UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ENTESAR OSMAN KASHEF, *et al.*,

Plaintiffs,

-against-

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

Defendants.

No. 1:16-cv-03228-AKH-JW

Hon. Alvin K. Hellerstein

MEMORANDUM OF LAW IN SUPPORT OF BNP PARIBAS S.A. AND BNP PARIBAS US WHOLESALE HOLDINGS, CORP.'S MOTION FOR SUMMARY JUDGMENT

SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
T: 212–558–3196

CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, New York 10006
T: 212–225–2000

Attorneys for Defendants BNP Paribas, S.A. and BNP Paribas US Wholesale Holdings, Corp.

July 21, 2023

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page(s)

Rules and Statutes

Cases

Page(s)

Page(s)

Page(s)

Foreign Law

Defendants BNP Paribas S.A. ("BNP Paribas") and BNP Paribas US Wholesale Holdings, Corp. ("BNPP Wholesale" and together with BNP Paribas, the "BNPP Defendants")[1] respectfully submit this memorandum of law in support of their motion for summary judgment.

PRELIMINARY STATEMENT

The nineteen Plaintiffs in this case seek to hold the BNPP Defendants liable as "accomplices" for the range of injuries Plaintiffs allegedly suffered during the period from 1998 to 2008 (the "Relevant Period") across Sudan, a country that was then the size of Western Europe. Plaintiffs' allegations are based on BNP Paribas's June 2014 guilty plea and related civil settlements with U.S. federal and New York State authorities, addressing violations of U.S. sanctions prohibiting financial transactions with the Government of Sudan ("GOS") and Sudanese entities. *See, e.g.*, Third Amended Complaint ¶¶ 3, 101–14, 191–218, ECF No. 241 ("TAC"). Plaintiffs' theory is that the processing of U.S. dollar-denominated transactions for public and private Sudanese entities in violation of U.S. sanctions makes the BNPP Defendants liable for any and all injuries purportedly suffered by Plaintiffs at the hands of the GOS or its various alleged proxies. TAC ¶¶ 196, 298.

The discovery in this case demonstrates that, as a matter of law, the BNPP Defendants cannot be held liable as "accomplices" to the various unidentified actors who injured Plaintiffs. Nothing in the record suggests that the financial transactions entered into by various BNPP entities—primarily non-party BNP Paribas (Suisse) S.A. ("BNPP Suisse")—are linked to the individual acts of violence that allegedly injured Plaintiffs.

---

[1] As discussed below, BNPP NY "has no legal identity separate from" BNP Paribas. *Bayerische Landesbank, N.Y. Branch v. Aladdin Cap. Mgmt. LLC*, 692 F.3d 42, 51 (2d Cir. 2012). Plaintiffs' claims against BNPP NY and BNP Paribas are "one and the same." *Id.*

First, Plaintiffs' claims, which are governed by Swiss law under the Court's prior choice of law ruling, all suffer from the fundamental legal defect that Plaintiffs cannot establish that the BNPP Defendants committed the requisite "unlawful" acts under Swiss law. The Swiss Code of Obligations ("SCO") Articles 41(1) and 50(1), the bases for Plaintiffs' claims against the BNPP Defendants, require, among other elements, that Plaintiffs establish the unlawfulness of the BNPP Defendants' conduct by demonstrating that such conduct violated a protective Swiss legal norm intended to protect Plaintiffs from the harm they suffered. No such norm or violation exists here. And no Swiss case or authority supports the proposition that a Swiss court would look to *U.S.* sanctions violations as a basis for holding a financial institution liable to individuals injured in a sanctioned country (indeed, as a matter of U.S. law, U.S. sanctions violations do not create any private right of action). Unable to identify any violation by the BNPP Defendants of a duty owed to them, Plaintiffs ask the Court to adopt a novel theory posited by their Swiss law expert that no such duty is needed to establish accomplice liability, but this theory has never been adopted by a Swiss court. Moreover, this theory relies on establishing primary liability of the GOS, but Articles 41 and 50 SCO do not apply to the sovereign acts of a foreign state. Plaintiffs cannot use their novel interpretation of Swiss law to pursue a scope of liability in this case that goes far beyond any imposed by Swiss law.

Second, as a matter of Swiss law, Plaintiffs must also establish that the BNPP Defendants were at "collective fault" with the perpetrators of Plaintiffs' injuries. But here there is no dispute that the BNPP Defendants did not injure any of the Plaintiffs, were not present when any of the Plaintiffs' alleged injuries were suffered, and did not enter into a conspiracy to injure Plaintiffs. The Swiss case law is clear—for defendants to be held liable as accomplices, they must actually participate in the injury-causing conduct. Nor does Plaintiffs' resort to a negligence theory help

them because, as noted above, it is undisputed that the BNPP Defendants, as a matter of Swiss law, had no duty to Plaintiffs.

Third, there is no triable issue of fact that the financial transactions entered into by the BNPP Defendants were the "natural" (*i.e.*, "but-for") or "adequate" (*i.e.*, "proximate") cause of Plaintiffs' injuries. As to natural causation, Plaintiffs have failed to adduce any evidence that the BNPP Defendants' financial services were actually used to fund any attack or purchase weapons that harmed Plaintiffs here. Aware of this, Plaintiffs will no doubt invoke, as they did at the motion to dismiss stage, the so-called "oil nexus" theory, under which they allege that letters of credit[2] issued by non-party BNPP Suisse in connection with Sudanese oil exports financed the GOS's efforts to clear civilians from oil lands. But discovery has refuted *that* theory since not one Plaintiff here was actually "cleared" from oil land.

Even if Plaintiffs were able to raise an issue of natural causation, the lack of adequate, or proximate, causation requires dismissal here. Swiss law applies "adequate" cause as a limit on potential legal liability (like U.S. law), and does so in a restrictive manner. Here, the main component of the BNPP Defendants' alleged contribution to Plaintiffs' injuries—the processing of transactions (primarily oil-related transactions by non-party BNPP Suisse)—was indisputably legal under Swiss law and so imposing liability based on it would create the exact type of "systemic liability" that the Swiss law adequate cause analysis rejects. The evidence fails to show any link between any of the BNPP Defendants' financial transactions and any injury suffered by Plaintiffs here. Discovery has shown that Sudan, like any other country, has a range of revenue sources as well as massive expenditures unrelated to military spending (setting aside

[2] Letters of credit are financial instruments that guarantee payment for goods or services. An oil refinery may, for example, arrange for a letter of credit to reassure a seller of crude oil that the refinery will pay for its delivery.

Plaintiffs' facile equation of all military spending with alleged human rights abuses). Plaintiffs' purported chain of causation is based on speculation and interrupted by the actions of multiple independent, and intervening, actors, none of whom (if actually identified at all) had any connection to any BNPP Defendant. Plaintiffs thus cannot establish any plausible adequate causation as to their own alleged injuries (much less to "all atrocities" in Sudan over a fourteen-year period, as claimed in Plaintiffs' Motion for Class Certification).[3]

At bottom, no Swiss law authority supports the proposition that the conduct of the BNPP Defendants in processing financial transactions was "sufficiently closely related" to any of these Plaintiffs' injuries so as to satisfy adequate (*i.e.*, proximate) causation.

For all of these reasons, the BNPP Defendants are entitled to summary judgment on all of Plaintiffs' claims. In addition, the BNPP Defendants are entitled to summary judgment on the following points:

- BNPP NY should be dismissed as it is black letter law that, as a branch of BNP Paribas, it has no separate legal identity and so is not amenable to suit.
- BNPP Wholesale should be dismissed for the additional reason that there is no evidence that it had a relationship with any Sudanese client or that it processed any Sudanese transaction.
- Sudanese law, which applies here under New York's borrowing statute (N.Y. C.P.L.R. § 202), requires dismissal of any claim based on an injury that occurred prior to April 29, 2001 (*i.e.*, more than fifteen years prior to the commencement of this action) because it sets fifteen years from the date of injury as the absolute outside limit for any tort claim.
- Finally, the Court should dismiss Plaintiffs' claim for punitive damages, which are not allowed as a matter of Swiss law, as well as Plaintiffs' claim for disgorgement, which Plaintiffs have abandoned. Plaintiffs are also not entitled to

[3] Plaintiffs have moved to certify a class of nearly 25,000 individuals based on these same claims. Although the class period Plaintiffs have proposed runs from 1997 to 2011 ("Proposed Class Period"), the injuries identified by Plaintiffs allegedly occurred from 1998 to 2008.

any property damages given the lack of documents supporting their claims of such damage.

Accordingly, the Court should grant the BNPP Defendants summary judgment on all of Plaintiffs' claims.

FACTUAL BACKGROUND

A. Sudan is a Large Country with a Tumultuous History Characterized by Violent Conflict

During the Relevant Period, Sudan was the largest country in Africa. Ex. 58, Expert Report of Enrico Carisch dated Jan. 6, 2023, ¶ 21 ("Carisch Report").[4] Prior to its split with South Sudan in 2011, Sudan measured approximately 2.4 million square kilometers, roughly the size of Western Europe. Ex. 135, *Land area (sq. km)*, The World Bank (July 15, 2023) ("Land area (sq. km) – The World Bank").[5] The Darfur region alone is 400,000 square kilometers, roughly the size of France. Ex. 130, *Darfur*, Britannica (July 15, 2023) ("*Darfur*, Britannica");[6] Ex. 135, Land area (sq. km) – The World Bank. And the region that now comprises South Sudan is approximately 630,000 square kilometers, larger than the size of France. *Id.*[7]

Sudan's population as of the last official census, published in 2009 (also including present-day South Sudan), was approximately 39 million, with its citizens representing over 500 ethnic groups and speaking more than 400 languages. Ex. 137, *5th Sudan Population and Housing Census*, Central Bureau of Statistics, Apr. 26, 2009, at 3; Ex. 58, Carisch Report ¶ 21.

---

[4] Unless otherwise indicated all referenced exhibits are attached to the Declaration of Charity E. Lee, dated July 21, 2023.

[5] Available at: https://data.worldbank.org/indicator/AG.LND.TOTL.K2?end=2011&locations=SD-GB-IE-BE-DK-CH-AT-PT-ES-FR-DE-IT&start=2011&view=bar.

[6] Available at: https://www.britannica.com/place/Darfur.

[7] Available at: https://data.worldbank.org/indicator/AG.LND.TOTL.K2?end=2020&locations=SD-SS&start=2020&view=bar.

The federal state of Khartoum, which encompasses the metropolitan area of Khartoum, Sudan's capital city, had a population of approximately five million, and Juba, the capital city of what is now South Sudan, had a population of just under 400,000. Ex. 137, *5th Sudan Population and Housing Census*, Central Bureau of Statistics, Apr. 26, 2009, at 8, 15.

A vast territory with a large, diverse population and scarce resources, Sudan has experienced frequent, violent conflict throughout its history. The country has experienced at least five regime changes since its independence from British and Egyptian colonial rule on January 1, 1956. Ex. 58, Carisch Report ¶¶ 22–24. At the time of independence, Sudan was embroiled in its First Civil War between the country's northern and southern regions, which lasted seventeen years and claimed approximately 500,000 lives. Ex. 58, Carisch Report ¶ 22. In 1958, only two years after independence, a Sudanese army general led a coup, ousting Sudan's coalition government and seizing power. Ex. 58, Carisch Report ¶ 23. Six years later, in 1964, a popular uprising led to a civilian government that was in turn disbanded by a subsequent army coup in 1969. Ex. 58, Carisch Report ¶ 23. The First Civil War ended in 1972, but this peace was short-lived, as an uprising in 1983 sparked Sudan's Second Civil War, which would last for twenty-two years. Ex. 58, Carisch Report ¶¶ 24–25.

In 1989, Brigadier Omar Hassan Ahmed al-Bashir came to power through another military coup. Ex. 58, Carisch Report ¶ 24. The 1989 coup followed months of growing discontent and confrontations between the army and the government over the government's handling of the Second Civil War, as well as economic struggles and famine. Ex. 58, Carisch Report ¶ 24. Following years of north-south civil war, and as the result of a prolonged peace process engaged in by the al-Bashir regime and rebel forces, Sudan's southern region seceded and formed an independent nation, South Sudan, on July 9, 2011. Ex. 58, Carisch Report ¶ 21.

In addition to the two civil wars and political unrest, as discussed below, Sudan also has a history of regional inter-ethnic conflicts and proxy border conflicts with neighboring countries.

B. Sudan's Major Conflicts During the Relevant Period Are Complex, with Deep Historical Roots and Various Constituencies

Sudan has experienced numerous violent conflicts, including during the Relevant Period. These conflicts are complex and deeply rooted in the region's tumultuous history, arising out of various regional disputes and involving various different factors.

1. Second Civil War (1983–2005)

The Second Civil War, which began in 1983 and lasted until 2005 (*i.e.*, seven years into the Relevant Period), arose from a variety of factors, in particular claims by the southern Dinka and Nuer tribal groups that they were being marginalized by the GOS in Khartoum. Ex. 58, Carisch Report ¶ 25. The principal southern rebel group throughout the war was the Sudan People's Liberation Army ("SPLA"), led by Lieutenant Colonel John Garang. Ex. 58, Carisch Report ¶ 25. During the twenty-two-years-long conflict, the SPLA split into various factions, sometimes fighting against each other. Ex. 58, Carisch Report ¶ 26.

The SPLA's inter-factional fighting accounted for a significant proportion of the violence and death in the Second Civil War. Ex. 58, Carisch Report ¶¶ 26, 44. Notably, in 1991, the SPLA split along ethnic lines into the Dinka and Nuer factions, with Garang leading the Dinka-dominated SPLA-Torit faction, and Riek Machar leading the Nuer-dominated SPLA-Nasir faction, which would then evolve into the South Sudan Independence Movement/Army ("SSIM/A"). Ex. 58, Carisch Report ¶ 26. In describing this conflict, Plaintiffs' proposed anthropology expert, Professor Jok Madut Jok, wrote in 1999 that "[a]t 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." Ex. 73, Jok Tr. at 47:13–21, Dep. Ex. 2 (Jok Madut Jok and Sharon Elaine Hutchinson, *Sudan's Prolonged Second Civil War and the Militarization of Nuer and Dinka Ethnic Identities*, 42 Afr. Stud. R. 125, 127 (1999)).

In April 1997, the Sudanese government signed the Khartoum Peace Agreement with some opposing rebel groups, establishing a power-sharing agreement between the northern and southern regions and merging the signatory rebel groups into the South Sudan Defence Forces ("SSDF"), which would coordinate with the Sudanese Armed Forces ("SAF"). Ex. 54, Expert Report of Suliman Baldo dated Sept. 30, 2022 ¶ 167 ("Baldo Opening Report"). Garang's SPLA faction did not sign the Khartoum Peace Agreement. *Id.* The Second Civil War did not officially end until 2005, however, when the Sudanese government signed the Comprehensive Peace Agreement ("CPA") with additional opposing rebel groups. Exs. 125–129, Comprehensive Peace Agreement, Government of the Republic of the Sudan-Sudan People's Liberation Movement/Sudan People's Liberation Army, 2005. The CPA provided a wealth- and power-sharing arrangement between the northern and southern regions, a commitment from the Sudanese government to the peace process, and a future referendum for Sudan's southern region to decide on its independence. *See id.*

2. **Darfur Conflict**

The conflict in Darfur that emerged in 2003 is likewise complex and has deep historical roots. Darfur is a vast area with scarce resources over which the region's various ethnic groups have long competed. Ex. 58, Carisch Report ¶¶ 27–38; Ex. 57, Suliman Baldo et al., "Darfur in 2004 the Many Faces of a Conflict" at 1–2 (working paper, submitted to Select Committee on International Development, Parliament of the United Kingdom of Great Britain and Northern Ireland Jan. 11, 2005) (Exhibit 3 to Baldo Dep.) ("Baldo et al., Many Faces of a Conflict"). While contemporary Darfur politics is often framed in terms of "Arab" nomadic tribal groups

and "African" sedentary tribal groups, and indeed these terms have grown to take on meaning, they are overly simplistic and do not reflect the complexities of the conflict. *See* Ex. 58, Carisch Report ¶ 28 n.29 (explaining that the terms are used as a shorthand for one's livelihood); Ex. 56, Baldo Tr. at 71:7–10 (Plaintiffs' proposed expert testifying, "When I say, 'Arab origin,' if you go to Darfur, the distinction is not, you know, Arab on a racial basis. It's a cultural identification."); Ex. 57, Baldo et al., Many Faces of a Conflict at 1 (describing identities in Darfur as "complex, subtle and fluid, with the possibility of individuals or groups changing identity in response to political and economic circumstance" and that "[p]olitical Arabism in Darfur is a relatively recent creation, related to Darfurian Arabs' linkages with Sudanese political parties and Libya").

