UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ENTESAR OSMAN KASHEF *et al.*,

Plaintiffs,

-against-

BNP PARIBAS S.A., BNP PARIBAS S.A. NEW YORK BRANCH, and BNP PARIBAS US WHOLESALE HOLDINGS, CORP.,

Defendants.

Civil No. 1:16-Civ-03228-AKH

Hon. Alvin K. Hellerstein

Oral Argument Requested

BNP PARIBAS S.A. AND BNP PARIBAS US WHOLESALE HOLDINGS, CORP.'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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PRELIMINARY STATEMENT

Plaintiffs seek to certify a class comprising every single individual currently in the United States who allegedly suffered human rights abuses at the hands of the Government of Sudan ("GOS") or its agents over the course of 14 years. The class would include individuals who lived in rural villages or in major cities. It would include individuals who allege that they suffered abuse while living in Sudan in the late 1990s and those who allege injuries as recently as 2011. The class would include individuals who claim that they were harmed by government officials or militia while they were detained in prison, that they were assaulted when travelling, or that they were harmed when their village or home was attacked or their property taken. All of these individuals fall into the class that Plaintiffs propose here, united solely by the common thread that they all lived in Sudan at some point during a 14-year period of near-constant conflict.

Plaintiffs' proposed class is unprecedented, unworkable, and fails to meet the requirements for certification under Rule 23. Plaintiffs are pursuing claims against BNP Paribas S.A. and BNP Paribas U.S. Wholesale Holdings, Corp. (the "BNPP Defendants") based on various injuries that each individual claims he or she suffered when living in Sudan. Adjudicating these claims — from determining the type of injury (if any) that the Plaintiff suffered and identifying who caused that injury, to determining how, and whether, the BNPP Defendants played any role — is necessarily a claim-specific process. The sheer scope of the class, with each putative class member's unique circumstances and experiences across a decade and a half in a country the size of Western Europe, only puts these issues into starker perspective. It is precisely these features that make sweeping tort actions inappropriate for class treatment. And that is only more so in cases, like this one, involving claims based on various injuries suffered in the context of foreign conflicts. Plaintiffs bear the burden to show that class treatment is appropriate here. They have not done so.

First, Plaintiffs fail to demonstrate that common questions susceptible to class-wide proof will predominate over individualized inquiries. Plaintiffs appear to suggest that they can present generalized proof, largely in the form of expert testimony, about what happened in Sudan and the general conduct of the GOS and the BNPP Defendants over the course of the 14-year class period, but Plaintiffs cannot litigate this case in the abstract, detached from Plaintiffs' actual claims. The issues that actually need to be resolved to adjudicate each *individual's* claim concern what happened to him or her and how — questions that are necessarily individualized. Tellingly, Plaintiffs' Motion largely ignores the numerous and varying claims that are actually alleged in their Complaint and encompassed by the proposed definition of the class. Plaintiffs instead try to avoid the many predominance deficiencies by narrowing their focus to a claim they call "forced displacement." But Plaintiffs' only proposed method for proving "forced displacement" on a class-wide basis relies on fundamental mischaracterizations of U.S. immigration law. Plaintiffs incorrectly claim that by virtue of the proposed class members' status as Sudanese refugees and asylees, the U.S. government determined that the GOS or its agents had "forcibly displaced" every one of them. Based on a plain reading of applicable immigration law and as the facts clearly show, no such determination was ever made. The immigration status of the putative class members thus is not a source of class-wide proof that can satisfy Rule 23(b)'s requirements. Nor is "forced displacement" a uniform, compensable injury under Swiss law, the substantive law governing Plaintiffs' claims; it is simply a label Plaintiffs have contrived to manufacture the appearance of commonality.

Second, Plaintiffs fail to demonstrate that class treatment is the superior method for fairly and efficiently proceeding here. The sheer number of individualized questions that will need to be resolved for each individual putative class member renders proceeding as a class impractical. Indeed, because class membership depends on whether an individual actually suffered an injury at

the hands of the GOS or its agents, the Court will need to conduct mini-trials just to determine who should be included in the class at all. Plaintiffs do not even offer a workable method for identifying potential class members and providing them notice in the first place.

Third, Plaintiffs have not presented a single, class-wide common question as required under Rule 23(a). Plaintiffs instead seek to link their class, of what they claim is over 25,000 individuals who suffered harm all across Sudan between 1997 and 2011, with what Plaintiffs maintain was a single, unvarying "policy" of genocidal violence by the GOS. But nothing in the record, including the reports of Plaintiffs' proposed experts, remotely supports the existence of such a sweeping, uniform policy that could have caused the alleged harm of *every single* class member spanning over a decade.

Fourth, Plaintiffs fail to show that the proposed class meets the ascertainability requirement. The proposed class defines membership based on whether the individual suffered a "human rights abuse" — a term Plaintiffs never define. Plaintiffs provide no basis for the Court to determine where the bounds of the class begin and end.

Fifth, Plaintiffs' passing request that, in the alternative, the Court certify unspecified "issue classes" under Rule 23(c)(4) offers no explanation for why those purported issue classes would not suffer the same fundamental deficiencies present in Plaintiffs' proposed class. Rule 23(c)(4) issue classes are reserved for circumstances where they would materially advance the litigation; this case is not one of them.

Plaintiffs' allegations in this action are horrific. The conflicts that embroiled Sudan are devastating and brutal. But this case is about the actual injuries that each Plaintiff suffered and whether those specific injuries give rise to liability on behalf of the BNPP Defendants. The record here presents real, concrete uncertainties about the nature and circumstances of each Plaintiff's alleged injuries and the existence of any causal link to conduct by the BNPP Defendants. Plaintiffs

cannot sidestep these questions by proposing a boundless, indeterminate class based on what generally happened in Sudan in the late 1990s and early 2000s and that is detached from Plaintiffs' actual claims against the BNPP Defendants in this case.

BACKGROUND

A. Sudan's History of Conflict

Plaintiffs' claims and those encompassed by the proposed class arise from the strife and conflicts that have plagued Sudan for many decades. The context in which these claims allegedly arose and the history of the various conflicts that emerged during this period are essential to understanding the key issues that will need to be addressed to resolve these claims.

1. The Second Civil War

Beginning in 1983, the conflict commonly referred to as the Second Sudanese Civil War erupted, largely due to dissatisfaction among southern Sudanese with the government's continued marginalization of southerners and its failure to abide by earlier agreements. (Ex. 58 (Carisch Report) ¶¶ 24–25; Ex. 93 (Verhoeven Report) at 7.)[1] This conflict between north and south commenced when the Sudan People's Liberation Army ("SPLA"), led by Lieutenant Colonel John Garang, rebelled and began fighting the Sudanese Army. (Ex. 58 (Carisch Report) ¶¶ 24–25; Ex. 93 (Verhoeven Report) at 7; Ex. 54 (Baldo Report) ¶ 159.) The Second Civil War lasted until the 2005 Comprehensive Peace Agreement, which in turn led to the formation of independent South Sudan in 2011. (Ex. 58 (Carisch Report) ¶ 25.)

The Second Civil War was longer, bloodier, and more complex than the civil war that had preceded it. (Ex. 93 (Verhoeven Report) at 7.) This conflict was in part fueled by a dispute over

[1] Unless otherwise stated, references to "Ex." are to the exhibits to the Declaration of Charity E. Lee submitted in support of the BNPP Defendants' Motion for Summary Judgment, Rule 56.1 Statement, and Opposition to Plaintiffs' Motion for Class Certification, and *Daubert* Motion.

control of the oil production fields, and encompassed a number of political, tribal, and ethnic dimensions. The Sudanese government and associated militias battled the core SPLA as well as other rebels groups, which included splinter SPLA factions such as the SPLA-Nasir and the South Sudan Independence Movement/Army ("SSIM/A"). (Ex. 58 (Carisch Report) ¶ 26.) Both sides and all parties involved in this conflict are well documented as committing violence against civilians. (*Id.*) In fact, violence during the period of the Second Civil War was not exclusively related to that conflict's north-south divide. There is a documented history of interethnic and intertribal violence occurring among southerners.

For instance, schisms within the SPLA produced factions that were primarily divided on ethnic lines, including Garang's Dinka-dominated SPLA and the Nuer-dominated SPLA-Nasir led by Riek Machar. (*Id.* ¶ 39.) These SPLA groups then engaged in interethnic violence against their rival groups with devastating results, including raids that killed thousands of civilians, burned dozens of villages, and resulted in famine after the destruction of livestock and crops. (*Id.* ¶¶ 39–40.) The violence committed by the SPLA and other groups against civilians caused thousands to become refugees who fled their homes, often to other countries. (*Id.* ¶ 45.)

In addition to the pervasive violence against civilians, the Second Civil War destabilized Sudanese governance. In 1985, the ruling military dictatorship was overthrown and a parliamentary system was reestablished. (*Id.* ¶ 24.) This government proved short lived. In 1989, Brigadier Omar Hassan Ahmed al-Bashir led a military coup, capitalizing on frustrations over the government's inability to resolve the Second Civil War, economic struggles, and a famine. (*Id.* ¶ 24.) Al-Bashir remained in power until April 2019, when, following civilian protests, he was toppled in a military coup. (Ex. 71 (Hufbauer Report) ¶¶ 121, 124.)

2. Continuing Violence in Sudan and Arms Proliferation

Throughout the 1990s and 2000s, conflict occurred in other regions of Sudan. (Ex. 56 (Baldo Dep. Tr.) at 112:16–113:18.) As one of Plaintiffs' proposed experts acknowledged, by 2000, there were "[s]ix main conflict zones" in Sudan, which included regions in south, central, and east Sudan (but not the western Darfur region). (Ex. 74 (Jok Dep. Ex. 5) at 2; Ex. 73 (Jok Dep. Tr.) at 216:15–217:2.) The Government of Sudan was by no means the only violent actor during this period, as this same Plaintiffs' expert has recognized elsewhere.[2] This fighting resulted in significant numbers of casualties, with one scholar publishing data demonstrating that the number of war-related deaths in Sudan was far higher during the early 1990s than in the late 1990s and early 2000s.[3]

These violent conflicts throughout Sudan were enabled, in part, by a large-scale and multifaceted arms trade that funneled weapons to the GOS, rebel groups, tribal militias, and even ordinary civilians. The GOS secured weapons from foreign governments, such as China, Chad, Ethiopia, Russia, Libya, India, and Iran. (Ex. 65 (Fogarty Dep. Tr.) at 112:19–113:6; 130:5–19; 121:23–12; 127:21–25; 126:22–127:2; 115:2–21; Ex. 58 (Carisch Report) ¶ 139.) Further, there

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[2] *See* Ex. 134, Jok M. Jok & Sharon E. Hutchinson, *Sudan's Prolonged Second Civil War and the Militarization of Nuer and Dinka Ethnic Identities*, 42 African Studies Review 125, 127 (Sept. 1999) ("[T]he number of South Sudanese wounded and killed continued to rise well into 1999. At this point, the number of Dinka and Nuer who have died in these fratricidal conflicts and in other South-on-South confrontations since the re-eruption of full-scale civil war in Sudan in 1983 exceeds those lost to atrocities committed by the Sudanese army."); *id.* at 136 ("[S]outhern civilians on both sides of the SPLA/GoS divide remain hostages of their nominal guardians. In the cities, the government tries to tie down as many civilians as possible to form a human shield against long- range SPLA attacks. In the countryside, the guerrilla army relies on civilians for food and does not hesitate to take from them whatever it needs.").

[3] *See* Alex de Waal, *The Conflict in Darfur, Sudan: Background and Overview* 32 (Feb. 2022), https://sites.tufts.edu/reinventingpeace/files/2022/04/AdW-expert-witness-statement-DF-for-ICC.pdf.

were "weapons that were in circulation in the broader region of the Horn of Africa" during the period of 1989 to 1997 because the "Horn of Africa has long been in a conflict-torn region." (Ex. 95 (Verhoeven Dep. Tr.) at 223:10–15.) Numerous foreign governments sought to insert themselves in various conflicts on all sides, including at times the United States, providing weapons, funding, and support. (Ex. 58 (Carisch Report ¶¶ 29, 31, 53); Ex. 70 (Hudson Dep. Tr.) at 110:16–112:4; 125:24–126:12.) Weapons were therefore widely available during this period, and used by government, rebel, and civilian forces.

3. The Darfur Conflict

Darfur, the western region of Sudan encompassing an area nearly the size of France, comprises several states and is populated by peoples of multiple tribes and ethnicities. (Ex. 58 (Carisch Report) ¶ 28.) Resource-scarce and afflicted by frequent droughts, Darfur has suffered conflict and violence nearly unabated since the 1970s. (*Id.*) A principal conflict in the region pitted primarily sedentary agriculturalist non-Arab tribes, including the Fur, Zaghawa, and Masalit, against the primarily nomadic pastoralist Arab tribes, including the Rizeigat Aballa and Rizeigat Baggara, in a conflict over access to water and arable land. (*Id.*) Regional actors also stoked the tensions in Darfur. Then-leader of Libya Muammar Ghaddafi, as one notable example, armed Chadian nomadic tribesman in the 1980s, with one scholar noting that the "influx of Kalashnikov rifles . . . 'changed the moral order of Darfur.'" (*Id.* ¶ 29.)

Over time, certain armed groups coalesced into rebel factions, who opposed the Sudanese government due to its support of Arab tribes. (*Id.* ¶ 30.) But in 2003, the lower level of violence prevalent throughout Darfur for decades turned into a complex and deadly crisis following an attack by rebels against the Sudanese army. On April 25, 2003, Darfuri rebel groups attacked al-Fasher Airport in North Darfur state, destroying several military aircraft and killing at least 100 Sudanese soldiers. (*Id.* ¶¶ 27, 30; Ex. 56 (Baldo Dep. Tr.) 100:18–101:7; Ex. 54 (Baldo Report) ¶

190.) This attack was a "turning point," instigating an armed conflict in the region that rapidly escalated over the course of the next two years. (Ex. 56 (Baldo Dep. Tr.) 100:18–101:7.)

The post-2003 Darfur conflict was complex and involved a range of armed groups, including varying tribal militias, rebels, Sudanese government forces, and foreign interveners. (Ex. 58 (Carisch Report) ¶ 31.) Two of the most prominent rebel groups were the Sudan Liberation Army ("SLA")[4] and the Justice and Equality Movement ("JEM"). (*Id.*) The SLA, which received support from the Eritrean government, launched attacks against the Sudanese government but also committed atrocities against civilians, including attacking villages, raping women, killing children, and torturing and executing opponents. (*Id.* ¶¶ 31a, 48–50.) As a result of these rebel attacks on villages, numerous Sudanese civilians, including Arabs, were forced to flee their homes for refugee camps. (Ex. 60 (Elbagir Dep. Ex. 3) at 1–2.) Over time, the SLA fragmented into a number of smaller independent splinter groups, all of which were responsible for attacks within Darfur. (Ex. 58 (Carisch Report) ¶ 31a.)

