UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ENTESAR OSMAN KASHEF *et al.*, Plaintiffs, -against- BNP PARIBAS S.A., BNP PARIBAS S.A. NEW YORK BRANCH, and BNP PARIBAS US WHOLESALE HOLDINGS, CORP., Defendants.	Civil No. 1:16-Civ-03228-AJN Hon. Alison J. Nathan

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS BNP PARIBAS S.A. AND BNP PARIBAS US WHOLESALE HOLDINGS, CORP.'S MOTION TO DISMISS FOR *FORUM NON CONVENIENS*

December 8, 2021

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PRELIMINARY STATEMENT

Plaintiffs—a putative class represented by nineteen former Sudanese citizens—bring tort claims against Defendants BNP Paribas S.A. ("BNPP"), its New York branch ("BNPP-NY"),[1] and BNPP's indirect subsidiary, BNP Paribas US Wholesale Holdings, Corp. ("BNPP-NA"). Plaintiffs seek to hold Defendants liable under Swiss tort law for harms that Plaintiffs allegedly suffered at the hands of the Government of Sudan ("GOS") between 1997 and 2009. According to Plaintiffs, Defendants violated Swiss law by facilitating the GOS's atrocities in Sudan by providing financial services—almost exclusively in Switzerland through BNPP's Swiss subsidiary—to the GOS. Those claims, as has become increasingly evident, bear little connection to New York and should not be adjudicated in this forum.

This action should be dismissed in favor of Switzerland under the doctrine of *forum non conveniens*. As the Court has previously recognized, "conduct in Switzerland is at the heart of this litigation." *Kashef* v. *BNP Paribas SA*, 442 F. Supp. 3d 809, 820 (S.D.N.Y. 2020) ("*Kashef I*"). Plaintiffs' claims are based on a course of alleged tortious conduct that occurred almost entirely in Geneva and that predominantly involved BNPP's Swiss subsidiary BNP Paribas (Suisse) SA ("BNPP Suisse")—an entity that Plaintiffs declined to sue. According to the Complaint:

- BNPP Suisse was at one point "the sole correspondent bank in Europe for Sudanese Government Bank 1," and "nearly all major Sudanese commercial banks had U.S. dollar accounts" with BNPP Suisse. (ECF No. 241 ("TAC") ¶¶ 10, 102, 104; TAC Ex. C ("SOF") ¶ 19.)

[1] Notwithstanding that, as a licensed foreign bank branch, BNPP-NY "has no legal identity separate from" BNPP, *Bayerische Landesbank, N.Y. Branch* v. *Aladdin Cap. Mgmt. LLC*, 692 F.3d 42, 51 (2d Cir. 2012), Plaintiffs improperly named BNPP-NY as a separate defendant in the Complaint. Defendants reserve all rights regarding the status of BNPP-NY.

- BNPP, and primarily BNPP Suisse, conspired with Sudanese banks and entities to access U.S. financial markets for Sudan's imports and exports. (TAC ¶¶ 10, 101-102; SOF ¶¶ 17-18.)

- BNPP Suisse used certain "method[s]" to facilitate transactions on behalf of Sudanese account-holders that would avoid detection, such as removing transaction messages referencing Sudan, or processing transactions through third-party "satellite" banks. (TAC ¶¶ 111-113; SOF ¶ 18.)

- BNPP Suisse allegedly provided its Sudanese clients liquidity and access to markets that allegedly contributed to the growth in Sudan's oil revenues, and those revenues, in turn, were allegedly used to finance genocide. (TAC ¶¶ 115-151.)

In contrast, the Complaint is largely devoid of allegations of misconduct by BNPP's indirect U.S. subsidiary or misconduct that took place in New York. Indeed, in determining that Swiss tort law governs Plaintiffs' claims, this Court already has concluded that "almost all of BNPP's [allegedly] tortious activity was committed in one location: Switzerland," and "Switzerland has the greatest interest" in this action. *Kashef I*, 442 F. Supp. 3d at 818, 824.

A "motion to dismiss on *forum non conveniens* grounds may be made at any time." *Wave Studio, LLC* v. *Gen. Hotel Mgmt. Ltd.*, 2017 WL 972117, at *5 (S.D.N.Y. Mar. 10, 2017) (CS), *aff'd*, 712 F. App'x 88 (2d Cir. 2018). Defendants previewed in their earlier motion to dismiss briefing that they would "seek dismissal based on *forum non conveniens*" if it became clear that the factors warranted such relief. (ECF No. 172 at 1 n.1.) Such factors confirm that the action should proceed in Switzerland. To begin with, dismissal is warranted following the Court's ruling that the remaining causes of action are based exclusively on Swiss tort law, which—as applied to these unique factual allegations—is nascent and evolving. In these circumstances, principles of comity dictate that U.S. courts ought to defer consideration of novel applications of Swiss law to the courts in Switzerland. Moreover, the parties' disputes over the scope of discovery in recent months—some of which Plaintiffs have now brought to this Court (*see* ECF No. 257 ("Pls.' MTC"))—have made clear that many of the documents and witnesses that Plaintiffs seek

are located in Switzerland, outside the possession, custody, or control of Defendants or this Court's jurisdiction. Those new considerations have further tipped the balance and compel dismissal in favor of Switzerland.

