* have nothing at all to say about the elements of an aiding and abetting claim. BNPP cites those cases for their "proximate cause" holdings,[170] but, unlike here,

[164] SAC ¶¶ 102-119.

[165] *See Weiss v. Nat'l Westminster Bank PLC*, 453 F. Supp. 2d 609 (E.D.N.Y. 2006); *Strauss v. Credit Lyonnais, S.A.*, No. 06-CV-0702 (CPS), 2006 WL 2662704 (E.D.N.Y. Oct. 5, 2006); *Goldberg v. UBS AG*, 660 F. Supp. 2d 410 (E.D.N.Y. 2009).

[166] MTD at 27 n.29, citing *Mazzaro de Abreu v. Bank of Am. Corp.*, 525 F. Supp. 2d 381 (S.D.N.Y. 2007) (granting in part, denying in part, motion to dismiss with leave to amend).

[167] MTD at 27 (emphasis in original).

[168] MTD at 27.

[169] *Bigio*, 675 F.3d at 174-75.

[170] MTD at 27-28.

both cases involved an attenuated chain of causation and fail to allege the connection between the state sponsor of terror and the terrorist organizations that caused the injuries.[171]

2. The Complaint Sufficiently Pleads Claims for Negligence Per Se

In New York, "[a]n unexcused violation of a statutory standard of care, if unexplained, constitutes negligence per se."[172] A complaint must plausibly allege that: (1) "the plaintiff is a member of the class intended to be benefited by the statute;" (2) "the statute is intended to protect against the very hazard that caused the plaintiff's injury;" and (3) the statutory violation "cause[d] the injury."[173] "Under a negligence *per se* regime, the statute creates the ***duty*** and the violation establishes the breach."[174] At that point, "if such violation is the proximate cause of the injury, liability is established."[175] Here, Plaintiffs' allegations meet each of the three elements.

With respect to Plaintiffs' claim for negligence per se for violations of the Sanctions, Plaintiffs are members of the class intended to benefit from the Sanctions, and the Sanctions aimed to protect against the very hazard that caused the Plaintiffs' injuries.[176] Thus, Plaintiffs meet the first two elements of a negligence per se claim.

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[171] *Owens v. BNP Paribas S.A.*, No. CV 15-1945 (JDB), 2017 WL 394483, *10 (D.D.C. Jan. 27, 2017); *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 118, 124 (2d Cir. 2013). BNPP also cites *Rothstein* for the same proposition, but, like in *Owens* and *In re Terrorist Attacks*, the chain of causation is attenuated: "It does not allege that UBS provided money to Hizbollah or Hamas. It does not allege that U.S. currency UBS transferred to Iran was given to Hizbollah or Hamas." *Rothstein v. UBS AG*, 708 F.3d 82, 97 (2d Cir. 2013).

[172] *Mahar v. U.S. Xpress Enterprises, Inc.*, 688 F. Supp. 2d 95, 108 (N.D.N.Y. 2010) (citation omitted).

[173] *Velasquez v. U.S. Postal Service*, 155 F. Supp. 3d 218, 227-28 (E.D.N.Y. 2016) (quotation and citation omitted).

[174] *German v. Fed. Home Loan Mortg. Corp.*, 896 F. Supp. 1385, 1397 (S.D.N.Y. 1995) (emphasis added).

[175] *Prohaska v. Sofamor, S.N.C.*, 138 F. Supp. 2d 422, 448 (W.D.N.Y. 2001) (citation omitted).

[176] *See supra* notes 8-14 and accompanying text.

Plaintiffs also meet the third element, proximate cause, because Plaintiffs have plausibly alleged injuries that were a "natural and foreseeable consequence" of BNPP's actions.[177] Notably, proximate cause is invariably a factual issue, not to be decided as a matter of law.[178]

With respect to Plaintiffs' claim for negligence per se for falsification of business records, Plaintiffs' claim is based on BNPP's felony violation of § 175.10, which states, "[a] person is guilty of falsifying business records in the first degree when he commits the crime of falsifying business records in the second degree [New York Penal Law § 175.05], and when his intent to defraud includes an intent to commit another crime or to aid or conceal the commission thereof."

