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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x
4 ENTESAR OSMAN KASHEF, et al.,

5 Plaintiffs,

6 v.

16 CV 3228 (AJN)

7 BNP PARIBAS SA, et al.,

8 Defendants.
9 -----x

New York, N.Y.
October 24, 2019
3:00 p.m.

10 Before:

11 HON. ALISON J. NATHAN,

12 District Judge

13 APPEARANCES

14 PIERCE BAINBRIDGE BECK PRICE & HECHT LLP

15 Attorneys for Plaintiffs

16 BY: KATHRYN LEE CRAWFORD

17 MATTHEW PHILIP RAND

SHIRA LAUREN FELDMAN

18 CLEARY GOTTlieb STEEN & HAMILTON LLP

19 Attorneys for Defendants

20 BY: CARMINE D. BOCCUZZI JR.

21 KATHERINE R. LYNCH

22 RATHNA J. RAMAMURTHI
23
24
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1 (Case called)

2 THE COURT: I will take appearances of counsel,
3 starting with counsel for the plaintiffs.

4 MS. CRAWFORD: Kathryn Lee Crawford on behalf of the
5 plaintiffs.

6 MR. RAND: Matthew Rand on behalf of the plaintiffs.

7 MS. FELDMAN: Shira Feldman on behalf of the
8 plaintiffs.

9 THE COURT: Good afternoon to the three of you.
10 And on behalf of the defendants?

11 MR. BOCCUZZI: Carmine Boccuzzi on behalf of the
12 defendants.

13 MS. LYNCH: Katherine Lynch on behalf of the
14 defendants.

15 MS. RAMAMURTHI: Rathna Ramamurthi on behalf of the
16 defendants.

17 THE COURT: Good afternoon, counsel. Please be
18 seated.

19 We are here on the defendants' renewed motion to
20 dismiss, for oral argument on the renewed motion to dismiss,
21 following remand from the Second Circuit.

22 What I'd like to do is give each side a half an hour,
23 with defendants arguing first. You have indicated some
24 division of time between counsel, which is fine, with the
25 caveat that my expectation is that we have a "one lawyer per

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1 issue" rule, so that it's clear who's arguing what, and you're
2 not cross-moving between the same side.

3 So, for the defendants, who will argue first?

4 MR. BOCCUZZI: I will, your Honor.

5 THE COURT: Okay. Would you like to reserve time?

6 MR. BOCCUZZI: Yes. We would like to reserve about
7 five minutes.

8 THE COURT: All right. So we'll try to give you
9 notice before the 25 minutes have elapsed.

10 MR. BOCCUZZI: Okay.

11 THE COURT: This is Mr. Boccuzzi?

12 MR. BOCCUZZI: Yes, your Honor.

13 THE COURT: Am I saying that right?

14 MR. BOCCUZZI: Boccuzzi.

15 THE COURT: Boccuzzi? Thank you.

16 MR. BOCCUZZI: Good afternoon. Carmine Boccuzzi from
17 Cleary Gottlieb for the BNPP defendants.

18 I would like to start by discussing -- and I will
19 actually now tell you how we will divide the argument. My
20 colleague, Katherine Lynch, she will address primary liability
21 and the intentional infliction of emotional distress claim, and
22 I will deal with choice-of-law issues, secondary liability
23 issues, aiding and abetting and conspiracy.

24 THE COURT: Okay. And you will start with choice of
25 law?

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1 MR. BOCCUZZI: Yes.

2 The parties have obviously written quite a bit about
3 choice of law, given the number of jurisdictions that the
4 conduct touches upon. I think, your Honor -- and just to
5 replay those -- the plaintiffs are Sudanese individuals now in
6 the United States. They were injured in the Sudan by other
7 Sudanese individuals; BNP, a French bank, primarily through its
8 Swiss affiliate, violated OFAC sanctions and processing dollar
9 transactions. The connection to New York is that since this
10 involved dollar clearing, like the trillions of other
11 transactions that involve dollar clearing, the transactions
12 passed or touched in some way on New York.

13 So, as we argued, applying the governmental interest
14 analysis, Sudan or Swiss law should apply; however, I think,
15 your Honor -- and we would say that, given that these claims
16 fail to state a claim under any applicable law, your Honor
17 could take the route that you did in the first motion to
18 dismiss on the unjust enrichment and the commercial bad-faith
19 claims, which is to say that, even under New York law, which
20 appears common ground as arguably the most permissive of the
21 bodies of law, these causes of action fail to state a claim.

22 THE COURT: I think, analytically, what would be most
23 useful to me -- I understand strategically why you've
24 structured it as you have, but the first question, based on
25 your supplemental briefing, is whether federal law somehow

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1 preempts -- and I suppose there's a subset of questions there,
2 but that's number one. Assuming the answer to that is no, then
3 the next question is the choice-of-law question, what law
4 applies to the particular claims -- New York, Sudanese, Swiss
5 law -- and then the third branch of the decision tree is, with
6 respect to each of those claims, under the controlling law, is
7 a plausible claim stated? That's how I think of it.

8 MR. BOCCUZZI: Sure. And I was going to get to the
9 federal law point. I was just thinking chronologically how it
10 unfolded, because, obviously, in our view, the Second Circuit's
11 decision, which accepted plaintiffs' invitation to cast these
12 claims as jus cogens claims, and characterizing them and
13 accepting that they're jus cogens claims, said, therefore, that
14 was a basis for rejecting the application of the act-of-state
15 doctrine. I think that holding is now significant here, when
16 we think about the governmental interest analysis. When we're
17 talking about jus cogens claims -- and we've cited case law,
18 the Doe case and the Ungaro case from Florida -- we're thinking
19 more as a choice-of-law analysis. And the Doe case discusses
20 it in this way before it talks about preemption, and it says
21 the U.S. government, the federal government, has the greatest
22 interest in claims implicating international torts, which the
23 Second Circuit says are what we are dealing with.

24 Once you're in the land of international torts, you're
25 in the land of the federal common law. And under the Jesner

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1 case, which came down from the Supreme Court after your Honor
2 decided the first motion to dismiss or the first part of the
3 motion to dismiss in this case, those claims are not actionable
4 against the BNPP defendants.

5 So we would say the choice-of-law analysis shifts
6 somewhat because now you have a new interested jurisdiction and
7 a new applicable body of law, and the first and foremost
8 jurisdiction, as it were, with the greatest governmental
9 interest here would be the U.S., and that requires the
10 application of *Jesner* and so the dismissal of these claims.

11 Now, then, going past that, if the Court decides that
12 it doesn't go the federal law route or it wants to consider the
13 claims --

14 THE COURT: Just so I understand, the federal law
15 route that you're arguing, I think subsumed in your analysis of
16 the circuit's decision is the idea that -- sort of
17 question-begging -- that the law of *jus cogens* or international
18 law applies because the court held that the act-of-state
19 doctrine doesn't apply where, at base, that's the conduct at
20 issue, right?

21 MR. BOCCUZZI: Right.

22 THE COURT: The circuit did say, to be sure, to
23 prevail in the secondary liability claims against BNPP, the
24 plaintiffs will need to establish primary torts committed by
25 the Sudanese regime.

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1 What do you make of primary torts?

2 MR. BOCCUZZI: I think, since this is cast in the
3 nature of giving material support to genocide, as against my
4 client, which is the way the Second Circuit talked about the
5 tort here, there would have to be a finding that in fact there
6 was a genocide that happened during the relevant period of the
7 complaint and in the context of the named 21 plaintiffs. So I
8 think the primary tort there is the concept of a primary
9 international law tort, because the Second Circuit is quite
10 explicit that these are jus cogens violations, and because
11 they're jus cogens violations, that's why, as a second reason,
12 it found the act-of-state doctrine didn't apply.

13 So I don't think that they were steering us to say, by
14 using that language, it's some tort under a local law, because
15 it's talked about in the context of the case that frames these
16 and accepts the characterization from plaintiffs of these
17 claims as international jus cogens claims or international tort
18 claims.

19 At least that's how we read the decision, your Honor.
20 But, again, if you then march through --

21 THE COURT: I want you to march down through in a
22 moment.

23 MR. BOCCUZZI: Okay.

24 THE COURT: I just do want to make sure I understand:
25 The idea of if, under the governmental interest analysis,

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1 federal law somehow controls as the rule of decision, what law
2 am I then applying?

3 MR. BOCCUZZI: Well, then I think you're looking at
4 the body of case law that you find in the context of the Alien
5 Tort Statute, which talks about international law claims and
6 spends a lot of time trying to figure out the contours of
7 international law and how to apply it, and the most recent
8 utterance on that law which we have from the Supreme Court, the
9 Jesner case, says that, under that body of law, since it's not
10 a clear international law norm around corporate liability,
11 therefore, a case like this needs to be dismissed. And the
12 Jesner case involved arguments or claims that Arab Bank, in
13 that case, had processed money for -- I think there it wasn't
14 state sponsors of terrorism but, rather, actual terrorist
15 organizations. And the claim was that that was a jus cogens
16 violation, cognizable under the Alien Tort Statute. And the
17 court said, no, they weren't going to recognize that.

18 THE COURT: All right. So if you would move to the
19 second category.

20 MR. BOCCUZZI: Sure. So that would be the rule of
21 decision under the federal rubric.

22 But then, moving down to the next one --

23 THE COURT: I'm sorry, I keep stopping you.

24 MR. BOCCUZZI: Yes.

25 THE COURT: So you would say there's no sort of

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1 separate body of federal common law with respect to these
2 claims, and I would look at the body of law developed under ATS
3 and TVPA? That's the body of law I look to?

4 MR. BOCCUZZI: Yes, yes.

5 THE COURT: Okay.

6 MR. BOCCUZZI: But then, moving now to the three
7 jurisdictions that were discussed in the main briefs, again,
8 submitted to your Honor before *Jesner*, you consider which
9 country has the greatest governmental interest in what's
10 happened here.

11 THE COURT: Just to start with the basics, I think
12 everybody agrees New York law of conflicts of law applies?

13 MR. BOCCUZZI: Yes, your Honor.

14 THE COURT: Okay.

15 MR. BOCCUZZI: And that was the New York conflicts
16 rule that I just articulated.

17 THE COURT: Yes.

18 MR. BOCCUZZI: So when you're looking at -- and
19 everybody agrees these are conduct-regulating rules.

20 THE COURT: Right.

21 MR. BOCCUZZI: So then you look at the place where the
22 tort occurred. Plaintiffs' counsel relies on *Licci*. And *Licci*
23 applied New York law, but in the context of that case, it was
24 understood by the Second Circuit that all the tortious acts by
25 the bank in that case occurred in New York. Here, however, the

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1 tortious acts really took place either in the Sudan, where the
2 plaintiffs were injured, or else where the banking decisions
3 were made, which, we say, is Switzerland. Again, the
4 transactions passed through New York; however, the sort of
5 decision-making et cetera was really based in Switzerland, so
6 applying the Licci approach, you would have to look to Swiss
7 law.