The JEM fought Sudanese government forces with support and weapons provided by the government of Chad, including anti-aircraft guns, rocket-propelled grenades, machine guns, small arms, and vehicles. (*Id.* ¶ 31b; Ex. 56 (Baldo Dep. Tr.) 177:19–178:5.) The JEM also used these arms to commit atrocities against civilians in Darfur, including attacks on villages that killed civilians and involved fighters wearing camouflage uniforms, riding in Land Cruisers, and carrying automatic weapons. (Ex. 58 (Carisch Report) ¶¶ 31b, 48–50.) Indeed, three JEM leaders were indicted for war crimes by the International Criminal Court for a 2007 attack with anti-aircraft guns, artillery, and rocket-propelled grenades that killed 12 African Union peacekeepers. (*Id.*

[4] The SLA was also previously known as the Darfur Liberation Front. (Ex. 58 (Carisch Report) ¶ 31a.)

¶ 31b.)[5] Other armed groups and tribal militias also remained active in Darfur during the 2003 conflict. In fact, the SPLA provided Darfuri rebels with substantial support, including providing arms and trainings, and occasionally organized and launched attacks in the region. (*Id.* ¶ 31c.)

Opposing the rebel groups were the Sudanese government and an array of loosely organized militias. (*Id.* ¶¶ 32–34.) Plaintiffs refer to these militia collectively as the "Janjaweed" and describe it as a singular and primary actor in Darfur. (*E.g.*, ECF No. 421 (Mot.) at 46–47.) But experts acknowledge that these militia groups were far from monolithic (Ex. 58 (Carisch Report) ¶ 32), and were rather, as Plaintiffs' proposed expert put it, a "motley crew" of groups of different tribal militias and other fighters. (Ex. 93 (Verhoeven Report) at 17; Ex. 95 (Verhoeven Dep. Tr.) at 370:9–18; Ex. 56 (Baldo Dep. Tr.) at 111:2–7.) During the post-2003 Darfur conflict, militias associated with the Janjaweed fought at the behest of the GOS, but also launched attacks on their own initiative and for their own motivations, battled each other, and themselves rebelled against the GOS. (Ex. 58 (Carisch Report) ¶¶ 32–34; Ex. 94 (Verhoeven Reply Report) at 37; Ex. 56 (Baldo Dep. Tr.) at 111:23–112:2; *see also* Ex. 59 (Elgabir Decl. ¶¶ 39, 54, 62 (describing defection of militia units to oppose the Government of Sudan).)

The Darfur conflict peaked in 2004 and significantly deescalated by 2005, although the region has continued to experience ongoing instability and violence in the aftermath of the 2003 conflict.[6]

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[5] *Case Information Sheet – The Prosecutor v. Abdallah Banda Abakaer Nourai*, Int'l Crim. Ct. (July 2021), https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/BandaEng.pdf.

[6] *See* de Waal, *supra* note 3, at 52–58; United States Holocaust Memorial Museum, "Darfur" (July 2023), https://encyclopedia.ushmm.org/content/en/article/darfur (accessed on July 21, 2023).

B. BNPP U.S. Sanctions Investigation

In June 2014, Defendant BNP Paribas pled guilty in this Court to conspiring to violate certain U.S. sanctions laws relating to Sudan ("2014 DOJ Plea Agreement"), and stipulated to a related Statement of Facts (Ex. 1). In the 2014 DOJ Plea Agreement, BNP Paribas admitted that it or its subsidiaries provided U.S. dollar banking services to certain Sudanese government and commercial entities. At the same time, BNP Paribas also entered into a plea agreement with the District Attorney of the County of New York ("DANY"), in which BNP Paribas pled guilty to certain violations of New York law in connection with its violation of United States sanctions relating to Sudan. The DANY plea agreement also included a stipulated factual statement with admissions identical to the DOJ Statement of Facts.

As part of these plea agreements, BNP Paribas did not admit to conspiring with the GOS to commit human rights violations, nor did it admit to possessing any knowledge that the GOS was committing the human rights violations alleged by Plaintiffs. Moreover, these guilty pleas do not refer to any alleged causal connection between the BNPP Defendants' conduct and any injuries suffered by Plaintiffs. As an Assistant U.S. Attorney stated at BNP Paribas's sentencing hearing, "the victims [of the Government of Sudan] are not victims of this crime and cannot show that they were directly harmed by BNPP's conduct." (Ex. 2 (Sentencing H'rg Tr.) at 9:19–21); *see also id.* at 10:11–12 ("[T]here's no direct pecuniary harm to the victims of these regimes tied to BNPP's conduct at issue here.").)

C. This Action

1. Plaintiffs and Their Claims

In 2016, following BNP Paribas's guilty pleas, Plaintiffs — seeking to represent a putative class of former Sudanese individuals now living in the United States — brought claims against the BNPP Defendants for a range of injuries that they allege they suffered in and after leaving Sudan

at the hands of the GOS and various of its alleged agents. The claims of the 19 named Plaintiffs vary considerably in date, nature, and circumstances. Plaintiffs' various claimed injuries span the late 1990s to at least 2008. (*E.g.*, ECF No. 241 (TAC) ¶¶ 30, 49.) The injuries occurred in rural Darfur, in southern Sudan, against the backdrop of a decades-long civil war, in Khartoum and other metropolitan areas, and in Egypt. (*E.g.*, *id.* at ¶¶ 33, 37, 41, 47.) The alleged perpetrators include members of the Sudanese military, Sudanese security forces, police, and militias. (*E.g.*, *id.* at ¶¶ 35, 38, 49, 50d.) The various alleged incidents include attacks by militiamen on villages, wrongful arrests and detentions by security forces, and home invasions by uniformed or plainclothes persons. (*E.g.*, *id.* at ¶¶ 50c, 50d, 50e.) The alleged injuries themselves include physical and sexual assault, loss of family members, conversion or damage of property, and various catch-all references to "human rights abuses" by the GOS. (*E.g.*, *id.* at ¶¶ 30, 37, 39, 42.)

The class that Plaintiffs claim to represent is even broader. Plaintiffs define the proposed class as follows:

> All U.S. citizens, lawful permanent residents, or lawfully admitted refugees or asylees who formerly lived in Sudan or South Sudan and 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) perpetrated by the Government of Sudan ("GOS") and its agents (including the Janjaweed and other GOS militia) from November 1997 through December 2011.

(Mot. at 3–4.)

Plaintiffs are attempting to hold the BNPP Defendants liable for every human rights abuse (with no finite list of or definition for what constitutes a "human rights abuse") allegedly committed by the GOS or its agents between 1997 and 2011 against any person in Sudan who subsequently happened to relocate to the United States, asserting that each such injury was in fact caused by the conduct underlying BNP Paribas's guilty plea. Specifically, the Complaint asserts

that by processing transactions involving Sudanese banks or commercial entities in violation of U.S. sanctions on Sudan, the BNPP Defendants "knowingly facilitated and supported the crimes of a lawless regime by providing the financial means by which the GOS committed widespread human rights violations." (TAC ¶ 194.) The financial services that are the subject of the Complaint were primarily processed by a Swiss subsidiary of BNP Paribas, BNP Paribas (Suisse) S.A, which is not a defendant in this case. (*See* Ex. 1 (Statement of Facts) ¶ 17.) The Complaint does not allege that any of these financial services violated Swiss sanctions.

2. Procedural History

In 2017, the BNPP Defendants filed a motion to dismiss the action on several grounds, which the Court granted in March 2018, primarily based on the act of state doctrine. *See Kashef* v. *BNP Paribas SA*, 316 F. Supp. 3d 770, 776 (S.D.N.Y. 2018) ("*Kashef I*"). The Court dismissed the remaining claims because they were either time-barred or because Plaintiffs had failed to state a claim. *Id.* at 779–84. Plaintiffs appealed. In May 2019, the Second Circuit reversed and vacated the dismissal. *Kashef* v. *BNP Paribas S.A.*, 925 F.3d 53 (2d Cir. 2019) ("*Kashef II*").

Following the Second Circuit's decision, Judge Nathan ordered supplemental briefing on the previously unaddressed arguments in Defendants' motion to dismiss, including whether New York, Sudanese, or Swiss law applies to Plaintiffs' claims. (ECF. No. 115). In a March 3, 2020 opinion, Judge Nathan determined that, because the relevant actions alleged in the Complaint were undertaken by BNPP Suisse in Switzerland, Swiss law governed Plaintiffs' various asserted tort claims. *Kashef* v. *BNP Paribas SA*, 442 F. Supp. 3d 809, 821 (S.D.N.Y. 2020) ("*Kashef III*"). Defendants subsequently moved under Rule 12(b)(6) to dismiss for failure to state a claim under Swiss law, which the Court, necessarily accepting Plaintiffs' allegations as true, granted in part and denied in part. *Kashef* v. *BNP Paribas SA*, 2021 WL 603290 (S.D.N.Y. Feb. 16, 2021)

("*Kashef IV*"). The action was reassigned to this Court on April 6, 2022. The parties engaged in discovery, including expert discovery, for several years. Discovery closed in May 2023.

LEGAL STANDARD

Plaintiffs "bear[] the burden of establishing by a preponderance of the evidence that each of Rule 23's requirements have been met." *Johnson* v. *Nextel Commc'ns Inc.*, 780 F.3d 128, 137 (2d. Cir. 2015). Satisfying Rule 23 requires a "rigorous analysis that the prerequisites . . . have been satisfied." *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 351 (2011). This "rigorous analysis" requires the court to "resolve material factual disputes relevant to each Rule 23 requirement." *Brown* v. *Kelly*, 609 F.3d 467, 476 (2d Cir. 2010). Indeed, the court "must look 'behind the pleadings,' even if such an inquiry 'overlap[s] with the merits of the plaintiffs' underlying claim,' and determine if the plaintiffs have demonstrated Rule 23 requirements be preponderance of the evidence." *Marotto* v. *Kellogg Co.*, 415 F. Supp. 3d 476, 480 (S.D.N.Y 2019) (AKH) (citation omitted).[7]

ARGUMENT

Plaintiffs fail to demonstrate that their proposed class — consisting of what Plaintiffs claim are over 25,000 individuals allegedly injured by the GOS or its agents over a 14-year period —

[7] Plaintiffs misleadingly rely on a quote from *Yi Xiang* v. *Inovalon Holdings*, 327 F.R.D. 510, 519 (S.D.N.Y. 2018), a securities litigation, to insist that "doubts concerning the propriety of class certification should be resolved in favor of class certification." (Mot. at 70.) But securities fraud claims are fundamentally distinct from the types of varied and distinct tort injuries asserted by the Plaintiffs in this case. And the sole Second Circuit case (another securities litigation) cited in *Inovalon* for the above proposition states only that "[w]hen reviewing a grant of class certification, we accord the district court noticeably more deference than when we review a denial of class certification." *Levitt* v. *J.P. Morgan Sec., Inc.*, 710 F.3d 454, 464 (2d Cir. 2013) (quoting *In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 480 (2d Cir. 2008)). *Levitt* says nothing about how a district court should resolve its *own* "doubts" concerning whether class certification is appropriate in the first instance. Regardless, for the reasons explained below, there are no "doubts" about Plaintiffs' showing that could tip the scale in favor of certification here.

satisfies the requirements for certification, including predominance, superiority, commonality, and ascertainability. Each alone is fatal to Plaintiffs' Motion.

First, the proposed class fails to meet Rule 23(b)(3)'s predominance requirement: individual questions concerning the particular injury allegedly suffered by each putative class member will quickly predominate over any common questions, and Plaintiffs' attempt to bypass those individual questions with an amorphous claim of "forced displacement" is based on a flawed understanding of U.S. immigration procedures and a distortion of applicable foreign law. *Second*, for similar reasons, the proposed class fails to satisfy Rule 23(b)(3)'s superiority requirement: far from presenting a fair and efficient method of resolving the case, Plaintiffs seek to certify a sprawling, "fail-safe" class and force the Court and the parties to take impermissible shortcuts concerning key issues of liability. *Third*, in addition to falling far short of Rule 23(b)'s predominance and superiority requirements, the proposed class cannot even satisfy Rule 23(a)'s commonality requirement, because none of the purportedly "common" questions identified by Plaintiffs are capable of class-wide *resolution*. *Fourth*, Plaintiffs have not shown that the putative class satisfies Rule 23's implied requirement of ascertainability because the proposed class definition is boundless and indeterminate by its own terms. Lastly, Plaintiffs' proposed alternative of unspecified "issue classes" under Rule 23(c)(4) would suffer from the same fundamental failures as the full class.

I. THE PROPOSED CLASS FAILS RULE 23(B)'S PREDOMINANCE REQUIREMENT.

Rule 23(b)(3) requires that Plaintiffs establish predominance, *i.e.*, "that the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). To satisfy the predominance requirement, Plaintiffs must identify common questions that are "susceptible to generalized, class-wide proof" and that these

questions are "more prevalent or important" than the non-common issues. *Tyson Foods, Inc.* v. *Bouaphakeo*, 577 U.S. 442, 453 (2016) (citation omitted). "[T]he predominance criterion is far more demanding" than Rule 23(a)'s requirements, *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 624 (1997), and thus the court's analysis will often begin (and end) there, *see Ruffo* v. *Adidas Am. Inc.*, 2016 WL 4581344, at *2 (S.D.N.Y. Sept. 2, 2016) (AKH). Indeed, that is particularly so in tort actions such as this one, which are rarely certified for class treatment because "so many individualized legal and individualized damages inquiries are ultimately required." *In re Motors Liquidation Co.*, 447 B.R. 150, 160 (Bankr. S.D.N.Y. 2011); *see also Geiss* v. *Weinstein Co. Holdings LLC*, 474 F. Supp. 3d 628, 636 (S.D.N.Y. 2020) (AKH) (denying preliminary approval of a proposed settlement class providing compensation for tort claims on predominance grounds because potential claimants were allegedly harmed "in different manners" and "in different locations" across a period of decades).

Here, the proposed class claims for any and all "human rights abuses" allegedly committed by the GOS will entail almost exclusively individualized questions that cannot be resolved on a class-wide basis. Indeed, Plaintiffs concede as much in their Motion. (*See* Mot. at 92–93, 103.) Plaintiffs instead try to take a shortcut, claiming that certification is nevertheless appropriate, and that predominance is satisfied, based on a purportedly class-wide injury of "forced displacement." (*Id.*) Not only does this argument ignore the numerous individualized questions that would still dominate the numerous claims in their proposed class, but Plaintiffs also fail to demonstrate that this manufactured "claim" of forced displacement is susceptible to class-wide proof or even viable under applicable law.

A. Individualized Questions Would Overwhelm the Resolution of Putative Class Members' Claims for Alleged Human Rights Abuses Spanning a 14-year Period.

Focusing on their fatally flawed forced-displacement theory, Plaintiffs ignore the bulk of the asserted claims included in their proposed class — *any* "human rights abuses," "including" but not limited to "genocide, battery, assault, unlawful imprisonment, sexual abuse, threats of violence and/or deprivation of property" (Mot. at 3) — which will overwhelmingly entail individualized questions. Plaintiffs misleadingly claim that these individual human rights abuses are "*additional* damages" tied to some abstract "*fact* of compensable injury" and need not be considered as part of the predominance analysis. (*Id.* at 93, 103.) That is incorrect.

