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

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

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September 8, 2023

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## PRELIMINARY STATEMENT

The BNPP Defendants[1] demonstrated in their Opening Brief that they are entitled to summary judgment on all of Plaintiffs' claims. Plaintiffs' claims fail as a matter of law for numerous independent reasons—including because Plaintiffs cannot show that the BNPP Defendants committed the requisite illicit acts, that the BNPP Defendants consciously collaborated with the Government of Sudan ("GOS") to injure Plaintiffs, or that any conduct by the BNPP Defendants was the natural (but-for) and adequate (proximate cause) of the Plaintiffs' alleged harms. Any one of these deficiencies is a sufficient basis to grant the BNPP Defendants summary judgment on Plaintiffs' claims. Plaintiffs' Opposition only confirms that they fall short as to each of them.

***The BNPP Defendants committed no illicit act under Swiss Law.*** Swiss law requires Plaintiffs to prove that the BNPP Defendants committed an "unlawful act." That was the holding of the Swisscom Case in 2019, where the Swiss Supreme Court determined that Plaintiffs must prove "*the illegality of participant behavior*" in order to establish civil liability under Article 50 of the Swiss Code of Obligations ("SCO"). That requirement is consistent with this Court's prior rulings on Swiss law, which (contrary to Plaintiff's arguments) did not foreclose consideration of additional Swiss law issues in the context of the now fully-developed factual record. Plaintiffs' novel theory that Article 50 SCO obviates the need to demonstrate unlawfulness on the part of each participant has never been adopted by the Swiss Supreme Court.

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[1] Capitalized or abbreviated terms not defined here are defined in the BNPP Defendants' Opening Brief in Support of Summary Judgment, ECF No. 443 (the "Opening Brief" or "Defs. SJ Br."). Plaintiffs' Opposition to Defendants' Motion for Summary Judgment is defined as "Opposition Brief" or "Pls. SJ Opp'n").

***The BNPP Defendants cannot be jointly and severally liable with the GOS, a public law entity.*** Plaintiffs' novel theory fails under Swiss law for another reason —as Plaintiffs' Swiss law expert has previously published, public acts of sovereign entities are subject to public law. Because Article 41 SCO is a private law provision, it does not apply to the GOS. And because Article 50 SCO creates joint and several liability for Article 41 SCO tortfeasors, the BNPP Defendants cannot be jointly and severally liable with the GOS.

***The BNPP Defendants did not consciously collaborate in the injurious course of conduct.*** Swiss law also requires Plaintiffs to prove that the BNPP Defendants consciously collaborated in the injurious course of conduct. The injurious course of conduct at issue here was the commission of the injuries alleged by Plaintiffs—not, as Plaintiffs claim, BNPP's violation of U.S. sanctions. The evidentiary record simply does not support that the BNPP Defendants consciously collaborated in the injuries Plaintiffs allege that they suffered at the hands of members of the military, police, or militias in Sudan. Plaintiffs cannot circumvent this failure by claiming that the BNPP Defendants somehow violated a duty of care to Plaintiffs; they identify no such duty, and Swiss law makes clear that the provision of financial services cannot create any duty towards third parties, even if those services violate Swiss banking regulations. Nor is it sufficient for Plaintiffs to assert that the BNPP Defendants "morally encouraged" the GOS or were "willfully indifferent" to the GOS's actions. "Moral encouragement" only applies where multiple actors participate *directly alongside* the primary perpetrator in the injury-causing activity, which was not the case here.

***Plaintiffs cannot show that the BNPP Defendants were the natural (but-for) cause of their injuries***. Plaintiffs argue that they can demonstrate natural causation because an alleged $22.2 billion in letters of credit issued—almost exclusively by non-party BNPP Suisse—in

connection with Sudanese oil transactions exceeded the GOS's purported military expenditures. But while in the Motion to Dismiss decision the Court was required to accept Plaintiffs' allegations that the BNPP Defendants equipped and mobilized armed forces with sophisticated weapons that were actually used in attacks on Plaintiffs to clear them from oil regions to obtain and sell more oil, discovery has not borne out this theory. Plaintiffs were not cleared from oil lands, and most were not injured by sophisticated weapons (and no evidence links any BNPP Defendant to a sophisticated weapon purchase in any event). And Plaintiffs are wrong that this is an issue of dueling expert testimony. Instead of presenting "dueling" expert opinions on the issue of causation, Plaintiffs' purported experts conducted no analysis to support Plaintiffs' claims about an increase in the frequency or velocity of attacks that supposedly resulted from financial services provided by any BNPP entity.

***The BNPP Defendants were not the adequate (proximate) cause of Plaintiffs' injuries.*** Plaintiffs also cannot dispute that the causal chains Plaintiffs have tried to draw between financial services and Plaintiffs' injuries are too attenuated to sustain liability under Swiss law. Plaintiffs' adequate cause argument boils down to the assertion that it was foreseeable that if the GOS obtained revenues, then violence would ensue. But such a general approach to foreseeability has been specifically rejected by the Swiss Supreme Court, as it would impose no real limit on potential liability (the stated purpose under Swiss law for the adequate cause analysis). Plaintiffs have not adduced any evidence that the BNPP Defendants transacted with any of the individuals that allegedly perpetrated violence against Plaintiffs. Plaintiffs thus resort to arguing that *every expenditure* by any individual or entity within the government of Sudan, regardless of whether it has any connection to the military, was a proximate cause of not only

their injuries but a single, nationwide campaign of "genocide" that lasted fifteen years. That strains credulity and lacks any evidentiary support.

Plaintiffs' theory of adequate causation further fails because it would impermissibly expands tort liability where the Swiss legislature has not otherwise sought to regulate. Plaintiffs cannot genuinely dispute that the conduct alleged—principally processing letters of credit for oil exports in favor of Sudanese entities—was not prohibited under Swiss law. Using Swiss tort law to impose "system liability" through courts for banking services that the legislature deemed permissible would be inconsistent with Swiss law.

***BNPP Wholesale should be dismissed for additional reasons***. Plaintiffs do not dispute that BNPP Wholesale did not engage in any transactions with any Sudanese clients. Even if there were admissible evidence that BNPP Wholesale knew that transactions with Sudanese entities were being processed through BNPP's New York branch, which there is not, such awareness is insufficient to establish BNPP Wholesale's participation in the alleged injurious conduct against Plaintiffs or that BNPP Wholesale was causally connected to Plaintiffs' alleged injuries. Nor are Plaintiffs' arguments about BNPP Wholesale's flawed compliance program sufficient to establish that BNPP Wholesale committed an "unlawful act" where it had no duty to Plaintiffs.

***Sudanese law requires dismissal of claims based on injuries occurring before April 29, 2001***. New York's Borrowing Statute, which indisputably applies, requires that a cause of action be timely in both New York and the jurisdiction where the claim accrued—here, Sudan. That the Second Circuit previously held that Plaintiffs' claims were timely under New York law has no bearing on the separate question of whether Plaintiffs' claims were timely under Sudanese law (which was an affirmative defense specifically pled by the BNPP Defendants in their Answer

filed in 2021). They were not. Sudanese law imposes a non-tollable 15-year bar for tort claims that bars claims for any injury that occurred before April 29, 2001.

***Summary Judgment is proper as to Plaintiffs' requests for punitive damages and property damages***. Plaintiffs cannot demand punitive damages or property damages as a matter of law. Swiss law applies to Plaintiffs' requests for punitive damages, as the Court has already determined, and all parties agree it does not provide for punitive damages. Plaintiffs admit that they have not provided competent evidence to permit the factfinder to reasonably estimate the quantum of their property damages. Plaintiffs insist that they can prove their damages through Plaintiffs' testimony at trial. But Plaintiffs have not provided any evidence to support their damages *estimates* (despite repeated requests from the BNPP Defendants to do so) *and* have not put forward any damages expert (despite saying that they would). In the absence of admissible documentary evidence or expert testimony, Plaintiffs' testimony alone is insufficient to establish a reasonable basis for Plaintiffs' property damages calculations and thus to survive summary judgment.

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

## ARGUMENT

## I. PLAINTIFFS FAIL TO RAISE A GENUINE DISPUTE THAT THE BNPP DEFENDANTS COMMITTED AN UNLAWFUL ACT

### A. Plaintiffs' Demand That The Court Ignore Relevant Swiss Law Should Be Rejected

During expert discovery in this case, the parties exchanged expert reports on Swiss law, which this Court can and should consider as part of this motion. "Rule 44.1 . . . provides that a court, in determining foreign law, may consider 'any relevant material or source, including testimony[.]'" *Tyco Int'l Ltd. v. Walsh*, No. 02 Civ. 4633 (DLC), 2010 WL 3860390, at *1

(S.D.N.Y. Oct. 4, 2010) (internal citations omitted); *see also id.* at *2 ("[A] court has an independent duty to determine foreign law if choice of law principles require its application . . . ."). But Plaintiffs now demand that the Court ignore this relevant Swiss authority. Pls. Opp'n to Defs. Mot. for Summ. J. at 68-71 (Aug. 18, 2023), ECF No. 465 ("Pls. SJ Opp'n"). Plaintiffs' arguments fail for multiple reasons.

*First*, Plaintiffs argue that the BNPP Defendants are seeking an impermissible "do over" on the Swiss law elements of Plaintiffs' claim. Pls. SJ Opp'n at 68. Plaintiffs are wrong. The Court's decision on the Motion to Dismiss does not foreclose consideration of the Swiss law issues in the context of the now fully developed factual record. *See Maraschiello v. City of Buffalo Police Dep't*, 709 F.3d 87, 97 (2d Cir. 2013) (affirming district court's grant of summary judgment, despite earlier denial of motion to dismiss on same claim, because "[t]he doctrine of law of the case is 'discretionary'" and "would not preclude a district court from granting summary judgment based on evidence after denying a motion to dismiss based only on the plaintiff's allegations"). Law of the case does not straitjacket the Court, particularly where, as here, briefing at summary judgment provides more "extensive" information, regardless of whether there has been a change in controlling law. *Centauro Liquid Opportunities Master Fund, L.P. v. Bazzoni*, No. 15 CV 9003-LTS-SN, 2019 WL 4464242, at *5, *7–8 (S.D.N.Y. Sept. 18, 2019) (departing from decisions regarding English law "that were previously established as law of the case" based on "the more extensive briefing of English law that has been proffered in connection with this motion practice").

*Second*, consideration of the Müller and Romy Reports, as well as the Thevenoz Report which Plaintiffs altogether ignore, is all the more appropriate given the concededly "novel"

nature of Plaintiffs' Swiss law theory[2] and the indisputable fact that the reports and cited authorities speak to Swiss legal issues central to the case. Indeed, it is the theories of Plaintiffs' Swiss law expert, Professor Franz Werro, that have grown increasingly untethered from Swiss law. For example, Professor Werro now argues that the BNPP Defendants committed an illicit act because they violated a number of Swiss criminal statutes against complicity in war crimes and genocide, but he does not analyze the elements of liability under these statutes or explain why banking services that were permissible under Swiss law (and were never prosecuted in Switzerland despite an in-depth investigation in connection with BNPP Suisse's U.S. sanctions violation, *see* Defs. SJ Br. at 18-19, 29) violated these statutes. *See infra* Section I(C); Werro Mar. 2023 Report ¶ 141, ECF No. 435-104. Professor Werro also makes the novel argument that "forced displacement" is actionable under Swiss tort law, using as his sole "interpretive authority" a collection of inapposite cases from the European Court of Human Rights ("ECtHR"), which necessitated a rebuttal report from former ECtHR judge Professor Helen Keller. *See* Werro Mar. 2023 Report ¶¶ 69-76; Expert Report of Franz Werro dated Aug. 16, 2023 ¶¶ 51-58, ECF No. 461-70 ("Werro Aug. 2023 Report"), *see also* Keller Report ¶¶ 10-19, ECF No. 435-97. Law of the case does not bind this Court to Plaintiffs' expert's unsupported, evolving theories, even if, as Plaintiffs' wrongly suggest, some portions of these theories were accepted by the Court previously. *Maraschiello*, 709 F.3d at 97 (law of the case doctrine "is 'discretionary and does not limit a court's power to reconsider its own decisions prior to final judgment'" (quoting *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992)); *see also Arizona v. California*, 460 U.S. 605, 618 (1983) ("Law of the case directs a court's discretion, it does not limit the tribunal's power.").

[2] *See infra* Section I(B).

*Finally*, Plaintiffs are wrong in relying on the scheduling orders pertaining to the BNPP Defendants' Motion to Dismiss, Pls. SJ Opp'n at 69, to argue that the Müller and Romy Reports are untimely. *See* Op & Ord. dated Mar. 3, 2020 at 21, ECF No. 151 ("Choice of Law Op.") (ordering supplemental briefing on Motion to Dismiss); Scheduling Ord. dated Mar. 20, 2020 at 1, ECF No. 155 (permitting discovery in connection with supplemental briefing). Nowhere did the Court state that this "Swiss law discovery" for purposes of the Motion to Dismiss should or would encapsulate the entirety of the parties' Swiss law submissions for the remainder of the case.[3] Nor did the parties "stipulate[] to" or the Court conclusively "determine[]" various of these elements of the Swiss law analysis in connection with the Court's Motion to Dismiss decision. *See, e.g.*, Pls. SJ Opp'n at 64, 75, 76. Plaintiffs' own Swiss law expert has submitted two additional expert reports as well—one in response to Professor's Müller's January 2023 Report, *see* Werro Mar. 2023 Report, and one in opposition to this Motion for Summary Judgment.[4] *See* Werro Aug. 2023 Report; *see also Syntel Sterling Best Shores Mauritius Ltd. v. TriZetto Grp.*, No. 1:15-cv-00211 (LGS ) (SDA), 2020 WL 1442915, at *5 (S.D.N.Y. Jan. 27, 2020) (denying motion to strike foreign law reports submitted with summary judgment

[3] Contrary to Plaintiffs' suggestion that the BNPP Defendants "seek reconsideration of the Court's rulings on the Article 50.1 elements," Pls. SJ Opp'n at 69, the expert reports of Professors Müller and Romy are not inconsistent with Judge Nathan's prior decisions, as discussed in this Section. And to the extent that there is any "doctrinal muddle," Pls. SJ Opp'n at 69, it is because Swiss tort law is complicated—striking the reports of leading Swiss law scholars would not eliminate the "muddle."

[4] When Plaintiffs served the rebuttal report of their Sudanese law expert, they took the *opposite* position to the one they now advance. Plaintiffs stated that, because "BNPP served the Declaration of Tayeb Hassabo in anticipation of a future Rule 44.1 determination by the Court, rather than as a witness who would give expert testimony at trial[,]" it was "not necessary for BNPP to serve Mr. Hassabo's declaration on September 30, 2022 [the deadline for opening expert reports], and therefore it is not necessary for an opposing declaration to be served today." *See* Ex. 152, Email from T. Bruening to BNPP Defendants' counsel dated Jan. 6, 2023. The parties later discussed the possibility of submitting additional foreign law declarations in connection with class certification and summary judgment briefings (leaving the issue of foreign law depositions to a potential meet and confer), further confirming that Plaintiffs were not surprised by these reports. *See* Ex. 153, Email from K. Lynch to B. Landau dated Apr. 3, 2023. Yet Plaintiffs did not raise any purported concerns until their Opposition Brief.

opposition where moving party was "not prejudiced because they submitted evidence regarding the primary issue addressed in [a foreign law report]").[5]

### B. Plaintiffs' Claims Fail Given The Lack Of Any "Unlawful Act" Committed By The BNPP Defendants

Contrary to Professor Werro's novel and untested theory of Swiss law (which was concocted by his former PhD student during the pendency of this litigation), liability under Swiss tort law requires an "unlawful act" on the part of the BNPP Defendants. *See* Defs. Mem. in Supp. of Mot. for Summ. J. at 32-33 (July 21, 2023), ECF No. 442 ("Defs. SJ Br."); Ex. 160, Expert Report of Christoph Müller dated Sept. 8, 2023 ¶¶ 6-26 ("Müller Reply Report").