8 We also cite the Wultz case, which in that case, I
9 believe, looking at the various jurisdictions --

10 THE COURT: Your argument is that Swiss law would
11 apply to all of the claims?

12 MR. BOCCUZZI: Yes, your Honor, yes, your Honor.

13 THE COURT: No distinction between the secondary
14 liability and primary liability?

15 MR. BOCCUZZI: I think we say the order is, if you
16 don't apply Sudanese law, then you would go to Swiss law, and
17 it would apply across the board I. Think the one distinction
18 you could make --

19 THE COURT: So your first argument is that Sudanese
20 law applies?

21 MR. BOCCUZZI: I'm sorry, your Honor. Looking at the
22 tortious conduct at issue here, which is, their claims against
23 my client, the bank, I think you would start with Swiss law,
24 but if you fell away from Swiss law, I think the next
25 jurisdiction would be Sudanese law.

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1 THE COURT: And that's because injury occurred in
2 Sudan?

3 MR. BOCCUZZI: Correct.

4 THE COURT: And at least some conduct occurred -- I
5 mean, it seems like there might be cross-jurisdictional
6 conduct, no?

7 MR. BOCCUZZI: Yes, yes. And certainly the primary
8 tortious conduct, the acts by the Sudanese individuals against
9 the Sudanese plaintiffs, all happened in the Sudan. And then
10 the alleged secondary activity, which they say was by my client
11 in processing these transactions, happened outside the Sudan,
12 in primarily Switzerland, we would say.

13 THE COURT: Okay.

14 MR. BOCCUZZI: And then we think that the jurisdiction
15 is comparative. The least governmental interest is New York.
16 Obviously, these transactions touch New York, they involved
17 dollars, they went through various New York banks, and so
18 New York governmental interests are implicated, but we don't
19 think, applying the governmental interest analysis, that those
20 interests are at the forefront.

21 All that being said, again, it may be easiest just to
22 apply New York law because the parties seem to agree that
23 that's the most permissive. And there are common strands
24 through all three laws, and that is, primarily, the lack of
25 causation is a key point, and the conspiracy claims, the lack

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1 of an agreement among the parties, any well-pled allegation of
2 an agreement among the parties to commit these human rights
3 abuses.

4 And so there, on the conspiracy point, I think the key
5 is that plaintiffs say there are four elements of
6 conspiracy - an agreement, an overt act, parties' intentional
7 participation with a common plan or purpose. They argue those
8 first three elements are all satisfied by BNPP's guilty plea
9 often the OFAC violations. That is incorrect. Plaintiffs are
10 really mushing together two conspiracies, the conspiracy that
11 my client pled guilty to, which was the conspiracy to violate
12 OFAC sanctions, versus the conspiracy to commit human rights
13 violations. That second conspiracy, there are no well-pleaded
14 facts that BNPP ever entered into that conspiracy.

15 And, your Honor, if your Honor were to accept this,
16 you'd be ruling in line with the mass of cases that are
17 considering these types of allegations, where banks have pled
18 guilty to violating OFAC, and then there have been claims
19 brought by the victims of terrorist activities, and the
20 plaintiffs have argued that that should all be put together.
21 The courts have been uniform -- we cite the O'Sullivan case in
22 our supplemental briefing. Again, that came out after your
23 Honor ruled on the first motion to dismiss. There's the
24 Freeman case that just came out of the Eastern District on
25 September 30th, the Siegel case in the Second Circuit. All

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1 these cases make the distinction and dismiss claims because
2 those cases are missing the allegation that the bank that
3 violated OFAC sanctions, that there are facts that supported
4 the idea that the bank was actually conspiring to violate human
5 rights or otherwise participate in a terrorist act. So that's
6 number one.

7 On the other argument, aiding and abetting, is lack of
8 proximate causation. I would just say, lack of proximate
9 causation covers all of these torts. And our reason to dismiss
10 all of the torts across the board -- and Ms. Lynch will be
11 giving you the additional reasons for the primary torts, but on
12 the proximate cause analysis, I want to start with a line from
13 then District Judge Lynch in the Mustafa case, which we cite.
14 The Mustafa case involved allegations that an Australian
15 company was aiding, or helping and supporting, the Hussein
16 regime. The claim was brought by Kurdish plaintiffs, who said,
17 our partners, our husbands, suffered human rights abuses at the
18 hands of Saddam Hussein, and this company and also a French
19 bank should be held liable for supporting the Hussein regime.

20 Judge Lynch started his analysis by saying as a
21 preliminary matter, it must be noted that aiding the Hussein
22 regime is not the same thing as aiding and abetting its alleged
23 human rights abuses. That principle applies here as well, that
24 to the extent there were transactions with Sudanese entities,
25 that does not equate to aiding and abetting human rights abuses

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1 that may have been carried out.

2 And, importantly, again, here, I think the main cases
3 to look at, your Honor, are the Rothstein case, the Owens case,
4 which was decided by the circuit court, the D.C. Circuit, and
5 affirmed the dismissal of very similar claims to the ones here
6 against my client BNPP, and the Mustafa case, which we talked
7 about, but all those cases train on the attenuated proximate
8 causation and the fact that proximate causation requires a
9 direct connection between the alleged tortious act and the
10 injury.

11 As the Supreme Court has said numerous times, the
12 tendency of the law is to not go past the first step. So in
13 the Rothstein case, we get the principle that if you're dealing
14 with a government -- and Rothstein involved Iran, which is seen
15 as the most egregious supporter of terrorism -- governments
16 have many legitimate uses for hard currency, and so that, in
17 and of itself, breaks the chain of causation, but then when you
18 trace it through, their theory of causation in this case, the
19 transactions helped Sudan get its hands on hard currency. That
20 hard currency made it easier -- it doesn't say they could only
21 survive with hard currency; they say, otherwise, they would
22 have to go through barter or use secondary currency. It just
23 made it so they had more money to spend.

24 But that theory is completely separate from linking
25 what BNPP did to the actual attacks that they allege in their

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1 complaint. And if you look in paragraphs, I think, 30 to 50 in
2 the complaint, where the different attacks are discussed, that
3 their plaintiffs suffered, these are attacks that occurred
4 over, I believe, 12 years, 1997 to 2009, all different sorts of
5 configurations of what was going on, no connection at all, no
6 direct connection, with BNPP, as is required.

7 So you can go through the facts the way the
8 allegations, the way the court, did in Rothstein. There's no
9 allegation that BNPP participated in the attacks, there was no
10 allegation that money that was transferred as a result of the
11 BNPP transactions was used in the attacks, there's no
12 allegation that without the hard currency that the attacks
13 would not have happened. And, in fact, there's discussion, at
14 paragraph 69 and 70 and 148, that Sudan itself had a long
15 history of conflict and tragedy and violence --

16 And so BNP was not the proximate cause of that.

17 THE COURT: The cases you cited in support --
18 Rothstein, you've talked at length, Mustafa -- those are
19 decided at what stage?

20 MR. BOCCUZZI: Those are motion to dismiss.

21 THE COURT: Both motions to dismiss?

22 MR. BOCCUZZI: Yes, your Honor.

23 And one thing I was going to say -- because I think my
24 time is up and Ms. Lynch needs to address the other issues --
25 the allegation, for example, about the use of ghost houses,

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1 that is in 148, is specifically said to occur before BNPP's
2 involvement in any transactions. So, again, you have conduct
3 in the Sudan that preceded any transactions by BNPP, and so one
4 can't say that we were the proximate cause of that, apart from
5 the attenuated chain of causation in the complaint.

6 The only other issue, just quickly: There are two
7 other BNPP entities issued in the complaint, BNPP North
8 America -- that's essentially a holding company, and there's no
9 allegation that it did anything, so that is a separate reason
10 why it shouldn't be there -- and BNPP --

11 THE COURT: I don't think plaintiffs responded to that
12 point, but I'll ask them, in the briefing.

13 MR. BOCCUZZI: As for the New York branch, for
14 purposes of the liability, it doesn't have separate legal
15 personality, so it's just misnamed in the complaint.

16 THE COURT: So the holding company and the New York
17 branch --

18 MR. BOCCUZZI: Have those separate reasons why. But,
19 obviously, ruling on proximate causation and the lack of the
20 other points raised would require dismissal of all the
21 entities.

22 THE COURT: And just before you turn it over to your
23 colleague, to move you back to my category 2, your primary
24 argument is that either Sudanese or Swiss law applies. Sort of
25 a process question: To the extent that I think that's right,

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1 where there are competing expert declarations at this stage and
2 somewhat limited briefing, because I don't have briefing from
3 the plaintiffs post remand on the questions of Sudanese and
4 Swiss law, would you agree a hearing is necessary, even at this
5 stage, to resolve those questions, if I deem them necessary to
6 resolve?

7 MR. BOCCUZZI: When you say hearing, your Honor, do
8 you mean --

9 THE COURT: The 44.1 hearing on the meaning of foreign
10 law.

11 MR. BOCCUZZI: Your Honor can decide it as a matter of
12 law. If by hearing, you mean further argument --

13 THE COURT: No, I don't mean further argument.

14 MR. BOCCUZZI: You mean having the witnesses come
15 here?

16 THE COURT: Yes. There are competing declarations as
17 to the meaning of law, and I think, on the paper, I can't
18 decide who's right about Sudanese law or there's limited or
19 otherwise available resources. Again, I understand your
20 argument -- I don't need to decide it because I can just accept
21 New York law and you win even if you contend -- but if I think
22 in fact Swiss law controls a particular claim, which I think is
23 actually your first argument here, but there's competing
24 declarations on the meaning of Swiss law -- for example, I
25 think, under Sudanese law, your experts dispute the

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1 availability of conspiracy claims in the civil context -- how
2 do I reserve that at this stage?