In making this misleading assertion, Plaintiffs appear to be relying on the term "damages" under Swiss law to refer to the legally compensable injury, or "harm," that gives rise to liability in the first place. Such "damages" are not simply a measure of the *amount* of appropriate compensation, but rather the core "loss" or "harm" that gives rise to a claim under Article 41 of the Swiss Code of Obligations ("SCO"). (*See* Ex. 99 (Müller Reply) ¶¶ 92–93.) For this reason, Plaintiffs' implicit suggestion to bifurcate findings on liability and "damages" misses the mark. Rather, Plaintiffs still must establish that the BNPP Defendants are in fact liable for *each* of these purported injuries under applicable Swiss law. *See Marshall* v. *Hyundai Motor Am.*, 334 F.R.D. 36, 57 (S.D.N.Y. June 14, 2019) ("[T]he court will be required to conduct individualized inquiries to determine whether class members suffered any injuries at all — a proposition that is much different than determining the quantum of damages for each class member."). And none of the requisite elements for proving the BNPP Defendants' liability for each alleged human rights abuse can be established through generalized, class-wide proof.

Even accepting Plaintiffs' novel application of Article 41 and Article 50(1) SCO,[8] Plaintiffs must prove that (i) each of them was harmed by an unlawful act or acts of the GOS, *i.e.* the illicit act, *Kashef IV*, 2021 WL 603290, at *3; (ii) the BNPP Defendants "consciously assisted" the GOS in carrying out those acts and "knew or should have known that [they] were contributing" to illicit acts, *i.e.*, conscious collaboration, *id.*; and (iii) the BNPP Defendants' contributing conduct "was the natural and adequate cause of [each] plaintiff's harm or loss," *i.e.*, causation, *id.* at *6. Plaintiffs fail to explain how the resolution of *any* of those elements, let alone each of them, "can be achieved through generalized proof" and without individual analysis of the specific injuries claimed by each putative class member. *Ruffo*, 2016 WL 4581344, at *1, 3 (citation omitted) (putative class failed to satisfy predominance element where individualized analysis was needed to show reliance of each plaintiff on allegedly misleading advertising and to establish damages). Indeed, this is precisely why mass tort cases that arise out of a *single* event or course of conduct — *i.e.*, those that do not consist of tens of thousands of alleged injuries suffered over the course of 14 years across the then-largest country in Africa — are "ordinarily not appropriate for class treatment." *Amchem*, 521 U.S. at 625; *see also In re Motors*, 447 B.R. at 163 ("Civil actions involving mass torts are often not certified for class action treatment . . . because so many individualized legal and individualized damages inquiries are ultimately required."). A careful review of each of the required elements of Plaintiffs' claims illustrates the numerous individualized questions that will quickly dominate such a proceeding.

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[8] As explained in the BNPP Defendants' contemporaneously filed motion for summary judgment, Swiss courts have not adopted Plaintiffs' Swiss law expert's theory that Art. 50(1) SCO can serve as an independent cause of action against a party that has not independently violated Art. 41 SCO. While Plaintiffs' expert has advocated an untested and expansive interpretation of Article 50(1) SCO, Swiss law requires that Plaintiffs prove that the BNPP Defendants are liable to them under Art. 41 SCO in order to bring their claims, which Plaintiffs have not and cannot do. (Mem. in Support of Mot. for Summary Judgment) at 26–34.)

1. Individualized questions will predominate the illicit act requirement.

Plaintiffs do not propose a single common question that would resolve the "unlawfulness" or "illicit act" element as to each individual putative class member. Instead, Plaintiffs list four general (and largely duplicative) questions in the abstract about the type of conduct that the GOS and various militias engaged in during the 14-year class period. (Mot. at 79.) But Plaintiffs cannot prove that they suffered injuries at the hands of the GOS in the abstract. To determine whether the BNPP Defendants are liable for each of the claimed injuries suffered by putative class members, the Court will need to determine who carried out those human rights abuses, when, and how.[9] (*See* Ex. 99 (Müller Reply) ¶¶ 70–76.) Resolving these questions necessarily requires individualized inquiries into each putative class member's allegations.

Identity of the Perpetrator. A fundamental question that the Court will need to resolve is *who* in fact carried out the harm that injured each putative class member. Plaintiffs' purported class spans 14 years, covers the entire country of Sudan, and encompasses numerous, distinct conflicts involving various non-governmental groups engaged in violence. (*See supra* at 11–12.) But the identity of the perpetrator — whether a member of the police, the Sudanese military, a militia, or some other entity or group — cannot be established by anything other than individual testimony or documentary evidence concerning the attacks or abuses suffered by each putative class member. *See Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, 226 F.R.D. 456, 482

[9] As discussed further below (*see infra* Sect. II), Plaintiffs have proposed an inappropriate fail-safe class defined to include only those individuals who have in fact suffered a human rights abuse at the hands of the GOS or its agents. To the extent that Plaintiffs' failure to present general, class-wide proof is more appropriately viewed as a question of ascertainability and superiority rather than predominance, as explained below, Plaintiffs cannot satisfy these requirements either, because the Court would need to resolve these individualized questions even to determine who is a proper member of the class. But regardless, the inherently individualized inquiries of who harmed each claimant and how preclude certification in either case.

(S.D.N.Y. 2005) ("The plaintiffs will have to show with respect to *each individual class member* that the injuries for which they are claiming damages were actually caused by the [GOS's] Campaign." (emphasis added)).

Whether the GOS or a militia or rebel group carried out each attack or committed each abuse is not an inconsequential question. Sudan was host to numerous armed conflicts between 1997 and 2011, each involving a complex web of GOS forces, militia groups, and even foreign intervention. (*See supra* at 4–9.) As former member of the UN Panel of Experts on Sudan, Enrico Carisch, explained: "There were human rights violations committed by various parties to the conflicts throughout Sudan during the Proposed Class Period, including by the numerous, frequently evolving rebel groups and sub-groups operating in present-day South Sudan and the Darfur States." (Ex. 58 (Carisch Report) ¶¶ 37–53; *see also supra* at 7–9 (recounting atrocities committed by rebel groups in Darfur against civilians).) Plaintiffs' own proposed experts acknowledge the complexity of conflicts during that period, with many of them expressly agreeing that non-governmental actors were also committing various harm against civilians during the class period. (Ex. 54 (Baldo Report) ¶ 206 ("Darfur rebel groups obstructed humanitarian access to war victims, looted food and other humanitarian relief supplies . . . [and] violently attacked humanitarian relief workers . . . ."); Ex. 55 (Baldo Reply) ¶ 95 ("I acknowledge that rebels in the South and in Darfur also engaged in crimes."); *see also* Ex. 74 (Jok Dep. Tr. Ex. 5) at 3 (describing in southern Sudan "a complex web of fighting in the province among Nuer factions, within pro-government factions, and between pro-government and rebel forces forced at least 50,000 persons to flee their homes").)

Plaintiffs' proposed experts emphasize that the "scale" of the violence committed by the GOS far outweighs that carried out by rebel groups and that rebel violence was more "episodic." (*See, e.g.*, Ex. 69 (Hudson Reply) ¶ 137; *see also* Ex. 55 (Baldo Reply) ¶ 6.) But that misses the

point. Accepting Plaintiffs' theory that the GOS is liable for every human rights abuse committed in Sudan over the course of more than a decade, simply on the basis that the GOS carried out disproportionately more of that violence, would constitute an "inappropriate shortcut" that absolves Plaintiffs of their burden to prove their claims. *In re Motors*, 447 B.R at 163 ("[I]nappropriate shortcuts as to individual issues of wrongful conduct, causation and requisite purpose and assistance . . . would have to come at the expense of due process concerns.").

Indeed, the testimony of the 19 named Plaintiffs, several of whom could not definitively identify their attackers, provides just a glimpse of the numerous contested issues of attribution that will need to be resolved for each putative class member. This record establishes that reliance on purportedly independent indicia of attribution, such as the clothing worn by the alleged attackers, is highly fact-specific and dependent on individual testimony. (*See, e.g.*, Ex. 50 (Tingloth Dep. Tr.) at 90:17–21 ("In Sudan, [people from the government] don't wear a uniform. They just wear clothes and they carry things that they would handcuff a person with. And they would carry a gun."); Ex. 39 (Hassan Dep. Tr). at 78:13–19 (explaining that the men who came to her home "were wearing regular clothes"); Ex. 37 (John Doe Dep. Tr.) at 85:22–86:9 (men who came to house "didn't have any uniform" and were "wearing plain clothing").[10] Some Plaintiffs did not even witness the attacks on which they are basing their claims. (*See, e.g.*, Ex. 27 (Abbo Ahmed

[10] For this reason, Plaintiffs' reliance on *Does I* v. *Gap, Inc.*, 2002 WL 1000073 (D.N. Mar. Is. May 10, 2002), is misplaced. (*See* Mot. at 93 n. 412.) In that case, the plaintiffs alleged that they were all subjected to involuntary servitude in their work for specific factories on the island of Saipan. *Id.* at *7. The class was limited to employees of those factories, and so the identities of the perpetrators — the contractor companies who employed the garment workers at these factories — was clear. *See also Talisman*, 226 F.R.D. at 483 (distinguishing *Does I* because there the "class suffered an identical injury — peonage — from a common source, the garment production system on one island").

Abakar Dep. Tr.) at 104–105.)[11] Although Plaintiffs may try to rely on proposed expert testimony regarding the typical practices or appearance of the members of the GOS military to fill in these gaps, Plaintiffs cannot rely on that proposed expert testimony in the abstract, untethered from any actual, alleged abuse or attack.[12]

As other courts have recognized in rejecting proposed classes of tort claimants in connection with foreign conflicts, identifying the perpetrator requires individualized proof. In *Talisman*, the plaintiffs brought claims against a Canadian oil company for allegedly working with the Sudanese government to systematically commit human rights abuses against civilians who were living in several oil blocks in southern Sudan, and plaintiffs sought to certify a class of

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[11] Consistent with Plaintiffs' efforts to detach this case from the specific injuries and circumstances alleged by Plaintiffs, their counsel, through conduct during Plaintiffs' depositions, frequently sought to obstruct the BNPP Defendants' examination of Plaintiffs' allegations that form the basis of their claims in this litigation. (*See, e.g.*, Ex. 40 (Kashef Dep. Tr.) at 87:17-87:24 ("Q: And some of your understanding of what happened in 2003 is based upon what your neighbors told you? MS. BOYD: Objection. Vague. Legal jargon like 'based upon,' not okay. Misstating her testimony from before. Argumentative. And this line of questioning is just so problematic in so many ways. The facts are not even in dispute."); *see also* Ex. 42 (Khalifa Dep. Tr.) at 125:7–126:12) (Plaintiffs' counsel calling the BNPP Defendants' counsel "sociopathic"). But understanding what each of these named Plaintiffs recalls and what he or she specifically alleges happened to him or her is critical to determining whether the BNPP Defendants should be held liable for each Plaintiff's claims. Contrary to Plaintiffs' counsel's accusations in her declaration (ECF No. 419 ¶¶ 42–45), the BNPP Defendants' counsel pursued lines of questioning for the purpose of developing the record and clarifying contradictory or unclear testimony from Plaintiffs. (*See, e.g.*, Ex. 37 (John Doe Dep. Tr.) at 67:10–70:24 (questioning about inconsistency between deposition testimony and immigration records); Ex. 27 (Abbo Ahmed Abakar Dep. Tr.) at 109:14–110:9 (same); Ex. 36 (Jane Doe Dep. Tr.) at 151:24–153:3; 155:3–156:4 (questioning about inconsistency in deposition testimony).) Plaintiffs' counsel's assertion that the BNPP Defendants' "tactics" are "reminiscent" of interrogations performed by the al-Bashir regime (ECF No. 419 ¶ 42–43), is outrageous, inappropriate, and wholly unfounded.

[12] In fact, Plaintiffs appear to recognize that each individual Plaintiff's ability to credibly identify his or her attacker is central to their claims by their attempt to use proposed expert testimony to bolster Plaintiffs' credibility (*see* Ex. 72 (Jok Report) ¶ 114) — a plainly impermissible use of expert testimony, *see United States* v. *Cruz*, 981 F.2d 649, 662–63 (2d Cir. 1992).

individuals who claimed they were injured by GOS forces limited to those oil fields during a five-year period. 226 F.R.D. at 457–58. But the Court recognized that "warfare persisted through much of the Class Period between shifting, protean factions of rival rebel groups based loosely on tribal affiliations," and that would pose individualized questions as to whether each class member was actually harmed by the GOS. *Id.* at 482.

The court in *In re Motors* tracked *Talisman*'s reasoning closely in finding that a proposed class of individuals injured by the apartheid system in South Africa had failed to establish predominance. 447 B.R. at 159. The plaintiffs in that case brought claims against General Motors for allegedly aiding and abetting the apartheid system by selling armored vehicles to the government and maintaining apartheid policies in its workplace. *Id.* In declining to certify a class, the court reasoned that although "hundreds of thousands or millions of individuals were injured, in many cases grievously, by the apartheid system as a whole, or by specific means by which it was implemented, their rights to recover against [General Motors] for such injuries would depend not just on their individual damages . . . but also on the numerous combinations of injury involved, action causing it, assistance of that action, and purpose on the part of [General Motors] personnel to facilitate the commission of the primary violations of international law and resulting injury on which the aiding and abetting claims would be based." *Id.* at 160–61.

Similarly, in *In re Chiquita Brands International Inc. Alien Tort Statute & Shareholders Derivative Litigation*, 331 F.R.D. 675 (S.D. Fla. 2019), the court declined to certify a proposed class of victims of a Colombian terrorist organization (the "AUC") who brought claims against Chiquita Brands, which had pled guilty in U.S. court to paying bribes to the AUC. *Id.* at 677–78. The court found that individual issues predominated over common issues because for each class member, it would have to be determined whether "the AUC was involved in each crime, and if so, whether a sufficiently significant financial tie existed between the AUC operative and Defendant

Chiquita to satisfy proximate cause requirements." *Id.* at 686. The court also pointed out that "Plaintiffs [did] not describe how they would confront their burden of showing causation in a class action trial, and this is no small obstacle where they propose a class defined by a multiplicity of events spanning a nine-year period of time and two large geographic regions. No one set of operative facts will establish liability where the identity of the principal perpetrator of each underlying attack [is] in dispute." *Id.* 687. So too here. Resolving this question of who caused each alleged injury and whether the injury is causally connected to any conduct by the BNPP Defendants cannot be resolved without individualized, claim-specific proof.

In their effort to distinguish *Talisman*, Plaintiffs mischaracterize the nature of the allegations and the *Talisman* court's reasoning for rejecting certification. Plaintiffs assert that because Talisman only contributed "$195 million" in "oil-producing royalties" to the GOS, there is "no comparison in kind or in scale" between Talisman's and the BNPP Defendants' alleged causal contributions. (Mot. at 96.) But in *Talisman*, the Canadian oil company was actually *on the ground* in Sudan, and the plaintiffs had alleged it was actively collaborating with Sudanese military forces to coordinate and fund military operations in the region. 226 F.R.D. at 463–64. Indeed, the alleged connection between Talisman's contributions to the alleged human rights abuses by the GOS military was far clearer than the attenuated connection alleged here between the BNPP Defendants' financial services and the human rights abuses committed throughout Sudan. The fundamental problem identified by the Court in *Talisman* (of several) was that the plaintiffs could not prove that "each attack was caused by the Government or Government-affiliated military forces." *Id.* at 482. That problem will only be exacerbated here when expanded across the entirety of Sudan and stretched over 14 years.[13]

[13] Plaintiffs also attempt to distinguish *Talisman* on the basis that it involved multiple claims, while here there is "just one cause of action." (Mot. at 96.) As an initial matter, Plaintiffs are

Attribution of Conduct. Even assuming that each class member could adequately identify the individuals who allegedly harmed them, each claimant will also need to demonstrate that those individuals' actions were attributable to the GOS under applicable law. Plaintiffs are seeking to bring claims against the BNPP Defendants based on alleged harms committed by various militia groups that Plaintiffs claim were acting as "agents" of the GOS. (Mot. at 3–4.) Plaintiffs will accordingly need to prove that the conduct of each of these militia groups can be properly attributed to the GOS under applicable agency law across a 14-year period.