BACKGROUND

Plaintiffs are a putative class of Sudanese refugees who allege that they suffered atrocities at the hands of the GOS while residing in areas of Sudan and present-day South Sudan. (TAC ¶¶ 23-24.) They allege that BNPP, by "providing the financial means" to the GOS, facilitated every alleged human rights violation or other wrongdoing by the GOS between 1997 and 2009. (*Id.* ¶¶ 1, 24, 190, 194.)

As alleged in the Complaint, until 2007, BNPP Suisse provided banking and financial services to Sudanese banks. (TAC ¶ 106.)[2] BNPP Suisse at one point was the "sole correspondent bank in Europe" for a financial institution owned by the GOS, and "all major Sudanese commercial banks [used] [BNPP Suisse] as their primary correspondent bank in Europe." (TAC ¶¶ 102, 104; SOF ¶ 19.) In Switzerland, BNPP Suisse "process[ed] U.S. dollar transactions" and "developed a business in letters of credit for the Sudanese banks." (TAC ¶¶ 104, 106.) BNPP Suisse "also took on a central role in Sudan's foreign commerce market." (*Id.* ¶ 106.)

In connection with these accounts and services, "BNPP, predominantly through its Swiss-based subsidiary, [BNPP Suisse], conspired with numerous Sudanese banks and entities . . . to violate the U.S. embargo by providing Sudanese banks and entities access to the U.S. financial system." (SOF ¶ 17; TAC ¶ 13.) According to the Complaint, BNPP Suisse employed various

[2] Tellingly, the Complaint itself goes to great lengths to avoid referencing BNPP Suisse or Switzerland, often replacing BNPP Suisse with "BNPP" when citing the Statement of Facts and other materials from BNPP's guilty pleas. (*Compare* TAC ¶ 106 *with* SOF ¶ 19; TAC ¶ 113 *with* SOF ¶ 24.) But those materials, which Plaintiffs have fully incorporated into their Complaint, identify BNPP Suisse as the "predominant[]" entity working with Sudan. (SOF ¶ 17.)

"methods" to provide these services without detection, including "modifying or omitting references" to sanctioned entities in payment messages originating from Geneva. (TAC ¶ 111.) BNPP Suisse also arranged to use "satellite banks"—other banks with accounts at BNPP Suisse—"to process illicit transactions" on behalf of Sudanese clients. (TAC ¶¶ 112-13.) The Complaint highlights the "letters of credit" provided by BNPP Suisse that were used to "cover[] a significant part of Sudanese imports and therefore facilitated and increased revenues from Sudan's crude oil sales." (TAC ¶ 108.) These actions were carried out primarily in Switzerland, where Sudanese clients held their accounts, and where nearly all of BNPP's financial services to Sudanese clients were centered. (SOF ¶¶ 19-33.)

U.S. authorities subsequently investigated BNPP's activities for violations of U.S. sanctions laws, resulting in BNPP's pleading guilty in 2014 to violations of U.S. and New York State law. Relying on the guilty pleas, Plaintiffs now bring various tort claims based on alleged conduct that occurred almost entirely in Switzerland and allegedly caused Plaintiffs' injuries in Sudan (*id.* ¶¶ 257-529), which this Court has determined are governed by Swiss law. Plaintiffs bring these claims against BNPP and its New York subsidiary BNPP-NA—but not BNPP Suisse, whose alleged conduct is at the heart of this case.

Plaintiffs commenced this action in April 2016. Defendants moved to dismiss on several grounds, including that Plaintiffs' claims were time-barred and barred by the act of state doctrine. This Court agreed. *Kashef* v. *BNP Paribas SA*, 316 F. Supp. 3d 770 (S.D.N.Y. 2018). In May 2019, the Second Circuit vacated the dismissal. 925 F.3d 53 (2d Cir. 2019). On remand, the parties addressed choice of law. The Court concluded that Switzerland had the strongest connection and that Swiss law should apply. *Kashef I*, 442 F. Supp. 3d at 821. With that clarity, Defendants moved to dismiss for failure to state a claim under Swiss law, which the Court granted

in part and denied in part in February of this year. *Kashef* v. *BNP Paribas SA*, 2021 WL 603290 (S.D.N.Y. Feb. 16, 2021) ("*Kashef II*"). The parties are now in discovery.

ARGUMENT

I. PLAINTIFFS' ACTION SHOULD BE DISMISSED UNDER THE DOCTRINE OF *FORUM NON CONVENIENS* BECAUSE SWITZERLAND, NOT NEW YORK, IS AT THE HEART OF THIS LITIGATION.

Pursuant to the doctrine of *forum non conveniens*, a district court in its discretion can "refuse to entertain jurisdiction of a case . . . when doing so would best serve the convenience of the parties and the ends of justice." *Gross* v. *British Broadcasting Corp.*, 386 F.3d 224, 229 (2d Cir. 2004). The Second Circuit has set out "a three-step process to guide the exercise of [courts'] discretion." *Wamai* v. *Indus. Bank of Korea*, 2021 WL 3038402, at *3 (S.D.N.Y. July 14, 2021) (DLC). First, the court "determines the degree of deference properly accorded the plaintiff's choice of forum." *Id.* Next, the court "considers whether the alternative forum proposed by the defendants is adequate to adjudicate the parties' dispute." *Id.* Finally, the court "balances the private and public interests implicated in the choice of forum." *Id.* The circumstances of this action compel dismissal under that framework.