First, Plaintiffs are members of the class intended to be benefited by § 175.10, which is a remedial law to benefit the victims of the underlying crime that the person falsifying the business records intends to commit or conceal.[179] If the records were not falsified, the underlying crime could have been exposed earlier thereby preventing the crime. Therefore, if the plaintiff falls within the class of people that the underlying statute—here the Sanctions—is intended to benefit, the plaintiff also falls within the class of people that § 175.10 is intended to benefit.

Second, Section 175.10 is intended to protect the victims of underlying crime—here the Sanctions. Thus, if the plaintiff is injured by the Sanctions, the plaintiff is also injured under § 175.10. Here, BNPP's violation of § 175.10 necessarily included the intent to violate the

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[177] *See Allison v. Rite Aid Corp*., 812 F. Supp. 2d 565, 568-69 (S.D.N.Y. 2011); SAC ¶¶ 101, 106, 108-09, 113, 116-18, 120-21, 123, 126-51, 185.

[178] *See In re Sept. 11 Prop. Damage & Bus. Loss Litig*., 468 F. Supp. 2d 508, 519-20 (S.D.N.Y. 2006), *aff'd sub nom, Aegis Ins. Servs., Inc. v. 7 World Trade Co., L.P.,* 737 F.3d 166 (2d Cir. 2013); *Newman v. RCPI Landmark Props., LLC,* 28 N.Y. 3d 1032, 1033 (N.Y. 2016).

[179] *See, e.g., People v. Ackermann*, 989 N.Y.S.2d 268, 271 (N.Y. Sup. Ct. 2014).

Sanctions or conceal their violations.[180] Therefore, § 175.10 was intended to protect Plaintiffs from those same injuries.

Third, the element of causation is satisfied because, had BNPP not falsified business records, New York and federal authorities would have discovered BNPP's Sanctions violations and would have stopped BNPP and the resulting "macabre feedback loop."[181]

In response, BNPP does not put forward an argument as to whether the Complaint states claims for negligence per se. Rather, it addresses "a private right of action."[182] BNPP misses the point. Negligence per se and private rights of action under a statute are "two analytically related but ***legally distinct*** concepts."[183] "[O]ne does not exclude the other."[184] A private right of action seeks "to enforce [a statute] privately."[185] It "imposes per se liability without any of the limitations application to the common-law forms of action," whereas in negligence per se, the "[p]laintiff seeks to recover for the common law tort of negligence and to use [the statutory] violations as proof that [the defendant] breached its duty of care."[186] BNPP relies on *Broder* and *Christian*, but neither addresses negligence per se claims.[187] Nor do any of any of BNPP's other

[180] *See*, e.g., *People v. Box,* 44 N.Y.S.3d 645, 647-48 (N.Y. App. Div. 2016) (intent to commit separate crime of identity theft was an element of falsifying business records in the first degree where defendant applied for a credit card in grandfather's name).

[181] SAC ¶¶ 11, 290; *see also* SAC ¶¶ 170-82 (public pressure would have stopped BNPP).

[182] MTD at 30; *see also* MTD at 22 ("But there is no private right of action for a conspiracy to violate U.S. sanctions.").

[183] *Loewy v. Stuart Drug & Surgical Supply, Inc.*, No. 91 CIV. 7148 (LBS), 1999 WL 216656 at *2 (S.D.N.Y. Apr. 14, 1999) (emphasis added).

[184] *Signature Health Center, LLC v. New York*, 902 N.Y.S.2d 893, 903 (N.Y. Ct. Cl. 2010).

[185] *Loewy,* 1999 WL 216656*,* at *2.

[186] *Signature Health Center*, 902 N.Y.S.2d at 903.