Plaintiffs cast this as a "common" question that can be proven with generalized, class-wide proof (Mot. at 79), but misleadingly oversimplify the inquiries that this issue will entail. Expert testimony provided by both parties has demonstrated that the various militia groups and other actors participating in armed conflicts in Sudan between 1997 and 2011 were far from monolithic. (*See, e.g.*, Ex. 58 (Carisch Report) ¶¶ 32–36 (describing shifting allegiances among Janjaweed militia groups); Ex. 68 (Hudson Report) ¶ 92 ("Each of these respective security forces had their own semi-formalized alliances with local irregular forces for the purposes of both understanding the complex local tribal forces across Darfur and for carrying out crimes of opportunism that involved as much score-settling by local militia forces as it did rebellion crushing by the central Government.").)

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relying on a misleading comparison of Swiss and American legal regimes. Swiss tort law is a civil system, and the cause of action for private torts is provided by statute — Art. 41 SCO. Thus, while Swiss courts do not recognize separate "causes of action" for each type of tort, such as battery, or assault, or wrongful death, tort claims under Art. 41 SCO can and do vary considerably and will entail the same level of complexity as if each claim were asserted as a separate cause of action under the American common law system. But regardless, it is unclear why the number of causes of action would be a basis to distinguish *Talisman*'s fundamental conclusion that a class based on alleged human rights abuses committed against civilians by the GOS cannot meet Rule 23's requirements, and Plaintiffs offer no explanation. Plaintiffs also note that "Talisman was not criminally charged and convicted" (*id.*), but again, Plaintiffs provide no explanation for why that distinction is meaningful here, nor can they.

Plaintiffs also insist on treating the "Janjaweed" as a singular arm of the GOS throughout the proposed class period, yet their own proposed expert testified that the alleged government coordination with militia groups that became known as the Janjaweed did not begin until 2003 — nearly six years into the proposed class period. (Ex. 56 (Baldo Dep. Tr.) at 103:6–18.) And further complicating the inquiry, Plaintiffs' own proposed experts also testified that various militia groups "switched allegiance[s]" over the course of the proposed class period. (Ex. 70 (Hudson Dep. Tr.) at 108:15–17; *see also* Ex. 56 (Baldo Dep. Tr.) at 111:23–112:2; Ex. 59 (Elbagir Decl.) ¶¶ 39, 54, 62 (describing defection of militia units to oppose the GOS); Ex. 94 (Verhoeven Reply) at 37 (explaining that various Janjaweed tribal leaders rebelled against the Government of Sudan in 2007 and 2009).) The relevant inquiry thus will not simply be whether "the Janjaweed" is an agent of the GOS; it will depend on the timing of the specific alleged attack, the identity of the alleged militia group that carried it out, and the status of that militia at that particular time.[14]

2. Individualized questions will predominate the causation requirement.

Plaintiffs further fail to demonstrate that the critical element of causation — *i.e.*, that the BNPP Defendants' conduct was a legally sufficient cause of each of the alleged injuries suffered by each putative class member — can be established through class-wide proof. Plaintiffs must

[14] Plaintiffs do not even clarify in their Motion which militia groups they intend to show are agents of the GOS, naming only "Janjaweed" and "SPLA co-opted factions of Riek Machar and Kerubino Bol," while also referring to other unspecified "auxiliary tribal militias." (Mot. at 79.) Only further complicating this question, Plaintiffs confuse the issues by inconsistently defining "the Janjaweed." (*See, e.g.*, Ex. 40 (Kashef Dep. Tr.) at 133:16–134:2, 134:13–15 (testifying that she uses the term "Janjaweed" to refer to the military and the police).) And several putative class members in the related *Sherf* action allege that they suffered human rights abuses at the hands of the "Janjaweed" between 1997 and 2002 (*see, e.g.*, Compl. (ECF No. 1) ¶¶ 72, 84, 86, 95, 101–03, 105, 108, 112–13, 117, *Sherf* v. *BNP Paribas S.A.*, No. 1:23-cv-04986 (S.D.N.Y.) ("*Sherf* Compl.")), despite Plaintiffs' proposed experts asserting that the GOS did not coordinate with "Janjaweed" militia groups until *after* Darfur rebel groups attacked a military airfield in Al-Fashir, Darfur, in April 2003 (*see, e.g.*, Ex. 55 (Baldo Reply) at ¶ 54).

prove that the BNPP Defendants' conduct was both the natural (*i.e.*, but-for) and adequate (*i.e.*, proximate) cause of each of their alleged harms. (*See* Ex. 98 (Müller Report) ¶ 137); *Kashef IV*, 2021 WL 603290, at *6–7.)

Plaintiffs list a number of "common" questions that purportedly can be addressed through generalized expert testimony. (*See* Mot. at 80–81 (*e.g.*, whether the BNPP Defendants' conduct supported the GOS's "genocidal campaign of persecution" or whether it was "foreseeable" that BNPP's violation of U.S. sanctions "would facilitate the protraction of [the] genocide").) But once again, Plaintiffs approach this element entirely in the abstract, divorced from their and the putative class members' actual claims. Plaintiffs must establish that the BNPP Defendants' conduct was a natural and adequate cause of *their injuries* — not, as Plaintiffs appear to insist, that the BNPP Defendants' conduct contributed to at least some harms somewhere in Sudan against some unknown person during the proposed class period (if Plaintiffs are able to prove even that). *See Talisman*, 226 F.R.D. at 474–75 (holding that "individual causation issues [cannot be] reserved for separate, later treatment"). And Plaintiffs have offered no basis for doing so without conducting individualized inquiries into the circumstances that resulted in each claimed injury.

Natural Causation. This Court previously stated that 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 IV*, 2021 WL 603290, at *6; (*see also* Ex. 98 (Müller Report) ¶ 137 (natural causal link exists "between an event and a result if, without the event, the result would not have occurred")). Plaintiffs make no distinction between natural and adequate causation in their Motion, and claim that "causation" can be proven generally with "the same expert and documentary evidence." (Mot. at 94.) But none of the purported expert testimony and documentary evidence that Plaintiffs offer can adequately establish natural causation here for every single injury suffered by every *Plaintiff*, let alone each putative class member. Tellingly,

their Motion does not even mention the actual injuries and human rights abuses that each of the 19 named Plaintiffs allegedly suffered while living in Sudan (*see id.* at 94–96).

To take just a few comparative examples of the individualized questions that predominate on natural causation, Plaintiff Halima Samuel Khalifa claims that she was attacked in her home in South Darfur in 1998 and in Khartoum in 1999[15] (*see* TAC ¶ 49), while Plaintiff Entesar Osman Kashef alleges that her village in Darfur was attacked by the Janjaweed in 2008 (*id.* ¶ 30). Plaintiffs have alleged that they were harmed by armed militia groups in various parts of Sudan, the GOS military, police officers, and plainclothes persons who they believe were associated with the GOS. (*See, e.g.*, Ex. 6 (Abbo Ahmed Abakar R&Os to Defs.' 1st Rogs) at 3; Ex. 14 (Judy Roe R&Os to Defs.' 1st Rogs) at 3; Ex. 40 (Kashef Dep. Tr.) at 120:20–22); Ex. 37 (John Doe Dep. Tr.) at 85:22–86:9.) Their injuries range from incidents involving crude weapons like ropes and rubber hosing, and incidents that involved no weapons at all, to alleged attacks on villages involving automatic weapons. (*See, e.g.*, Ex. 3 (Abdalla R&Os to Defs.' 1st Rogs) at 3; Ex. 4 (Ulau R&Os to Defs.' 1st Rogs) at 3; Ex. 5 (Tingloth R&Os to Defs.' 1st Rogs) at 3.) As explained in the contemporaneously filed motion for summary judgment, Plaintiffs have not adduced sufficient evidence to establish a but-for causal link between the BNPP Defendants' conduct and *any* of these alleged attacks and incidents. (Mem. ISO Mot. for Summary Judgment at 38–45.) Nor have Plaintiffs explained how any of the proffered documentary evidence or expert testimony can establish on a *class-wide basis* that each of the many disparate individual injuries suffered by each putative class member would "not have occurred at the same time or in the same way or

[15] At this time BNPP did not even *exist*. Any Sudan-related financial transactions were carried out by predecessor entities to BNPP Suisse, the Swiss subsidiary of BNPP that did the vast majority of the transactions that violated U.S. sanctions and is not even a defendant in this case.

magnitude" absent the financial transactions allegedly processed by the BNPP Defendants and involving Sudanese entities. *Kashef IV*, 2021 WL 603290, at *6.

For example, the BNPP Defendants have put forth expert testimony demonstrating that certain weapons used by the GOS military and described in Plaintiffs' allegations were legacy weapons acquired prior to the proposed class period, were provided by foreign states, or could have been acquired using means other than Sudan's currency reserves. (*See* Ex. 58 (Carisch Report) ¶¶ 235–291; *see also id.* ¶ 18 ("[W]eapons were acquired through state-to-state transfers, cash payments, bartering, and other types of non-traditional transactions that would not have required access to USD through BNPP."); *id.* ¶ 281 ("[The] GoS had at its disposal a significant stock of arms, ammunitions, and dual-use goods that required no financial services to acquire because GoS had them stockpiled from pre-embargo times, seized them as battlefield seizures from defeated rebel units, or bought them in cash acquisitions on the open markets.").) Similarly, the BNPP Defendants' expert evidence explains that the GOS obtained the allegiance of certain militia groups without using financial incentives at all. (*See, e.g.*, *id.* ¶¶ 33–34.) These questions cannot be resolved without determining the specific perpetrators and means involved for each alleged human rights abuse.

In an effort to overcome this insurmountable hurdle, Plaintiffs incorrectly claim that the Court "has already held" that BNP Paribas's alleged "pervasive complicity . . . would establish that 'funds accessed by Sudan through the BNPP Defendants' financial services were actually used for the attacks that injured plaintiffs.'" (Mot. at 95.) But the Court never stated that a causal connection could be established uniformly for the entire class. The Court's but-for causation analysis also focused on the BNPP Defendants' alleged "core" role in the "oil-genocide nexus." *Kashef IV*, 2021 WL 603290, at *6. The role of transactions processed by the BNPP Defendants in injuries to Plaintiffs and the connection between any Plaintiff's injuries to oil necessarily turn

on whether each individual Plaintiff and class member can allege, based on their specific circumstances, a but-for causal connection. *Id.*; (*see also* Mem. ISO Mot. for Summary Judgment at 38–45).

Plaintiffs may argue that they have provided sufficient common evidence to prove that the BNPP Defendants' conduct was a but-for cause of *every* human rights abuse committed by the GOS during the proposed 14-year class period. But as the Court in *Talisman* explained, regardless of whether Plaintiffs can actually prove such a remarkable assertion on the merits, the Rule 23(b)(3) inquiry does not permit a court to "ignor[e] the existence of defenses" when determining whether individualized contested issues will predominate over contested issues susceptible to generalized, class-wide proof. 226 F.R.D. at 483–84. And because the predominance inquiry requires an identification of the "subjects that will be contested at trial and evaluating each party's burden of proof on the elements of its cause of action or defense," "[P]laintiffs cannot hide behind their allegations in order to avoid an issue that will play a central role in [the BNPP Defendants'] defense." *Id.* at 484.

Adequate Causation. Determining adequate causation presents even more challenges for Plaintiffs. The Court previously stated that "[a]n adequate causal link exists when the wrongdoer's conduct was capable, in the ordinary course of events and common experience, of leading to the kind of result that occurred." *Kashef IV*, 2021 WL 603290, at *7. "[L]ike proximate cause, the requirement of adequate cause works as a limit on legal liability in an otherwise infinite chain of but-for causal effects." *Id*. Adequate cause requires an assessment of whether the acts of the BNPP Defendants can be "reasonably considered to *have directly resulted* in at least some of the harm done to Plaintiffs." *Id.* at *8 (emphasis added). Each putative class member will thus need to prove that the BNPP Defendants' "conduct was, according to the ordinary course of events and the general experience of life, sufficiently closely connected to the damage or loss that he or she

has suffered." (Ex. 99 (Müller Report) ¶ 139.) This remains true even accepting Plaintiffs' contention that the immigration status of putative class members suffices to establish "forced displacement" attributable to the GOS (*see* Mot. at 98), because even Plaintiffs do not suggest that this "proof of attribution" to the *GOS* speaks to whether the *BNPP Defendants'* conduct was an adequate cause of such forced displacement.

An examination of Plaintiffs' actual allegations illustrates how this assessment will vary for each putative class member. For example, one Plaintiff has alleged that his village in Darfur was attacked by the GOS military using sophisticated military aircraft. (*See* Ex. 27 (Abbo Abakar Tr.) at 94:10–99:23.) Another Plaintiff has alleged that the business he ran with his father in Sudan's capital city of Khartoum was confiscated by the Sudanese military. (Ex. 41 (Lukudu Tr.) at 136:3–137:1.) Another Plaintiff alleges that he was detained in Khartoum by "security personnel and physically beaten with crude weapons, including "plastic hoses." (Ex. 51 (Ulau Dep. Tr.) at 54:23–60:9; 63:12–65:17.)

Whether the claimed injury was "sufficiently closely connected" to the financial transactions Defendant BNP Paribas processed involving Sudanese entities is a question that the BNPP Defendants are entitled to adjudicate based on the facts of each Plaintiff's particular injury and the purportedly relevant foreign exchange or trade finance transactions. The analysis will necessarily differ for an attack in 1997 in a civil war conflict region as opposed to the actions of police officers or security forces abusing individuals in Khartoum in the mid-2000s, and the same is true with respect to instances of rape, sexual assault, and HIV infection. Determining whether it would be "reasonable" to hold the BNPP Defendants liable unavoidably requires independent analyses based on the specific nature of the claim.