While Plaintiffs' Opposition Brief identifies alleged "absolute rights" violations by the GOS, *see* Pls. SJ Opp'n at 71-80, Plaintiffs do not claim (i) that *BNP Paribas* or *BNPP Wholesale* committed any of those acts or (ii) that the GOS was acting on behalf of the BNPP Defendants in committing any human rights abuses alleged by Plaintiffs. In addition, to the extent Plaintiffs rely, through reference to international law, on the purported "forced displacement" injury, Pls. SJ Opp'n at 77-80, that does not constitute an unlawful act or cognizable injury under Swiss law at all. As explained by Professor Helen Keller—without rebuttal from Plaintiffs—the ECtHR cases Plaintiffs cite in their Opposition Brief are inapposite, and in fact underscore that "[t]he singular fact of 'forced displacement' . . . does not suffice to prove a [rights] violation." Keller Report ¶¶ 8-27. "It cannot be assumed that [any absolute] right[] was violated simply by the fact that the individual left Sudan." *See* Müller Second Report ¶ 87, ECF No. 435-99. Plaintiffs do not cite to any *Swiss* authority for their "forced displacement" umbrella claim, because they cannot.

[5] The sole case Plaintiffs cite on this issue did not concern a foreign law report submitted under Fed. R. Civ. P. 44.1. *See Adv. Analytics, Inc. v. Citigroup Glob. Mkts., Inc.*, 301 F.R.D. 31 (S.D.N.Y. 2014).

Similarly, Plaintiffs' arguments that BNP Paribas violated U.S. or French law fall flat on multiple levels. Pls. SJ Opp'n at 119. First, unlawfulness for purposes of Swiss tort liability is determined as a matter of Swiss law. *See* Müller First Report ¶ 121, ECF No. 435-98; Müller Second Report ¶¶ 43-45. Second, Plaintiffs mischaracterize BNP Paribas's 2014 guilty pleas, in which BNP Paribas pled guilty to violating U.S. sanctions on Sudan, not to a conspiracy to commit human rights abuses. *See infra* at 17-18. Plaintiffs also misrepresent the scope and purpose of the June 2014 joint Cease and Desist Order between the U.S. Board of Governors of the Federal Reserve and the French banking supervisory authority, l'Autorité de Contrôle Prudentiel et de la Résolution ("ACPR") (the "Cease and Desist Order"). Pls. SJ Opp'n at 119. The Cease and Desist Order contains no statement whatsoever regarding BNPP's compliance with French law. As explained in the preamble, the ACPR joined the cease and desist order as the "home country supervisor[]" to ensure BNP Paribas acts in accordance with U.S. law. *See* TAC Exhibit F, Cease and Desist Order, ECF No. 241-6 at 3. As explained by the BNPP Defendants' French anti-money laundering expert, Professor Antoine Gaudemet, "[t]he French government, for its part, disapproved of U.S. diplomatic policy as being too isolationist," and "French policy was to prevent weapons, terrorism or security-related transactions with Sudan, but otherwise not to discourage multinational corporations from doing business in Sudan, and to pursue a policy of multilateralism." Gaudemet Report ¶¶ 142-143, ECF No. 435-66; *see also id.* ¶¶ 144-159 (discussing French government policy statements favoring a multilateral approach towards Sudan, including strengthening economic links between France and Sudan).

Plaintiffs and Professor Werro also argue that it is "paradoxical [] that an accomplice or an instigator can only be liable under Article 50.1 CO if they are also liable as a perpetrator under Article 41.1 CO." Pls. SJ Opp'n at 70 n.294. But the BNPP Defendants are not arguing

that an "accomplice" can only be liable as a "perpetrator"; rather, Swiss law requires that the liability of each participant (whether principal, accomplice or instigator) be based on an illicit act by that participant. DFSC 145 [2019] III 72, reas. 2.2.1 at 74, ECF No. 435-120 ("Swisscom Case") ("joint and several liability of participants for damages *presupposes . . . the illegality of participant behavior*") (emphasis added); *see also* Müller First Report ¶ 33 (English translation of Art. 41(1) SCO) (obligation to pay compensation for "[a]ny person who unlawfully causes loss or damage to another"); Romy July 2023 Report ¶ 15, ECF No. 435-102. It is Plaintiffs and Professor Werro who create the anomaly by arguing that Article 50(1) SCO would somehow impose joint and several liability on multiple parties who cause a harm together even though some of the parties did not commit an illicit act. *See* Ex. 160, Müller Reply Report ¶ 6 ("It is important to underline that the Swiss Federal Supreme Court has never stated that Article 50(1) SCO is an independent basis for liability."). Not surprisingly, the near unanimous view of Swiss legal scholars is that Article 50(1) SCO can be invoked *only* against a defendant who meets the requirements for tort liability (including unlawfulness) under Article 41 SCO. Müller Reply Report ¶¶ 6-26.

Plaintiffs' position is directly contradicted by the Shooting Contest Case, which Plaintiffs heavily rely on, where the Swiss Supreme Court stated that a defendant who was not the main perpetrator "[could not] be held liable for the accident except pursuant to article 41 et seq. CO which governs unlawful acts. Even though he himself did not shoot the bullet that hit the plaintiff, he could be required to repay the damage if he committed a wrongful act which is an adequate cause of the damage." DFSC 71 [1945] II 107 at 110, ECF No. 435-111 ("Shooting Contest Case") (addressing liability of lieutenant who had "moral and *de facto* authority" over participants in shooting contest). Only after finding that the defendant met the requirements of

Article 41 SCO did the court hold the defendant jointly and severally liable with the participants. *Id.* at 110-112.

Similarly, in the Stamp Dealer and Locksmith cases relied on by Plaintiffs, Pls. SJ Opp'n at 86-88 & n.339, the Swiss Supreme Court found unlawfulness by the accomplices, permitting their joint and several liability for damages. *See* DFSC 82 [1956] II 544, reas. 1 at 547, ECF No. 460-9 ("Stamp Dealers Case") (stamp club's president, a co-defendant, violated unfair competition law "in his capacity as President of the [club], in whose name he wrote, signed and distributed" the unlawful materials); Supreme Court 4A_185/2007, reas. 6.2.2, ECF No. 435-116 ("Locksmith Case") (use of infringed trademark on vehicles leased by accomplice to the perpetrator in violation of a court order "constitute[d] a wrongful act, invoking [accomplices'] personal liability"); *see also* Müller First Report ¶ 71.

Plaintiffs are also wrong that the Swisscom Case supports their view. *See* Pls. SJ Opp'n at 85. There, the Swiss Federal Supreme Court observed that, "*under the old Copyright Law*," an accomplice need not satisfy the requirements for *statutory copyright infringement* to be held "jointly and severally liable for the infringement under Article 50(1) SCO." Swisscom Case, reas. 2.2.1 at 75 (emphasis added). That statement, however, does not help Plaintiffs given the court's conclusion that "the illegality of participant behavior*"* still must be established for Article 50. *Id*. at 74. Nor does the Rediffusion Case, which predates Swisscom, bridge the gap. DFSC 107 [1981] II 82, ECF No. 460-8 ("Rediffusion Case"). There, the court found that antenna operators did not have to satisfy the elements for *copyright infringement* to be *enjoined* from broadcasting copyrighted material under Article 50 SCO—the court did not hold that *no*

unlawful act was required on the part of the antenna operators or that the operators were jointly and severally liable for damages. Rediffusion Case, reas. 9 at 92-93.[6]

As a last ditch effort, Plaintiffs attack Professor Müller's credibility, declaring wrongly that his reports contain a number of "falsehoods." Pls. SJ Opp'n at 70-71. They criticize his supposed reliance on cases concerning Article 51 SCO, which deals with liability for parties who are liable for the same harm on different legal grounds (*e.g.*, contract and tort). *See* Pls. SJ Opp'n at 70 & n.294; Werro Aug. 2023 Report ¶ 10. But, Professor Müller actually cites *both* Article 51 SCO *and* Article 50 SCO caselaw in support of a principle addressed by the Swiss Supreme Court in both contexts: a person who is not liable for harm cannot otherwise be jointly and severally liable. *See* Müller Reply Report ¶¶ 19-22.[7] They also claim that Professor Müller "made knowingly false, material representations of fact" by stating that Professor Werro's theory was invented in 2017 (and further claim that Professor Romy "repeats the lie"), simply because the idea was mentioned in one sentence of a 1991 PhD thesis (never cited by any Swiss court) on application of tort law to contract liability. Pls. SJ Opp'n at 70-71; Müller Reply Report ¶ 24; Müller First Report ¶ 43. But Professor Werro's former PhD student (Vincent Perritaz) was the first to provide some argument as to why the theory should be accepted in his 2017 PhD thesis

[6] Moreover, the accomplice antenna operators were essential to the perpetrator's dissemination of copyrighted material and were so closely related to the harm that "[i]nitially, the plaintiff also accused [PTT] of directly violating its copyrights." *Id.*, reas. 2 at 86; Müller First Report ¶¶ 75-78.

[7] *See* Ex. 160, Muller Reply Report ¶¶ 19-21; Ex. 163, DFSC 130 [2004] III 362 at 369-70 ("Work Contract Case") (citing scholarship on Article 50 for holding in Article 51 case that "[j]oint and several liability implies a preceding liability: a person who is not liable for damage cannot be held jointly and severally liable"); *see also* Ex. 162, DFSC 104 [1978] II 225 at 232 ("Defamation Case") (identifying application of statute of limitations as "possibly even the only practical basis of the distinction between" Articles 50 and 51). While Professor Müller inadvertently stated in his original report that the Defamation Case concerned Article 50, rather than Article 51, the underlying principle is discussed in both contexts. And Professor Müller explicitly identified the Work Contract Case as an Article 51 case in his report. *See* Müller First Report ¶ 37.

(*i.e.*, during the pendency of this litigation). *See* Müller Reply Report ¶¶ 23-24. Whenever the theory was "invented"—whether in one sentence in a 1991 PhD thesis focused on a different area of law or in a 2017 PhD thesis—the critical point is that no Swiss court has endorsed it, undercutting the notion that this is a well-established theory rooted in "a century of case law." Pls. SJ Opp'n at 85; Werro Mar. 2023 Report ¶ 10.[8]

### C. There Can Be No Joint Liability Between The GOS And The BNPP Defendants Under Article 50 SCO

Plaintiffs' and Professor Werro's theory fails for the additional reason that the BNPP Defendants cannot be liable under Article 50 SCO for the public acts of a foreign sovereign, for the reasons explained by Professor Isabelle Romy, a former Swiss Supreme Court Judge. Ex. 161, Expert Report of Isabelle Romy dated Sept. 8, 2023 ("Romy Sept. 2023 Report"); Romy July 2023 Report ¶¶ 19-42. Plaintiffs and Professor Werro do not—and cannot—refute this. *See* Pls. SJ Opp'n at 80-82.

While Plaintiffs argue that the issue has already been decided (in the context of the pleadings stage decision about the U.S. law act of state defense), *see* Pls. SJ Opp'n at 80, that is incorrect because the BNPP Defendants' position is based on Swiss law. *See* Defs. SJ Br. at 32-33 ("Acts of a foreign state in their sovereign capacity (*jure imperii*) are public law acts not subject to tort liability *under Swiss law*.") (emphasis added). The fact that genocide is a crime

[8] Plaintiffs insinuate that Professor Müller may have edited Vincent Perritaz's 2023 article to include the word "new," Pls. SJ Opp'n at 71 n.299, but Perritaz himself provided this characterization in the first draft of the 2023 article provided to Professor Müller. Müller Reply Report ¶ 23. That characterization was consistent with Perritaz's prior repeated statements concerning the novelty of his theory. Perritaz stated in his thesis (which was advised by Professor Werro) that he was *advocating* for a novel theory of liability under Article 50, rather than describing a theory that was well-established in the Swiss legal community at the time. Ex. 176, Vincent Perritaz, *Le Concours D'actions et la Solidarite* ¶ 247 (Peter Gauch, ed., 2017) (summarizing scholarship on Article 50 and stating: "However, we believe that there is a need to go further"); *see also* Ex. 175, Vincent Perritaz, *L'art. 50 al. 1 CO: une norme qui fonde la responsabilité?* At 799-800 (2018) ("In the approach advocated here, [Article 50(1) SCO] alone is the basis for the individual liability of the other participants . . . .).

under Swiss law, *see* Pls. SJ Opp'n at 82, likewise misses the point, because the issue is not whether the acts of the GOS violated any applicable law, but whether the alleged conduct can qualify as the predicate unlawful conduct *under Article 41 SCO*. As Professor Romy explained, the alleged conduct by the GOS cannot. Ex. 161, Romy Sept. 2023 Report ¶¶ 23-29. Moreover, Plaintiffs cite no Swiss authority supporting the conclusion that the BNPP Defendants would be liable for genocide or war crimes.

As the Hockey Case demonstrates, Article 50 SCO liability does not attach where, as here, a defendant is a governmental body subject to public law, not private law such as Article 41 SCO. Ex. 161, Romy Sept. 2023 Report ¶¶ 30-32 (discussing DFSC 79 [1953] II 66, ECF No. 435-112 ("Hockey Case") (rejecting Article 50 liability as to the municipality, which was subject to public law, and other private law tortfeasors). Plaintiffs are wrong in trying to distinguish the Hockey Case on the grounds that the GOS is a foreign sovereign rather than a Swiss municipal body. Pls. SJ Opp'n at 82-83; Werro Aug. 2023 Report ¶ 38. The legal principle on which the Hockey Case rests is that, where an entity is not subject to Swiss private law (such as the GOS, whose actions constitute acts of a public authority), then it cannot be held jointly and severally liable under Article 50 with defendants who are subject to private law. *See* Ex. 161, Romy Sept. 2023 Report ¶¶ 30-32. Contrary to Professor Werro's recent position that the GOS is liable under Article 41 SCO because there is no Swiss public law to exempt it from liability, Werro Aug. 2023 Report ¶ 27, the principle is the opposite, as Professor Werro himself has stated before: "In the absence of a public law provision, the public authority is therefore not liable under CO 41 *et seq*." Ex. 168, Franz Werro & Vincent Perritaz, *Commentaire romand Code des obligations I: Art. 61 CO* (2021); *see* Ex. 161, Romy Sept. 2023 Report ¶¶ 18-22. Because there is no public law provision providing for liability of the GOS's acts of public authority, Article 41

does not apply to the GOS and there can be no joint liability between the GOS and the BNPP Defendants under Article 50. *See* Ex. 161, Romy Sept. 2023 Report ¶¶ 18-22.

Plaintiffs are also wrong that Professor Romy's opinion that the BNPP Defendants cannot be liable under Article 50 SCO for the public acts of a foreign sovereign conflicts with her prior assessment that the case can be heard in Switzerland. *See* Pls. SJ Opp'n at 80-81. While a Swiss court can exercise *jurisdiction* over the BNPP Defendants (which was the issue Professor Romy addressed previously), Plaintiffs' claims fail *on the merits* because Article 50 SCO does not support Plaintiffs' theory of liability. *See* Ex. 161, Romy Sept. 2023 Report ¶¶ 26-29.