[187] *See* MTD at 31; *Broder v. Cablevision Systems Corp.*, 418 F.3d 187, 200-01 (2d Cir. 2005); *Christian v. Town of Riga*, 649 F. Supp. 2d 84, 91 (W.D.N.Y. 2009).

cases.[188] Plaintiffs use the Sanctions and § 175.10 to define the duty owed by BNPP to Plaintiffs. At a minimum, BNPP's violations of the Sanctions and § 175.10 constitute evidence of its negligent conduct sufficient to survive a motion to dismiss.[189]

BNPP also contends, citing *In re Terrorist Attacks*, that it did not "owe[] a duty to Plaintiffs" because "as a general matter under New York law, banks do not owe non-customers a duty to protect them from the international torts of their customers."[190] This argument is a red herring. *In re Terrorist Attacks* is not a negligence per se case.[191] In negligence per se cases, the duty comes from the law violated. Thus, any common law duty is beside the point.[192]

3. The Complaint Sufficiently Pleads Claims for Intentional and Negligent Infliction of Emotional Distress

The parties agree on the elements that must be established for an intentional infliction of emotional distress cause of action under New York law:

> The tort has four elements: (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional

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[188] *See* MTD at 18, 22 n.23, citing *Peterson v. Islamic Republic of Iran*, No. 13-cv-9195 (KBF), 2015 WL 731221, at *1 (S.D.N.Y. Sept. 20, 2015) (declaratory judgment, rescission of fraudulent conveyances, turnover, and equitable relief); *McFadden v. Ortiz*, No. 5:12-CV-1244 (MAD/ATB), 2013 WL 1789593, at *3 (N.D.N.Y. Apr. 26, 2013) (cause of action was for violating "the New York Penal Law regarding falsifying business records"); *Am. Bank and Trust Co. v. Bond Int'l Ltd.*, 464 F. Supp. 2d 1123, 1124 (N.D. Okla. 2006) (moving to appoint a receiver); *Glen v. Club Mediterranee S.A.*, 365 F. Supp. 2d 1263 (S.D. Fla. 2005) (TWEA claims and declaratory relief); *Vasile v. Dean Witter Reynolds Inc.*, 20 F. Supp. 2d 465, 481 (E.D.N.Y. 1998) (direct claims for criminal and civil conspiracy).

[189] *See Vasquez v. Soriano*, 965 N.Y.S.2d 121-22 (N.Y. App. Div. 2013).

[190] MTD at 30 (quoting *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d at 216 (quotation and alteration omitted)).

[191] *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d at 126.

[192] In any event, New York law establishes a duty in circumstances like these even absent criminal conduct: "Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to the circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." *Havas v. Victory Paper Stock Co., Inc.*, 49 N.Y.2d 381, 386 (N.Y. 1980) (quotation, citation, and alteration omitted); *Varga v. Parker*, 524 N.Y.S.2d 905, 906 (N.Y 1988) (same).

> distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress.[193]

The Complaint alleges each of these elements, including the linchpin of this cause of action—severe emotional distress.[194] BNPP does not contend otherwise.[195]

First, BNPP asserts that its conduct was not extreme and outrageous. Once again, BNPP asserts it was merely "processing financial transactions" for a third party, who was the actual perpetrator. For this, BNPP cites *In re Terrorist Attacks*, where the Second Circuit declined to hold banks accountable where they provided legal "routine banking services."[196] *In re Terrorist Attacks* and other cases dealing with banks acting in the ordinary course are inapposite.

Second, BNPP contends that its sanctions violations were not "intentionally directed" at Plaintiffs and/or were not "motivated by an intent to cause Plaintiffs harm."[197] Plaintiffs do not, and need not, allege that BNPP specifically intended to commit genocide and human rights abuses. But, under New York law, "reckless conduct is encompassed within the tort denominated intentional infliction of emotional distress" and is established upon a showing that a defendant disregarded "'a substantial probability of causing' severe emotional distress."[198] Here, Plaintiffs allege facts showing that BNPP consciously disregarded a substantial probability of causing severe emotional distress to Sudanese civilians targeted by GOS genocide and human rights atrocities when it did billions of dollars of criminal transactions with its co-conspirator who

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[193] *Howell v. N.Y. Post Co.*, 81 N.Y.2d 115, 121-22 (N.Y. 1993); *see also Bender v. City of New York*, 787 F.2d 790 (2d Cir. 1996).

[194] SAC ¶¶ 473-480.

[195] SAC ¶¶ 473-480; MTD at 28-29.

[196] *In re Terrorist Attacks on Sept.11, 2001,* 714 F.3d 118, 124 (2d Cir. 2013).

[197] MTD at 29.