As with but-for causation, the Court's prior opinion recognized the context-specific inquiry that adequate causation requires. The Court explained that, as is sufficient at the motion to dismiss

stage, Plaintiffs had plausibly alleged that it would be reasonable to hold the BNPP Defendants liable "for causing *at least some* of [the] human rights abuses in Sudan" — not *all*. *Kashef IV*, 2021 WL 603290, at *7–8 (emphasis added). The Court went on to explain that a "key part of the cycle alleged by Plaintiffs" was the allegation that the al-Bashir regime was using funds purportedly processed by the BNPP Defendants "to seize and develop oil rich lands," and specifically targeting "inhabitants of those regions." *Id.* at *8. But the Court cannot assess this theory of adequate causation without examining the particular circumstances of each putative class member, including where they allege they were harmed, when, and why. Notably, not a single named Plaintiff testified that he or she was injured in connection with any oil-clearing activity, and none of the named Plaintiffs even allege that they were injured in an area that was targeted for oil exploitation.[16]

Plaintiffs try to manufacture some unifying principle by indiscriminately referring to every action of the GOS during the class period as part of a single, uniform "genocidal campaign." (*See, e.g.*, Mot. at 94; *id.* at 21 (describing an alleged "genocidal campaign against Black Africans and a violent, paranoid purge of perceived dissidents")). But Plaintiffs provide no support for this oversimplified theory, nor can they. Nothing in the record supports the claim that there was a uniform "genocidal campaign" "between 1997 and 2011" in Sudan. *Id.* at 35, 94. And Plaintiffs

[16] Plaintiffs themselves appear implicitly to recognize the individualized assessment that adequate causation requires here, seizing on particular details in the documentary record that Plaintiffs claim reveal causal links between the specific transactions at issue and actions taken by the GOS military. (*See, e.g.*, Mot. at 28–30 (speculating that a credit facility to purchase civil airport infrastructure could be linked to the military because bombs could be transported to aircrafts "using ordinary airport luggage trolleys"); *id.* at 31 (speculating that a credit facility issued in favor of Renault could have covered the import of vehicles used by the Sudanese military).) Setting aside that Plaintiffs' assertions are wholly speculative and lack support in the record, even these purported theories for establishing causation will depend on the particular circumstances of each alleged incident or attack — *e.g.*, did the attack involve a Renault truck, or an aircraft deploying explosives?

are eliding the GOS's involvement in numerous different conflicts and efforts over that time period. Plaintiffs' purported "campaign" includes the development of oil fields in the south in the late 1990s (*supra* at 4–5; *see also* Mem. ISO Motion for Summary Judgment at 14–17), the continued fighting of and intermittent peace efforts in the Second Civil War (*supra* at 4–5), continued tribal and ethnic conflict in Darfur during the mid-2000s (*supra* at 7–9), and the al-Bashir regime's purported treatment of "dissidents" (Mot. at 21). Plaintiffs' claim that a common question exists as to whether the GOS employed a "campaign of genocide" and that the BNPP Defendants were adequate causes of that "campaign" thus is not even a class-wide question, let alone a basis on which to certify an entire class.

In *Talisman*, the plaintiffs employed an analogous strategy to circumvent individualized issues, claiming that "the Government of Sudan was engaged in a campaign of genocide and crimes against humanity targeting non-Muslim, African Sudanese" in the narrowly defined "Class Area." 226 F.R.D. at 482. The Court correctly rejected certification, because even assuming that the *Talisman* plaintiffs could adequately establish that such a campaign existed, the plaintiffs could not show "with respect to each individual class member that the injuries for which they are claiming damages were actually caused by the Campaign" using general, class-wide proof. *Id*. Plaintiffs here are employing an even more ambitious version of this unsuccessful strategy, defining the purported "campaign" so broadly as to try to eliminate the need to prove causation because such a campaign encompasses every possible human rights abuse carried out by the GOS during the proposed 14-year class period. But Plaintiffs provide no support for establishing that such a clearly defined and uniform campaign existed. And even then, individualized determinations would *still* need to be made to determine whether an individual was in fact harmed by the GOS or its agents, among others. (*See supra* at 18–25.)

For these reasons, Plaintiffs' reliance on cases in which the court certified classes encompassing individuals "aggrieved by a single policy of the defendants" is misplaced. (*See* Mot. at 94.) In each of those cases, the alleged "policy" in question was clearly defined and uniform in application, and it was easily proven (or undisputed) that a putative class member was in fact subject to the policy in question. In *Brown* v. *Kelly*, 609 F.3d 467 (2d Cir. 2010), the proposed class consisted of individuals who were arrested, summonsed, or prosecuted by New York City under a specific provision of New York law that was deemed unconstitutional. *Id.* at 483–84. In *In re Nassau County Strip Search Cases*, 461 F.3d 219 (2d Cir. 2006), the proposed class comprised individuals who were subject to Nassau County's "blanket" written policy of strip searching all newly admitted misdemeanor detainees, which the defendants conceded had been in place, and the defendants even possessed records of "all the newly-admitted misdemeanor detainees strip searched pursuant to the blanket policy." *Id.* at 224, 228–29. As discussed in more detail below, *Menocal* v. *GEO Group, Inc.*, 882 F.3d 905 (10th Cir. 2018), similarly involved a uniform policy — in that case a *written* policy — subjecting individuals in immigration detention centers to punishment if they refused work requests, and there was no dispute over who was subjected to that policy. *See id.* at 920. Here, by contrast, Plaintiffs cannot even precisely define the purported "policy," let alone establish with class-wide proof who was subjected to it.[17]

[17] Although individualized questions overwhelmingly dominate issues of liability, and that alone is sufficient to defeat certification under Rule 23, the complicated, individualized nature of these proceedings only worsens when one takes into account Plaintiffs' claimed damages. *First*, Plaintiffs have not offered *any* class-wide methodology for establishing economic damages. The only evidence in the record concerning lost property or lost wages is each Plaintiff's own testimony recalling with rough approximation what he or she owned or earned in Sudan, an exercise that Plaintiffs appear to suggest be repeated for all 25,000 putative class members. And even then, as explained in the BNPP Defendants' motion for summary judgment filed contemporaneously herewith (at 66–68), such testimonial approximation is insufficient. *Second*, the one purported methodology that Plaintiffs do put forth to assess Plaintiffs' claimed medical injuries is not only inherently flawed and inadmissible because the methodology deviates from well-established best practices for forensic diagnostics and relies on inappropriate assessments of credibility (*see* Ex. 87

B. Plaintiffs Cannot Satisfy Predominance by Manufacturing a Claim of "Forced Displacement."

In an attempt to sidestep (or distract from) the numerous individualized inquiries that will dominate resolution of Plaintiffs' various claims, Plaintiffs are now contending that every member of the proposed class suffered the injury of "forced displacement," which they style as a discrete "moral harm" and "injury to human dignity," and which they claim is suffered on a class-wide basis because every putative class member left Sudan and now lives in the United States. (Mot. at 104–05.) Plaintiffs' forced displacement theory does not and cannot create a common, class-wide question for at least two reasons. *First*, a class member's immigration status, Plaintiffs' *only* proposed basis for proving this claimed injury, does not provide class-wide proof of "forced displacement" by the GOS or its agents. *Second*, Plaintiffs' assertion that "forced displacement" is a common, viable claim held by every putative class member has no basis in Swiss law, the substantive law applicable to their claims.

1. Plaintiffs' assertion that a class-wide tort of "forced displacement" can be adequately proven using immigration records mischaracterizes U.S. immigration law and relies on flawed expert testimony.

Relying exclusively on the report and testimony of their proposed immigration expert, Prakash Khatri,[18] Plaintiffs argue that the mere fact that a member of the proposed class has been

(Morgan Report) ¶ 12), but it also is a subjective analysis that cannot function as a class-wide model. Indeed, Plaintiffs' own proposed medical expert admitted that he had no basis to determine whether the harms purportedly evident in the examined named Plaintiffs were representative of the wider class. (Ex. 92 (Rosenfeld Tr.) at 21:7–14.) And even then, Plaintiffs *still* provide no methodology for determining the appropriate amount of damages associated with any particular physical or mental injury.

[18] As the BNPP Defendants' explain in their accompanying motion to exclude, the inconsistencies and methodological flaws in Mr. Khatri's analyses, including several described herein, also render Mr. Khatri's opinions unreliable such that they are inadmissible under Federal Rule of Evidence 702. To be clear, regardless of the fact that Plaintiffs have not met their burden to show that Mr. Khatri's proffered testimony is even admissible, his opinions are fundamentally flawed and cannot provide generalized, class-wide proof for the reasons explained. But the

determined to satisfy the statutory definition of "refugee" under U.S. law suffices to establish that such individual was "forcibly displaced," and further that such "forced displacement" is attributable to the GOS or its agents.[19] (Mot. at 97–98.) In other words, Plaintiffs contend that a putative class member's U.S. immigration status *alone* — and nothing else — permits the Court to infer both a class-wide injury of "forced displacement" and that this purported injury was caused by the GOS or its agents. But this inference distorts applicable immigration law and procedure and is belied by the record.[20]

a) Plaintiffs and their proposed expert mischaracterize U.S. immigration law.

Plaintiffs' argument that forced displacement is "in the very definition of a refugee" (Mot. at 97) misstates U.S. immigration law. Whether an individual has been "forcibly displaced" is not a criterion that is considered in adjudicating refugee or asylum claims. (Ex. 96 (Yale-Loehr Report) ¶ 29.) The statutory definition of "refugee" found within the Immigration and Nationality Act ("INA") requires only that an individual be "outside any country of such person's nationality" and "unable or unwilling to return to . . . that country" on the basis of past persecution or a well-founded fear of persecution. 8 U.S.C. §1101(a)(42). This definition addresses whether the

inadmissibility of Mr. Khatri's proposed testimony is an independent basis to deny Plaintiffs' Motion, which relies almost exclusively on Mr. Khatri's proposed expert testimony to try to satisfy their burden under Rule 23.

[19] The requirement that an individual satisfies the statutory definition of "refugee" under U.S. law applies to both refugee and asylum applicants. (Ex. 75 (Khatri Report) at 4.)

[20] Plaintiffs also choose to ignore that their proposed class definition does not even require that the class member was initially admitted to the United States as a refugee or asylee, and includes U.S. citizens and legal permanent residents (LPRs) who allegedly suffered human rights abuses in Sudan or South Sudan during the proposed class period. (Mot. at 3–4.) For those individuals, Plaintiffs offer no class-wide proof at all.

individual can return to his or her country of origin, but the U.S. government makes no finding as to the fact-specific circumstances of that individual's *departure* from that country.

In other words, there is no presumption that the reasons animating an individual's decision to leave his or her country of nationality in the first instance — a decision that may, in certain circumstances, be voluntary and independent of any alleged harm — has any bearing on a later finding by the U.S. government that he or she is "unable or unwilling to return" to that country under the INA.

Indeed, U.S. immigration law and regulations contemplate a wide breadth of circumstances where an individual can qualify as a "refugee" under the INA without having been "forcibly displaced." And Plaintiffs' own proposed immigration expert, Mr. Khatri, readily admits this. For example, he opines in his report that "[m]ost" of the Sudanese nationals who received a grant of asylum during the proposed class period came to the United States either on temporary B-1 or B-2 visitor visas or student visas. (Ex. 75 (Khatri Report) at 18.) Those individuals with temporary visitor or student visas were "[o]bviously" not "forcibly displaced" when they left Sudan, as Mr. Khatri conceded at his deposition. (Ex. 77 (Khatri Dep. Tr.) at 108:22-109:21.) Likewise, the asylum regulations in effect during the proposed class period (Ex. 78 (Khatri Dep. Ex. 9 (62 Fed. Reg. 10312)); Ex. 79 (Khatri Dep. Ex. 10 (65 Fed. Reg. 76121))) permitted a Sudanese national to make a claim of asylum by establishing not that they themselves suffered past persecution by the Government of Sudan or its agents, but rather a "pattern or practice" of persecution of other "similarly situated" persons, without the need for the individual to show that he or she was "singled out individually" for and in fact suffered persecution, and without any specific finding as to how or why that individual left Sudan to come to the United States. (*See* 77 (Khatri Dep. Tr.) at 218:17–221:6.) More generally, it is well settled that refugee or asylum claims based on a well-founded fear of *future* persecution, as opposed to past persecution, can be successful even when the

probability of future persecution is as little as ten percent. *See INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 431, 440 (1987). Simply stated, it is erroneous to conclude that an individual's immigration status means that he or she has been "forcibly displaced" because the law does not require such a finding.

b) Plaintiffs' reliance on U.S. immigration status is inapplicable to "derivative" refugees and asylees.

The U.S. government has made no determination as to whether spouses and children of the principal applicant who are admitted as "derivative" refugees and asylees, and who likely comprise a majority of the proposed class, independently satisfy the definition of a "refugee" under U.S. law. (Ex. 96 (Yale-Loehr Report) ¶ 63.) Defendants' expert calculates, and Plaintiffs' proposed expert appears to endorse, a general estimate that "derivative" refugees comprise approximately 60% of the proposed class. (*Id.*; Ex. 76 (Khatri Reply Report) at 15.) By law, "derivative" spouses and children of principal refugees and asylees are not required to establish a claim that would qualify them independently as a refugee or asylee and instead are granted derivative status solely on the basis of the government's adjudication of the principal applicant's refugee or asylum status. (Ex. 96 (Yale-Loehr Report) at ¶ 60.) Plaintiffs' blanket assertion that "derivative" refugees "have been forcibly displaced as a family unit" (Mot. at 97) thus oversimplifies the highly individualized circumstances of immigrant families.

Discovery taken from Plaintiff Abulgasim Abdalla and Plaintiff Entesar Kashef, for example, establishes that individuals admitted to the United States as "derivative" refugees during the proposed class period include children born outside of Sudan who immigrated with their principal applicant parents. (Ex. 30 (Abdalla Dep. Tr.) at 26:16–22; Ex. 25 (Abdalla Immigration Records) at PLA-001839; Ex. 40 (Kashef Dep. Tr.) at 43:24–25; Ex. 26 (Kashef Immigration Records) at PLA-001313–16.) Similarly, during Plaintiff Nicolas Hakim Lukudu's deposition,

Mr. Lukudu explained that he was denied refugee status during an initial interview with the United Nations (Ex. 41 (Lukudu Dep. Tr.) at 58:21–59:2), and that he was only later admitted to the United States as a "derivative" refugee on his second wife's application (*id.* at 60:21–61:8). Mr. Lukudu further testified that he had met and married his second wife while they were both living in Egypt, and that he freely traveled between Sudan and Egypt to run his business in the years leading up to his departure for the United States upon the approval of his second wife's application. (*See id.* at 99:3–100:13.) Mr. Lukudu's status as a "derivative" refugee thus has nothing to do with his reasons for leaving Sudan, nor does it establish that he was "forcibly displaced" from Sudan (he was not).

These examples illustrate why Plaintiffs' exclusive reliance on immigration status cannot support an inference of "forced displacement" on a class-wide basis.[21] Plaintiffs have no basis to claim that every individual admitted as a "derivative" refugee during the proposed class period can independently satisfy the legal definition of a "refugee" under U.S. law or was "forcibly displaced."