## II. PLAINTIFFS FAIL TO RAISE A GENUINE DISPUTE THAT THE BNPP DEFENDANTS CONSCIOUSLY COLLABORATED WITH THE GOS TO INJURE THEM

### A. Plaintiffs Have Failed To Establish Conscious Collaboration In The Injurious Course Of Conduct

In order to show collective fault, Plaintiffs must adduce evidence raising a material issue of fact that the BNPP Defendants consciously collaborated in the injurious course of conduct. *See* Defs. SJ Br. at 34-37; Locksmith Case, reas.6.2.1 at 12 ("[T]he perpetrators must have consciously cooperated to achieve this result."); Müller Second Report ¶ 50. Contrary to Plaintiffs' claims, *see* Pls. SJ Opp'n at 92, "collective fault" or conscious collaboration in the injurious course of conduct is a well-established element of accomplice liability under Swiss law[9] and was not rejected by the Court in its previous ruling on Defendants' Motion to

[9] Plaintiffs' citations to the Shooting Contest and the Carpenters' Strike cases are not to the contrary. *See* Pls. SJ Opp'n at 92-93. In the Shooting Contest Case, the innkeeper was held liable because he failed to take proper safety measures with respect to the injurious course of conduct (*i.e.*, the shooting contest, which occurred on the premises of his establishment), contrary to his specific legal duty to ensure the health and safety of his customers. Shooting Contest Case, reas. 3 at 113–15; Müller First Report ¶ 68; *see also id.* ¶ 86 (Article 50 SCO cases often involve "natural persons [who] were all present in the same place at the same time . . . [and] [t]herefore . . . had, or could have had, the same first-hand and personal knowledge of the tortious situation."). And the union leader held liable in the Carpenters' Strike Case not only collaborated in, but *incited* the injurious course of conduct. *See* DFSC 57 [1931] II 417 at 2, ECF No. 460-14 ("Carpenters' Strike Case") (affirming liability of union leader who intentionally instigated

Dismiss.[10] Professor Werro himself acknowledged this requirement in his prior report in this case, stating: "[W]hat 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 (Aug. 31, 2020), ECF No. 174 ("Werro Suppl. Decl.") (emphasis added). By definition, "collective fault" cannot be determined without first considering *what* was done jointly and whether this gives rise to fault towards the plaintiff.

And Plaintiffs are wrong that BNP Paribas's prior guilty pleas to U.S. sanctions violations somehow estops the BNPP Defendants from moving for summary judgment on the requisite element of the BNPP Defendants' alleged conscious collaboration in the conduct that caused Plaintiffs' injuries. *See* Pls. SJ Opp'n at 89-90. Collateral estoppel based on a prior guilty plea requires that "the issues in both proceedings are identical." *Gordon v. Sonar Cap. Mgmt. LLC*, 116 F. Supp. 3d 360, 363–65 (S.D.N.Y. 2015). That is not the case here. As explained in the Opening Brief, pleading guilty to U.S. sanctions violations does not establish liability for human rights abuses under Swiss tort law. Defs. SJ Br. at 28-29. This distinction is consistent with Article 50 SCO caselaw, which focuses on the *injurious act* when assessing conscious collaboration. *See* Locksmith Case, reas.6.2.1 at 12 ("[T]he perpetrators must have consciously cooperated to achieve this result."); Müller Second Report ¶ 50; Defs. SJ Br. at 34-35. In fact, Swiss courts have explicitly recognized that conscious collaboration in one course of conduct does not create accomplice liability for actions separately undertaken by a primary

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.).

[10] In arguing that this element was previously rejected, Plaintiffs misquote a section of the Court's opinion that discussed whether accomplice liability under Article 50 SCO requires participation that was either "immediate" and "substantial" or "willful" and "substantial." *See* Op. & Order at 9 (Feb. 16, 2021), ECF No. 193 ("Swiss MTD Op.") (internal quotations omitted).

tortfeasor. *See, e.g.*, Ex. 164, Supreme Court 4A_573/2010, reas. 5 at 8 ("Father-Son Robbery Case") (robber's son not jointly liable for robberies committed by his father in another city, even though father and son collaborated on other robberies during same time period).[11] The guilty pleas are silent as to whether the BNPP Defendants conspired with the GOS to commit human rights abuses, and discovery has adduced no evidence of any such conspiracy. Thus, Plaintiffs' claims fail because they cannot show that the BNPP Defendants consciously collaborated in the injurious course of conduct.

### B. Plaintiffs Have Failed to Establish a Violation of a Duty Owed by the BNPP Defendants to Plaintiffs

Plaintiffs cannot avoid their burden to show collective fault by resorting to a theory of negligence because Plaintiffs have not identified any duty of care owed by the BNPP Defendants to Plaintiffs, as required by Swiss law. *See* Defs. SJ Br. at 35-37; Müller First Report ¶ 107. Plaintiffs and Professor Werro cite out of context a handful of Swiss cases and Professor Müller's related commentary to suggest incorrectly that mere "tolera[nce]" or "moral support" of tortious conduct is enough for accomplice liability. *See* Pls. SJ Opp'n. at 92, 105; Werro Mar. 2023 Report ¶¶ 111–12. But in each of those cases, persons physically present on the premises of the injurious act incited violence,[12] or (allegedly) failed to protect their customers, to whom

[11] Plaintiffs also repeatedly accuse the BNPP Defendants of pleading guilty or admitting to "money laundering," citing to the Statement of Facts from BNP Paribas's plea agreement with the Department of Justice, *see, e.g.*, Pls. SJ Opp'n at 1 (citing Statement of Facts, *United States v. BNP Paribas, S.A.*, 14 Cr. 460 (LGS) (June 30, 2014), ECF No. 435-1, but the Statement of Facts contains no such admission. Even if Plaintiffs' allegations of money laundering—based solely on improper legal conclusions from two of their experts (*see* Pls. Statement of Additional Material Facts, ECF No. 463, ¶ 66)—were correct (they are not), Swiss courts have explicitly held that money laundering offenses do not give rise to tort liability. Müller Second Report ¶ 41(1) (citing First Lee Decl. Ex. 119, DFSC 143 [2017] III 653, reas. 4.3.2.2 at Müller 661 ("Money-Laundering Case")); Defs. SJ Br. at 28.

[12] For example, a strike leader inciting violence against strike breakers in the Carpenters' Strike Case, or the boys encouraging one another to throw fire crackers in the Firecrackers Case. *See* Carpenters' Strike Case, reas. 2; DFSC 42 [1916] II 473, reas. 3 at 476–77, ECF No. 435-109 ("Firecrackers Case").

they owed a duty, at an establishment within their control.[13] Here, Plaintiffs do not allege that the BNPP Defendants: (i) were present at the site of any of the injuries alleged; (ii) incited the GOS to commit violence against Plaintiffs; (iii) had any relationship with any Plaintiffs; or (iv) exercised control over the sites of alleged injuries.

Plaintiffs cite the Shooting Contest and Ski Lift cases for the proposition that the BNPP Defendants owed a "general duty to respect the right to life and bodily integrity as an absolute right" towards Plaintiffs. *See* Pls. SJ Opp'n at 93-94. But those cases cannot bear that weight, as both involved a violation of a well-established duty that the defendants owed to their customers. Müller Reply Report ¶ 30. Here, on the other hand, Swiss law makes clear that the provision of financial services, even if such services violate banking regulations, does not create any duty towards third parties and therefore cannot form the basis of liability for Plaintiffs' injuries. *See* Defs. SJ Br. at 28 (describing limited scope of bank liability in tort under Swiss case law); Müller Second Report ¶¶ 40-42 (citing Swiss cases that declined to recognize tort liability for violations of Swiss anti-money laundering and bankruptcy laws).

Plaintiffs also espouse a new theory that "willful[] indifferen[ce] to known risks of funding a mass murderer" is sufficient to establish liability. Pls. SJ Opp'n at 93. Plaintiffs point to general news articles about the situation in Sudan, or announcements by the U.S. Government, to support the conclusion that the BNPP Defendants or non-party BNPP Suisse knew about human rights abuses committed by the GOS. *See* Pls. SJ Opp'n at 91. But despite these reports,

[13] For example, the innkeeper who continued to serve alcohol to and did not put a stop to a shooting contest on his premises was liable in contract and tort for harm to his customer in the Shooting Contest Case; and a ski lift operator was obligated under tort and contract law to take adequate precautionary measures to ensure the safety of its customers (but was ultimately not held liable) in the Ski Lift Case. *See* Müller First Report ¶¶ 67-69; Müller Reply Report ¶ 30; Shooting Contest Case at 113-15; DFSC 126 [2000] III 113 at 115, ECF No. 460-15 ("Ski Lift Case").

both the Swiss government and the European Union adopted a far narrower approach than the United States to sanctions against Sudan. *See* Defs. SJ Br. at 28 n.14 Hood Report ¶¶ 5.16, 5.24, ECF No. 435-67 (EU and Swiss sanctions against Sudan limited to military-related transactions). Nor do these generalized reports establish contemporaneous knowledge about the nature of the GOS's involvement in human rights abuses in a particular year or region, let alone evidence of contemporaneous knowledge of attacks purportedly involving BNP Paribas or BNPP Suisse clients or financial services.[14] *See* Müller Second Report ¶ 50.

Even as to U.S. sanctions, Plaintiffs' characterization of any and every transaction covered by U.S. sanctions as "funding a mass murderer" is also not supported by the evidence. *See* Hufbauer Report ¶¶ 65-78, ECF No. 435-71 (insistence on direct causal connection between sanctions violations and specific injuries "misunderstands how economic sanctions work in practice," as "[t]he central purpose of sanctions over the past century has been to change the policies of foreign states over time, and seldom to prevent immediate harm to specific individuals"). Contrary to Plaintiffs' assertion, there is not a straight line between sanctions and human rights abuses. *See Ofisi v. BNP Paribas, S.A.*, No. 22-7083, 2023 WL 4378213, at *2 (D.C. Cir. July 7, 2023) (affirming dismissal of terrorism claims because BNP Paribas's alleged "objective was to provide banking services, admittedly in violation of the U.S. embargo, to Sudan" rather than committing terrorism); *see also* Defs. SJ Br. at 29 n.16 (collecting cases). Indeed, Plaintiffs' self-described human rights expert has previously questioned the need for sanctions against Sudan. *See* Suliman Baldo et al., "Darfur in 2004 the Many Faces of a

[14] Similarly, and contrary to Plaintiffs' claim, the Second Circuit's ruling in connection with the Motion to Dismiss, which required the Second Circuit to accept allegations from Plaintiffs' Second Amended Complaint as true, does not establish knowledge of any specific acts by the GOS or that the BNPP Defendants played any role in such events. *See* Pls. SJ Opp'n at 91.

Conflict" at 5, ECF No. 435-57 (stating that he and his co-authors were all "uncomfortable with the portrayal of the Darfur conflict as genocide and with the consequence that Sudan should be subject to punitive sanctions"). Even "the Clinton administration acknowledged that the [U.S. sanctions passed in 1997] were more a 'statement of principle,' rather than [a] powerful antidote to human rights abuses," as evidenced by the US government's "willingness to make exceptions for the import of commodities like gum arabic." Hufbauer Report ¶ 44.

## III. PLAINTIFFS HAVE NOT RAISED A GENUINE DISPUTE OF MATERIAL FACT AS TO NATURAL (BUT-FOR) OR ADEQUATE (PROXIMATE) CAUSATION

Plaintiffs have failed to raise a triable issue of fact that the BNPP Defendants' conduct was both the natural (but-for) and adequate (proximate) cause of each of their varied injuries. Defs. SJ Br. at 37–57.

### A. Plaintiffs Have Not Raised a Genuine Dispute of Fact that the BNPP Defendants Were the Natural (But-For) Cause of Plaintiffs' Alleged Injuries

Plaintiffs' initial theory of natural causation, accepted as true by the Court for the purposes of the Motion to Dismiss, was that the BNPP Defendants (1) "equip[ped] and mobilize[d] armed forces" (2) with "sophisticated weapons" (3) that were "actually used" in attacks on Plaintiffs in order to clear them from "oil regions to obtain and sell more oil." Swiss MTD Op. at 13 (internal quotations omitted). Plaintiffs must show that the specific harm suffered by *these individual Plaintiffs*—not some harm suffered by *some unidentified individuals* somewhere in Sudan during the Proposed Class Period—"would not have occurred at the same time or in the same way or magnitude without the conduct alleged." *Id.* at 12; *see also id.* at 16 (requiring that Plaintiffs show that the BNPP Defendants' conduct "directly resulted in at least some of the harm *done to Plaintiffs*") (emphasis added).

#### 1. Plaintiffs Cannot Satisfy the Natural Cause Standard Established by the Court in its Motion to Dismiss Decision

Plaintiffs concede that eighteen of the nineteen Plaintiffs did not even live in an oil concession block, much less in an area within an oil block actually subject to oil exploration.[15] Recognizing this gap in their evidence, Plaintiffs now claim that "oil regions" and "oil rich lands," actually includes all of Darfur, all of present-day South Sudan, and even Sudan's capital city Khartoum (*i.e.*, to cover the locations of nearly all injuries alleged by Plaintiffs' here). Swiss MTD Op. at 13, 17. But such unsubstantiated lawyers' arguments cannot defeat summary judgment, particularly in the face of Plaintiffs' concessions that their injuries were not on oil lands.[16] As to the only Plaintiff who alleges an injury within an oil concession block, Plaintiffs have adduced no evidence that she was injured in an effort to "seize and develop" land for oil production. *Id.* at 17.

Plaintiffs also do not contest that many Plaintiffs were not injured with "sophisticated weapons" at all. *See, e.g.*, Pls. Rule 56.1 Resps. ¶¶ 127, 157, 163, 192, 214, 249, 351, 375, 378, 410, 428, 441, 444, ECF No. 463 (attackers used hands, feet, sticks, whips, handguns, etc.). For the few Plaintiffs who do claim they were injured by "sophisticated weapons," it is undisputed that the GOS had access to such weapons without any purported "assistance" from the BNPP Defendants. *Id.* ¶¶ 62, 69, 72-73, 76 (access to weapons prior to Proposed Class Period). Faced with this evidence, Plaintiffs now advance a theory that, but for the BNPP Defendants' financial services, the GOS could not have, for example, provided "food, equipment, and training" for

[15] *See* Pls. Rule 56.1 Resps. ¶¶ 110, 115, 122, 149, 154, 158, 170, 177, 191, 199, 211, 212, 223, 233, 241, 246, 315, 330, 335, 344, 352, 361, 374, 385, 392, 397, 402, 409, 418, 429, 440 ("Uncontroverted" that alleged injuries were *not* in an oil concession block).

[16] In any event, as made clear by Plaintiffs' Proposed Class Definition and claims in this Action, whether a Plaintiff was in an "oil region" is actually irrelevant to their theory. TAC ¶ 220, ECF No. 241 (seeking to certify a class of individuals from *anywhere* in Sudan or South Sudan); *see also* Pls. Rule 56.1 Resps. ¶¶ 157-58 (Plaintiff Khalifa alleging injury in Gedaref—not in an oil block, Darfur, South Sudan, or Khartoum).

"pilots[]" (with no supporting evidence that the GOS even made such internal payments in the supposedly needed dollars). Pls. SJ Opp'n at 110. Plaintiffs point to no authority supporting that this is "sufficient to demonstrate a factual causal link between BNPP and [an] increase in human rights abuses" throughout Sudan for fifteen years. Swiss MTD Op. at 13.

**2. Plaintiffs' Unsupported Claim that BNPP Entities (Almost Exclusively Non-Party BNPP Suisse) Processed Letters of Credit for $22.2 Billion in Oil Export Transactions Does Not Establish But-For Causation**

In light of these evidentiary gaps, Plaintiffs' theory of natural causation boils down to the argument that the BNPP Defendants were the "cause" of all of Plaintiffs' injuries because, from 1999 to 2009, certain BNPP entities (almost exclusively non-party BNPP Suisse) allegedly processed letter of credit transactions for oil export revenues that exceeded the country's supposed $15.1 billion in "military expenditures." Pls. SJ Opp'n at 32, 90, 98; *id.* at 101 ("Nothing more is required."). Plaintiffs' argument fails at every step.