Throughout Darfur's modern history, there have been local conflicts over resources as well as tensions about the respective roles of regional and central government in local politics. Ex. 58, Carisch Report ¶¶ 27–28; *see also* Ex. 56, Baldo Tr. at 214:22–215:7 (Plaintiffs' proposed expert identifying 1921 Sudanese colonial government policy to install tribal leaders to challenge Masalit leadership in West Darfur as a cause of the modern-day conflict). For example, violence in Darfur increased in the 1980s when Muammar Gaddafi, then leader of Libya, armed Chadian nomadic tribesmen in a dispute over Darfur's shrinking arable agricultural zones. Ex. 58, Carisch Report ¶ 29; *see also* Ex. 56, Baldo Tr. at 61:5–9, 64:17–67:12 (Plaintiffs' proposed expert testifying to conflict in Darfur in the late–1980s and early–1990s between "pastoralist" and "farming" tribes).

Many, including Plaintiffs' proposed experts, also identify the al-Bashir regime's ouster of senior Islamist official Hassan al-Turabi as contributing to the Darfur conflict, as many Darfurians were aligned with al-Turabi's political wing. *See* Ex. 93, Expert Report of Harry

Verhoeven dated Sept. 30, 2022 at 16 ("Verhoeven Opening Report") ("The tensions that followed this internal coup were considerable as fears mounted that Turabi loyalists would strike back and kill Bashir or remove him, in turn, from the political scene. But the pushback came from an unexpected direction: the Darfur region in Western Sudan."); *see also* Ex. 57, Baldo et al., Many Faces of a Conflict ("Baldo, et al., Many Faces of a Conflict") (Plaintiffs' proposed expert stating in prior publication that this regime split "helped created the conditions for the conflict"). As ethnic conflict increased throughout the 1990s, discontent among the sedentary ethnic groups with the central government's policies perceived as favoring the pastoralist ethnic groups increased, and in 2002 and early–2003 rebel groups coalesced. Ex. 58, Carisch Report ¶ 30. On April 25, 2003, Darfur rebel groups conducted a joint attack on al-Fasher Airport, destroying military aircraft and killing approximately 100 Sudanese government forces. Ex. 58, Carisch Report ¶ 27; Ex. 56, Baldo Tr. at 100:22–101:7.

Following the al-Fasher Airport attack, full-scale conflict began throughout the region among GOS, GOS-aligned Darfurian tribal militias, and rebel groups. Ex. 58, Carisch Report ¶ 30; Ex. 56, Baldo Tr. at 103:12–19; 111:15–22 (Plaintiffs' proposed expert testifying that the GOS's involvement in Darfur did not begin until 2003). Violence peaked in 2004 and significantly deescalated by 2005, although the region experienced significant instability before and after the major conflict period. Ex. 56, Baldo Tr. at 210:18–25. In May 2006, the GOS signed the Darfur Peace Agreement with one rebel faction, although other factions did not sign. Ex. 58, Carisch Report ¶ 43; Ex. 52, Expert Report of Kathi Austin dated Sept. 30, 2022 ¶ 56 ("Austin Opening Report").

The Darfur conflict involved various constituencies. On the rebels' side, the two main factions were the Sudan Liberation Army ("SLA"), founded in 2002, and the Justice and

Equality Movement ("JEM"), founded in 2003. Ex. 58, Carisch Report ¶ 31. The Eritrean government provided the SLA support at various points during the conflict. Ex. 58, Carisch Report ¶ 31.a. The JEM was suspected of being affiliated with a leading member of Sudan's Islamist movement and former key member of the Bashir regime, Hassan al-Turabi, and of aiming to unseat al-Bashir and install al-Turabi. Ex. 58, Carisch Report ¶ 31.b. JEM forces also received substantial support from Chad, including anti-aircraft guns, rocket-propelled grenades, machine guns, small arms and vehicles. Ex. 58, Carisch Report ¶ 31.b; Ex. 56, Baldo Tr. at 177:19–178:5. While not formally active in Darfur, the SPLA provided the Darfurian rebels with substantial support, including arms supplies and insurgency trainings. Ex. 58, Carisch Report ¶ 31.c.

GOS forces, as well as various groups of generally GOS-aligned tribal militias, who would become colloquially referred to as "Janjaweed," engaged in attacks against the rebels, as well as civilian areas with populations expected to be affiliated with rebel groups or causes. However, Plaintiffs' own proposed experts admit that the term "Janjaweed" does not refer to a monolithic organization or armed force controlled by the GOS. Ex. 95, Verhoeven Tr. at 370:9–18 ("Janjaweed' is a term that has been used in the context of Sudan to refer to a combination of different groups of people . . ."); Ex. 56, Baldo Tr. at 101:13 ("'Jangaweed' is a generic name. The Jangaweed is basically a general common name for an assortment of ethnically-recruited militiamen and fighters . . ."). The GOS is reported to have provided resources to some ethnic militias in Darfur and in some instances these groups engaged in attacks alongside more formal GOS forces, but these ethnic militias also engaged in attacks on their own initiative. Ex. 58, Carisch Report ¶ 33. In fact, and as Plaintiffs' own proposed experts admit, during the Relevant Period, some "Janjaweed" groups engaged in attacks *against* the GOS. Ex. 94, Expert Reply

Report of Harry Verhoeven at 37 ("Verhoeven Reply Report"); Ex. 56, Baldo Tr. at 111:23–112:2.

3. Arms Proliferated Throughout Sudan in the Years Prior to the Relevant Period

Against the backdrop of consistent violent conflicts throughout Sudan, a largescale and multifaceted arms trade funneled weapons to the GOS, rebel groups, tribal militias, and ordinary civilians.

Long before the Relevant Period, the GOS secured weapons from foreign governments. In 1992, Ethiopia provided the Sudanese government a fleet of T–54 and T–55 Soviet model tanks and other equipment. Ex. 65, Fogarty Tr. at 130:5–19. By 1992, there were as many as 2,000 Iranian political advisors in Khartoum training mainly Sudan's Popular Defense Forces ("PDF"), a paramilitary force formed by legislation in 1989 that is part of the SAF. Ex. 65, Fogarty Tr. at 119:4–13; Ex. 56, Baldo Tr. at 69:7–13. Russia, in or around 1996, provided two squadrons of Sukhoi bomber aircrafts, with sixteen aircrafts in each squadron, and ten Mi–24 helicopter gunships to Sudan. Ex. 65, Fogarty Tr. at 121:23–123:12. Libya provided the GOS with heavy artillery in 1995 and, in the same year, a U.S. company was reported to have shipped USD $120 million in arms to the GOS, including Howitzer, mortar and tank ammunition. Ex. 65, Fogarty Tr. at 127:21–25, 128:23–129:7. In 1996, an Indian company supplied arms to the Sudanese government. Ex. 65, Fogarty Tr. at 126:22–127:2. And prior to 1997, Iran supplied the Sudanese government with G3 assault rifles, mortars and ammunition. Ex. 65, Fogarty Tr. at 115:2–21.

Further, as Plaintiffs' proposed Sudan political economy expert Verhoeven admitted, there were "weapons that were in circulation in the broader region of the Horn of Africa" between 1989 and 1997 (*i.e.*, prior to the Relevant Period) because:

> The Horn of Africa has long been in a conflict-torn region with wars in Ethiopia and what is now Eritrea, Chad, Uganda, [and] a range of other countries. And there was a lot of trafficking, and a lot of back and forth between those weapons, because you have kind of this general regional market depending on who has money . . . .That, too, was a source of problems of some of the weapons that went to the Sudan Armed Forces.

Ex. 95, Verhoeven Tr. at 223:10–224:2; *see also* Ex. 58, Carisch Report ¶ 29. Verhoeven also admitted that between 1989 and 1997, the SAF (Sudan's formal military) used "Antonov planes," "helicopter gunships," "Kalashnikov rifles," "various types of artillery" and "AK–47s and other forms of rifles." Ex. 95, Verhoeven Tr. at 230:13–231:2, 221:1–222:8, 222:23, 223:7–9.

Similarly, as referenced above, rebel groups were armed by various internal factions and neighboring countries prior to and during the Relevant Period.

Many ordinary civilians also owned weapons. For example, small arms became commonly available in Darfur as early as the 1980s; by 1990, "a Kalashnikov [assault rifle] could be bought for USD $40 in a Darfur market." Ex. 58, Carisch Report ¶ 29. During the Relevant Period, there were millions of weapons in circulation in Sudan among civilians and actors that were not part of the formal state security services or the country's many armed groups. Ex. 58, Carisch Report ¶ 51.

C. From 1975 to 2009, Foreign Entities Discovered, Developed and Monetized Sudan's Oil Infrastructure

1. Various Western Companies Developed Sudan's Oil Infrastructure

Long before Sudan's first export of oil in August 1999 and any financial services provided by any BNPP entities, Western oil companies invested in and developed Sudan's oil infrastructure. *See* Ex. 90, Patey Tr. at 75:18–76:21. Following some initial efforts by an Italian oil company in the 1950s, U.S. oil company Chevron began exploration in Sudan in the 1970s in

response to oil market instability and encouragement from the U.S. government. Ex. 133, *History of Oil Exploration in Sudan*, Ministry of Energy and Petroleum of the Republic of Sudan (July 15, 2023);[8] Ex. 136, Luke Patey, The New Kings of Crude: China, India, and the Global Struggle for Oil in Sudan and South Sudan 19–20 (2014) ("The New Kings of Crude"); Ex. 62, Expert Report of Philip Verleger dated Jan. 6, 2023 ¶¶ 18–21 ("Verleger Report"); Ex. 88, Expert Report of Luke Patey dated Sept. 30, 2022 at 3 ("Patey Opening Report"); Ex. 90, Patey Tr. at 63:21–64:23.

Chevron, and its later twenty-five-percent interest partner Shell (Sudan) Development Company Limited, spent approximately USD $1 billion between 1974 and 1992 mapping, surveying, and acquiring the technology necessary to identify the largest oil reserves in Sudan. Ex. 136, The New Kings of Crude at 13–16; Ex. 62, Verleger Report ¶ 52; Ex. 90, Patey Tr. at 110:6–15. In the 1980s, Chevron discovered the Unity oil field in the Upper Nile province and the Heglig oil fields between Kordofan and Upper Nile, made other oil discoveries in both Upper Nile and Kordofan, and had almost fully prepared production facilities to exploit Sudan's oil resources. Ex. 136, The New Kings of Crude at 16; Ex. 90, Patey Tr. at 68:11–69:18. In January 1983, Chevron announced that it would spend an estimated USD $1 billion constructing an export pipeline from Sudan's southern oil fields to its northeastern Red Sea coast. Ex. 136, The New Kings of Crude at 2, 22–23. In the words of Plaintiffs' proposed oil expert Luke Patey, "Chevron [discovered], or laid the exploratory groundwork, for the vast majority of Sudan's major oilfields in the late 1970s and early 1980s." Ex. 88, Expert Report of Luke Patey dated March 2, 2023 at 13 ("Patey Reply Report"). According to Dr. Patey, senior Sudanese oil

[8] Available at: http://www.mop.gov.sd/eng/page/history-of-oil-exploration-in-sudan.

officials stated that "[t]he Americans did everything except turn on the taps." Ex. 88, Patey Reply Report ¶ 21.

Based on the oil discoveries in the 1970s and 1980s, Sudan's oil fields are divided into a number of "blocks" representing geographic areas. *See* Ex. 90, Patey Tr. at 63:3–20. The blocks, numerically, are Blocks 1, 2, 3, 4, 5, 5A, 5B, 6, and 7, as depicted in the map below. TAC Ex. M.

Chevron exited the Sudanese oil industry and the Canadian company Arakis Energy Corporation ("Arakis") purchased the rights in 1993 to Blocks 1, 2, and 4, which contained the Unity and Heglig oil fields. Ex. 62, Verleger Report ¶ 54; Ex. 136, The New Kings of Crude at 58–59. After two years of developing Sudanese oil fields, in December 1996, Arakis sold seventy-five percent of its shares to China National Petroleum Corporation ("CNPC"), the

Greater Nile Petroleum Company ("GNPOC")[9] and the Canadian company Talisman Energy, in varying percentages. Ex. 62, Verleger Report ¶ 55. As a result of the sale, CNPC took a forty percent interest in Blocks 1, 2, and 4 of Sudan's Unity and Heglig oil fields. Ex. 62, Verleger Report ¶ 55. In 1998, Arakis was purchased by Talisman Energy. Ex. 62, Verleger Report ¶ 61. Talisman committed to investing USD $760 million over two years on oil projects in Sudan, and was also able to further increase the development of the oil blocks, but ultimately sold its interest in Sudan to India's national oil company, Oil and Natural Gas Corporation Limited, in 2002. *See* Ex. 62, Verleger Report at 35 n.116, 40 n.140.

2. Sudan's Oil Export and (Non-Oil Export) Revenues Increased During the Relevant Period, and the GOS Spent These Revenues on Various Expenditures

The first barrels of crude oil were exported from Sudan on August 31, 1999. Ex. 88, Patey Opening Report at 7.

The GOS spent its revenues—collected together in a common fund, as is the general practice for governments around the world—on various expenditures. Ex. 84, Expert Report of John Llewellyn dated Jan. 6, 2023 ¶¶ 24, 57–58 ("Llewellyn Report"). From the period of 1997 to 2009, such expenditures included infrastructure projects, health and education, and repaying loans. Discussed *infra* at 51–52. Upon gaining independence, South Sudan took approximately 75% of the previously unified country's oil territory. Ex. 95, Verhoeven Tr. at 302:15–23.

D. Certain BNP Paribas Entities—Primarily Non-Party BNPP Suisse—Provided Financial Services to Sudanese Entities, Including Letters of Credit for Oil Exports

[9] GNPOC was a joint venture created by CNPC with Petronas (the Malaysian state oil corporation), Sudapet (the Sudanese state oil firm), and Arakis, whose stake was eventually acquired by the Indian state oil company, Oil and Natural Gas Corporation Limited. Ex. 62, Verleger Report ¶ 55.

Plaintiffs' allegations principally concern two BNPP entities: defendant BNP Paribas and non-party BNPP Suisse.[10]

BNP Paribas is a company incorporated in, and organized under the laws of, France, and is the parent company and, either directly or through a wholly owned subsidiary, owns non-party BNPP Suisse and defendant BNPP Wholesale. Ex. 11, The BNPP Defs. Responses and Objections to Pls. First Set of Requests for Admission, Response to Request No. 6 at 16–17 ("Defs. RFA Responses"); Ex. 9, The BNPP Defs. Second Supp. Responses and Objections to Pls. Second Set of Interrogs., Supplemental Response to Interrog. No. 17 at 66 ("Defs. Second Supp. Rog. Responses").

Non-party BNPP Suisse is a corporation organized under the laws of Switzerland. Ex. 9, Defs. Second Supp. Rog. Responses, Supp. Response to Interrog. No. 17 at 66–67.

1. Non-Party BNPP Suisse was Responsible for the Vast Majority of Sudanese Business at Issue in this Action

BNPP Suisse's Sudan business originated from its predecessor in interest—United European Bank ("UEB") (previously referred to as United Overseas Bank). Ex. 11, Defs. RFA Responses, Response to Request No. 2 at 14. Since the 1990s, UEB conducted commercial business involving Sudanese banks and commercial entities, providing services including opening accounts to confirm or negotiate letters of credit, domicile export proceeds and conduct correspondent banking transactions. Ex. 9, Defs. Second Supp. Rog. Responses, Supp. Response to Interrog. No. 8 at 36; Ex. 19, BNPP-KASHEF-00013603 at 13604. BNPP Suisse inherited these Sudanese banking relationships when it merged with UEB in 2001. Ex. 9, Defs. Second Supp. Rog. Responses, Supp. Response to Interrog. No. 8 at 36; Ex. 35, [redacted] Tr. at 112:3–17.

[10] As to Plaintiffs' claims regarding the two other BNPP defendants, BNPP Wholesale and BNPP NY, *see infra* 58-61.

In addition to providing services to commercial banks and other entities in Sudan, BNPP Suisse provided financial services to Sudanese banks in the form of letters of credit for U.S. dollar-denominated oil export transactions. BNP Paribas's DOJ Plea Agreement Statement of Facts ¶ 19 (the "DOJ Statement of Facts") (defined herein).

