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.	No. 1:16-cv-03228-AKH-JW Hon. Alvin K. Hellerstein

PLAINTIFFS' REPLY IN SUPPORT OF CLASS CERTIFICATION

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I. Introduction

In opposing class certification, BNPP continues to disparage the genocide survivors and victims of its criminal conspiracy with the Government of Sudan ("GOS" or the "Regime"), describing them as "former Sudanese individuals now living in the United States" who just "happened to relocate" here.[1] BNPP's unwillingness to admit that the members of the proposed class are in fact *U.S. citizens* and lawful permanent residents who fled unspeakable horrors before being admitted by the U.S. Government as refugees and asylees is even more remarkable given this Court's prior rebuke.[2] And BNPP's contempt for these class members and their legal claims permeates its entire opposition brief as it dismisses the significance of the U.S. Government's immigration determination, misstates the facts, and mischaracterizes Plaintiffs' arguments. BNPP at least agrees that the "allegations in this action are horrific"[3] – it simply wants to deny the class members, victims of the bank-funded horror, any efficient means of redress.

Though BNPP attempts to insert what it contends are "individualized" issues, all class members will use common evidence to prove their claims and all share the common injury of forced displacement. And for 92.8% of class members, their forcible displacement by the GOS or its agents has already been adjudicated by the political branches of the U.S. Government.[4] Where

[1] Defs.' Mem. in Opp. to Pls.' Mot. for Class Cert., ECF No. 434 ("Opp."), at 10-11; *see also* Mem. in Supp. of Defs.' *Daubert* Mot., ECF No. 439, at 1 (describing class members as "individuals currently in the United States who formerly lived in Sudan").

[2] Order Denying Motion to Dismiss for Forum Non Conveniens, ECF No. 338, at 5 ("FNC Op.") ("Defendants also endeavor to undermine Plaintiffs' connections to New York and the United States by characterizing them as Sudanese refugees, seemingly to suggest that I should treat them differently based on their national origin. Defendants cite no case law supporting the proposition that a present U.S.-resident's birthplace enhances or diminishes that resident's connection to the United States or the forum. . . . They also fail to explain how such a theory, adopted and enforced by me, would be constitutional.") (citing *Hernandez v. State of Tex.*, 347 U.S. 475, 482 (1954), and *Shelley v. Kraemer*, 334 U.S. 1, 18-23 (1948)); *see also* Emma Lazarus, *The New Colossus*, Statue of Liberty (1883) ("Give me your tired, your poor, Your huddled masses yearning to breathe free, The wretched refuse of your teeming shore. Send these, the homeless, tempest-tost to me, I lift my lamp beside the golden door!").

[3] Opp. at 3.

[4] *See infra* Section IV.A.

refugee or asylee status has been granted, forced displacement is *definitional*—to be admitted as a refugee or asylee, refugees and asylees *must* demonstrate they are outside their country of nationality (*i.e.*, that they are displaced) and suffered or fear persecution, such that they are unable to return (*i.e.*, that the displacement was forcible). 8 U.S.C. § 1101(a)(42). Indeed, the Form I-590: Registration for Classification of a Refugee asks from which country each applicant "fled or was displaced."[5] Attribution to the GOS or its agents is similarly definitional—persecution of a refugee or asylee must be inflicted "on account of a protected ground," 8 U.S.C. § 1101(a)(42)(A), and committed by the government, its agents, or a third party that the government is "unable or unwilling" to control.[6] Any individualized circumstances leading to a refugee or asylee's forced displacement (i.e., specific time or location of human rights abuses) are already baked into the U.S. Government's binding determination.[7] These U.S. Government determinations as to 92.8% of class members also create an inference that the remaining 7.2% of class members—diversity visa recipients who were also displaced from Sudan during the same timeframe, under the same nucleus of facts—were similarly situated.[8]

Class members' common injury—forced displacement—is a violation of their absolute rights and is compensable under Swiss law, where a breach of the "general duty to respect the right to life and bodily integrity as an absolute right" is unlawful.[9] BNPP misstates the relevant Swiss law inquiry—it is not whether Swiss law provides a "cause of action" explicitly for "forced displacement," but whether forced exile through violent state persecution infringes on absolute

[5] *See infra* at 17, *citing* Ex. 196, PLA-000924 at 925.

[6] *See infra* at 24-25.

[7] *See infra* at 27.

[8] *See infra* Section IV.A.4.

[9] *See infra* at 32, *citing* Ex. 117, *Ski Lift*, Swiss Sup. Ct., 126 III 113, p. 115 (2000).

rights within the meaning of Article 50 CO.[10] Any argument that Swiss law demands a more "individualized assessment of the particular circumstances that led to the individual's leaving,"[11] asks this Court to disregard the U.S. Government's refugee determinations and look to Swiss procedural rules in lieu of a U.S. class action. For the common infringement of their absolute rights and affront to human dignity, the Court can award common, baseline damages to each class member. *See In re Nassau Cnty. Strip Search Cases*, 742 F. Supp. 2d 304 (E.D.N.Y. 2010).

What BNPP calls "abstract,"[12] is the undisputed and concrete fact that BNPP laundered enough money to the Regime to pay many times over for every single abuse inflicted on each Plaintiff and each class member. For the first seven years of this case, BNPP's Swiss law expert did not even question that BNPP was a but-for cause of Plaintiffs' and the Class's injuries. *See Kashef v. BNP Paribas SA*, No. 16-CV-3228 (AJN), 2021 WL 603290, at *6 (S.D.N.Y. Feb. 16, 2021) ("Professor Roberto does not address the issue of natural cause as it pertains to this case in his testimony."). Yet now BNPP retreats in denial of uncontested facts, basic math, and the prior holdings of this Court. But despite BNPP's attempts at misdirection, Plaintiffs have shown with common evidence, including expert testimony and BNPP's own admissions, that BNPP's criminal assistance was the lifeblood of the Bashir Regime and was the natural and adequate cause of class members' injuries.[13] BNPP's conscious assistance to the GOS and the causal link between BNPP's conduct and the GOS's genocidal campaign will be established *exclusively* through common

[10] *See infra* at 31.

[11] Opp. at 48.

[12] Opp. at 2.

[13] *See infra* Section IV.B.

evidence.[14] BNPP's circumvention of U.S. sanctions and money laundering for Sudanese clients,[15] its "feeding" the GOS with billions of dollars in oil revenue, and the impact of this oil revenue[16]—fueling a 3,000% increase in military spending and exceeding Sudan's entire military budget[17]—and GOS's use of BNPP's assistance to execute a genocidal campaign of human rights abuses, are facts common to every class member.[18]

In its attempt to find individualized issues where the common evidence is against it, BNPP reaches to new heights going so far as to defend its co-conspirator the Sudanese Regime, ignoring the U.S. Congress and the International Criminal Court's findings, denying that Sudan pursued a genocidal campaign, and downplaying it as amorphous "continued tribal and ethnic conflict in Darfur."[19] That is certainly one way to describe a state policy of ethnic cleansing well-documented and recognized by the international community. BNPP claims Plaintiffs "provide no support," but ignores the virtually undisputed expert testimony of Dr. Suliman Baldo, Dr. Jok Maduk, Dr. Harry Verhoeven, and Mr. Cameron Hudson. Tellingly, Enrico Carisch, the only expert BNPP could find to support its genocide denialism, copied and pasted his definition of the "Janjaweed" from Wikipedia; cited a paid Sudanese lobbyist famous for wearing a "Hang Mandela" t-shirt; and wrote that the founders of the Save Darfur campaign, which include Holocaust survivor Elie Wiesel and

[14] *See infra* Section IV.B at 36-40.

[15] *See infra* Section IV.B, *citing* Mem. in Supp. of Pls.' Mot. for Class Cert., ECF No. 421 ("Pls.' Mem."), at 12-35, 50-61.

[16] *See infra* Section IV.B, *citing* Pls.' Mem. at 2, 18-20, 22, 35, 59-60

[17] *See infra* Section IV.B, *citing* Pls.' Mem. at 2, 5, 23, 95.

[18] *See infra* Section IV.B, *citing* Pls.' Mem. at 35-49.

[19] Opp. at 32.

the U.S. Holocaust Memorial Museum, are "shrill" advocates whose "propaganda narratives" help "to raise even more money."[20]

Despite BNPP's shocking defense of its co-conspirator and its attempts at obfuscation of the evidence against it, in every trial to come, be it one pursuant to a class action or thousands for individual claims, the same evidence will be introduced, through the same experts, as to each of the predominating points. And because all class members share the common, compensable injury of forced displacement, any individualized evidence goes only to the additional *amount* of damages to which each class member is entitled, not *whether* a class member is entitled to damages at all, and can be efficiently determined by the class member's account of their experiences in testimony that BNPP does not dispute would take one day or less.[21]

Common evidence shows that BNPP's conscious assistance is the ***natural cause*** of class members' injuries—the GOS's atrocities "would not have occurred at the same time or in the same way or magnitude" without BNPP's embargo-breaking conspiracy and its systemic role as "the Sudanese government's de facto central bank." *Kashef*, 2021 WL 603290, at *6. BNPP laundered enough oil revenue for Sudan to pay for every single abuse the GOS inflicted on each class member. Common evidence also shows that it is the ***adequate cause***—BNPP cannot circumvent the standards of adequate causation by citing to a Swiss law case this Court has already found inapposite. *Kashef*, 2021 WL 603290, at *9. Even under BNPP's artificial standard, all attacks perpetrated by the GOS or its agents are closely connected to the finite pool of government funds

[20] *See infra* Section IV.B, *citing* Deposition of Enrich Carisch ("Carisch Dep.") at 334:3-350:17; 352: 21-358:9 and Ex. 55 to Declaration of Charity E. Lee ("Lee Decl."), ECF No. 435-55, Expert Reply Report of Dr. Suliman Baldo ("Baldo Reply"), dated March 2, 2023, at ¶ 110.

[21] *See infra* Section IV.B, *citing* Pls.' Mem. at 116.

that enabled them,[22] and the volume of BNPP's support of the GOS means that all attacks funded by the GOS are closely connected to BNPP. BNPP's speculations and musings that rebel groups may have possibly perpetrated the crimes against refugees and asylees hold no water. Discovery in this case has closed; and where is BNPP's evidence that any group other than the GOS committed widespread and systematic violence against civilians? There is no record evidence that any actor other than the GOS (1) maintained security services and detention facilities; (2) possessed, much less used, combat aircraft and helicopters; (3) conducted joint operations between militias and conventional armed forces; (4) attacked indigenous African civilians using Arab nomads on horseback; (5) possessed and expressed racial animus against indigenous Africans; or (6) killed or displaced thousands of civilians.

BNPP's opposition brief only further demonstrates that the requirements of Rule 23 are met. Indeed, BNPP concedes that Plaintiffs meet several of the Rule 23 requirements – including numerosity, typicality, and adequacy – and concedes many of the key points by failing to rebut them.[23] BNPP also cannot escape the reality that forced displacement is a cognizable injury suffered by all class members, 92.8% of whom have already been determined by the U.S. Government to have suffered or feared persecution by the GOS or its agents.[24] And BNPP misapplies the predominance standard to obscure the way in which common questions will predominate over individual ones.[25] BNPP likewise misapplies the test for superiority by failing to account for the manageability challenges of the only alternative to class certification – hundreds

[22] Ex. 248, Remarks by Deputy Attorney General Cole at Press Conference Announcing Significant Law Enforcement Action, Justice News, June 30, 2014.

[23] *See infra* Section II. At the same time, BNPP introduces new factual misstatements. *See infra* Section III.

[24] *See infra* Section IV.A.

[25] *See infra* Section IV.B.

or thousands of individual plaintiffs trying nearly identical cases over the next several decades, with many thousands of class members denied relief altogether.[26]

For a closely analogous case the Court need look no further than Judge Rakoff's recent opinion granting class certification in *Doe 1 v. JPMorgan Chase Bank, N.A.*, No. 22-CV-10019 (JSR), 2023 WL 3945773 (S.D.N.Y. June 12, 2023).[27] "The core of [that] case – plaintiff's allegation that JP Morgan supported Jeffrey Epstein's sex-trafficking venture while it knew or should have known that that venture was in operation – involves a common set of questions of law and fact" that, as in this case, "has already been subject to extensive discovery and forms the chief part of any class member's complaint against JP Morgan." *Id.* at *10. As in *Doe 1*, the named plaintiffs here have already "borne the burden of turning over highly sensitive documents and communications in discovery, as well as sitting for depositions," which were "a grueling experience, given [each] deposition's length and its subject-matter," and a "class action would also spread the risk and expense of litigating against a tenacious and well-resourced adversary across the class." *Id.* at *7, 11. "It is, in many respects, the quintessential class action." *Id.*

Accordingly, the Court should grant Plaintiffs' motion for class certification. After over seven years, "with Defendants making every effort to avoid actually litigating and resolving the dispute,"[28] and with "efficient procedures available in this forum,"[29] it is time for the over 25,000 class members to obtain justice.

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[26] *See infra* Section IV.C. BNPP's arguments on commonality and ascertainability are equally without merit. *See infra* Sections IV.D and IV.E. And BNPP is unable to credibly explain why the alternative of issue certification would not materially advance the litigation, in the event the Court does not grant full certification. *See infra* Section V (explaining how BNPP's proposed, inefficient approach would consume *42 years* of this Court's time).

[27] *Doe 1* was decided just after Plaintiffs filed their opening brief and about six weeks before BNPP filed its opposition, but BNPP did not cite it despite its analogous facts.

[28] FNC Op. at 9.

[29] *Id.* at 11.

II. BNPP Concedes Central Legal and Factual Points

A. BNPP Concedes that Plaintiffs Meet Several of the Rule 23 Requirements for Class Certification.

BNPP's opposition brief does not dispute that Plaintiffs have met four essential elements of Rule 23's class certification requirements: numerosity, typicality, adequacy, and appointment of class counsel:

- ***Numerosity.*** In conceding that Plaintiffs have met the Rule 23(a)(1) numerosity requirement, BNPP agrees that the class is "so numerous that joinder of all members is impracticable." *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 244-45 (2d Cir. 2007). Indeed, BNPP embraces Plaintiffs' estimation of a class size of over 25,000 individuals.[30]

- ***Typicality.*** BNPP does not dispute that the representative plaintiffs' claims are typical of the claims of the class pursuant to Rule 23(a)(3). Accordingly, BNPP agrees that "each class member's claim arises from the same course of events, and each class member makes similar legal arguments" to prove BNPP's liability. *Brown v. Kelly*, 609 F.3d 467, 475 (2d Cir. 2010) (quoting *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d. Cir. 1997)). The same course of events includes "BNPP's criminal conspiracy with the GOS and contribution to its human rights abuses."[31]

- ***Adequacy.*** BNPP concedes that the representative plaintiffs "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). In doing so, it agrees that there are no conflicts of interest between the representative plaintiffs and the class, that the representative plaintiffs understand the purpose of the action, and that they have demonstrated "their deep commitment to their responsibilities." *Marisol A.*, 126 F.3d at 378; *Does I v. The Gap Inc.*, No. CV–01–0031, 2002 WL 1000073, at *4 (D. N. Mar. Is. May 10, 2002).[32]

- ***Appointment of Class Counsel.*** BNPP concedes that class counsel will "fairly and adequately represent the interests of the class," Fed. R. Civ. P. 23(g)(4), not contesting Judge Nathan's June 25, 2020 determination that Interim Co-Lead Class Counsel "satisfy the requirements of Rule 23(g)." Order of Appointment of Interim Co-Lead Class Counsel, ECF No. 167, at 1.

[30] Opp. at 43-44, 55.

[31] Pls.' Mem. at 82.

[32] Pls.' Mem. at 87.

B. BNPP Concedes Key Facts in Support of Class Certification.

BNPP fails to rebut, and therefore concedes, a number of facts at the crux of various elements of the class certification analysis:

- ***Role of BNPP France.*** BNPP does not dispute Plaintiffs' significant evidence of BNPP France's involvement in and control of the bank's support for the Sudanese Regime.[33]

- ***Impact of BNPP's Assistance.*** BNPP does not dispute that "[c]lamping off the flow of U.S. dollars from BNPP to Khartoum had an immediate impact on the Bashir Regime."[34]

- ***Inability of all Class Members to File Individual Suits.*** BNPP does not dispute that in the event a class is not certified, although some class members could choose to bring individual suits, most class members will be unable to do so. Due to the nature of the abuses suffered and the population in question, most will lack adequate financial resources and access to lawyers and will fear reprisal, making individual suits impractical. *See Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81, 86 (S.D.N.Y. 2001) (Hellerstein, J.).[35]

- ***Forced Displacement is a Harm to Dignity.*** BNPP does not dispute that forced displacement is an affront to human dignity, to which everyone has a common inherent right, akin to the strip searches conducted in the Nassau County Correctional Center. *See Nassau Cnty.*, 742 F. Supp. 2d at 307.[36]

- ***Common evidence of BNPP's Conduct.*** BNPP does not and cannot argue that its conduct—the conspiracy to violate U.S. sanctions and the financial support of the Sudanese economy —would be subject to individualized proof. For instance, each class member should not have to individually prove that BNPP engaged in wire-stripping or provided billions of U.S. dollars for the benefit of the Sudanese Regime's genocidal efforts, as the evidence of BNPP's conduct does not vary by class member.

- ***No Admitted Refugee or Asylee Who Did Not Suffer or Fear Persecution by the GOS.*** Plaintiffs identified a serious deficiency in BNPP's argument which remains unanswered: there is no record evidence of a Sudanese refugee or asylee who departed Sudan during the class period and was admitted to the United States but did *not* suffer or fear persecution by the GOS or its agents.[37] BNPP still has not identified such an individual, thereby conceding that it is not possible to do so.

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[33] *See* Pls.' Mem. at 7-60.

[34] Pls.' Mem. at 58.

[35] *See also* Pls.' Mem. at 76-77 (*citing* Declaration of Kathryn Lee Boyd ("Boyd Decl."), ECF No. 419, at ¶¶ 46-51).

[36] Pls.' Mem. at 83, 104.

[37] Pls.' Mem. at 6, 48, 100.

- ***Common Patterns of Injuries.*** BNPP does not deny that the abuses suffered by Plaintiffs and class members fall into common patterns that include such elements as ghost houses and other arbitrary detention, killing or disappearing of family members, property theft, torture, and sexual abuse.[38] This is echoed in BNPP's concession that the representative plaintiffs' claims arise from the same course of events and are based on the same legal arguments.[39]

III. BNPP Makes Numerous Misstatements or Mischaracterizations of Key Facts.

Littered throughout BNPP's opposition brief are statements that are contradicted by the factual record or are fundamentally lacking in relevant context. Given that the adjudication of class certification issues is best served by a full accounting of the record, Plaintiffs present the below corrections and context for BNPP's misstatements and mischaracterizations.

BNPP's Knowledge of GOS Abuses. BNPP boldly claims that it did not "admit to possessing any knowledge that the GOS was committing the human rights violations alleged by Plaintiffs."[40] This is directly contradicted by the Stipulated Statement of Facts ("SSOF") as agreed and consented to by BNPP's corporate representative and approved by BNPP's current attorney, Karen Patton Seymour.[41] Indeed, BNPP stipulated that its employees recognized "BNPP's central role in providing Sudanese financial institutions access to the U.S. financial system, *despite the Government of Sudan's role in supporting terrorism and committing human rights abuses*."[42]

DOJ Victim Identification. BNPP attempts to distance its conduct from its victims, the members of the proposed class, with statements from an Assistant U.S. Attorney during BNPP's

[38] *See* Pls.' Mem. at 83-84.

[39] *See supra* at 8 (discussing typicality).

[40] Opp. at 10.

[41] *See* Ex. 1 to Lee Decl., ECF No. 435-1, SSOF at 36.

[42] ECF No. 435-1, SSOF at ¶ 20 (emphasis added); *see also* Ex. 126, Deposition of Dan Cozine ("Cozine Dep.") at 105:24-106:16; 118:18-120:21.

sentencing hearing.[43] However, in that same hearing, prosecutors acknowledged the importance of compensating the "numerous individuals . . . who suffered grievous harm at the direction of the regime[] in Sudan . . . that this defendant willfully processed billions of transactions for."[44] The Department of Justice specifically sought information from those harmed "during the course of BNPP's conspiracy."[45] The AUSA further stated that "in light of the unprecedented nature of the BNPP's criminal conspiracy and the resulting forfeiture, the government believes it is important to set up a process that will ultimately lead to the compensation of individuals who have suffered harm at the hands of these regimes that benefited from BNPP's conduct in this case," and even established a website, usvbnpp.com, to collect information from BNPP's victims.[46] Unfortunately, no compensation has been paid to any of BNPP's victims.