A. Plaintiffs' Choice of Forum Is Not Entitled to Substantial Deference Because the Lawsuit Lacks a Bona Fide Connection to New York, and Plaintiffs Elected Not to Name as a Defendant the BNPP Entity with the Closest Connection to the Alleged Misconduct.

The Court should not afford undue deference to Plaintiffs' decision to file this action in New York. "[T]here is no rigid rule of decision protecting U.S. citizen or resident plaintiffs from dismissal for *forum non conveniens*." *RIGroup LLC* v. *Trefonisco Mgmt. Ltd.*, 949 F. Supp. 2d 546, 551-52 (S.D.N.Y. 2013) (JMF), *aff'd*, 559 F. App'x 58 (2d Cir. 2014). The "degree of deference to be given to a plaintiff's choice of forum moves on a sliding scale depending on several relevant considerations." *Iragorri* v. *United Tech. Corp.*, 274 F.3d 65, 71 (2d Cir.

2001). Those considerations vary depending on the circumstances of the case, but they center around the "plaintiff's or the lawsuit's bona fide connection to the United States and to the [plaintiff's] forum of choice." *Id.* at 72. Such a connection is lacking here.

As this Court has recognized, New York has only a "minor connection" to this lawsuit. *Kashef I*, 442 F. Supp. 3d at 820. "Switzerland"—not New York—"is at the heart of this litigation." *Id.* Specifically, Plaintiffs allege that BNPP Suisse "served as a correspondent bank for Sudanese entities" and, through the services it provided, allowed the Sudanese regime to increase oil revenues and finance atrocities committed against its citizens. *Id.* The services alleged in the Complaint—the provision of letters of credit, the use of "satellite banks," and the modification of payment messages—were all conducted by BNPP Suisse in Switzerland. In contrast, Plaintiffs allege merely that "BNPP cleared money through New York—a process that is automated and ministerial." *Id.*

Despite basing their claims almost entirely on allegedly tortious conduct carried out by BNPP Suisse, *id.* at 818 (BNPP Suisse "committed the tortious conduct alleged here"), Plaintiffs conspicuously chose not to sue the Swiss subsidiary. Indeed, Plaintiffs appear to go to great lengths to strip any reference in the Complaint to Switzerland, though such efforts did not prevent this Court from rightly recognizing that the allegedly "tortious activity was committed in one location: Switzerland." *Id.* Plaintiffs instead have named BNPP-NA, a New York-based indirect subsidiary of BNPP, as a defendant. But the Complaint barely mentions BNPP-NA, and does not—and cannot—explain how BNPP-NA's conduct in New York contributed to the tortious conduct that allegedly occurred in Switzerland. Plaintiffs' forum choice of New York does not "deserve[] presumptive deference simply because the chosen forum is [BNPP-NA's] home forum." *Pollux Holding* v. *Chase Manhattan Bank*, 329 F.3d 64, 74 (2d Cir. 2003); *see also*

Schertenleib v. *Traum*, 589 F.2d 1156, 1164 (2d Cir. 1978) (granting *forum non conveniens* dismissal even though plaintiff sued defendant in his home forum because "none of the relevant events occurred [t]here, and none of the sources of proof [were] [t]here"). That is particularly so when Plaintiffs have strategically included a New York subsidiary of BNPP as a defendant while declining to sue the subsidiary that allegedly carried out the tortious conduct. "[T]he more it appears that the plaintiff's choice of a U.S. forum was motivated by forum-shopping reasons, . . . the less deference the plaintiff's choice commands and, consequently, the easier it becomes for the defendant to succeed on a *forum non conveniens* motion by showing that convenience would be better served by litigating in another country's courts." *Iragorri*, 274 F.3d at 72; *see also Pollux Holding*, 329 F.3d at 74 (choice to sue a defendant at home is entitled to deference only "to the extent that the plaintiff and the case possess *bona fide* connections to, and convenience factors favor, that forum").

The key issues in this litigation will be the financial services provided to Sudanese entities by BNPP Suisse; whether BNPP "knew or should have known" that those services "contribut[ed] to" the GOS's tortious acts; and whether those services were the "natural and adequate cause" of Plaintiffs' harm. *Kashef II*, 2021 WL 603290, at *2. Because "the operative facts of this litigation unquestionably took place in Switzerland," any deference due to Plaintiffs' choice to sue here "does not operate at full strength." *LaSala* v. *TSB Bank, PLC*, 514 F. Supp. 2d 447, 457 (S.D.N.Y. 2007) (CSH). In considering the appropriate level of deference, *Iragorri* instructs courts also to look to the availability of witnesses and evidence. 274 F.3d at 72. The key witnesses and evidence here are located in Switzerland, with much of the documentary evidence

sought by Plaintiffs held by BNPP Suisse.[3] Where "[m]uch of the relevant documentary evidence" is abroad and "potentially relevant witnesses are . . . outside the subpoena power of this Court," the "difficulty of conducting discovery" here "weighs against deference to the plaintiffs' choice." *Owens* v. *Turkiye Halk Bankasi A.S.*, 2021 WL 638975, at *4 (S.D.N.Y. Feb. 16, 2021) (DLC).