2. Europe and the United States Had Differing Approaches to Regulating Business with Sudanese Entities

At various points throughout the 1990s and 2000s, France, Switzerland, the European Union, the United Nations and the United States had different regulations, varying in type and scope, on commercial business involving Sudanese entities. Ex. 71, Expert Report of Gary Hufbauer dated Jan. 5, 2023 ¶¶ 21, 23, 29–33, 45–47, 109, 111 (detailing relevant sanctions involving Sudan imposed by the United States and United Nations) ("Hufbauer Report"); Ex. 67, Expert Report of Andrew Hood dated Jan. 6, 2023 ¶¶ 5.16–19, 5.24.1–3, 5.26 (discussing U.N., E.U., French and Swiss sanctions involving Sudan) ("Hood Report"); Ex. 66, Expert Report of Antoine Gaudemet dated Jan. 6, 2023 ¶ 114 (noting BNPP entities have not been found to have violated applicable European Union, French, or Swiss sanctions in connection with their transactions involving Sudan between 1997 and 2009) ("Gaudemet Report"). A major difference between the U.S. sanctions regime imposed on Sudan during the Class Period and the corresponding U.N., E.U., French and Swiss regimes was that the non-U.S. regimes imposed narrower and more targeted prohibitions on transactions involving specific persons or categories. *See* Ex. 67 Hood Report ¶¶ 6.2, 6.3.8–10. By contrast, U.S. sanctions broadly prohibited all U.S.-dollar financial services for Sudanese parties, with limited exceptions. Ex. 71, Hufbauer Report ¶¶ 28, 35.

The Swiss Financial Market Supervisory Authority ("FINMA") expressly found no indications that BNPP Suisse was in violation of Swiss sanctions, which prohibited transactions

relating to Sudanese entities for a military purpose. Ex. 132, Press Release, FINMA, Inadequate Risk Management of US Sanctions: FINMA Closes Proceedings Against BNP Paribas (Suisse) (July 1, 2014) ("FINMA found no indications of Swiss sanctions having been breached"); Ex. 33, [redacted] Tr. at 99:16–20 (testifying that Swiss regulatory authority FINMA found no indication that BNPP Suisse breached Swiss sanctions against Sudan).

3. In June 2014, Following a Comprehensive Transaction Review, BNP Paribas Pleaded Guilty to Violating U.S. Sanctions

In June 2014, BNP Paribas entered into plea agreements with the U.S. Department of Justice ("DOJ") and District Attorney of the County of New York ("DANY"), in which BNP Paribas pleaded guilty on behalf of itself and certain affiliates to federal and state charges relating to violations of U.S. sanctions prohibiting certain financial transactions involving designated countries, including Sudan, as well as related Specially Designated Nationals.[11] TAC Ex. B, BNP Paribas's DOJ Plea Agreement dated June 27, 2014 ("2014 DOJ Plea Agreement"); TAC Ex. D, BNP Paribas's DANY Plea Agreement dated June 30, 2014 (the "2014 DANY Plea Agreement"). The 2014 DOJ and DANY Plea Agreements each attached an identical stipulated Statement of Facts. Ex. 1, DOJ Statement of Facts; *see also* TAC Ex. E, BNP Paribas's DANY Plea Agreement Statement of Facts (the "DANY Statement of Facts). In the 2014 guilty pleas,

[11] In connection with the plea agreements, BNP Paribas also entered into a Cease and Desist Order Issued Upon Consent Pursuant to the Federal Deposit Insurance Act, as Amended, Supervisory Cooperation Decision Applying the Joint Statement of the French and U.S. Banking Supervisors of May 24, 2004, with the Board of Governors of the Federal Reserve System, Washington D.C. ("FRB") and the Autorité de Contrôle Prudentiel et de Résolution, Paris, France ("ACPR") (the "2014 FRB-ACPR Cease and Desist Order"), an Order to Cease and Desist and Order of Assessment of a Civil Money Penalty Issued Upon Consent Pursuant to the Federal Deposit Insurance Act, as Amended, with the FRB ("Second 2014 FRB Cease and Desist Order"), a Settlement Agreement with the U.S. Department of Treasury's Office of Foreign Assets Control ("OFAC") ("2014 OFAC Settlement Agreement"), and a Consent Order under New York Banking Law § 44 with the New York State Department of Financial Services ("NYDFS") ("2014 NYDFS Consent Order") (collectively, the "2014 Settlement Agreements"). TAC Exs. F–I.

BNP Paribas admitted that BNP Paribas or its subsidiaries provided U.S. dollar banking services involving public and private Sudanese entities in violation of U.S. sanctions.

BNP Paribas did not admit in any of the 2014 plea materials to conspiring with the GOS to injure Plaintiffs. Further, the 2014 plea materials do not establish that any conduct by the BNPP Defendants was causally connected to any injuries suffered by Plaintiffs. As an Assistant U.S. Attorney stated at BNP Paribas's sentencing hearing for violating U.S. sanctions, under federal terror victim restitution guidelines, "the victims [of the GOS] are not victims of this crime and cannot show that they were directly harmed by BNPP's conduct." Ex. 2, Transcript of Sentencing Hearing dated May 1, 2015, *United States v. BNP Paribas, S.A.*, 14-CR–460-LGS, 2015 WL 1962882 (S.D.N.Y. Apr. 30, 2015) at 9:19–21 ("Sentencing Hearing Tr."); *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.").

In connection with the U.S. government's investigation culminating in BNP Paribas's 2014 guilty pleas, BNP Paribas conducted a comprehensive review (the "Transaction Review") of transactions potentially impermissible under U.S. law and processed by entities including BNP Paribas and BNPP Suisse. Ex. 61, Expert Report of Gary B. Goolsby dated Jan. 6, 2023 ¶ 26 ("Goolsby Report"); Ex. 63, Expert Report of Timothy J. Fogarty Sr. dated Sept. 30, 2022 ¶ 224 ("Fogarty Opening Report"). [redacted]

[12] [redacted] *See* Ex. 61, Goolsby Report ¶ 38 n.33; Ex. 63, Fogarty Opening Report at Ex. 1, n.3;

[redacted]

[redacted] *See* Ex. 61, Goolsby Report ¶ 54; Ex. 22, BNPP-KASHEF-00046285 at 46316–46318. In addition, the Transaction Review identified two entities that processed transactions related to oil with Sudanese counterparties: BNP Paribas and BNPP Suisse, totaling USD $6.63 billion. BNP Paribas was responsible for approximately USD $130 million of the total Sudanese oil-related transactions, which is two-percent of the USD $6.63 billion total. *See* Ex. 61, Goolsby Report ¶ 55; Ex. 63, Fogarty Opening Report ¶¶ 230, 233, 235; Ex. 20, BNPP-KASHEF-00042444 at 42460–42466; Ex. 22, BNPP-KASHEF-00046285 at 46316. Non-party BNPP Suisse, by contrast, was responsible for USD $6.5 billion in Sudanese oil-related transactions, approximately ninety-eight percent of the total USD $6.63 billion Sudanese oil-related transactions. *See* Ex. 61, Goolsby Report ¶¶ 22, 45; Ex. 23, BNPP-KASHEF-00046989 at 47016, 47103.

The Transaction Review likewise did not identify any admissible evidence that any BNPP entity processed transactions for a military purpose. Ex. 35, [redacted] Tr. at 258:3–259:15, Dep. Ex. 253; Ex. 61, Goolsby Report ¶¶ 88–89.

E. The Nineteen Plaintiffs

The nineteen plaintiffs in this case formerly lived in Sudan, came to the United States as refugees and are now living in the United States as citizens, lawful permanent residents, or are awaiting eligibility for permanent resident status. TAC ¶¶ 23, 30–50e. Plaintiffs seek to hold the BNPP Defendants liable for various types of injuries suffered throughout Sudan in incidents (often multiple separate incidents per Plaintiff) allegedly caused variously by GOS formal

Ex. 21, BNPP-KASHEF-00044856 at 44946–44947); Ex. 23, BNPP-KASHEF-00046989 at 47104–47105.

military forces, GOS security forces, police, GOS-paramilitaries, militias and other actors, as depicted in the Plaintiff Location Maps. Ex. 138, Plaintiff Location Maps; *see also* TAC ¶¶ 30–50e. They allege that their injuries occurred in various regions throughout Sudan and present-day South Sudan, as well as abroad in Cairo, Egypt (where the perpetrators are alleged to be Egyptian authorities). *Id.* The injuries alleged by Plaintiffs occurred between 1998 and 2008, *i.e.*, during ten years of the fourteen-year Proposed Class Period. *Id.*; *see also* Pls. Mem. in Supp. of Mot. for Class Cert. at 3–4, ECF No. 431 (Pls. Class Cert. Br.).

For example, twelve Plaintiffs allege that at least some of their injuries occurred in Khartoum in unlawful home invasions or detentions in prisons or secret detention centers (so-called "ghost houses"). Four Plaintiffs allege that at least some of their injuries were from unlawful home invasions or detentions in cities in present-day South Sudan. Seven Plaintiffs allege that they were injured in attacks by the GOS military and/or tribal militias in Darfur. Plaintiffs also allege a variety of different injuries from attacks by the GOS military and/or tribal militias elsewhere in Sudan.

No Plaintiff has adduced any evidence, *inter alia*, that:

- He or she lived in an area that was the subject of GOS oil exploitation efforts;
- A GOS actor injured him or her in order to clear lands for oil exploitation efforts; or
- A GOS actor injured him or her through the use of weapons that the GOS acquired through a transaction processed by any BNPP Defendant.

F. Prior Rulings on Swiss Law

After conducting a choice of law analysis, this Court held that all of the claims in this action are governed by Swiss law and ordered supplemental briefing on "whether Plaintiffs have stated a claim under Swiss law." Op. & Order, at 19–21 (Mar. 3, 2020), ECF No. 151.

On February 16, 2021, the Court granted in part and denied in part the BNPP Defendants' motion to dismiss Plaintiffs' Swiss law tort claims. Op. & Order at 1, 3–4 (Feb. 16, 2021), ECF No. 193 ("Swiss MTD Op."). The Court dismissed Plaintiffs' primary liability claims, but concluded that, accepting the allegations in the Complaint as true, Plaintiffs had plausibly alleged BNP Paribas's secondary liability.[13]

The Court identified the following elements for a claim for secondary liability under Article 50(1) SCO:

> (1) a main perpetrator committed an illicit act, (2) the accomplice consciously assisted the perpetrator and knew or should have known that he was contributing to an illicit act, and (3) their culpable cooperation was the natural and adequate cause of the plaintiff's harm or loss.

Id. at 4–5.

As to the illicit act by the main perpetrator, the Court assumed for the purposes of the motion to dismiss that this factor was met without analyzing the factors for liability of the GOS. *Id*. at 6. The Court found conscious collaboration and fault were preliminarily met through allegations that BNP Paribas knew or should have known that its financial services were supporting the GOS's human rights violations that injured Plaintiffs. *Id*. at 9. In doing so, the Court emphasized the alleged link between the GOS's human rights abuses and oil development. *Id*. at 11–12.

[13] The Court held that Plaintiffs had failed to plead primary tort liability under Swiss law, and therefore dismissed four counts of primary tort liability: two counts of negligence per se (Counts 1 and 2), outrageous conduct causing emotional distress (Count 15), and negligent infliction of emotional distress (Count 16). *Id.* at 5; *see also* TAC ¶¶ 257–94, 473–84 (alleging these counts). But accepting Plaintiffs' allegations as true, the Court allowed Plaintiffs' claims of conspiracy and aiding and abetting liability relating to battery, assault, wrongful arrest, wrongful death, and property conversion or damage to proceed to discovery. Swiss MTD Op. at 20.

As to causation, the Court credited Plaintiffs' allegations that BNP Paribas's sanctions violations "generated massive revenues in oil sales," which the GOS in turn used to "equip and mobilize armed forces" that "committed ethnic cleansing in oil regions to obtain and sell more oil." *Id*. at 13. The Court accepted as true for purposes of the motion to dismiss that Plaintiffs plausibly alleged the following causal chain: (1) GOS "was committing horrific abuses, [2] those abuses were committed with weapons and soldiers that were bought with funds generated by its relationship with BNP Paribas, [3] the GOS would not otherwise be able to obtain those funds without BNP Paribas deciding to break the law, [4] the purpose of that law was at least in part to prevent the GOS from continuing those abuses—which is why BNPP undertook measures to evade detection of its activities[]" and, finally, (5) the GOS "was using the profits from its oil to obtain more oil." *Id*. at 17. However, as discussed below, discovery has shown that Plaintiffs' theories do not hold true.

The Court's Swiss law rulings did not address elements of liability under Article 41 SCO, which requires a showing of "unlawfulness" by the BNPP Defendants and the GOS that Plaintiffs have not met here.

In an opinion dated April 26, 2021, the Court additionally addressed Plaintiffs' claims as to BNPP Wholesale and found that collective references to "BNPP" in Plaintiffs' Complaint (as opposed to allegations of wrongful acts by BNPP Wholesale specifically) were sufficient for the motion to dismiss phase. ECF No. 218.

ARGUMENT

Under Federal Rule of Civil Procedure 56(a), summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

Kesner v. Buhl, 590 F. Supp. 3d 680, 692 (S.D.N.Y. 2022) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). A "genuine issue" of "material fact" exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

"Where, as here, the non-moving party would bear the burden of persuasion at trial, the moving party must first make a *prima facie* case by either identifying the portions of the record 'which it believes demonstrates the absence of a genuine issue of material fact' or 'pointing out . . . that there is an absence of evidence to support the non-moving party's case.'" *Golden Pac. Bancorp v. FDIC*, 375 F.3d 196, 200 (2d Cir. 2004) (quoting *Celotex*, 477 U.S. at 323, 325). The burden then shifts to the non-moving party to come forward with competent evidence to show there is a genuine issue for trial. *Id.*

To overcome a motion for summary judgment, plaintiffs "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "[M]ere speculation and conjecture is insufficient to preclude the granting of the motion." *Harlen Assocs. v. Inc. Village of Mineola*, 273 F.3d 494, 499 (2d Cir. 2001). The Court "may rely only on 'material that would be admissible or usable at trial,'" *Merring v. Town of Tuxedo,* No. 07–CV–10381 (CS) , 2009 WL 849752, at *5 (S.D.N.Y. Mar. 31, 2009) (citation omitted), and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248. "The mere existence of a scintilla of evidence in support of the plaintiff[s'] position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff[s]." *Id.* at 252.

I. PLAINTIFFS HAVE FAILED TO CREATE A GENUINE DISPUTE OF FACT THAT THE BNPP DEFENDANTS COMMITTED AN UNLAWFUL ACT UNDER

SWISS LAW OR CONSCIOUSLY COLLABORATED IN THE GOS'S UNLAWFUL ACTS

Switzerland has a single, generally applicable, tort provision, Article 41 SCO. Article 41, as stated in its title, addresses "General principles – Conditions of liability." Ex. 98, First Expert Report of Christoph Müller dated Jan. 6, 2023 at ¶ 33 ("Müller First Report") (English Translation of Art. 41(1) SCO). As relevant here, Article 41(1) provides that: "Any person who unlawfully causes loss or damage to another, whether willfully or negligently, is obliged to provide compensation." *Id.*

Based on this provision, Swiss courts and scholars have distilled four elements of tort liability under Article 41(1) SCO: (1) unlawfulness, (2) fault, (3) causation and (4) harm or damage to the plaintiff. *See* Ex. 98, Müller First Report ¶ 14; Ex. 99, Second Expert Report of Christoph Müller dated July 21, 2023 ¶ 30 ("Müller Second Report"); Ex. 104, Expert Report of Franz Werro dated March 2, 2023 ¶ 16 ("Werro 2023 Report").

Article 50 SCO, as stated in its title—"Multiple liable parties – In tort"—addresses joint and several liability for damages in situations involving multiple liable parties:

> (1) Where two or more persons have together caused damage, whether as instigator, perpetrator or accomplice, they are jointly and severally liable to the person suffering damage.
>
> (2) The court determines at its discretion whether and to what extent they have right of recourse against each other.
>
> (3) Abettors are liable in damages only to the extent that they received a share in the gains or caused damage due to their involvement.

Ex. 98, Müller First Report ¶ 34 (English Translation of Article 50 SCO). Based on Article 50(1) SCO, Swiss courts additionally require "conscious collaboration" (also known as "joint fault") and "joint causation" for the joint and several liability of an accomplice. Ex. 99, Müller Second Report ¶ 31.

Importantly, Article 50(1) SCO provides for joint and several liability for two or more persons who "cause damage" within the meaning of Article 41 SCO; it is not an independent basis for liability. Ex. 99, Müller Second Report ¶¶ 10–11; Ex. 98, Müller First Report ¶ 32. This means that each defendant, whether a perpetrator or accomplice, must meet not only the criteria of joint fault and joint causation for Article 50(1) SCO, but also the criteria for general tort liability under Article 41 SCO—*i.e.*, unlawfulness of the defendant's act that forms the basis of the plaintiff's claim, fault, causation and a damage or injury to the plaintiff. In addition, Articles 41 and 50 SCO "presuppose[] that the relation between the plaintiffs and the perpetrators (accomplice, instigator or main perpetrator) are governed by *private* law," and would not apply to the GOS's conduct here. Ex. 102, Expert Report of Isabelle Romy dated July 21, 2023 ¶ 12 ("Romy 2023 Report") (emphasis added).