3 MR. BOCCUZZI: I think, your Honor, you could have
4 another go at comparing the two declarations. The reason why I
5 say is that is, I recently did that myself, and I would argue
6 that the experts we've put forward quote and cite controlling
7 authorities. The Sudanese -- Mr. Hassabo, for example, is a
8 practicing lawyer. I don't think their expert is a practicing
9 lawyer. He cites cases with quotes and just like a brief, and
10 their experts, by and large, rely on very generalized
11 principles, and so, you know, when there's a wrong, there's a
12 remedy. And I think if you move from the general to the
13 specific, I think you'll find that our experts give compelling
14 rationales and support for specific reasons why --

15 THE COURT: So, at this stage, you want me to decide
16 it on the papers?

17 MR. BOCCUZZI: I think you could. But, if not,
18 obviously, the Court has discretion to --

19 THE COURT: Well, I'm asking. You don't know
20 whether -- I think if you prevail on the papers, and the
21 question is: Would you want a hearing to establish it, or do
22 you rest on the papers?

23 MR. BOCCUZZI: I think would rest because of the
24 relative strength of the declarations.

25 THE COURT: All right.

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1 Turning over to your colleague, Ms. Lynch? He left
2 you two minutes. How much time do you want to go beyond that?

3 MS. LYNCH: I'll be as fast as possible. I think I
4 might be able do it in two minutes.

5 MR. BOCCUZZI: Excuse me, your Honor. Just --

6 THE COURT: You're cutting into her time more?

7 MR. BOCCUZZI: I'll sit down. I'll give up some of my
8 reply time if she needs to.

9 MS. LYNCH: I can be quite fast.

10 I'm going to briefly address the negligence and the
11 emotional distress claims -- I'll leave Sudanese and Swiss law
12 aside, we address those in our briefs -- and demonstrate why
13 those claims fail under those jurisdictions' laws.

14 To turn to New York law, as your Honor is aware,
15 proximate causation is a required element for all of these
16 claims, so your Honor can, and should, dismiss these primary
17 liability claims for all the reasons why Mr. Boccuzzi already
18 articulated, that there's no proximate causation.

19 I'd like to briefly discuss a couple of other reasons
20 why these claims should fail.

21 So for the negligence claims, they should be dismissed
22 because BNPP owed no duty to plaintiffs --

23 THE COURT: You're arguing as a matter of New York
24 law?

25 MS. LYNCH: As a matter of New York law, which we

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1 agree is the least demanding.

2 So, under New York law, the Second Circuit,
3 articulating New York law in the In Re Terrorist Attacks on
4 9/11 case, said banks do not owe noncustomers a duty to protect
5 them from the intentional torts of their customers. And that's
6 the case here.

7 There's no common-law duty that BNPP owed to
8 plaintiffs because the plaintiffs weren't BNPP's customers. To
9 try to get around the lack of the common-law duty, plaintiffs
10 assert claims for negligence per se, relying on the Sudanese
11 Sanctions Regime and the New York Penal Law, that BNPP pleaded
12 guilty to violating, which is a law prohibiting falsifying
13 business records. But none of those laws and regulations
14 actually create any private rights of action or create any
15 duties that BNPP would owe plaintiffs. The executive orders
16 underlying the Sudanese Sanctions Regime, as your Honor is
17 aware, they explicitly state that they create no right or
18 benefit enforceable by any person. All the courts that
19 consider whether the sanctions regimes create private rights of
20 action have concluded that they do not, and plaintiffs would
21 not be members of the class if these regulations are
22 intended to benefit -- they're intended to benefit the national
23 security of the United States.

24 The Supreme Court said, in the Alexander v. Sandoval
25 case, that where statutes focus on the person regulated, rather

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1 than the individual protected, they do not create private
2 rights that are enforceable by private plaintiffs.

3 So, the negligence claims should all fail for lack of
4 duty. New York Penal Law is the exact same way. The
5 plaintiffs have no case that supports a negligence per se claim
6 for any New York criminal statute, let alone the
7 falsifying-business-records statute. And that statute also --
8 one of its required elements is intent to defraud. There's no
9 allegation here that BNPP defrauded plaintiffs, so even if
10 there is a protected class under that statute, plaintiffs are
11 not it. And that is the reason why the negligence claims fail,
12 in addition to the proximate causation.

13 And briefly to address the intentional infliction of
14 emotional distress: Your Honor is aware it's a very, very high
15 bar, to bring such a claim under New York law. In fact, you
16 noted in your Weisman case that no IID case has ever succeeded
17 before the New York Court of Appeals, and the handful of cases
18 that have succeeded in the lower courts have all been the
19 result of longstanding campaigns of systematic, deliberate,
20 malicious harassment of plaintiffs. That's not alleged here.

21 The Terrorist Attacks case, again, is controlling.
22 There were allegations in that case that the bank intentionally
23 funded al Qaeda, and the IID claims and the negligence claims
24 failed in that case, both for lack of causation, lack of duty,
25 and all the other elements. IID should be invoked as a last

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1 resort. It's not available here.

2 So, for all of the reasons I've just stated and my
3 colleague has articulated, you should dismiss the complaint
4 with prejudice. Thank you.

5 THE COURT: Thank you.

6 You were just a couple minutes over, total, so I'll
7 give plaintiffs 33 minutes, to even it out, and then you can
8 have five minutes on rebuttal if you need it.

9 Good afternoon, Ms. Crawford.

10 MS. CRAWFORD: Good afternoon. Thank you.

11 I will be addressing the choice of law and the
12 argument that new federal interests should be considered in
13 that analysis. While my colleague Matt Rand will address the
14 12(b)(6) challenges to the state law causes of action under
15 New York law and, if need be, under Sudanese and Swiss law.

16 I have three points to make, really three and a half
17 but three points, and I'd like to just set those out because I
18 think they follow your Honor's rubric:

19 The first is that really the Second Circuit opinion
20 and what the holding was, in our opinion, has been just wildly
21 taken out of context.

22 The second is the preemptive federal interest that
23 your Honor has asked us to address, that had been put forward
24 newly by the defendants.

25 And the fourth is the New York interests in the

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1 interests analysis under New York's choice of law, as opposed
2 to Sudan and Swiss law.

3 The first point is --

4 THE COURT: I'm sorry, tell me the division between
5 your colleagues again.

6 MS. CRAWFORD: Choice of law is going to be me, and
7 Mr. Rand will take the 12(b)(6) state law causes of action.

8 THE COURT: Thank you.

9 MS. CRAWFORD: The notion that the Second Circuit has
10 stated or held that our complaint, the plaintiffs' complaint,
11 is premised on jus cogens crimes is, at its core, incorrect and
12 wrong. Our complaint, as the Second Circuit --

13 THE COURT: I mean, it did say literally all of
14 plaintiffs' claims are premised on these blatant violations of
15 jus cogens norms. That's a direct quote from the opinion.

16 MS. CRAWFORD: Yes. I'm going to take that head-on,
17 because it was within the context of the act-of-state doctrine
18 in which the Second Circuit held that, indeed, Sudan's conduct
19 was not an issue and would not be adjudicated by this Court.
20 In other words, what's at issue is BNPP's conduct, which is the
21 violation of sanctions, the criminal violation of sanctions,
22 and the causal link to the human rights violations and the
23 injuries of the plaintiffs.

24 Sudan's conduct, which is held to jus cogens norms, as
25 a sovereign, is not an issue. And that was the holding under

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1 Kirkpatrick.

2 THE COURT: It's not an issue for purposes of
3 establishing Sudan's -- with respect to the secondary liability
4 claims, you first have to establish Sudan's primary liability.
5 And the circuit said, those claims are premised on these
6 blatant violations of jus cogens norms.

7 MS. CRAWFORD: In the context of determining whether
8 or not international law crimes should be deferred to by this
9 Court. That was the secondary holding, not central. The
10 central holding was that, under Kirkpatrick, your Honor would
11 not be adjudicating the validity -- in other words, whether
12 they were jus cogens norms or not -- merely whether those torts
13 occurred and not whether they were even torts, merely whether
14 the militarization then led to the injuries of our client.

15 So, within the chain of causation, yes, your Honor
16 will look to whether or not the actions occurred, but the
17 Second Circuit was very clear, in the act of state, under
18 Kirkpatrick that this Court would not be determining whether
19 these crimes were jus cogens or international law at all. In
20 fact, we are U.S. citizens, we are not aliens, we are not held
21 under the ATS claims --

22 THE COURT: Permanent residents, right?

23 MS. CRAWFORD: Permanent residents and citizens,
24 mostly citizens.

25 At this point, we do not have a standing as an alien

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1 under the ATS. I would submit that none of the ATS claims
2 apply. But --

3 THE COURT: You didn't bring an ATS claim for that
4 reason alone?

5 MS. CRAWFORD: For that reason alone. ATS does not
6 apply here.

7 THE COURT: What about TVPA?

8 MS. CRAWFORD: Equally, your Honor, TVPA -- is it for
9 U.S -- I'm not sure if it's for U.S. citizens, but there is
10 another reason we don't meet an element of the TVPA, and I
11 can't remember what that is, and I apologize --

12 THE COURT: That's okay.

13 MS. CRAWFORD: -- but I can find that out.

14 What Judge Chin said at the oral argument, in
15 admonishing BNPP, was that they were the ones that brought
16 international jus cogens law into this case. This case is
17 BNP's sanctions as a tort violation that led to, proximately,
18 the injuries of our clients.

19 THE COURT: You want me to be persuaded by what was
20 said in argument, which, for immediate reference, I can tell
21 you often has no bearing on decision-making, but ignore that
22 line in the opinion?

23 MS. CRAWFORD: No, your Honor, I don't want you to
24 ignore it but take it into context. It's been taken out of
25 context. It's in the context of deciding a defense, an act of

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1 state, whether or not this Court should defer to the acts of
2 Sudan, which admittedly were mass rape and genocide. And the
3 court said, first of all, you don't meet the threshold of
4 Kirkpatrick, which is that this court doesn't have to
5 determine, in deciding the torts -- and the Second Circuit
6 accepted that we pled torts under New York law -- that in
7 deciding those tort elements, jus cogens is not a
8 consideration -- will never be, will not be -- and Sudan's
9 crimes would not be determined to be valid or invalid in the
10 adjudication of our claims.

11 The Second Circuit accepted as true our
12 characterization that this is not about Sudan's conduct, this
13 is about BNPP's conduct, when it stated, and I quote, on page
14 8, that we allege, and it must be accepted as true that BNPP
15 circumvented U.S. sanctions, that's what this case is about,
16 and New York law, in brackets, and provided Sudan with
17 financial resources, knowing that Sudan was committing
18 atrocities, knowing that the purpose of the sanctions was to
19 prevent Sudan from acquiring funds with which to carry out
20 those atrocities, and knowing that Sudan's likely purpose in
21 using the U.S. financial markets for illegal oil sales was to
22 acquire billions of U.S. dollars to purchase the weapons and
23 materials used by the militia, the military forces. That is
24 what the trial would be about. The causation --

25 THE COURT: Just so I understand, you added "in

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1 brackets, New York law," which is the question here, but the
2 language there was "committing atrocities." You're saying
3 that's what the trial is about, whether Sudan was committing --
4 so that Sudan circumvented U.S. sanctions, that would be one;
5 provided Sudan with financial resources, number two; knowing
6 that Sudan -- number three; and number four, was committing
7 atrocities -- is that essentially the elements of what you'd
8 have to prove?