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[21] The related actions recently filed in this Court by Plaintiffs' counsel on behalf of a number of purported absent members of the putative class and other individuals, *Sherf* v. *BNP Paribas S.A.*, No. 1:23-cv-04986 (S.D.N.Y.), and *Ring* v. *BNP Paribas S.A.*, No. 1:23-cv-05552 (S.D.N.Y.), only serve to underscore the need for this Court to undertake an individualized inquiry as to each putative class member into the specific circumstances and motivations giving rise to their departure from Sudan in order to determine whether they were "forcibly displaced." A number of the plaintiffs allege they were "forcibly displaced" from Sudan several years after their other injuries are alleged to have taken place. For example, in the *Sherf* action, Plaintiff Haleima Nasralden Abdelmawla Sherf alleges that she was "forcibly displaced" from Sudan 11 years after an alleged attack on her village; Plaintiff Adam Babker Ibrahim alleges that he was "forcibly displaced" seven years after his alleged detention; and Plaintiff Anwar Hamed Elnour alleges that he was "forcibly displaced" from Sudan two years after allegedly being detained and working in Khartoum during that period. *See Sherf* Compl. ¶¶ 29, 31, 38. Likewise, in the *Ring* action, Plaintiff Mohamed Omer Salih Hasabo alleges that he was "forcibly displaced" from Sudan six years after an alleged attack on his village; and Plaintiff Ibrahim Fadl Jumaa alleges that he was "forcibly displaced" from Sudan seven years after an alleged attack on his village. *See* Compl. (ECF No. 1) ¶¶ 47, 71, *Ring* v. *BNP Paribas S.A.*, No. 1:23-cv-05552 (S.D.N.Y.) ("*Ring* Compl.").

c) The immigration status of putative class members is not proof of attribution to the Government of Sudan or its purported agents.

Plaintiffs' conclusory argument that the fact of refugee or asylum status alone is "proof of attribution" to the Government of Sudan or its "agents" (Mot. at 98) completely ignores that U.S. immigration law permits applicants to bring refugee and asylum claims based on the conduct of non-governmental actors. As both Plaintiffs and their proposed immigration expert, Mr. Khatri, acknowledge, the United States permits refugee or asylum claims based on the conduct of actors that the government is "unwilling or unable" to control. (*See id.*; Ex. 75 (Khatri Report) at 6.) Neither Plaintiffs nor their proposed experts dispute that, during the entirety of the proposed class period, Sudanese nationals were subjected to violence and persecution at the hands of rebel groups and other actors unaffiliated with the Government of Sudan. (*See, e.g.*, Ex. 94 (Verhoeven Reply Report) at 44 ("[BNPP Defendants' expert] Mr. Yale-Loehr is correct that not *all* human rights [violations] on the territory of the Republic of Sudan between 1997 and 2009 were unequivocally and demonstrably committed by the Al-Ingaz regime and its security apparatus. No doubt some violations can be clearly identified as having been ordered or carried out by other, non-governmental actors not under regime control or influence."); Ex. 55 (Baldo Reply Report) ¶ 108 ("This is not to say that there were no incidents of rebels abusing civilians."); Ex. 69 (Hudson Reply Report) ¶¶ 135, 137 ("Rebel violations tended to be episodic and opportunistic, rather than systematic.").)

During this period, both the U.S. State Department and the United Nations recognized widespread incidences of violence in Sudan perpetrated by non-governmental actors. As explained by Defendants' immigration expert, the U.S. State Department documented pervasive violence by rebel groups and other non-governmental actors across Sudan, including extrajudicial killings, torture, gender-based violence, human trafficking, and the use of child soldiers. (*See, e.g.*, Ex. 96

(Yale-Loehr Report) ¶¶ 32–37.) Likewise, a 2000 United Nations report cited by one of Plaintiffs' proposed experts (*see* Ex. 93 (Verhoeven Report) at 21 n.64) acknowledges that the SPLA, a rebel group long embroiled in a rebellion against the GOS in Khartoum, behaved as an "occupying army" in regions of southern Sudan, sexually abused women, recruited child soldiers, and caused thousands to leave Sudan for refugee camps in neighboring countries. (*See* Ex. 139 *Situation of Human Rights in the Sudan*, No. A/55/374, U.N. Gen. Assembly (Sept. 11, 2000) ¶¶ 38–41.)[22]

Under the appropriate facts and circumstances, this non-governmental violence could have formed the basis of a valid refugee or asylum claim: As Plaintiffs' proposed immigration expert, Mr. Khatri, explained at his deposition, the United States did not foreclose claims for refugee or asylum status based on the conduct of non-governmental actors during this period. (*See* Ex. 77 (Khatri Dep. Tr.) at 90:1–14 ("And let me just clarify that piece because it's not just the Government of Sudan and its agents. It's also — it could also include individuals that the Government was unable or unwilling to protect the individual against. These are third parties that potentially — it's — *I guess in every scenario it's a little different*, but there are certain situations where there may be a non-governmental actor that the Government of Sudan is actively not willing to assist its citizens in protecting them against them and does nothing, and those — I mean, it's a definitional issue that a refugee officer would look at and ascertain.") (emphasis added).) Because the GOS did not have a monopoly on violence, the fact that an individual established a successful refugee or asylum claim *alone* says nothing about who was responsible for the conduct giving rise to that claim,[23] and Plaintiffs have no basis to argue that the GOS and its agents are necessarily

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[22] As discussed above (*see supra* at 24–25), shifting allegiances among various militant groups in Sudan will only further complicate the determination of whether each individual refugee asserted a credible fear of persecution based on conduct attributable to the GOS.

[23] Plaintiffs' proposed experts make varying, contradictory, and speculative claims about the scope of the GOS's responsibility for and complicity in the violence in Sudan during the proposed

responsible for the persecution or fear of persecution underlying the claims of *every* one of the 24,000 Sudanese refugees and asylees (not counting diversity visa applicants)[24] during the putative class period. (*See* Mot. at 100.)

Plaintiffs misleadingly claim that there was "an explicit U.S. government finding" that "92.8%" of individuals who fled Sudan and were admitted to the United States during the proposed class period "suffered or faced persecution at the hands of the [GOS] or its agents." (Mot. at 62–63.) To make this claim, Plaintiffs rely in part on the country-specific "priority processing" designations for refugee applicants, which are set annually by the U.S. President to determine which groups are granted *access* to *apply* to the U.S. refugee admissions program. But these

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class period. Without presenting any discernible, let alone reliable, methodology, certain of Plaintiffs' proposed experts embrace a boundless theory of liability, opining that the GOS is responsible for every act of violence that occurred during a 14-year period. (*See* Ex. 77 (Khatri Dep. Tr.) at 139:16–140:1) (explaining that he did not know "of non-government entities that the [GOS] did not consider their agents who — through whom a claim of persecution was granted to a Sudanese national"); *see also* Ex. 70 (Hudson Dep. Tr.) at 116:20–117:7 (rebel-on-rebel violence can be "attribute[d] to the [GOS]" because the GOS "created a system where mass atrocities were able to flourish").) In contrast, others gesture toward some limiting principle with respect to the complicity of the Government of Sudan in an effort to appear more credible. (*See, e.g.*, Ex. 95 (Verhoeven Dep. Tr.) at 377:8–381:10 (agreeing that "human rights violations [were] committed by different rebel movements in Sudan" between 1997 and 2011 but admitting that he "can't answer" how many more human rights abuses were committed by the GOS as compared to other groups).)

[24] Plaintiffs also assert that the proposed class comprises not only refugees and asylees in the United States, but also an unspecified number of Sudanese nationals who immigrated to the United States on "diversity" visas through the annual green card lottery designed to distribute immigrant visas to nationals of countries with historically low rates of immigration, without regard to whether those nationals experienced or feared persecution. (*See* Mot. at 75 & n.363, 101; Ex. 75 (Khatri Report) at 22–23.) Plaintiffs make no serious attempt to argue that they can avoid the need for an individualized inquiry into the circumstances of the departure from Sudan of the proposed class members who immigrated to the United States on diversity visas, all but conceding that even under their theory, the U.S. government has made no finding as to these individuals that would justify an inference of "forced displacement." (*See* Mot. at 101.) This alone dooms their arguments on forced displacement, since they concede that the immigration status of the approximately 7% of the proposed class members who received diversity visas cannot serve as "generalized, class-wide proof," *Tyson Foods*, 577 U.S. at 453, or justify an inference that they were forcibly displaced.

designations involve no "explicit findings" that any admitted refugee suffered persecution at the hands of the GOS or its agents. (*See* Ex. 75 (Khatri Report) at 7 ("These priorities provide *access* to [the U.S. refugee program] and are distinct from whether a person qualifies for refugee status through that process.").) And Mr. Khatri himself concedes that individuals permitted to apply for refugee resettlement under these "priority processing" designations still need to establish an individual claim of persecution or well-founded fear in order to satisfy the legal definition of a "refugee." (*Id.* at 7–8.) Likewise, the annual Presidential reports to Congress establishing the annual "priority processing" designations during the proposed class period often made no reference to "persecution" in Sudan at all. (*See* Exs. 81–82 (Khatri Dep. Ex. 11).)

Plaintiffs' baseless assertion that Defendants cannot "challenge the U.S. government's now-final determination" as to whether the majority, *but not all*, of the putative class members have satisfied the statutory definition of a "refugee" misses the point.[25] (Mot. at 101.) As explained, the fact that an individual was determined on a case-specific basis to have "satisfied the legal criteria for admission" to the United States (*id.*), by itself says nothing about why that individual left his or her country of nationality, or the actor or actors that formed the basis of his or her claim of persecution or well-founded fear of persecution. The approval of a refugee application cannot obviate the need for every member of the putative class to present admissible evidence of injury and causation on an individualized basis.

[25] Plaintiffs' principal support for this assertion is the Supreme Court's decision in *Trump* v. *Hawaii*, 138 S. Ct. 2392 (2018), which addressed whether an executive order regarding immigration restrictions was within the plenary power of the executive branch, *id.* at 2403, and has nothing to do with deference afforded to eligibility determinations for individual refugee and asylum claimants. Plaintiffs also cite *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976), which considered a due process challenge to a federal policy precluding non-citizens from the federal civil service and likewise does not address refugee or asylum eligibility determinations.

d) Plaintiffs have not shown that any "class-wide inference" is appropriate.

Plaintiffs concede that the immigration status of putative class members is, at most, mere "circumstantial evidence of causation." (Mot. at 100.) To be clear, this purported evidence is based on a misstatement of U.S. immigration law and procedure and an oversimplified narrative of the numerous discrete and overlapping conflicts in Sudan. Plaintiffs nevertheless insist that their "circumstantial evidence" should be enough to warrant certification based on the Tenth Circuit's decision in *Menocal*, 882 F.3d 905. *Id.* But *Menocal* only confirms the inappropriateness of this case for class treatment.

Menocal involved a proposed class of immigration detainees covered by a uniform, written policy issued by the defendant government contractor that "subject[ed] detainees who refused to perform . . . uncompensated work to discipline." 882 F.3d at 920. Relying on prior Tenth Circuit precedent with similar facts, the court explained that a reasonable jury could conclude from the "circumstantial evidence" that a class member received notice of the policy's terms and performed work when assigned and that the existence of the written policy and the threat of discipline was the reason that the class members chose to work — which was all plaintiffs needed to prove their claims. *Id.* at 919–20. And the defendant had already *conceded* that each class member received notice of the policy's terms, including the potential sanctions, and each detainee performed work when assigned. *Id.* at 920. The court explained because an individual could prove causation based solely on the existence of the policy, so too could each class member, and thus the written policy "provide[d] the 'glue' that [held] together the class" and that each class member "share[d] the relevant circumstantial evidence in common" such that causation "cannot be explained" in any other way. *Id.* at 920–21.

Here, in contrast, there is no similar "glue" that can "hold together" the highly disparate claims of each of the 25,000 members of the proposed class, and no "uniform piece of

circumstantial evidence" can *alone* support an inference of "forced displacement" attributable to the GOS or its agents. As discussed above (*supra* at 31–33) and in the BNPP Defendants' contemporaneously filed motion to summary judgment (at 44–45), and despite Plaintiffs' efforts to lump every action taken by the GOS over a 14-year period into a single "campaign," there is no single, uniform policy that led to putative class members leaving Sudan. The mere fact that a proposed class member has been admitted to the United States as a refugee or asylee, without more, does not address whether the individual was "forcibly displaced" at the time he or she left Sudan, or whether such individual was persecuted or feared persecution by the GOS, as opposed to a non-governmental actor. To establish those elements under Plaintiffs' own conception of their claim, the putative class members would need to provide individualized proof — whether through testimony or documentary evidence — of the circumstances of and reasons for their departure. And where, as here, Plaintiffs cannot rely on generalized, class-wide proof, "[t]he challenge of presenting that individualized proof on behalf of thousands of class members, even if it were logistically feasible, will quickly dominate the proof regarding the common issues." *Talisman*, 226 F.R.D. at 482–43.[26]

[26] As an afterthought, Plaintiffs suggest that any flaws with their exclusive reliance on immigration status to establish both the injury of "forced displacement" and causation can be resolved through the creation of subclasses pursuant to Fed. R. Civ. P. 23(c)(5). (*See* Mot. at 101 n.431 (suggesting that diversity visa applicants can be separated)). But the problems with relying on immigration status alone as proof of "forced displacement," let alone any of the other injuries Plaintiffs and other putative class members allege, exist regardless of whether those individuals were primary applicants, derivative applicants, or in the United States on diversity visas. Narrowing the proposed class to specific types of refugees and asylees would not solve those fundamental deficiencies.

2. Plaintiffs' purported "forced displacement" claim is not cognizable under Swiss law.

Plaintiffs' attempt to fashion a certifiable class based on purported "forced displacement" fails for the additional and independent reason that Plaintiffs' oversimplified conception of a tort of forced displacement is not cognizable under Swiss law. Plaintiffs base this new claim on the most recent submission of their proposed Swiss law expert, who asserts that "being forced to flee" due to alleged government persecution is a compensable tort under Swiss law. (Ex. 104 (Werro Reply) ¶ 69.) But Plaintiffs and their proposed Swiss law expert do not cite a *single* Swiss case to support this assertion, relying instead on a handful of entirely distinguishable cases from the European Court of Human Rights (ECtHR) involving formal government expulsion. (*Id.* ¶¶ 70–72.) To state a claim under Swiss law, Plaintiffs each must specifically allege that an act of the GOS violated an *established* right under Swiss law and the mere fact that an individual cannot or is unwilling to return home due to fear of or past persecution is not itself an established right. Plaintiffs are simply trying to place a unifying label on claims that are as varied and individualized as the remainder of their claims.

a) Plaintiffs' Swiss law expert mischaracterizes applicable international law.

Plaintiffs' proposed Swiss law expert, Franz Werro — who does not purport to be an expert on public international law or the European Convention on Human Rights — asserts that the ECtHR "has on many occasions awarded compensation to victims of displacement for non-pecuniary damage such as emotional suffering." (Ex. 104 (Werro Reply) ¶ 29.) But as Dr. Helen Keller, former judge on the ECtHR, explains, the "singular fact of 'forced displacement'" "does not suffice to prove a violation" under international law. (Ex. 97 (Keller Report) ¶ 27; *see also id.* ¶ 8.)

The purported "many occasions" cited by Plaintiffs' proposed expert are a handful of ECtHR expulsion cases relating to one state's occupation of another state's territory that resulted in certain persons being actively prevented from returning to their homes, and in which individuals were legally stripped of their property or were legally forbidden to return to their country of origin. (*See id.* ¶¶ 9–22.) The ECtHR in those cases recognized the state's liability for concrete actions that violated established rights, including the "liberty of movement" (*e.g.*, *Georgia* v. *Russia No.* 2 (finding unlawful Russia's administrative practice of refusing to permit Georgian nationals to return to their homes)) or the unlawful deprivation of property (*e.g.*, *Loizidou* v. *Turkey* (finding unlawful Turkey's attempt to strip Cypriot's legal ownership of property though a new constitutional document)). (*See* Ex. 97 (Keller Report) ¶¶ 13–15, 25.) But the ECtHR did not purport to establish liability for moral harm suffered by refugees who flee their country of origin as a result of persecution or fear of persecution. (*Id.* ¶ 22, 27.) While "'forced displacement' might coincide with concrete human rights violations, . . . the concrete actions or measures attributable to the authorities interfering with the right in question" must be determined for each Plaintiff based on his or her "individual circumstances." (*Id.* ¶¶ 26–27.)[27]

b) Swiss law does not recognize a blanket claim for "forced displacement" for any individual who left Sudan due to past or feared persecution by the government.