Defendants are entitled to summary judgment given the lack of evidence creating a material issue of fact that the BNPP Defendants committed an unlawful act under Swiss law or consciously collaborated in the acts that harmed Plaintiffs.

A. Plaintiffs Have Failed to Raise a Genuine Dispute that the BNPP Defendants Committed an Unlawful Act Under Swiss Law

1. No Unlawful Act by the BNPP Defendants under Swiss Law

As explained by the BNPP Defendants' Swiss tort law expert and Professor of Law at the University of Neuchâtel, Dr. Christoph Müller, "unlawfulness" for purposes of Swiss tort liability requires a violation of a Swiss protective norm by each alleged tortfeasor. Ex. 99, Müller Second Report ¶¶ 35–36, 117. This has recently been reiterated by the Swiss Federal Supreme Court in the "Swisscom Case," discussed further *infra* at 46, where the court stated that "[s]trictly speaking, [Article 50 SCO] only stipulates that several participants are jointly and severally liable for damage caused collectively" and that liability for such damage under Article

50(1) SCO presupposes that the participant has engaged in an unlawful act. Ex. 120, DFSC 145 [2019] III 72, reas. 2.2.1 at 74.

Plaintiffs have no admissible evidence that the BNPP Defendants violated any Swiss legal norm protective of Plaintiffs. In the context of the banking industry, the Swiss Federal Supreme Court has twice rejected attempts by plaintiffs to create new protective norms supporting a finding of unlawfulness. Each time—once in the context of the Swiss anti-money laundering act and the other in the context of fraud in bankruptcy—the court found that violations of the applicable statute did not give rise to individual tort liability because the statutes were intended to provide system-wide regulations rather than claims for individual injured persons. Ex. 99, Müller Second Report ¶¶ 40–42 (citing Ex. 119, DFSC 143 [2017] III 653, reas. 4.3.2.2 at 661 ("Money-Laundering Case") and Ex. 117, DFSC 141 [2015] III 527, reas. 3.5 ("Bankruptcy Case")).

So too here. Plaintiffs do not allege that the BNPP Defendants violated Swiss sanctions on Sudan, that the BNPP Defendants engaged in any violent acts that injured them, nor have they alleged that the BNPP Defendants engaged in any unlawful conduct that in itself resulted in an attack on any Plaintiff. *See* Ex. 99, Müller Second Report ¶ 34. Swiss law did not broadly prohibit all transactions involving Sudan or Sudanese entities and, like E.U. sanctions on Sudan, reflected different policy, regulatory and legal conclusions than those reached by the United States, namely, that broad sanctions against Sudan would not be beneficial to the citizens of that country.[14] Swiss courts would not accept that Swiss sanctions on Sudan or any applicable Swiss

[14] *See* Ex. 67, Hood Report ¶¶ 5.16.1–5.16.16 (UN/EU sanctions against Sudan limited to military related transactions); *Id.* ¶¶ 5.17–5.20 (French sanctions); ¶¶ 5.21–5.24.4 (Swiss sanctions); Ex. 66, Gaudemet Report ¶ 22; Ex. 83, Expert Report of Barry Koch dated Sept. 30, 2022 ¶ 100 n.4 ("Koch Opening Report") (Plaintiffs' proposed expert admitting that U.N. and E.U. sanctions were limited to an arms embargo); Ex. 68, Expert Report of Cameron Hudson dated Sept. 30, 2022 ¶ 18 ("Hudson Opening

banking regulations created a protective norm in favor of Plaintiffs. Ex. 98, Müller First Report ¶ 121 ("[E]ven if BNP Paribas (Suisse) had violated Swiss sanctions, a Swiss court would not understand that these sanctions regimes imposed any duties on the Defendants or BNP Paribas Suisse vis-a-vis the Plaintiffs.").

Even if, *arguendo*, the BNPP Defendants' provision of financial services implicated some Swiss protective norm that applied to Plaintiffs, Plaintiffs' case rests primarily on the issuance of letters of credit in connection with Sudanese oil transactions, *infra* at 46, which was permissible under Swiss law.[15] Indeed, as noted above, FINMA specifically found no indications that BNPP Suisse was in violation of Swiss sanctions, which prohibited transactions relating to Sudanese entities for a military purpose. *See supra* at 19-20.

The gravamen of the TAC—BNPP's guilty plea to violations of U.S. sanctions on Sudan—is simply not a protective norm under Swiss law.[16] Defendants are aware of no case,

---

Report") (Plaintiffs' proposed expert admitting that the UN and EU sanctions against Sudan were limited to an arms embargo).

[15] To the extent Plaintiffs try to point to military-related transactions as a basis for liability, the record in this case is devoid of any evidence that BNPP Suisse engaged in any military-related transaction, much less one that injured any Plaintiff here.

[16] Even as a matter of U.S. law, OFAC and similar sanctions did not create any duties to, or provide a private right of action for, Plaintiffs. *See Ofisi v. BNP Paribas, S.A.*, No. 22–7083, 2023 WL 4378213 (D.C. Cir. July 7, 2023) ("As the district court correctly noted, there is no private right of action for violation of banking sanctions under the common law."); *Peterson v. Islamic Rep. of Iran*, No. 13-CV–9195 (KBF), 2015 WL 731221, at *7 (S.D.N.Y. Feb. 20, 2015) (no private right of action for violating Executive Order prohibiting transfers of funds relating to the interests of Iran) *vacated in part on other grounds*, 963 F.3d 192 (2d Cir. 2020); *Am. Bank & Tr. Co. v. Bond Int'l Ltd.*, 464 F. Supp. 2d 1123, 1127 (N.D. Okla. 2006) (no private right of action under The Trading With the Enemy Act); *Gleo v. Club Mediterranee S.A.*, 365 F. Supp. 2d 1263, 1272 (S.D. Fla. 2005) (same). *See also* Ex. 2, Sentencing Hearing Tr. at 9:19–21 (Assistant U.S. Attorney stating at BNP Paribas's sentencing hearing for violating U.S. sanctions, under federal terror victim restitution guidelines: "the victims [of these regimes] are not victims of this crime and cannot show that they were directly harmed by BNPP's conduct)"; *id*. at 10:11–12 ("[T]here's no direct pecuniary harm to victims of these regimes tied to BNPP's conduct at issue here.").

and Plaintiffs have cited none, where a Swiss court has "borrowed" a "legal norm" from a non-Swiss jurisdiction to support a finding of unlawfulness for purposes of Articles 41 or 50 SCO. This is consistent with, and reflective of, Swiss courts' restrictive approach to tort liability. Ex. 99, Müller Second Report ¶ 37 (stating that "[t]he Swiss Federal Supreme Court is . . . extremely reluctant to recognize protective norms [capable of] establishing unlawfulness by conduct"). This view is further affirmed by Dr. Luc Thevenoz, a Professor of corporate law at the University of Geneva and the Director of the Centre for Banking and Finance Law, who explains in his report, "the potential civil liability of BNPP France for the alleged wrongdoings of BNPP Suisse is not governed by the principles of U.S. criminal law which were the basis for BNPP France accepting criminal liability for the breach of U.S. sanctions by BNPP Suisse." Ex. 102, Expert Report of Luc Thevenoz dated Jan. 6, 2023 ¶ 15 ("Thevenoz 2023 Report").[17]

The Swiss government submitted an amicus brief arguing against secondary liability for a bank under analogous circumstances in *Rothstein v. UBS AG*, 708 F.3d 82 (2d Cir. 2013), a case where victims of terrorist attacks sought to hold UBS liable under the U.S. Anti-Terrorism Act, 18 U.S.C. § 2333, for attacks occurring between 1997 and 2006 that they claimed were caused by the bank's violations of U.S. sanctions. Brief of Swiss Government as Amicus Curiae at 4, *Rothstein v. UBS AG*, 708 F.3d 82 (2d Cir. 2013) ("Swiss Government Amicus Br."). Like the transactions at issue here, "[t]he actions of UBS that [were] the subject of th[e] lawsuit were commercial transactions (the exchange of banknotes for electronic deposits) conducted from

[17] Plaintiffs' Swiss law expert Franz Werro alternatively tries to suggest that the BNPP Defendants violated Swiss criminal prohibitions on fraud and reckless complicity in violent crimes. Werro Mar. 2023 Report ¶ 141. But these claims are again premised on the notion that BNP Paribas or BNPP Suisse failed to take sufficient steps to avoid violating U.S. sanctions. This is nothing more than a recharacterization of the claim that the BNPP Defendants violated U.S. sanctions, which is not a basis for unlawfulness under Swiss law.

Switzerland that at the time were permissible under Swiss law, and which did not involve U.S. persons." *Id.* at 4. The Swiss government opined that "[p]rivate individuals should not be permitted to use the courts to penalize commercial transactions that were authorized by the government of the nation that had jurisdiction over those transactions," *id.*, because that would mean "[Swiss] governmental decisions on economic interaction with other countries would always be subject to 'second-guessing' by private individuals," *id*. at 19–21.

Finding no support in Swiss law, Plaintiffs' Swiss law expert, Franz Werro, who does not purport to be an expert on public international law, cites inapplicable case law by the European Court of Human Rights ("ECtHR"), claiming that the ECtHR "on many occasions awarded compensation to victims of displacement for non-pecuniary damage such as emotional suffering." Pls. Class Cert. Br. at 102–03. But as Professor Keller, a former Judge at the ECtHR and current Professor at the Faculty of Law of the University of Zurich, Switzerland, explains, neither the European Convention on Human Rights ("ECHR") nor ECtHR case law recognizes "forced displacement" as a standalone claim or theory of liability. *See* Ex. 97, Expert Report of Helen Keller dated July 21, 2023 ¶¶ 12, 24, 27 ("Keller Report"). In addition, the basic premise that the ECHR or the ECtHR case law would apply to the BNPP Defendants via Swiss law is fundamentally flawed. Even if the ECHR or ECtHR case law did recognize "forced displacement," the ECHR places obligations only on Member States, not individuals or corporations.[18] *See* Ex. 97, Keller Report ¶ 31, 33.

[18] Further, to the extent Plaintiffs rely on international law as the source of their "forced displacement" theory, such claims are foreclosed under federal common law under Second Circuit and Supreme Court precedent. *See, e.g.*, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 112, 115–16 (2013) (noting that under federal common law "federal courts [] recognize private claims" for a "modest number of international law violations," which are "sufficiently definite," under international law and dismissing claims alleging defendant corporation's complicity in "Nigerian military and police forces attack[s on] Ogoni villages, beating, raping, killing and arresting residents and destroying or looting property."); *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1393, 1399 (2018) (recognizing federal common law claims

2. Plaintiffs' Novel Theory of Article 50(1) SCO Liability Is Wrong

Unable to identify any unlawfulness under Swiss law by the BNPP Defendants, Plaintiffs rely on the novel theory of their expert Franz Werro to argue that Article 50 SCO is "an independent basis for liability" against an accomplice, which does not require any showing of unlawful conduct by the BNPP Defendants under Article 41(1) SCO. Werro 2023 Report ¶ 26. But, as Professor Müller has explained, Professor Werro's claim that Article 50(1) SCO is an "independent basis for liability" has not been accepted by *any* Swiss court. Professor Werro has himself acknowledged that rather than relying on existing case law or legal authorities, his analysis on bank liability is based on how he thinks the law "should be applied." Ex. 106, Werro Tr. at 105:4–6; *id.* at 105:2–4 ("I hope that this opinion of mine will influence courts and will be taken into account by courts").[19] Confirming the novelty of Werro's theory, Professor Isabelle Romy, former judge on the Swiss Federal Supreme Court, states: "I have never seen a Swiss court adopt Prof. Werro's novel theory that an accomplice can be held liable solely on the basis of Art. 50(1) [SCO], without showing that the accomplice independently meets the requirements for liability under Art. 41 [SCO], in all of my time on the Swiss Federal Supreme Court and as a private attorney." Ex. 102, Romy Report ¶ 12.

As Professor Romy further explains, Werro's artificial construct for Article 50(1) SCO liability, which assumes that only the GOS meets the requirements for tort liability as a

---

for violations of "specific, universal, and obligatory" international law norms but dismissing claims alleging defendant foreign bank's complicity in financially facilitating "criminal acts of terrorism, causing the deaths or injuries for which petitioners [sought] compensation").

[19] This theory of Article 50 SCO was proposed in an article by Vincent Perritaz, a former PhD student of Professor Werro. In an article published May 2023, Mr. Perritaz expressly notes that his idea of Article 50 SCO as an independent basis is "new." *See* Ex. 122, Alexis Overney & Vincent Perritaz, *Lien de causalité*, *in* Anne-Sylvie Dupont & Christoph Müller, *Concepts fondamentaux de l'indemnisation: convergences et divergences* ¶ 75 (2023).

perpetrator, additionally fails because Articles 41 and 50 SCO are not applicable to the GOS. Ex. 102, Romy 2023 Report ¶¶ 17–19. As explained by the Swiss Supreme Court in the "Hockey Case," Article 50 SCO does not create joint and several liability between private parties who are subject to Article 41 SCO and sovereign entities subject to public law. Ex. 112, DFSC 79 II [1953] 66, reas. 8 ("The Moutier players, the Delémont Hockey-Club and Loriol caused damage by joint negligence; they also are jointly and severally liable (article 50 chapter 1 CO). However, there is not in any way joint and several liability with the municipality of Moutier, whose liability, if found, would not be based on article 41, but on public cantonal law."); Ex. 112, Romy 2023 Report ¶ 37.

So too here. Even accepting Plaintiffs' novel theory that Article 50(1) SCO is an independent basis for liability (it is not), the GOS cannot be held liable as a perpetrator based on Article 41 SCO. Acts of a foreign state in their sovereign capacity (*jure imperii*) are public law acts not subject to tort liability under Swiss law. Ex. 112, Romy 2023 Report ¶ 29. Plaintiffs' alleged injuries in this case, which include claims of assaults, unlawful arrest and property loss relating to the GOS would be considered *jure imperii* and therefore not subject to Articles 41 and 50 SCO liability. Ex. 112, Romy 2023 Report ¶¶ 30–33 (collecting cases and explaining that "military activities, acts analogous to expropriation or nationalization, …[and] decisions to seize objects of historical or archaeological value" are considered *jure imperii*). Thus, joint and several liability for the BNPP Defendants as accomplices also fails.

Plaintiffs have failed to a raise a genuine dispute that either the BNPP Defendants or the GOS committed an "unlawful act" within the meaning of Article 41 SCO. Accordingly, there is also no genuine dispute that the BNPP Defendants cannot be jointly and severally liable under Article 50(1) SCO. On this basis alone, the Court should dismiss Plaintiffs' claims.

B. Plaintiffs Have Failed to Raise a Genuine Dispute that the BNPP Defendants Are at "Fault" Under Swiss Law

Even if the Court were to ignore, contrary to Swiss Supreme Court precedent, the unlawfulness requirement, Plaintiffs' claims fail given their inability to establish "collective fault" by the BNPP Defendants together with the GOS. To show collective fault, Plaintiffs needed to—and failed to—adduce evidence raising a material issue of fact that the BNPP Defendants consciously collaborated *in the injurious course of conduct*. *See, e.g.*, Ex. 116, Supreme Court 4A_185/2007, reas. 6.2.1 at 12 ("Locksmith Case") ("[T]he perpetrators must have consciously cooperated to achieve this result."). As Plaintiffs' Swiss law expert explained, "what triggers liability for an accomplice under Article 50 CO is to provide conscious assistance *to the illicit act of the main perpetrator*." Supplemental Declaration of Franz Werro ¶ 78, ECF No. 174 ("Werro Supp. Decl.") (emphasis added). Not surprisingly, many Article 50(1) SCO cases involve joint tortfeasors who participated in the same conduct—the different tortfeasors were all directly liable under Article 41(1) SCO and/or it was unclear from the circumstances which tortfeasor actually inflicted the injury. *See, e.g.*, Ex. 109, DFSC 42 [1916] II 473 ("Firecrackers Case") (three friends who roamed the streets together throwing firecrackers jointly liable whether or not a specific defendant's firecrackers injured plaintiff, because they were at least negligent as to injuries that occurred in the course of their shared activity); Ex. 107, DFSC 25 [1899] II 817 ("Bar Fight Case") (brawl participants jointly liable for injury inflicted in brawl); Ex. 110, DFSC 45 [1919] II 304 ("Brawl Case") (same); Ex. 115, DFSC 104 [1978] II 184 ("Bow and Arrow Case") (three children playing with a bow and arrow jointly liable when one child shot someone in the eye); Ex. 112, Hockey Case (hockey players who organized or participated in an illicit hockey game jointly liable for injuries from the game); Ex. 108, DFSC 38 [1912] II 471 ("Father and Son Case") (two boys throwing stones jointly liable when

bystander was hit by one of the stones); Ex. 114, DFSC 100 [1974] II 332 ("Arson Case") (boys playing with matches jointly liable for fire).