9 MS. CRAWFORD: The elements would be under, of course,
10 New York tort law, gross negligence; however, it's a good
11 point --

12 THE COURT: You're relying on what the circuit said
13 here, and I want to understand: When they say "was committing
14 atrocities" and you're saying that's what the trial is about, I
15 don't know that that answers what law applies.

16 MS. CRAWFORD: Which they couldn't -- no, I'm saying,
17 the framing of the case is what Sudan did as a jus cogens crime
18 versus what BNP did, in violating New York and U.S. law, is
19 where the disconnect here is. Our framing is that we would
20 look to -- the trial would be about was the criminal conduct
21 that BNP was convicted of in this court and in New York State,
22 was the criminal conduct to blame for Sudan's increased
23 militarization, and did that -- and so, but for, and
24 proximately, without that criminal conduct, they would not have
25 been able, they would not have committed the crimes, the

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1 injuries, to our clients.

2 So, the liability phase of this would be whether BNP's
3 criminal conduct was to blame for Sudan's increased
4 militarization, and whether that increased militarization led
5 to the violence where our plaintiffs lived at the time that BNP
6 was committing those crimes. It's BNP's crimes that frame our
7 complaint, not Sudan's jus cogens.

8 So I do want to move to my second point, if your Honor
9 doesn't have any further questions.

10 THE COURT: Just to break it down a little bit:
11 Thinking about the different claims, take conspiracy to commit
12 conversion, which you plead as your 13th claim, so you first
13 have to establish that Sudan committed the New York tort, under
14 your argument of conversion, right?

15 MS. CRAWFORD: It's an element, that conversion was
16 primarily committed by Sudan. And I don't want to take
17 Mr. Rand's arguments, because he will address this, but, yes,
18 your Honor, we will have to prove --

19 THE COURT: Well, it occurred.

20 MS. CRAWFORD: That the tort occurred.

21 But you will not have to pronounce it valid or
22 invalid, especially under jus cogens. That would not be an
23 issue for this case.

24 THE COURT: Right, I recognize it overlaps a bit, but
25 for purposes of choice of law, is it right that to prove

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1 conspiracy to commit conversion, you will have to prove that
2 Sudan -- and if you're right that New York law controls -- that
3 Sudan committed conversion?

4 MS. CRAWFORD: One element would be that, yes, your
5 Honor, without a doubt. But, most importantly, our case is
6 about the criminal conduct by BNP, without which that tort
7 would not have occurred. That's the proximate cause chain,
8 that the Second Circuit, and I believe -- said -- we pled and
9 we have to accept it as true -- we're in the plausibility of
10 Iqbal here -- we have pled that without that conduct -- without
11 that criminal conduct, not legitimate banking conduct, not just
12 the transactions, but without that conduct -- the human rights
13 violations themselves could not have occurred.

14 THE COURT: And the human rights violation there is
15 conversion?

16 MS. CRAWFORD: That would be taking of property. We
17 didn't bring international human rights claims under
18 international law. We brought what we can bring, because we're
19 a private citizen bringing torts against actors in New York,
20 under personal jurisdiction, to state a tort claim of
21 conversion, property claim. It's not a human rights violation.
22 That would be an ATS claim. That is not our claim.

23 I do want to make this point, your Honor, because it's
24 been intimated by the other side, that where there's not an ATS
25 claim, where there's not a jurisdiction under the ATS or human

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1 rights claims, therefore, state law tort claims can't stand.
2 And there's no case supporting that. Granted, if there are
3 unique federal interests that are going to be adjudicated,
4 then, of course, the federal law would preempt. That's a
5 preemption argument.

6 I would, as sort of my half point, say that there is
7 no choice-of-law analysis under New York that looks to state
8 versus federal.

9 THE COURT: Yes, I agree --

10 MS. CRAWFORD: It's a preemption argument.

11 THE COURT: That's the first step, before we decide
12 that New York law controls the choice-of-law analysis, would be
13 the question whether somehow federal law preempts.

14 MS. CRAWFORD: Preempts.

15 And I think it's foreclosed by your Honor's order that
16 this is a new argument that can't be raised. And in any
17 event --

18 THE COURT: Why is that?

19 MS. CRAWFORD: I think you did make an order saying no
20 new arguments --

21 THE COURT: Oh.

22 MS. CRAWFORD: -- that weren't made in the first
23 motion to dismiss. And I submit they weren't made in the
24 first -- because it just doesn't work; there is no unique
25 federal interest. And I think --

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1 THE COURT: I suppose they could have argued in the
2 alternative, but it's an argument that derives from what the
3 circuit held, which they --

4 MS. CRAWFORD: That's the point that they made, but I
5 just wanted to clarify, it's not a choice-of-law argument, it's
6 a preemption argument. And the way preemption does not apply
7 in this case, I think really draws from or comes from the
8 Second Circuit's opinion in the act-of-state doctrine.

9 The Sabbatino factors themselves, which are sort of
10 throughout the cases that BNP has cited, look to whether there
11 is a unique federal interest, usually foreign policy, and those
12 were rejected by the Second Circuit. The act of state was
13 rejected out of hand. So I would just say, on that fact alone,
14 not to mention that if we look at the criminal prosecutions,
15 which are the really the center point of our case, the federal
16 and state laws were prosecuted together, arm in arm. As a
17 matter of fact, three New York, out of five, agencies, New York
18 agencies -- including DFS and Bank of New York and the Feds
19 and, of course, my former office, the office of the Manhattan
20 DA's Office -- were preeminent in investigating and actually
21 detecting the criminal conduct, which is much more than
22 transactions passing through chips, as sort of touching
23 New York. It was a system of commission and omission, of
24 having no compliance, of banking regulation compliance, in the
25 New York branch, so that, until the New York branch was caught

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1 and they had to switch it to another, probably New York, bank,
2 the New York branch was willfully blind to all of these
3 coverups of transactions that were coming between Sudan -- and
4 BNP was allowing them access to dollars. It's the access to
5 dollars that New York is central to. And that's why we talked
6 about the chips being -- that's how they got their dollars.
7 Without dollars -- without New York City, the financial capital
8 of the world --

9 THE COURT: Can I ask, have you shifted to the third
10 part of the argument, which is why, under New York
11 choice-of-law rules, New York law would apply? Because that's
12 what it's sounding in.

13 MS. CRAWFORD: I was sort of melting into my third
14 point, yes, your Honor.

15 THE COURT: I'm sorry, before you do that, just on the
16 sort of federal interest preemption question, your colleague on
17 the other side cites Doe as the primary case. Do you want to
18 address that?

19 MS. CRAWFORD: Doe v. Exxon -- was it Doe -- there was
20 a couple of Does.

21 THE COURT: What's the cite?

22 MR. BOCCUZZI: I'm sorry, your Honor, I misspoke. I
23 meant City of New York v. British Petroleum.

24 THE COURT: Sounds like Doe. You do not mean Doe?

25 MR. BOCCUZZI: I meant the BP case.

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1 THE COURT: Okay.

2 MS. CRAWFORD: Well, I didn't have --

3 THE COURT: Then you don't have to address it. You
4 can move to the third point.

5 MS. CRAWFORD: One more point about the notion that
6 somehow, if there are human rights claims that are not viable,
7 that therefore state tort law would not be viable, and I really
8 want to bring in a case that wasn't cited to the Court's
9 attention, and we have copies for counsel, and that's the
10 Sexual Minorities Uganda v. Lively. It was an ATS case, and it
11 was denied. It was the First Circuit. The court there
12 dismissed the ATS international law claims under the Alien Tort
13 Statute. They dismissed those claims -- they failed to meet
14 international law standards -- and allowed the state tort
15 claims to go forward in state court.

16 THE COURT: What jurisdiction?

17 MS. CRAWFORD: Massachusetts, First Circuit. And I
18 have cases -- I don't want to move away from the microphone,
19 but we have cases for counsel and the Court. But that's the
20 Sexual Minorities Uganda v. Lively. But even cases cited by
21 this court during the briefing -- the Marcos case, the Republic
22 of Iraq -- had federal interests that failed, and the state
23 claims continued.

24 So there are just no unique federal interests that
25 would apply here.

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1 THE COURT: You did cite that case, and defendants
2 dealt with it in their footnote, which always makes me
3 suspicious. That was the question of whether it was
4 appropriate to have dismissed the state law claims rather than
5 accepting them as supplemental jurisdiction?

6 MS. CRAWFORD: Yes, your Honor.

7 THE COURT: And the circuit said: "The complaint's
8 assertion of nonstatutory wrongs describes traditional types of
9 torts by private entities. The Republic identifies no uniquely
10 federal interest in the Rules of Decision to be applied, nor
11 any conflict between a federal policy or interest and the use
12 of state law. And you've addressed the federal interest
13 argument, the conflict argument. I guess the question is
14 whether, in light of the circuit's conclusion here, whether the
15 nonstatutory wrongs described traditional types of torts by
16 private entities.

17 MS. CRAWFORD: I would argue they do, and I would
18 argue that the Second Circuit accepted those allegations as
19 pled, that these are private U.S. citizens against a private
20 entity, for injuries arising from criminal conduct. And
21 New York has a great interest in providing remedies for victims
22 of crimes that occurred in New York. And I submit that the
23 crimes occurred -- the allegations, our plausible allegations,
24 are, the crimes occurred right here, that this is where, if the
25 compliance had been what it should have been -- and they're

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1 still being monitored throughout, not just OFAC, DFS, Bank of
2 New York, DANY.

3 THE COURT: So that seems like a post-conduct
4 regulation, and the cases make this distinction, the sort of
5 temporal distinction. Under the interest analysis, first, I
6 think everybody agrees injury occurred in Sudan, right?