To be sure, a U.S. resident's choice of a U.S. forum, even if not where she resides, can be afforded deference when the forum was chosen for convenience. *Iragorri*, 274 F.3d at 72-73. But there are no clear indications that New York was chosen for convenience in this litigation. According to the Complaint, most Plaintiffs are California residents, and none allege residency in or a connection to New York.[4] Plaintiffs also "do not bring a single claim under federal law" or New York law that would warrant pursuing their action here. *Erausquin* v. *Notz, Stucki Mgmt. (Bermuda) Ltd.*, 806 F. Supp. 2d 712, 728 (S.D.N.Y. 2011) (WHP). Moreover, given the lack of a meaningful connection to this forum, the mere fact that Plaintiffs are U.S. citizens or residents does "not constitute the powerful, near-decisive factor[]" warranting a lawsuit here. *CCS Int'l, Ltd.* v. *ECI Telesystems, Ltd.*, 1998 WL 512951, at *7 (S.D.N.Y. Aug. 18, 1998) (LAP). In *Celestin* v. *Martelly*, 524 F. Supp. 3d 43 (E.D.N.Y. 2021) (LDH), for example, the court reasoned that plaintiffs' choice to sue in New York on behalf of a class of U.S. consumers did not warrant "special deference" "because in relation to the core operative facts," "the parties and events at best have only marginal links to [p]laintiff's selected forum." *Id.* at 51 n.6. In fact, even when plaintiffs are New York residents, courts in this District have afforded diminished deference when the

[3] As discussed in more detail below (*see infra* Section I.C.1), Plaintiffs are seeking access to documents and information outside Defendants' possession, custody, or control and subject to Swiss banking secrecy, data privacy, and blocking statutes.

[4] Previously, just two of the representative plaintiffs were residents of New York. (ECF No. 49 ¶¶ 34, 45.) Both individuals were voluntarily dismissed from the action in June 2021.

"operative facts of [the] action took place outside of the Southern District of New York" and the lawsuit, as here, "lacks a substantial connection to New York." *Wenzel* v. *Marriott Int'l, Inc.*, 2014 WL 6603414, at *3 (S.D.N.Y. Nov. 17, 2014) (ANT), *aff'd*, 629 F. App'x 122 (2d Cir. 2015).

Two recent *forum non conveniens* dismissals in this District, *Wamai* and *Owens*, are instructive. In both, a class of judgment creditors of the Government of Iran—comprising U.S.-resident and foreign victims of terrorist attacks by groups linked to Iran—brought rescission claims under New York and federal law against a foreign bank for allegedly assisting Iran to circumvent U.S. sanctions. *Wamai*, 2021 WL 3038402, at *1-2; *Owens*, 2021 WL 638975, at *1-2. In *Wamai*, defendant Industrial Bank of Korea had entered into a deferred prosecution agreement with federal and state prosecutors, following an investigation, for oversight failures at its New York branch that led to the branch processing transactions in violation of U.S. sanctions. 2021 WL 3038402, at *2. And in *Owens*, Halkbank had been indicted in this District for conspiring with Iran to violate U.S. sanctions by way of fraudulent transactions directed through New York financial institutions. 2021 WL 638975, at *2. But despite these links to New York, the court in each case concluded that the plaintiffs' choice of forum was not entitled to significant deference because the claims had little substantive connection to New York. Rather, plaintiffs' claims were based on "alleged fraudulent scheme[s]" to circumvent U.S. sanctions that took place at the banks' respective locations in Turkey and Korea. *Owens*, 2021 WL 638975, at *4; *see also Wamai*, 2021 WL 3038402, at *4. Thus, relevant evidence, including the key witnesses and documents, were located in those countries and outside of New York. *Id*. So too here.

Plaintiffs appear to proceed on the assumption that their claims are simply an extension of the investigation conducted by U.S. authorities for U.S. sanctions violations. That is the purported "connection" to New York. But this is not a sanctions case, and Plaintiffs are not

bringing claims for compensation because of Defendants' violations of U.S. sanctions laws. Rather, Plaintiffs seek recompense under Swiss tort law for actions that predominantly occurred in Switzerland and that allegedly caused harms to Plaintiffs (indirectly) in Sudan. Plaintiffs' choice to bring this action in New York and not to name BNPP Suisse as a defendant are not entitled to deference and, for the reasons explained below, are outweighed by the multiple factors supporting dismissal.

B. Swiss Courts Provide an Adequate Alternative Forum.

An alternative forum is adequate "if the defendants are amenable to service of process there, and if it permits litigation of the subject matter of the dispute." *LaSala*, 514 F. Supp. 2d at 455. "The test does not mean that the same degree of relief must be available in the alternative forum." *Id.* Unless litigating in the alternative forum presents a "fundamental obstacle" to recovery, "American courts are not prone to characterizing a sovereign nation's courts as 'clearly unsatisfactory.'" *Id*. Defendants BNPP and BNPP-NA conditionally consent to jurisdiction in a Swiss civil court in the event that this motion is granted. (*See* Declaration of Prof. Isabelle Romy ("Romy Decl.") ¶ 31); *see also BFI Grp. Divino Corp.* v. *JSC Russian Aluminum*, 298 F. App'x 87, 91 (2d Cir. 2008) ("An agreement by the defendant to submit to the jurisdiction of the foreign forum can generally satisfy this requirement.").