Here, there is no dispute that the BNPP Defendants were not involved in the alleged injury causing conduct (*e.g.*, assaults, unlawful detentions) that harmed Plaintiffs. There is no evidence, and Plaintiffs do not allege, that the BNPP Defendants were present in Sudan or engaging in human rights violations with the GOS against Plaintiffs or any other individuals in Sudan or that the BNPP Defendants intended to injure Plaintiffs. *See* TAC ¶¶ 257–529. Accordingly, and as they did at the motion to dismiss stage, Plaintiffs try to rely on a theory of negligence in order to establish fault by the BNPP Defendants. Pls. Class Cert. Br. at 68–69, 79–80; Pls. Swiss MTD Opp. Br. at 15, ECF No. 173. But for the reasons explained above, *see supra* at 29-30, Plaintiffs have failed to identify any duty of care that the BNPP Defendants violated, defeating any attempt to base liability against the BNPP Defendants on a negligence theory. Ex. 99, Müller Second Report ¶ 52; Ex. 98, Müller First Report ¶ 121.[20]

As explained by Professor Müller, "[t]here is no Swiss tort law case that comes even remotely close to holding a bank liable as an accomplice under Article 50(1) of the Swiss Code of Obligations ('SCO') to any third party." Müller First Report ¶ 11; *see also* Ex. 102, Thevenoz 2023 Report ¶¶ 12–14; Suppl. Decl. of Vito Roberto ¶¶ 57–62, ECF No. 169. The Swiss Shooting Contest and Locksmith Cases, both of which were cited by the Court in deciding the motion to dismiss, demonstrate why Plaintiffs fall well short of demonstrating an issue of fact as

[20] Werro tries to claim that no duty of care is required for establishing negligence by citing to the "Carpenter Strike Case" but that case involved liability based on intentional wrongdoing, not negligence. *See* DFSC 57 [1931] II 417 at 420 ("Carpenters' Strike Case") (affirming liability of union leader, who intentionally instigated striking workers "to attempt to intimidate the strikebreakers by using physical violence," for injury sustained by a strikebreaker in an attack committed in the course of violent intimidation); Werro 2023 Report ¶ 95. There are no allegations or evidence that the BNPP Defendants encouraged or directed the GOS to commit the attacks against Plaintiffs.

to the BNPP Defendants having "collective fault" with the unidentified Sudanese individuals alleged to have harmed Plaintiffs. *See* Swiss MTD Op. at 7–8. In the "Shooting Contest Case," an innkeeper was held liable under Article 50 for allowing soldiers who were patrons at the inn's restaurant to organize a shooting competition in the inn's garden. *See* Ex. 111, DFSC 71 [1945] II 107. During the contest, one of the bullets bounced off a tree and seriously injured another patron sitting on the terrace. The Swiss court found all of the soldiers liable for the patron's injury, including those who did not shoot. As to the innkeeper, while the Swiss court found him to be unaware that the soldiers had shifted from shooting at far away targets to aiming for more nearby and dangerous glass, the court nonetheless held the innkeeper liable for the patron's injuries because he permitted the shooting contest to take place on his inn's premises without taking the proper safety measures. Thus, the Swiss court found the innkeeper, who permitted the shooting contest on his property and had a legal duty towards his patrons, liable as an accomplice in the injurious course of conduct (*i.e.*, the shooting contest that took place on his property). Ex. 98, Müller First Report ¶¶ 67–69. No such connection, either based in any legal duty as between the BNPP Defendants and Plaintiffs or in the facts, similarly exists to support Plaintiffs' theory that a Swiss court would deem the BNPP Defendants in "collective fault" with the perpetrators of the injurious conduct here.

In the Locksmith Case, the Swiss court found that a locksmith and the company ("Y S.A.") that was in charge of the accounts and was the owner of the vehicles used in connection with the locksmith's shop, were jointly and severally liable under Article 50(1) SCO for the damage resulting from the unlawful use of a Swiss trademark by the locksmith. *See* Ex. 116, Locksmith Case; *see also* Ex. 98, Müller First Report ¶ 70. The court found Y liable because Y itself directly infringed the plaintiff's intellectual property rights through the services it provided

to the locksmith, which included "entering into leasing agreements" on the locksmith business's behalf; having "a bank account using the infringing tradename;" and "collect[ing] debts using letterhead containing the infringing mark. Ex. 98, Müller First Report ¶ 71.

Here, no such connection—legally, physically or otherwise—connects the BNPP Defendants to any Plaintiff, or any person who injured Plaintiffs. There is no showing that the BNPP Defendants committed the violent acts that injured Plaintiffs, that the financial services provided by BNP Paribas or BNPP Suisse gave rise to any duty under Swiss law to Plaintiffs "to take all measures required by the circumstances to ensure the safety" of Plaintiffs, or, even if any such duty existed, that the financial services were unlawful under Swiss law. Ex. 98, Müller First Report ¶ 130 (quoting the Shooting Contest Case) (emphasis omitted).

II. PLAINTIFFS HAVE FAILED TO RAISE A GENUINE DISPUTE THAT THE BNPP DEFENDANTS WERE THE NATURAL ("BUT FOR") OR ADEQUATE ("PROXIMATE") CAUSE OF PLAINTIFFS' ALLEGED INJURIES

Article 41(1) SCO and Article 50(1) SCO require Plaintiffs to establish that the BNPP Defendants were both the "natural" and "adequate" cause of Plaintiffs' injuries. *See* Swiss MTD Op. at 12. It is common ground among the parties and was accepted by this Court that the Swiss law "concepts of 'natural' and 'adequate' causation are similar to the concepts of 'but for' and 'proximate' cause in United States tort law." *Id.* Discovery has shown that Plaintiffs cannot establish either natural or adequate causation here.

A. Plaintiffs Have Failed to Raise a Genuine Dispute that the BNPP Defendants Were the Natural Cause of Their Alleged Injuries

"Natural causation is the logical (or scientific) relationship between the event giving rise to liability and the damage or loss: an event is thus the natural cause of a result if it is one of the *sine qua non* conditions of the result. There is accordingly a natural causal link between an event and a result if, without the event, the result would not have occurred." Ex. 98, Müller First

Report ¶ 137. As Professor Müller explains, "In the case at hand, with respect to natural causation . . . each individual Plaintiff will have to prove (as a matter of fact) that without the Defendants (as distinct from BNP Paribas (Suisse)) processing financial transactions for the GOS during the relevant period, he or she would not have suffered the damage or loss that he or she has suffered." *Id*. ¶ 138.

In allowing this case to proceed to discovery, the Court determined Plaintiffs had plausibly alleged that "the BNPP Defendants' financial services *were actually used for the attacks that injured* [P]laintiffs." Swiss MTD Op. at 13 (emphasis added). However, discovery has shown that Plaintiffs have not raised a triable issue of fact that any financial services provided by the BNPP Defendants were used in the attacks that caused their injuries.

1. There Is No Evidence that the BNPP Defendants' Financial Services Were "Actually Used" for the Attacks that Injured Plaintiffs

Plaintiffs fail to raise an actual issue of triable fact that the BNPP Defendants were the but-for cause of their injuries, given that there is no evidence that the BNPP Defendants' financial services were "actually used for the attacks that injured Plaintiffs." *See* Swiss MTD Op. at 13. There is simply no evidence that any transactions processed by the BNPP Defendants (or any BNP Paribas entity, for that matter) are *linked to*, let alone the *cause of*, Plaintiffs' alleged injuries.

In allowing this case to proceed past the motion to dismiss stage, the Court credited Plaintiffs' allegations in the TAC that the GOS used oil export revenues processed through BNP Paribas to "import sophisticated weapons from major arms suppliers in China, Russia, Ukraine, Iran and Belarus," and that, in turn, the GOS used these weapons to injure Plaintiffs. Swiss MTD Op. at 13; TAC ¶ 126 ("The GOS used the oil wealth that it acquired thanks to BNPP's criminal actions to embark on a major weapons acquisition spree. The GOS did not just

purchase standard guns and ammunition. It purchased modern, highly sophisticated and extremely expensive armaments capable of inflicting massive amounts of harm and damage in a ruthlessly efficient manner."). However, discovery has shown that there is no such link between oil export revenues processed by any BNPP Defendant and the injuries to Plaintiffs.

First, discovery has shown that nearly all of the Sudanese oil export transactions, and indeed the vast majority of Sudan-related transactions of any kind, were processed by BNPP Suisse, which is a separate entity and not a party to this litigation. *See* Defs. Rule 56.1 Statement ¶¶ 101, 106; TAC ¶¶ 1, 53–57; Ex. 61, Goolsby Report ¶¶ 22, 30–31, 40; Exs. 19, 22, BNPP-KASHEF-00042444 at 42460–42466 (BNP Paribas); BNPP-KASHEF-00046285 at 46316 (BNPP Suisse) (internal transaction review documents indicating that BNPP Suisse processed ninety-eight percent of the U.S.-dollar denominated oil export letters of credit for Sudanese entities identified in the transaction review). BNP Paribas was only responsible for a miniscule amount of oil export transactions, and BNPP Wholesale, a U.S.-based holding company, was involved in no Sudanese business. Ex. 9, Defs. Second Supp. Rog. Responses, Supp. Response to Interrog. No. 17 at 66; Exs. 19, 22, BNPP-KASHEF-00042444 at 42460–42466 (BNP Paribas); BNPP-KASHEF-00046285 at 46316 (BNPP Suisse) (internal transaction review documents indicating that BNPP Suisse processed ninety-eight percent of the U.S.-dollar denominated oil export letters of credit for Sudanese entities identified in the transaction review); *infra* at 60-61. Thus, at the outset, Plaintiffs' causation theory, already premised on a claim of secondary liability, is one additional step removed from the actions of any BNPP Defendant entities in this case. Parent corporation BNP Paribas cannot be held liable for the actions of its subsidiaries as a result of its corporate relationship to BNPP Suisse, nor can BNPP Wholesale, a separate subsidiary with no ownership stake in BNPP Suisse. Defs. Rule 56.1 Statement ¶¶ 98,

100; Ex. 9, Defs. Second Supp. Rog. Responses, Supp. Response to Interrog. No. 17 at 66, 67; Ex. 102, Thevenoz 2023 Report ¶¶ 10–11 ("Swiss law recognizes that distinct corporate entities – such as BNPP [Paribas], [BNPP Wholesale] and BNPP Suisse – are legally separate from one another, each with its own assets, liabilities, and duties to clients, third parties and States, and each individually and separately liable when it breaches its own such duties. Exceptions to this principle of legal separateness are narrow and involve abuse of the corporate form.").

Second, to the extent Plaintiffs claim the BNPP Defendants were the but-for cause of their injuries from "sophisticated weapons," Swiss MTD Op. at 13, *see also* TAC ¶ 126, their theory of natural causation fails for the simple reason that discovery has established that the majority of Plaintiffs were not injured by "sophisticated weapons" *at all.* Fifteen Plaintiffs claim that at least some of their injuries occurred in allegedly unlawful home invasions and/or detentions in secretive detention centers (so-called "ghost houses"), and not in a military-style combat setting. *See, e.g.*, TAC ¶ 148; Defs. Rule 56.1 Statement ¶¶ 121, 148, 171; Ex. 31, Adam Tr. at 93:23–97:1–8; Ex. 42, Khalifa Tr. at 121:12–17, 128:14–129:5, 143:12–14; Ex. 42, Ali Tr. at 66:20–67:9. In their testimonies, Plaintiffs who allege injuries in this manner consistently described being harmed by no weapons at all, or else commonly available materials or rudimentary weapons. *See, e.g.*, Defs. Rule 56.1 Statement ¶¶ 243, 413; Ex. 45, Jane Roe Tr. at 72:7–23; Ex. 48, Shbur Tr. at 86:13–18, 94:11–14. These are not the "sophisticated weapons" Plaintiffs allege that the GOS could not have acquired without oil export revenues.

Nor is there evidence that any financial services by the BNPP Defendants were used to harm any Plaintiff in ghost houses, through sophisticated weapons, or otherwise. TAC ¶ 148. Notably, Plaintiffs' own proposed experts admitted that "ghost houses" existed at least as early as 1989, undercutting any claim that the BNPP Defendants were a but-for cause of these pre-

existing sites or this activity. Defs. Rule 56.1 Statement ¶¶ 38–43; Ex. 56, Baldo Tr. at 225:19–228:24; Ex. 93, Verhoeven Opening Report at 8. Admitting that these detention activities occurred before the GOS began receiving oil export revenues, Plaintiffs' proposed experts have likewise conducted no studies or offered any methodology to determine the scale of "ghost houses" or other GOS detention activities in Sudan at any point before, during, or after the Relevant Period. Defs. Rule 56.1 Statement ¶¶ 41–42; Ex. 56, Baldo Tr. at 227:11–228:24 ("I would say, you know, that I don't have an indication of increase or decrease in numbers of ghost houses in that period. But I know ghost houses did exist in 1997, 1998, prior to '97, after, well after 1998.").

Similarly, some Plaintiffs allege that individuals attacked their villages and harmed them or their family members by firing small arms. *See, e.g.,* Defs. Rule 56.1 Statement ¶¶ 386, 388, 389; Ex. 29, H. Abakar Tr. at 59:7–8, 59:11–13, 63:17–8, 70:7–9. Here too, there is simply no evidence that any of the small arms these Plaintiffs allege they were injured by were in fact purchased as a result of transactions processed by any BNPP Defendant, much less that the GOS could not have had access to these small arms but for receiving oil export revenues. The record shows that the GOS *did* have access to such weapons before the export of oil began in August 1999. Plaintiffs' proposed experts admitted that these weapons have long been widely available to the GOS, rebel forces, and civilians in Sudan, and, in fact, were often circulated among these factions. *See* Defs. Rule 56.1 Statement ¶ 61; Ex. 95, Verhoeven Tr. at 221:14–225:15; 230:23–231:2 (testifying that the GOS had a "very wide range of weapons systems" from the period of 1989 to 1997 (*i.e.*, in the years between al-Bashir's rise and the Proposed Class Period), including "AK–47s," "Kalashnikov[s]," and "other forms of rifles."). Indeed, there have long been "weapons that were in circulation in the broader region of the Horn of Africa." Defs. Rule

56.1 Statement ¶ 76; Ex. 95, Verhoeven Tr. at 223:10–224:2 ("The Horn of Africa has long been a conflict-torn region with wars in Ethiopia and what is now Eritrea, Chad, Uganda, [and] a range of other countries. And there was a lot of trafficking, and a lot of back and forth between those weapons, because you have kind of this regional market depending on who has money.").

As to the Plaintiffs who testified that they witnessed or were injured in attacks involving military-grade weapons systems, there is likewise no admissible evidence of a but-for causal connection between any transactions by any BNPP Defendant and the purchase of these weapons. Here too, the record shows, and Plaintiffs' experts admit, that the GOS had access to substantial military weaponry *prior to* the August 1999 date Plaintiffs claim marks the beginning of the GOS's ability to monetize its oil. Defs. Rule 56.1 Statement ¶¶ 65, 67, 70, 73–75, 84; Ex. 88, Patey Opening Report at 7 (describing oil export beginning in August 1999); Ex. 93, Verhoeven Opening Report at 26; Ex. 95, Verhoeven Tr. at 230:13–16 (describing Antonov planes as an "old" technology that the Sudanese Armed Forces had access to dating back at least to al-Bashir's rise to power in 1989), 230:17–22 (admitting that the GOS had helicopter gunships during the period of 1989–1997), 229:13–18 (admitting that the PDF and GOS-backed tribal militias had "land cruisers" during the period of 1989–1997); Ex. 65, Fogarty Tr. at 123:6–12 (acknowledging that the GOS received ten Mi–24 helicopter gunships in 1996), 125:15–21 (acknowledging that the GOS received six Mi–24B attack helicopters in 1997), 128:23–129:7 (acknowledging that the GOS received a shipment of Howitzers, mortars, and tank ammunition in 1995). None of the Plaintiffs alleging attacks involving military-grade weapons has adduced evidence that the weapons were even purchased *after* the GOS began exporting oil in August 1999, much less purchased *with* revenues processed by any of the BNPP Defendants, and so any claim that the BNPP Defendants were the "but-for" or natural cause fails. *See also* Ex. 121,

Supreme Court 4A_311/2021, consid. 3.2.1 ("Unfair Competition Case") (finding lack of natural causation for unfair competition claims because plaintiff failed to prove that without the defendant's actions, its assistants would not have left and its sales would not have fallen).