"War-Related Deaths." Attempting to contradict Plaintiffs' experts' reports on the massive human toll caused by the Regime, BNPP stylizes a single data point from Alex de Waal's report to the International Criminal Court as a "scholar publishing data," purportedly showing that war-related deaths in Sudan were "far higher" in the early 1990s than during the class period starting in late 1997.[47] In doing so, BNPP omits that de Waal explains this discrepancy—the early years relied up on by BNPP suffer from poorer demographic data collection quality.[48] Further, BNPP ignores key central facts in de Waal's report. Notably, that while the late 1980s and early 1990s

[43] Opp at 10.

[44] Ex. 2 to Lee Decl., ECF No. 435-2, Transcript of Sentencing Hearing, dated May 1, 2015, at 9-11.

[45] *Id*. at 12.

[46] *Id*. at 15.

[47] Opp. at 6 n.3

[48] *See* Ex. 86, Alex de Waal, *The Conflict in Darfur, Sudan: Background and Overview*, at fn. 83 (Feb. 2022) ("the quality of demographic data collection improves over time which may partly explain why more recent estimates (e.g. for Darfur) are lower than earlier ones.").

were marked by insurgency activity, the spike in casualty rates beginning at the start of the class period is attributable to the GOS and its agents.[49]

Nature of the Janjaweed. Again ignoring ample expert evidence and even that of their own expert,[50] Defendants attempt to present the Janjaweed and associated militias as being "loosely organized" and having divided loyalties.[51] In reality, they were mobilized by the Sudanese Government under the legal framework provided by the Popular Defense Forces Act of 1989 ("PDFA"), "formaliz[ing] and institutionaliz[ing] the militias as organs of the state."[52] Plaintiffs' expert Dr. Suliman Baldo explains further:

> [T]he Popular Defense Forces Act provided the legal framework for the GOS to organize and exercise command and control over the various Arab tribal militias it recruited throughout the 1990s and early 2000s, including the Baggara Arab tribal militias known colloquially as the "*murahilim.*" With the outbreak of rebellion in Darfur in 2003, the GOS utilized Popular Defense Forces framework to mobilize Arab tribal militias in Darfur.

[49] *See* Ex. 86, at 32-33. During 1997-1998, "[a] major driver of this destruction was a military campaign by a renegade SPLA commander, Kerubino Kuanyin, who had aligned himself with the GoS, in which his forces looted and burned civilian settlements." *Id*. at 33. Another component of the fatality rate at that time was a campaign by Sudan Armed Forces and its allies "to control the areas of the Upper Nile where oil deposits had been identified twenty years earlier, in order for oil extraction to begin. This involved mass displacement of local Nuer communities." *Id*. In his report, de Waal also references the work of Philip Roessler, who "attributed the large-scale ethnically-targeted violence of 2003-04 in part to the fact that security services no longer possessed the precise intelligence that would have enabled them to target individuals, and so they resorted to indiscriminately targeting entire communities." *Id*. at 35.

[50] The UN's Panel of Expert reports from 2008 and 2009, chaired by BNPP's expert Enrico Carisch, confirmed that the Janjaweed were supplied by, under the command of, and purportedly excused from breaking international human rights law by the GOS. Ex. 175, UN S.C., Letter dated 7 November 2008 from the Chairman of the Security Council Committee established pursuant to resolution 1591 (2005) addressed to the President of the Security Council, U.N. Doc. S/2008/647 ¶ 226 (Nov. 11 2008) ("2008 POE Report") at ¶¶ 136-42, 158-63; Ex. 174, U.N. S.C., Letter dated 27 October 2009 from the Chairman of the Security Council Committee established pursuant to resolution 1591 (2005) addressed to the President of the Security Council, U.N. Doc. S/2009/562 at 75-88 (Oct. 29, 2009) ("2009 POE Report") (attributing to the GOS the "[f]ailure to disarm auxiliary forces (Janjaweed)"). The 2009 POE Report separately clarified that the term "Janjaweed" encompassed groups that subjectively identified as "Arab" who "chose to join . . . forces organized by the Government of Sudan in order to gain access to land and enhance their socio-political status," and thus became known "as insurgents, outsiders or Janjaweed." *Id.* at 14. In his deposition, Mr. Carisch agreed that the witnesses the POE interviewed consistently defined "Janjaweed" to be "militias coming from those communit[ies] perceived 'Arab.'" Ex. 153, Carsich Dep. at 216:18-217:4.

[51] Opp. at 9.

[52] ECF No. 435-55, Baldo Reply at ¶ 40.

> Informally, and with regional variations, these tribal militias were called the *murahaleen*, *mujahadeen*, *fursan*, and in Darfur, the *janjaweed*.[53]

The GOS's control of the Janjaweed and associated militias was practical as well as legal. In the GOS's campaign against Black African ethnic groups, it "recruited, armed and bankrolled tribal militias from clans that self-identified as Arabs whom their victims called 'janjaweed.' The GOS paid and supplied these militias directly, using logistical ground and aerial supply chains to reach the remote western region of Darfur."[54] The Janjaweed's assaults of civilians and raids on village on the ground would be paired with aerial attacks from SAF forces.[55] BNPP's own expert Enrico Carisch corroborates the relationship between the Janjaweed militias in the GOS in his UN Panel of Expert reports.[56] Additionally, when the international community pressured the GOS to dismantle the Janjaweed, many of the Janjaweed groups were integrated into the Border Intelligence Corps, later renamed Border Guard corps, under the formal command structure of the Sudan Armed Forces ("SAF").[57]

BNPP Suisse. Even in the face of its guilty plea taking responsibility for BNPP Suisse, BNPP works to detach itself from its subsidiary's conduct, attempting to place all the blame on BNPP Suisse for the primary processing of the financial services at the center of Plaintiffs'

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[53] *Id*. at ¶ 41.

[54] Ex. 54 to Lee Decl., ECF No. 435-54, Expert Report of Dr. Suliman Baldo ("Baldo Report"), dated September 30, 2022, at ¶ 13.

[55] *Id*.

[56] Ex. 175, 2008 POE Report and Ex. 174, 2009 POE Report ("The strong tribal links that formed the original basis for Government recruitment of Arab militias, and arguably the creation of the Janjaweed, remain largely intact [...]. The Government's penchant for providing them with military material and support has been institutionalized, with arms, uniforms and training now being furnished as part of a legitimate induction process as opposed to the clandestine style of old. However, as the Panel has demonstrated in previous sections of this report, in both incarnations these forces have operated in concert with SAF forces during ground attacks on civilian and military targets and have habitually committed a range of violations of international humanitarian law and human rights abuses.").

[57] ECF No. 435-54, Baldo Report at ¶¶ 77-78.

claims.[58] BNPP's scapegoat attempt fails; it does not dispute that Defendant BNP Paribas SA ("BNPP France") pleaded guilty to a conspiracy with the GOS, acting through and in concert with its branches and subsidiaries, including BNPP Suisse.[59] BNPP corporate representative Dan Cozine confirmed that BNPP France pleaded guilty on behalf of BNPP Suisse.[60] And as noted above, BNPP does not dispute Plaintiffs' significant evidence of *BNPP France's* own involvement in and control of the bank's support for the Sudanese Regime.[61]

Case Procedural History. BNPP presents the Court with a remarkably abbreviated recounting of this case's procedural history.[62] It leaves out, among other losses for BNPP, its unsuccessful request for Judge Nathan to reconsider her denial of BNPP's motion to dismiss for failure to state a claim under Swiss law.[63] It was in that motion that BNPP conceded the standard for secondary liability under Article 50(1) of the Swiss Code of Obligations.[64] Further, BNPP does not discuss its waiting six years into the litigation, and until Judge Nathan was nominated for the Second Circuit, to move to dismiss the case under *forum non conveniens* in December 2021. This Court denied BNPP's motion on May 3, 2022.[65]

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[58] *See* Opp. at 12.

[59] *See* Landau Decl. Ex. 43 at ¶¶ 14-16, 19-20.

[60] Ex. 126, Cozine Dep. at 97:14-22.

[61] *See supra* at 8.

[62] Pls.' Mem. at 12-13.

[63] *See id.*; *Kashef v. BNP Paribas SA*, No. 16-CV-03228 (AJN), 2021 WL 1614406 (S.D.N.Y. Apr. 26, 2021) (denying motion for partial reconsideration).

[64] Defs.' Mem. in Supp. of Mot. for Partial Recons., Mar. 2, 2021, ECF No. 198, at 2 ("To state a claim for secondary liability under Article 50(1) of the Swiss Code of Obligations, a plaintiff needs to allege that '(1) a main perpetrator committed an illicit act, (2) the accomplice consciously assisted the perpetrator and knew or should have known that he was contributing to an illicit act, and (3) their culpable cooperation was the natural and adequate cause of the plaintiff's harm or loss.").

[65] FNC Op., ECF No. 338 (denying *forum non conveniens* dismissal).

IV. Legal Argument

A. Forced Displacement Is a Cognizable Injury Suffered by All Class Members.

Try as BNPP might to resurrect "individualized" issues underlying class members' immigration cases, those issues were *already* resolved by virtue of the U.S. Government's adjudication of their immigration status, demonstrating classwide proof of injury. As Plaintiffs explained in their opening brief, by granting refugee or asylee status, the U.S. Government necessarily determined that 92.8% of class members were forcibly displaced by the GOS or its agents.[66] These admission determinations, and the laws undergirding them, are solely entrusted to the political branches and may not here be reopened or reviewed.[67] These U.S. Government determinations likewise create an inference that the remaining 7.2% of class members—diversity visa recipients who were also displaced from Sudan during the same timeframe, under the same nucleus of facts—were similarly situated.

BNPP nonetheless clings to the argument, despite the commonly understood legal definitions and standards, that asylees and refugees in the class were *not* forcibly displaced, and *not* by the genocidal GOS. BNPP also argues that these inferences cannot be extended to diversity visas recipients, who were also displaced in the context of the GOS's atrocities. BNPP's arguments fall apart with any scrutiny. Its flaws exposed, it is clear that the legal and factual questions underlying class members' claims are resolvable through generalized proof of the fact of their

[66] Pls.' Mem. at 97-102.

[67] *Cf.* Pls.' Mem. at 101; *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (noting the Supreme Court has "repeatedly emphasized that over no conceivable subject is the legislative power of Congress more complete than it is over the admission of" non-citizens) (internal quotation marks and citation omitted). BNPP attempts to question the "deference afforded to [the executive branch's] eligibility determinations for individual refugee and asylum claimants" Opp. at n.25, but BNPP's deference must be complete. *Only* the U.S. Government may attempt to reopen or terminate a grant of refugee or asylum status. *See* 8 C.F.R. § 207.9; 8 C.F.R. § 1208.24.

immigration status. *See* Pls.' Mem. at 92-93; *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 118 (2d Cir. 2013).

1. The U.S. Government Has Already Determined That 92.8% of Class Members Suffered or Feared Persecution by the GOS and Were Forcibly Displaced.

By definition, refugees and asylees are forcibly displaced. BNPP is nonetheless adamant, despite the clear text of the statute and its consistent interpretation, that Plaintiffs' recitation of this statute reflects "fundamental mischaracterizations" of the INA and "distorts" U.S. immigration law and procedure.[68] BNPP suggests that Plaintiffs' reliance on the text is a "manufactur[ed]" tactic to demonstrate class-wide proof of injury.[69] And attempting to shoehorn these disagreements into *Daubert* criteria, it advances nearly verbatim arguments in its request to exclude Prakash Khatri's testimony in full.[70] Despite its bold language, BNPP does not and cannot sustain its objections.

As a threshold matter, BNPP takes the position that the definition of "refugee" in the INA does not require refugees and asylees to be forcibly displaced because the statute does not expressly say "forcibly displaced."[71] But the definition is clear: to be admitted as a refugee or asylee, refugees and asylees *must* demonstrate they are outside their country of nationality (*i.e.*, that they are displaced) and suffered or fear persecution, such that they are unable to return (*i.e.*, that the displacement was forcible). 8 U.S.C. § 1101(a)(42).[72] This is generally an undisputed

[68] Opp at 2, 35.

[69] *Id.* at 15, 34.

[70] Plaintiffs do not rely "exclusively" on the report and testimony of Mr. Khatri to provide class-wide proof of injury as BNPP suggests. Opp. at 34 & n.18. To the contrary, Mr. Khatri's reliable testimony and methodologies are appropriately used, in combination with other evidence in the case (such as the clear text of the INA) to demonstrate that common issues predominate as a function of class members' immigration status. Further, for many of the same reasons that BNPP fails to demonstrate that Mr. Khatri's testimony is inadmissible, it also fails to demonstrate that his testimony is "fundamentally flawed" and therefore inappropriate for consideration in support of Plaintiffs' arguments for class certification. Opp. at 34 n.18; *see* Pls.' Opp. to BNPP's *Daubert* Mot., ECF No. 449 ("*Daubert* Opp.").

[71] Opp. at 35.

[72] *See also* Pls.' Mem. at 97; *Daubert* Opp. at 5 & Ex. 1, Deposition of Prakash Khatri ("Khatri Dep.") at 93:16-19 ("[The statute] doesn't specifically write out 'forcible displacement' or 'forced displacement,' but what does forced displacement mean? It means the very thing they've stated there [in Section 1101]").

concept of immigration law, based not only on the text of the INA, but by the understanding and practice of U.S. and international bodies.[73] BNPP does not address these authorities. Nor does it address admissions by its own expert, Mr. Yale-Loehr, who widely broadcasted his opinion (prior to being retained by BNPP) that refugees and asylees are indeed forcibly displaced.[74]

It is even clear from the U.S. Government-issued application form itself (Form I-590: Registration for Classification of a Refugee), through which *all* refugees seek refugee status, that refugees must indicate that they fled or were otherwise displaced from their home country:[75]

[73] *See* Pls.' Mem. at 97; Ex. 76 to Lee Decl., ECF No. 435-76, Expert Reply Report of Prakash Khatri ("Khatri Reply"), dated March 2, 2023, at 2-3 & n.5 (collecting cites); Khatri Dep. at 91:8-96:18; *see also, e.g.*, International Criminal Tribunal for the Former Yugoslavia (ICTY), *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Public Redacted Version of Judgement Issued on 24 March 2016 – Volume I of IV (TC), 24 March 2016, para. 489: (with respect to the meaning of forced displacement in the context of international criminal laws, "[t]he term 'forced' may include physical force, as well as the threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power, or the act of taking advantage of a coercive environment. The forced character of the displacement is determined by the absence of genuine choice by the victim in his or her displacement."); ICTY, *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, Judgement (TC), 30 May 2013, para 993 (same).

[74] Pls.' Mem. at 97-98 (quoting Ex. 167, Deposition of Stephen Yale-Loehr ("Yale-Loehr Dep."), dated May 1, 2023, at 91:7- 92:6, 96:3-97:5, 90:4-18).

[75] Ex. 196, PLA-000924 (box 4); *see also* Ex. 199, PLA-001228 at 1229-30; Ex. 202, PLA-001407 at 18-19; Ex. 198, PLA-001145 at 1145-46; Ex. 207, PLA-001647 at 1648-50; Ex. 212, PLA-012583 at 85-86; Ex. 209, PLA-001726 at 27-28; Ex. 206, PLA-001587 at 89; Ex. 208, PLA-001688 at 89-90; Ex. 213, PLA-013072 at 74, 76; Ex. 200, PLA-001279 at 80-81; Ex. 204, PLA-001506 at 7-8; Ex. 211, PLA-001837; Ex. 196, PLA-000924 at 924-25; Ex. 194, PLA-000756 at 758-59; Ex. 201, PLA-001313 at 13-16; Ex. 195, PLA-000830 at 31-33; Ex. 197, PLA-001027 at 29-30.

[redacted] -1 A 212 542 950 A[redacted] [redacted]amdan Juma

Department of Homeland Security
U.S.Citizenship and Immigration Services

OMB No.1615-0068;Expires 12/31/06

I-590, Registration for Classification as Refugee

Type or print the following information in black ink *(Read instructions on Page 2)* **A File No:** A 212 542 950

1. Name: *(First) (Middle) (Last)* (1) See G-325C
Hamdan Juma ABAKAR

2. Present Address: (Street Number and Name of Town or City/State or Province Country)
C/O UNHCR, Kakuma Refugee Camp, Kakuma 4, Block P Kakuma Rift Valley Kenya

3. Date of Birth: *(mm/dd/yyyy)*	Place of Birth:*(City/Town)*	Province:	Country:	Present Citizenship/Nationality:
Jan 1 1977	Habila	Western Darfur	Sudan	Sudan

4. Country from which I fled or was displaced: Sudan
On or about *(mm/dd/yyyy)*: Sep 1 2006

(2) No returns

5. Reasons (State in detail):
See Case History

6. My present immigration status in Kenya *(Country in which residing)* is Refugee

These forms are reviewed and approved by the U.S. refugee officer in adjudicating each refugee's application.[76]

Avoiding the INA's clear text and the nature of a country ravaged by genocide, BNPP creates a false distinction: that the INA does not address an individual's decision to *leave* Sudan, but only the decision not to *return*.[77] BNPP does not point to a single authority for that interpretation, not even its own expert. Indeed, as above, refugees had to explicitly state in their applications that they "fled" or were "displaced" from Sudan. Nor does BNPP explain *why* any such a distinction, even assuming one exists, means that refugees are not forcibly displaced. Forcible displacement is formally adjudicated when the U.S. Government determines that the refugee or asylee meets the definition of "refugee" under U.S. law. *See* 8 U.S.C. § 1101(a)(42).

[76] Ex. 196, PLA-000924 at 925.

[77] Opp. at 35-36.

The classwide proof of harm is the U.S. Government *determination* that results in refugee or asylee immigration status; it stands regardless of the exact moment in time the decision is made.

BNPP's attempts to further "illustrate" why the INA does not mean what it says likewise fail. BNPP is emphatic that the INA contemplates a "wide breadth of circumstances" such that a refugee or asylee may not be forcibly displaced,[78] but the *only* examples it cites fail to support that claim. BNPP also speculates, without referencing a single governing legal standard or criteria advanced by Plaintiffs or Plaintiffs' expert and effectively conceding most factual predicates, that the GOS and its agents were not responsible for class members' fear or persecution and displacement. As discussed below, these arguments are based on mischaracterizations and fail to undermine the inevitable conclusion that all asylees and refugees, by definition, *were* forcibly displaced by the GOS or its agents—a binding, final determination for 92.8% of class members that serves as common proof of harm for the entire proposed class.

a. BNPP's Purported "Examples" Fail to Demonstrate that Asylees and Derivative Refugees are Not Forcibly Displaced.

First, reiterating its flawed interpretation of the INA, BNPP contends that because asylees (who make up just 13% of the proposed class) may have *first* arrived to the United States in non-immigrant status (*e.g.*, a B-1 or B-2 visitor visa), they were not forcibly displaced when they *left* Sudan.[79] While Mr. Khatri proactively identified in his report that asylees may have arrived in the United States in non-immigration status, BNPP neglects to mention the rest of Mr. Khatri's testimony, consistent with the text and its interpretation—that asylees are determined to be forcibly displaced *once they are granted asylum*.[80] At the time of adjudication, the U.S. Government

[78] Opp. at 36.

[79] Opp. at 36.