As to the second prong, this Court has already found that Swiss courts recognize the types of tort claims that Plaintiffs allege in the Complaint. *See Kashef II*, 2021 WL 603290, at *9. Indeed, "in the context of forum non conveniens inquiries, courts in this Circuit have repeatedly found that Switzerland is an adequate forum for adjudication of . . . tort [claims]." *Do Rosário Veiga* v. *World Meteorological Org.*, 486 F. Supp. 2d 297, 304 (S.D.N.Y. 2007) (VM); *see also Accent Delight Int'l Ltd.* v. *Sotheby's*, 394 F. Supp. 3d 399, 410 (S.D.N.Y. 2019) (finding

Switzerland adequate alternative forum for fraud and breach of fiduciary duty claims); *LaSala*, 514 F. Supp. 2d at 456 (finding same for common law tort claims).

Additionally, that Switzerland may not provide for the same discovery procedures as U.S. courts does not bear on the adequacy analysis. Courts in this Circuit have long held that "some inconvenience or the unavailability of beneficial litigation procedures similar to those available in the federal district courts does not render an alternative forum inadequate." *Borden, Inc.* v. *Meiji Milk Prods. Co., Ltd.*, 919 F.2d 822, 829 (2d Cir. 1990); *see also Otor, S.A.* v. *Credit Lyonnais, S.A.*, 2006 WL 2613775, at *4 (S.D.N.Y. Sept. 11, 2006) (RO) ("foreign forum is not inadequate simply because its discovery procedures may be more restrictive").[5] Switzerland is an adequate forum for Plaintiffs' claims. Plaintiffs can—and should—litigate this action in a Swiss civil court.

C. Both the Public and Private Interests Weigh Heavily in Favor of Dismissal.

"At the final stage of the *forum non conveniens* analysis, the Court must consider whether the applicable private and public interest factors support dismissal." *Wamai*, 2021 WL 3038402, at *7. At this stage of the litigation, those factors weigh decisively in favor of dismissal.

1. Considerations of Convenience Compel Dismissal in Favor of Switzerland.

"Private interest factors are those that involve the 'convenience of the litigants.'" *Id.* at *7. They include: "(1) the ease of access to evidence; (2) the availability of compulsory process; (3) the cost for cooperative witnesses to attend trial; (4) the enforceability of a judgment; and (5) all other practical matters that might shorten any trial or make it less expensive." *Holzman*

[5] To the extent Plaintiffs invoke Switzerland's lack of a class action mechanism, that does not render the forum inadequate either. *See Aguinda* v. *Texaco, Inc.*, 303 F.3d 470, 478 (2d Cir. 2002); (*see also* Romy Decl. ¶ 25 (Swiss courts permit joinder of related claims)).

v. *Guoqiang Xin*, 2015 WL 5544357, at *8 (S.D.N.Y. Sept. 18, 2015) (Nathan, J.). Those factors strongly support dismissal here.

a) Much of the Key Evidence Is Located in Switzerland and Will Be Difficult to Produce in New York.

Where, as here, "alleged misconduct is centered in the foreign forum and the majority of evidence resides there, dismissal is favored." *LaSala*, 514 F. Supp. 2d at 458. As this Court has recognized, Plaintiffs' claims are based on transactions that occurred and services that were provided in Switzerland. *See Kashef I*, 442 F. Supp. 3d at 814. While BNPP Suisse produced materials in the investigation by U.S. authorities (with redactions to comply with Swiss banking secrecy and data privacy laws), Plaintiffs seek access to unredacted information and many additional records regarding those services that are located in Switzerland and are not in Defendants' possession, custody, or control. *See Wamai*, 2021 WL 3038402, at *4 (where action "primarily involves allegations that Korea-based employees of a Korean bank conspired to violate U.S. law," "[m]uch of the potential proof . . . is in Korea").

Plaintiffs have insisted that "much, if not all, of the necessary liability evidence has either been stipulated to by BNPP in its guilty pleas or already transferred to the United States in connection with the" investigations by the U.S. authorities. (ECF No. 173 at 2 n.4.) Yet Plaintiffs' discovery requests now extend far beyond the investigation records located in the United States. (*See* Ex. 1, RFP Nos. 19-20 (documents relating to Swiss and French investigations); No. 24 (documents concerning sanctions compliance); No. 25 (documents concerning alleged bank practices related to Sudanese clients); Nos. 26-27 (documents concerning Sudanese transactions); Nos. 29-31 (documents concerning Sudanese clients)).[6] Moreover, having now received

[6] Exhibit 1 is attached to the Declaration of Karen Patton Seymour, dated December 8, 2021 ("Seymour Decl.").

documents contained in the productions to the U.S. authorities, Plaintiffs argue that those productions do not contain information "clearly relevant" to their claims, including the "identities of the BNPP employees, Sudanese accomplices, and correspondents" who were involved in the allegedly tortious conduct that occurred in Switzerland. (Pls.' MTC at 1.) Given Plaintiffs' insistence that the more comprehensive set of documentary evidence is held in Switzerland, considerations of convenience weigh strongly in favor of litigating this action there. *See LaSala*, 514 F. Supp. 2d at 458; *see also Erausquin*, 806 F. Supp. 2d at 728 (dismissing in favor of Switzerland where "vast majority of [defendants'] documents are located in Switzerland and Luxembourg").