7 MS. CRAWFORD: Injury occurred in Sudan. But under
8 conduct-regulating analysis --

9 THE COURT: Certainly some conduct occurred in Sudan?

10 MS. CRAWFORD: To the extent that BNP was acting as
11 the Central Bank of Sudan, without question, but --

12 THE COURT: Where did the conspiracy to commit battery
13 occur?

14 MS. CRAWFORD: Well, your Honor, I think we have
15 alleged that the conspiracy to violate sanctions -- and I
16 really want to talk about the framing -- the conspiracy to
17 violate U.S. sanctions, it was foreseeable that the injuries
18 would happen. We haven't alleged a two-part conspiracy. We
19 have one conspiracy here -- and Mr. Rand will address this --
20 we have one conspiracy, and that's what they pled guilty to,
21 conspiracy to violate sanctions, knowing the benefit of those
22 sanctions were human rights victims, like ours, and knowing
23 that even -- not even reasonably foreseeing it, but actually
24 foreseeing that the victims were suffering.

25 THE COURT: The New York tort is not conspiracy to

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1 violate sanctions, right?

2 MS. CRAWFORD: Well, yes, it is, your Honor. Our
3 conspiracy that we pled is a conspiracy to violate sanctions,
4 foreseeably and knowing that the reasonable and natural
5 consequence -- and this is what the Second Circuit said we
6 pled -- would be injuries to these people; they were the
7 beneficiaries of the sanctions.

8 And, in fact, with all the emails that the BNP
9 compliance officers and execs were going through, they knew
10 that without the dollars that were New York centric, without
11 the petrodollars, those crimes would not have happened. And
12 Licci is very clear that -- and just to answer your Honor's
13 question: The post-conduct monitoring would not be so
14 necessary if it weren't for the fact that the crimes occurred
15 here in New York, with this branch, with the compliance
16 officers that were fired here because they tried --

17 THE COURT: Aren't the primary allegations against
18 what occurred in the Swiss bank?

19 MS. CRAWFORD: No. The primary allegations -- that is
20 something that the defendants have brought up, recharacterizing
21 our complaint -- our complaint is that the lack of compliance,
22 that the whistle-blowing -- the understanding that New York was
23 the place which the petrodollars came, nothing in Switzerland
24 provided dollars in and of itself. It was through -- if you
25 read the allegations from the statement of facts in which they

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1 pled guilty, correct me if I am wrong because I don't have it
2 in front of me -- the conspiracy occurred through the Swiss
3 subsidiary, directing conduct -- directing the dollar
4 transactions to New York.

5 THE COURT: The Swiss subsidiary --

6 MS. CRAWFORD: Through, the conspiracy through them.

7 THE COURT: Right, so there's at least some conduct,
8 you would agree, occurring in Switzerland?

9 MS. CRAWFORD: But not the primary conduct. The
10 primary -- Switzerland doesn't -- has Swiss francs.

11 THE COURT: But if somebody's in Switzerland and
12 they're saying let's circumvent these sanctions --

13 MS. CRAWFORD: They can't do without New York.

14 THE COURT: But if that conversation is happening in
15 Switzerland, then, at least for purposes of the analysis, some
16 of the conduct is happening in Switzerland?

17 MS. CRAWFORD: Well, we didn't allege that, but that
18 would be something in discovery, which I think would be exactly
19 what discovery would be about.

20 THE COURT: You do allege it because you do rely on
21 the admission.

22 MS. CRAWFORD: All it says is through -- so what we
23 have understood from just -- what we understand is that there
24 was a team in Geneva that was making these decisions, but the
25 decisions were about conduct in New York.

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1 THE COURT: I mean, for example, BNPP Swiss processed
2 a majority of the transactions constituting apparent violations
3 of U.S. sanctions.

4 MS. CRAWFORD: Yes, your Honor, the point being --

5 THE COURT: In the consent order between New York and
6 defendants notes, "BNP Paribas, through the Geneva branch of
7 its Swiss subsidiary, created deceptive schemes and
8 transactions structures to conceal thousands of illegal
9 Sudanese transactions."

10 MS. CRAWFORD: To conceal them from New York
11 regulators. The point was, the New York regulators had no idea
12 what was going on. And they continued to be concealed through
13 all the Darfur genocide; the point being, your Honor -- what I
14 want to end with -- is that New York State, New York DFS,
15 New York Bank of New York, and the Southern District of New
16 York put together massive resources in prosecuting the conduct
17 that was occurring here. They exercised their criminal
18 jurisdiction. This case is a follow-on for the victims of
19 crimes. New York has long had an interest in providing a forum
20 for the victims of crimes that occur here.

21 THE COURT: Right, but I think an interest in
22 providing forum is not the same as the choice-of-law analysis.

23 MS. CRAWFORD: Well, in government is interest is, I
24 think, exactly what we're looking at, with regulating the
25 conduct of banks, which we rely on, from Licci that, as opposed

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1 to applying Israeli law, where the injuries occurred, like
2 here, the terrorist injuries, it was the allegations that it
3 was the banks operating in New York, and it was a Lebanese
4 Canadian bank operating in New York, that was regulated by
5 New York banking law, which is at issue here, that had New York
6 being the choice of law, the clear choice, in that case. And
7 we believe this case is virtually, in the choice-of-law
8 analysis, on four corners.

9 I think my time may be up.

10 THE COURT: I didn't divide your time but you can hand
11 it off. I'll ask my clerk the time remaining.

12 MS. CRAWFORD: Thank you.

13 THE COURT: Eight minutes remaining.

14 MR. RAND: Thank you, your Honor. I will try to get
15 through everything as quickly as possible.

16 I think, as the Second Circuit recognized, BNP
17 admitted to facts supporting the elements of plaintiffs'
18 New York causes of action. Specifically, first, BNP foresaw,
19 and in fact knew, the consequences of their illegal conduct,
20 namely, that the provision of U.S. dollars would enable Sudan
21 to attack its own citizens; and, second, that BNP's actions
22 were a substantial factor in causing those actions.

23 I'd like to move on first to the issue of causation
24 because I think that causation actually touches on a lot of the
25 other issues that are left open in the causes of action under

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1 New York. Specifically, as the Court of Appeals said in Hain,
2 proximate causation requires two factors: One, there has to be
3 foreseeability; and, two, there has to be a substantial act.

4 I also think that these elements do touch on the
5 elements of some of the substantive causes of action, such as
6 in conspiracy, where the foreseeability is an element and the
7 substantial participation element of aiding and abetting.

8 THE COURT: Do you agree with the basic proposition
9 that proof of violation of sanctions is not itself sufficient
10 to establish causation?

11 MR. RAND: Yes, your Honor, I do agree that the proof
12 of violence of sanctions is not by itself sufficient. But if
13 what we're talking about, though, in terms of what is
14 foreseeable from that, the admission that they violated
15 sanctions, BNP already admitted that it was foreseeable that
16 Sudan was going to use those resources to commit the actions
17 that they did. And moreover --

18 THE COURT: What are you citing for that admission?

19 MR. RAND: The statement of facts --

20 THE COURT: What specifically?

21 MR. RAND: Specifically, paragraphs 3 and 4 of the
22 statement of facts, your Honor.

23 THE COURT: Which say?

24 MR. RAND: I'm sorry, I couldn't hear you.

25 THE COURT: Which say what?

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1 MR. RAND: Sorry?

2 THE COURT: Which say what?

3 MR. RAND: I'm sorry, I don't have the exact
4 quotations in front of me.

5 But they also, in paragraphs 19 and 20 of the --

6 THE COURT: Sorry, because I think it's important, the
7 argument is that paragraphs 3 and 4 stand for the proposition,
8 I'll look at them and that will be BNPP admitting that -- your
9 language was -- that it was foreseeable that Sudan was going to
10 use those resources to commit the actions that they did?

11 MR. RAND: That's correct, your Honor.

12 And paragraphs -- and I will also say, in those
13 paragraphs, if I remember correctly, those are the ones that
14 are talking about the purpose of the sanctions, that the
15 sanctions were there to stop the causal nexus that we allege in
16 our complaint. They also, in the footnote to paragraph, I
17 think --

18 THE COURT: What else would sanctions be for?

19 MR. RAND: I mean --

20 THE COURT: I guess that's the question of whether --
21 you've conceded that the violation of sanctions is not
22 sufficient. Sanctions are there, presumably, whether it's
23 Sudan or Iran terrorist organizations, to prevent the conduct
24 that those organizations are engaged in, no?

25 MR. RAND: That's correct, yes.

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1 And the sanctions here were aimed, at least in part,
2 quite clearly, at preventing the very conduct that occurred,
3 that impacted our plaintiffs, among other people.

4 I will also point out, your Honor, that in paragraphs
5 19 and 20 of the statement of facts, both the federal and the
6 state statement of facts, as the Second Circuit recognized, BNP
7 admitted that they knew that Sudan, on the ground, was
8 committing the very acts that we allege happened to our
9 plaintiffs. So, between the foreseeability and the knowledge
10 element, we do think that this part of proximate causation is
11 met.

12 The second part of proximate causation is the
13 substantial factor, substantial assistance. And, here, BNP
14 talks a lot about the fact that a bank providing ordinary
15 banking services could not be held liable for those actions.
16 But I think this is a mischaracterization of what the banking
17 services were that they actually provided. In none of the
18 cases that they cite, including Rothstein, are there any
19 allegations that the bank knowingly violated sanctions to
20 provide money to the commission of genocide or other egregious
21 conduct.

22 For example, there was a case in the Second Circuit
23 called Primavera, which we did not cite but I'm happy to
24 provide copies if you desire, where the Second Circuit made
25 clear that ordinary banking services do not include banking

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1 services where there's an extraordinary motivation to
2 participate in fraud or there's a participation in financing, a
3 fraudulent scheme, particularly where the financing was not
4 routine. I think both of those situations apply here. We know
5 there was fraud because BNP pled guilty to falsifying their
6 documents under the New York 175.10, and we also know that this
7 is extraordinary nonroutine conduct because only BNP was
8 convicted for violating the sanctions to this degree.

9 So I think for them to hide behind this being ordinary
10 conduct is not sufficient.

11 THE COURT: Well, right, but, again, just on that, at
12 least I think it's a different point than the first point you
13 made, but the second point, that's just a statement that they
14 violated the sanctions?

15 MR. RAND: Right, it is a statement they violated
16 sanctions but a statement they violated sanctions knowing the
17 consequences of violating the sanctions, that violating the
18 sanctions are not routine banking practices, that they can't
19 cite cases that --

20 THE COURT: I hope violating sanctions are not routine
21 banking practices but we'll leave that for another day.

22 MR. RAND: That would also be my hope, but that is in
23 fact their argument, is that they cannot be liable for these
24 actions because they were routine banking practices, and that's
25 what a significant portion of their argument hides behind.

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1 And, as you sort of jokingly pointed out, you would hope that's
2 not the case.