[80] *See* ECF No. 435-76, Khatri Reply at 2-4; Khatri Dep. at 114:5-8.

indisputably determined that asylees were unable to return based on persecution or fear of persecution from the GOS or its agents. *See* 8 U.S.C. § 1101(a)(42).[81]

BNPP also submits that asylees are not forcibly displaced because they can, in theory, prove a well-founded fear of future persecution based on a "pattern or practice" of persecution to a similarly-situated group, instead of being "singled out individually."[82] As a threshold matter, gaining asylum based on a pattern or practice of persecution *still* means that asylees are forcibly displaced, because they are still required to meet the refugee definition; they just may do so on the basis of pattern-or-practice evidence.[83] *See* 8 C.F.R. §§ 208.13(a), (b)(2). Further, pattern-or-practice claims will prevail only if the asylum-seeker shows "systematic, pervasive, or organized effort to kill, imprison, or severely injure members of the protected group." *Ahmed v. Gonzales*, 467 F.3d 669, 675 (7th Cir. 2006) (internal quotations omitted).[84] Thus, these individuals must meet a "*high*" threshold, not a lower one, for demonstrating that they would be persecuted if returned. *Id.* ("The standard is high because once the court finds that a group was subject to a pattern or practice of persecution, every member of the group is eligible for asylum."). In any event, BNPP does not point to a shred of evidence reflecting that any Sudanese asylees were

[81] Similarly, BNPP suggests that because some of the class members included in the *Sherf* and *Ring* complaints alleged that they were forcibly displaced after certain of their other injuries occurred in Sudan, individualized issues must predominate. Opp. at 38 n.21. But all class members, including the *Sherf* and *Ring* plaintiffs, share the common injury of forced displacement *in addition to* their other injuries, regardless of how close in time those injuries were to one another. Many class members suffered multiple injuries before finally fleeing Sudan.

[82] Opp. at 36; *see* 8 C.F.R. § 208.13(b)(2)(iii).

[83] BNPP no longer appears to dispute, nor could it, that a well-founded fear of future persecution creates a valid claim to asylum or refugee status. *See* Pls' Mem. at 99 n.426. Instead, BNPP critiques a legal standard for establishing well-founded fear based on a 10% or more likelihood, according to Supreme Court precedent dating back to 1987, which it suggests is too low. Opp. at. 36-37 (citing *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 431, 440 (1987)). Regardless of the propriety of making that argument here, a 10% chance (or more) of being killed if you walk through a particular door would be enough to keep almost everyone from walking through voluntarily. This is why anyone fleeing their homes due to a well-founded fear of persecution has been forcibly displaced. *See* Pls' Mem. at 99 n.426.

[84] *See also, e.g.*, Khatri Dep. at 221:16-222:1 (noting, for example, that "if you're part of a group that -- against who genocide is being committed, then obviously returning to the country would clearly get you targeted for genocide, and that is what the country wants to protect against is making a person -- or exposing a person to genocide").

admitted to the United States on this basis, nor is there any indication in the case law or immigration treatises. BNPP's speculation is thus unfounded and irrelevant, since any such asylees are still forcibly displaced.

Second, BNPP maintains that derivative refugees—*i.e.*, children or spouses who are displaced with the principal refugee—should not be considered forcibly displaced. But the common understanding is that "the family unit experiences the persecution or fear as a unit . . . . If human rights abuse forces a family member to leave his or her home, this abuse necessarily forces spouses and children to leave, too, in order to maintain family unity."[85] For this reason, derivatives are classified as "refugees" *by law*. 8 U.S.C. § 1157; 8 C.F.R. § 207.7.[86] Mr. Khatri explains that family unity is a "long-held principle" of immigration law, specifically within the refugee context.[87] BNPP's own expert admits that "[h]aving family units stay together is an important priority of U.S. immigration law."[88] These principles do not reflect an "oversimplifie[d]" analysis.[89] To the contrary, it is BNPP's various red herrings, devoid of this understanding, that reflects *its own* indifference to the refugee experience.

For example, despite BNPP's attempt to use named Plaintiffs as illustrations to demonstrate that derivative refugees are not displaced, anyone who has not lived in Sudan is not a class member.[90] For that reason, Plaintiff Abulgasim Abdalla's and Plaintiff Entesar Kashef's children,

[85] *See* Pls.' Mem. at 75 (quoting ECF No. 435-76, Khatri Reply at 14-15).

[86] *See also* ECF No. 435-76, Khatri Reply at 14-15 (noting that the derivative refugee laws recognize "that there is something inherent in the close family unit whereby the experience of the principal necessarily imputes to his or her child or spouse" and that the family unit is almost always displaced and are resettled in the United States together); Khatri Dep. at 99:21-100:10.

[87] Khatri Dep. at 98:11-13; 99:1-13 ("[A] family unit is what we recognize as a sacred almost group and you can't separate them out.").

[88] Ex. 167, Yale-Loehr Dep. at 104:23-105:3.

[89] Opp. at 37.

[90] *See* Pls.' Mem. at 3-4 (defining the proposed class).

who were *born in refugee camps* after their parents fled Sudan, are not named plaintiffs or class members (even though they, too, were necessarily displaced).[91] Likewise, BNPP's reductive summary of Plaintiff Nicolas Hakim Lukudu's experiences in Sudan as support for excluding an entire category of derivative status refugees from the class falls flat.[92] The narrative leaves out that in 2004, while Plaintiff Lukudu awaited resettlement with his second wife as a family unit,[93] the GOS took both his business and home.[94] He was then arrested by the GOS, tortured for three days with guns, sticks, and rats, and was interrogated daily for two months on fabricated allegations of gun running.[95] When he was finally released from detention, he was dropped off in the desert at night.[96] Yet BNPP insists that "he was not" forcibly displaced from Sudan.[97] Of course he was.

Even if BNPP *were* to actually identify a derivative refugee who—despite their spouse's or parent's fear or persecution and forcible displacement from Sudan—was not also forcibly displaced, to prevail on predominance Plaintiffs need not show that *every single class member* was injured.[98] Based on the above principles of immigration law, it is clear that all or virtually all of them were, as the GOS used harm and threats of harm against family members as a means of terror

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[91] *See* Opp. at 37.

[92] Opp. at 37-38.

[93] Previous denial of a 1998 refugee application by the United Nations, Opp. at 37, is immaterial because it preceded both the marriage to his second wife, from whom he received derivative status, and his 2004 torture and displacement by the GOS.

[94] *See, e.g.*, Ex. 142, Deposition of Nicolas Lukudu ("Lukudu Dep."), dated June 1, 2022, at 92:9-22.

[95] Ex. 142, Lukudu Dep. at 68:9-69:5, 76:2-10, 76:11-13, 76:22-25, 80:2-84:2, 84:3-85:2.

[96] Ex. 142, Lukudu Dep. at 79:2-7, 85:9-11, 85:15-86:1. Plaintiff Lukudu's experiences are consistent with those of Plaintiff Isaac Ali who was detained and tortured by the security services and was granted refugee status based upon his own experiences. *See, e.g.*, Ex. 137, Deposition of Isaac Ali ("Ali Dep."), dated June 3, 2022, at 82:19-85:24, 87:17-90:11, 91:7-94:6, 97:5-19, 99:3-100:8.

[97] Opp. at 38.

[98] *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1175 JG VVP, 2014 WL 7882100, at *44 (E.D.N.Y. Oct. 15, 2014), *report and recommendation adopted*, No. 06-MD-1775 JG VVP, 2015 WL 5093503 (E.D.N.Y. July 10, 2015) ("Nothing in our class certification jurisprudence requires that every single class member suffer an impact or damages, regardless of the size of the class…Instead, only when it is apparent that a great many persons have not been impacted should a court deny class certification")(quotations and citations omitted).

and repression.[99] Furthermore, should the Court credit BNPP's so-called "illustrative" examples—even though none of them undermines the U.S. Government's decision that asylees and derivative

[99] *See id.* Case in point, based on the testimony of virtually all named Plaintiffs who were resettled in the United States as a family unit, as well as the testimony of Plaintiffs' experts, families experienced persecution and displacement as a unit.

See Ex. 5, Jok Report ¶ 66 (citing Ex. 134, John Doe Dep. at 79:15-80:23; Ex. 147, Ulau Dep. at 65:2-7; Ex. 148, Jane Roe Dep. 86:11-18); *id*. ¶ 67 ("If regime agents suspected someone of subversive activities . . . . the NISS would threaten their relatives and family members, often arresting, assaulting, and raping wives, adult children, or brothers and sisters of the suspect."); *id*. ¶ 68 ("Plaintiff's accounts of threats against family members are consistent with well documented human rights abuses in Sudan after 1997") (citing Ex. 134, John Doe Dep. at 79:15-80:25; Ex. 147, Ulau Dep. at 65:2-7; Ex. 148, Jane Roe Dep. 86:11-18); *id*. ¶ 69 ("Often, the GOS forces would visit the family of an abductee to further intimidate them while the family member who was under suspicion was detained in a ghost house. They would beat and rape the family members and mak[e] further threats" and noting that Plaintiffs' deposition testimony is "entirely consistent with the GOS's standard procedure.") (citing Ex. 136, Adam Dep. at 118:7-120:6; Ex. 145, Judy Doe Dep. at 70:17-25; Ex. 141, Khalifa Dep. at 67:14-18; Ex. 138, Hassan Dep. at 50:8-55:1); *id*. ¶ 70-71 ("Frequently, family members would be forbidden by the GOS to speak about what happened to them—or else. This threat operated in addition to the cultural taboo forbidding them from talking about any issues that could bring shame upon the family, which included rapes and sexual assaults. This was part of the practice of intimidating the whole population."); *id* ¶ 72 ("Soldiers would come into the villages and kill families and family members.") (citing Ex. 143, Omar Dep. at 101:9-16; Ex. 146, Tingloth Dep. at 60:4-19, 110:25-112:7; Ex. 132, Hamdan Dep. at 67:1-23, 77:12-78:8, 88:8-89:6; Ex. 135, Jane Doe Dep. at 95:3-11; Ex. 140, Kashef Dep. at 77:23-86:5); ("Other family members were left behind during raids on villages, never seen again, and the remaining families were left to wonder if they were burned to death, killed by a bomb from an Antonov airplane, or if they could be alive somewhere else.") (citing Ex. 130, Abbo Abakar Dep. at 105:15-111:15; Ex. 137, Ali Dep. at 66:20-75:20); *id*. ¶ 73 ("In other words, the harm by the GOS is intended to and is inflicted communally."); *id*. ¶ 74 ("In addition, the GOS engaged in the extensive disappearing of suspects and/or their family members as a tool of oppression"); ECF No. 435-54, Baldo Report at ¶ 126 ("Mental torture included: threats against family members, mock executions, blindfolding, racist or sexual verbal abuse.") (citing, *inter alia*, Ex. 134, John Doe Dep. at 78:22-80:25; Ex. 148, Jane Roe Dep. at 85:15-86:18; Ex. 147, Ulau Dep. at 64:24-65:7).

For a sampling of Plaintiffs' testimony, *see* Ex. 244, Pl. John Doe's Obj. & Resp. to Defs.' First Set of Interrogs. dated Apr. 18, 2022 ("For seven days he was interrogated under torture, beating with black hoses and kicked, subjected to sexual violence, given little food or water, **and terrorized by threats that his family would be murdered**.") (emphasis added); Ex. 134, John Doe Dep. at 79:10-18; Ex. 138, Hassan Dep. at 67:17-23 ("I had mentioned earlier that they had told me you would—they had threatened me that I would either lose my life or my children. *id*. at 54:16-55:1 ("They would say 'Where are the papers' And I would tell them 'I don't have any papers.' And they would say 'We'll kill you or we'll kill one of the kids.'"); *id*. at 52:16-25 ("They started beating me. [My child] started saying, 'Don't kill my mother.' They took him and they threw him. And they also took [another child] and also they threw him."); *id*. at 69:20-70:11 (Q: "And you mentioned that they also did things to your children." A: "They would pick them [up] and throw them."); Ex. 147, Ulau Dep. at 64:24-65:7 ("They say they would bring the entire—my entire family here to the detention, and they may kill them."); Ex. 240, Pl. Jane Roe's Obj. & Resp. to Defs.' First Set of Interrogs. dated Apr. 18, 2022 ("In or around January 2003, in Khartoum, [Ms. Jane Roe] suffered the murder of, injury to, and threat of injury to family members, . . ."); *id*. ("They threatened her family to keep her silent about what they did to her."); Ex. 148, Jane Roe Dep. at 86:11-18 ("They blindfolded me, and then they held my hands and put me in the car. They became scared, because when they saw the blood that I had—I had the miscarriage, they opened my—if I—they told me if I open my mouth, they will—and say anything, they will kill all my relatives."); Ex. 136, Adam Dep. at 118:7-12 ("Yes. After—the same night they arrested me, five people went to my house and they raped my wife."); Ex. 143, Tingloth Dep. at 60:10-11 (Q: "Do you know how your father was killed?" A: "He was shot with a gun."); *id*. at 110:25-111:3 (Q: "Describe how your brothers were killed." A: "The attack that happened at Romamine (phonetic) where my brother . . . was killed, we had ran to the forest and most of the people died and they took things."); Ex. 132, Hamdan Dep. at 67:1-5 (Q: "What happened to your grandfather?" A: "He was shot in the head

refugees are forcibly displaced—the Court can separately deal with the asylee and derivative refugee categories by creating subclasses if necessary.[100]

b. BNPP—Not Plaintiffs—Ignores the Relevant Standards and Facts Regarding the Involvement of Non-Governmental Actors.

BNPP also criticizes Plaintiffs for "completely ignor[ing]" that U.S. immigration law permits applicants to bring claims against non-governmental actors, implying that Plaintiffs' argument regarding attribution to the GOS or its agents—who were waging genocide—is flawed.[101] But in fact, Plaintiffs and Mr. Khatri have explained why the GOS and its agents were the persecutors here, based not only on the INA but relevant country conditions, including the Regime's brutal campaign of ethnic cleansing against civilians.[102] It is BNPP that consistently fails to engage with or rebut those arguments, citing not one contrary example.

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and he died."); *id*. at 88:8-18 (Q: "How did your father die?" A: "From the attacks by the airplane, along with the 51 people who died." Q: "Where was your father when the attack happened?" A: "He was with his friend, his colleague in the house. And then the children of his colleague, all of them died."); Ex. 135, Jane Doe Dep. at 92:17-93:22 (Q: "Okay. Paragraph 37 of Exhibit 1 says the attackers broke the hand of your daughter who was nearly four years old." A: "Yes. That is . . . my daughter, and that was in the valley."); *id*. at 152:5-10 (Q: "Were the men who raped you and your mother in Marla, were they from the military, the Sudanese military?" A: "It was the—the military and the Janjaweed. They all came to the valley.") (objection omitted); id. at 135:2-25 ("[My husband said], 'I was tortured to the point of death. I wanted to die.' He had stated that he had wounds and flies were sitting in it, and he stated that he had been burned, and the wounds became infected, because he had wounds, and the wounds became infected, and even the marks are there until today, of the burns."); *id*. 95:3-9 (Q: "Did you see your father get killed?" A: "He and his brother were killed at the door, and—and when we saw it, we ran."); Ex. 139, Judy Roe Dep. at 70:1-12 (Q: "After you were attacked, were you able to see your husband shortly thereafter?" A: "No, I did not see him. He was taken to prison.").

[100] *See* Pls' Mem. at n. 431. Plaintiffs' suggestion that the Court may segregate the class, if needed, by immigration status was not an "afterthought," Opp. at 44 n.26, but explicitly accounted for in Mr. Khatri's estimate (which itself is separated by immigration category, each of which is explained and estimated), and advanced by Plaintiffs themselves in their opening brief in support of class certification. *See* Pls' Mem. at 101 n.431. In any event, it is permissible for the Court to create subclasses in this manner when warranted. *See, e.g.*, *In Petrobras Sec.*, 862 F.3d 250, 274 (2d Cir. 2017); *Air Cargo*, 2014 WL 7882100, at *45 ("Courts presiding over class actions are certainly capable of dealing with the fact that a class may have a few outliers that went undamaged. And where such outliers are so prevalent as to present intractable case management problems for an otherwise appropriate class, this problem 'should be solved by refining the class definition rather than by flatly denying class certification on that basis.'") (quoting *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 823 (7th Cir. 2012)).

[101] Opp. at 39.

[102] *See* Pls.' Mem. at 98-100; *Daubert* Opp. at 9-14.

Instead, once again, BNPP parrots a litany of acts of violence by non-governmental actors untethered to any class member—including citations compiled by a research assistant for Mr. Yale-Loehr, who admits he is not an expert in Sudan or offering any expert opinion as to events that occurred in Sudan,[103] as if that is enough to undermine attribution to the genocidal state. The dispute is not whether non-governmental actors committed some violence in Sudan during the class period; Plaintiffs' own experts acknowledge that they sometimes did.[104] The dispute is whether that violence alone *could amount to a claim of refugee or asylum status*, which must be guided by the relevant legal frameworks, as well as the facts.[105] It cannot.

Despite Plaintiffs' detailed arguments in their opening brief spelling out the relevant criteria and country conditions,[106] BNPP does not even *address* the "unable or unwilling" government nexus standard, nor the statutory requirement that persecution must be on account of a protected ground—much less how any entity other than the GOS or its agents could have met those standards on the factual record here.[107] To the contrary, BNPP appears to concede more than it defends. It does not refute, for example, that the GOS was trying to control opposition or rebel groups, which would prevent satisfying the "unable or unwilling" standard for such groups.[108]

[103] Opp. at 39-40. *See* Ex. 167, Yale-Loehr Dep. at 134:11-135:5; *see also* 12:13-13:10, 133:2-134:5 (admitting that his research assistant, a law student where Mr. Yale-Loehr teaches, located the reports and identified the quotes to highlight from each, which Mr. Yale-Loehr "verified" by reading other parts of the report).

[104] Opp. at 39.

[105] *See* Pls.' Mem. at 98-100.

[106] *See id*.

[107] *See* Opp. at 39-42. In its reply in support of its *Daubert* motion, BNPP *again* neglects to engage with these standards and does not dispute that they apply, effectively conceding that it cannot refute the clear implications of Plaintiffs' arguments. *See* BNPP's Reply in Supp. of *Daubert* Mot. (ECF No. 453) at 6-8; *Daubert* Opp. at 9-14.

[108] *See* Opp. at 39-42; Pls.' Mem. at 99 & n. 425.

Indeed, BNPP itself writes that "[t]he Sudanese government and associated militias battled the core SPLA as well as other rebel groups," a key concession that undermines its argument.[109]

Nor does BNPP rebut the case law (including regarding the Taliban and Salvadoran gangs) or ample expert testimony (from actual Sudan experts) supporting those conclusions.[110] It also fails to point to one single example of a Sudanese refugee or asylee succeeding on a claim against a non-governmental actor alone, despite Mr. Khatri's identification of that flaw in his report nearly one year ago. *Cf. Menocal v. GEO Grp.*, 882 F.3d 905, 921 (10th Cir. 2018) (dismissing similarly speculative claims where "even after three months of discovery regarding class certification issues, GEO did not present any individualized rebuttal evidence to the district court that would cause individual causation questions to predominate at trial").[111] Yet BNPP continues to speculate that "[u]nder the appropriate facts and circumstances, this non-governmental violence could have formed the basis of a valid refugee or asylum claim."[112] But it makes absolutely no showing to support that speculation.[113]

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[109] Opp. at 5.

[110] Pls.' Mem. at 99 & n. 425.

[111] In BNPP's reply in support of its *Daubert* motion, it attempts to argue that Plaintiffs shift their burden under Rule 23 to BNPP by flagging BNPP's repeated failure to identify a *single* Sudanese refugee or asylee who departed Sudan during the class period and was admitted to the United States, but did *not* suffer or fear persecution by the GOS or its agents. *See* BNPP's Reply in Supp. of *Daubert* Mot. (ECF No. 453) at n.3. Not so. Plaintiffs have met their burden under Rule 23; Plaintiffs are simply revealing BNPP's unfounded speculation, which cannot defeat class certification. Tellingly, BNPP *again* fails to point to any example that would undermine attribution to the Regime. *See id.* at 6-8; *Daubert* Opp. at 9-14.

[112] Opp. at 40.

[113] Nor does BNPP support its criticism that Plaintiffs' experts make "varying, contradictory, and speculative claims" about the scope of the GOS's violence (which is well-documented as a matter of historical fact), Opp. at 40 n.23, which it makes with egregious mischaracterizations. For example, Mr. Khatri did not testify that the GOS is "responsible for every act of violence" during the class period, *id.*; he testified that he was not aware of a refugee or asylum grant stemming from harm by a non-governmental entity that was *not* the GOS's agent, which BNPP still fails to rebut. *See* Khatri Dep. at 139:18–140:1 ("[F]rom everything that I have read and have understood over the years, I did not know of any agents – I'm sorry -- of non-government entities that the Government did not consider their agents who -- through whom a claim of persecution was granted to a Sudanese national"). Similarly, BNPP mischaracterizes the testimony of Dr. Verhoeven and Mr. Hudson, which is consistent in its consideration of GOS's role. Mr. Hudson is not presenting a "boundless theory of liability," but rather testified that not only did the GOS

Instead of engaging with the actual facts, BNPP mischaracterizes Mr. Khatri's testimony to make its point. BNPP notes that Mr. Khatri recognizes that non-governmental groups can be persecutors as a general matter, but then ignores the vast majority of his testimony explaining why, *in this case*, the persecutors were the GOS and its agents.[114] BNPP also latches on to Mr. Khatri's testimony regarding "priority processing" designations made by the President.[115] Mr. Khatri discussed the priority processing categories to explain that the GOS was actively recognized as committing harm and that Sudanese refugees were prioritized for admission during the class period.[116] Though refugee families *still* must meet the "refugee" definition based on a finding by a U.S. refugee officer—as class members did here—the priority processing criteria provide further, though not sole, support for attribution to the GOS.