Switzerland considers the collection of evidence in Switzerland for litigation to be an exclusively judicial function, and the circumvention of the Swiss judiciary constitutes an infringement on Swiss sovereignty. (Romy Decl. ¶ 42.) Indeed, such circumvention is criminalized under Article 271 of the Swiss Criminal Code. (*Id.*) Accordingly, the production of evidence located in Switzerland for use in U.S. litigation must be conducted through the procedures set forth in the Hague Convention on the Taking of Evidence Abroad ("Hague Convention")—specifically, a letter of request to the Swiss central authority, which will initiate a request to the Swiss judiciary. (*Id.* ¶¶ 47, 50.) The complications presented by this case are particularly acute because the documentary evidence in Switzerland is held by BNPP Suisse, which is a separate entity from BNPP and a non-party to this litigation outside the jurisdiction of this Court. It would be a criminal offense under Article 271 for BNPP Suisse to produce those documents for purposes of this litigation unless in accordance with the Hague Convention procedures. (*Id.* ¶¶ 46, 50); *see also S.E.C.* v. *Stanford Int'l Bank, Ltd.*, 776 F. Supp. 2d 323, 339 (N.D. Tex. 2011) (recognizing risk of criminal liability under Swiss law in ordering use of Hague

Convention procedures to seek evidence from non-party in Switzerland).[7] The costs associated with the "time-consuming and expensive process of obtaining essential documentary evidence . . . under the Hague Convention" can be mitigated if this action were to proceed in Switzerland. *Crosstown Songs U.K. Ltd.* v. *Spirit Music Grp.*, 513 F. Supp. 2d 13, 17 (S.D.N.Y. 2007) (MGC).

Nor should "certain additional costs of discovery, namely, compliance with foreign privacy laws," be overlooked. *Erausquin*, 806 F. Supp. 2d at 728. For example, Swiss law prohibits—except in a limited set of circumstances that are not applicable here—the disclosure of personal data in the United States, even for purposes of litigation. (Romy Decl. ¶ 49.) Bank records from BNPP Suisse will also be subject to Switzerland's bank secrecy laws. (*Id.* ¶ 48.) For this reason, the documents previously produced to U.S. authorities were heavily redacted. For example, the identity of each Sudanese client—information that Plaintiffs are now demanding in their letter-motion to compel (Pls.' MTC at 2)— was identified only by the entity's location (*e.g.*, "[Swiss] Sudanese Bank 18"). But the identities of BNPP Suisse's Sudanese clients and their roles in the alleged atrocities will be relevant to causation and knowledge. *See Kashef II*, 2021 WL 603290, at *8 (Plaintiffs must show that BNPP Suisse's services to its Sudanese clients "can be reasonably considered to have directly resulted in" Plaintiffs' alleged harms). Litigating the scope of privacy and bank secrecy protections—issues already disputed by the parties (*see* Pls.' MTC;

[7] Plaintiffs insist in their letter-motion to compel that "Swiss blocking and secrecy laws are not implicated at this time" (Pls.' MTC at 3), but that is belied by the very relief they request in their motion. Plaintiffs demand that Defendants reveal the names of Swiss employees protected by pseudonyms that were used in the productions made to the U.S. authorities in accordance with Swiss data privacy, bank secrecy, and blocking laws. Indeed, each of the documents that Plaintiffs attach to their letter-motion as "highly relevant" (*id.* at 2) examples are documents that were produced by BNPP Suisse, and are thus located in their unredacted form in Switzerland, subject to limitations imposed by Swiss privacy laws and blocking statutes, and outside of BNPP's possession, custody, or control. (*See* Seymour Decl. ¶ 8.)

Seymour Decl. ¶¶ 3-8)—will require briefing and expert testimony, making litigating in New York significantly more time-consuming and expensive. *See Holzman*, 2015 WL 5544357, at *9 (litigating in New York would "create additional expert witness costs as '[w]ritten and oral testimony from experts . . . remains the basic mode of proving foreign law'" (citation omitted)).

b) The Vast Majority of Relevant Witnesses Are Located in Switzerland.

"The location of witnesses is always a key issue in a *forum non conveniens* inquiry." *Fustok* v. *Banque Populaire Suisse*, 546 F. Supp. 506, 510 n.11 (S.D.N.Y. 1982). Here, the vast majority of relevant witnesses are located outside of New York. Indeed, of the 12 individuals that Defendants identified in response to Plaintiffs' interrogatory, six are current or former employees who worked, and presumably currently reside, in Switzerland.[8] (*See* Pls.' MTC, Ex. B; Seymour Decl. ¶ 6.) Plaintiffs allege that BNPP Suisse's provision of financial services to Sudanese banks assisted the Sudanese government in committing human rights abuses. (TAC ¶¶ 102-114, 134-36.) Current and former employees of BNPP Suisse will thus be critical witnesses, as Plaintiffs themselves recognize. (Pls.' MTC at 2.) Other witnesses worked, and presumably are still located, in France. (*See* Seymour Decl. ¶ 7.) In contrast, few if any witnesses with relevant knowledge are located in New York. Only one individual in New York is mentioned in the Complaint, and only for sending an email discussing the conduct of a different bank. (TAC ¶ 186.) The Complaint provides "no reason to believe that [New York] witnesses have knowledge of 'the precise issues that are likely to be actually tried.'" *Wamai*, 2021 WL 3038402, at *4 (citation omitted); *see also Erausquin*, 806 F. Supp. at 727 (dismissing where witness "most prominently featured" in the

[8] Further underscoring the difficulties of litigating this action in New York, and as highlighted by Plaintiffs' first letter-motion to compel, many of those individuals can only be identified pseudonymously due to Swiss data privacy restrictions. (*See* Seymour Decl. ¶ 6.) Such restrictions would not apply if the case were to proceed in a Swiss court. (*See* Romy Decl. ¶ 51.)

complaint was located in Switzerland); *LaSala*, 514 F. Supp. 2d at 460 (dismissal where witnesses resided in Switzerland, where the "alleged fraudulent scheme occurred," even though correspondent transactions were executed in New York).