3 We also think there are three reasons why --

4 THE COURT: Well, I guess I had understood their
5 argument slightly differently, which is that they violated
6 sanctions -- presumably, I don't know how you'd parse it out,
7 given the fungibility of money, but you want to argue some of
8 the financial transactions caused the human rights violations
9 that your claims are premised on? You don't need to prove that
10 all of the transactions --

11 MR. RAND: That's correct, your Honor. We don't
12 believe we have to prove all the transactions. But, also, I
13 will point out that in the complaint there were allegations
14 that the vast majority of the money that Sudan was able to
15 raise because of the sale of oil, which, if you look at the
16 complaint, the volume and sale of oil, starting in 1997 to the
17 end of the period, so from 1997 to 2007, is a substantial
18 increase in the amount of oil that was being sold.

19 Moreover, there are allegations in the complaint that
20 the vast majority of the amount of money that was being spent
21 in Sudan went to the military, it didn't go to alternative
22 sources of funding. And that comes from a WikiLeaks cable
23 where the U.S. ambassador -- I believe to Khartoum but I don't
24 remember exactly where the ambassador was to, but the U.S.
25 ambassador specifically stated this isn't a situation where the

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1 government is using its money for other sources, it's using the
2 money basically to commit the crimes that impacted our
3 plaintiffs, our clients.

4 So, it isn't that you're just funding a government and
5 the government is doing otherwise legitimate actions; it is
6 pretty much exclusively committing these crimes. And that is
7 certainly the allegations that are in the complaint. So this
8 goes, I think, to the substantial assistance prong that we were
9 discussing.

10 The next issue that I would like to discuss very
11 quickly, your Honor -- I know that I'm slightly short on
12 time -- is the issue of negligence --

13 THE COURT: I want you to take those points on before
14 you do: I picked this one before, just to think through what's
15 ahead if the claims survive. So aiding and abetting
16 conversion, what do you have to prove?

17 MR. RAND: We would have to prove that our clients,
18 the plaintiffs, owned certain property in Sudan, that property
19 was taken from them, and that part and parcel with the taking,
20 the ability of Sudan to have the resources to go about taking
21 that property is because of the substantial assistance that BNP
22 provided for them.

23 THE COURT: So you will have to prove that Sudan
24 engaged in property-taking?

25 MR. RAND: Correct, your Honor, yes.

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1 THE COURT: And that -- okay.

2 MR. RAND: Actually, if I may, I would like to go back
3 very quickly to one issue on the issue of conspiracy, your
4 Honor. There, BNP says that -- we actually are dealing with
5 two different conspiracies, right? One is the conspiracy to
6 commit sanctions, which is what they pled guilty to, and the
7 second is the conspiracy to commit the human rights violations.
8 But our argument, your Honor, is that that is one -- we only
9 pled one conspiracy, and that was the conspiracy that they pled
10 guilty to, and it was the one to violate the sanctions.
11 However, they are liable, under New York law, for the
12 foreseeable consequences of the conspiracy that they engaged
13 into.

14 So, for example, under the Kashi case, which I believe
15 was a Second Circuit case, the defendant in that instance only
16 agreed to a specific portion of the conspiracy, and the
17 district court found that that defendant was only liable for
18 that one portion of the conspiracy and that all of the harm
19 that befell the plaintiffs. The Second Circuit reversed, and
20 found that because it was foreseeable that all the harm would
21 occur, the defendant was actually liable for the full scope of
22 the conspiracy.

23 Similarly, here, your Honor, we think that BNP has
24 already admitted to foreseeing, and admitted to knowing what
25 the consequences of this conspiracy was, and, as a result, is

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1 liable for the foreseeable consequences of that conspiracy.

2 THE COURT: So the point that you make, that
3 Ms. Crawford made too, is, when I look at these individual
4 claims, when you make a state law aiding and abetting
5 conversion claim, that -- I had sort of understood it as the
6 violation of sanctions as conduct that would be used to
7 establish the aiding and abetting of conversion, but somehow
8 the argument has shifted to the conspiracy itself is the
9 violation of sanctions?

10 MR. RAND: I think --

11 THE COURT: What are the elements of conspiracy to
12 violate sanctions?

13 MR. RAND: Well, I think the elements of conspiracy,
14 generally -- sorry, I'm just flipping to my note on that -- the
15 elements -- so there's agreement, which I think we have here,
16 there's the overt act, the intentional participation --

17 THE COURT: So, wait. So there's an agreement between
18 who and who?

19 MR. RAND: Here, between BNP and Sudan.

20 THE COURT: I'm going to mess up your divisions.
21 Where did that agreement take place?

22 MR. RAND: I think the allegations are that the
23 agreement took place -- I mean, it's a wide-ranging conspiracy,
24 so I think it took place in many different locations.

25 THE COURT: You're breaking down the elements. So

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1 there's an agreement between BNPP and Sudan?

2 MR. RAND: That's correct.

3 THE COURT: And where did that take place?

4 MR. RAND: I think, as I said, I don't think it took
5 place in one individual location. I think that --

6 THE COURT: Well, what are some of the locations?

7 MR. RAND: I think that the locations are probably
8 Sudan, Switzerland, and I think that partly it took place here
9 in New York, as well.

10 THE COURT: What aspects of the agreement occurred in
11 New York?

12 MR. RAND: I think that Sudan wanted BNP to violate
13 sanctions so it could process transactions through New York.

14 THE COURT: That's the nature of the conspiracy. I'm
15 breaking it down by element. It's unclear to me, in what you
16 allege of the agreement, whether it's sort of sitting around
17 the table on the phone or sending emails or having discussions,
18 it's hard to see what of those took place in New York, in your
19 allegations.

20 MR. RAND: I will say one thing that's, I think, in
21 the allegations, which is important for this conversation as
22 well, your Honor, is that BNP admitted that it willfully
23 understaffed its New York compliance department so that it
24 couldn't be part of this conversation, so that they couldn't
25 say, hey, guys, we shouldn't do this, this is illegal and

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1 wrongful conduct. So to the extent that there wasn't a person
2 on the ground here in New York sending an email or making a
3 phone call, that is because BNP willfully decided that there
4 shouldn't be someone here.

5 THE COURT: Where did they do that?

6 MR. RAND: Where did they mention this?

7 THE COURT: Where did they do that? You said they
8 willfully decided that there should not be someone in New York.
9 Where did that happen, under your allegations? I'm not saying
10 you have to prove it here. What are under the allegations?

11 MR. RAND: I do not know, standing here today, where
12 specifically the allegations are as to where that decision was
13 made.

14 THE COURT: All right. So we were going through the
15 elements. So, an agreement?

16 MR. RAND: Correct.

17 THE COURT: Next?

18 MR. RAND: The next element is an overt act.

19 THE COURT: Again, just as an example, we're using --
20 what did I say?

21 MR. RAND: We were using conversion, your Honor.

22 THE COURT: Yes, thank you.

23 MR. RAND: You're welcome.

24 THE COURT: Conspiracy to commit --

25 MR. RAND: There's a lot of causes of action.

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1 THE COURT: So what's an overt act?

2 MR. RAND: Here, I think an over act is processing
3 those transactions through New York.

4 THE COURT: Okay. Processing transactions? How does
5 that establish a conspiracy to commit conversion?

6 MR. RAND: Well, as we were saying, part and parcel
7 with committing the conversion is the violation of the
8 sanctions as well, so I think it does establish that there was
9 a conspiracy to commit conversion.

10 THE COURT: All right. So your overt act, you want to
11 say, is processing transactions. What's the next element?

12 MR. RAND: The next element is intentional
13 participation.

14 THE COURT: And what does that look like?

15 MR. RAND: So, here, it's knowingly processing the
16 transactions, knowingly providing Sudan with access to the U.S.
17 financial system.

18 THE COURT: And it's BNP executives' knowledge at that
19 point?

20 MR. RAND: Correct, your Honor.

21 THE COURT: And those executives/employees are in
22 Switzerland when they have that knowledge?

23 MR. RAND: I think, among other places, yes.

24 THE COURT: And in Sudan?

25 MR. RAND: Well, they also point out in the statement

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1 of facts that there were people in New York who raised red
2 flags about these issues and about the fact that they were
3 providing funding to a regime that was engaging in these
4 actions.

5 THE COURT: So that's proof of knowledge, the red
6 flag-raising?

7 MR. RAND: Correct, your Honor, yes.

8 THE COURT: And then what's next?

9 MR. RAND: Resulting damage.

10 THE COURT: You didn't state elements of the
11 conversion in that?

12 MR. RAND: No, sorry, I thought we were just
13 discussing the conspiracy aspect.

14 THE COURT: Oh, okay.

15 MR. RAND: Okay. So then, on top of that, there is
16 the elements of conversion.

17 THE COURT: I'm sorry, resulting in damage, again,
18 just for the interest now, the conduct analysis, that's in
19 Sudan?

20 MR. RAND: Correct, your Honor.

21 THE COURT: Go ahead.

22 MR. RAND: So the elements of conversion are property,
23 which is specific and identifiable; then the plaintiff had
24 ownership, possession or control of the property before the
25 property was converted; and that the defendant exercised

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1 unauthorized dominion over the property.

2 THE COURT: All of that's in Sudan?

3 MR. RAND: Correct, your Honor.

4 THE COURT: There's nothing else you'd have to prove
5 with respect to this?

6 MR. RAND: To conversion? Conspiracy to commit
7 conversion? No, your Honor.

8 THE COURT: So turn to --

9 MR. RAND: I believe I'm very short on time.

10 THE COURT: You're over time but I'll allow it because
11 it's helpful, and I'll make sure to extend comparable time to
12 your colleagues across the way.

13 So do you want to turn to intentional infliction of
14 emotional distress?

15 MR. RAND: I was going to turn to negligence and
16 negligence per se.

17 THE COURT: Go ahead.

18 MR. RAND: So, basically, your Honor, the elements of
19 negligence --

20 THE COURT: There's a duty argument here?

21 MR. RAND: Right, exactly. And the duty comes from
22 the statutes, it comes from the statutes and the regulations,
23 when we're talking about the violation of the sanctions; and
24 then, as opposed to 175.10, it comes from just the violation of
25 that. So the duty comes from both of these two sort of

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1 statutes and regulations together.

2 As I think we explained in the briefing, defendants
3 conflate lack of private right of action with negligence
4 per se. While they may be related doctrines, they are not the
5 same. And so, for example, in the Loewy case, which we cite in
6 the briefing, the Court went through and rejected the
7 defendants' argument that because there was no prior right of
8 action, there can't be negligence per se. And what the
9 Southern District made clear was that they are distinct,
10 different causes of action, and one does not sort of govern the
11 other.