BNPP also mischaracterizes Plaintiffs' position regarding the deference owed to the U.S. Government's immigration findings.[117] Plaintiffs explained that the individualized criteria underlying a refugee or asylee's admission to the United States—such as the time or location of

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create a system ripe for atrocities, the GOS actively worked to exacerbate and foment abuses committed by other groups. Ex. 152, Deposition of Cameron Hudson ("Hudson Dep."), dated April 4, 2023, at 116:11-117:24. Indeed, "the government of Sudan was in the business of sponsoring mass atrocities." *Id*. at 116:21-22. It is true that Dr. Verhoeven could not quantify the "absolute number" of abuses perpetrated by the Al-Ingaz Regime "compared to others," because, as he testified, one of the "others" referred to by BNPP counsel "ended up aligning itself with the government in Khartoum." Ex. 170, Deposition of Harry Verhoeven ("Verhoeven Dep."), dated March 30, 2023, at 379:17-381:10.

[114] Opp. at 40. *See, e.g.*, Khatri Dep. at 39:18–140:1; 142:12-14; 144:16–146:1; 158:19-159:9; 161:15-162:2 168:13-18.

[115] Opp. at 41.

[116] *See, e.g.*, Ex. 75 to Lee Decl., ECF No. 435-75, Expert Report of Prakash Khatri ("Khatri Report"), dated Sept. 30, 2022, at 7-9; Khatri Dep. at 140:11-16 ("[F]rom my understanding of how the U.S. Government was stating the prioritization in every one of the years, it seemed fairly apparent that they were not referencing third parties. They were referencing the Government of Sudan or its agents."); *id.* 128:10-22 (noting Sudan's "documented history of human rights abuses" and use of Sharia law to subject non-Muslims to "government restrictions"); *id.* at 131:16-132:2 ("Q. In the fiscal year 2006 report . . . is there an explicit recognition of persecution by the Government of Sudan? A. Yes.") (objection omitted); *see also id*. at 115:18-118:10 (explaining priority processing).

[117] Opp. at 42.

the human rights abuses, or the specific events that forced them to flee[118] were *already taken into account* when their status was granted.[119] Try as it might to latch onto the "case-specific" nature of the adjudication process to suggest that individual questions nonetheless predominate,[120] BNPP cannot reopen or question those decisions here. It is precisely *because* the U.S. Government undertook a "case-specific" inquiry that this Court need not do so again.[121]

2. Circumstantial Evidence Supports an Inference that the Remaining 7.2% of Class Members Were Also Forcibly Displaced.

Together with common proof regarding the GOS's genocidal campaign targeted against the Black African ethnic population and BNPP's complicity, refugees and asylees' immigration status—which establishes forcible displacement and attribution to the GOS or its agents for 92.8% of class members[122]—permits an inference that the GOS or its agents were *also* responsible for the displacement of the remaining 7.2% of class members, *i.e.*, diversity visa recipients who were displaced during the same time period under the same nucleus of facts.[123] BNPP attempts to avoid the weight of circumstantial evidence here—including that these diversity visa recipients were displaced from their homes like other ethnically targeted refugees and asylees, during a period

[118] Opp. at 1, 42

[119] *See* Pls.' Mem. at 101-102.

[120] Opp. at 42.

[121] *See* Pls.' Mem. at 101-102.

[122] BNPP's characterization of 92.8% as merely a "majority" is truly an understatement. Opp. at 42.

[123] *See* Pls.' Mem. at 100-101; ECF No. 435-75, Khatri Report at 23, 26 (explaining methodology for determining which diversity visa recipients were displaced—a methodology BNPP did not dispute in its *Daubert* motion). Additionally, two misstatements bear correcting. First, Plaintiffs did not "all but conced[e]" that diversity visa recipients in Mr. Khatri's estimate were not forcibly displaced, Opp. at 41 n.24, but explicitly argued that forcible displacement by the GOS or its agents for this relatively small group could be proven *circumstantially*. *See* Pls' Mem. at 100-101. Second, Plaintiffs did not "choose to ignore" that the proposed class definition includes "U.S. citizens and legal permanent residents" who suffered human rights abuses. Opp. at 35 n.20. As Mr. Khatri explained, refugees and asylees *become* legal permanent residents and U.S. citizens. ECF No. 435-75, Khatri Report at 17. And according to Mr. Khatri's estimate, 92.8% of class members – regardless of their citizenship status today – were admitted as refugees or asylees.

when the Regime was waging genocide against these protected groups[124]—but the evidence overwhelmingly supports an inference here. *See Air Cargo*, 2014 WL 7882100, at *46 ("None of this evidence conclusively establishes that 'all or virtually all' of the class members were impacted, but it does not need to. It is enough that a reasonable juror could rely on the inferences permitted by this evidence to find common impact by a preponderance standard."). [125]

BNPP misinterprets Plaintiffs' arguments regarding the appropriateness of a classwide inference in this case and attempts to distinguish one analogous case—*Menocal*—simply because the common evidence in that case involved an institutional policy.[126] Putting aside that the GOS *did* have a genocidal policy against the ethnic populations from which class members originate,[127] the common evidence here is even stronger and rarer: it involves a *U.S. Government determination* that 92.8% of class members were forcibly displaced by the GOS or its agents. Whether described as a policy or an administrative decision, both provide generalized proof of attribution—the "glue" holding class members' allegations together. *Menocal*, 882 F.3d at 920 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 352 (2011)). BNPP disputes the "glue" exists here, but it simply re-hashes its disagreement with the fact of the GOS's genocidal campaign, as well as the INA and the legal standard for forcible displacement, nothing more.[128]

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[124] *See* Pls.' Mem. at 38, 44-45; Ex. 5, Jok Report ¶¶ 107-14; Ex. 7, Baldo Report ¶ 12.

[125] BNPP dismisses this as "mere" circumstantial evidence, Opp. at 43, but circumstantial evidence *is* evidence. *See, e.g.*, *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1184 (2d Cir. 1992) ("In any lawsuit, the plaintiff may prove his case by direct *or* circumstantial evidence. If a jury can give equal or greater weight to circumstantial evidence, then requiring only 'direct' evidence to sustain a plaintiff's burden of proof is not only unhelpful, it is baffling. Juries are frequently (and correctly) instructed, as they were here, that the law makes no distinction between the weight to be given to either direct or circumstantial evidence.") (cleaned up).

[126] Opp. at 43-44.

[127] *See* Pls.' Mem. at 42, 45, 50, 62, 85, 94-95, 107; *see also infra* at 53-57.

[128] Opp. at 44.

Importantly, in *Menocal*, the existence of the policy was sufficient to determine causation, even where class members' "hypothetical" motives to perform labor pursuant to the policy may not have been uniform. 882 F.3d at 921 (noting GEO Group's "speculative assertions regarding the class members' subjective motivations for performing their cleaning duties," and concluding that its "hypothetical alternative explanations for the class members' labor do not defeat the Appellees' showing that the causation element is susceptible to class-wide proof"). BNPP asserts similar speculations regarding class members' "individualized" motivations to flee their homes in Sudan, but it has adduced no evidence that *any single person*—displaced from Sudan who entered on a diversity visa—left for a reason other than the GOS's genocide. BNPP's speculations are thus insufficient to defeat a classwide inference. *See id.*[129]

3. Forced Displacement Is a Compensable Injury Under Swiss Law.

Given that all class members share the common injury of forced displacement, BNPP turns its focus to arguing that this classwide injury is not cognizable under Swiss law.[130] As an initial matter, the meaning of Swiss law is a question that is common to all class members. And BNPP is wrong; where forced displacement violated class members' violated absolute rights, the resulting emotional suffering is compensable as a moral harm and cognizable under Swiss law. BNPP's flawed arguments are founded on (1) an invented standard for cognizable claims and (2) an offensively reductive description of Plaintiffs' experiences as they were forced from their homeland by a state-sponsored genocidal campaign.

[129] In any event, as with other immigration categories separately estimated by Mr. Khatri, should the Court disagree that a classwide inference of attribution to the GOS or its agents is appropriate for diversity visa recipients, it can create a subclass for diversity visa recipients or otherwise modify the class definition as appropriate. *See supra* note 99; *see also infra* at note 292.

[130] Opp. at 45.

a. Forced Displacement Infringed on Plaintiffs' and Class Members' Absolute Rights and Caused Compensable Harm.

BNPP and yet another new expert, Professor Helen Keller, offer a red herring, inviting the Court to consider whether Plaintiffs "allege that an act of the GOS violated an *established* right under Swiss law."[131] BNPP provides no definition for "established right" or citation to authority for that standard. It is unclear based on BNPP's brief and Professor Keller's report whether their conception of "established" turns on the explicit statement of the right itself (i.e. right to the liberty of movement)[132] or the manner in which someone is deprived of it (i.e. the unlawful deprivation of property by a state).[133] Regardless, it is not relevant to the Swiss law analysis.

Putting aside the timeliness issue of BNPP's latest expert report,[134] under Swiss law, a plaintiff is not required to identify a specific prohibition or "cause of action" to recover compensation for violations of absolute rights.[135] As the Swiss Supreme Court explains: "The legal order directly protects these rights, without it being necessary to determine in each case whether the perpetrator of the injury violated a specific prohibition." Ex. 121, *Plane Crash*, Swiss Sup. Ct., 112 II 118, p. 128 (1986). *Id.*; *see also* Ex. 104 to Lee Decl., ECF No. 435-104, Declaration of Franz Werro ("Werro Decl."), dated March 2, 2023, at ¶¶ 64, 73-75, 150 ("There is no enumerated list of types of physical injuries that are cognizable, just as there are no "causes of action" for personal injury under Swiss law, in contrast to American tort law."). Therefore, the relevant inquiry is not whether Swiss law provides a specific cause of action for "forced displacement," but rather

[131] Opp. at 45.

[132] Opp. at 46.

[133] Opp. at 46; Ex. 97 to Lee Decl., ECF No. 435-97, Expert Report of Helen Keller ("Keller Report"), dated January 6, 2023, at 10.

[134] *See* Plaintiffs' Response to Defendants' Motion for Summary Judgment ("MSJ Opp") Argument Section I.B.

[135] BNPP itself notes this elsewhere in its brief. Opp. at 24 n.13.

whether being forced into exile by violent state persecution (*i.e.*, the fact of forced displacement) infringes on absolute rights and causes compensable moral harm, within the meaning of Article 49 CO.

The European Convention of Human Rights ("ECHR") and jurisprudence of the European Court of Human Rights ("ECtHR") are instructive for three reasons.[136] *First*, they form part of domestic Swiss law: "The ECHR, as a state treaty approved by the Federal Assembly, is no less binding on the authorities applying the law than federal laws." Swiss Sup. Ct., 111 Ib 68, p. 70-71. *Second*, the ECtHR has long recognized that forced displacement or expulsion from one's home is a violation of the "right to respect for private life" and property rights.[137] *Third*, the ECtHR specifically recognizes that the violation of these rights—when a victim is "forced by . . . military forces" to "abandon their home, property, and possessions"[138]—can cause "anguish and feelings of helplessness and frustration" that are compensable as non-pecuniary damage.[139] Here, Plaintiffs' experts have identified forced displacement as a trauma common to class members that is distinct from other abuses suffered.[140] As described by Dr. Jok, becoming a refugee is particularly "humiliating for anyone steeped in Sudanese culture, which prizes formality, propriety, decency,

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[136] *See* ECF No. 435-104, Werro Decl. at ¶¶ 69-76.

[137] *Maslov v. Austria*, Case No. 1638/03, Judgment, EctHR, Grand Chamber, June 23, 2008, ¶¶ 61-63, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-87156%22]}; *Loizidou v Turkey*, Case No. 15318/89, Judgment, ECtHR, Grand Chamber, July 28, 1998, ¶¶ 39; *Cyprus v. Turkey*, Case No. 25781/94, Judgment (Merits), ECtHR (Grand Chamber), 10/05/2001, https://hudoc.echr.coe.int/eng?i=001-59454; *Demades v. Turkey*, Case No. 16219/90, Judgment (merits and just satisfaction), ECtHR, 31/07/2003, https://hudoc.echr.coe.int/fre?i=001-61272.

[138] *Xenides-Arestis v. Turkey*, Case No. 46347/99, Judgment, ECtHR, Dec. 22, 2005, ¶ 11, https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-71800%22]}.

[139] *Xenides-Arestis v. Turkey*, Case No. 46347/99, Just Satisfaction Judgment, ECtHR, Dec. 7, 2006, ¶ 47, https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-78359%22]} (awarding 50,000 euros in compensatory damages for moral harm).

[140] Pls'. Mem. at 63-64, n. 13 (citing Ex. 7, Expert Report of Dr. Allen Keller and Dr. Barry Rosenfeld ("Keller & Rosenfeld Report"), dated Sept. 30, 2022, at 9-10).

work, and provision for the family," and the resettlement process is traumatic in a manner specific to Sudanese cultural norms.[141]

b. Plaintiffs and Class Members Suffered Concrete Violations to Their Absolute Rights at the Hands of the GOS or its Agents.

BNPP reduces Plaintiffs' experiences of suffering unimaginable violence, being driven from their homes, separated from their families, taken from their land and businesses, forced into unstable refugee camps, and subjected to the uncertainty of resettlement as Plaintiffs "deciding to leave Sudan."[142] In discounting the realities of genocide survivors' experiences, BNPP seeks to bolster its ill-founded argument that Plaintiffs seek compensation for "unspecified 'moral harm.'"[143] Instead, Plaintiffs feared violent state persecution and suffered concrete violations to their bodies, their safety, their absolute rights to private life, their freedom of movement, and their property, as protected under Swiss law.

Swiss courts recognize a "general duty to respect the right to life and bodily integrity as an absolute right." Ex. 117, *Ski Lift Case*, Swiss Sup. Ct., 126 III 113, p. 115 (2000). A breach of that duty is unlawful. *Id.* BNPP's expert Professor Müller does not dispute that "[i]n general, Swiss law recognizes physical personality rights (*e.g.*, the right to life and bodily integrity), affection personality rights (*e.g.*, the right to family life), and social personality rights (*e.g.*, the right to reputation or publicity)."[144] Violations of these rights are legally cognizable as "moral harm."[145]

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[141] Pls'. Mem. at 63-64, n. 334-337, (citing Ex. 5, Jok Report at ¶¶ 116, 118, 120, 123.)

[142] Opp. at 47; *see also* Opp. at 11 (describing class members as people who "happened to relocate" to the United States); *cf.* Annex A (attached to Plaintiffs' contemporaneously filed Response to Defendants' Motion for Summary Judgment).

[143] Opp. at 47.

[144] ECF No. 435-104, Werro Decl. at ¶ 145.

[145] *Id.* ¶¶ 145-156.

Here, there is nothing unspecific about the moral harm to Plaintiffs and class members.[146] They were victimized and displaced by a systematic campaign of ethnic cleansing orchestrated at and controlled by the highest levels of the Sudanese Government.[147] The ECtHR's decision in *Chiragov and others v. Armenia* illustrates why victims forcibly displaced by an organized campaign of ethnic cleansing and persecution, who are not freely able to return, have had their rights to private life, family life, and home violated. In *Chiragov*, victims who were Azerbaijani Kurds and Muslims were "forcibly displaced from their homes by . . . Armenian-backed forces" in a "military action" that led to "large-scale ethnic expulsion and the creation of mono-ethnic areas."[148] The victims were "prevented from returning" to their homes "located in a territory occupied by the government." *Id.* ¶ 3. The Court held that "their forced displacement and

[146] Forced displacement causes a concrete moral harm. Plaintiffs' experts Dr. Rosenfeld and Dr. Keller identify "the trauma inherent in displacement—fearing for their safety and being forced to flee their homes and country…" Ex. 7, Keller & Rosenfeld Report at 9. As Dr. Rosenfeld testified, "being forced to flee your home and your country is inherently traumatic, under threat of . . . life-threatening violence." Ex. 166, Deposition of Dr. Barry Rosenfeld ("Rosenfeld Dep.") at 89:10-15. Plaintiffs' experts note commonalities associated with the trauma of Plaintiffs' displacement: "All of the plaintiffs described a marked loss of status as a result of having to flee their homes and country of origin – and all plaintiffs described this as both necessary (for their survival) and unwanted (i.e., each plaintiff expressed that they would have happily stayed in their native country if their survival did not necessitate their flight)." Ex. 7, Keller & Rosenfeld Report at 9. Plaintiffs suffered acutely following their displacement, in part as a result of "ruptured family relationships that were described as closely intertwined, with multi-generational households and shared resources (e.g., homes, land, wealth, livestock, and often work). Indeed, many plaintiffs cited this lasting separation from family as a significant source of distress and every plaintiff indicated that they would never have emigrated to the U.S. if they did not fear for their very survival." *Id*. at 12-13. And as Plaintiffs' expert Dr. Jok explains, "[t]he loss of ancestral lands is a unique and deeply felt injury to Sudanese sense of self, identity, pride and worth as a human," and being reduced to refugees is "humiliating for anyone steeped in Sudanese culture, which prizes formality, propriety, decency, work, and provision for the family." Ex. 5, Jok Report ¶¶ 116, 118.

In evaluating the 19 representative Plaintiffs, Drs. Keller and Rosenfeld employed the same published, peer-reviewed methodology they pioneered and that has since been used by practitioners in evaluating the psychological and medical injuries sustained in refugee populations and torture survivors. Ex. 7, Keller & Rosenfeld Report at 6-7; Appendix A1-A2. Dr. Rosenfeld, a board-certified forensic psychologist, designed the specific elements of his evaluation according to the cultural, linguistic, and experience-based features of the Plaintiffs. Ex. 7, Keller & Rosenfeld Report at 7-9, 14-19. Defendants' expert, Dr. Morgan, criticizes the approach of Plaintiffs' experts but effectively ignores these factors, demanding that evaluators instead employ an interview technique designed for an academic setting. Ex. 166, Rosenfeld Dep. at 171:10-175:5. Additionally, Drs. Rosenfeld and Keller use the data of the physical findings to compare and corroborate the details of Plaintiffs' recollections. *Id.* at 226:22-227:4; 250:21-252:18; Ex. 7, Keller & Rosenfeld Report at 20.

[147] *See infra* at 53-57.

[148] *Case of Chiragov and Others v. Armenia*, Case No. 13216/05, Judgment, Grand Chamber, ECtHR, June 16, 2015, ¶¶ 217, 220, https://hudoc.echr.coe.int/eng?i= 001-155353

involuntary absence" constituted an "unjustified interference with their right to respect for their private and family lives as well as their homes." *Id.* ¶ 206. This analogous ECtHR caselaw, as a part of Swiss law, aids in determining whether Plaintiffs' absolute rights to private life, freedom of movement, and property, as protected under Swiss law, were violated by the fear of violent state persecution that made them flee their homes and be unable to return.[149]

To arrive at BNPP's conclusion that "the Court would . . . need to conduct an individualized assessment of the particular circumstances that led to the individual's leaving" for each class member,[150] the Court would need to disregard the function and authority of the U.S. Government's refugee determinations.[151] It would also need to substitute Swiss procedural rules for the U.S. class action device, as Professor Müller urges,[152] and as BNPP already tried and failed to achieve when it sought to dismiss this action on *forum non conveniens* grounds.[153]

Because forced displacement is a compensable injury under Swiss law and because that same injury was suffered by all class members, class certification under Rule 23 is appropriate.

4. BNPP Does Not Dispute that the Court Can Award Baseline Damages to Every Class Member for the Harm to Human Dignity They All Suffered Due to Their Forced Displacement.