[198] *Dana v. Oak Park Marina*, 660 N.Y.S.2d 906, 910 (N.Y. App. Div. 1997) (citation omitted).

perpetrated those atrocities.[199] Moreover, BNPP officials at senior levels understood and consciously disregarded the ongoing "humanitarian catastrophe."[200]

Finally, BNPP challenges causation, asserting that "[a]llegations based solely on the provision of financial services to a third party … fail to satisfy IIED's causation requirement."[201] Of course, that does not respond to the Complaint here. At trial, Plaintiffs' burden on causation will not be to establish that BNPP itself wielded the swords or dropped the bombs or savaged the women and children, but rather to show that BNPP's own criminal contribution was a substantial factor in causing those horrors to occur.[202] The facts in the Complaint, all clearly alleged and in part admitted, provide a clear basis on which the jury can make that determination.

The Complaint also sufficiently pleads negligent infliction of emotional distress, which BNPP does not even address except a boilerplate footnote suggesting it fails "for the reasons stated in" its earlier section addressing intentional infliction of emotional distress.[203] Unlike the intentional claim, a claim for negligent infliction of emotional distress does not require either outrageous conduct or an intentional or reckless mental state by the defendant. Rather, liability attaches based on "the traditional negligence concept that by unreasonably endangering the plaintiff's physical safety the defendant has breached a duty owed to him or her for which he or she should recover all damages sustained…."[204] Here, BNPP's negligence caused an unreasonable danger to the Plaintiffs' safety, including by the Sanctions violations and § 175.10

[199] *See, e.g.,* SAC ¶¶ 152-169.

[200] SAC ¶¶ 183-88; Ex. C at ¶ 20.

[201] MTD at 29.

[202] *Nallan v. Helmsley-Spear, Inc.,* 50 N.Y.2d 507, 520-21 (N.Y. 1980) ("Of course, the fact that the 'instrumentality' which produced the injury was the criminal conduct of a third person would not preclude a finding of 'proximate cause' if the intervening agency was itself a foreseeable hazard.") (citing Restatement, Torts 2d, §§ 302B, 449; Prosser, Torts [4th ed], at 271-272).

[203] MTD at 30 n.30.

[204] *Bovsun v. Sanperi*, 61 N.Y.2d 219, 229 (N.Y. 1984).

which provide evidence of a duty and standard of care.[205] Recovery of emotional damages is also provided for those traumatized by witnessing the injury or death of a close relative.[206]

4. The Complaint Sufficiently Pleads Commercial Bad Faith

A claim for commercial bad faith lies for any "scheme or acts of wrongdoing" so long as either (1) the "bank's actual knowledge of the scheme or wrongdoing [ ] amounts to bad faith," or (2) the banks principals were "complicit[ ] . . . in alleged confederations of the wrongdoers."[207] The Complaint plausibly alleges each of these elements.[208]

BNPP, relying on *Lerner*, disagrees and first contends that claims for commercial bad faith relate only to "fraud in the making and cashing of checks and were created as an exception to the general rule that a bank is absolved of liability for a check made out to a fictitious payee when the maker knows that the payee is fictitious."[209] However, the *Lerner* court's characterization merely described one application of the doctrine, not its entire scope as BNPP alleges. In fact, numerous courts have found commercial bad faith claims in contexts other than checks made out to fictitious payees.[210] Similarly, here, in violation of U.S. laws, BNPP completed thousands of illegal financial transactions that gave the GOS unlawful access to the

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[205] *See* SAC ¶¶ 30-52.

[206] *See Bovsun*, 61 N.Y.2d at 229.

[207] *Musalli Factory for Gold & Jewellry v. JPMorgan Chase Bank, N.A.*, 261 F.R.D. 13, 24 (S.D.N.Y. 2009) (quoting *Mazzaro*, 525 F. Supp. 2d at 394-95), *aff'd sub nom*, *Musalli Factory for Gold & Jewellry Co. v. JPMorgan Chase Bank, N.A.*, 382 F. App'x 107 (2d Cir. 2010).

[208] *See supra* notes 35, 38-40; s*ee also* SAC ¶¶ 183-84.

[209] MTD at 33 (citing *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 293 (2d Cir. 2006) (quotations omitted)).