12 THE COURT: But you do have to establish a duty?

13 MR. RAND: That's correct, your Honor, yes.

14 THE COURT: So what is the duty here?

15 MR. RAND: As I said, there would be two. The first
16 comes from the sanctions violations, essentially, not to
17 violate the sanctions; and the second duty comes from 175.10,
18 which is not to falsify business records with the intent to
19 hide the commission of another crime.

20 THE COURT: Okay. All right.

21 MR. RAND: So, then, on the intentional infliction of
22 emotional distress claim, here, BNP's conduct clearly is
23 outrageous and extreme, and BNP did so knowingly, as we've
24 discussed before, of what the consequences of that conduct was
25 going to be. We don't actually need to show that BNP

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1 specifically intended to cause the emotional distress in order
2 for BNP to be liable for the commission of that emotional
3 distress. And this was set forth in the Dana case which is a
4 New York Appellate Division case, which I believe we also cited
5 in the briefing.

6 Very quickly, your Honor, you asked before about
7 having a hearing about foreign law, and plaintiffs would agree
8 that such a hearing would be necessary if your Honor does
9 believe that Sudanese or Swiss law applies to this case.
10 Obviously, as my colleague, Ms. Crawford, explained, we don't
11 believe that that is the case, but we think that there are some
12 real credibility issues with some of the allegations that are
13 made in both of the declarations.

14 So, for example, Mr. Hassabo states that you can't be
15 negligent in order to find liability under the concerted action
16 causes of action in Sudan, which is under CTA Section 5(u), but
17 the Supreme Court cases that he quotes from specifically state
18 that negligence is sufficient to establish liability.

19 Similarly, as our expert Mr. Igris points out -- who
20 is, by the way, a practicing lawyer, he does not live in Sudan
21 but he is a practicing lawyer, who is Sudanese and has
22 practiced in Sudan, as his bio makes out -- similarly,
23 Mr. Igris points out that if Mr. Hassabo was correct, he would
24 write out significant parts of the CTA and basically make them
25 nugatory, which is obviously something which doesn't make

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1 logical sense.

2 Similarly, we think that there are also similar
3 problems with Mr. Roberto's declaration. Mr. Roberto also says
4 that you can't be negligent to establish concerted action.
5 But, again, the cases that he cites to in his declaration --
6 that he himself has translated -- makes clear that negligence
7 could be sufficient to establish causation under Swiss law.

8 So we think, even setting aside the question of the
9 battle of the experts, internally to their own experts, there
10 are some real credibility issues that we think should be
11 determined and should be heard on a hearing.

12 The very last point I will make --

13 THE COURT: And just as a procedural matter, if I
14 think I need to resolve Sudanese or Swiss law, for purposes of
15 the motion to dismiss, it wouldn't be somehow that they're
16 plausibly alleged under Swiss law or Sudanese law, I need to
17 make that determination now, presumably, given the sort of
18 unusual nature of foreign law, which is a legal question under
19 the Federal Rules. So I think you'd agree, but tell me if I've
20 misunderstood, that if I think I need to decide the question
21 and I don't think I can resolve it on the papers, it would be a
22 hearing for purposes of resolving the motion to dismiss?

23 MR. RAND: That's correct, your Honor, yes.

24 And then the final issue I want to stated very quickly
25 is that there are specific allegations about BNP NA in the

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1 complaint, and I'm happy to direct those to you --

2 THE COURT: I was going to ask about that. So there's
3 the holding company argument and then the New York branch?

4 MR. RAND: That's correct, your Honor, yes.

5 So, in terms of BNPP North America, if you look at
6 paragraph 186 of the complaint, it states the DFS -- meaning
7 the department New York Department of Financial Services --
8 investigation of BNPP found that "in December 2005, when a
9 settlement with U.S. regulators and Dutch bank ABN AMRO was
10 announced for violations of U.S. sanctions law, the head of the
11 ethics and compliance for BNPP North America wrote, 'The dirty
12 little secret isn't so secret anymore.'" And that's the end of
13 the quotation.

14 So there are direct allegations that, at a minimum,
15 BNPP NA knew about what was going on. And this would also show
16 that BNPP NA was involved in the conduct such that otherwise
17 there would not have been an ethics and compliance officer who
18 was making comments about the conduct and saying that this
19 little secret isn't secret anymore. And we think that is
20 sufficient to keep BNPP NA in the case at this stage.

21 Similarly, as to the New York branch, there are
22 instances in which a New York branch can be held separately
23 liable from the foreign parent. And there are specific
24 allegations in the complaint and in the attached statement of
25 facts that go specifically to the New York branch and make

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1 references to the New York branch. So, therefore, we think, at
2 this stage, it is appropriate to keep them in the complaint.

3 I'm also happy to provide you with the paragraph
4 references for where we talk about the New York branch
5 specifically if you would like that.

6 THE COURT: Go ahead.

7 MR. RAND: So it's in complaint paragraphs 202, 206,
8 208, 214, and 217.

9 THE COURT: And then just, as I'm trying to appreciate
10 the nature of the argument, both you and Ms. Crawford made this
11 point, the idea that the framing you want me to accept is that
12 you're alleging a conspiracy to violate sanctions, that's the
13 tort you're alleging?

14 MR. RAND: That's the conspiracy part of it, correct,
15 your Honor.

16 THE COURT: And what's your best authority for why
17 that's actionable under New York law?

18 MR. RAND: Sure. I think that was the Kashi case that
19 I had cited to you earlier, your Honor.

20 THE COURT: Do you have the cite for that?

21 MR. RAND: I don't have it off the top of my head but
22 it is cited in the briefs.

23 THE COURT: Thank you.

24 MR. RAND: Thank you.

25 THE COURT: And I took you over by -- including your

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1 five minutes, you've got about 20 minutes, if you need it.

2 MR. BOCCUZZI: Okay, your Honor. I'll try to be
3 briefer than that, and thank you for giving me the time.

4 Just to follow up on some of these points:

5 To the extent plaintiffs now characterize the gravamen
6 of what they're doing as pursuing a claim for conspiracy to
7 violate sanctions, there is no private right of action for
8 conspiracy to violate sanctions. The Kashi case is not a
9 sanctions case; it's a fraud case, at least to my memory of it.
10 And I thought they were relying on that case for the concept of
11 someone who was in a conspiracy to reach the liability they may
12 then have as a conspirator, as a coconspirator. The person in
13 Kashi was found to have been the person who kind of set up the
14 whole fraud, and so the court said he should be liable for
15 things that fell from that fraud, unlike what the district
16 court had held. So I don't think Kashi helps them.

17 I think going through the elements of the conspiracy,
18 the way the court did with plaintiffs' counsel, was very
19 helpful because it shows that the elements that they're able to
20 identify stop at a conspiracy to violate OFAC sanctions. Your
21 Honor asked about where do we find the conspiracy to commit
22 conversion, and then you can go through the list -- they have
23 several conspiracy claims -- battery, assault, detention,
24 violation of law at the local level of Sudan. There's no
25 well-pleaded guilty allegation of any such conspiracy about

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1 that. Their argument really hinges on --

2 THE COURT: Well, you're saying there aren't
3 allegations of -- Mr. Rand laid out the elements of conspiracy
4 and then the elements of the substantive crime of conversion,
5 right? So you need to establish all of those, presumably, to
6 establish the claim. So you're saying there aren't elements
7 pled with respect to the conversion claim, property that the
8 plaintiff had ownership of that was taken?

9 MR. BOCCUZZI: What you have are allegations in the
10 complaint that plaintiff X or plaintiff Y had property that was
11 taken, but there is no well-pleaded allegation that BNPP was
12 involved in that conduct or agreed to conspire to commit that
13 conduct. What you found when you get to the counts of the
14 complaint, again and again, it's the boilerplate that you find,
15 of just restating the legal standards.

16 THE COURT: This is your causation argument?

17 MR. BOCCUZZI: This is causation, but it's also the
18 argument, it just is missing the elements of a claim, to state
19 a claim for conspiracy to commit conversion, conspiracy to
20 commit assault, all those things. You need to have an
21 agreement to commit the act, to be in the conspiracy. It's not
22 enough to say they conspired to violate OFAC sanctions and
23 then, because there was hard currency in the Sudan and then,
24 therefore, in their theory, Sudan had more money to do abusive
25 things and, therefore, there were abusive things that happened,

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1 that, therefore, we conspired to do those abusive things.
2 That's a complete break, and that's completely contrary to the
3 case law, the O'Sullivan case the other cases we cite, and the
4 Rothstein case as well. There, the allegation was that -- I
5 can't remember the bank in that case, it might have been UBS --
6 was giving material support to terrorism, and the court said
7 that transactions, in that case, with Iran was not enough to
8 hold them liable for the injuries that were being claimed there
9 as a result of Iran's terrorist attacks, I think against
10 Israelis and people in Israel.

11 So, there is a complete break either in the element of
12 the claim of an agreement to conspire to commit these acts and
13 then, of course, the causation problems that open up around
14 this.

15 I would refer your Honor -- this is a case --

16 THE COURT: Just to understand, you're saying to
17 prove, under New York law, a conspiracy to commit conversion,
18 you need to plead facts that would establish an agreement to
19 commit conversion?

20 MR. BOCCUZZI: Yes, your Honor.

21 THE COURT: Not an agreement to violate sanctions that
22 aided and abetted conversion?

23 MR. BOCCUZZI: Yes, your Honor, yes, your Honor. And,
24 again, it also falters at the first step and when it's stated
25 that way, since there's no prior right of action for violating

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1 sanctions or conspiring to violate sanctions. So the claim
2 fails on those multiple different levels.

3 And there is a decision from the Eastern District --

4 THE COURT: What about aiding and abetting, though?
5 As I've said, and you've agreed to, it sounds like it would be
6 sufficient, the aiding and abetting conversion. So the
7 violation of sanctions -- I could do the same exercise -- give
8 me the elements of aiding and abetting conversion under
9 New York law.

10 MR. BOCCUZZI: You need to have a primary tort, in
11 this case, conversion.

12 THE COURT: Right.

13 MR. BOCCUZZI: You need to have --

14 THE COURT: Conversion is pled.

15 MR. BOCCUZZI: They have pled that, yes. I mean,
16 really, I think they plead it as taking/conversion, but, yes,
17 they plead that some of their clients were driven off of their
18 land by Janjaweed or other third-party militias.