2. **There Is No Evidence to Support the Claim that the Financial Transactions by the BNPP Defendants Caused the GOS to Attack Plaintiffs with "Greater Frequency And Velocity" in Order to Clear "Oil Regions to Obtain and Sell More Oil"**

At the motion to dismiss stage the Court credited Plaintiffs' allegation of an oil "nexus," according to which oil export revenues processed by the BNPP Defendants beginning in August 1999 enabled the GOS to acquire "sophisticated weapons" it otherwise could not have accessed and attack Plaintiffs "with greater frequency and velocity" in order to clear them from oil-rich lands in pursuit of more oil revenues to be processed by the BNPP Defendants. *See* Swiss MTD Op. at 12–13; TAC ¶ 11 ("Specifically, BNPP assisted the GOS with its oil exploitation efforts, which were well-known to include harming, killing and displacing people in oil rich regions. In turn, assisting the GOS in its export of oil, BNPP gave the GOS resources to exploit additional oil resources. Thus, BNPP's U.S. Sanctions violations created a macabre feedback loop."). But as is demonstrated below, there is no evidence in the record supporting this purported "oil nexus" —Plaintiffs' construct for imposing liability on the BNPP Defendants for Sudanese government violence aimed to clear oil lands so that more oil could be exploited.

First, positing the natural cause of any purported injury to the flow of U.S. dollars that allegedly began with the export of oil in August 1999 fails on its face for Plaintiffs injured before that date. *See, e.g.*, Defs. Rule 56.1 Statement ¶ 121; Ex. 31, Adam Tr. 93:23–97:8 (Turjuman Adam alleging GOS arrest in 1998); Defs. Rule 56.1 Statement ¶ 148; Ex. 42, Khalifa Tr. 121:12–17, 128:14–129:5, 143:12–14 (Halima Khalifa alleging assault by GOS forces in 1998); Defs. Rule 56.1 Statement ¶¶ 169, 173, 176; Ex. 32, Ali Tr. 54:6–9, 60:23–25, 70:4–11, 71:2–13,

71:19–72:5, 78:19–79:24, 80:15–81:12 (Isaac Ali alleging GOS murder of GOS military officer uncle and father in 1998 and detention by police officers in May 1999); *see also* TAC ¶ 220 (defining the Proposed Class Period as beginning in 1997).

Second, there is no evidence that any Plaintiff was forcibly displaced from oil land by the GOS to further its oil exploitation efforts. In fact, 18 of the 19 Plaintiffs did not even live in an oil block. Defs. Rule 56.1 Statement ¶¶ 109–110, 114–116, 121–122, 127, 129, 134, 139, 148–149, 153–154, 157–158, 161, 169–170, 176–177, 180, 190–191, 198–199, 206, 210–212, 216, 222–223, 232–233, 240–241, 245–246, 302, 314–315, 320, 329–330, 334–335, 343–344, 351–352, 360–361, 368, 373–374, 378, 384–385, 391–392, 396–397, 401–402, 408–409, 417–418, 428–429, 439–440; Ex. 138, Plaintiff Location Maps. One Plaintiff, Nyanriak Tingloth, testified that she lived in Abyei, an area that, during the time in which she alleges she was injured, was roughly the size of Massachusetts overlapping Blocks 2 and 4. Defs. Rule 56.1 Statement ¶ 306; Ex. 50, Tingloth Tr. 110:16–18, 111:20–112:7; 118:11–13; 123:2–7; Ex. 138, Plaintiff Location Maps. However, she has adduced no admissible evidence that where she was attacked within this area was the subject of GOS oil exploitation efforts, much less that the alleged attack was perpetrated by the GOS in order to clear oil-rich land for drilling. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 226 F.R.D. 456, 458, 482 (S.D.N.Y. 2005) (holding that merely living in an oil-rich area is not sufficient to establish that an individual was injured by the GOS in a campaign to clear oil-rich lands, since "warfare persisted through much of the Class Period between shifting, protean factions of rival rebel groups based loosely on tribal affiliations").

B. Plaintiffs Have Failed to Raise a Genuine Dispute of Fact that the BNPP Defendants Were the Adequate Cause of Plaintiffs' Alleged Injuries

"[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." Swiss MTD Op. at 14.

Adequate causation "serves as a corrective factor to the concept of causes in science, which may need to be restricted in order to be acceptable for legal responsibility." Ex. 120, Swisscom Case, reas. 2.3.1 at 81. The Court "must consider not only all the circumstances of the case, but also the protective function of the norm and the types of circumstances that appropriately should give rise to liability." Ex. 98, Müller First Report ¶ 137(ii). The Swiss Federal Supreme Court has accordingly held that "not every act of participation that is merely 'somewhat' of promoting influence, *but is not sufficiently closely related to the act itself*, is sufficient." Ex. 98, Müller First Report ¶ 143 (quoting the Swisscom Case) (emphasis added). In ruling on the motion to dismiss, the Court recognized that the adequate cause analysis 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." Swiss MTD Op. at 16 (emphasis added).[21] Adequate causation is not satisfied if the chain of causation "is far too long to constitute proximate cause," is "too attenuated to satisfy the proximate cause requirement," "rest[s] on mere conjecture" or "depend[s] on the intervention of multiple parties." Swiss MTD Op. at 16 (citing cases; internal quotations omitted).

Swiss courts have also found no adequate "causal connection" exists (1) where the defendant's actions were independent of actions and decisions by non-parties that directly caused plaintiffs' injuries or (2) where plaintiffs' injuries were too far removed from the actions of the defendant. *See* Ex. 98, Müller First Report ¶ 137; *see also* Ex. 121, Unfair Competition Case, Supreme Court 4A_311/2021 consid. 3.2.1 (the Swiss Supreme Court finding the causal link

[21] *See also* Swiss MTD Op. at 15 ("A finding of adequate cause under Swiss tort law…requires determining whether it would be 'reasonable' to hold BNPP responsible for causing *at least some* of human rights abuses in Sudan, which *includes* looking at the factor of whether those atrocities were foreseeable to BNPP at the time." (emphasis added)).

between unfair business practices of a competitor company and a drop in sales was lacking because the drop in sales could be attributed to other causes); Ex. 118, Somatoform Disorder Case, DSFC 142 [2016] III 433 (plaintiff's somatoform pain disorder, which developed with a latency period of several months from the date of an accident in which plaintiff witnessed his wife being injured, could not be attributed to the tortfeasor).

Finally, each Plaintiff must establish causation as to his or her individual injuries, and not the injuries of some undefined and unidentified subset of individuals in Sudan during the ten-year Relevant Period. *See* Ex. 98, Müller First Report ¶ 60 ("Plaintiffs cannot prevail on liability for the whole group by claiming that *some* people in that group were injured as a result of Defendants' conduct. As a matter of substantive Swiss law, causation towards a non-individualised plurality of persons is not sufficient to establish liability towards individual injured parties."); *see also id.* (explaining that Swiss law does not provide for group-wide causation).

1. The Processing of Financial Transactions by the BNPP Defendants Is Not "Sufficiently Closely Related" to Plaintiffs' Injuries to Satisfy the Swiss Adequate Cause Standard

Here, assessing the "circumstances of the case" in light of the relevant legal "norm"—*i.e.*, financial sanctions—demonstrates that a Swiss court would not deem the conduct of the BNPP Defendants "sufficiently closely related" to the injuries suffered by Plaintiffs (or even Plaintiffs' broader "all atrocities" theory) so as to be deemed their adequate cause. Ex. 98, Müller First Report ¶ 146. "Such a generalizing attribution does not lead to a reasonable limitation of liability." Ex. 72, Supreme Court 4A_7/2007, reas. 5.4 at 11 ("Barbecue Grill Case").

First, a finding of liability here would not comport with the legal norms protected by Swiss tort law. The gravamen of Plaintiffs' claims is the BNPP Defendants' admitted violation

of U.S. sanctions imposed on Sudan. TAC ¶ 2. As discussed *supra* at 19-20, Swiss law did not broadly prohibit all transactions with any Sudanese entity. This is dispositive. On the motion to dismiss, in distinguishing the Swisscom Case, the Court accepted as true Plaintiffs' allegation that the BNPP Defendants had an "illegal" relationship with Sudan. Swiss MTD Op. at 19. But, as a matter of Swiss law, there was no such "illegal relationship," much less the violation of any Swiss law creating a duty of care toward Plaintiffs. Ex. 98, Müller First Report ¶¶ 121, 128–30.

The Swisscom Case, the leading Swiss Supreme Court case on adequate causation under Article 50 SCO, supports the conclusion that there is no evidence supporting adequate causation here. In declining to find that causation was satisfied with respect to an internet services provider who allegedly knowingly hosted content that infringed the plaintiffs' intellectual property rights, the Swiss Supreme Court specifically recognized that it would not be appropriate for courts to impose civil liability on companies providing services that are *lawful* under Swiss law. Ex. 120, Swisscom Case, reas. 2.3.2 at 84. Similarly, in its amicus brief in *Rothstein*, the Swiss government opined that under the plaintiffs' theory of civil liability for U.S. sanctions violations, "companies would face substantial and unpredictable risks of being sued in the United States for conduct that conforms to the legal requirements of the nations in which they operate and has no link to the persons initiating the lawsuits." Brief for Gov't of Switz. as Amicus Curiae Supporting Affirmance, *Rothstein v. UBS AG*, 708 F.3d 82, 97 (2d Cir. 2013) (No. 125) at 17.

As mentioned above, the Swiss Supreme Court in the Swisscom Case emphasized that holding a defendant jointly and severally liable would create an impermissible "system liability" regime, imposing systemic affirmative obligations on internet services providers through Swiss tort law rather than regulation. Ex. 120, Swisscom Case, reas. 2.3.2 at 84 ("Its [i.e., Swisscom's]

participation is based solely on the fact that it – together with numerous other access providers . . . provides the technical infrastructure so that access to the worldwide internet from Switzerland is possible at all . . . Such a 'system liability' with corresponding obligations to verify and cease and desist in the form of technical access blocks cannot be based on the [tort] liability of participants under civil law."). In the context of human rights reform, Switzerland held a referendum in 2020 proposing tort liability on companies that did not, *inter alia*, "take appropriate measures to prevent any violation of internationally recognized human rights." Ex. 98, Muller First Report ¶¶ 147–49. The Swiss Federal Council, Swiss Parliament, and Swiss voters rejected the referendum, with the Swiss Parliament specifically expressing concern that the law would create a risk of abusive and extortionate lawsuits against Swiss companies and turn Swiss courts into the world's judicial authority. Ex. 98, Muller First Report ¶¶ 150–53.

Second, the circumstances of this case further demonstrate the lack of a sufficient connection between the alleged conduct of the BNPP Defendants (here, primarily the processing of oil-related transactions by non-party BNPP Suisse) and Plaintiffs' alleged injuries, much less "all atrocities" committed by the GOS. *See* Swisscom Case, reas 2.3.2 (holding that requirement of adequate causation is not satisfied when the causal link is dependent upon "the intervention of multiple third-party actors"). It is undisputed that during the ten-year Relevant Period Sudan was the largest country in Africa with a population of 39,154,490 people according to the country's official census conducted in 2009. Defs. Rule 56.1 Statement ¶ 5; Ex. 137, 5th Sudan Population and Housing Census, Central Bureau of Statistics, Apr. 26, 2009, at 3. By Plaintiffs' proposed experts' own admissions, the individuals who allegedly injured Plaintiffs consisted of various actors in a range of positions in different formal government armed forces, formal government security forces, paramilitary groups, an unenumerated number of unidentified tribal

militias, and others, all with different command structures which Plaintiffs have not sought to define with any specificity. *See, e.g.*, Defs. Rule 56.1 Statement ¶ 49, Ex. 56, Baldo Tr. at 69:18–21 (describing the "Popular Defense Forces" as a "paramilitary force" without "soldiers in uniform and bound by regulations" and without a "hierarchy that is very formal and strict"); Defs. Rule 56.1 Statement ¶ 50; Ex. 93, Verhoeven Opening Report at 17 (describing the "Janjaweed" as "a motley crew of former PDF fighters, self-declared self-defence units of nomadic tribes, mercenaries and the protective guard of important local powerbrokers"); Defs. Rule 56.1 Statement ¶ 53; Ex. 94, Verhoeven Reply Report at 37 (admitting that some so-called "Janjaweed" tribal leaders rebelled and fought against the GOS in 2007 and 2009); Defs. Rule 56.1 Statement ¶ 27; Ex. 93, Verhoeven Opening Report at 16 (discussing struggles for control between senior GOS leaders). The record is devoid of any connection between any of these perpetrators and any transaction carried out by the BNPP Defendants.

The range and number of these intervening actors undermines any claim that the BNPP Defendants proximately caused Plaintiffs' injuries. The Steel Boycott Case is instructive. Ex. 113, DFSC 90 [1964] II 501. There, a group of companies alleged that certain steel mill suppliers boycotted them and that certain other suppliers, which had decisive positions in the ironworks industry, were liable for this boycott. The Swiss Supreme Court rejected liability, stating that "even if [steel supplier defendants] knew about the conducts of the [boycotting] suppliers and these conducts indirectly worked to their advantage" they could not be liable because "[defendants] were not involved in the decision on these measures, but rather that . . . they were taken by the [third parties] of their own initiative, in order to protect their own interests, and therefore the causal connection between the conduct of the defendant and the harmful act of the [third parties] in question is lacking." *Id.* at 508–509. So too here, the BNPP

Defendants had no involvement in the injuries to Plaintiffs, which Plaintiffs claim were perpetrated by the GOS or its agents. To the extent these injuries were the result of actions by the GOS, the injuries were the results of independent acts of the GOS and its supposed agents "of their own initiative."

Plaintiffs' arguments are all the more attenuated when viewed in light of the undisputed fact that Sudan is a country and has vast expenditures. *See* Defs. Rule 56.1 Statement ¶ 81; Ex. 84, Llewellyn Report ¶ 58. Plaintiffs ground their theory of liability on macroeconomic data to argue that, since the GOS's oil revenues and military expenditures generally increased during the Relevant Period, *id.*, oil revenues purportedly processed by the BNPP Defendants must have caused human rights abuses in Sudan through increased military expenditures. *See* Ex. 64, Fogarty Reply Report ¶¶ 120, 135; Ex. 52, Austin Opening Report ¶ 86; Ex. 94, Verhoeven Reply Report at 29–29. But this argument is incorrect on multiple levels.

Plaintiffs cannot tie any one particular revenue source (here, predominantly oil export revenues) to any one particular expenditure (here, military expenditures, setting aside Plaintiffs' unsupported characterization that any and all military expenditures equate to human rights abuses). Ex. 84, Llewellyn Report ¶¶ 48–49. It is undisputed that the GOS had billions and billions in expenses wholly unrelated to the military. *Cf. Rothstein v. UBS AG*, 708 F.3d 82, 97 (2d Cir. 2013) (affirming dismissal of Anti-Terrorism Act claims against UBS based on violation of U.S. sanctions against Iran, *inter alia* because plaintiffs did not meet their burden to establish proximate cause: "the fact remains that Iran is a government, and as such it has many legitimate agencies, operations, and programs to fund"); *Kemper v. Deutsche Bank AG*, 911 F.3d 383, 393 (7th Cir. 2018) ("When one of the links on a causal chain is a sovereign state, the need for facts specifically connecting a defendant's actions to the ultimate terrorist attack is especially acute.

That [sovereign] is involved in substantial non-terrorist activities is clear from [plaintiff's] complaint."). Indeed, the factual record demonstrates billions of expenditures by the Sudanese government on a variety of non-military purposes from the period of 1997 to 2009, including, *inter alia*:

- USD $19.5 billion on transfers to regional governments as part of the peace process to end the Second Civil War, Defs. Rule 56.1 Statement ¶ 81, Ex. 84, Llewellyn Report ¶¶ 33, 58, n.58;
- USD $10 billion on building the Merowe dam, per Plaintiffs' proposed expert Verhoeven's admission, Defs. Rule 56.1 Statement ¶ 81, Ex. 93, Verhoeven Report at 24–25;
- USD $1 billion on raising the height of the Roseires dam, Defs. Rule 56.1 Statement ¶ 81, Ex. 93, Verhoeven Report at 24–25; and
- USD $3.5 billion on repaying loans, Defs. Rule 56.1 Statement ¶ 81, Ex. 84, *Supplementary Analysis, Sudan Central Government revenue and expenses* (Exhibit 2 to Llewellyn Report) ("Rev and Expenses" Sheet).

The GOS additionally spent significantly on other investments in infrastructure and social programs (*e.g.*, health and education). Ex. 84, Llewellyn Report ¶ 58.[22] During this period, Sudan saw increases in indicators of social welfare, including government spending per student, income equality, and life expectancy at birth. Ex. 86, Expert Report of Victor Menaldo dated Jan. 6, 2023 ¶¶ 112–13 ("Menaldo Report").