*First*, this theory—that oil export revenues caused military expenditures which, in turn after a long and speculative chain of events, caused Plaintiffs' injuries—fails on its face for the Plaintiffs whose alleged injuries occurred before August 1999, when oil exports began.[17] Pls. SJ Opp'n at 114 ("*Swisscom* stands for the uncontroversial proposition that an alleged accomplice cannot be liable for a tort that has already occurred . . ."); Pls. Rule 56.1 Resps. ¶ 84 ("Uncontroverted" that oil exports began in August 1999). Plaintiffs' claim that BNPP Suisse's so-called "partnership" with the Central Bank of Sudan beginning in 1997 provided the GOS

[17] *See* Abubakar Abakar, Isaac Ali, Turjuman Adam, Halima Khalifa and Ambrose Ulau all allege at least some of their injuries occurred before this date. *See* Defs. Mem. in Opp'n to Pls. Mot. for Class Cert. at ¶¶ 109–113 (Abubakar Abakar); ¶¶ 169–175, 176–179 (Issac Ali); ¶¶ 121–126 (Turjuman Adam); ¶¶ 148–160 (Halima Khalifa); ¶¶ 222–230 (Ambrose Ulau) (July 21, 2023), ECF No. 434 ("Defs. Class Cert. Opp'n").

"moral support" to "borrow[] against future oil proceeds to finance weapons purchases" is pure speculation. Pls. SJ Opp'n at 105-06. The only document Plaintiffs' purported oil-markets expert cites in support of this "moral support" theory—a Human Rights Watch report that Plaintiffs themselves disclaim as unreliable in their Rule 56.1 Responses[18]—refers to a single GOS missile purchase "underwritten by a [] loan against future oil extraction" *in 1996*. Human Rights Watch, *Sudan: Global Trade, Local Impact: Arms Transfers to all Sides in the Civil War in Sudan* (Aug. 1998) at 36 ECF No. 461-3; *see* Patey Opening Report at 8 n.19. This is one year before Plaintiffs allege BNPP entered into a "partnership" with the Central Bank of Sudan, belying any claim that the GOS would not have purchased weapons on credit against future oil sales but-for any "moral support" Plaintiffs allege BNPP began providing in 1997. Pls. SJ Opp'n at 105.

The "moral support" theory also has no basis in Swiss law, other than Professor Werro's *ipse dixit*. As Professor Müller explained in his treatise *Extracontractual Liability* (which Plaintiffs' mischaracterize), Pls. SJ Opp'n at 97, 105, Swiss courts have in the context of Article 50(1) SCO liability adopted the term "psychological contribution" in the specific instance where

[18] Plaintiffs dispute ¶ 64 of the BNPP Defendants' Rule 56.1 Statement on the basis that "the only source" supporting their own purported expert Timothy Fogarty's deposition testimony is a statement reported in a Human Rights Watch article relied on and frequently cited by Mr. Fogarty and four other of Plaintiffs' purported experts. Fogarty Opening Report ¶ 107, ECF No. 435–63; Patey Opening Report at 8, ECF No. 435-88; Baldo Opening Report ¶ 159, ECF No. 435–54; Baldo Reply Report ¶ 73, ECF No. 435–55; Hudson Reply Report ¶ 138, ECF No. 435–69; Austin Reply Report ¶¶ 6, 113, ECF No. 435-53. Plaintiffs' attack on their own source material highlights the fundamental problem with their expert reports, *i.e.*, stringing together hearsay statements and unsubstantiated articles to build an advocacy piece that reads more like a legal brief than an expert report is not a reliable methodology. *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 136 (2d Cir. 2013) ("[A] party cannot call an expert simply as a conduit for introducing hearsay under the guise that the testifying expert used the hearsay as the basis of his testimony."); *United States v. Dukagjini*, 326 F.3d 45, 58–59 (2d Cir. 2003) (excluding testimony where "expert was repeating hearsay evidence without applying any expertise whatsoever"); *State v. Deutsche Telekom AG*, 419 F. Supp. 3d 783, 790 (S.D.N.Y. 2019) ("[W]here expert reports read like legal briefs and threaten to usurp judges' duty to determine the relevant law, courts may reasonably exclude such evidence at trial.") (internal citation omitted).

persons jointly "participate in an altercation . . . or a violent demonstration." Christoph Müller, *Extracontractual Civil Liability* (2013), ECF No. 460-5 ¶¶ 840-41 (explaining by way of example that if "[t]hree boys, A, B, and C, are playing together with a bow and arrow" and "[t]he arrow shot by A injures C's right eye," B is jointly and severally liable as joint participant in the same injury-causing conduct); *see also* Müller Reply Report ¶¶ 29-30.[19] That is of course not the situation here as relevant to the BNPP Defendants. *See* Pls. SJ Opp'n at 117 n.474 ("Plaintiffs do not allege that BNPP and the Regime were both committing atrocities").

*Second*, Plaintiffs do not actually dispute the fact that the GOS had significant revenues unrelated to oil exports during the Relevant Period. Thus, their attempt to frame BNPP Suisse letters of credit related to oil exports as "causing" military spending (and in turn their injuries) fails, particularly given that they cannot link any particular revenue to any particular expenditure. Pls. Rule 56.1 Resps. ¶ 80. Further supporting this conclusion is the undisputed fact that the GOS had $10.24 billion in *domestic* oil revenues from 1997 to 2009, which Plaintiffs do not even contend any BNPP entity processed.[20] Pls. SJ Opp'n at 29 (alleging "*all* of the Bashir Regime's oil *exports* were financed by letters of credit handled by BNPP") (first emphasis in original;

[19] In any event, Plaintiffs have adduced no evidence regarding what is, exactly, the "moral support" they allege BNPP provided. Tellingly, Plaintiffs appear to have left a placeholder citation in footnote 426 of their Opposition Brief, where they presumably intended to fill this evidentiary gap with citations to their various purported experts. Of course, there is no record evidence, even in the form of inadmissible expert opinion, supporting this "moral support" theory.

[20] Plaintiffs' purported oil markets expert provides data from the International Monetary Fund ("IMF") showing *all* of the GOS's oil revenues (export and domestic sales to refineries) from 1999 to 2009, while Plaintiffs' purported central banking expert provides the IMF's data showing only the GOS's oil *export* revenues, which are the $22.2 billion in revenues Plaintiffs allege BNPP entities processed. Patey Opening Report at 23 (figure 2) (showing that the GOS's oil revenues from 1999 to 2009 totaled approximately $35 billion); Ex. 156, Patey Oil Revenues Chart; Fogarty Opening Report ¶ 270 & Table 14 (showing that the GOS's oil export revenues from 1999-2009 totaled $22.19 billion). The difference between the figures provided by Dr. Patey and Mr. Fogarty represents the amount of domestic oil sale revenues accrued to the GOS during this period according to Plaintiffs.

second emphasis added). Nor can Plaintiffs dispute that, during this time, the GOS had billions more in revenues unrelated to oil exports or domestic sales (including, *inter alia*, international exports and domestic sales of agricultural and other products, tax revenues, and humanitarian aid) totaling $25.85 billion from 1997 to 2009. Llewellyn Report ¶ 52 & Table 2, ECF No. 435-84.[21] Together, these $36.1 billion in revenues unrelated to oil export transactions were enough to cover the GOS's entire supposed military budget more than twice over.

Plaintiffs repeat the cumulative total of oil export revenues and supposed military expenditures from 1999 to 2009 ($22.2 billion and $15.1 billion, respectively) to obscure the additional undisputed fact that oil export revenues were *not* sufficient to cover military expenditures in most years during the Relevant Period.[22] Fogarty Opening Report ¶ 270 (providing yearly breakdown of GOS oil export revenues and supposed military expenditures). In addition to receiving no oil export revenues at all in 1997 and 1998, the GOS's oil revenues were less than its supposed military expenditures in 1999, 2000, 2001, 2002, and 2009.[23] *Id.* Critically, Plaintiffs cannot dispute the IMF data (on which they rely), showing that the GOS's *non-military expenditures* during the this period were far greater than its supposed military

[21] On top of this, Plaintiffs' purported expert Dr. Verhoeven testified to the large amount of financial investment by China and Gulf states during this period. *See, e.g.*, Verhoeven Tr. at 184:25–187:6, 354:3–355:5, ECF No. 464-130; *see also*, Ex. 159, Harry Verhoeven, *Water, Civilization, and Power in Sudan* (2015) at 171 (book by Verhoeven listing $1.6 billion in financial investment for construction of Sudan's Merowe dam).

[22] For ease of reference, a chart aggregating the yearly breakdown of the GOS's total oil revenues, oil export revenues, domestic oil sales, supposed military expenditures, and supposed non-military expenditures as discussed in the reports of Dr. Patey and Mr. Fogarty is available at Ex. 158, Aggregated Experts' Oil Revenue and Expenditures Chart.

[23] 11 of the 19 Plaintiffs allege that at least some of their injuries occurred in these seven years. Defs. SJ Br. ¶¶ 109 (Abakar, Nyala, 1998 or 1999), 153 (Khalifa, Khartoum, 1999), 157 (Khalifa, Gedaref, 1999), 161 (Khalifa, Khartoum, 1999), 176 (Ali, Khartoum, 1999), 190 (Roe, Khartoum, 1999), 198 (Abdalla, Dowiet, 1999), 222 (Ulau, Khartoum, 1999), 127 (Adam, Wau, 2000), 180 (Ali, Khartoum, 2000), 240 (Roe, Juba, 2001), 408 (Shbur, Khartoum, 2001 or 2002), 129 (Adam, Wau, 2002), 302 (Tingloth, Khartoum, 2002), 314 (Omar, Sulu, 2002), 232 (Doe, Wau, early 2000s).

expenditures (including, *inter alia*, spending on infrastructure, social programs, education, and debt servicing). For example, from 1997 to 2009, the GOS transferred $19.5 billion to regional governments as part of the North-South peace process. Llewellyn Report ¶ 58 & n.58; Comprehensive Peace Agreement at 54-55, ECF No. 435-125 ("CPA").

Nor do Plaintiffs dispute that the Comprehensive Peace Agreement provided for a wealth-sharing arrangement between the two regions. Pls. Rule 56.1 Resps. ¶¶ 31-33 (Comprehensive Peace Agreement ended war and provided for wealth- and power-sharing as well as revenue transfers to regional governments). This included the GOS paying 50% of its oil revenues from oil wells in Southern Sudan to the Government of Southern Sudan. CPA § 5.6.

*Third*, Plaintiffs' unfounded reliance on supposed "military expenditures" as a proxy for the level of human rights abuses in Sudan cannot overcome the undisputed fact that there is no evidence to support their allegation that the BNPP Defendants' financial services caused "attacks on civilian populations [to] occur with greater frequency and velocity." TAC ¶ 103, ECF No. 241; Swiss MTD Op. at 13. As an initial matter, the figures relied on by Plaintiffs—purported "military expenditures" calculation reached by the Stockholm International Peace Research Institute ("SIPRI")—are inadmissible hearsay.[24] Plaintiffs' attempt to introduce these figures through their purported experts Mr. Fogarty and Dr. Patey is unavailing, since neither provides any expert analysis related to these figures and both experts admittedly do not have experience in the arms industry. Fogarty Tr. at 66:15-17, ECF No. 464-131 (admitting no expertise in arms trade); Pls. SJ Opp'n at 107 (describing Dr. Patey as an "oil industry expert").[25]

[24] *See Abascal v. Fleckenstein*, 820 F.3d 561, 566 (2d Cir. 2016) (independent nonprofit was not a public office and thus its reports are not admissible public records under 803(8)).

[25] *Nimely v. City of New York*, 414 F.3d 381, 399 n.13 (2d Cir. 2005) ("[I]t is worth emphasizing that, because a witness qualifies as an expert with respect to certain matters or areas of knowledge, it by no

In any event, as confirmed by Plaintiffs' purported experts, Plaintiffs have not adduced any evidence of a nationwide increase in the "frequency and velocity" of attacks *at all*, much less as a supposed resulting increase in "military expenditures," which were a supposed result of BNPP Suisse's financial services. *See, e.g.*, Baldo Tr. at 227:11-228:24, ECF No. 464-124 ("I would say, you know, that I don't have an indication of increase or decrease in numbers of ghost houses in that period."); Fogarty Tr. at 140:24-141:10 142:2-17, ECF No. 464-131 (testifying that he did not "do any analysis of the human rights abuses in Sudan . . . to quantify how they increased"); Jok Tr. at 204:22-205:6, ECF No. 460-67 (admitting that he did not quantify violence); Verhoeven Tr. at 213:11-215:21, ECF No. 464-130 (same). The history of Sudan during the period of Plaintiffs' alleged injuries demonstrates violence ebbing and flowing depending on the local facts on the ground in a given region, and regardless of oil revenues or supposed military expenditures. *See, e.g.*, Baldo Tr. at 164:21-165:2, 87:2-6, ECF No. 464-124 (Plaintiffs' purported expert testifying that the "first phases of the peace process" were underway in 2001 and that it was "more safe" at that time); Pls. Rule 56.1 Resps. ¶ 31 (Second Civil War ended in 2005). Tellingly, when Plaintiffs claim in their Opposition Brief that violence increased, they include no citations to evidence, not even to inadmissible speculative claims by their purported experts. *See, e.g.*, Pls. SJ Opp'n at 33 (no citation for claim that "arms deals expanded dramatically after 1999, as BNPP-laundered petrodollars flowed to Khartoum"); *id.* at 109 (no citation for claim that there was a "massive increase in NISS facilities in the 1990s and 2000s").[26]

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means follows that he or she is qualified to express expert opinions as to other fields.") (internal citation omitted); *Marvel Characters*, 726 F.3d at 136.

[26] The only evidence of an increase in violence during the Relevant Period is in Darfur, insofar as the conflict did not break out until 2003 (*i.e.*, six years into the proposed class period), quickly escalating and then significantly deescalating by 2005. Baldo Tr. at 112:3-14, 210:18-25, ECF No. 435-56. The "time,"

*Fourth*, Plaintiffs' $22.2 billion number is plainly overstated, although whether it is $22.2 billion or $6.63 billion (as found in the BNPP Transaction Reviews), Goolsby Report ¶¶ 22, 55, ECF No. 435-61, is not material to this motion (given the GOS's vast revenue sources and expenditures). At a minimum, there is no evidence on which a reasonable jury could infer that BNPP entities processed the $9.5 billion in oil revenues received by GOS entities in 2008 and 2009, after BNP Paribas and BNPP Suisse made the decision to cease their Sudan business lines in 2007.[27] BNPP-KASHEF-00000177, ECF No. 464-18 (document from February 2007 as latest document discussing *any* BNPP entity processing oil export revenues); BNPP-KASHEF-0028707, ECF No. 464-75 (email from June 2007 summarizing steps BNPP and BNPP Suisse will take to wind down Sudanese accounts); *Opals on Ice Lingerie v. Bodylines Inc.*, 320 F.3d 362, 370 n.3 (2d Cir. 2003) ("[I]t is well established that 'conclusory statements, conjecture, or speculation by the party resisting the motion will not defeat summary judgment.'"). There is no evidence to raise a triable issue of fact as to whether BNPP Suisse processed *any* Sudanese oil export transactions in 2008 and 2009, much less *all* of them.

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"way," or "magnitude" in which the violence in Darfur would have occurred "without the conduct" alleged is a fact that Plaintiffs and their purported experts have not explored. The fact that the violence in Darfur rose and fell independently from the violence in other regions shows the baseless nature of Plaintiffs' characterization of every alleged harm throughout a 15-year class period in Sudan as a "campaign" that can be treated as a single tort for the purposes of showing causation. *See infra* at 35-37.