Although BNPP contends – incorrectly, as set out above – that forced displacement is not compensable under Swiss law, nowhere does it dispute that if forced displacement is indeed compensable and common to all class members, the Court can award baseline damages to each class member for the affront to human dignity that all class members have suffered. This is the

[149] *See* Ex. 247, Declaration of Franz Werro, dated August 16, 2023, at ¶¶ 53-54.

[150] Opp. at 48.

[151] *See supra* at Section IV.A.

[152] Opp. at 47-48 (citing Professor Müller for the assertion that Swiss law "requires an individualized assessment").

[153] FNC Op. at 10-11 (noting that "Swiss courts do not have class action or complex litigation case-management mechanisms" and "[w]hether a substitute procedure exists or not in Switzerland is seemingly beside the point, given the existing suit and the efficient procedures available in this forum").

lesson of *In re Nassau County Strip Search Cases*, 742 F. Supp. 2d 304, discussed at length in Plaintiffs' opening brief.[154]

In *Nassau County Strip Search Cases*, the court awarded the same baseline amount to every class member "attributable to the affront to human dignity necessarily entailed in the being illegally strip searched." *Id*. at 307. Determination of additional damages for "injuries sustained by individual class members" was left "to be resolved in a subsequent damages phase or phases of the proceeding." *Id.* Plaintiffs have explained how the same procedure could be used here, with the first phase leading to an award of baseline damages to every class member due to the common harm to human dignity caused by their forced displacement, and a second phase to determine what *additional* damages class members sustained due to "genocide, battery, assault, unlawful imprisonment, sexual abuse, threats of violence and/or deprivation of property."[155]

Although *Nassau County Strip Search Cases* was a central case on which Plaintiffs relied in their opening brief, BNPP completely fails to offer *any* response to it,[156] thereby conceding that (1) the inherent dignity of a human being is not an individualized inquiry; (2) forced displacement, like the strip searches conducted at the Nassau County Correctional Center, is an affront to human dignity; and (3) if forced displacement is indeed a common, compensable harm, it would be appropriate to award baseline damages to every class member for the affront to human dignity associated with forced displacement, with determination of *additional* damages owed to individual

[154] Pls.' Mem. at 103-106.

[155] Pls.' Mem. at 104-106.

[156] BNPP does not so much as cite the district court's 2008 or 2010 decisions in *Nassau County Strip Search Cases* that were discussed in Plaintiffs' opening brief. Pls.' Mem. at 103-106. BNPP does cite the Second Circuit's 2006 opinion three times, but the district court's discussion of damages occurred *after* remand so is totally absent from BNPP's opposition brief. *See* Opp. at 33 (listing the Second Circuit's opinion in a series of cases where a "policy" was at issue), 54 (quoting the Second Circuit's opinion for the proposition that certification should be a "fair and efficient method for resolving this case"), and 59 (citing the Second Circuit's opinion as an example of issue classes where the court can "reserve damages for individualized determinations in a subsequent proceeding"). BNPP's failure to address *any* of the post-remand proceedings demonstrates that it has no answer at all.

class members left for a subsequent phase. These concessions alone show why class certification is warranted here.

B. The Predominating Elements of Plaintiffs' Claims Will Be Established Through Common Evidence.

Because all class members suffered forced displacement perpetrated by the GOS or its agents, proof of the remaining elements of Plaintiffs' claims will be straightforward using predominantly common evidence. As BNPP does not dispute, its conscious assistance to the GOS and the causal connection between BNPP's conduct and the GOS's campaign of atrocities will be established through *exclusively* common evidence.

The way BNPP circumvented U.S. sanctions and laundered money for its Sudanese clients is the same for every class member.[157] The way BNPP "[fed]" the GOS with billions of dollars in oil revenue is the same for every class member.[158] The way in which this oil revenue, facilitated by BNPP's sole handling of illicit transactions and which exceeded Sudan's entire military budget, fueling a 3,000% increase in military spending, is the same for every class member.[159] And the way in which the GOS used these BNPP-facilitated resources to carry out a genocidal campaign of human rights abuses on a national scale is the same for every class member.[160] Whether there is one trial or one thousand, common evidence will be introduced on each of these points—through the same experts—and will consume the vast majority of time at trial.

BNPP does not actually dispute any of this. Instead, it focuses on the final link in the chain of causation, in which the specific injuries to each class member are connected to the GOS's campaign of abuses. But in contending that any individualized issues as to this final link in the

[157] Pls.' Mem. at 12-35, 50-61.

[158] Pls.' Mem. at 2, 18-20, 22, 35, 59-60.

[159] Pls.' Mem. at 2, 5, 23, 95.

[160] Pls.' Mem. at 35-49.

chain will "overwhelm" the numerous common issues in a trial,[161] BNPP fundamentally mischaracterizes how Plaintiffs intend to prove their claims.

First, as discussed above, the U.S. Government's binding refugee determinations serve as common proof of this final link in the chain. We know that each class member was forcibly displaced by the GOS or its agents because the U.S. Government necessarily found that this was so as to 92.8% of class members, which serves as circumstantial evidence as to the other 7.2%.[162] This forcible displacement also entitles each class member to baseline damages for the common harm to their human dignity.[163] Thus, at least as to the 92.8% of class members who were admitted to the United States as refugees or asylees, proof of liability *and* damages can be accomplished exclusively with common evidence. Other than establishing their membership in the class (which all class members must do in every class action), individualized evidence would be completely unnecessary to obtain a judgment of liability and baseline damages for forcible displacement.

Second, because individual class members will seek more than just these baseline damages for forcible displacement, including additional damages for the torture, detention, rapes, and other abuses they endured, which fall into common patterns based on the Regime's systematic violence,[164] they will need to introduce some individualized evidence.[165] But this individualized

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[161] Opp. at 16.

[162] *See supra* at Section IV.A. In *Marshall v. Hyundai Motor America*, 334 F.R.D. 36 (S.D.N.Y. 2019), cited by BNPP, only 8.6% of vehicles needed the repair that was the subject of the case. *Id.* at 57. That is a far cry from the 92.8% of class members here who have necessarily been found by the U.S. Government to have been forcibly displaced by the GOS or its agents.

[163] *See supra* at 35-36.

[164] *See* Pls. Mem. at 63 (*citing* Ex. 5, Jok Report at 12-37; ECF No. 435-54, Baldo Report at 29-42). The common patterns of abuses at the hands of the Regime remain uncontested by BNPP.

[165] BNPP asserts that "Plaintiffs concede" in their opening brief that there will be individualized questions. Opp. at 15 (citing Pls.' Mem. at 92-93, 103). It fails to disclose that Plaintiffs' discussion of individualized questions related only to the amount of *additional* damages, not BNPP's liability or the award of baseline damages to every class member for the harm to their human dignity resulting from their forced displacement. And BNPP does not dispute that individualized damages determinations will not defeat class certification. *See* Pls.' Mem. at 106-08.

evidence goes just to the *amount* of damages each class member should be awarded, not *whether* each class member receives damages at all.[166] And as BNPP does not dispute, testimony from each class member on these individualized issues would not take more than a single day.[167] Indeed, for the nineteen named Plaintiffs, it appears their seven-hour depositions coupled with common expert evidence was sufficient proof to preclude BNPP from moving for summary judgment on whether they were harmed by the GOS and its agents.

Third, as BNPP concedes, the claims of the class representatives are typical of the claims of all class members, who "suffered from common patterns of injuries inflicted by the Government of Sudan."[168] This admitted typicality will result in the proof of injuries that match these "common patterns" being relatively uncontroversial. In all likelihood, BNPP will not bother to dispute the Plaintiffs' testimony about what the Sudanese Government did to them. It will instead seek to defend the case by arguing that it is not responsible for these harms, on the basis of exclusively common evidence.[169]

Fourth, BNPP seems not to appreciate that the Rule 23 standard asks whether "common issues *predominate* over any questions affecting only individual [class] members," *Petrobras*, 862 F.3d at 268 (emphasis in original), not whether there are any individual questions at all. *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 107-08 (2d Cir. 2007); *see also Doe 1*, 2023 WL 3945773, at *8 ("Rule 23(b)(3) does not require a plaintiff to show that no

[166] BNPP suggests that when Plaintiffs say "damages," they must mean whether there is a "legally compensable injury" under Swiss law. Opp. at 16. But that is clearly not what Plaintiffs mean. When Plaintiffs say "damages," they mean the term as it is commonly understood in a U.S. proceeding: the *amount* of compensation to which the injured party is entitled.

[167] Pls.' Mem. at 115.

[168] Pls.' Mem. at 83-85.

[169] As BNPP notes, it is seeking summary judgment as to *all* plaintiffs based on its own interpretation of Swiss law – an obviously common question that does not vary from class member to class member. Opp. at 17 n.8.

individual issues exist; that would be an impossibly high standard.") (emphasis in original). The inquiry requires consideration of how "substantial" the individualized issues will be. *U.S. Foodservice Inc.*, 729 F.3d at 118. By pointing only to the individualized questions and ignoring the much more "substantial" common questions in the context of this case, BNPP improperly puts its thumb on the scale.

Tellingly, while BNPP includes lengthy sections in its brief arguing that individualized questions predominate as to the illicit act and causation elements of Article 50, it attempts no such argument when it comes to the conscious assistance element, implicitly conceding that common questions predominate as to that issue. As discussed below, it is wrong about the significance of individualized as opposed to common questions when it comes to illicit act and causation, but its complete failure to weigh any individualized issues against the overwhelmingly common proof as to conscious assistance exposes the weakness in its opposition to class certification.

Judge Rakoff's recent decision in *Doe 1* is instructive. "The core of [that] case – plaintiff's allegation that JP Morgan supported Jeffrey Epstein's sex-trafficking venture while it knew or should have known that that venture was in operation – involves a common set of questions of law and fact" that "has already been subject to extensive discovery and forms the chief part of any class member's complaint against JP Morgan." *Doe 1*, 2022 WL 3945773, at *10. In that case as in this one, "[i]f each class member pursued an individual action against" the bank, each would need to prove the bank's conduct and knowledge. *Id.* at *8. "The legal questions on these elements are to be resolved with class-wide arguments; the factual questions are susceptible to generalized proof. . . . It is, in many respects, the quintessential class action." *Id.*

This was so even though the bank there, like BNPP here, "purports to identify some questions that must be resolved on an individualized basis." *Id* at *9. As Judge Rakoff explained,

"[m]any of these questions, however, are in fact either wholly or largely common to the class. And the individual inquiries that remain are peripheral." *Id.* Thus, while "JP Morgan might argue, at a later stage of this litigation, that certain members of the class were not actually coerced into performing commercial sex acts . . . . that argument would form a relatively minor part of this case and could be addressed through post-trial proceedings." *Id.* at *9 n.9; *see also id.* at *10 ("While plaintiff's prima facie case and JP Morgan's anticipated defenses might raise some questions that are specific to each class member, these questions are relatively peripheral and can be handled at a later date.").

1. Common Questions Predominate as to the Illicit Act Element.

BNPP exaggerates the significance of individualized questions as to the illicit act element. Indeed, this Court held that BNPP previously "*stipulate[d]"* that this element was satisfied. *Kashef*, 2021 WL 603290, at *3 (emphasis added). BNPP's belated claim that individualized issues will predominate as to the identity of the perpetrator and attribution to the GOS is contrary to its stipulation and also simply wrong.

a. The Identity of the Perpetrator is Not a Predominating Individual Issue.

The identity of the perpetrator will not be a substantial issue in this case. As explained above, the U.S. Government has already necessarily determined that all admitted refugees and asylees (who make up 92.8% of class members) suffered or feared persecution by the GOS or its agents and were forcibly displaced.[170] Notwithstanding BNPP's wild speculation that perhaps an

[170] *See supra* at Section IV.A. BNPP mischaracterizes Plaintiffs' argument when it references "Plaintiffs' theory that the GOS is liable for every human rights abuse committed in Sudan over the course of more than a decade." Opp. at 20. Not so. As Plaintiffs have explained, the GOS and its agents were responsible for the human rights abuses, including forced displacement, suffered by every *refugee or asylee* who left Sudan during the class period *and was subsequently admitted* to the United States. *See supra* Section IV.A. If other groups – lacking the required government nexus – engaged in abuses, their victims would not have qualified as refugees and so would not be in the United States or part of the proposed class. BNPP's effort to distinguish *Does I v. Gap, Inc.*, 2002 WL 1000073, as featuring a class "limited" to those where "the identities of the perpetrators" was "clear," and where "the class suffered an identical

attack on a class member was carried out by a "rebel group,"[171] an assertion inconsistent with the U.S. Government's determination of refugee and asylee status, whether the particular actor was "a member of the police" or "the Sudanese military,"[172] is irrelevant; in either case the perpetrator is the GOS or its agents.[173] Same for the government's Arab tribal militias, colloquially called Janjaweed ("devils on horseback"), mujahidin ("holy warriors"), or murahilin. Whether these militia were an agent or instrumentality of the GOS is not a question of "applicable agency law,"[174] but a factual issue addressed through common evidence. Indeed, BNPP's claim that the government's "coordination" with its own militia began in 2003,[175] mischaracterizes expert testimony. Common expert evidence shows the tribal militia were mobilized prior to 1997 pursuant to the Popular Defense Forces Act and comprise one branch of the government's armed forces under a chain of command leading through Sudan's National Security Council to the President.[176] One specific deployment in Darfur began in 2003.[177]

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injury . . . from a common source," Opp. at 20 n.10, fails because the proposed class here is limited to U.S. citizens, permanent residents, and lawfully admitted refugees and asylees who were forcibly displaced by the GOS – an identical injury from a common source – with a U.S. Government finding to that effect for 92.8% of them.

[171] Opp. at 19.

[172] Opp. at 18.

[173] In addition, the record evidence including that of BNPP's own expert shows that the vast majority of all violence against civilians was committed by the GOS and its agents; there is no record evidence that anyone else engaged in widespread or systematic attacks. *See infra* at 53-57; Pls. Mem. at 63 (*citing* Ex. 5, Jok Report at 12-37; ECF No. 435-54, Baldo Report at 29-42. Indeed, the map that BNPP submitted with its motion for summary judgment shows that the opposition forces controlled only a few discrete areas of the country. *See* Ex. 138 to Lee Decl., ECF No. 435-138. BNPP cherry picks the testimony of its expert, Enrico Carisch, to exaggerate the violence perpetrated by "numerous, frequently evolving rebel groups. Opp. at 19. But Mr. Carisch described the GOS security services (NISS) as the "single entity on which to pin responsibility for the decade-long mayhem in Sudan." Ex. 153, Enrico Carisch Dep. at 308:11-21. In the UN Commission of Inquiry report Mr. Carisch replies upon, the Commission found "that rebels have killed civilians, although the incidents and numbers of deaths have been few." *See* ECF No. 435-55, Baldo Reply at ¶ 109. It "obtained no information indicating" that "torture of captured enemy combatants by the rebels . . . had taken place." *Id*. And it "did not find any cases of rape committed by rebels." *Id*.

[174] Opp. at 24.

[175] Opp. at 25.

[176] *See supra* at 11-13, n. 50-57 (discussing *Nature of the Janjaweed*).

[177] ECF No. 435-54, Baldo Report at ¶¶ 190-91; ECF No. 435-55, Baldo Reply at ¶ 38.

Moreover, because the class is defined in terms of those who were subjected to human rights abuses by the GOS or its agents, identification of the perpetrator goes to whether an individual is a class member in the first place, not how the class will prove its claims. And the Second Circuit has approved the use of class member affidavits to establish class membership.[178]

To the extent that class members will need to identify the perpetrator to support their claim for *additional* damages beyond the common, baseline damages for forced displacement, this will be easily accomplished by the class member's own testimony, which BNPP does not dispute would take one day or less.[179]

b. Plaintiffs Attribute Their Injuries to the GOS.

BNPP's claim that the testimony of the named plaintiffs shows that there will be "numerous contested issues" about the identity of attackers, is belied by BNPP's failure to assert a claim – in its lengthy summary judgment motion – that even one of the nineteen plaintiffs had failed to link his or her injuries to the GOS or its agents. To the contrary, under excruciating depositions, each of the nineteen plaintiffs positively identified the persecutors and explained how they did so.

BNPP cites the testimony of Plaintiffs Tingloth, Hassan, and John Doe that their attackers did not wear uniforms,[180] but does not dispute that they were indeed agents of the GOS. BNPP's own proffered expert, Enrico Carisch, has described the GOS security services (NISS) as the "single entity on which to pin responsibility for the decade-long mayhem in Sudan."[181] Plaintiffs' expert Dr. Baldo, a leading human rights investigator and ICC witness regarding Sudan, reviewed the testimony of the Plaintiffs and confirmed that "the harm and injuries that security agents of the

[178] *See infra* at 61. Contrary to BNPP's argument, Opp. at 18 n.9, there is no "fail-safe class" here. *See infra* Section IV.C.2.

[179] Pls.' Mem. at 116.

[180] Opp. at 20.

[181] Ex. 153, Carisch Dep. at 308:11-21.

GOS inflicted on the Plaintiffs were consistent with harms and injuries" on which he was contemporaneously reporting,[182] where NISS agents "were a fixture of civilian life in Sudan and generally recognizable to civilians, despite their frequent use of surreptitious methods such as plain-clothed agents, borrowed names, and unmarked vehicles."[183]

Consistent with the security services' regular practice as described by Dr. Baldo, Plaintiff Tingloth clearly identified the perpetrators as being "security people" and explained that "security people in Sudan wear regular clothing and . . . they carry guns."[184] Plaintiff Hassan also positively identified the perpetrators who came to her house as being from the security services or "military intelligence" —they had an ID "badge", "guns around their waist", "regular clothing", and "black boot[s] of the government."[185] And Plaintiff John Doe testified the perpetrators were "the Janjaweeds" which "usually wear . . . jalabiya . . . the long clothing, and then they also have [a] turban . . . like a scarf".[186] CNN's Chief International Investigative Correspondent who has reported widely on Sudan, Nima Elbagir, corroborates that the clothing of the Janjaweed at the time included "a mix of army uniforms, flowing civilian clothes, turbans, and scarves wrapped around their faces."[187]

BNPP's only support for its statement that "[s]ome Plaintiffs did not even witness the attacks on which they are basing their claims,"[188] is the testimony of Plaintiff Abbo Abakar, where BNPP's own quoted passage undercuts its position. Although he was outside his village, Plaintiff

[182] ECF No. 435-54, Baldo Report at ¶¶ 15-16.

[183] *Id.* ¶ 110; *see also id.* ¶ 125 (discussing NISS' regular practice of home raids).

[184] Ex. 146, Tingloth Dep. at 91:1-4.

[185] Ex. 138, Hassan Dep. at 63:13-15, 76:23-78:19.

[186] Ex. 134, John Doe Dep. at 85:22-86:20.

[187] Ex. 59 to Lee Decl., ECF No. 435-59, Declaration of Nima Elbagir ("Elbagir Decl."), dated August 9, 2022, at ¶ 55.

[188] Opp. at 20.

Abbo Abakar testified that was "not far" and that "You can see the smoke and you can hear some stuff . . . ."[189] Counsel for BNPP did not ask Mr. Abakar a follow-up question, but the "stuff" Mr. Abakar heard included guns because "[h]e recalled running to his home 'as soon as the sound of the guns stopped . . . to go see what happened to the family – who is alive.'"[190] Moreover, the attack that BNPP highlights is but one alleged by Plaintiff Abbo Abakar. BNPP fails to acknowledge that he also testified to a previous attack where uniformed Sudanese government officials and other Janjaweed fighters on horseback wearing the "jalabiya", with weapons and air support from a black and green colored helicopter, attacked and destroyed his village of Bawudah,[191] all of which are common characteristics of the GOS and its agents, the Janjaweed. *See* Ex. 5, Jok Report, ¶¶ 16-17, 22 (describing that after 1997, the GOS used helicopters as part of the genocide so "they could fly closer to the ground and attack people in a more targeted fashion" and that key features of the Janjaweed included that they are the "only ones who attack on horseback, in numbers, aggressively, with modern weapons" and "they arrive before or after the army arrives, and the army does nothing to stop the rampage"); ECF No. 435-54, Baldo Report, at ¶¶ 21-22 (confirming that "all Plaintiffs' testimonies that [he] read [which included the deposition transcript of Plaintiff Abbo Abakar] conform with what is publicly known about the . . . methods of violence by the Government of Sudan and the Janjaweed that took place in Darfur."); *see also id.*, ¶¶ 71-76.[192]

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[189] Ex. 130, Deposition of Abbo Abakar ("Abbo Abakar Dep."), dated June 6, 2022, at 104:6-9.