[210] *See, e.g., Rosner v. Bank of China*, No. 06 CV 13562, 2008 WL 5416380, at *3 (S.D.N.Y. Dec. 18, 2008), *aff'd*, 349 F. App'x 637 (2d Cir. 2009) (bank aided company's theft of investor money by fraudulently transferring that money outside of the U.S.); *Mazzaro de Abreu v. Bank of Am. Corp.*, 525 F. Supp. 2d 381, 395 (S.D.N.Y. 2007) (bank made fraudulent transfers for another bank that solicited funds from investors with the promise of a profit and instead used said funds to pay vendors and lenders); *Prudential-Bache Sec., Inc. v. Citibank, N.A.*, 73 N.Y.2d 263, 266-67 (N.Y. 1989) (bank employees accepted bribes to open and service illegal accounts that were part of an embezzlement scheme).

U.S. financial system which provided necessary support for the GOS's campaign of violence and human rights abuses and which, as the DFS said, "involved numerous schemes."[211] These types of acts of wrongdoing are clearly contemplated by the commercial bad faith doctrine. BNPP next argues that Plaintiffs have not made the required showing of actual knowledge. However, not only did BNPP have actual knowledge that its actions were in violation of U.S. Sanctions, it also knew that these actions enabled the GOS to perpetrate its violence.[212] These allegations are more than sufficient to show actual knowledge.[213]

5. The Complaint Sufficiently Pleads Unjust Enrichment

To plead unjust enrichment "[a] plaintiff must allege 'that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered.'"[214] A plaintiff must "assert a connection between the parties that [is] not too attenuated,"[215] and "a defendant's awareness of the plaintiff and of the potential negative impact of its own conduct on the plaintiff may serve as further indication of the required closeness between parties."[216] A claim for unjust enrichment "depends upon broad considerations of equity and justice."[217] Here, Plaintiffs have alleged that BNPP was enriched by fees from billions in transactions at Plaintiff's expense, and that it is

[211] *See, e.g.* SAC, Ex. J, at 3.

[212] *See, e.g.*, SAC ¶¶ 121, 188; Ex. J at 2 (BNPP played a '"pivotal part in the support of the Sudanese government which . . . refuses the United Nations intervention in Darfur.'").

[213] *See Mazzaro de Abreu*, 525 F. Supp. 2d at 395-96 (plaintiff adequately stated a commercial bad faith because the allegation that the bank's principal expressed concern for getting caught making fraudulent transfers and violating U.S. laws).

[214] *Philips Int'l Invs., LLC v. Pektor*, 982 N.Y.S.2d 98, 102 (N.Y. App. Div. 2014) (quoting *Georgia Malone & Co. v. Rieder*, 19 N.Y.3d 511, 516 (N.Y. 2011)).

[215] *Georgia Malone*, 19 N.Y.3d at 517 (citation omitted).

[216] *Chen v. New Trend Apparel*, 8 F. Supp. 3d 406, 465 (S.D.N.Y. 2014) (citing *Georgia Malone*, 19 N.Y.3d at 517).

[217] *Philips Int'l Invs.*, 982 N.Y.S.2d at 102 (citing *Paramount Film Distrib. Corp. v. New York*, 30 N.Y.2d 415, 421 (N.Y. 1972), *cert. denied* 414 U.S. 829 (1973) (citation omitted) (emphasis in original)).

against equity to allow BNPP to retain its ill-gotten gains.[218] As to the sufficiently close connection to BNPP, Plaintiffs allege BNPP's "awareness of the plaintiff[s]," "the potential negative impact of its own conduct on the plaintiff[s]," and BNPP role as a "de facto Central Bank" of Sudan, which put it in unique relationship to the population of Sudan.[219]

F. Plaintiffs' Allegations Establish Claims Under Sudanese and Swiss Law

Even were the Court to apply Swiss or Sudanese law, the facts alleged sufficiently plead causes of action under those laws. Under Swiss law, as described in the Declaration of Franz Werro, Article 50 Section 1 of the Swiss Code of Obligations ("CO") provides a cause of action. Under Sudanese law, as described in the Declaration of Nagi Idris, the Sudan Civil Transactions Act provides causes of action. Further, Werro and Idris refute BNPP's experts' respective analyses. BNPP's foreign law declarations are also facially flawed. For example, Roberto argues that Plaintiffs have not set forth a claim under Swiss tort law. Even though, as explained by Werro, Roberto misstates the requirements of Article 50 CO,[220] Plaintiffs meet the misstated requirements because they do allege that BNPP's actions were "substantial" and "either willful or immediate."[221] Roberto's case on joint tortfeasors also supports Plaintiffs here, not BNPP.[222]

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[218] SAC ¶ 501.