In fact, in every single year from 1998 to 2008, the GOS's non-military expenditures were sufficiently large to consume *all* of the GOS's oil revenues—both exports and domestic sales. Ex. 84, Llewellyn Report at 23 fig. 2.[23] Likewise, the GOS had billions of dollars-worth

[22] In addition to these development and social expenditures, as claimed by Plaintiffs' proposed expert, GOS officials also diverted public funds for personal enrichment, including at least $4 billion in assets to al-Bashir and his associates. 56.1 Statement ¶ 82; Ex. 88, Patey Opening Report at 19.

[23] *See also Owens v. BNP Paribas, S.A.*, 897 F.3d 266, 276 (D.C. Cir. 2018) (affirming dismissal of claims against the BNPP Defendants *inter alia* because "Plaintiffs' complaint fails to plausibly allege that any currency processed by BNPP for Sudan was either in fact sent to al Qaeda or necessary for Sudan to

of non-oil revenues during the Relevant Period, which it acquired through taxation, as well as foreign and domestic sales of other goods and services. Ex. 84, Llewellyn Report at 23 fig. 2, 24 fig. 3. Sudan's GDP during the Relevant Period was many times that of the GOS's expenditures; that excess was national wealth accessible by the GOS through taxation. Ex. 84, Llewellyn Report at 34 fig. 7, ¶ 65. During the Relevant Period, Sudan's *non-oil revenues* increased alongside its *military expenditures*, and its *oil revenues* increased alongside its *non-military expenditures*. Ex. 84, Llewellyn Report at 23 fig. 2, 24 fig. 3.

Plaintiffs will likely reference their proposed experts' irrelevant discussion of Recommendation 5 of the Guidance on Criminalizing Terrorist Financing published by the Financial Action Task Force ("FATF"), a global money laundering and terrorist financing watchdog organization, to argue that because money is fungible, "funds . . . used for non-attack expenses . . . may substitute for other funds . . . which can then be used for an attack"; thus, in their view the Court should assume that every dollar processed by the BNPP Defendants in connection with Sudan was used to commit the human rights abuses allegedly suffered by Plaintiffs and every other person in Sudan. *See* Ex. 64, Fogarty Reply Report ¶ 122. However, FATF Recommendation 5 is a document providing guidance on criminalizing the financing of "terrorists" and "terrorist organizations," not sovereign governments with a wide range of revenues sources and expenditures. *See* Financial Action Task Force, *Guidance on Criminalising Terrorist Financing (Recommendation 5)* ¶ 25 n.5–6 (Oct. 2016).

fund the embassy bombings"); *Ofisi v. BNP Paribas, S.A.*, No. 22–7083, 2023 WL 4378213 (D.C. Cir. July 7, 2023) (same).

2. Plaintiffs Cannot Establish Adequate Causation with Respect to Each Plaintiff (and Proposed Class Member) Through Generalizations and Speculation

Unable to establish the causal nexus alleged in the TAC, Plaintiffs instead advance various sweeping theories to argue through generalizations and speculation that the BNPP Defendants should be found to be the adequate cause of every injury experienced by Plaintiffs (and the entire Proposed Class of approximately 25,800 individuals). *See, e.g.*, Pls. Class Cert. Br. These arguments are not supported by Swiss law, because they are based on causal chains that "rest on mere conjecture," Swiss MTD Op. at 16–17; *see also Weber v. Paduano*, No. 02 Civ. 3392 (GEL), 2003 WL 22801777, at *14–15 (S.D.N.Y. Nov. 25, 2003) (granting summary judgment for apartment building manager because establishing alleged proximate causal link between manager's negligence in maintaining fire safety infrastructure and fire set by apartment resident would require jury to engage in "mere conjecture and impermissible speculation").

First, Plaintiffs' general theory that the Court should impute adequate causation as to each individual Plaintiff's alleged injury because the GOS accrued oil export revenues through transactions processed by BNPP entities (primarily non-party BNPP Suisse) "rest[s] on mere conjecture" regarding the contribution of the BNPP Defendants' financial services. Swiss MTD Op. at 16. Plaintiffs admitted in their TAC that, absent U.S.-dollar clearing services provided by BNP Paribas entities, the GOS would still have profited off of its oil reserves, either through selling its oil in other currencies or bartering it. TAC ¶ 6 (alleging that, without access to U.S.-dollar clearing services, the GOS would have had to "barter its oil in exchange for other commodities or goods or sell it in other currencies"), *id.* ¶ 118 (alleging that, due to U.S. and EU sanctions, Iran had to sell its oil to China and India at a discount of "as much as ten percent").[24]

[24] The availability of other means for the GOS to market its oil is readily apparent in the record, as Plaintiffs' own experts concede that the GOS continued to receive significant oil export revenues as late

Plaintiffs have adduced no evidence as to the alleged additional amount of revenues received by the GOS as a result of any dollar processed by the BNPP Defendants. Indeed, other countries, such as Iraq, utilized euro-denominated transactions for their oil during the same time period, and actually received a greater return due to the benefit of a favorable exchange rate. Defs. Rule 56.1 Statement ¶¶ 87–88; Ex. 62, Verleger Report ¶¶ 40, 43; Ex. 90, Patey Tr. at 249:6–10 ("Q. Did you do anything to try to quantify what a discount would be if Sudan had to do oil transactions in a currency other than the US dollar? A. No, I didn't try to quantify it."); *cf.* Swiss MTD Op. at 17 (determining the allegation that "the [al-Bashir] Regime would not otherwise be able to obtain [oil export] funds without BNP deciding to break the law" to be a relevant link in the causal chain).

The related claim advanced by Plaintiffs' proposed experts that the GOS could only have acquired "sophisticated weapons" with U.S. dollars likewise fails for the same reasons. See Ex. 93, Verhoeven Opening Report at 22. Plaintiffs' proposed experts have presented no evidence beyond conclusory statements regarding weapons-supplying nations' supposed insistence on transacting only in U.S. dollars.

Second, Plaintiffs and their proposed experts make unsupported attempts to cast nearly *every expenditure* by the GOS as contributing to human right abuses in Sudan, for example:

- Plaintiffs' proposed expert Dr. Verhoeven claims that the GOS's expenditures to construct dams contributed to human rights abuses in Sudan because dam construction involved clearing villages, and the BNPP Defendants should be held responsible for those human rights abuses (although no Plaintiff alleges that he or she was removed from a village to build a dam). Ex. 95, Verhoeven Tr. at 333:17–335:13.

---

as 2011, and nothing in the record ties any BNPP entity to those transactions. *See* Ex. 88, Patey Opening Report at 25 fig. 4 (indicating that the GOS had sufficient oil revenues to cover its military expenditures in 2008 and 2009); Ex. 95, Verhoeven Tr. at 302:15–23 (testifying that Sudan exported oil from 1999 to 2011, when it lost three-quarters of its oil reserves after South Sudan seceded).

- Verhoeven claims that GOS expenditures on civil servant salaries, "office renovations," and other "material perks" were "crucial" in "enabl[ing] [the GOS] to carry out its ongoing and intensifying repressive activity." Ex. 95, Verhoeven Tr. at 339:3–12.

- Plaintiffs' proposed expert Kathi Austin claims that the BNPP Defendants should be held liable for all human rights abuses in Sudan in part because of BNP Paribas's alleged processing of a single USD $35,000 payment by Gezira Trade and Services, a company that Austin alleges imported "heavy tractors, dump trucks, and other medium and light trucks" that *may* have been used to construct roads that the GOS then used to drive military vehicles on while committing human rights abuses. Ex. 52, Austin Opening Report ¶ 231.

- Plaintiffs' proposed expert Luke Patey claims that letters of credit for imports of medical equipment contributed to human rights abuses, since hospitals were built in areas favoring access by certain populations over others. Ex. 90, Patey Tr. at 198:9–199:3.

Plaintiffs' proposed experts' expansive view of what expenditures contribute to Plaintiffs' alleged injuries illustrates how novel and unprecedented Plaintiffs' theory of causation is. Under their view, virtually every expense by the GOS can be presumed to have furthered the injuries of Plaintiffs.

Third, echoing their motion for class certification, Plaintiffs will no doubt argue that they have raised an issue of material fact based on a few internal bank documents apparently showing credit risk exposure related to two transactions between an entity under the corporate umbrella of Renault, a multi-billion dollar French automobile manufacturer with business across the globe, and GIAD, a Sudanese multi-faceted engineering and manufacturing conglomerate that advertises itself as the largest industrial group in Africa. Pls. Class Cert. Br. at 31–35. Plaintiffs are wrong. As an initial matter, no Plaintiff even alleges an injury in an attack involving Renault or GIAD vehicles and thus any purported connection to business between Renault and GIAD is wholly irrelevant. Defs. Rule 56.1 Statement ¶ 109. [redacted], Chief Operating Officer of BNP Paribas Corporate & Institutional Banking, testified that the credit risk refers to a BNP Paribas entity providing insurance to Renault (not to GIAD) in the event Renault was not paid,

not that BNP Paribas processed a transaction between the two entities. Ex. 43, [redacted] Tr. at 149:10–20. Nothing in the record indicates the purpose of the underlying transaction between Renault[25] and GIAD, so any allegations by Plaintiffs and their proposed experts to the contrary is baseless speculation. *MTX Communications Corp. v. LDDS/WorldCom, Inc.*, 132 F. Supp. 2d 289, 291, 293 (S.D.N.Y. 2001) (excluding expert testimony due in part to its reliance on unsubstantiated data, and noting that "[e]xpert testimony should be excluded if it is speculative or conjectural, or if it is based on assumptions that are so unrealistic and contradictory as to suggest bad faith or to be in essence an apples and oranges comparison"); *Primavera Familienstifung v. Askin*, 130 F. Supp. 2d 450, 529–30 (S.D.N.Y. 2001) (excluding expert testimony on the incentives of defendant based solely on expert's economic expertise because "[w]hile it is permissible for [an expert] to base his opinion on his own experience, he must do more than aver conclusorily that his experience led to his opinion"). In fact, the document cited by Plaintiffs' proposed expert Kathi Austin to speculate about BNP Paribas's financial services relating to Sudan shows Renault vehicles were used by Red Cross and United Nations operations in southern Sudan and Darfur. Ex. 61, Goolsby Report ¶ 110. Other BNP Paribas internal documents likewise show that GIAD manufactured tractors. Ex. 61, Goolsby Report ¶ 111.

Taking another example from their motion for class certification, Plaintiffs cite an internal bank document apparently showing that BNPP Suisse extended a credit line to the Civil Aviation Authority of Sudan ("CAAS") for USD $25 million and processed flyover fees (mandatory payments by international commercial airlines for flying through Sudan's airspace). Plaintiffs then speculate that any such funds processed through BNPP Suisse harmed Plaintiffs in

[25] A French corporation, Renault Trucks, was also bound by applicable French and European Union sanctions prohibiting transactions for a military purpose.

this case. Pls. Class Cert. Br. at 29–30; Ex. 24, BNPP-KASHEF-00048093. Concerning the apparent credit line, the face of the document clearly states that it was issued for "civil airport infrastructures (shuttles, X-ray gates, baggage turnstiles, etc.)." Ex. 24, BNPP-KASHEF-00048093 at 48103; *see also id.* at 48098 ("In accordance with the opinion of Compliance, we insist on knowing the purpose of our funding at all times."). Concerning the processing of flyover fees, as the document shows, "major recognized" airlines based in France, Britain, Germany, and other countries paid these mandatory fees to the CAAS pursuant to the International Air Transport Association's regulations. Ex. 24, BNPP-KASHEF-00048093 at 48101.

III. BNPP NY SHOULD BE DISMISSED AND ALL CLAIMS AGAINST BNPP WHOLESALE SHOULD BE DISMISSED

A. BNPP NY Cannot Be Liable as It Is Not a Separate Legal Entity from BNP Paribas

For the reasons above, and for the additional reason that BNPP NY is not an entity independent from BNP Paribas, the claims against BNPP NY should be dismissed.

It is "well-settled that the domestic branch of a foreign bank is not a separate legal entity under either New York or federal law." *Greenbaum v. Handelsbanken*, 26 F. Supp. 2d 649, 651–52 (S.D.N.Y. 1998); *see also First Nat'l Bank of Bos. (Int'l) v. Banco Nacional de Cuba*, 658 F.2d 895, 900 (2d Cir. 1981) ("[F]ederal law regards a national bank and its branches as a single entity."). The court in *Greenbaum* further noted that, in New York, "a foreign banking corporation authorized to operate a branch or agency in New York may sue and be sued, but there are no similar provisions for the branch itself." 26 F. Supp. 2d at 653.

BNPP NY is a licensed foreign bank branch located in New York. *See* Defs. Rule 56.1 Statement ¶ 95; Ex. 9, Defs. Second Supp. Rog. Responses, Supp. Response to Interrog. No. 17 at 66; Ex. 10, BNPP Defs. Resps. and Objs. to Pls. Third Set of Interrogs.; Ex. 34, [redacted] Tr. at

104:11–12 ("Q: Is BNPP New York a subsidiary? A: No, BNP New York is a branch."); Ex. 35, [redacted] Tr. at 20:25–21:4, 267:6–14 ("[T]he New York Branch is part of [BNP Paribas]. It has a regulatory standing, so it is reviewed by DFS and the Fed as a branch, but legally it's part of BNP Paribas S.A."; "Q: Can you please describe generally the relationship between BNP Paribas S.A. and BNP Paribas S.A. New York branch? A: Yes. BNP Paribas S.A. is the global corporation that has operations on a global basis. The New York branch is a part of S.A. that has no specific corporate designation, as I understand, but does have regulatory standing and regulatory requirements."); Ex. 33, [redacted] Tr. at 108:4–5 (referring to BNPP NY as BNP Paribas's "branch in New York"); Ex. 47, [redacted] Tr. at 280:2–14 (testifying that BNPP NY was licensed to do business as a "Branch of BNP Paribas, S.A."). It is not, as Plaintiffs have alleged, a subsidiary of BNP Paribas. *See* TAC ¶ 56. As a branch and not a subsidiary of BNP Paribas, BNPP NY "has no legal identity separate from" BNP Paribas and thus is not amenable to suit. *Bayerische Landesbank, New York Branch v. Aladdin Cap. Mgmt. LLC*, 692 F.3d 42, 51 (2d Cir. 2012).[26] The "well-established line of precedent holding that unincorporated subdivisions of a corporate entity have no legal personality and cannot . . . be sued," *In re Beacon Assocs. Litig.*, 818 F. Supp. 2d 697, 706 (S.D.N.Y. 2011), requires that the Court dismiss BNPP NY from this action.

Because BNPP NY is a domestic branch of a foreign bank, the claims against it should be dismissed. *See Bayerische*, 692 F.3d at 51.

[26] *See also* Ex. 123, BNP Paribas 165(d) Resolution Plan at 21, filed with the Federal Deposit Insurance Corporation (Dec. 31, 2015), https://www.fdic.gov/regulations/reform/resplans/plans/bnp-idi–1512.pdf.

B. No Reasonable Juror Could Find BNPP Wholesale Liable for Plaintiffs' Injuries

The claims against BNPP Wholesale fail for all of the reasons discussed above, as well as for the additional reason that discovery has confirmed that BNPP Wholesale was not involved in any of the conduct Plaintiffs allege caused their injuries.

BNPP Wholesale is a corporation organized under the laws of Delaware and a fully-owned subsidiary of BNP Paribas USA, Inc., which in turn is a fully-owned subsidiary of BNP Paribas. Ex. 9, Defs. Second Supp. Rog. Responses, Supp. Response to Interrog. No. 17 at 66.

The Court permitted Plaintiffs' claims against BNPP Wholesale to proceed past the motion to dismiss stage, holding that the Complaint had adequately *alleged* that (1) BNPP Wholesale "contributed to the [GOS]'s illicit acts" because "it was a component of the scheme that funds be cleared through financial institutions in New York," and (2) BNPP Wholesale "was aware . . . that the BNPP defendants were violating U.S. Sanctions" based on the sole allegation in the Complaint that a BNPP Wholesale employee referred to another bank's sanctions violations as a "dirty little secret." Mem. Op. & Order at 6 (Apr. 26, 2021), ECF No. 218. Discovery has disproven both.

First, discovery has shown that BNPP Wholesale—itself only a holding company—did not engage in *any* transactions with Sudanese clients, *see supra* 40, and even more broadly had "*no* relationship" with Sudanese clients, *see* Ex. 35, [redacted] Tr. at 235:9–237:24 (emphasis added).