"If this case proceeds in New York, then, discovery and trial would likely involve an arduous process of securing the appearance of witnesses without the benefit of this Court's subpoena power and transporting witnesses." *Wamai*, 2021 WL 3038402, at *4. For those witnesses located in Switzerland, their testimony can only be compelled through Hague Convention procedures. (Romy Decl. ¶¶ 45, 50, 52); *see also Veiga*, 486 F. Supp. 2d at 306 (deposing witnesses in Switzerland "would cause not only greater financial hardships, but significant delays in preparing the case for trial before this Court, and ultimately in resolving the merits of the dispute").

Switzerland presents a substantially more convenient forum, as the majority of relevant witnesses are likely located there and will be subject to compulsory process by Swiss courts without resort to Hague Convention procedures. (*See* Romy Decl. ¶ 19, 51.) And as for the witnesses located in France, "the ease and expense of transporting witnesses" to Switzerland "will be far less burdensome than to New York." *Erausquin*, 806 F. Supp. 2d at 727. The parties and the witnesses should not be forced to bear these costs when they can be avoided if this action were to proceed in Switzerland.

c) Further Considerations of Convenience Demonstrate that Switzerland Is the Appropriate Forum.

Additional considerations of convenience only further make clear that Switzerland is the more appropriate forum for this action.

There will be extensive costs incurred in connection with translating Swiss law decisions and obtaining expert reports and testimony on a number of important issues, including

Defendants' secondary liability, Sudan's primary liability, agency law, and as noted above, bank secrecy, among others. *See Holzman*, 2015 WL 5544357, at *9. Furthermore, nearly all of the relevant documents are in French and will require certified translations if this action proceeds in New York. *See Cortec Corp.* v. *Erste Bank Ber Oesterreichischen Sparkassen AG*, 535 F. Supp. 2d 403, 412 (S.D.N.Y. 2008) (CM) (analysis of the private interest factors "must include the private cost of providing certified translations of hundreds of pages of documentary evidence"). These costs can also be avoided if the action proceeds in Switzerland.

Plaintiffs have suggested that New York cannot be inconvenient for Defendants given that they have litigated the action here for several years. (ECF No. 173 at 3 n.4.) But, thus far, this case has entailed motions practice and an appeal, which do not directly implicate the core concerns under the *forum non conveniens* analysis. Indeed, "[a] motion to dismiss on *forum non conveniens* grounds may be made at any time," *Wave Studio*, 2017 WL 972117, at *5, and parties frequently bring such motions—and courts grant them—once discovery has begun and the burdens of proceeding in that forum become apparent. *See, e.g.*, *Golden Horn Shipping Co.* v. *Volans Shipping Co.*, 2017 WL 3535002, at *5 (S.D.N.Y. Aug. 16, 2017) (JPO) (granting motion filed "two and [a] half years from the Complaint"); *In re Optimal U.S. Litig.*, 886 F. Supp. 2d 298, 306 (S.D.N.Y. 2012) (JPO) (as "discovery in this case has progressed, it has become clear that the focus of discovery is in Europe, which weighs against . . . plaintiffs' choice"); *Erausquin*, 806 F. Supp. 2d at 719 (granting motion two years after complaint filed and after parties were for "nine months . . . embroiled in a dispute over the scope of [a discovery order] and Defendants' reliance on foreign privacy laws allegedly preventing them from producing documents located overseas").

Defendants have repeatedly indicated that they may seek *forum non conveniens* dismissal if it became clear that the relevant factors warranted such relief. (*See* ECF No. 172 at 1

n.1; ECF No. 230 at 90; ECF No. 248 at 92.) The subsequent progression of this action, including the initial stages of discovery, has crystallized that this action belongs in Switzerland.

2. The Relevant Public Interests Will Best Be Served If This Action Proceeds in Switzerland.

Not only is New York an inconvenient forum for this action, but no public interest is served by litigating this action here. In evaluating the public interests, a court should consider, among other factors, the "interest of forums in deciding local disputes, and interest in issues of foreign law being decided by foreign tribunals." *Holzman*, 2015 WL 5544357, at *9.

a) This Action Raises Novel Questions of Swiss Tort Law that a Swiss Court Should Decide in the First Instance.

"The seeming necessity of this Court's deciding a complex and unsettled issue of Swiss law is a powerful factor weighing in favor of dismissal." *LaSala*, 514 F. Supp. 2d at 467. Here, the application of Swiss law is certain, and U.S. courts "have 'virtually no interest in resolving' disputes governed *exclusively* by foreign law." *Holzman*, 2015 WL 5544357, at *10; *see also Wellton Int'l Express* v. *Bank of China (Hong Kong)*, 2020 WL 3489389, at *3 (S.D.N.Y. June 26, 2020) (JPO) ("*mere likelihood* of the application of foreign law weighs in favor of dismissal"). Defendants do not question the Court's competence to apply foreign law. But a Swiss court will be far more familiar with the legal issues presented by this case, which extend beyond the disputes regarding Article 50 that the Court addressed. Such issues include the standards for primary liability, agency, and calculating damages. (ECF No. 248 at 90-95.)