[219] SAC ¶¶ 106, 152-90, 197-98. BNPP's cases do not fit the facts here. *Corsello* holds that unjust enrichment is not available where it duplicates a conventional contract or tort claim. *See Corsello*, 18 N.Y.3d at 790-91. *Mandarin* holds that the connection between the plaintiff, who authored an anonymous appraiser letter that found "a path to a prospective purchaser" was insufficient. *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182-183 (N.Y. 2011). *Chevron* holds that an unjust enrichment claim was inchoate because the defendant was not yet enriched. And *Broder* holds that unjust enrichment is not available where it was not "independent of the requirements of the [federal] statute." *Broder*, 418 F.3d at 203.

[220] Roberto Decl. ¶ 20. Roberto cited SCT 104 [1978] II 25 for "willful" but in that case, the Swiss Federal Tribunal states that the "parties must have caused the damage together either willfully **or negligently.**" Roberto Decl. ¶ 25 (emphasis added).

[221] *Compare* SAC ¶ 91 (willful); ¶¶ 116-17, 121, 135 (immediate); ¶¶ 106, 116-17, 121 (substantial) with Roberto Decl. ¶ 28 (purportedly unsatisfied requirements).

G. Plaintiffs Properly Assert Claims Against BNPPNY and BNPPNA

BNPPSA's New York Branch has a separate legal status.[223] BNPP contends "the domestic branch of a foreign bank is not a separate legal entity."[224] In response, Plaintiffs offered to dismiss the New York Branch if BNPPSA agreed to its liability for the Branch's acts and not to raise any defenses based on that separate status, such as discovery. BNPP rejected that offer.[225] Therefore, the Branch should remain a defendant or be dismissed with an appropriate order.

BNPPNA is properly named as a Defendant. The DFS Press Release stated, "BNPP's violations were particularly egregious in part because they … were committed with the knowledge of multiple senior executives." As an example of such a senior executive, the Press Release then points to the Head of Ethics and Compliance for BNPP North America, quoting him as saying, 'the dirty little secret isn't so secret anymore, oui?'"[226] Thus, Plaintiffs properly allege BNPPNA's active participation in the torts alleged.[227]

IV. CONCLUSION

For the reasons set forth herein, Plaintiffs respectfully request that the Court deny Defendants' Motion to Dismiss or in the alternative request leave to amend.

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[222] *See, e.g.*, Roberto Decl. ¶ 28 (discussing SCD 79 [1953] II 66) (finding joint tortfeasor liable when instrumental in bringing about the circumstances that lead to the injury, even though the tortfeasor did not intend the injuries that ultimately occurred).

[223] *Greenbaum v. Handelsbanken*, 26 F. Supp. 2d 649, 653 (S.D.N.Y. 1998) ("for certain purposes, both New York and federal law treat branches as separate entities").

[224] MTD at 34, quoting Greenbaum, 26 F.Supp.2d at 651-52.

[225] Decl. of Thomas B. Watson, ¶¶ 2-4 and Exs. 1-2.

[226] SAC, Ex. J at 3.

[227] *See, e.g., Silvercreek Management, Inc. v. Citigroup, Inc.*, No. 02-CV-881 (JPO), 2017 WL 1207836, at *12 (S.D.N.Y. Mar. 31, 2017) (conspiracy sufficiently alleged when the defendants "knowingly agreed to participate in the allegedly fraudulent transactions").

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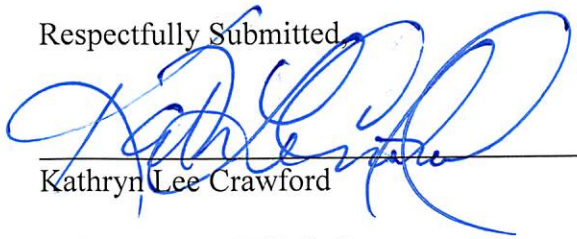
Respectfully Submitted,



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