Plaintiffs' proposed theory of liability for "forced displacement" also finds no support in Swiss tort law. To be sure, Plaintiffs' Swiss law expert never offers any source under Swiss law

[27] Plaintiffs' invocation of international human rights law further misses the mark because international law does not provide for liability for private corporations, on a direct or secondary basis, for violations of established rights. As Dr. Keller explains, "corporations do not have a binding legal obligation to comply with international human rights standards" and "international law does not recognize the liability of corporations for complicity in [a] state's conduct." (Ex. 97 (Keller Report) ¶¶ 40–41.)

that would recognize Plaintiffs' claim for forced displacement based on their refugee status, relying entirely on ECtHR case law. Indeed, he admits that "the Swiss Federal Court has rarely dealt with cases of displacement, *if at all*," and never cites any. (Ex. 104 (Werro Reply) ¶ 69 (emphasis added).) But resorting to Swiss tort law would not save Plaintiffs' claims. As Professor Christoph Müller explains, Swiss law does not recognize a general, compensable claim for any loss resulting from "forced displacement" from one's country of origin due to persecution or fear of persecution by the state. (Ex. 99 (Müller Reply) ¶¶ 83–84.)

At a minimum, both experts agree that to state a claim under Swiss tort law, a primary tortfeasor must satisfy each of the four prerequisites for tort liability under Article 41 SCO: unlawfulness, fault, causation, and injury or loss. (Ex. 99 (Müller Reply) ¶¶ 11, 84–87; ECF No. 174 (Werro Report) ¶ 22.) As explained in further detail in the BNPP Defendants' contemporaneously filed motion for summary judgment (at 28–32), to establish unlawfulness, each Plaintiff must prove conduct by the GOS that "violated an absolute right protected by" Swiss law or a violation of a Swiss statutory provision of a sort that Swiss courts determine can give rise to tort liability. (Ex. 99 (Müller Reply) ¶ 88.) This is true regardless of whether the conduct by the GOS in question resulted in the Plaintiff deciding to leave Sudan or not. For example, an individual claiming a violation of her right to property would need to establish that she owned property and that the property in question was wrongfully taken from her due to conduct by the GOS. (*Id.* ¶ 89.) Similarly, an individual claiming a violation of her right to private and family life would need to establish that conduct by the GOS prevented her from returning to her "home" within the meaning of Swiss law, which requires an individualized assessment of the person's then-current circumstances. (*See id.* ¶ 89 & n.44.) But critically, unspecified "moral harm" from having to leave one's country of origin is *not* a compensable violation of an absolute right. (*Id.* ("Plaintiffs' statement in their Class Certification Motion at p. 104 that 'all class members have

suffered the common injury of forced displacement that entitles them to damages under Swiss law' for 'moral harm' is incorrect as a matter of Swiss law.").)

Furthermore, even where each Plaintiff or putative class member alleges that she suffered violations to her specific, established rights as a result of her decision to leave Sudan, the individual still needs to demonstrate that conduct by the GOS naturally and adequately caused those violations by forcing her to leave. That assessment requires each individual to "establish the concrete circumstances . . . in order to (objectively) establish that any reasonable person in the same circumstances would have had no other choice than to leave Sudan." (*Id.* ¶ 87.) For each Plaintiff and putative class member, the Court would thus need to conduct an individualized assessment of the particular circumstances that led to the individual's leaving, including whether the departure can reasonably be considered "forced" by the actions of the GOS or its agents and whether that forced departure led to an injury based on a recognized absolute right; an unwillingness to return due to fear of persecution by the state, without more, is simply not enough. (*Id.* ¶¶ 85–87) Thus, even assuming Plaintiffs could provide adequate class-wide proof that each putative class member had a well-founded fear that she will be subject to persecution if she returns to Sudan (which, for the reasons explained above, they cannot), that fact alone would not give rise to liability against the GOS under Art. 41 SCO, and Plaintiffs would need to establish that claim on an individualized basis for each potential class member.

At bottom, Plaintiffs' attempt to fashion a class based on a purportedly common claim under forced displacement theory stumbles at every turn. A class member's immigration status cannot serve as a proxy for proving "forced displacement" by the GOS or its agents, and Plaintiffs have presented no generalized, class-wide proof with which to establish that purported claim. Nor does the purportedly common claim of "forced displacement" as conceived of by Plaintiffs and their proposed Swiss law expert have any basis in Swiss law. Forced displacement is simply a

label that Plaintiffs seek to attach to their varying claims of alleged violations of established rights under Swiss law in order to feign uniformity.

* * *

Plaintiffs fail to carry their burden to demonstrate that common issues subject to class wide proof will predominate over individual issues. Plaintiffs' entire basis for certification rests on a fundamentally flawed application of U.S. immigration law and fabricated rights under Swiss law, and for that reason alone Plaintiffs' request for certification fails. But in their narrow focus on the concept of "forced displacement," Plaintiffs also ignore the majority of their actual claims. These claims each present fundamentally individualized questions that go to the heart of liability and *must* be resolved to adjudicate each of Plaintiffs' and the putative class member's claims. Plaintiffs provide no class-wide method for doing so, nor can they, and these core questions substantially outweigh any of the purportedly "common" legal and factual issues that Plaintiffs identify.

II. THE PROPOSED CLASS FAILS RULE 23(B)'S SUPERIORITY REQUIREMENT.

For largely the same reasons that Plaintiffs cannot establish that common questions predominate over individualized issues, Plaintiffs have not shown that the class action mechanism is "superior to other available methods for fairly and efficiently adjudicating the controversy" under Fed. R. Civ. P. 23(b)(3). "Given [Plaintiffs'] failure to establish predominance," their "failure to establish superiority largely follows." *Royal Park Invs. SA/NV* v. *Deutsche Bank Nat'l Tr. Co.*, 2018 WL 1750595, at *20 (S.D.N.Y. Apr. 11, 2018).

The "disjunctive inquiry" required under Rule 23(b)(3) requires a distinct "determination that class certification is the superior method for adjudicating [the] claims." *Sykes* v. *Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 82 (2d Cir. 2015). The text of the Rule instructs courts to consider various non-exhaustive factors as pertinent to the superiority inquiry, including "the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3)(D). Of the factors enumerated

in the Rule, "manageability 'is, by the far, the most critical concern in determining whether a class action is a superior means of adjudication.'" *Sykes*, 780 F.3d at 82. "[T]he determination of superiority must look to the evidence on the record and to the class that plaintiffs actually seek to certify." *Adkins* v. *Morgan Stanley*, 307 F.R.D. 119, 147 (S.D.N.Y. 2015). Courts also consider the administrative feasibility of determining class membership in the context of analyzing manageability. *See In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 299 F. Supp. 3d 430, 463 (S.D.N.Y. 2018).[28] Here, Plaintiffs' proposed class presents a number of fundamental deficiencies and complications that render class treatment untenable.

First, the sheer impracticality inherent in managing a litigation of this complexity renders it inappropriate for class treatment. As the court in *Adkins* explained, the need for "separate factfinding as to . . . relative culpability in different contexts" reflects a proposed class's unmanageability. 307 F.R.D. at 147. Similarly here, the highly individualized evidence of injury and causation — over a 14-year period and vast geographic expanse — that each member of the putative class will have to adduce to establish their claims will force the Court to "choose between

[28] The Second Circuit held in *In re Petrobras* that "administrative feasibility" is not a necessary "requirement" in the specific context of the ascertainability inquiry. 862 F.3d 250, 269 (2d Cir. 2017). But courts in this District have repeatedly recognized that *In re Petrobras* did not foreclose consideration of the administrative infeasibility of a proposed class in the context of the Rule 23(b)(3) predominance or superiority inquiries. *See Aluminum Warehousing Antitrust Litig.*, 336 F.R.D. 5, 65–66 & n.51 (S.D.N.Y. 2020) (denying certification of class where "individual analysis of each class member's transactions would be required to determine whether the purchaser qualified for class membership" and explaining *In re Petrobras* recognized that "some of the inquiries that other circuits had treated as part of the administrative feasibility inquiry in fact were 'territory belonging to the predominance requirement'"); *In re LIBOR*, 299 F. Supp. 3d at 463 ("[W]e do not read *Petrobras* to preclude a consideration of administrative feasibility concerns in analyzing predominance and superiority."); *Royal Park*, 2018 WL 1750595, at *15 ("These many obstacles to identification of a beneficial owner led the Court to question the administrative feasibility of certifying such a class, a concern that, while not central to ascertainability, remains central to the predominance analysis."). Plaintiffs' assertion that there is no independent "'administrative feasibility' requirement in this Circuit" (Mot. at 111), is beside the point.

holding one or more trials of extraordinary complexity, on the one hand, or taking inappropriate shortcuts as to individual issues of wrongful conduct, causation and requisite purpose and assistance, on the other." *In re Motors*, 447 B.R. at 163. And the "shortcuts" Plaintiffs urge the Court to endorse here, in the form of inferential statistics, erroneous assumptions about immigration status, and general assertions about the conduct of the al-Bashir regime instead of individualized proof, "would have to come at the expense of due process concerns." *Id.*[29]

Second, and compounding the unmanageability of the proposed class in this action, Plaintiffs have proposed a "fail-safe" class of individuals who suffered "human rights abuses" perpetrated by the GOS or its agents during the putative class period. (Mot. at 3–4, 112–13.) Often defined in terms of a "legal injury," a fail-safe class "requires a court to decide the merits of individual class members' claims to determine class membership," which has the effect of "undermining superiority." *Nypl* v. *JPMorgan Chase & Co.*, 2022 WL 819771, at *9 (S.D.N.Y. Mar. 18, 2022). The problems inherent to fail-safe classes mean that courts "typically refuse" to

[29] To downplay concerns about their proposed class's manageability, Plaintiffs invoke out-of-Circuit authority that permitted the assessment of individualized causation and damages based largely on inferential statistics. (*See* Mot. at 108 (citing *Hilao* v. *Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996)).) Plaintiffs imply that this Court could take a similar approach here to calculate damages. However, *Hilao*'s approach has been criticized widely, including by the U.S. Supreme Court. *See Dukes*, 564 U.S. at 67 ("The [*Dukes*] Court of Appeals believed that it was possible to replace . . . proceedings with Trial by Formula. . . . We disapprove that novel project."); *see also Howard* v. *CVS Caremark Corp.*, 2014 WL 11497793, at *9 (C.D. Cal. Dec. 19, 2014) (denying class certification and explaining that "[i]n *Dukes*, the Supreme Court disapproved of the use of *Hilao's* sampling approach to establish . . . liability where it prevented the [defendant] from asserting its statutory defenses to [] each of the plaintiffs' individual claims"). Even before *Dukes*, courts in this Circuit disapproved of *Hilao*. In *Talisman*, Judge Cote cited approvingly to the *Hilao* dissent, which expressed concerns about relying on statistical inferences to establish individual questions of causation and damages, 226 F.R.D. at 473–74, and noted that the method of adjudicating class-wide claims in *Hilao* "would be unlikely to survive today." *Id.* at 483 ("[T]here may be little question that the Government of Sudan caused tremendous harm to the people of southern Sudan, but the question is which people and how much."). As such, *Hilao*'s disavowed approach cannot serve as a roadmap for handling Plaintiffs' unmanageable class.

certify them. *Id.* Here, in order to determine class membership, the Court would need to make findings on at least two elements of Plaintiffs' claims. Specifically, the Court would have to decide, as to each potential class member, whether he or she suffered a particular "human rights abuse" that is compensable under Swiss law. And the Court would further have to decide whether that "human rights abuse" is attributable to the GOS on an individualized basis, either directly or through an agency analysis. (*See supra* at 24.)

Fail-safe classes like the one proposed here are "unmanageable because a determination on the merits would be required to identify class members who would receive notice and an opportunity to opt out." *Nypl*, 2022 WL 819771, at *9; *see also Ford* v. *TD Ameritrade Holding Corp.*, 995 F.3d 616, 624 (8th Cir. 2021) (declining to certify proposed fail-safe class where class definition required findings on multiple contested elements of liability). Moreover, courts have recognized that fail-safe classes are "asymmetrically unfair" and present due process challenges to defendants in class actions, because "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." *Garcia* v. *ExecuSearch Grp., LLC*, 2019 WL 689084, at *2 (S.D.N.Y. Feb. 19, 2019). Because the Court would need to hold a mini-trial on the merits to ascertain class membership in the first instance, individual class members would effectively get two bites at the apple.[30]

Third, Plaintiffs' proposed class definition is replete with due process concerns more generally. Courts have recognized that "due process concerns regarding notice to absent class members" is pertinent to the superiority analysis and the manageability of a class action. *In re*

[30] Removing the injury and attribution conditions would not save Plaintiffs' proposed class under Rule 23, because those highly individualized issues would still need to be addressed to determine whether each putative class member has a viable claim — issues that, as explained above, would substantially predominate over any claimed class-wide issue.

Petrobras Securities, 862 F.3d 250, 268 n.19 (2d Cir. 2017); *see also Hecht* v. *United Collection Bureau, Inc.*, 691 F.3d 218, 222 (2d Cir. 2012) ("Absent class members have a due process right to notice and an opportunity to opt out of class litigation when the action is 'predominantly' for money damages."). Despite seeking to certify a class that will bind absent class members to the ultimate judgment on liability in this action, Plaintiffs have proposed no mechanism — through expert testimony or otherwise — for providing "individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). The logistical difficulties in determining class membership for purposes of complying with Rule 23's notice and opt-out requirement become clear when considering that the class is defined to include naturalized U.S. citizens, legal permanent residents, and lawfully admitted refugees and asylees, who were admitted to the United States on a variety of immigrant or non-immigrant visas, and who, according to Plaintiffs, are "geographically dispersed throughout the United States." (Mot. at 76.)

Although Plaintiffs claim that the proposed class member's immigration records can provide "objective proof of class membership" (Mot. at 113), they acknowledge that individual class members would need to submit a request under the Freedom of Information Act (FOIA) in order to obtain a copy of those records. (*See* Ex. 75 (Khatri Report) at 11.) But Plaintiffs never explain how each individual class member would know to request a copy of their immigration records without receiving notice of this action. Nor do Plaintiffs provide any way to identify those individuals to provide notice in the first place, only underscoring the difficulties of ascertaining class membership. And several of the named Plaintiffs have disavowed the accuracy of the contents of their own immigration records in the first place, raising questions about the ability of putative class members to rely on these records as "objective proof of class membership." *See, e.g.*, Ex. 12 (Jane Doe RFAs) at 19 ("Plaintiff admits that her signature appears on PLA-001030, but that the document referenced in this Request is in English and Plaintiff neither speaks nor reads

English, when she was interviewed as part of the resettlement process she was not able to understand the Egyptian Arabic interpreter well, and the interviewers wrote information on a computer in English and Plaintiff does not know what they wrote.").