[27] Plaintiffs' claim that "BNPP continued to process hundreds of millions of petrodollars for Sudanese banks and foreign oil companies well into 2009 (and likely later) during the bank's wind-down of its criminal conspiracy with the GOS," Pls. Rule 56.1 Resps. ¶ 90, has no basis in the purported evidence they cite. *See* BNPP-KASHEF-00030053, ECF No. 464-79 (discussing payments during 2007 wind down and no mention of Central Bank of Sudan or oil); Fogarty Reply Report ¶¶ 99–102, ECF No. 435-64; Verhoeven Opening Report at 55-56, ECF No. 435-93. No source cited by Plaintiffs (nor their purported experts) for this claim references the Central Bank of Sudan or oil. In one illustrative example, Dr. Verhoeven supports his claim that "the bank continued to process tens of millions of petrodollars" with a receipt showing a *blocked* [redacted] payment attempt from [redacted] to [redacted] Ex. 148, BNPP-KASHEF-00002552.

### 3. Plaintiffs' Reliance on Irrelevant Legal Authorities and Arguments Is Insufficient to Raise a Genuine Dispute as to Natural Causation

In trying to create purported material issues of fact, Plaintiffs also rely on a theory based on strawman causation arguments that are unmoored from Swiss law.

*First*, Plaintiffs claim that the natural causation standard actually does not require them to show that the BNPP Defendants were a but-for cause of Plaintiffs' alleged injuries, but only that they engaged in the type of conduct that, in the abstract, would be "generally capable of facilitating" those injuries. Pls. SJ Opp'n at 108 (internal quotations omitted). But the Swisscom Case, which rejected the type of broad liability asserted here, did not conduct its causation analysis at such a high level of generality. Swisscom Case, reas 2.3.2. Instead held that the plaintiff must show that the defendant's conduct was sufficiently "closely related" to the conduct of the actual violators (*i.e.*, the primary tortfeasors, the equivalent of the on-the-ground individuals alleged to have harmed Plaintiffs here). *Id*.; *see also* Swiss MTD Op. at 13 (accepting as true allegation that "the BNPP Defendants' financial services were *actually used* for the attacks that injured plaintiffs") (emphasis added).

*Second*, Plaintiffs dismiss as "hypothetical causation" the allegation in their own Complaint that, without BNPP Suisse's U.S. dollar clearing services, the GOS would nevertheless have earned oil revenues through sales in non-sanctioned currencies (*e.g.*, euros, British pounds). TAC ¶ 6, ECF No. 241. As Plaintiffs recognized, the Court must assess the but-for scenario absent the alleged contributory conduct—here, the *sanctions-violating* letters of credit in *U.S. dollars*. *See* Swiss MTD Opp. at 16 (taking as true allegation that "BNPP provided the Sudanese government with a *means to evade U.S. sanctions* . . . [which] in turn [] allowed the Sudanese regime to generate significant profits from its oil industry" (emphasis added)). Having failed to adduce any evidence of the extra revenues the GOS earned as a result of the sanctions-

violating U.S. dollar financial services, Plaintiffs cannot now disclaim this reality they previously recognized.[28] In any event, Plaintiffs' "hypothetical causation" argument is a red herring, presupposing that *any* oil export revenues were, in fact, the but-for cause of the harms alleged. The point is not that the GOS *could have* found other sources of revenue during the Relevant Period; the point is that it *did have* other sources of revenue, as well as other expenditures, and Plaintiffs have no evidence tying any oil export revenues to any supposed military expenditures, much less to any expenditures purportedly used to harm any Plaintiff. *See infra* at 37-42.

*Third*, Plaintiffs create a strawman when arguing that the BNPP Defendants are demanding some overly stringent "direct receipts" standard (a phrase apparently invented by Plaintiffs for the purposes of this briefing) adopted by expert Enrico Carisch. Pls. SJ Opp'n at 97. Mr. Carisch did not purport to create a legal standard, nor are the BNPP Defendants relying on him for one. Rather, Mr. Carisch identified the speculative gaps in Plaintiffs' purported expert Kathi Austin's assertions that the BNPP Defendants directly processed weapons transactions. Ms. Austin repeatedly speculates as to cash flows, the activities of entities, and the purposes of transactions with no discernible methodology; this observation is hardly a demand for "receipts." *See, e.g.*, Carisch Report ¶¶ 106-11, ECF No. 435-58 (pointing out that, contrary to Ms. Austin's conclusion, the mere reference to "military attachés"—foreign diplomats—does not establish the financing of weapons purchases *at all*, much less to injure Plaintiffs); *id.* ¶ 120

[28] The IMF data regarding the GOS's revenues, on which Plaintiffs' and their purported experts otherwise rely shows that the GOS earned a value of $9.46 billion in oil export revenues from 2010 to 2011 (*i.e.*, after any allegations by Plaintiffs that any BNPP entity was processing oil export transactions, or any allegation that the GOS was receiving oil revenues in supposedly needed dollars). Ex. 157, Sudan Central Government Oil Revenue, 2010-2011. This further supports the undisputed fact that that the GOS would have had significant oil revenues absent BNPP Suisse's U.S.-dollar clearing services.

(criticizing Ms. Austin's reliance on a document showing a tractor purchase by the Sudanese Ministry of Agriculture as evidence of weapons transactions); *MTX Commc'ns Corp. v. LDDS/WorldCom, Inc.*, 132 F. Supp. 2d 289, 291 (S.D.N.Y. 2001) ("[E]xpert testimony should be excluded if it is speculative or conjectural . . . [.]"). And as discussed *infra* at 37-42, to the extent Plaintiffs seek to establish causation by arguing that the BNPP Defendants processed transactions for the weapons that were used to harm Plaintiffs (much less any weapons at all), Ms. Austin's speculation cannot overcome that there is *no* evidence of this.

*Fourth*, the Financial Action Task Force's ("FATF") Recommendation 5 ("Guidance on Criminalising Terrorist Financing"), cited by Plaintiffs' purported experts Timothy Fogarty and Ms. Austin, is immaterial. Pls. SJ Opp'n at 108; Financial Action Task Force, *Guidance on Criminalising Terrorist Financing (Recommendation 5)* (Oct. 2016) ¶ 20, ECF No. 435-131.[29] FATF is an international watchdog organization that proposes standards for preventing money laundering and international terrorism; it is not a Swiss legal body and its recommendations are not themselves Swiss law.[30] To the extent it is reflected in Swiss law at all, by its terms, Recommendation 5 concerns the *financing of terrorist organizations* (not processing transactions for sovereign government entities). Financial Action Task Force, *Guidance on Criminalising Terrorist Financing (Recommendation 5)* (Oct. 2016) ¶ 13, ECF No. 435-131. Moreover,

[29] Neither Mr. Fogarty nor Ms. Austin claims to be a legal expert of any kind, making any statements by them purporting to opine on the "analytical framework on fungible financial complicity used by the International Criminal Court" and its relevance to the applicable Swiss law framework inadmissible. *See* Nimely, 414 F.3d at 399 n.13 (explaining that when an expert witness is qualified in "certain matters or areas of knowledge, it by no means follows that he or she is qualified to express expert opinions as to other fields"). Further, while Mr. Fogarty and Ms. Austin appear to have applied no discernible methodology at all in reaching their inadmissible legal conclusions on causation, to the extent they "apply" the FATF "analytical framework" rather than applicable Swiss law, Pls. SJ Opp'n at 108, their opinions should be excluded as irrelevant.

[30] FATF, "What We Do," https://www.fatf-gafi.org/en/the-fatf/what-we-do.html.

Recommendation 5, unlike Article 50(1) SCO, contains no analogous causation requirement, making Plaintiffs' entire discussion irrelevant.

*Fifth*, Plaintiffs invoke *Flick et al.*, a 1947 Nuremberg U.S. Military Tribunal decision (not a Swiss law civil liability case) where defendants Flick and Steinbrick were members of a group called the "Himmler Circle of Friends" and, following a tour of the Dachau concentration camp, began giving money directly to SS leader Heinrich Himmler to fund Nazi atrocities. Ex. 165, *Flick et al*., Nuremberg Military Tribunal, Judgment of Dec. 22, 1947 at 25. There are no such facts here—there is no evidence of any direct dealings between the BNPP Defendants and any individual in Sudan who actually ordered or carried out any act that injured Plaintiffs. Nor were there "blank checks" given by any BNPP Defendant to any Sudanese entity—rather, there were commercial transactions and, consistent with Swiss law, there is no record evidence that any transaction involved the financing of weapons. *Id.*

### B. Plaintiffs Have Not Raised a Genuine Dispute of Fact that the BNPP Defendants Were the Adequate (Proximate) Cause of Plaintiffs' Alleged Injuries

Adequate causation is a question of law. Supreme Court 4A_7/2007, reas. 5 at 8, ECF No. 435-72 ("Barbecue Grill Case") ("The question of the adequacy of the causal connection is of a legal nature and is subject to independent examination of the Federal Supreme Court."). In their Opposition Brief, Plaintiffs do not cite a *single* Swiss court decision on Articles 41 or 50 SCO finding that adequate causation was satisfied, let alone a decision where the court found adequate causation based on an attenuated chain of causation similar to the one alleged here. Instead, Plaintiffs selectively quote statements from the Court's Motion to Dismiss Decision, Pls. SJ Opp'n at 110-11; try to distinguish the Swisscom Case, the leading Swiss Supreme Court case on adequate causation for accomplice liability, in which the court found *no* adequate causation,

*id.* at 114-15; and assert Professor Werro's personal opinion regarding what is "common sense," *id.* at 110. For the reasons discussed below, all of these arguments are unavailing.

**1. Plaintiffs' Reliance on a "Foreseeability" Standard Misstates Swiss Law and Is Unsupported by the Record**

Echoing their argument, rejected by the Court at the Motion to Dismiss stage, that adequate causation hinges on whether an injury was "objectively foreseeab[le]," Plaintiffs argue that objective foreseeability is a "key factor" that is "decisive in determining" the existence of proximate causation. Pls. SJ Opp'n at 110 (citing the DFSC [1993] 119 Ib 334 ¶ 5, ECF No. 460-62 ("Borehole Case"")).[31] Professor Werro then asserts that it is "common sense" that this standard is satisfied here. *But see In re Mirena IUD Prods. Liab. Litig.*, 169 F. Supp. 3d 396, 484 (S.D.N.Y. 2016) ("If her opinion is based on simple common sense, it is not helpful . . . ."). Plaintiffs and Professor Werro are wrong.

As an initial matter, and as this Court held, objective foreseeability is one among several factors that should be considered in the proximate cause analysis, including whether causal chain is "too attenuated," "far too long," "rest[s] on mere conjecture," or "depends on the intervention of multiple parties." Swiss MTD Op. at 15-17 (internal quotations omitted).

As to objective foreseeability, Plaintiffs, contrary to Swiss law, frame the inquiry at the level of abstraction that it was generally foreseeable that the GOS would commit *some* undefined acts of violence *somewhere* in Sudan at *some* point during the 15-year Proposed Class Period. *See* Pls. Rule 56.1 Resps. ¶ 109 (Plaintiff Abubakar Abakar fled forced recruitment into the

[31] The Borehole Case analyzes causation in the context of a different Swiss law provision (Article 685 of the Swiss Civil Code), and not Articles 41 or 50(1) SCO. In its Motion to Dismiss decision, the Court correctly pointed out that Professor Werro relied on only criminal cases to argue that "objective foreseeability" is all that is required to establish causation. Swiss MTD Op. at 14. It appears that Plaintiffs and Professor Werro still cannot find an Article 41 or 50(1) SCO case to support their argument.

Sudanese military); *id.* at ¶ 210 (Plaintiff Abulgasim Abdalla ambushed while in transit in Darfur); *id.* at ¶ 428 (Plaintiff Shafika Hassan injured in home invasions by security agents on suspicion of affiliation with rebel groups ); *see also id.* ¶ 45 (claiming that any human rights abuses by *rebel faction* "would be attributable to the GOS's campaign of violence" based on its signing of Darfur Peace Agreement); Pls. Rule 56.1 Resps. ¶ 357 (claiming that the BNPP Defendants were the adequate cause of injuries inflicted by *Egyptian police forces* in Cairo, allegedly coinciding with a visit to Cairo by then-Sudanese Vice President). But, as the Swiss Supreme Court held in the Barbecue Grill Case, "[s]uch a generalizing attribution does not lead to a reasonable limitation of liability." Barbecue Grill Case, reas 5.4 at 11; *see also Zapata v. HSBC Holdings PLC*, 414 F. Supp. 3d 342, 357 (E.D.N.Y. 2019) (holding that "imputing responsibility for [Mexican drug] Cartels' continued existence to [HSBC]" because it laundered over $800 million in cartel revenues "would effectively hold HSBC liable for all Cartel violence . . . . this is 'precisely the kind of unlimited, sprawling, and speculative liability that proximate cause forbids'").

Plaintiffs otherwise cannot demonstrate objective foreseeability through recourse to the existence of U.S. sanctions on Sudan. Pls. SJ Opp'n at 111. U.S. sanctions violations do not, in themselves, establish a causal link to human rights abuses. *See O'Sullivan v. Deutsche Bank AG*, No. 17 CV 8709-LTS-GWG, 2019 WL 1409446, at *9 (S.D.N.Y. Mar. 28, 2019) (holding that "[d]efendants' knowledge of the animating purpose behind U.S. sanctions" against Iran does not "support [the] assertion that the attacks were a foreseeable consequence of any alleged agreement to evade U.S. sanctions"). Nor did the law in Switzerland identify as objectively foreseeable harms to individuals from commercial transactions involving Sudan or Sudanese entities given that Switzerland (like France and the European Union) permitted such transactions

to occur (the conclusion being that commercial business with Sudan would be beneficial to the country). *See supra* at 10-11, 20.[32] Indeed, nearly halfway through the Proposed Class Period, the Second Sudanese Civil War actually *ended*, and the GOS transferred billions of dollars of funds, including significant GOS oil revenue shares, to Southern Sudan pursuant to the Comprehensive Peace Agreement. Pls. Rule 56.1 Resps. ¶¶ 31-33; CPA § 5.6, ECF No. 435-125 (mandating payment of 50% of GOS oil revenues from Southern Sudan wells to the Government of Southern Sudan); *id.* at § 7.3 (mandating payment of 50% of GOS non-oil revenues to the Government of Southern Sudan); *see also* Baldo Tr. at 164:21-165:2; 87:2-6, ECF No. 464-124 (testifying that violence in Southern Sudan *decreased* around 2001). As to the conflict in Darfur, Plaintiffs agree it began in 2003 (six years into the Proposed Class Period), Baldo Tr. at 67:22-23, ECF No. 464-124, and according to one of Plaintiffs' expert reports, was "unexpected." Verhoeven Opening Report at 16-17.

Plaintiffs' conclusory statements regarding a hindsight view of what developments should have been expected to occur in Sudanese local and national, African regional, and world politics over a 15-year period cannot be a basis for adequate causation with respect to tens of thousands (by Plaintiffs' count) of individual, distinct incidents across Sudan. At bottom, Plaintiffs' theory is limitless. They argue that, because of oil export transactions processed almost entirely by BNPP Suisse, the BNPP Defendants are the natural and adequate cause of every act of violence committed by "the Regime" (boundlessly defined to include even *rebel* groups) nationwide over a fifteen-year period—a theory encompassing "millions" of people who experienced unenumerable injuries in Sudan by unidentified actors under countless different

[32] It is undisputed that BNPP Suisse and, to a far lesser extent, BNP Paribas provided some other commercial banking services to Sudanese private and public entities. However, Plaintiffs make clear that the processing of oil export revenues is the conduct material to their claims. Pls. SJ Opp'n at 97, 111.

incidents. *See* Pls. SJ Opp'n at 114 ("the causal chain between its conspiracy and the millions of victims is foreseeable at each link"); *but see* First Müller Report ¶ 137 (quoting Swisscom holding that the purpose of adequate causation is "to *limit* liability") (emphasis added).