Second, during his deposition, the BNPP Wholesale employee testified, without contradiction, that his reference to a "dirty little secret" was in fact a reference to OFAC's knowledge of non-U.S. banking practices before the ABN AMRO settlement in 2010 with the Department of Justice for sanctions violations involving Iran, Libya, Sudan, Cuba and other

countries. *See* Ex. 49, [redacted] Tr. at 200:16–201:4, 204:19–205:10, 290:9–291:18; Ex. 91, Expert Report of Teresa Pesce dated Jan. 6, 2023 at 54 ("Pesce Report"). But even assuming knowledge of U.S. sanctions violations, that alone is insufficient to establish collective conduct under Swiss law.

Moreover, Plaintiffs cannot establish liability over BNPP Wholesale based on the conduct of *other* BNPP entities. As discussed above, Swiss law, like U.S. law, recognizes that distinct corporate entities are legally separate from one another and the actions of one corporate entity cannot be imputed to another absent certain extraordinary circumstances involving abuse of the corporate form. *Supra* 40-41; *see also* Mem. Op. & Order, at 5–6 (Apr. 26, 2021), ECF No. 218 (distinguishing between allegations asserted against BNPP Wholesale, BNPP NY, and BNP Paribas). As both parties' experts agree, and as this Court has previously held, Swiss law requires, among other things, *participation* by an alleged perpetrator in wrongful conduct. *See* Swiss MTD Op. at 9. Plaintiffs having adduced no evidence that BNPP Wholesale participated in any wrongful conduct that harmed them, BNPP Wholesale is entitled to summary judgment on all claims.

IV. THE SUDANESE LIMITATIONS PERIOD BARS PLAINTIFFS' CLAIMS FOR INJURIES OCCURING PRIOR TO APRIL 2001

At minimum, any of Plaintiffs' claims for injuries occurring before April 29, 2001 are time-barred under Sudan's limitations period.

Here, none of the Plaintiffs were New York residents at the time their causes of action accrued.[27] *See* TAC ¶¶ 30–50e. Under the New York borrowing statute (N.Y. C.P.L.R. § 202),

[27] Whether an individual was a New York resident or non-New York resident at the time the cause of action accrued—rather than at a later point in time—is the relevant consideration for purposes of applying N.Y. C.P.L.R. § 202. *See, e.g.*, *Dugan v. Schering Corp.*, 86 N.Y.2d 857, 859 (N.Y. 1995) ("Because decedent was not a resident of New York at the time the cause of action accrued, CPLR 202, the so-called

which applies to federal courts sitting in diversity in New York,[28] as is the case here, where claims accrued to non-New York residents outside of New York such claims must be timely both under New York law and under the law of the place where the claims accrued. *See* N.Y. C.P.L.R. § 202 (Consol. 2017) ("An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply.").

Under the New York borrowing statute, a tort claim accrues "at the time and in the place of the injury." *Royal Park Invs. SA/NV v. U.S. Bank Nat'l Ass'n*, 324 F. Supp. 3d 387, 399 (S.D.N.Y. 2018) (citing *Glob. Fin. Corp. v. Triac Corp.*, 93 N.Y.2d 525, 526 (N.Y. 1999)). Here, Plaintiffs were injured in Sudan, and thus their claims accrued in Sudan between 1998 and 2008, the dates of the earliest and latest injuries alleged by Plaintiffs, respectively. Accordingly, the timeliness of any claims for injuries asserted by Plaintiffs is governed by the shorter of the time periods provided for by New York *and* Sudanese law.

The maximum limitations period for any of Plaintiffs' claims is six years under New York law. *See* N.Y. C.P.L.R. § 213. The Second Circuit previously found that Plaintiffs' claims

---

'borrowing' statute, requires dismissal of this suit unless it is timely under the Statute of Limitations of both New York and North Carolina[.]" (citation omitted)).

[28] According to the *Erie* and *Klaxon* Doctrines, a federal court sitting in diversity must apply the choice of law rules of the state in which it sits for substantive questions, including statutes of limitations. *See Tilton v. NynEx.World Trade/Lamarian Systems, Inc.*, No. 98 CIV. 5770(AKH), 1999 WL 476441, at *2 (S.D.N.Y July 8, 1999) ("Generally, for *Erie* purposes, statute of limitations questions are treated as substantive, and consequently, are controlled by state law."); *Stuart v. Am. Cyanamid Co.,* 158 F.3d 622, 626–27 (2d Cir. 1998) ("Where jurisdiction rests upon diversity of citizenship, a federal court sitting in New York must apply the New York choice-of-law rules and statutes of limitations."); *see also Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 109–111 (1945). The New York choice of law rules for limitations periods include the New York borrowing statute.

were timely under New York law, specifically N.Y. C.P.L.R. § 215(8)(a), which provided them with one year from May 1, 2015 (the date that BNP Paribas's judgment of conviction was entered) to commence a civil action. *Kashef v. BNP Paribas S.A.*, 925 F.3d 53, 62–63 (2d Cir. 2019).

Under Sudanese law, however, Section 159 of the Civil Transactions Act 1984 provides that (1) no action for damages/compensation may be heard after the lapse of five years from the date the injured person has known of (i) the injury and (ii) the person who caused the tortious act; and (2) in all cases, no action can be heard after the lapse of fifteen years from the date of the injury. *See* Ex. 100, Opening Declaration of Tayeb Hassabo dated Sept. 30, 2022 at ¶ 12 ("Hassabo Opening Report"); Ex. 101, Reply Declaration of Tayeb Hassabo dated Mar. 2, 2023 at ¶ 2 ("Hassabo Reply Report"). The fifteen-year time limit is absolute and cannot be subject to tolling or suspending under Sudanese law. *Id.* at ¶ 31. As a result, regardless of any tolling or other suspension provisions that may be provided by New York law, all claims for injuries that occurred at least fifteen years before the filing of the Complaint on April 29, 2016, *i.e.*, before April 29, 2001, are time-barred.

Accordingly, the following claims must be dismissed:

- All claims by Plaintiff Ambrose Martin Ulau, since all of his claims predate 2001. *See* Defs. Rule 56.1 Statement ¶ 222; Ex. 51, Ulau Tr. at 61:6–11; TAC ¶ 47.
- All claims by Plaintiff Halima Khalifa, since all of her claims predate 2001. *See* Rule Defs. 56.1 Statement ¶¶ 148, 153, 157, 161, 166; Ex. 8, Khalifa Tr. at 121:12–122:10; TAC ¶ 49.
- All claims by Plaintiff Judy Roe, since all of her claims predate 2001. *See* Defs. Rule 56.1 Statement ¶ 190; Ex. 14, Judy Roe Tr. at 61:3–62:11; TAC ¶ 50b.
- All claims by Plaintiff Isaac Ali, since all of his claims predate 2001. *See* Defs. Rule 56.1 Statement ¶¶ 169, 173, 176, 180, 185; Ex. 7, Ali Tr. at 60:23–25, 78:19–79:24, 82:19–83:12; TAC ¶ 50d.–4.

In addition, all claims for injuries alleged by individuals that occurred before April 29, 2001 are also time-barred, and must be dismissed for these Plaintiffs:

- Plaintiff Abubakar Abakar. *See* Rule 56.1 Statement ¶¶ 109–113; Ex. 28, Abu. Abakar Tr. at 85:22–86:12; TAC ¶ 33.
- Plaintiff Jane Roe. *See* Defs. Rule 56.1 Statement ¶¶ 240–244; Ex. 45, Jane Roe Tr. at 66:2–67:6; TAC ¶ 41.
- Plaintiff Turjuman Ramadan Adam. *See* Defs. Rule 56.1 Statement ¶¶ 121–128; Ex. 31, Adam Tr. at 93:23–101:22; TAC ¶ 43.

V. THE BNPP DEFENDANTS ARE ALSO ENTITLED TO SUMMARY JUDGMENT ON CERTAIN OF PLAINTIFFS' DAMAGES CLAIMS

The Court should grant summary judgment for the BNPP Defendants on Plaintiffs' claims for punitive damages, disgorgement and property damages.

A. Plaintiffs Are Not Entitled to Punitive Damages as a Matter of Law

Under New York's choice of law rules Swiss law applies to Plaintiffs' claim for punitive damages, which are conduct-regulating. Op. & Order, at 11, Mar. 3, 2019, ECF No. 151 (applying Swiss law to plaintiffs' conduct-regulating claims "[b]ecause the relevant tortious conduct occurred in Switzerland"); *Guidi v. Inter-Continental Hotels Corp.*, No. 95-cv–9006 (LAP), 2003 WL 1907901, at *1, 3 (S.D.N.Y. Apr. 16, 2003) ("[t]his Court and other courts in this Circuit have repeatedly held that punitive damages are conduct-regulating" (citing cases)). Both sides agree that punitive damages are not available under Swiss law. *See* Ex. 98, Müller First Report ¶ 164 ("Swiss law excludes the possibility of awarding punitive damages."); Ex. 104, Werro 2023 Report ¶ 143 ("Swiss law does not provide for punitive damages, only compensatory damages. On this Professor Müller and I agree."). Accordingly, Plaintiffs' claim for punitive damages should be dismissed. *See* TAC at 153, Prayer for Relief (f).

B. Plaintiffs Are Not Entitled to the Remedy Of Disgorgement as a Matter of Law

The Court should grant summary judgment to the BNPP Defendants on the issue of Plaintiffs' request for disgorgement.

Plaintiffs have abandoned their request for disgorgement. *See* TAC ¶ 502, Prayer for Relief (e) at 153. None of their Rule 26(a)(1) Disclosures, as amended and supplemented, identifies disgorgement as part of the damages Plaintiffs are seeking, and there is no other support for such a remedy in the record. *See* Ex. 140, Pls. Initial Disclosures; Ex. 141, Pls. Am. Initial Disclosures; Ex. 142, Pls. Second Am. Initial Disclosures; Ex. 143, Pls. Third Am. Initial Disclosures; Ex. 15, Pls. Suppl. Initial Disclosures (dated Aug. 10, 2022); Ex. 16, Pls. Suppl. Initial Disclosures (dated Dec. 21, 2022); *Mortg. Resol. Servicing, LLC v. JPMorgan Chase Bank, N.A.*, No. 15 CV 293-LTS-RWL, 2019 WL 4735387, at *10–11 (S.D.N.Y. Sept. 27, 2019) (disgorgement request waived where plaintiffs failed to include that request in initial disclosures and there otherwise being no "factual or legal support for" that request in the record).

In any event, disgorgement is a remedy, not a freestanding cause of action. *Stavroulakis v. Pelakanos*, N.Y.S.3d 725, WL 846677, at *8 n.19 (N.Y. Supr. Ct. 2018) ("Like rescission, disgorgement is a remedy, not an independent cause of action."). The only pleaded basis for disgorgement in the TAC was plaintiffs' unjust enrichment claim, which this Court dismissed. *See* TAC ¶¶ 497–502 (unjust enrichment claim seeking "an order compelling Defendants to disgorge the profits they have realized or may realize as a result of their improper conduct"); Mem. Op. & Order at 17–19 (Mar. 30, 2018), ECF No. 101 (dismissing plaintiffs' unjust enrichment claims), *vacated on other grounds and remanded sub nom Kashef v. BNP Paribas S.A.*, 925 F.3d 53, 57 n.3 (2d Cir. 2019) (noting plaintiffs did not challenge on appeal this

Court's dismissal of unjust enrichment claims); TAC at 146 n.178 (noting dismissal of unjust enrichment claim).

Finally, Swiss law limits damages to compensatory damages, which do not include disgorgement. *See* Ex. 99, Müller Second Report § IV.5; Ex. 104, Werro 2023 Report ¶ 143 (Swiss law limits available damages to "only compensatory damages"); *accord S.E.C. v. Amerindo Inv. Advisors Inc.*, No. 05 CIV. 5231 RJS, 2014 WL 2112032, at *4 (S.D.N.Y. May 6, 2014) ("Unlike other remedies, disgorgement is not designed to compensate victims or to punish wrongdoers."). Any claim for disgorgement thus fails as a matter of law.

C. The Court Should Grant Summary Judgment to the BNPP Defendants on the Issue of Plaintiffs' Alleged Property Damage Because Plaintiffs Fail to Substantiate Those Requests with Sufficient Evidence

To withstand a motion for summary judgment, Plaintiffs must marshal evidence demonstrating a triable issue of fact for the jury, including as to damages. *Serio v. Dwight Halvorson Ins. Servs., Inc.*, No. 04-CV-3361, 2007 WL 9701070, at *3–4 (S.D.N.Y. Oct. 4, 2007) (stating that, in a diversity case, the sufficiency of the evidence to warrant submission of an issue to a jury is a question governed by federal law and applying federal summary judgment standard over foreign law counterpart); TAC ¶¶ 426, 441, 456 (referencing "loss of property and income" in connection with conversion and taking claims). Throughout this litigation, Plaintiffs had the independent, ongoing obligation under Federal Rule 26(a) to provide "a computation of any category of damages" claimed in the TAC and to make "available for inspection and copying" the non-privileged or non-protected evidentiary material on which each computation is based. *Design Strategy, Inc. v. Davis*, 469 F.3d 284, 295–96 (2d Cir. 2006) (quoting Fed. R. Civ.

P. 26(a) and Fed. R. Civ. P. 26 Advisory Committee Notes to 1993 Amendments). Plaintiffs' failure to provide sufficient evidence as to the alleged property damages warrants dismissal.

Here, Plaintiffs have only provided, in their Supplemental Initial Disclosures, unsupported estimates of their alleged damages to property. *See*, *e.g.*, Ex. 16, Pls. Suppl. Initial Disclosures at 5–16 (home and farm value estimates ranging from USD $6,000 to USD $350,000; livestock value estimates ranging from USD $1,200 per cow to USD $100 per goat or sheep to USD $900 per donkey; vehicle value estimates ranging from USD $400 to USD $15,000). Despite the BNPP Defendants' requests for supporting information, *see*, *e.g.*, Ex. 18, Letter from C. Boccuzzi to B. Landau (Nov. 21, 2022), Plaintiffs provided these estimates without *any* documents or other information to support them.[29] Plaintiffs' unsupported estimations are nothing more than "mere speculation and conjecture," which is "insufficient to preclude the granting of" summary judgment. *Harlen Assocs. v. Village of Mineola*, 273 F.3d 494, 499 (2d Cir. 2001); *see also Design Strategy*, 469 F.3d at 295 (Rule 26 "requires a 'computation,' *supported by documents*." (emphasis added)).

Accordingly, the BNPP Defendants are entitled to summary judgment on the issue of Plaintiffs' alleged damages to property. *See Maier-Schule GMC, Inc. v. Gen. Motors Corp. (GMC Truck & Bus Grp.)*, 154 F.R.D. 47, 60 (W.D.N.Y. 1994) (denying motion to certify appeal of decision awarding summary judgment to defendants as to damages to property where plaintiff failed to provide relevant, competent evidence "estimat[ing] damages to a reasonable degree of certainty"); *cf. Palmieri v. Allstate Ins. Co.*, 445 F.3d 179, 192 (2d Cir. 2006) (grant of summary judgment to plaintiff affirmed where plaintiff supported property damage claim with checks and

[29] The BNPP Defendants reserve all rights to seek relief under Federal Rule 37(c), including, but not limited to, an order precluding Plaintiffs from belatedly introducing new evidence in support of their damages claims.

affidavits describing replacement costs of repairs to damaged property and defendant failed to raise genuine issue of fact); *Philadelphia Indem. Ins. Co. v. Barker*, 1:19-CV–1456, 2021 WL 1840592, at *3–5 (N.D.N.Y. May 7, 2021) (denying summary judgment as to damages where plaintiff submitted expert report, supported by invoices, opining on cost to rebuild building damaged in fire).

CONCLUSION

For the reasons set forth above, the BNPP Defendants respectfully request that the Court grant summary judgment and dismiss the TAC, and all claims, with prejudice.

Dated: New York, New York
July 21, 2023

SULLIVAN & CROMWELL LLP

/s/ Karen Patton Seymour
Karen Patton Seymour
Suhana S. Han
Alexander J. Willscher
Oliver W. Engebretson-Schooley
John C. Wynne
125 Broad Street
New York, New York 10004
T: 212–558–3196
seymourk@sullcrom.com
hans@sullcrom.com
willschera@sullcrom.com
engebrestsono@sullcrom.com
wynnej@sullcrom.com

CLEARY GOTTLIEB STEEN & HAMILTON LLP

/s/ Carmine D. Boccuzzi, Jr.
Carmine D. Boccuzzi, Jr.
Abena Mainoo
Charity E. Lee
One Liberty Plaza
New York, New York 10006
T: 212–225–2000
cboccuzzi@cgsh.com
amainoo@cgsh.com
charitylee@cgsh.com

Attorneys for Defendants BNP Paribas, S.A. and BNP Paribas US Wholesale Holdings, Corp.