Plaintiffs' suggestion to rely on unsworn representations or affidavits from putative class members to establish class membership (*see* Mot. at 113) likewise "sacrific[es] procedural fairness." *Adkins*, 307 F.R.D. at 141. Defendants "have a due process right to challenge the veracity" of the representations or affidavits of putative class members about their claimed injuries in Sudan, particularly when discovery has shown that there may be valid "concerns about the accuracy of such affidavits" in terms of the timing, perpetrators, and circumstances of various alleged injuries. *Hunter* v. *Time Warner Cable Inc.*, 2019 WL 3812063, at *14 (S.D.N.Y. Aug. 14, 2019). (*See, e.g.*, Ex. 27 (Abbo Abakar Dep. Tr.) at 98:12-13 ("I cannot remember something that happened 20 years ago."); Ex. 38 (Judy Doe Dep. Tr.) at 100:23–25 ("I'm not good at dates. But there are points that I remember. And there are points that I don't.").) The contested nature of these issues would require the Court to conduct individual fact-finding for each individual who claims membership in the proposed class.

Even accepting the impermissible "shortcuts" Plaintiffs propose, the sprawling nature of the proposed class renders it unmanageable at every stage: the difficulties in making adequate notice raises significant due process concerns, determining class membership is administratively infeasible, and the highly individualized nature of the Court's findings on injury and causation would result in a trial of "extraordinary complexity." *In re Motors*, 447 B.R. at 163. Looking to the class that Plaintiffs "actually seek to certify," *Adkins*, 307 F.R.D. at 147, and where absent class members have shown they are willing and able to bring and litigate individual claims (*see Sherf* Compl.; *Ring* Compl.), Plaintiffs cannot show that certifying the proposed class is the most "fair and efficient method of resolving this case." *In re Nassau Cnty.*, 461 F.3d at 230.

III. THE PROPOSED CLASS FAILS RULE 23(a)'S COMMONALITY REQUIREMENT.

Although the Court need not reach the issue, Plaintiffs' proposed class also fails to satisfy the minimum commonality requirements under Rule 23(a)(2). The Supreme Court has explained that, to satisfy the commonality requirement, plaintiffs' "claims must depend upon a common contention," and that since "[a]ny competently crafted class complaint literally raises common 'questions,'" the "common contention, moreover, must be of such a nature that it is capable of classwide resolution — which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in *one stroke*." *Dukes*, 564 U.S. at 349–50 (emphasis added) (citation omitted). But Plaintiffs have failed to posit even a single question capable of class-wide resolution for *all* 25,000 putative class members.

Plaintiffs repeatedly highlight purportedly common questions regarding the interactions of BNPP entities with Sudanese entities and the GOS's general conduct during the proposed class period. (*See* Mot. at 78 (claiming "BNPP's conspiracy to violate U.S. sanctions" is "a common course of conduct" relevant to all claims).) For the reasons explained, these abstract questions about patterns of conduct shed no light on the actual injuries alleged by each Plaintiff, the specific conduct by the GOS that allegedly caused those injuries, and any "natural" and "adequate" causal link between the financial services provided by the BNPP Defendants and each separate injury. "[W]hat matters is not just the 'raising of common questions — even in droves — but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.'" *Ouedraogo* v. *A-1 Int'l Courier Serv., Inc.*, 2014 WL 4652549, at *3 (S.D.N.Y. Sept. 18, 2014) (quoting *Dukes*, 564 U.S. at 350) (finding lack of commonality for putative class of delivery drivers seeking unpaid wages because, despite a "blanket policy" of classifying drivers as independent contractors, other factors relevant to determining employment status would require individualized determinations).

None of Plaintiffs' "common" questions provide such common answers here. Each individual Plaintiff and putative class member will need to show that their alleged injury was traceable to some combined act of the GOS and the BNPP Defendants. Plaintiffs' claim that every single alleged injury across the putative class was caused by a single "genocidal campaign" (Mot. at 78–79, 81), is exactly the type of broad-strokes common policy claim that was rejected by the Supreme Court in *Dukes*. There, plaintiffs had provided evidence of numerous instances of sex-discrimination across the company during the proposed class period, and sought to present this as proof of a company-wide policy, but plaintiffs could not present "convincing proof of a companywide discriminatory pay and promotion policy" that "ties *all* their 1.5 million claims." *See* 564 U.S. at 357–59 (emphasis added). Plaintiffs here have presented no admissible evidence to establish that the violence plaguing the entire country of Sudan during (as well as before and after) the putative class period spanning 14 years, and every single wrongful act taken by the GOS, was part of a singular policy or plan.

IV. THE PROPOSED CLASS FAILS RULE 23'S IMPLIED ASCERTAINABILITY REQUIREMENT.

Plaintiffs seek to certify a class that encompasses a seemingly boundless number of alleged injuries, framed as "human rights abuses." That renders class membership indeterminate, and Plaintiffs thus also cannot satisfy the implied requirement of ascertainability.

The Second Circuit has recognized, within Fed. R. Civ. P. 23, an "implied requirement of ascertainability." *Nypl*, 2022 WL 819771, at *6. Under this requirement, a class must be "defined using objective criteria that establish a membership with definite boundaries." *Fikes Wholesale, Inc.* v. *HSBC Bank USA, N.A.*, 62 F.4th 704, 716 (2d Cir. 2023) (quoting *In re Petrobras*, 862 F.3d at 269). The ascertainability requirement's purpose is to ensure that a class is "sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a

member," and "'defined by objective criteria' so that it will not be necessary to hold 'a mini-hearing on the merits of each case.'" *In re Petrobras*, 862 F.3d at 266–67 (emphasis removed) (quoting *Brecher* v. *Republic of Argentina*, 806 F.3d 22, 24 (2d Cir. 2015)). The implied ascertainability requirement precludes class certification "if a proposed class definition is indeterminate in some fundamental way," such that there is no "clear sense of who is suing about what." *Id.* at 269. When a proposed class is indeterminate, there is no way to "readily identify those who will be bound (or benefitted) by the judgment," and courts must engage in "the cumbersome process of inquiring into and conducting a mini-hearing on the merits of every potential class member's claim." *Bellin* v. *Zucker*, 2022 WL 4592581, at *5–6 (S.D.N.Y. Sept. 30, 2022) (AKH). Indeed, in *Bellin*, this Court recently denied class certification on the basis that the proposed class definition would require the Court to decide on an individual basis whether each putative class member suffered a distinct due process violation. *Id.*[31]

Similarly here, the proposed class definition does not "establish a membership with definite boundaries." *In re Petrobras*, 862 F.3d at 269. Plaintiffs' open-ended class definition sweeps in all individuals who were "subjected to human rights abuses" in Sudan and South Sudan over a 14-year period, "*including*," but not limited to, "forced displacement, genocide, battery, assault, unlawful imprisonment, sexual abuse, threats of violence and/or deprivation of property."

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[31] Plaintiffs imply in a footnote that this Court should disregard its decision in *Bellin* because "the Court did not cite *Petrobras* in its opinion," speculating that the Court must have overlooked it. (Mot. at 114 n.450.) This Court in *Bellin* found that the proposed class failed to satisfy ascertainability because "the class cannot be ascertained by reference to objective criteria," 2022 WL 4592581, at *5, which is consistent with the standard set forth in *In re Petrobras* and affirmed in *Fikes*. Indeed, *In re Petrobras* explained that administrative feasibility is an objective, rather than a requirement, of ascertainability. *See* 862 F.3d at 266–67 (noting that "a class must be 'defined by objective criteria' *so that* it will not be necessary to hold 'a mini-hearing on the merits of each case'"). *Bellin*'s explanation that the proposed class definition would require "individualized mini-hearings," which "run[s] contrary to the principle of ascertainability," is a perfectly valid reference to the animating purpose of this requirement. 2022 WL 4592581, at *6.

(Mot. at 3 (emphasis added).) Plaintiffs provide no definition of "human rights abuses" or a discrete list of alleged injuries that would qualify for class membership. Likewise, at no point have Plaintiffs sought to cabin the scope of the seemingly boundless number of alleged compensable harms that they have unilaterally determined constitute "human rights abuses" under an ambiguous, undetermined conception of "violations of absolute rights" that, as described (*supra* at 47–49), has no basis in Swiss law. (Mot. at 4; *see also* Ex. 16 (Pls.' Supp. Initial Disclosures) at 3 ("Plaintiffs and other class members have additional injuries entitling them to further damages and moral reparation. Plaintiffs' damages and moral reparation include compensation for loss and the past and future pain and suffering resulting from such injuries, *including but not limited to the following* . . . .") (emphasis added).) Accordingly, the proposed class here, "though ostensibly defined by objective criteria, nonetheless present[s] fatal challenges of determinability." *In re Petrobras*, 862 F.3d at 269 n.20.

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Plaintiffs have failed to establish that their proposed class satisfies Rule 23's predominance, superiority, commonality, *or* ascertainability requirements. Any one of these failures is fatal to certification, and for these reasons Plaintiffs' Motion should be denied.

V. CERTIFICATION OF UNSPECIFIED "ISSUE CLASSES" IS NOT APPROPRIATE.

As a last-ditch throwaway, Plaintiffs urge this Court, in the alternative, to certify an "issues-class" under Rule 23(c)(4) "for all common issues" and leave the remaining issues for a resolution on individualized bases. (Mot. at 114.) But the issues that Plaintiffs identify — the purportedly "numerous common questions" identified elsewhere in their Motion (*id.* at 115) — suffer from the same defects explained above: that these issues are not in fact "common" to the entire class and that Plaintiffs fail to explain how certifying any of those issues would solve the fundamentally individualized nature of proving liability for Plaintiffs' claims.

Rule 23(c)(4) provides that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues." Fed. R. Civ. P. 23(c)(4). Issue classes are typically used to resolve liability and reserve damages for individualized determinations in a subsequent proceeding. *See In re Nassau Cnty.*, 461 F.3d at 226. But any issue certified for treatment under Rule 23(c)(4) must satisfy the fundamental requirements of Rule 23(a), including commonality. *See, e.g.*, *Kassman* v. *KPMG LLP*, 416 F. Supp. 3d 252, 285 (S.D.N.Y. 2018). Further, even if a common issue is identified, "issue certification may be inappropriate if a 'number of questions . . . would remain for individual adjudication' or if issue certification 'would not materially advance the litigation because it would not dispose of larger issues' relevant to the case." *In re LIBOR*, 299 F. Supp. 3d at 464 (citation omitted). Rule 23(c)(4) "should not be invoked merely to postpone confronting difficult certification questions" or to "gerrymander predominance." *Id.* (citation omitted). Where resolution of purportedly common issues would not even establish the defendant's liability, an issue class would not materially advance the litigation. *See, e.g.*, *Marshall*, 334 F.R.D. at 61 (denying certification of issue class concerning whether vehicles had common defects because "the individual elements that would predominate are themselves liability factors, including[] breach, actual injury, ascertainable loss, causation, and reliance," even if issue of "a common defect might lend itself to a class proceeding").[32]

[32] *See also Packard* v. *City of New York*, 2020 WL 1467127, at *3 (S.D.N.Y. Mar. 25, 2020) (denying certification of issue class on whether police officers were properly trained to respect the rights of protesters because "the [c]ourt would be unable to resolve the question of the [defendant's] liability [towards each putative class member] without individualized inquiry"); *Royal Park*, 2018 WL 1750595, at *20 ("If the sole issue with [p]laintiff's motion were the deficiencies with its ability to prove *damages* class-wide, it would be proper to certify a liability class under (c)(4). . . . However, this case presents myriad individualized issues with respect to liability as well.").

Here, Plaintiffs ask the Court to create issue classes to "resolve the numerous common questions identified" in their Motion (at 115). Rather than specifying which issues would be best addressed by a Rule 23(c)(4) class, Plaintiffs merely refer to their list of 20 purportedly "common" questions and ask the Court to sort it all out. (*Id.*) As discussed above (*supra* Sect. I, III), each of these "common" issues does not lead to a common *answer* for the entire class. For example, although Plaintiffs frame whether the GOS "pursued a genocidal campaign" as a common issue (Mot. at 79), resolving abstract questions about generalized patterns of behavior does nothing to address what injuries each Plaintiff suffered, whether the GOS or its alleged agents inflicted each individual injury, and whether the BNPP Defendants' alleged conduct was causally connected to each such injury. (*See supra* at 18–33.) So, too, for the question of whether various individuals were acting as agents of the GOS. (*See supra* at 24–25.)[33]

Even if Plaintiffs could carve out specific factual disputes that are common to the class, resolving those issues would not "materially advance the litigation." *In re LIBOR*, 299 F. Supp. 3d at 464 (citation omitted). Indeed, for each issue class member, the Court or a special master would be left with nearly the entire case still to resolve. That was precisely the concern identified by the

[33] For that reason, Plaintiffs' reliance on *In re Foreign Exchange Benchmark Rates Antitrust Litigation* ("*FOREX*"), 407 F. Supp. 3d 422, 436 (S.D.N.Y. 2019), is misplaced. (*See* Mot. at 116.) There, the court certified an issue class related to the existence of a clearly defined antitrust conspiracy. 407 F. Supp. 3d at 436. Specifically, the alleged conspiracy involved the use of "chat rooms to fix spreads" and could be easily resolved through class-wide documentary records. *Id.* at 427–28. Further, the existence of the alleged conspiracy, and the defendants' participation therein, were the sole basis of the plaintiffs' claims; if the defendants were found not to have participated in the conspiracy, the claims necessarily would fail. *Id.* at 437. But here, Plaintiffs are not bringing "conspiracy" claims. Plaintiffs are bringing inherently individualized tort claims for specific injuries that they allegedly suffered over a 14-year period. And whether Plaintiffs' alleged "conspiracy" exists says little about the nature of those individual injuries. Plaintiffs cannot manufacture an issue class by asserting that every single one of those injuries was the result of a "conspiracy" — one that would have to continue over a decade and would have to encompass every single harm allegedly suffered by over 25,000 putative class members at the hands of the GOS and its agents during that time period.

Court in *Talisman* when it rejected a similar effort: "Partial certification does not provide a satisfactory resolution of the complex challenges facing a class action in the circumstances presented here. It would defer until another day decisions on too many of the critical issues on which Talisman's liability to each class member rests." *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, 2005 WL 2278076, at *5 (S.D.N.Y. Sept. 20, 2005); *see also In re Chiquita*, 331 F.R.D. at 687 (declining to certify an issue class "covering the mechanics of Chiquita's alleged financial transactions with [a terrorist organization]" because it "would do very little to increase the efficiency of the litigation"). Although Plaintiffs try to minimize the relevance of the *Talisman* court's refusal to certify an issue class based on the supposed "financial impact of BNPP's complicity" (Mot. at 116), Plaintiffs' attempt is unavailing for the reasons discussed above (*supra* at 23–24 & n.13).

Ultimately, the Court should deny Plaintiffs' request for issue class certification because where "there are no common questions that will generate 'common answers' in a classwide proceeding . . . no issue class can be certified under Rule 23(c)(4)." *Kassman*, 416 F. Supp. 3d at 285. And even if Plaintiffs could identify a common issue, resolution of such issue would not materially advance this litigation.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Class Certification should be denied.

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