[190] Ex. 7, Keller and Rosenfeld Report, Appendix C1, p. 2.

[191] *See* Ex. 130, Abbo Abakar Dep. at 90:7-23, 92:24-96:5.

[192] The fact that Plaintiffs' descriptions are consistent with GOS actors' appearance and modus operandi as described by experts is not impermissible "bolstering" of the witnesses' credibility. Opp. at 21 n.12. BNPP's reliance on *United States v. Cruz*, 981 F.2d 659, 662-63 (2d Cir. 1992), is misplaced. In *Cruz*, the Second Circuit held that the way in which "drug traffickers may seek to conceal their identities by using intermediaries would seem evident to the average juror from movies, television crime dramas, and news stories," and so expert testimony to that effect was inadmissible. *Id.* at 662. BNPP does not suggest that the average juror in the Southern District would be remotely familiar with the

BNPP's musing that it may possibly wish to challenge some class member's identification at trial – and the suggestion that any brief cross-examination on that point would predominate over the numerous common issues in the case – is specious.

c. BNPP Ignores the Scale of its Financial Contribution to the GOS.

BNPP relies heavily on three cases – *Motors*, *Chiquita*, and *Talisman* – but each is distinguishable. As BNPP notes, the claims in *Motors* were based on international criminal law, which required identification not just of the perpetrators but also their "purpose" to violate international law. Opp. at 22; *see also In re Motors Liquidation Co.*, 447 B.R. 150, 159 (Bankr. S.D.N.Y. 2011). There is no such requirement under Article 50. Moreover, the proposed classes in *Motors* included "hundreds of thousands or millions of individuals" in South Africa, *id.* at 155, 160, as compared to the approximately 25,000 U.S. citizens and permanent residents in this case. And GM was alleged to have contributed to apartheid by acts such as engaging "in workplace segregation and retaliation against . . . employees who engaged in union and/or anti-apartheid activity." *Id.* at 154. While these acts may indeed have contributed to apartheid, proof of the causal connection between that conduct and the injuries of millions of people was far more difficult in *Motors* than in this case given BNPP's pervasive support for the Sudanese Regime in excess of the country's entire military budget.[193]

BNPP emphasizes that in the *Chiquita* case, the issue was proof of the causal link between Chiquita's financial support and the perpetrators.[194] But BNPP's financial support for the GOS

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dress or behavior of agents of the GOS. In addition, the Second Circuit explained in *Cruz* that the issue on which the expert testified was not actually in dispute. *Id.* If BNPP does not challenge the fact that class members were injured by the GOS or its agents (as it previously stipulated) there should be no need for additional expert testimony on that topic.

[193] *Motors* was also a bankruptcy case where Rule 23 did not necessarily apply at all. *Motors*, 447 B.R. at 157. And the bankruptcy judge ruled that the claims could not be asserted in a bankruptcy proceeding in any event. *Id.* at 168-69.

[194] Opp. at 22-23.

was *more than 12,000 times greater* than the mere $1.7 million at issue in *Chiquita*. *In re Chiquita Brands Int'l Inc. Alien Tort Statute & S'holders Derivative Litig.*, 331 F.R.D. 675, 677 (S.D. Fla. 2019). Chiquita did not provide the entire budget of the paramilitaries in Colombia as BNPP did for the GOS. And the members of the proposed class in *Chiquita* had not already been adjudicated refugees as 92.8% of proposed class members here have been.

As for *Talisman*, Plaintiffs pointed out in their opening brief that "BNPP dwarfs Talisman's role as Regime financier," with Talisman's $195 million in oil-producing royalties amounting to *barely 0.7%* of the over $22 billion supplied by BNPP.[195] BNPP's response is to say that Talisman was "actually on the ground in Sudan."[196] But so was BNPP, where it mattered most—meeting several times a year in Khartoum with the leaders in charge of funding the government and the government's mass atrocities campaign.[197] And although Plaintiffs emphasized the much more expansive proposed class in *Talisman* – 250,000 victims primarily residing in Sudan – compared to the proposed class here of 25,000 U.S. citizens and permanent residents,[198] BNPP ignores the point entirely. It is a critical distinction: in *Talisman*, the plaintiffs were trying to attribute a financial contribution over *100 times smaller* than BNPP's to a proposed class that was *ten times larger* than the proposed class here.[199]

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[195] Pls.' Mem. at 96.

[196] Opp. at 23.

[197] *See e.g.* Ex. 74, BNPP-KASHEF-00014655_EN at 56.

[198] Pls.' Mem. at 96.

[199] In BNPP's view, the "fundamental problem" in *Talisman* was in proving that "each attack was caused by the Government or Government-affiliated military forces," Opp. at 23 (quoting *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 226 F.R.D. 456, 482 (S.D.N.Y. 2005), but the proposed class in *Talisman* was not 92.8% refugees and asylees actually admitted to the United States, where the U.S. government necessarily found that they suffered or feared persecution by the GOS or its agents. *See supra* Section IV.A. In addition, the record evidence is the evidence in *this case*, not a different case from nearly twenty years ago involving a different defendant, different proposed class (which was predominantly plaintiffs *in* Sudan), and different discovery. BNPP is not asking the Court to take judicial notice of the facts in *Talisman*, nor would that be appropriate, including because that case lacked the benefit of twenty years of accumulated research and data about what actually happened.

2. Common Questions Predominate as to Causation.

BNPP's discussion of the purportedly individualized questions that it believes will predominate regarding causation rests on the BNPP's feigned confusion of how Plaintiffs will prove causation under Swiss law: through common evidence.[200] As explained in Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, causation will be established by expert testimony demonstrating that BNPP sustained the Regime's entire operation.[201] Its money-laundering structure injected enough U.S. dollars into Sudan's treasury to fund not just every human rights violation committed by the GOS, but its entire military budget.

Judge Rakoff recently confirmed in *Doe 1* that causation can be proved on a classwide basis in a case involving another bank financier facilitating violent crimes. In that case, JPMorgan argued, exactly like BNPP, that but-for and proximate causation could not "be resolved on a classwide basis because different members of the proposed class allegedly were abused by Epstein at different moments in time, and JP Morgan's provision of services to Epstein might have furthered Epstein's abuse of some but not others." *Doe 1*, 2023 WL 3945773, at *9. Judge Rakoff rejected the argument because "the evidence before the Court" showed that Epstein—like the GOS—"had a typical modus operandi" and JPMorgan "sustained Epstein's operation in a similar way throughout its existence." *Id.* at *10. "This theory of causation," which echoes Plaintiffs' theory here, "makes causation a largely common question." *Id*. While the present case arises under Swiss law, the theory of causation is similar: the GOS abused victims through a typical modus

[200] BNPP also cites generally to *Geiss v. Weinstein Co. Holdings LLC*, 474 F. Supp. 3d 628 (S.D.N.Y. 2020) (Hellerstein, J.) on this point. Opp. at 15. *Geiss* involved a proposed settlement to which a number of class members "strongly object[ed]." *Id.* at 632. As the Court observed, the settlement was "obnoxious" in "favoring" the defendants and their officers and directors "at the expense of the people suffering sexual abuse." *Id.* at 636. While the Court did identify predominance issues relating to one of the proposed subclasses, including due to the differing application of statutes of limitations, *id.* at 636, the proposed settlement was rejected because it was not "fair, reasonable, and adequate," *id.* at 637. The Court did not need to rule on whether a litigation class could be certified, and indeed invited the plaintiffs to "promptly" move for class certification if they intended to do so. *Id.* at 637.

[201] *See* MSJ Opp. Argument Section II.

operandi—as established by Plaintiffs' experts—and BNPP sustained its operations through the same conspiracy throughout the class period. Both prongs are susceptible to common proof.

Natural Causation. "[A] natural causal link exists where the harm would not have occurred at the same time or in the same way or magnitude without the conduct alleged." *Kashef*, 2021 WL 603290, at *6. Common evidence—in the form of BNPP's business records, US government and UN public documents, and fact and expert witness testimony—establishes that:

(1) Beginning in 1997, BNPP destroyed the deterrent effect of the U.S. embargo, encouraging the Regime to commit atrocities with economic impunity.[202]

(2) BNPP laundered "all of the principal sources of non-tax revenue for the Government of Sudan" including $22.2 billion in illicit oil revenue. The oil revenue alone exceeded Sudan's entire military budget by 46% on average, leading to a 3,000% increase in military spending.[203]

(3) Beginning in 2001, BNPP laundered the entire operating budget of Sudan's Civil Aviation Authority in charge of maintaining the air bases used by the SAF to transport weapons and troops and to bomb civilians.[204]

(4) Between 2004 and 2008, BNPP financed the import of armored vehicle components to GIAD, the Ministry of Defense's supplier of armored vehicles used by the Regime's army and Janjaweed militia in attacks on civilians.[205]

(5) Finally, throughout its conspiracy BNPP facilitated Sudan's import of weapons and ammunition, transferring payments from the Ministry of Defense to military attachés, the key purchasing agents in the arms trade, located in Russia and other key countries exporting arms to Sudan. There is a classwide inference that BNPP facilitated arms imports because it—

[202] *See* MSJ Opp. Argument Section II.C.1.

[203] *See* MSJ Opp. Argument Section II.C.1. at 96, *citing* Plaintiffs' Statement of Additional Material Facts ("SAMF") at ¶ 91.

[204] MSJ Opp. at 35-36, *citing* ECF No. 435-53, Expert Reply Report of Kathi Austin ("Austin Reply"), dated March 2, 2023, at ¶¶ 160-163; *See* Ex. 153, Carisch Dep. at 225:21-226:10, 236:11-21.; ECF No. 435-54, Baldo Report at ¶¶ 55-56, *See* Ex. 105, BNPP-KASHEF-00048093 at 48098.

[205] MSJ Opp. at 97, *citing* SAMF at ¶¶ 249-64.

a. handled over $80 billion in Sudanese transactions;[206]

b. failed to screen out military-related transactions as required by the UN, EU, French, and Swiss arms embargos;[207]

c. has refused to identify what was being bought and sold;[208]

d. has refused to identify how much credit it extended to the Ministry of Defense and how much money it transferred from that Ministry to its military attaché purchasing agents;[209] and

e. instructed its Rule 30(b)(6) witness to falsely testify that its multi-million dollar credit facilities with GIAD, the "crown jewel of the Defense Industries system"[210] were merely "insurance policies" and refuses to identify what GIAD imported.[211]

(6) By providing billions in revenue, directly financing air bases and armored vehicles, instrumental in the mass destruction of civilian populations, and facilitating Sudan's arms procurement, BNPP provided the economic and moral support that enabled the Regime to carry out a campaign of mass atrocities, for over thirteen years, that raped, tortured, killed or displaced millions of Sudanese civilians from disfavored populations, including the more than 25,000 class members in the United States. BNPP's pervasive and systematic support enabled these atrocities to occur in this time, manner, and magnitude.[212]

The Court has already held that if BNPP laundered more than Sudan's entire military budget, that would make BNPP a natural (but-for) cause. *Kashef*, 2021 WL 603290, at *6. More than that, the Court deemed this fact (now established by Plaintiffs' common evidence) sufficient to establish that "the funds accessed by Sudan through the BNPP Defendants' financial services

[206] MSJ Opp. at 115, *citing* SAMF ¶ 86.

[207] SAMF at ¶¶ 265-72; Ex. 6, Reply Report of Barry Koch at ¶¶ 66-70.

[208] Austin Reply at ¶¶ 168-81.

[209] MSJ Opp. Argument Section II.D.3.

[210] Chris Coons, et al., *Targeted Sanctions Can Help Restore Democracy in Sudan*, Foreign Policy, Feb. 28, 2022, https://foreignpolicy.com/2022/02/28/sudan-targeted-sanctions-can-help-restore-democracy/.

[211] MSJ Opp. at 38 n. 157, *citing* Ex. 126, Cozine Dep. at 266: 1-7; Ex. 127, Cozine Dep. Ex. 253 at 5.

[212] *See* MSJ Opp. Argument Section II.C.

were actually used" not just "for the attacks that injured plaintiffs," but also for the "Regime's attacks on civilian populations." *Id.* The Court did not hold that Art. 50 required a showing of "actual use": the Court was simply quoting BNPP's own argument to show that even under BNPP's proposed heightened standard, causation was met.[213]

BNPP tries to wiggle its way out of the Court's prior decision by claiming that BNPP—what the Regime called its "oil bank"[214]—did not play a "'core role' in the 'oil-genocide nexus.'"[215] Yet BNPP's own expert, Mr. Carisch, admitted that the NISS (Sudan's version of the KGB) was "at the helm of all major Sudanese companies" and had "full control over" state institutions. Specifically, according to Mr. Carisch, the NISS controlled BNPP's client and co-conspirator "the Sudan National Petroleum Corporation, which controls the state's entire oil and gas industry."[216] And the NISS, he admits, was "the single entity on which to pin responsibility for the decade-long mayhem in the Sudan . . . ."[217] This is common evidence that does not vary by class member.

Nevertheless, BNPP harps that each class member would need to individually establish the "connection between [his or her] injuries to oil."[218] But BNPP forgets that its internal documents

[213] Judge Nathan's opinion speaks for itself: "Though Defendants argue that 'it cannot be presumed the funds accessed by Sudan through the BNPP Defendants' financial services were actually used for the attacks that injured plaintiffs,' Def. Supp. at 19, that is in fact precisely what Plaintiffs here allege. Plaintiffs claim that the revenue generated for the Sudanese government by BNPP's assistance exceeded its entire military budget, leading to a massive increase in military expenditures (ten times what it had been prior to the Sudanese government's partnership with BNPP), which is why the Regime's 'attacks on civilian populations ... occurred with greater frequency and velocity after BNPP agreed to partner with' it." *Kashef*, 2021 WL 603290, at *6.

[214] Ex. 85, BNPP-KASHEF-00028707 at 28711.

[215] Opp. at 28.

[216] Ex. 149, Enrico Carisch, *UN Sanctions, Peace and the Private Sector*, 6 JOURNAL OF INT'L PEACE OPERATIONS at 17 (2010); Ex. 153, Carisch Dep. at 307:9-312:19.

[217] Ex. 149, Enrico Carisch, *UN Sanctions, Peace and the Private Sector*, 6 JOURNAL OF INT'L PEACE OPERATIONS 17 (2010) at 17-18.

[218] Opp. at 28.

confirm that BNPP "handled all of the Sudanese government's oil revenue."[219] None of its experts dispute that "oil revenue became the lifeline of the regime."[220] Nor could they, since BNPP France pled guilty to committing the sanctions-evasion conspiracy "through its Swiss subsidiary,"[221] and it admitted that "BNPP Geneva had an essential role in the Government of Sudan's financial stability."[222] Moreover, none of BNPP's experts dispute that "[o]il became the cause of, and main objective of, an intensification in the Bashir Regime's assault on civilians."[223] In fact, BNPP's former Head of Territory in Switzerland testified that the "conflict was more intense" due to "the fact that some important reserves of oil were discovered in the desert."[224] BNPP fueled and profited from a macabre-feedback loop of oil for atrocities and atrocities for oil. That fact does not vary by class member.

Finally, it is irrelevant that the named Plaintiffs' "injuries range from incidents involving crude weapons like ropes and rubber hosing, and incidents that involved no weapons at all, to . . . attacks on villages involving automatic weapons."[225] BNPP's support for the Regime is not limited to weapons. In Sudan, tens of thousands of soldiers, security officers, and paramilitary fighters killed, tortured, and raped hundreds of thousands of civilians. They all relied on a common pool of funds: the GOS treasury. And that pool of funds grew—military spending rose by 3,000%—fueled by the billions in crime-proceeds from BNPP's conspiracy.

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[219] Ex. 64 to Lee Decl., ECF No. 435-64, Expert Reply Report of Timothy Fogarty ("Fogarty Reply"). Dated March 2, 2023 at ¶ 112.

[220] ECF No. 435-54, Baldo Report at ¶ 80.

[221] ECF No. 435-1, SSOF at ¶ 17.

[222] Ex. 1, DFS Consent Order at ¶ 26.

[223] ECF No. 435-54, Baldo Report at ¶ 174.

[224] Ex. 123, Deposition of Louis Bazire ("Bazire Dep."), dated June 28, 2022, at 87:24-25, 88:3-12.

[225] Opp. at 27.

If this feels abstract, the particulars are concrete. For example, the bombs that burned Nyanriak Tingloth's grandmother alive in the oil-producing region of Abyei fell from an Antonov cargo plane.[226] Even if we assume, as BNPP insists, that this plane was not bought with BNPP's help, or predates 1997,[227] the pilot who flew that plane was part of the SAF—he was paid from the Sudanese treasury. Bombs needed to be replenished—with funds from the national treasury. Fuel needed to be replenished—with funds from the treasury. The plane needed to take off from an air base—and Sudan's airbases were simply airports, funded directly by the "overflight tax" collected by BNPP and funneled to the Civil Aviation Authority.[228] Perhaps no sophisticated weapons were required to gang-rape Entesar Kashef in a GOS detention facility,[229] to tear out Kuol Shbur's toenails in a NISS ghost house,[230] or to shut down the law offices of Turjuman Adam,[231] or rape Judy Doe, infecting her with HIV.[232] But it does not matter: these are all acts of the Regime, carried out using government salaries, weapons, buildings, infrastructure and vehicles. And BNPP overwhelmingly funded and provided moral support to the GOS for all of it.

Nothing more is required. As Professor Werro explains, based on Swiss Supreme Court precedent, under Article 50, "BNPP's support need not be directly linked to each plaintiffs' harm,

[226] Annex A at ¶¶ 101-107.

[227] BNPP claims that Sudan had no need to acquire weapons, since it possessed legacy weapons from before 1997. Opp. at 28. Nonsense. In reality, Sudan's pre-1997 stockpile of weapons constituted "a diverse and often incompatible assortment of aging NATO and Warsaw Pact weapons systems, with different caliber munitions" many of them "of no use on the battlefield." Ex. 53 to Lee Decl., ECF No. 435-53, Austin Reply at ¶¶ 113-14. Weapons that were already "degraded and of no use" in 1998 could not plausibly have played a significant role, if any, in attacks occurring between 1997 and 2011. *Id.*

[228] Ex. 105, BNPP-KASHEF-00048093 at 98, 100.

[229] Annex A at ¶ 200.

[230] Annex A at ¶ 92.

[231] Annex A at ¶ 34.

[232] Annex A at ¶¶ 43, 46.

and it need not be the sole source of funding for the government's human rights abuses."[233] BNPP's own expert, Professor Müller, admits "[i]t is not necessary that each tortfeasor has directly contributed to the occurrence of the injury."[234] Indeed, a Swiss scholar who published an article analyzing this Court's opinion concluded that:

> jurisprudence relating to Article 50 CO does not obligate [the U.S. District Court] to proceed with such an in-depth analysis [of the "bank's activity and the atrocities committed in Sudan"], since it is not the existence of a direct causal link between the activity of the bank and the harm that gives rise to liability, but rather the simple participation in a collective fault.[235]

Ironically, Müller claims the Court should disregard this article because Professor Werro served on the author's PhD jury. But Professor Müller omits that Professor Werro was on his own PhD jury as well.[236]

Adequate Causation. Plaintiffs have set forth the applicable legal standards for adequate causation in their opening brief.[237] There is no need to restate them because instead of applying these standards, BNPP simply applies its latest Swiss law expert's opinion—whom it sprung on the Plaintiffs and the Court seven years into this case, after its previous expert was discredited by the Court for manufacturing purported requirements of Article 50. *Kashef*, 2021 WL 603290 at *3, 4.[238]

BNPP claims that each class members' injury must be "sufficiently closely connected" to BNPP's financial support of the Regime, apparently based on Professor Müller ipse dixit. Professor

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[233] ECF No. 435-104, Werro Decl. at ¶ 113.

[234] Ex. 107, Christoph Müller, *Extracontractual Civil Liability*, ¶ 839.

[235] Ex. 224, Arnaud Nussbaumer-Laghzaoui, Responsabilité plurale, responsabilité éloignée et dilution de responsabilité: La causalité à l'épreuve d'un monde complexe, La Semaine judiciaire, p. 391-406 (2022).

[236] Ex. 247, Declaration of Franz Werro at ¶¶ 20-21.

[237] Pls'. Mem. at 69.