**2. Plaintiffs Do Not Genuinely Dispute that the Alleged Harms Are Not Sufficiently "Closely Related" to the BNPP Defendants' Alleged Conduct**

Plaintiffs' Opposition further confirms that the chains they advance to support a single adequate causal inference with respect to the varied incidents alleged by the 19 Plaintiffs are "far too attenuated" and "long," "rest[] on mere conjecture," and "depend[] on the intervention of multiple parties." Swiss MTD Op. at 16; *see also* Müller First Report ¶ 83 (explaining that not every act that is "merely 'somewhat' of promoting influence, but is not sufficiently closely related to the act itself, is sufficient" (quoting Swisscom)). Indeed, Plaintiffs do not genuinely dispute the facts set forth in the BNPP Defendants' Opening Brief, Defs. SJ Br. at 46-52, establishing the lack of a sufficiently close relationship between the conduct primarily at issue here—oil export transactions by BNPP Suisse—and the varied, disparate harms alleged by Plaintiffs.

*First*, Plaintiffs do not genuinely dispute that the "Regime" is not a monolith. There is no evidence in the record that BNPP Suisse had a business relationship with any individuals or entities that perpetrated violence against Plaintiffs. *See, e.g.*, Judicial Hearing Officer Report, *Majuc v. DANY*, Index No. 160988/2017, NYCESF Doc. No. 65 (New York Freedom of Information Law decision finding no reference to "Janjaweed" in any BNPP-produced government document). By Plaintiffs' own admission, the alleged perpetrators of violence against them were the GOS's formal military; a conglomeration of paramilitaries under the umbrella of the People's Defense Forces; tribal militias in Darfur and throughout South Sudan variously called "Janjaweed" and "Mujahadeen," among other names; and others. *See, e.g.*, Pls.

Rule 56.1 Resps. ¶¶ 107, 198, 306, 314, 320. There is no evidence that any oil export transaction involving any BNPP entity had anything to do with these individuals or groups.

Indeed, Plaintiffs' baseless characterization of the "Regime" as one single entity notwithstanding, they do not contend that any Sudanese government entity for which any BNPP entity processed oil export transactions was the direct perpetrator of the harms alleged. Plaintiffs' generic allegation, largely based on Plaintiffs' purported expert Dr. Patey's say-so,[33] that the Central Bank of Sudan was "no ordinary financial institution" and was "dominated by military-Islamist party leaders," *id.* at 116, cannot create an issue of fact as to whether the Central Bank of Sudan itself committed the harms alleged. Moreover, whatever political affiliations Central Bank officials had, Plaintiffs' purported banking expert Mr. Fogarty testified that the Central Bank performed standard central banking functions, including issuing national currency, implementing monetary policy, serving as fiscal agent to the central government, managing foreign currency reserves, and serving as lender of last resort. Fogarty Tr. at 76:6-15, 77:12-78:21; *id.* at 49:7-23, ECF No. 464-131 (testifying that foreign central banks with less convertible currencies may hold accounts at foreign commercial banks).

*Second*, it is also undisputed that the GOS is a government with billions in non-oil export revenues and non-military expenditures, *see supra* at 25-27,which further supports the conclusion that Plaintiffs' causal claims are too attenuated and speculative to support liability. Courts that have addressed claims, under the Anti-Terrorism Act,[34] based on the violation of U.S.

[33] *E.E.O.C. v. Bloomberg L.P.*, No. 07 Civ. 8383 (LAP), 2010 WL 3466370, at *13–15 (S.D.N.Y. Aug. 31, 2010) (excluding report and testimony of expert where "the opinions in the report are supported by what appears to be a 'because I said so' explanation").

[34] Although Plaintiffs' claims are not brought under the Anti-Terrorism Act, the Court previously recognized the relevance of U.S. legal precedent on causation given its similarities to Swiss law. *See* Swiss MTD Op. at 12 ("The parties' experts agree that the concepts of 'natural' and 'adequate' cause are

sanctions by financial institutions processing transactions on behalf of sovereign government entities have consistently concluded that the links between the sanctions violations and the alleged harms are far too attenuated. *Cf. Bernhardt v. Islamic Republic of Iran*, 47 F.4th 856, 869 (D.C. Cir. 2022) ("While giving fungible dollars to a terrorist organization may be dangerous to human life, doing business with companies and countries that have significant legitimate operations is not necessarily so. That these business dealings may violate U.S. sanctions does not convert them into terrorist acts.") (quoting *Kemper v. Deutsche Bank AG*, 911 F.3d 383, 390 (7th Cir. 2018)); *Rothstein v. UBS AG*, 708 F.3d 82, 97 (2d Cir. 2013). At the Motion to Dismiss stage, the Court took as true Plaintiffs' claim that the BNPP Defendants "directly transacted with the perpetrators of the violence," which the Court identified as the Sudanese "military" and its "*de facto* military"—who, again, allegedly injured Plaintiffs to "clear oil-rich lands." Swiss MTD Op. at 20. Discovery has disproven this allegation, and has further shown the breadth of the GOS's revenues and expenditures during the Relevant Period.[35] *See supra* at 25-27.

Plaintiffs do not contest that Sudan had non-oil revenues and non-military expenditures. Pls. Rule 56.1 Resps. ¶ 80. Instead, they make the sweeping claim that *every single expenditure* by any agency, entity, or individual within the scope of Sudan's entire government was not "legitimate." Pls. SJ Opp'n at 107.

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similar to the concepts of 'but for' and 'proximate' cause in United States tort law."); *id.* (citing U.S. tort law on proximate causation).

[35] Plaintiffs' citation to the supposedly contrary authority, *Boim v. Holy Land Foundation for Relief & Dev.*, 549 F.3d 685 (7th Cir. 2008), a decision predating and readily distinguished by the Seventh Circuit in *Kemper*, only further supports the conclusion that they have failed to establish adequate cause here. There, the defendants directly gave money to (not processed transactions on behalf of) the terrorist organization Hamas (not a sovereign government). *Boim*, 549 F.3d at 701; *cf. Kemper*, 911 F.3d at 393 ("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.").

Thus, in Plaintiffs' view:

- Money spent on hydroelectric infrastructure contributed to the harms alleged by Plaintiffs because people were displaced to build dams (although not a single Plaintiff alleges that they were displaced due to dam construction). Pls. SJ Opp'n at 107.

- Money spent on improving road infrastructure contributed to the harms alleged because improved roads made it easier for military vehicles to travel to villages. *Id.*

- Even money funneled *away* from the GOS's military spending and into the personal coffers of Sudanese officials contributed to the harms alleged as a "direct form of complicity" (whatever that means).[36] *Id.*; *see also* Defs. SJ Br. at 54-55 (providing additional examples).

*Third*, Plaintiffs try to overcome these evidentiary gaps in their causal theory by labeling every incident in Sudan during the Relevant Period as a "genocidal campaign" has no basis in the record or the applicable causation analysis. Pls. SJ Opp'n at 111-14; *see also id.* at 32. Plaintiffs do not cite a *single* government, UN, or NGO report; academic or news article; or other publication claiming that there was a nationwide "campaign" at all, much less a "genocidal" one, occurring in the entire country of Sudan for a period of fifteen years. Plaintiffs' own purported expert Dr. Baldo admits that there was no such single campaign. *See* Baldo Tr. at 195:10-13, ECF No. 464-124 ("[T]here was conflict in multiple regions."); *see also Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 669 (S.D.N.Y. 2006) ("There is no evidence that any international body has found that genocide has occurred in southern Sudan, nor that the United States Department of State has made such a finding."). Public debate regarding whether acts of violence within Darfur fit the definition of genocide focused on the period of

[36] Plaintiffs appear to suggest that there is a dispute as to whether GOS officials expropriated $4 billion for their own personal gain, Pls' SJ Opp'n at 107 ("Even if this were true . . ."). In doing so, Plaintiffs dispute a statement made by their own purported expert Dr. Patey. Patey Opening Report at 18. Here, too, Plaintiffs apparently concede that experts cannot be a "conduit for hearsay," and also suggest that their own expert's report is inaccurate.

roughly April 2003 to 2005, and even for this specific context, Plaintiffs' own purported expert publicly disagreed with this characterization. *See* Suliman Baldo et al., "Darfur in 2004 the Many Faces of a Conflict," ECF No. 435-57 (memorandum submitted to British parliament in which Baldo and three Sudanese history scholars wrote, "All of the authors are uncomfortable with the portrayal of the Darfur conflict as genocide and with the consequence that Sudan should be subject to punitive sanctions and military intervention."). But more importantly, even if there were evidence of a "campaign," that would not overcome the various natural and adequate causal issues described.

### 3. A Finding that Adequate Cause Is Not Satisfied Comports with Swiss Legal Norms and Court Precedent

The Swiss Federal Supreme Court's Swisscom decision further supports the conclusion that adequate causation is not satisfied in this case. At each step, the Swiss Federal Supreme Court's reasoning in denying liability in the Swisscom Case is analogous based on the factual record developed in discovery.

*First*, the court in the Swisscom Case focused on the "direct violators" who actually committed the underlying Swiss statutory violation, and their conduct relative to the conduct of the defendant. *See* Swisscom Case, reas. 2.3.2. As in the Swisscom Case, the "customers" of BNPP Suisse were not "direct violators" of Swiss law. *Id.*, reas. 2.1.

*Second*, even accepting Plaintiffs' incorrect construct that BNPP Suisse's customer was the "Regime" as one single, indivisible entity, the BNPP Defendants' conduct is still not sufficiently "closely related" to the "direct violators'" conduct. *Id.*, reas. 2.1 ("Even if there were a copyright infringement [by Swisscom's customers], it would also have to be determined whether the defendant made a legally relevant contribution."). Swiss law thus requires a focus on the distance of the defendant's conduct (here, the provision of letters of credit for oil export

transactions) from the plaintiff's injury (here, the varied harms on the ground throughout Sudan over a fifteen-year period). *Id.* ("The defendant is therefore not very close to the initial act that was unlawful.").

The causal chain Plaintiffs seek to establish is even longer and more speculative than the chain the court rejected in the Swisscom Case—flowing from:

- the BNPP Defendants' corporate relationship to non-party BNPP Suisse (BNPP as its parent and BNPP Wholesale as an affiliate holding company with no corporate ownership stake), Pls. Rule 56.1 Resps. ¶¶ 92, 98;
- to BNPP Suisse's provision of letters of credit for Sudanese oil export transactions, Pls. Rule 56.1 Resps. ¶ 106;
- to the Central Bank's pooling these oil export revenues with significant revenues from other sources (domestic oil sales, non-oil product sales, tax revenues, foreign aid, etc.), Pls. Rule 56.1 Resps. ¶ 80;
- to unidentified actors within the GOS making policy decisions regarding whether and how to allocate these pooled funds (on, *inter alia*, military spending, funding of agencies, infrastructure projects, healthcare, payments to regional governments, debt servicing, etc.), Defs. Rule 56.1 Statement ¶¶ 81-82;
- to unidentified actors from one or more of the GOS's agencies recruiting unidentified individuals (members of, *inter alia*, one of the unidentified and unenumerated tribal militias, paramilitary forces, or formerly anti-government rebel groups who changed allegiances) to fight in the Darfur conflict, in the Second Civil War in South Sudan, or elsewhere, with the promise of money (though there is no evidence these individuals were paid in dollars), weapons, or even just "impunity," *see* Verhoeven Opening Report at 17 ("the Janjaweed would maraud with impunity"); Pls. SJ Opp'n at 40-41 n. 164 (alleging militias subject to claims included "Central Reserve Force," "Popular Defense Forces," "Border Intelligence," "Janjaweed," "Murahalin," "Mujahidin," and "Baggara");
- to those unidentified individuals actually engaging in attacks on the ground in one of Sudan's many independent regional conflicts throughout the 15-year Proposed Class Period (sometimes alone, sometimes allegedly in concert with formal armed forces), *see generally*, Defs. Rule 56.1 Statement ¶¶ 107-450.

*See also* Swisscom Case, reas. 2.3.2 ("[T]he complainant cannot be followed if it claims that the defendant has made its infrastructure services available to unknown lawbreakers.").

*Third*, Plaintiffs have not genuinely disputed that BNPP Suisse's (and, indeed, all BNPP entities') conduct, while violating *United States* sanctions, was permitted under *Swiss* law. *See* Defs. SJ Br. at 25-37; Swisscom Case, reas. 2.3.2. Just as Swisscom's provision of internet services that facilitated the download of illegally published content was permissible under Swiss copyright law, it is undisputed that, throughout the entire Relevant Period, it was legal for banks in Switzerland to conduct commercial business with Sudanese public and private entities, subject to prohibitions on financial arms transactions, which no Swiss legal authority has ever found any BNPP entity violated. *See* Defs. SJ Br. at 27-29. It is the province of the Swiss legislature to impose wholesale prohibitions on transactions with Sudanese entities, which it did not do. *Cf.* Swisscom Case, reas. 2.3.2 ("The legislator would have to provide a regulation . . . with suitable procedures and technical restrictive measures. However, the introduction of corresponding regulatory measures . . . has so far been waived."); *see also* Defs. SJ Br. at 30 (discussing Swiss government amicus brief in analogous case concerning Iranian sanctions: "the actions . . . were commercial transactions . . . conducted from Switzerland that at the time were permissible under Swiss law.").

Indeed, there is *no* Swiss case remotely close to imposing the sweeping scope of causation Plaintiffs seek to establish here. *See* Swisscom Case, reas. 2.3.1 ("[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.") (emphasis added). And in fact, other cases addressing adequate causation reveal that Swiss courts apply a rigorous standard, sometimes more so than under U.S. tort law. *Cf.* Barbecue Grill Case, reas. 5.4 at 11 (Swiss Supreme Court case holding that adequate cause *does not* extend to individuals injured while rescuing others from tortious conduct); *Wagner v. Int'l Ry. Co.*, 232 N.Y. 176 (1921) (holding that proximate

cause *can* extend to individuals injured while rescuing others from tortious conduct). Plaintiffs have failed to show why any Swiss court would make the value judgment in this case that adequate causation should be so boundless.

**4. Plaintiffs' Ancillary Theories of Causation Are Likewise Unavailing**

Plaintiffs try to shore up their deficient causation arguments by pointing to allegedly specific example transactions. *See* Pls. SJ Opp'n 96–102. These fail.

Plaintiffs' claim that BNPP provided credit lines for the purchase of "armored vehicle kits—including Renault Midlum 4x4s—imported and assembled by GIAD, fitted with heavy weapons, and used by military militia forces in ground assaults on the targeted civilian populations," Pls. SJ Opp'n at 36-37, fails on its face because no Plaintiff alleges that he or she was injured by a "Renault Midlum 4x4," (or *any* Renault or GIAD vehicle), *see generally*, Pls. Rule 56.1 Resps. ¶¶ 109-450. Even if they had been, Plaintiffs cannot create a triable issue of fact as to this issue, as there is *no* evidence that the purpose of the transaction, or transactions, for which BNPP provided letters of credit to Renault served any military purpose. *See* Defs. SJ Br. at 55-57 (addressing Plaintiffs' unsupported claims regarding Renault and GIAD).