The case for dismissal is particularly strong where, as here, Swiss law experts "disagree about critical points" and "Swiss law in this area is evolving." *LaSala*, 514 F. Supp. 2d at 467. Plaintiffs allege that Article 50 liability applies here to a set of facts that have no analogy in Swiss case law at any judicial level, let alone an authoritative opinion from the Swiss Supreme Court. (Romy Decl. ¶¶ 38-40.) Plaintiffs' claims also raise unresolved and controversial questions

regarding the precise meaning of Article 50 and the scope of secondary liability under Swiss law. (Romy Decl. ¶ 41.) Indeed, Swiss legal scholars are closely following this litigation for that reason. (*Id*.) Courts frequently dismiss actions that will require them to resolve controversial questions of foreign law. *See, e.g.*, *LaSala*, 514 F. Supp. 2d at 467; *Fustok*, 546 F. Supp. at 513 ("With Swiss legal experts in such sharp dispute as to Swiss law and the holding of Swiss high court rulings, the matter is best left to knowledgeable Swiss jurists."); *Schertenleib*, 589 F.2d at 1165 (same). Principles of comity require that these matters of Swiss tort law be examined by a Swiss court in the first instance.

b) Switzerland Has a Strong Interest in the Subject Matter of the Action.

The "public interest in having localized controversies decided at home" concerns which forum "possesses a stronger local interest in the controversy." *LaSala*, 514 F. Supp. 2d at 461. Here, "Switzerland's interests in this litigation far outweigh those of New York." *Kashef I*, 442 F. Supp. 3d at 818. That is because "Switzerland has a strong stake in policing and imposing liability for tortious conduct committed within its borders." *Id.* at 822. Switzerland also has a strong "interest in policing conduct by its corporations and officers." *Optimal*, 886 F. Supp. 2d at 310. That interest extends to the "reputability of the country's banking system," which is "intimately connected to the effectiveness of the country's regulation of its banks." *LaSala*, 514 F. Supp. 2d at 465. In fact, Switzerland has already demonstrated its interest in the conduct at issue here, including by enacting its own Sudanese sanctions regime. (Romy Decl. ¶ 53.)

New York, by comparison, has "[l]ittle [i]nterest" in this litigation. *Kashef I*, 442 F. Supp. 3d at 819. "[T]he argument that dollar transfers through banks in the United States creates a strong public interest in favor of the United States has been rejected by courts in this Circuit." *LaSala*, 514 F. Supp. 2d at 462 (collecting cases). "Moreover, to the extent New York

and the federal government have an interest in policing BNPP's criminal conduct" in violation of U.S. law, "they have [already] vindicated that interest." *Kashef I*, 442 F. Supp. 3d at 819.[9]

c) The Court Should Not Be Burdened with a Complex Matter with Little Connection to the Forum.

"New York . . . has an interest in avoiding the burden on [its] jurors by having them decide cases that have no impact on their community." *Banculescu* v. *Compania Sud Americana De Vapores, SA*, 2012 WL 5909696, at *8 (S.D.N.Y. Nov. 26, 2012) (ALC). Courts have found that asking the citizens of New York to serve as jurors in an action where the clearing of financial transactions is the sole alleged connection to the forum "would be inappropriate." *Lan Assocs. XVIII* v. *Bank of Nova Scotia*, 1997 WL 458753, at *6 (S.D.N.Y. Aug. 11, 1997) (JFK); *see also Potomac Cap. Inv. Corp.* v. *Koninklijke Luchtvaapt Maatschapplj N.V.*, 1998 WL 92416, at *11 (S.D.N.Y. Mar. 4, 1998) (AJP) ("New York's interest in this [alleged negligence case] is simply not sufficient to justify the enormous commitment of judicial time and resources that would inevitably be required if the case were to be tried here" and collecting cases). This interest is especially acute with respect to jurors called to serve in this District: "It is well-recognized that the Southern District of New York is a congested district," and there is "a legitimate interest in ensuring that disputes with little connection to the district be litigated elsewhere." *Banculescu*, 2012 WL 5909696, at *8. Indeed, on account of the COVID-19 pandemic, the trial backlog in this

[9] The U.S. authorities' prosecution focused solely on violations of U.S. sanctions. Indeed, at BNPP's sentencing hearing, the government stated that, under federal terror victim restitution guidelines, the victims of the Sudanese regimes were not victims of BNPP's crime. The sentencing court agreed. *See* ECF No. 55 at 9-11, *United States* v. *BNP Paribas S.A.*, 14-cr-460 (S.D.N.Y. May 1, 2015).

District has now become even more substantial.[10] This Court should not be burdened with presiding over complex litigation that has no clear nexus here.

* * *

Plaintiffs' substantive claims are governed exclusively by Swiss law, they are based on alleged conduct that occurred in Switzerland, and key evidence and witnesses are located in Switzerland. Litigating this action in New York will be unnecessarily complex, burdensome, and expensive. This action should be dismissed in favor of Switzerland.

CONCLUSION

For the foregoing reasons, this action should be dismissed for *forum non conveniens* in favor of Switzerland.

[10] *See* Tom McParland, *'Small Steps': Attorneys Welcome SDNY's Easing of COVID-19 Restrictions, But Say Return to Normal Remains Elusive*, New York Law Journal, June 15, 2021 (noting the "ever-growing backlog of cases that are set for jury trials").

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Respectfully submitted,

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