[238] *See* MSJ Opp. at 62-69.

Müller, however, bases this assertion on a single case, *Swisscom*.[239] In that case, the Swiss Supreme Court held that the purported contribution of an alleged accomplice was not "sufficiently closely related to the unlawful act" for a very specific reason: an alleged accomplice's contribution cannot be closely related to a tort that has already been committed, by an unknown actor, with whom the accused had no relationship.[240] This Court has already distinguished *Swisscom* as inapposite, "as Professor Werro persuasively explained." *Kashef*, 2021 WL 603290 at *9.[241]

Regardless, even under Professor Müller's newfound proposed standard of "closely connected" (a restatement of "proximately caused"), the sheer volume of BNPP's support solves that problem. All attacks perpetrated by the GOS are closely connected to the finite pool of government funds that enabled them. Since BNPP acted "as a de facto central bank for the Government of Sudan,"[242] all attacks funded by the GOS are closely connected to BNPP. Thus, for a victim forcibly displaced by the GOS, the only close connection that must be established to close the causal chain is attribution of their injury to the GOS. And the U.S. Government already made that determination for 92.8% of class members.

Finally, BNPP believes it knows better than the U.S. Government or the International Criminal Court whether the Bashir Regime carried out a "genocidal campaign against Black Africans."[243] The Second Circuit, however, already took judicial notice that "[t]he atrocities taking place in Sudan are widely known and have been condemned by both the United States and the

[239] Ex. 98 to Lee Decl., ECF No. 435-98, First Expert Report of Christopher Muller ("Muller Report I"), dated January 6, 2023, at ¶ 41.

[240] Ex. 112, *Swisscom Case*, DFSC 145 [2019] III 72 reas. 2.3.1 at 81-2.

[241] For further discussion of *Swisscom*, Plaintiffs refer the Court to their summary judgment opposition at 111-118 as well as Professor Werro's declaration on which the Court previously relied. Declaration of Franz Werro in Opposition to Motion to Dismiss, ECF No. 174, at ¶¶ 51-53.

[242] Ex. 248, Remarks by Deputy Attorney General Cole at Press Conference Announcing Significant Law Enforcement Action, Justice News, June 30, 2014.

[243] Opp. at 31-33.

international community as genocide." *Kashef*, 925 F.3d 53, 55 (2d Cir. 2019).[244] Undeterred, BNPP—always on the side of the GOS—claims that Plaintiffs have "manufactured" that there was a government "policy" of genocide.[245] The International Criminal Court must have "manufactured" the very same policy when a three-judge panel issued an arrest warrant against for genocide.[246] It found that the Regime had a "campaign" and "common plan" to carry out the "murder and extermination" of "ethnic groups," and that this formed a "genocidal policy."[247] But for BNPP, this legal determination by the foremost international criminal court in the world is an "oversimplified theory."[248] Ditto for the Sudan Peace Act of 2002, in which Congress found that the "Government of Sudan" engaged in a "policy of low-intensity ethnic cleansing" against indigenous African peoples in the South and that its actions "constitute genocide."[249]

Lastly, BNPP falls back on 20-year-old *Talisman*. There the district court agreed that the existence of a campaign of genocide targeting non-Muslim, African Sudanese was a common issue. *Talisman*, 226 F.R.D. at 482. The court, however, held that this and other common issues could not predominate because the defendant "intend[ed] to show that warfare persisted through much of the Class Period between shifting, protean factions of rival rebel groups," creating individualized issues on proximate causation (i.e., the attribution of each attack to the GOS). *Id.*

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[244] The Second Circuit cited H.R. Con. Res. 467, 108th Cong. (2004) (enacted) and S. Con. Res. 133, 108th Cong. (2004) (enacted).

[245] Opp. at 31-33.

[246] *Prosecutor v. Omar Al-Bashir,* Second Arrest Warrant for Omar Hassan Ahmad al Bashir of July 12, 2010, Case No. 02/05-01/09, ICC Pre-Trial Chamber I, https://www.icccpi.int/sites/default/files/CourtRecords/CR2010_04825.PDF.

[247] *Id*. at 5-7.

[248] Opp. at 31.

[249] Sudan Peace Act of 2002, Pub. L. No. 107-245 (Oct. 21, 2002).

BNPP cannot point to a shred of record evidence that any group other than the GOS committed widespread and systematic violence against civilians. As Dr. Baldo explained:

> This mass displacement was not caused by insurgent opposition groups. None of the rebel movements had the material means or sinister motivations to inflict such large scale harm on communities in their areas. On the contrary, rebels had an interest in maintaining good relations with local communities in areas of their control or their transient passage as they relied on local populations for their food, shelter, and upkeep.[250]

Dr. Baldo systematically debunks Mr. Carisch's effort to draw a false equivalence between the mass atrocities of the GOS and the isolated and opportunistic incidents of abuses by rebels.[251] Although BNPP cites the specter of rebels complicating the causal chain, the UN Commission of Inquiry report, Mr. Carisch's main source, paints a different portrait: the Commission found "that rebels have killed civilians, although the incidents and numbers of deaths have been few."[252] It "obtained no information indicating" that "torture of captured enemy combatants by the rebels…had taken place."[253] And it "did not find any cases of rape committed by rebels."[254] None of those facts made it into Mr. Carisch's report. Even in BNPP's opposition to class certification it fails to cite an example of rebels abusing civilians. BNPP notes that JEM rebel leaders were indicted by the ICC,[255] but it fails to mention that whereas Bashir was indicted for genocide, the

[250] ECF No. 435-55, Baldo Reply at ¶ 105.

[251] *See* ECF No. 435-55, Baldo Reply at ¶ 109.

[252] *Id.*

[253] *Id.*

[254] *Id.*

[255] Opp. at 8.

JEM defendants were prosecuted for one, isolated attack on an African Union military base—in other words, an attack on armed soldiers, not civilians.[256]

Not one of these facts varies on an individual basis and BNPP's insistence that they would need to be proven by the same evidence thousands of times, in thousands of separate trials, is groundless.

C. Class Treatment Is the Superior Method for Adjudicating Plaintiffs' Claims.

1. Class Certification Is Superior to the Only Alternative: Litigation of Hundreds or Thousands of Individual Cases Raising the Same Issues.

As BNPP acknowledges, in analyzing superiority the Court must compare the class mechanism to "other available methods for fairly and efficiently adjudicating the controversy." Opp. at 49 (quoting Fed. R. Civ. P. 23(b)(3)); *see also Petrobras*, 862 F.3d at 268 ("the superiority analysis . . . is explicitly comparative in nature"). It is therefore insufficient for BNPP simply to point to challenges in managing a class action: the question is how managing the class action would compare to the alternative.

Here, the only alternative to a class action identified by BNPP is its statement that "class members have shown they are willing and able to bring and litigate individual claims." Opp. at 54 (citing the complaints filed in *Sherf v. BNP Paribas SA*, No. 23-cv-04986 (AKH) (S.D.N.Y.), and *Ring v. BNP Paribas SA*, No. 23-cv-05552 (AKH) (S.D.N.Y.)). There are several fundamental flaws in BNPP's argument:

First, the 186 plaintiffs included in the *Sherf* and *Ring* complaints do not actually have strong "interests in individually controlling the prosecution . . . of separate actions," Fed. R. Civ.

[256] *See Prosecutor v. Banda*, Confirmation of Charges, Pre-Trial Chamber, ICC-02/05-03/09 at 4 (2011), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2011_02580.PDF (finding the African Union peacekeepers were not taking part in hostilities and thus were unlawfully attacked).

P. 23(b)(3)(A), but only filed separate claims out of an abundance of caution to protect against the running of the statute of limitations in the event the class is not certified.[257] If a class is certified, these individuals would proceed as members of the class. For this reason, BNPP has now stipulated "that it would conserve the resources of the parties and the Court if [*Sherf* and *Ring*] were stayed pending a decision on class certification" in this action.[258]

Second, should the *Sherf* and *Ring* cases (and others) go forward in the absence of class certification, BNPP has said that it plans to argue that all such claims are time-barred because, according to BNPP, *American Pipe* tolling is inapplicable.[259] BNPP is therefore not genuinely suggesting that litigation by individual class members is an alternative to class certification.

Third, even with hundreds or more individual claims, BNPP does not dispute that Sudanese-Americans are a "vulnerable" population with "limited understanding of the law, limited English skills, [and] geographical dispersal" throughout the United States and that the "realistic" alternative for many of the over 25,000 class members is no litigation at all. Pls.' Mem at 111 (quoting *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004), and *Menocal*, 882 F.3d at 915). Defendants' own expert agrees that BNPP thereby "will have avoided compensating many others who could have been part of the class action."[260]

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[257] *See* Pls.' Mem. at 110-11.

[258] ECF No. 23 in *Sherf*; ECF No. 14 in *Ring*. The parties subsequently agreed to a tolling stipulation, ECF No. 447, but the Court declined to approve it on August 3, 2023, explaining that "[t]he right to file lawsuits will not be prevented nor hindered," ECF No. 448; *see also* ECF No. 452 (denying reconsideration). Although BNPP's counsel has confirmed that they will nevertheless refrain from making arguments inconsistent with the stipulation to which they had agreed, given the Court's orders, Plaintiffs anticipate that at least hundreds more class members represented by Interim Co-Lead Class Counsel will file separate claims out of an abundance of caution.

[259] *See* ECF No. 447 (preserving the argument, echoing statements made by BNPP's counsel, that "the statute of limitations period was not tolled by the pendency of the putative class action").

[260] Pls.' Mem. at 77 (quoting Ex. 49, Yale-Loehr Dep. at 70:25-72:4).

Fourth, BNPP makes no effort to grapple with the far more significant management challenges that would be associated with even 200 individual claims, let alone 1,000 or more. This is a critical omission given the "comparative" inquiry that is required. Tellingly, BNPP completely ignores Plaintiffs' citation of *In re Visa Check/MasterMoney Antitrust Litigation*, 280 F.3d 124, 141 (2d Cir. 2001), and *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 800 (7th Cir. 2013), which describe the Court's class action management tools.[261] And it offers no response to this Court's own writings, cited by Plaintiffs, that pertain to the challenges of managing a multitude of individual cases. *Id.* at 108, 109.[262]

The Second Circuit has repeated its "admonition that 'failure to certify an action under Rule 23(b)(3) on the sole ground that it would be unmanageable is disfavored and should be the exception rather than the rule.'" *Petrobras*, 862 F.3d at 268 (quoting *Visa Check*, 280 F.3d at 140). As Judge Rakoff noted in *Doe 1*, "there are no apparent difficulties that are likely to be encountered in the management of this action as a class action apart from those inherent in any hard-fought battle where substantial sums are at issue and all active parties are represented by able counsel." 2023 WL 3945773, at *11 (quoting *Cromer Fin. Ltd. v. Berger*, 205 F.R.D. 113, 134 (S.D.N.Y. 2001)). And as in *Doe 1*, the named plaintiffs have already "borne the burden of turning over highly sensitive documents and communications in discovery, as well as sitting for depositions," which

[261] *See* Pls. Mem. at 107.

[262] BNPP does mention *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996), but misapprehends the proposition for which Plaintiffs cited that case. Opp. at 51 n.29. It is merely an example of how a special master can be tasked with determining the *amount* of damages to be awarded to class members for different categories of human rights abuses, which is one of the specific management tools identified by the Second Circuit in *Visa Check*. 280 F.3d at 141. As this Court has observed, a similar approach would be required if the case were to proceed as a mass tort instead. Alvin K. Hellerstein et al., *Managerial Judging: The 9/11 Responders' Tort Litigation*, 98 Cornell L. Rev. 127, 144-146 (2012). Any manageability challenges related to the determination of individual damages (other than common, baseline damages for forced displacement, *see supra* at Section IV.A.4.) would be present with or without class certification.

were "a grueling experience, given [each] deposition's length and its subject-matter,"[263] and a "class action would also spread the risk and expense of litigating against a tenacious and well-resourced adversary across the class." *Id.* at *7, 11. Moreover, as Judge Rakoff also observed, "proceeding as a class action would both avoid a multiplicity and scattering of suits, and it would empower some people who individually would be without effective strength to bring their opponents into court at all." *Id.* (cleaned up).

Nevertheless, BNPP contends that the "administrative feasibility of determining class membership" weighs against a finding of superiority.[264] While conceding that there is no stand-alone "administrative feasibility" requirement after *Petrobras*, BNPP invites the Court to consider it anyway as part of its superiority analysis.[265] Although some district courts may have reframed the issue in this way, the Second Circuit has flatly said that administrative feasibility arguments are "foreclosed by" *Petrobras*. *Langan v. Johnson & Johnson Consumer Cos.*, 897 F.3d 88, 91 n.2 (2d Cir. 2018).[266]

While BNPP objects to the use of affidavits to establish class membership based on a citation to a single district court case,[267] it fails to disclose that the Second Circuit itself expressly

[263] For example, Plaintiff Kashef's "intrusive memories of her experiences in Sudan" were exacerbated when she had to recount her experiences during deposition. Ex. 7, Keller & Rosenfeld Report, Appendix C12 at 5; *see also id.* at 21 (a Plaintiff who had a medical crisis during deposition explained, "When I think or talk about what happened to me in the Sudan, I feel dizzy, I feel my heart beating very fast, my blood pressure goes up and my body is shaking.").

[264] Opp. at 50.

[265] Opp. at 50 n.28.b

[266] BNPP's effort to shoehorn administrative feasibility into the superiority requirement also fails because a key distinction (recognized in the principal case BNPP cites) is that administrative feasibility must then be "considered comparatively rather than absolutely." *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 299 F. Supp. 3d 430, 463 (S.D.N.Y. 2018). Thus, the question is not whether establishing class membership will entail some measure of individual proof (it almost always will) but whether that presents more or fewer manageability challenges than the alternative of doing the same in hundreds or thousands of individual cases. Here, a class action would be superior for all the reasons set forth above. And to the extent BNPP seeks to frame ascertainability as a predominance issue, Opp. at 50 n.28, it remains the case that individual plaintiff-specific evidence will not predominate over the overwhelmingly common issues to be decided by the jury. *See supra* at Section IV.B.

[267] Opp. at 54.

approved the use of affidavits in *Petrobras* and *Langan*. *See Langan*, 897 F.3d at 91 n.2 ("In *Petrobas*, we cited approvingly the district court's grant of certification where the district court allowed putative class members to provide a sworn affidavit indicating when and where they purchased the olive oil at issue. Since we think it is more likely that a consumer would remember the time frame in which he purchased a bath or wash for his baby—that is, when his child was still a baby—than when he purchased a bottle of olive oil, we see no ascertainability problem with having the class members submit sworn affidavits describing the circumstances under which the purchases were made."). The case BNPP cites, *Hunter v. Time Warner Cable Inc.*, 15-cv-6445 (JPO), 2019 WL 3812063 (S.D.N.Y. Aug. 14, 2019), concerned the use of affidavits to establish whether individuals had received a "wrong number" call as many as six years earlier, in the face of evidence that 86% of those from whom affidavits would be sought did not actually receive such calls. *Id.* at *5, 8, 14. Notwithstanding the unsurprising fact that no one would be able recall every detail of something that "happened 20 years ago,"[268] BNPP does not seriously suggest that class members would not recall their forced displacement from their country and their homes, death of their family members and children, torture, arbitrary detention, or rape. [269] If affidavits are good

[268] Opp. at 54.

[269] In an attempt to discredit the recollections of the human rights victims serving as class representatives in this case, BNPP includes just two cherry-picked quotations (from Plaintiffs Abbo Abakar and Judy Doe) out of over a hundred hours of deposition testimony during which the nineteen named plaintiffs were subjected to grueling, repetitive, cross-examination-style interrogations. Opp. at 54; Boyd Decl. at ¶ 42. And BNPP omits other testimony from these same Plaintiffs that undercuts its argument. *See, e.g.*, Ex. 130, Abbo Abaker Dep. at 100:1-11 ("Q. How is it that you're able to remember specific details about what you saw when you were there? A. There are some stuff, if you have not seen them before in you life and you see them, they will never go away out of your mind. For example, if somebody died and you saw that dead person, that what you saw will never leave your mind."); Ex. 145, Judy Doe Dep. at 58:5-6 ("I don't remember dates that are there, but I remember what happened to me"); *id.* at 68:20-23 ("In my mind is the torture that I went through, that my daughter went through. That is what is in my mind, not years, or to point out exactly dates."); *id.* at 69:23:70:1 ("Don't remember this date. But what I remember, that we flee. We flee, and with – now we are starting from zero where I became a victim, and also my daughter became a victim."). Nor does BNPP raise any "concerns about the accuracy" of the testimony of any of the seventeen other named plaintiffs whom they questioned extensively about the most intimate and traumatic details of their experiences. *See, e.g.*, Ex. 134, John Doe Dep. at 54:6-18, 55:19-58:12 (repeated questioning regarding circumstances of sexual assault).

enough for proof of purchase of olive oil or baby wash, they are more than good enough for victims of what BNPP admits were "horrific" of human rights abuses.[270]

2. The Proposed Class Is Not a "Fail-Safe" Class.

BNPP's assertion that Plaintiffs have proposed a "fail-safe" class,[271] is simply wrong. As BNPP concedes, a "fail-safe" class is when "a finding of liability binds a defendant to an adverse judgment, while a finding of non-liability binds no class member because no class would exist by definition." Opp. at 52 (quoting *Garcia v. ExecuSearch Grp.*, No. 17cv9401, 2019 WL 689084, at *2 (S.D.N.Y. Feb. 19, 2019)). But *Garcia* itself demonstrates why BNPP misapplies that principle and has the very same "misunderstanding of the nature of fail-safe classes" that the defendant had in that case. *Garcia*, 2019 WL 689084, at *2. The question is whether it is possible for BNPP to prevail on the merits without the class members being defined out of the class; for example, "all persons as to whom the defendant is liable" would be a fail-safe class because if the defendant wins then by definition there are no members of the class to be bound by the judgment. *See id.* (explaining that a class definition that "encompass[ed] some individuals to whom ESG is not liable under the FCRA but who would nevertheless be bound by a finding of non-liability" was not a fail-safe class).[272]

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[270] Opp. at 3.

[271] Opp. at 51-52.

[272] Instead, the *Garcia* court noted that the defendant's argument went to ascertainability, and certified the class. *Garcia*, 2019 WL 689084; *see also infra* Section IV.E (discussing ascertainability). In another case cited by BNPP, *Royal Park Investments SA/NV v. Deutsche Bank National Trust Co.*, 14-CV-4394 (AJN), 2018 WL 1750595 (S.D.N.Y. Apr. 11, 2018), the court held that a class definition of those who "were damaged as a result of Deutsche Bank National Trust Company's conduct alleged in the Complaint" was *not* a fail-safe class because it "does not contain any language presupposing liability, but merely links putative class members' alleged injuries to the particular misconduct ascribed to [Deutsche Bank] in the Complaint." *Id.* at *10. And earlier this year, the D.C. Circuit altogether "reject[ed] a rule against 'fail-safe' classes as a freestanding bar to class certification ungrounded in Rule 23's prescribed criteria." *In re White*, 64 F.4th 302, 315 (D.C. Cir. 2023). It noted that "the textual requirements of Rule 23 are fully capable of guarding against unwise uses of the class action mechanism" and that "district courts should rely on the carefully calibrated requirements in Rule 23 to guide their class certification decisions and the authority the Rule gives them to deal with curable misarticulations of a proposed class definition." *Id.*

Here, it is possible for BNPP to obtain a binding judgment against class members. For example, if a jury finds that BNPP did not consciously assist the GOS, or did not causally contribute to its human rights abuses, all class members[273] (i.e., those subjected to human rights abuses by the GOS or its agents during the class period) would be bound by that adverse judgment.[274] Unlike in *Garcia*, a defense win in this case would not mean that there was "no class" at all; individual class members would not "get two bites at the apple" as BNPP suggests,[275] but rather would be bound by the adverse judgment on their claims. Put another way, Plaintiffs cannot establish BNPP's liability merely by demonstrating that they are members of the class,[276] and class

[273] As discussed elsewhere, these class members can establish their membership in the class through proof of their immigration status. BNPP questions the ability of immigration records to serve as "objective proof of class membership," but it confuses proof of immigration *status* (i.e., whether an individual was actually admitted as a refugee or asylee, an objective fact not subject to dispute), with the accuracy of the interview notes appended to refugee applications. Opp. at 53. While interview notes may contain inaccuracies, including because refugees were unable to understand the interpreter or read the English summary, BNPP does not challenge – nor could it – that the records accurately state the immigration status that was granted each refugee or asylee.