As to Plaintiffs' speculative allegations regarding the Civil Aviation Authority of Sudan ("CAAS"), the document they cite shows that BNPP Suisse processed flyover fees[37] paid by major airlines and provided a credit facility "civil airport infrastructures (shuttles, X-ray gates, baggage, turnstiles, etc.)." BNPP-KASHEF-00048093 at 48103, ECF No. 435-24. Plaintiffs argue, based on inadmissible hearsay, that military personnel "sometimes convey aircraft bombs . . . using ordinary airport luggage trolley." Pls. SJ Opp'n at 36. Here, too, Plaintiffs

[37] Flyover fees are fees charged by a country's aviation agency to airlines that fly over that country's airspace. BNPP-KASHEF-00048093 at 00048098, ECF No. 464-94.

cannot credibly argue that since ordinary airport infrastructure could prove helpful to GOS military aircraft, any processing of transactions for the agency that maintained the civilian airports should be considered to be the but-for and adequate cause of attacks carried out using military aircraft (much less other attacks against Plaintiffs not involving aircraft at all). Plaintiffs concede that the provider of ATM banking services in Sudan would not be liable if those ATMs were used by "the Regime" to further human rights abuses. *Id.* at 118.

Plaintiffs' repeated insinuations that the BNPP Defendants "refuse[]" to provide data or information, Pls. SJ Opp'n at 36-37, or that they have not provided documentation of the purpose of transactions for which there is no record at all, *id.* at 39 n. 158, is an impermissible attempt at shifting the burden of proof to the BNPP Defendants. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) ("The moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof."). Plaintiffs chose not to sue BNPP Suisse, the BNPP entity involved in the vast majority of the financial services at issue here. Moreover, Plaintiffs did not seek documents from Switzerland beyond the documents produced to the U.S. government in the prior sanctions investigation, which at the time had been redacted in compliance with applicable European data privacy and bank secrecy laws. During discovery, the Court held that Plaintiffs' request for a wholesale unmasking of the redactions in these documents would be contrary to foreign law. Ord., ECF No. 343 at 9 ("Plaintiffs are, in effect, asking Defendants to break the laws of the countries in which they operate."). In the absence of evidence establishing liability, Plaintiffs cannot now use the litigation strategy decisions they made as a basis to argue that the BNPP Defendants are required to prove a negative.

## IV. THE COURT SHOULD DISMISS ALL CLAIMS AGAINST BNPP WHOLESALE[38]

The claims against BNPP Wholesale should be dismissed because BNPP Wholesale was not involved in any of the conduct Plaintiffs allege caused their injuries.

Plaintiffs seek to hold BNPP Wholesale liable based on alleged weaknesses within BNP Paribas's compliance program for North America. *See* Pls. SJ Opp'n at 121. As an initial matter, Plaintiffs ignore the separateness of entities within a corporate family under Swiss law. *See* Defs. SJ Br. at 39-40; Ex. 102, Thevenoz 2023 Report ¶¶ 10-11 (explaining that Swiss law recognizes separateness of distinct corporate entities, such as BNPP Paribas, BNPP Wholesale and BNPP Suisse). Plaintiffs have not claimed, let alone adduced evidence of, any abuse of the corporate form that justifies disregarding BNPP Wholesale's corporate separateness. Nor can Plaintiffs repackage the issue as "vicarious liability," *see* Pls. SJ Opp'n at 14; their own Swiss law expert has stated that "Article 50.1 CO liability is not premised on vicarious liability." Werro Mar. 2023 Report ¶ 100. Accordingly, BNPP Wholesale can only be held liable based on its own conduct. However, BNPP Wholesale's alleged conduct falls far short of liability.

*First*, as explained in the Opening Brief, BNPP Wholesale did not engage in or process any transactions with any Sudanese clients, or maintain any accounts for them. *See* Defs. SJ Br. at 59 (citing Cozine Tr. at 235:9–237:24, ECF No. 435-35). Plaintiffs do not contest this fact, which is dispositive. Plainly, the requirement of "conscious collaboration" in the injury causing act of the primary perpetrator means a defendant must do something to be liable under Article 50(1). *See* DFSC 90 [1964] II 501 at 508–09, ECF No. 435-113 ("Steel Boycott Case") (finding defendant-companies were not liable for encouraging a boycott because "even if [defendants]

[38] Plaintiffs do not object to BNPP NY's dismissal from this case. *See* Pls. SJ Opp'n at 120 n.481.

knew about the conducts of the suppliers and these conducts indirectly worked to their advantage," it was "decisive" that defendants "were not involved in the business decisions of these suppliers" such that "the causal connection between the conduct of the defendant and the harmful acts of the suppliers is also missing").

*Second*, Plaintiffs' claim that BNPP Wholesale was aware of U.S. sanctions violations by other BNPP entities cannot be supported by the record. *See* Pls. SJ Opp'n at 123. As an initial matter, Plaintiffs point to evidence relating to correspondent banking services by *BNP Paribas New York Branch*. *See id.* at 123–24 (quoting BNPP-KASHEF-00031735, ECF No. 464-83; BNPP-KASHEF-00039213, ECF No. 464-88; Strombelline Tr. 97:18-113:15, 120:10-122:6, ECF No. 464-103). Moreover, the evidence shows that New York took steps to identify and correct potential sanctions violations. *See, e.g.*, BNPP-KASHEF-00031735, ECF No. 464-83 (BNP Paribas Ethics and Compliance-North America letters regarding transactions from non-U.S. branches rejected as non-compliant with OFAC regulations and prompting further review and intervention); BNPP-KASHEF-00039213, ECF No. 464-88 (memo reminding staff of compliance obligations and stating that transactions "that have been rejected . . . should not be resubmitted, unless" having been investigated and deemed not to violate U.S. law ); Strombelline Tr. at 99:12-22, 104:1–19, 106:11–107:18, ECF No. 464-103 (BNP Paribas New York investigations undertaken after transactions were blocked and rejected and recalling examples of OFAC filter stopping and rejecting payments).

Plaintiffs additionally fail to show that BNPP Wholesale must have known or should have known, had it exercised due care, that alleged deficiencies in its or the New York Branch's compliance program "would contribute to the Sudanese government's violation of human rights." Swiss MTD Op. at 9. Plaintiffs' entire theory rests on BNPP Wholesale employee

Stephen Strombelline.[39] At most, the discovery shows that Strombelline was given information alerting him to the *possibility of a risk* that transactions with Sudanese beneficiaries could be processed through BNP Paribas New York Branch. *See* Strombelline Tr. at 101:17–103:13, ECF No. 464-103. As explained above, Plaintiffs identify no evidence of contemporaneous knowledge that those banking services were used by the GOS in connection with any human rights abuses in a given year or a given region. *Supra* at 37-42. Moreover, awareness of *U.S.* sanctions violations has no bearing on unlawfulness, conscious collaboration or causation for any BNPP entity, *see supra* at 10-11, 17-21, 36, 39-40, much less awareness by BNPP Wholesale of violations by *other* BNPP entities.

*Third*, a weak compliance program would not amount to unlawfulness under Article 41 SCO. *See* Müller First Report ¶ 14. Even if BNPP Wholesale had inadequate personnel or policies in place (which BNPP Wholesale does not concede),[40] that would not establish liability for Plaintiffs' claims because Plaintiffs cannot show a duty owed by BNPP Wholesale to Plaintiffs. *Supra* Section I(B). Plaintiffs go still further afield insisting that the Court deem BNPP Wholesale like the "innkeeper" in the Shooting Contest case. Pls. SJ Opp'n at 128-29. But the innkeeper in that case was the owner of the premises, with duties to guests, *see* Müller

[39] Plaintiffs mischaracterize the parties' conduct during the course of discovery and in the months following the close of discovery. Plaintiffs allege that BNP Paribas has "obstructed Plaintiffs' ability to obtain evidence." Pls. SJ Opp'n at 121 n.483. This claim is baseless. BNP Paribas made good faith productions and presented relevant and responsive information in its possession regarding BNPP Wholesale. Any relevant information regarding BNPP Wholesale employees was made available to Plaintiffs.

[40]Plaintiffs' citation to the DFS Consent Order regarding BNPP's compliance program are inapposite here. *See* Pls. SJ Opp'n at 124 n.501 (citing Consent Order Under N.Y. Banking Law § 44, ECF No. 458-1 at ¶ 8). Those passages of the DFS Consent Order relate explicitly and specifically to BNPP NY, which again is a component of BNP Paribas lacking a distinct corporate identity. The knowledge and actions of BNPP NY cannot be attributed to BNPP Wholesale under Swiss law, as discussed above. *Supra* at 47-48.

First Report ¶¶ 67–69, whereas here BNPP Wholesale was indisputably a subsidiary of BNP Paribas—Plaintiffs have no basis to contend that, like the innkeeper, Strombelline or BNPP Wholesale had the ability to stop BNPP Suisse from providing banking services that violated U.S. sanctions.

## V. THE SUDANESE STATUTE OF LIMITATIONS MANDATES DISMISSAL OF PLAINTIFFS' CLAIMS FOR INJURIES OCCURRING BEFORE APRIL 2001

As demonstrated in the BNPP Defendants' Opening Brief, any claims for injuries that occurred before April 29, 2001 (fifteen years before the filing of the Complaint) were "commenced after the expiration of the time limited by the laws of . . . the state where the cause of action accrued," and should therefore be dismissed pursuant to N.Y. C.P.L.R. § 202 (the "Borrowing Statute"). *See* Defs. SJ Br. at 60-61.

### A. The BNPP Defendants Are Not Precluded From Challenging The Timeliness Of Plaintiffs' Claims Under Sudanese Law

Plaintiffs do not dispute that under the Borrowing Statute, a cause of action must be timely *both* under New York law *and* in the law of the jurisdiction where the claim accrued, in this case Sudan.[41] Plaintiffs nonetheless argue that, because the Second Circuit ruled that their claims are timely under New York law[42] (*i.e.*, the first half of the analysis required under the Borrowing Statute), this Court is somehow barred from considering the timeliness of Plaintiffs'

[41] Plaintiffs have long recognized the applicability of the Borrowing Statute. *See* Mar. 30, 2018 Mot. to Dismiss Ord. at 10, ECF No. 101 ("The parties agree that . . . under New York's borrowing statute, N.Y. C.P.L.R. 202, the Court must apply the shorter statute of limitations period of either New York or the state where the cause of action accrued.").

[42] The Second Circuit considered the timeliness of Plaintiffs' claims under N.Y. C.P.L.R. §215(8)(a) despite concluding that Plaintiffs waived the argument at the district court level. *Kashef v. BNP Paribas S.A.*, 925 F.3d 53, 62 (2d Cir. 2019). The Second Circuit held that it could nevertheless decide the issue because whether the claims were timely under New York law was a "purely legal" matter, and it did not engage in fact-finding on the Sudanese statute of limitations. *Id.*

claims under Sudanese law (*i.e.*, the second half of the analysis required under the Borrowing Statute). *See* Pls. SJ Opp'n at 129-31. This argument is illogical and incorrect.

Plaintiffs argue that dismissal of their claims under the Sudanese statute of limitations would violate the "mandate rule," Pls. SJ Opp'n at 130, but the Second Circuit only held that Plaintiffs' intentional tort claims were timely "under [N.Y. C.P.L.R.] § 215(8)(a)," which pertains to the *New York law* limitations period for civil proceedings following criminal proceedings. N.Y. C.P.L.R. § 215(8)(a); *Kashef v. BNP Paribas S.A.*, 925 F.3d 53, 63 (2d Cir. 2019). The mandate rule does not bar the analysis of the Sudanese statute of limitations because the Second Circuit did not address the timeliness of Plaintiffs' claims under *Sudanese* law. *Sompo Japan Ins. Co. of Am. v. Norfolk S. Ry. Co.*, 762 F.3d 165, 175 (2d Cir. 2014) (explaining that "the district court d[oes] not violate the mandate rule by addressing on remand an issue that was not decided by [the Second Circuit] in the original appeal").[43] Plaintiffs also argue that the BNPP Defendants waived the applicability of the Sudanese statute of limitations because the BNPP Defendants (despite being the appell*ees*) had "an opportunity and an incentive to raise it on appeal." Pls. SJ Opp'n at 130-31 (quoting *United States v. Quintieri*, 306 F.3d 1217, 1225 (2d Cir. 2002)). This is the same argument the Second Circuit rejected in *Brown v. City of New York*, stating that "[t]his Court has not held that an appellee is required, upon pain of subsequent waiver, to raise every possible alternate ground upon which the lower court could have decided an issue." 862 F.3d at 188.[44] The Second Circuit held in *Brown* that *Quintieri* (which Plaintiffs

[43] *See also Brown v. City of New York*, 862 F.3d 182, 186 (2d Cir. 2017) ("mandate rule did not apply to "tissue [that] was not decided in the District Court's initial opinion…not argued on appeal, and…[was] never addresse[d]" in prior appellate opinion).

[44] Any suggestion that the BNPP Defendants should have raised the Sudanese statute of limitations in their Motion to Dismiss, see Pls. SJ Opp'n at 131 n.526, is similarly baseless. It is well-established that a statute of limitations defense may be preserved by including it in the answer. Answer to the TAC at 91, ECF No. 248 (Second Affirmative Defense (*Limitations Period*)); *see Xerox State & Loc. Sols., Inc. v. Xchanging Sols. (USA), Inc.*, 216 F. Supp. 3d 355, 366 (S.D.N.Y. 2016) ("[T]he statute of limitations

rely on) was inapposite because its holding on waiver applied to "the limited scope of [a] resentencing remand" and because the defendant "was the appellant, not the appellee." *Id.*[45]

### B. Plaintiffs Are Wrong That The Fifteen-Year Limitations Period Did Not Begin To Run Until 2019

Plaintiffs fare no better on the merits. As explained in the Opening Brief, the plain language of Section 159(2) of the Sudanese Civil Transactions Act 1984 ("CTA") states that "in all cases" (words never addressed by Plaintiffs' Sudanese law expert, Osman Mekki) "no claim" shall be heard later than fifteen years from date of injury. Defs. SJ Br. at 62; *see* Hassabo Reply Report at ¶¶ 2, 31, ECF No. 435-101.[46] Plaintiffs' and Mr. Mekki's contention that the fifteen-year limitations period is subject to tolling contradicts statutory text and was thoroughly rebutted in Mr. Hassabo's reply report, which Plaintiffs received five months ago but largely ignore in their Opposition Brief.[47]

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defense need not be raised in a pre-answer motion. Rather, under Fed. R. Civ. P. 8(c), the statute of limitations constitutes an affirmative defense, to be asserted in a responsive pleading.") (citations omitted).

[45] Plaintiffs' reliance on *Call Ctr. Tech. v. Interline Travel & Tour, Inc.*, 622 Fed. Appx. 73 (2d Cir. 2015), is similarly misplaced. *See* Pls. SJ Opp'n at 129-31. There, the defendant originally argued that it was entitled to summary judgment under Connecticut law and, after losing on appeal, the defendant argued instead that "Texas as opposed to Connecticut law should apply to the court's analysis." *Id.* at 74. Here, as Defendants have consistently maintained throughout this case, the Borrowing Statute requires Plaintiffs' claims to be timely under *both* New York law and the law of the jurisdiction where Plaintiffs' claims accrued (*i.e.*, Sudan).

[46] Plaintiffs argue that Mr. Hassabo's failure to raise the statute of limitations in his previous declarations raises a "credibility issue." Pls. SJ Opp'n at 132. That is wrong because, as Plaintiffs know, Mr. Hassabo's prior declarations were "confined to addressing" the "elements of [Plaintiffs'] claims under Sudanese law." *See* Declaration of Tayeb Hassabo dated Oct. 5, 2016 at ¶ 12, ECF No. 36; Declaration of Tayeb Hassabo dated Mar. 19, 2017 at ¶ 12, ECF No. 67.

[47] Plaintiffs mount *yet another* frivolous waiver argument, asserting that the BNPP Defendants may not respond to Plaintiffs' tolling arguments, or the expert declaration they are based on, because the BNPP Defendants did not preempt these arguments in their Opening Brief. Pls. SJ Opp'n at 133 n.531. But Plaintiffs have not shown any prejudice, and where Plaintiffs raise "new material issues in opposition papers," Defendants' "response to those arguments [is] properly raised in their reply." *Bricklayers Ins. and Welfare Fund Bricklayers Pension Fund v. P.P.L. Constr. Servs. Corp.*, No. 12-CV-3920 (DLI)(RML), 2015 WL 1443038, at *7–8 (E.D.N.Y. Mar. 27, 2015).