19 The second is actual knowledge by the aider and
20 abettor of that primary tort.

21 And the third element is substantial assistance.
22 Where the substantial assistance to be an act that's
23 substantial, you need proximate cause. And that's part of
24 New York law. That's in the ESP v Osis case, the Madoff
25 cases -- one was in the Second Circuit, I think your Honor had

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1 one -- where the alleged aiding and abetting, it was held the
2 aider and abettor needs to have proximately caused the injury
3 that's being complained of.

4 So what you have here is -- again, proximate cause is
5 an argument that takes out all these claims -- there is no
6 proximate causation as between what BNPP did in violating
7 sanctions and these particular instances of conversion or
8 assault on the ground in Sudan.

9 Another case that's very much in line with these
10 principles that I'm talking about just came out from the
11 Eastern District by Judge Garaufis, the Zapata case, which was
12 from September 30th. There, that involved money laundering by
13 HSBC with some drug cartels. The allegation from people who
14 had suffered violence at the hand of these cartels was that
15 HSBC should be secondarily liable. And the court rejected
16 that, and the court rejected it because of the lack of a direct
17 causal link, and said: Just think about this as a policy
18 matter; to hold this bank liable for all the violent acts of
19 this cartel goes beyond any conception of causation that
20 New York law recognizes. It's even much more writ large here,
21 where we're talking about a country of 44 million people and
22 acts that happened there over 12 years.

23 So I think, under any analysis of proximate causation,
24 the claims fail.

25 And the Madoff case, I would also add, the theory of

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1 causation that was rejected is very much like what's going on
2 here, which is, by giving money to Madoff, the defendants have
3 sort of kept him going, and because of that, the plaintiffs
4 were injured. Of course, here, there's no well-pleaded
5 allegation that Sudan actually needed this hard currency to be
6 a functioning government or to commit these acts. That's not
7 pled here. There's just a statement about, hard currency is
8 better than having to barter or to use a secondary currency;
9 it's an efficiency argument but it's not a claim that we were
10 the proximate cause because we provided the hard currency
11 through some of these transactions.

12 Just in terms of the plea agreement, plaintiffs'
13 counsel cited, I think, paragraphs 3 and 4 and 19 and 20. 3
14 and 4 don't even mention BNPP; they're just about the enactment
15 of the sanctions. And, of course, that just falls into their
16 view, which is incorrect, that because the sanctions are
17 enacted to protect certain national policies and so it's out
18 there, and people know about that; if you violate it, all of a
19 sudden you're responsible for anything that the subject of the
20 sanctions might do. Again, no case holds that.

21 Paragraphs 19 and 20 -- 19 just talks about the
22 setting up of the accounts in BNPP Switzerland, and 20 are some
23 internal BNP documents cited in the plea agreement. And those
24 documents, there's commentary about, people recognize the
25 humanitarian crisis that's going on in the Sudan, but there's

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1 nothing indicating that people believe that their money is
2 going to be used to commit those atrocities. So it just
3 doesn't support their claims here. And I would also say, even
4 read as aggressively as they read it -- and I think your Honor
5 has the document -- they're just allowed to fair inferences.
6 It doesn't support -- what they're saying is we knew, but it
7 also doesn't help them as the matter of the proximate causation
8 problem.

9 Unless your Honor had any further questions, those
10 were the points that I wanted to cover.

11 THE COURT: On the holding company and the New York
12 branch, opposing counsel cited me paragraphs making allegations
13 about those entities.

14 MR. BOCCUZZI: The only paragraph he referenced for
15 North America, the holding company, that's a statement by one
16 person when ABN AMRO pled guilty, saying the dirty secret has
17 been exposed. It's not any action by that person, it's not any
18 allegation that NA participated in any sanctioned transactions
19 with Sudan, so it doesn't really help them at all. And, as he
20 said, that's the only statement that they have about BNPP North
21 America. So it doesn't satisfy the elements of the claims that
22 we've gone through -- conspiracy, aiding and abetting,
23 negligence -- it's a sound bite, essentially.

24 Forgive me, your Honor, he rattled off a bunch of
25 things --

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1 THE COURT: 202, 206, 208, 214.

2 MR. BOCCUZZI: So, 202 discusses the 2004 finding by
3 DFS that BNPP, presumably, in New York, had systematic failures
4 in complying with the Bank Secrecy Act and had deficiency in
5 monitoring transactions. That's part of an allegation that
6 BNPP in New York entered into a memorandum of understanding
7 that required it to improve its systems. Again, that's very
8 far afield from what we're talking about, so now they've taken
9 it a step further. They're saying, okay, you didn't monitor to
10 catch an OFAC-violating transaction, and so they're claiming
11 that that somehow satisfies the elements that are necessary for
12 these intentional torts. It's just not the case. And I think
13 the paragraph speaks for itself.

14 206? This is about BNPP. They quoted from a
15 cease-and-desist order in 2014, so when BNPP admitted to what
16 it had done and it said that it was processing funds through,
17 and it says through BNPP New York. So that was one of the
18 points you and I were discussing earlier, about Switzerland was
19 sending money, it had to use New York, and they sent it both
20 through banks unaffiliated with BNPP and through BNPP New York
21 branch. Again, that's just more of a linking BNPP New York to
22 the OFAC violation. That is something that the money passed
23 through but doesn't help them with the elements that we've gone
24 through on the various torts.

25 THE COURT: Okay.

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1 I do have one additional question, moving you back to
2 kind of the first category that we discussed --

3 MR. BOCCUZZI: Sure.

4 THE COURT: -- which opposing counsel, I think
5 rightly, characterizes as a preemption argument as opposed to a
6 New York choice-of-law argument. Do you agree with that?

7 MR. BOCCUZZI: That that's her characterization, or
8 that's the better characterization?

9 THE COURT: That that's the argument. I don't care
10 about your characterization -- that's way too meta for me -- I
11 just want to know, is that the right way to think of it?

12 MR. BOCCUZZI: It's interesting. It is complicated.
13 It seems to partake of both. And the case that I misnamed, the
14 City of New York case, starts by talking about it as an issue
15 of, I think, choice of law and federal common law versus state
16 law claims. It then goes on to talk about, in a second section
17 about the Clean Air Act, which is classic preemption, there's a
18 statute it preempts.

19 So, here, as we're understanding it -- but I agree
20 your Honor could think about it in either way, and I agree it
21 was a fair game point because we were talking about which law
22 to apply and it came from the Second Circuit's ruling -- either
23 it goes to what is the, quote, jurisdiction with the greatest
24 interest here, or, if it's talking about in preemption terms,
25 well, this is federal law, we see federal law all over this

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1 place -- the ATS, the ATA, the TVPA -- all of which they can't
2 satisfy the elements to. Which also brings up sort of the
3 novelty and the oddity and, I would say, why these claims fail
4 as well, that we have Congress legislating right and left in
5 this area, and now I'll bring an attenuated New York State law
6 claim and just forget about all that. I don't think that can
7 be the right result. I just --

8 THE COURT: You've not argued field preemption?

9 MR. BOCCUZZI: No, we haven't argued it, no, your
10 Honor.

11 THE COURT: So a state could establish torts for
12 violation of human rights, for example?

13 MR. BOCCUZZI: I don't know. That is an interesting
14 question. Whether they would legislate specifically in the
15 field of international human rights violations? I don't know
16 the answer to that question. It seems to be an area that's
17 really where the federal government does that, and certainly,
18 in line with the discussions some of the cases in our
19 supplemental brief, that does seem to me to be the purview of
20 the federal government as opposed to local state, given the
21 intersection with foreign policy and things outside the U.S.
22 borders.

23 THE COURT: Okay.

24 MR. BOCCUZZI: Of course, there's no statute like that
25 here. They're just trying to say that the common law of

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1 New York, we're going to fit these claims into those pegs.

2 THE COURT: Okay. But you're not arguing that somehow
3 ATS or TVPA preempts the field of torts that would touch upon
4 the kind of conduct alleged here?

5 MR. BOCCUZZI: No, we're not arguing field preemption.
6 That's why we're thinking, it's really going to the
7 governmental interest test, the identification of these claims
8 as jus cogens by the Second Circuit, and what that means when
9 you play it all out here.

10 THE COURT: The City of New York, the case that you're
11 citing, do you have the citation for that?

12 MR. BOCCUZZI: Yes. 325 F.Supp.3d 466 (S.D.N.Y.
13 2018), a Judge Keenan decision. I believe it's on appeal now.

14 THE COURT: Okay.

15 MR. BOCCUZZI: And then the Judge Garaufis case, it's
16 2019 WL 4918626. That's from about three weeks ago.

17 THE COURT: That's Zupaca?

18 MR. BOCCUZZI: Zapata Z-a-p-a-t-a.

19 THE COURT: So you want to argue -- it's sort of
20 both -- whether you view it as a preemption federal law
21 preemption, that is to say, federal court sitting in diversity,
22 you're making an argument about federal interests, such that
23 federal common law applies? That's one version of the
24 argument?

25 MR. BOCCUZZI: Yes.

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1 THE COURT: And the cases you just cited to me or the
2 City of New York case, you think, stands for that proposition,
3 in part?

4 MR. BOCCUZZI: Yes.

5 THE COURT: And then the other argument is, even under
6 a New York choice-of-law analysis, that it would point toward
7 federal common law?

8 MR. BOCCUZZI: Yes.

9 THE COURT: And the case that you're citing for that
10 is also the City of New York case?

11 MR. BOCCUZZI: Yes. And there's also the -- I think
12 it's called Ungaro. It's from a district court in Florida, and
13 I think it involved Nazi era claims, and the argument was that
14 this is an area that's engaged U.S. foreign policy, and so
15 we're to look to federal common law and not apply these state
16 law torts.

17 THE COURT: The U.S. foreign policy here is what?

18 MR. BOCCUZZI: Well, just, again, you're in the realm
19 of U.S. policy because you're talking about international
20 jus cogens violations, and so that's an area that's an interest
21 of, or implicates, federal common law. The ATS, for example,
22 gives jurisdiction, it's a federal statute, and then in that,
23 you bring your international law claims, which, of course,
24 under Jesner they can't state a claim.

25 THE COURT: Okay. All right. Thank you.

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1 MR. BOCCUZZI: Thank you.

2 THE COURT: The motion is submitted. I will endeavor
3 to get a decision as fast as I can, given the delay from the
4 appeal process, so, to the extent claims survive, I want to
5 keep moving forward as quickly as we can.

6 My thanks to all counsel. Thank you for reading my
7 rule and dividing argument; not everybody does that. So my
8 thanks both for reading the rule and to the partners in the
9 case for giving argument to some other counsel.

10 We are adjourned. Thank you.

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