[274] To be sure, the class definition includes objective criteria that each class member must satisfy to be included; indeed, that is a requirement of all class definitions. See Pls.' Mem. at 111-14. And a defendant has the right to argue that a particular individual does not qualify as a member of a class and therefore cannot recover against it. But a defendant's ability to dispute the prerequisites for class membership (e.g., that an individual did not purchase the relevant product, or not during the relevant period) does not transform every class definition into a "fail-safe" one. The difference is that in a "fail-safe" class it is the defendant's own legal liability that is baked into the class definition.

[275] Opp. at 52.

[276] In *Nypl v. JP Morgan Chase & Co.*, No. 15 Civ. 9300 (LGS), 2022 WL 819771 (S.D.N.Y. Mar. 18, 2022), cited by BNPP, the class was defined as those who "purchased supracompetitive foreign currency," where the defendants' liability turned on whether prices were in fact supracompetitive. *Id.* at *9. Thus, it would not have been possible for the defendants to obtain a binding judgment against class members, because a finding that they were not liable would lead to there being zero members of the class. Likewise, in *Ford v. TD Ameritrade Holding Corp.*, 995 F.3d 616, 624 (8th Cir. 2021), the class was defined "to include only those customers who were harmed *by TD Ameritrade's* alleged failure to seek best execution," meaning that "membership depends upon having a valid claim on the merits." *Id.* at 624. Here, the proposed class is not defined in terms of those who have a valid claim against BNPP; rather, it includes those who were subjected to human rights abuses by the GOS but who still must make out their claim on the merits against BNPP itself. In addition, BNPP mischaracterizes the class definition when it suggests that class membership turns on whether a particular human rights abuse is "compensable under Swiss law." Opp. at 52. The class definition plainly includes no such criterion.

members can be identified without determining whether BNPP is actually liable for their injuries.[277]

3. Class Notice Will Not Present Any Manageability Problems.

Suddenly overcome with worry for its victims, BNPP expresses "due process concerns" on behalf of class members who will need to receive notice of a certified class action.[278] But when defendants – "preferring not to be successfully sued by anyone" – raise arguments about protecting the interests of class members, "it is a bit like permitting a fox, although with a pious countenance, to take charge of the chicken house." *Eggleston v. Chi. Journeymen Plumbers' Loc. Union No. 130, U.A.*, 657 F.2d 890, 895 (7th Cir. 1981). So too here.

Of course class members must receive notice, and typically the parties will confer following the certification decision to see if agreement can be reached on the manner and form of notice. *See, e.g.*, *Feliciano v. CoreLogic Rental Prop. Sols., LLC*, 332 F.R.D. 98, 109 (S.D.N.Y. 2019) (Hellerstein, J.); *In re Chi. Bridge & Iron Co. N.V. Sec. Litig.*, 17 Civ. 1580 (LGS), 2020 WL 1329354, at *12 (S.D.N.Y. Mar. 23, 2020); *Novoa v. GEO Grp.,* No. 17-2514, 2020 WL 6694349, at *1 (C.D. Cal. Sept. 14, 2020). There is no reason to believe that the parties are not capable of doing the same in this case.

[277] This should resolve the issue, but to the extent the Court has any concerns about defining the class in terms of those subjected to human rights abuses by the GOS or its agents, there is an alternative: the Court could choose to define the class as "all U.S. citizens, lawful permanent residents, or lawfully admitted refugees or asylees who left Sudan from November 1997 through December 2011 and were subsequently admitted to the United States as refugees or asylees." Because all such individuals share the common injury of forced displacement by the GOS or its agents, *see supra* Section IV.A., this would merely be another way to describe the same group, a change only "of wording, not substance." *White*, 64 F.4th at 314 ("After all, a class of human beings cannot itself be circular. Only a class definition attempting to describe them can."). Defining the class in this way would not limit the categories of *damages*, in addition to common, baseline damages for the common injury of forced displacement, that class members would seek. It would, however, exclude approximately 1,625 individuals who were forcibly displaced by the GOS or its agents but entered the United States on diversity visas, an unfortunate result for Sudanese-American victims of BNPP's unlawful conduct who might then go uncompensated.

[278] Opp. at 53.

BNPP appears to believe that the only permissible notice is individual notice, but that is incorrect. Rule 23 calls for "the best notice that is practicable under the circumstances, *including* individual notice to all members who can be identified through reasonable effort," but also including "other appropriate means" of reaching class members. Fed. R. Civ. P. 23(c)(2)(B) (emphasis added). The rule "relies on courts and counsel to focus on the means or combination of means most likely to be effective in the case before the court." Fed. R. Civ. P. 23 adv. comm. note. And a "combination of mailed notice to all class members who can be identified by reasonable effort and published notice to all others is the long-accepted norm in large class actions." *Gordon v. Hunt*, 117 F.R.D. 58, 63 (S.D.N.Y. 1987).

To be sure, many class members will indeed receive individual notice because Plaintiffs' counsel has been in communication with well over one thousand class members and is able to reach them by email and text message.[279] But a comprehensive notice plan would include other means as well, such as providing the class notice to immigrant support groups and leaders in local Sudanese-American communities where refugees are concentrated.[280] *See Walters v. Reno*, 145 F.3d 1032, 1050 (9th Cir. 1998) (approving distribution of "notice to the nonprofit organizations that regularly assist immigrants" and "community outreach networks"); *Novoa*, 2020 WL 6694349, at *4 (approving "outreach to organizations that provide services to immigrants" that "may have access to class members who would be otherwise difficult to reach"); *Armijo v. Star*

[279] *See* Boyd Decl. at ¶¶ 26-27.

[280] BNPP's expert, Mr. Yale-Loehr, testified that according to data from the Migration Policy Institute, of which he is a fellow, the states with the largest Sudanese immigrant populations are California, Texas, Iowa, New York, and Virginia, and the counties with the largest Sudanese immigrant populations are in Fairfax County, Virginia; Guilford County, North Carolina; King County, Iowa; and Kings County, New York. Ex. 167, Yale-Loehr Dep. at 120:3-122:14. And Plaintiffs' counsel have attended numerous meetings and developed relationships with the Sudanese-American community and its leaders in cities with large refugee populations, including San Diego, California; Phoenix, Arizona; Buffalo, Syracuse, and Utica, New York; Dallas, Texas; Omaha, Grand Island, Papillion, and Lincoln, Nebraska; Des Moines, Iowa; Salt Lake City, Utah; and Minneapolis, Minnesota. *See* Boyd Decl. at ¶¶ 15, 16, 22.

Farms, Inc., No. 14-cv-01785, 2015 WL 13310426 (D. Colo. Dec. 14, 2015) (suggesting, for notice to a class of immigrants, "contacting agencies that recruit migrant farm workers"). Publication in Arabic-language news sources read by class members could be considered as well. *See, e.g.*, *Novoa*, 2020 WL 6694349, at *4.[281]

The logistics of providing class notice – no more complex here than in many other class actions – are therefore no impediment to granting class certification.

D. There Is More than a "Single Common Question" as Required by Rule 23(a).

BNPP's half-hearted argument that Plaintiffs have not satisfied the commonality requirement under Rule 23(a)(2) borders on the absurd. Lost in a muddle of mischaracterized case law, BNPP artificially inflates the commonality standard, seeming to claim that commonality can only exist where common questions resolve the entirety of class members' claims.[282] Instead, Plaintiffs are only required to present "a single common question" that would "resolve *an issue* that is central to the validity of each one of the claims in one stroke." *In re Libor*, 299 F. Supp. 3d at 462 (quoting *Wal-Mart*, 564 U.S. at 350). Plaintiffs here have presented twenty.[283]

Defendants notably fail to address the Second Circuit holding, cited in Plaintiffs' opening brief,[284] that "[w]here the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members, there is a common question." *Johnson v. Nextel Commc'ns*

[281] In addition, the U.S. Government clearly possesses a list of all class members from its immigration files, and has used such information to provide notice in other class action cases. *See, e.g.*, *Al Otro Lado, Inc. v. Mayorkas*, No. 17-cv-02366-BAS-KSC, 2022 WL 3142610, at *4 (S.D. Cal. Aug. 5, 2022); *Dong v. Johnson*, No. 17-2092-ES-JSA, 2022 WL 2818481, at *3 (D.N.J. Jan. 10, 2022); *Am. Baptist Churches v. Thornburgh*, 760 F. Supp. 796, 800 (N.D. Cal. 1991). Whether the parties will ask the Court to issue an order regarding the use of government data for this purpose does not need to be determined at this stage but can be addressed in the parties' future submissions on the notice plan. As explained above, it is not necessary to provide individual notice to each class member where other methods of notice are used.

[282] *See* Opp. at 56.

[283] Pls.' Mem. at 79-81.

[284] Pls.' Mem. at 78.

Inc., 780 F.3d 128, 137-38 (2d Cir. 2015). The gamut of questions relating to BNPP's conduct alone easily surpass the "low hurdle" of the Rule 23(a)(2) commonality requirement. *Fort Worth Emps.' Ret. Fund v. J.P. Morgan Chase & Co.*, 301 F.R.D. 116, 131 (S.D.N.Y. 2014). BNPP insinuates that its conduct was somehow specific as to each class member or would be subject to individualized proof, but fall short of explicitly arguing it, presumably because it could not do so in good faith.[285] The same BNPP conduct that led to human rights abuses and forced displacement of Plaintiff Abdulaziz Abdelrahman also led to human rights abuses and forced displacement of Plaintiff Jane Doe.[286] Indeed, Plaintiffs present at least eleven common questions speaking to BNPP's conduct.[287] Each resolves central issues concerning BNPP's Article 50 liability and not one requires an individualized inquiry in order to answer it.[288]

The commonality requirement is "easily met in most cases." *Jones v. Ford Motor Credit Co.*, No. 00Civ.8330RJHKNF, 2005 WL 743213, at *6 (S.D.N.Y. Mar. 31, 2005). So too here.

[285] *See* Opp. at 55-56.

[286] *See supra* Section IV.B (describing common questions and evidence as to all Plaintiffs and class members).

[287] Pls.' Mem. at 79-81 (listing common questions).

[288] BNPP's citation to two distinguishable cases, each contending with issues specific to employment law, is unavailing. In *Wal-Mart*, the Supreme Court did not deny certification on the basis of commonality because plaintiffs made a "broad-strokes common policy claim." Rather, in specifically conducting a Title VII inquiry, the Court noted that the central issue is "the reason for a particular employment decision." 564 U.S. at 352. This issue could be resolved on a classwide basis if the plaintiffs provided "significant proof that an employer operated under a general policy of discrimination" which the plaintiffs failed to do." *Id* at 353. In contrast, Plaintiffs here have provided significant proof of BNPP's corporate conduct in supporting the GOS and the well-established genocidal campaign waged by the Bashir Regime. BNPP similarly mischaracterizes *Ouedraogo* v. *A-1 International Courier Service, Inc.*, No. 12-cv-5651, 2014 WL 4652549 (S.D.N.Y. Sept. 18, 2014). There, the court did not find a lack of commonality "despite a 'blanket policy' of classifying drivers as independent contractors." The employer's classification policy for drivers was not in dispute and was not considered as a potential common question. *Ouedraogo*, 2014 WL 4652549, at *3. Instead, the plaintiff argued that he met the commonality requirement solely through "his ability to prove, 'based on common classwide evidence,'" that those classified as independent contractors were actually employees under New York labor laws. *Id*. Under New York law, the relevant inquiry to answer this question involves consideration of five factors; the three most significant of which were found by the court to be unsuited to a classwide analysis. *Id*. at *3-5.

E. The Class is Ascertainable.

BNPP does not dispute that ascertainability is a "modest" requirement for which "all that is needed" is for the class definition to provide "the timeframe . . . and place . . . in which a particular group . . . was allegedly harmed." Pls.' Mem. at 111-12 (quoting *Petrobras*, 862 F.3d at 269; *Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.*, 62 F.4th 704, 716 (2d Cir. 2023)). Nor does BNPP dispute that the class definition objectively defines the time and place of the alleged harms. Furthermore, BNPP agrees with Plaintiffs that the ascertainability inquiry does not include any "administrative feasibility" requirement. Opp. at 50 n.28 (citing *Petrobras*, 862 F.3d at 269).[289]

With these concessions, BNPP's argument that the class is not "defined by objective criteria" comes down to the class definition's use of a single word: "including."[290] Instead, BNPP requests a "concrete list" of injuries.[291] If warranted, that could be easily accomplished by simply removing the word "including" and defining "human rights abuses" in terms of the specific injuries listed in the parenthetical.[292]

But even that modification is unnecessary, because *all* class members have suffered the common injury of forced displacement.[293] Because forced displacement is specifically listed as an injury that brings a class member within the definition, whatever additional abuses they suffered

[289] BNPP's discussion of *Bellin v. Zucker*, 19 Civ. 5694 (AKH), 2022 WL 4592581 (S.D.N.Y. Sept. 30, 2022), Opp. at 57, offers no response to the key distinction – highlighted in Plaintiffs' opening brief – that "the class definition in *Bellin* turned on a subjective, not objective, criteria: whether each class member 'believed' that the number of care hours received were 'adequate.'" Pls.' Mem. at 114 n.450 (quoting *Bellin*, 2022 WL 4592581, at *5).

[290] Opp. at 57; *see also* Pls.' Mem. at 3 (including in class definition those who "were subjected to human rights abuses (*including* forced displacement, genocide, battery, assault, unlawful imprisonment, sexual abuse, threats of violence and/or deprivation of property)") (emphasis added).

[291] Opp. at 58.

[292] *See also* Pls.' Mem. at 63, 83-85 (listing the "common patterns" of abuses suffered by class members). BNPP's insistence that compensation for these human rights abuses "has no basis in Swiss law," Opp. at 58, is not only without merit, *see supra* at 29-34, it also raises a legal issue that is indisputably common to all members of the class.

[293] *See* Pls.' Mem. at 102-106; *supra* Section IV.A.

(whether listed in the parenthetical or not) are not determinative of class membership. Class membership is binary – someone is either within the class definition or not – but those in the class due to their forced displacement will seek damages for the full range of human rights abuses they suffered. Listing more or fewer examples in the class definition would not affect the size of the class.[294] The class definition therefore meets the "modest" ascertainability requirement as written.[295]

F. In the Alternative, Issue Class Certification Would Materially Advance the Litigation.

For all the reasons set forth above and in Plaintiffs' opening brief, class certification is warranted under Rule 23(b)(3) as to the class that Plaintiffs have proposed. Plaintiffs also noted the available alternative of issue class certification under Rule 23(c)(4), not as a "throwaway," as BNPP glibly states,[296] but because it would materially advance the litigation.[297] Contrary to BNPP's claim that Plaintiffs "ask the Court to sort it all out,"[298] Plaintiffs in fact identified the questions to be tried in a common proceeding.[299] BNPP's argument that these issues – all of which would be part of any individual trial and all of which rely on exclusively common evidence – are not actually "common" is nonsensical.[300] To the contrary, these are the "larger issues" in the case.[301]

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[294] Nevertheless, including these specific abuses in the class definition may assist with class notice so that class members properly understand the full scope of the case. Plaintiffs also have no objection to including the specific entities identified as "agents" of the GOS. *See* Pls.' Mem. at 79.

[295] Plaintiffs would not object to removal of the word "including" if the Court deems necessary. *See Robidoux v. Celani*, 987 F.2d 931, 937 (2d Cir. 1993) (discussing a district court's ability, with "little effort," to adjust the proposed class definition).

[296] Opp. at 58.

[297] Pls. Mem. at 114-117.

[298] Opp. at 60.

[299] *See* Pls.' Mem. at 79-81, 115.

[300] *See supra* Section IV.B (describing common questions and evidence as to all Plaintiffs and class members).

[301] Opp. at 59.

Equally baseless is BNPP's insistence that resolving common issues in one trial rather than hundreds or thousands of trials would not materially advance the litigation.[302] If BNPP persuades a jury that it did have the requisite knowledge or causal relationship, it would win as to all class members in one proceeding. And BNPP *does not dispute* that "an individual plaintiff is not expected to spend more than one day testifying as to their injuries."[303]

Simple math illustrates why BNPP misses the point. Taking just the 205 plaintiffs that have filed claims so far (the 19 named Plaintiffs and the 186 plaintiffs on the *Sherf* and *Ring* complaints), and assuming that trial of common issues takes two weeks, the case would be resolved in 215 days – less than one year.[304] But if each of those 205 plaintiffs is required to separately and repeatedly try the same common issues, it would take 2,255 days – or nearly *nine years* (assuming 260 working days per year). Surely, even BNPP would agree that saving eight years of this Court's time is a worthwhile endeavor. And the efficiencies only increase with additional class members filing individual claims: if there were over 1,000 plaintiffs doing so (a realistic assumption), BNPP's approach would take *42 years*. All of this underscores not just why issue class certification is an available option, but also why full Rule 23(b)(3) certification is far superior to the alternative of litigating hundreds or thousands of individual claims.

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[302] Opp. at 60. In the case BNPP cites, *Marshall v. Hyundai Motor America*, 334 F.R.D. 36, unlike here, the plaintiffs completely "failed to argue—let alone show" how issue certification would "materially advance" the litigation. *Id.* at 61. BNPP is also unable to distinguish *In re Foreign Exchange Benchmark Rates Antitrust Litigation*, 407 F. Supp. 3d 422 (S.D.N.Y. 2019), cited by Plaintiffs in their opening brief. Pls.' Mem. at 116. While the *Foreign Exchange* conspiracy involved "chat rooms to fix spreads," Opp. at 60 n.33, and BNPP's conspiracy with the GOS involved wire-stripping, use of satellite banks, and other sanctions evasion schemes, what makes the issues in both cases common is that they depend solely on evidence about what the *defendants* knew and did. As in *Foreign Exchange*, if BNPP is found by the jury not to have known or done what Plaintiffs allege, "the claims necessarily would fail" as to all class members, making issue certification appropriate as an alternative. Opp. at 60 n.33.

[303] Pls.' Mem. at 116.

[304] The same timeframe would apply with full Rule 23(b)(3) certification rather than issue class certification under Rule 23(c)(4), because the individual testimony (regarding individual damages in addition to common, baseline damages for forced displacement) would occur in subsequent proceedings that could be before a magistrate judge or special master. *See Visa Check*, 280 F.3d at 141.

V. Conclusion

Abused and driven out of Sudan, suffering from BNPP's criminal assistance to a genocidal regime, Plaintiffs have endured the retraumatization of litigating this case to represent and protect the interests of 25,800 other Sudanese Americans. The tragedy that they share an injury, forced displacement, also positions this case for efficient class resolution. Because BNPP has failed to undermine Plaintiffs' showing that the proposed class meets all of the requirements of Rule 23(a) and (b)(3), including that common issues predominate and a class action is superior to litigation of thousands of individual claims, the Court should grant Plaintiffs' motion, certify the proposed Class, and appoint Class Counsel.

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Respectfully submitted,

/s/ Kathryn Lee Boyd
Kathryn Lee Boyd
Theodor Bruening
Michael Eggenberger
Terrence W. Scudieri, Jr.
HECHT PARTNERS LLP
125 Park Avenue, 25th Floor
New York, NY 10017
(646) 502-9515
(646) 396-6452
(646) 777-2489
lboyd@hechtpartners.com
tbruening@hechtpartners.com
meggenberger@hechtpartners.com
tscudieri@hechtpartners.com

Kristen Nelson
HECHT PARTNERS LLP
6420 Wilshire Boulevard, 17th Floor
Los Angeles, CA 90048
(646) 490-2408
knelson@hechtpartners.com

/s/ Brent W. Landau
Brent W. Landau
HAUSFELD LLP
325 Chestnut Street, Suite 900
Philadelphia, PA 19106
(215) 985-3273
blandau@hausfeld.com

Michael D. Hausfeld
Scott A. Gilmore
Amanda E. Lee-DasGupta
Claire A. Rosset
Mary S. Van Houten Harper
HAUSFELD LLP
888 16th Street NW, Suite 300
Washington, DC 20006
(202) 540-7200
mhausfeld@hausfeldllp.com
sgilmore@hausfeld.com
alee@hausfeld.com
crosset@hausfeld.com
mvanhouten@hausfeld.com

Counsel for Plaintiffs