*First*, Plaintiffs argue that Shari'a law requires tolling of the fifteen-year limitations period because Plaintiffs were unable to pursue their claims in Sudanese courts until at least 2019. Pls. SJ Opp'n at 133–34.[48] This argument ignores the clear authorities cited by Mr. Hassabo that prevent Sudanese courts from invoking Shari'a where, as here, there is a "legislative text" on-point (*i.e.*, Section 159 CTA). *Id.* ¶¶ 8–18. Mr. Mekki argues that there is no legislative text specifically governing suspension or tolling of the fifteen-year period, *see* Pls. SJ Opp'n at 133 n.532, but that is because there is no such tolling. Indeed, Section 159 *does* provide for tolling of the *five-year* statute of limitations, Hassabo Reply Report ¶ 14, but the fifteen-year period contains no similar provision (and expressly applies "in all cases"), demonstrating the intent of the Sudanese Legislature to disallow tolling of the fifteen-year period. *Id.* The Sudanese Supreme Court has rejected similar efforts to supplement legislative text with Shari'a law, on the basis that this would "confer a power on courts amounting in its nature to a power of legislation, and [] courts do not originally have such power." *Id.* ¶ 16. And critically, even if Sudanese law allowed for consideration of Shari'a law in the context of an unambiguous statute, Mr. Mekki provides no support for his assertion that the application of Shari'a law would mean that the statute of limitations would not begin running until 2019. Hassabo Reply Report ¶ 19.

*Second*, Plaintiffs and Mr. Mekki venture even further afield to argue that the civil limitations period cannot lapse until the corresponding criminal limitations period lapses. Pls. SJ

[48] The only *Sudanese* law that Mr. Mekki cites in support of tolling the fifteen-year limitations period is Section 652 CTA, but this provision expressly applies only to "limitation of actions that arise out of property ownership" (not tort claims). Hassabo Reply Report ¶ 20. Therefore, it does not apply here. Mr. Mekki's citation to Egyptian Civil Code Article 382 is similarly misplaced, as that law applies only to claims arising from "commercial, financial and business obligations," and therefore is wholly inapplicable to Plaintiffs' tort claims. Hassabo Reply Report ¶ 23.

Opp'n at 134 n.533. This argument fails because it is not based on Section 159 CTA and is based instead on Article 172 of the *Egyptian* Civil Code.[49] Although Section 159 CTA adopts several provisions from Egyptian Civil Code Art. 172, it omits the provision Plaintiffs rely on here, which "demonstrates that the Sudanese Legislature did *not* intend to adopt" this provision. Hassabo Reply Report ¶¶ 26–28; *see also id.* ¶ 22 ("Sudanese courts would not reference Egyptian jurists' interpretation of provisions from the Egyptian Civil Code that contradict or are wholly absent from the corresponding Sudanese statutes.").

*Finally*, New York courts have rejected Plaintiffs' argument that the Borrowing Statute should not be applied when the forum in which the claim accrued was unavailable for the suit.[50] *Ins. Co. of N. Am. v. ABB Power Generation, Inc.*, 91 N.Y.2d 180, 187–88 (1997) (holding that Borrowing Statute does not require courts to determine whether jurisdiction is obtainable over defendant in foreign state where claim accrued). Nor would New York courts borrow tolling provisions (such as the ones invented by Mr. Mekki) that depend on a plaintiff's ability to sue the defendant in the jurisdiction where the claim accrued. *GML, Inc. v. Cinque & Cinque, P.C.*, 9 N.Y.3d 949, 951 (2007) (declining to apply Tennessee tolling provision based on inability to sue defendant in Tennessee, since defendants "were amenable to suit in New York" and it was therefore "irrelevant whether defendants are also subject to suit in Tennessee").

[49] Even applying the Egyptian statute, Plaintiffs' claims against Defendants would not have been tolled because "(1) there have not been any criminal proceedings against *the BNPP Defendants* in Sudan, and (2) the conduct alleged by Plaintiffs—namely that the BNPP Defendants engaged in financial transactions with the Government of Sudan and violated U.S. sanctions—is not prohibited under Sudanese law." Hassabo Reply Report ¶ 29 (emphasis added).

[50] Plaintiffs and Mr. Mekki also argue that Sudanese courts would toll the fifteen-year limitations period due to "fraudulent concealment of BNPP's involvement with the Regime," Pls. SJ Opp'n at 133, but "fraudulent concealment" is already addressed by the five-year period, which is tolled when the victim is unaware of the injury or the identity of the tortfeasor. Applying a similar exception to the fifteen-year period "would undermine the Legislature's attempt to differentiate between the [two] periods." Hassabo Reply Report ¶ 14 n.5.

## VI. SUMMARY JUDGMENT IS PROPER AS TO PLAINTIFFS' REQUESTS FOR PUNITIVE DAMAGES AND PROPERTY DAMAGES

Plaintiffs fail to support their requests for punitive damages and property damages, and the Court should grant summary judgment precluding these categories of damages.[51]

As an initial procedural matter, Plaintiffs cannot avoid consideration of their requests for punitive and property damages by claiming the BNPP Defendants' requested relief is premature. *See* Pls. SJ Opp'n at 134-35. As part of the "district court's inherent authority to manage the course of trials," the Court may consider arguments on summary judgment that serve to "narrow the issues to be presented to the jury," including as to damages. *See, e.g.*, *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 517 F. Supp. 2d 662, 666–67 (S.D.N.Y. 2007) (construing defendants' motion for summary judgment as to punitive damages as a motion *in limine* and granting same) (internal quotations omitted). Now that discovery has ended and the issues are fully presented to the Court, there is no cause to delay the Court's consideration of the merits of the BNPP Defendants' requested relief.

### A. As a Matter of Law, Plaintiffs May Not Seek Punitive Damages

All parties agree that there are no punitive damages under Swiss law. Plaintiffs are incorrect in claiming New York punitive damages can apply to their claims. *See* Pls. SJ Opp'n at 137.

It is "well-established in th[e Second] Circuit that punitive damages are conduct-regulating issues" under New York's conflict of laws rules. *Deutsch v. Novartis Pharms. Corp.*, 723 F. Supp. 2d 521, 524 (E.D.N.Y. 2010) (collecting cases).[52] As Plaintiffs recognize, this

[51] The Court should grant summary judgment as to the remedy of disgorgement for the additional reason that Plaintiffs explicitly concede that they do not seek disgorgement, Pls. SJ Opp'n at 135 n.536.

[52] The distinction Plaintiffs try to draw between the "punitive damage analysis" and the "analysis for compensatory damages" has no bearing on this result, Pls. SJ Opp'n at 137: Swiss law applies to Plaintiffs' request for punitive damages based on the choice of law analysis for punitive damages.

means that "under New York law—for punitive damages in particular—a court must . . . give controlling weight to the law of the jurisdiction with the strongest interest in the resolution of the particular issue presented." *Nat'l Jewish Democratic Council v. Adelson*, 417 F. Supp. 3d 416, 426 (S.D.N.Y. 2019) (internal quotation marks omitted). This Court already determined, based on a "conduct-regulating" analysis that New York had "little interest in this litigation," which did not displace Switzerland's overriding interest in having its law applied to Plaintiffs' claims. Choice of Law Op. at 11-12 (explaining that "to the extent New York and the federal government have an interest in policing BNPP's criminal conduct, they have vindicated that interest through these two lengthy criminal proceedings, each of which resulted in substantial financial penalties").

Plaintiffs point to the present Summary Judgment Motion as the only factor post-dating the choice of law decision that supports New York's interest in punitive damages being imposed. *See* Pls. SJ Opp'n at 139. This argument fails, because punitive damages are not intended to penalize defendants for defending themselves against claims. *See HC2, Inc. v. Delaney*, 510 F. Supp. 3d 86, 108 (S.D.N.Y. 2020) ("The legitimate defense of a litigation . . . cannot constitute an abuse of process.").

Plaintiffs also invoke *In re Air Crash Near Clarence Ctr. N.Y., on Feb. 12, 2009*, 798 F. Supp. 2d 481 (W.D.N.Y. 2011), a lawsuit concerning a plane crash in New York. Pls. SJ Opp'n at 140. But *In re Air Crash* further supports the application of Swiss law to Plaintiffs' request for punitive damages here. Specifically, *In re Air Crash* applied New York law to punitive damages because conduct in New York was at the heart of the litigation. 798 F. Supp. 2d at 492

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Similarly, contrary to Plaintiffs' claims, the Second Circuit's conclusion that Plaintiffs satisfied § 215(8)(a)'s requirements has no bearing on which jurisdiction's laws apply to punitive damages.

("New York is the site of the aircrash, the location of misconduct, the domicile of the majority of the decedents and plaintiffs, and the situs of property damage"). Here, as this Court has already recognized, the BNPP Defendants' "conduct in Switzerland is at the heart of this litigation." Choice of Law Op. at 13. Indeed, there is no allegation (let alone evidence) of "BNPP and the Sudanese government enter[ing] into any agreements in New York," "any schemes to evade American sanctions [being] concocted in New York," or "even . . . that a single conversation in furtherance of the conspiracy took place in New York." Choice of Law Op. at 14. Nor is any Plaintiffs a New York resident. Applying the rationale of *In re Air Crash* here, Swiss law governs the issue of punitive damages.

**B. Plaintiffs May Not Recover Property Damages**

Plaintiffs had the burden to prove their property damages, including by estimating those damages to a reasonable degree of certainty, *see Design Strategy, Inc. v. Davis*, 469 F.3d 284, 294–95 (2d Cir. 2006), and failed to do so.

Plaintiffs mischaracterize the BNPP Defendants' argument as faulting Plaintiffs for failing to produce property documents during discovery. Pls. SJ Opp'n at 135. Not so. Plaintiffs had the opportunity to provide expert testimony as to their property damages calculations, but choose not to do so.[53] In the absence of admissible documentary or expert evidence, testimony alone is insufficient to establish a reasonable basis for Plaintiffs' property

[53] The Court's Civil Case Management Plan and Scheduling Order for this case set the deadlines for opening expert reports "from a party with the burden of proof on an issue" to meet the deadlines set by the Court, Civ. Case Mgmt. Plan and Scheduling Ord. dated May 6, 2021, ECF No. 229 at 3 n.2, which Plaintiffs' initial disclosures acknowledged. *See, e.g.*, Pls. Third Amend. Initial Disclosures Pursuant to Fed. R. Civ. P. 26(a)(1) dated Aug. 2, 2021 at 6, ECF No. 435-143 ("Plaintiffs' complete damage assessments may rely in part on future expert discovery conducted in accordance with the Case Management Plan & Scheduling Order."). Expert discovery in this case closed on April 28, 2023, *see* Ord., ECF No. 409, without Plaintiffs submitting *any* expert information as to property damages.

damages calculations and thus to survive summary judgment.[54] *See Design Strategy*, 469 F.3d at 295 (Rule 26 "requires a 'computation,' supported by documents."); *see also* Defs. SJ Br. at 66-67 (citing cases).

Plaintiffs' own cases hold that a plaintiff who fails to offer a numerical damages calculation may be precluded from later relying on evidence to provide the trier of fact "a specific figure as to his nonpecuniary damages." *Cheng v. Guo*, No. 20-cv-5678-KPF, 2022 WL 4237079, at *9 (S.D.N.Y. Sept. 13, 2022). *Cheng* does not excuse Plaintiffs' failure to substantiate their property damages estimates here: that case was a follow-on litigation to a Nevada Anti-Slapp action, where the "sole precondition" to compensatory damages under Nevada law was plaintiff's success on a special motion to dismiss and where there appears to have been no case management order requiring submission of expert evidence on issues where plaintiff bore the burden of proof. *Id.* And while Plaintiffs' Supplemental Initial Disclosures provide estimates of the alleged quanta of property damages claimed by Plaintiffs, there is *no* evidence supporting those calculations, thus rendering them "mere speculation and conjecture." *Harlen Assocs. v. Vill. of Mineola*, 273 F.3d 494, 499 (2d Cir. 2001); *see also* Defs. SJ Br. at 66 (listing examples of Plaintiffs' alleged property damages estimates). This is in contrast to *Strawberry Park Resort Campground*, an employment discrimination case cited by Plaintiffs, Pls. SJ Opp'n at 136, where, as relevant here, the plaintiff identified "back and front pay" as the relevant categories of property damages, amounts which would have been known to and could

[54] Plaintiffs delayed submitting their property damages disclosures until four months after the close of fact discovery and after Defendants' repeated requests, *see* Letter from C. Bocuzzi to B. Landau, ECF 435-18 (Ltr. from BNPP Defendants to Plaintiffs requesting Rule 26 computations as to property damages), and after the depositions of all Plaintiffs had been completed discovery. *Compare* Pls. Suppl. Initial Disclosures dated Dec. 21, 2022, ECF No. 435-16 *with* Order, ECF No. 382 (setting deadline to complete fact witness depositions to Aug. 12, 2022).

have been verified by the employer. *See King v. Strawberry Park Resort Campground, Inc.*, No. 3:20-CV-01905-JCH, 2023 WL 2265948, at *10 (D. Conn. Feb. 28, 2023).

Given this dearth of evidence, it is impossible for a factfinder to determine a reasonable measure of the property damages Plaintiffs seek, as the BNPP Defendants' cases hold. Plaintiffs fail to meaningfully distinguish *Maier-Schule*, *Palimeiri* or *Philadelphia Indem.*, *see* Defs. SJ Br. at 66–67, which stand for the proposition that Plaintiffs' individual testimonies alone are insufficient to support their requests for property damages. *Cf.* Pls. SJ Opp'n at 137 n.539. "Foremost" in the *Maier-Schule* Court's decision was that the information submitted by the plaintiff "failed to estimate damages to a reasonable degree of certainty," which is exactly the point here. 154 F.R.D. at 60. In *Palmieri*, the Second Circuit found that checks underlying property damages properly warranted summary judgment as to the plaintiff's damages estimates. 445 F.3d at 192–93. In contrast, Plaintiffs here failed to support their estimates of property damages with any non-testimonial evidence. Last, in *Philadelphia Indem.*, the Court credited the defendant's argument that plaintiff "would need expert testimony to establish the value of the building [destroyed by the underlying fire and subject of the insurance claim at issue] before and after the fire," and that "an expert would be needed to justify any damages estimate plaintiff could come up with." 2021 WL 1840592 at *5. Again, here, Plaintiffs provided no expert testimony as to their property damages estimates.

Plaintiffs invoke the statement in *Holt v. KMI-Cont'l, Inc.* that "[s]ummary judgment is improper" when "there is any evidence in the record from which a reasonable inference could be drawn in favor of the non-moving party on a material issue of fact." Pls. SJ Opp'n at 135 (quoting *Holt v. KMI-Cont'l, Inc.*, 95 F.3d 123, 129 (2d Cir. 1996)). But *Holt*, which affirmed the dismissal of a plaintiff's employment discrimination claims under Title VII, did not involve a

determination as to the existence or adequacy of damages evidence. *Holt*, 95 F.3d at 129. And in *Martin v. Shell Oil Co.*, deposition testimony indicated the existence of a realtor who could provide evidence as to the property value in question. 180 F. Supp. 2d 313, 322–23 (D. Conn. 2002). Plaintiffs can point to no such evidence here.

The Court should enter summary judgment as to Plaintiffs' alleged property damages.

## CONCLUSION

For the foregoing reasons, the Court should grant the BNPP Defendants' Motion for Summary Judgment and dismiss Plaintiffs' claims.

Dated: New York, New York
September 8, 2023

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