UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION TO ENFORCE DEFENDANTS' GUILTY PLEA AGREEMENTS AND UNSEAL JUDICIAL DOCUMENTS

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

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

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

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BNP Paribas, S.A. and BNP Paribas U.S. Wholesale Holdings, Corp. (the "BNPP Defendants") respectfully submit this response to Plaintiffs' "Motion to Enforce Defendants' Guilty Plea Agreements and Unseal Judicial Documents." (ECF No. 490 ("Motion" or "Mot.").)

PRELIMINARY STATEMENT

At oral argument in September 2023 on the parties' pending motions for summary judgment and class certification, the Court instructed the parties to negotiate a compromise on the outstanding sealing disputes concerning the thousands of pages of confidential documents that Plaintiffs appended to their motions. So instructed, the parties began conferring in good faith. Over the course of several months, and following several calls and email exchanges, the parties had made considerable progress. The BNPP Defendants agreed to a substantially narrowed set of redactions to the parties' briefing, which the parties filed on the public docket in November. The parties next turned to the accompanying exhibits. The BNPP Defendants agreed to unseal the vast majority of the confidential exhibits, and the parties were negotiating the appropriate treatment for a handful of remaining BNPP documents.

Plaintiffs abruptly cut that process off, filing on March 25, 2024 what they styled in part as a motion to "unseal." But the motion has little to do with sealing. Indeed, apparently concerned that their hundreds of pages of briefing on three separate pending motions were insufficient, Plaintiffs seek another bite at these apples by raising a host of new arguments concerning how the BNPP Defendants are purportedly violating guilty pleas that BNPP entered into in 2014 related to violations of U.S. sanctions. And Plaintiffs do not stop there. They also bring what is effectively a premature (and meritless) motion *in limine*, asking the Court to "enforce" the plea agreements and bar the BNPP Defendants from making further statements that "contradict" these guilty pleas when the Court has yet to decide the BNPP Defendants' motion for summary judgment.

These arguments are not only ill-timed, but they also substantively misconstrue the nature of the guilty pleas that BNPP entered into and rely on distortions of the BNPP Defendants' arguments on summary judgment and class certification. For example, Plaintiffs claim that the BNPP Defendants are somehow "violating" BNPP's guilty pleas, but continue to conflate BNPP's violations of U.S. sanctions laws with the claims that Plaintiffs bring here—namely, that the BNPP Defendants in violation of Swiss tort law assisted the Sudanese government in committing human rights abuses against Plaintiffs in Sudan over the 12-year proposed class period. The sanctions investigation never purported to address Plaintiffs' claims, and the Statement of Facts certainly never states that the BNPP Defendants are liable for human rights abuses committed against Plaintiffs. And the arguments raised by the BNPP Defendants in prior briefing and the opinions expressed by the BNPP Defendants' experts and witnesses recognize and are consistent with this distinction.

Plaintiffs also claim that certain documents relating to Iran and Cuba must be unsealed because they are "evidence of crimes." As an initial matter, Plaintiffs did not even cite any of the information they seek to unseal regarding Iran and Cuba in their summary judgment or class certification briefing. That is because the information is irrelevant to this proceeding, as Magistrate Judge Willis already recognized in permitting the BNPP Defendants to redact matters related to Iran and Cuba for scope. Indeed, the Iran and Cuban sanctions are different regimes with different rules, including provisions for transaction licenses and permissible "U-Turn" transactions during the relevant period; Plaintiffs assume incorrectly that every reference to business with Iran or Cuba in a document must have been criminal. And in insisting that certain reviews undertaken at the request of the U.S. authorities must be made public, Plaintiffs *still* do

not address the government's asserted interest in keeping these records sealed, instead repeating the confused argument that because these materials are not *privileged* they can be filed publicly.

Ultimately, the Court already has all of the information that it needs to decide the pending motions and should reject Plaintiffs' transparent attempt to submit an unauthorized sur-reply through this purported motion to "unseal" and "enforce."

BACKGROUND

A. The Motions for Class Certification, Summary Judgment, and Sealing Are Fully Briefed.

Pending before the Court are Plaintiffs' motion for class certification (ECF No. 417) and the BNPP Defendants' motion for summary judgment (ECF No. 433). The parties completed briefing on those motions on September 8, 2023. In connection with those motions, the parties also filed several motions to seal information and exhibits included with the parties' filings. (ECF Nos. 416, 428, 432, 455, 468). All of those motions, including the parties' sealing requests, are pending.

On September 27, 2023, the Court held oral argument on the pending motions. The Court reserved decision on the class certification motion and the summary judgment motion. (*See* ECF No. 476 ("Hearing Tr.") at 48:4–12 (Sept. 27, 2023).) As to the sealing motions, the Court ruled that the names of individuals need not be "spread on the record," but that the names of any entities appearing on the Specially Designated Nationals ("SDN") List should not be sealed. (*Id.* at 4:24–5:2; 48:13–17; 49:23–25.) The Court otherwise reserved judgment, instructing the parties "to have a discussion and come up with an agreed solution." (*Id.* at 49:7–9.)

B. The Parties Engaged in Good Faith Sealing Negotiations.

Following the Court's instruction, the parties have engaged in productive negotiations. The parties adopted a sequenced approach, planning to resolve the status of the parties' briefs, then to

move to BNPP documents that were filed as exhibits, and finally to address the parties' expert reports and deposition transcripts. (*See* ECF No. 490-7 (Jan. 9, 2024 Email from K. Nelson to O. Engebretson-Schooley) ("In an effort to reach a compromise on information and materials currently under seal, we agree with your approach to address BNPP's underlying documents first.").) Over 360 exhibits containing materials designated as confidential were filed in the parties' briefing on class certification and summary judgment. The exhibits attached by Plaintiffs were particularly voluminous, comprising over 16,000 pages of materials. Accordingly, the negotiations, though productive, took time.

As part of these discussions, the BNPP Defendants "agreed to lift the vast majority of redactions" that had been applied to the parties' briefs (*see id.* (Oct. 28, 2023 Email from O. Engebretson-Schooley to A. Lee-DasGupta)), as well as to unseal a number of BNPP documents that had been included as exhibits (*see id.* (Dec. 6, 2023 Email from O. Engebretson-Schooley to K. Nelson)). Indeed, the parties were able to reach an agreement on appropriate redactions to the briefing papers and file revised redacted briefs by November 16, 2023. (*See* ECF Nos. 479–485.) The parties then turned to discussions regarding the 102 unique documents produced by the BNPP Defendants in discovery that had been filed provisionally under seal on the docket in connection with the parties' class certification and summary judgment briefing.

During the course of these discussions, the BNPP Defendants agreed that 90 of these documents could be unsealed, except that any individual names contained therein, consistent with the Court's instructions, would be redacted. (*See* ECF No. 490-7 (Dec. 6, 2023 and Feb. 7, 2024 Emails from O. Engebretson-Schooley).) The BNPP Defendants further agreed that transaction information related to Sudan found in four of the remaining 12 documents could be filed publicly, and proposed to redact transaction information related to third parties and countries not at issue in

the briefing. (*See id.*) And the BNPP Defendants agreed to unseal a fifth document containing certain legal memoranda, with redactions applied to one memo that concerned an entity in Canada. (*See id.*) The BNPP Defendants proposed to maintain only seven of the 102 documents produced in discovery under seal, on the basis that they contain or reflect confidential material prepared during the government investigations into sanctions violations in response to requests from those authorities. (*See id.*) As of March 7, 2024, the BNPP Defendants had responded to Plaintiffs' most recent correspondence, further explaining their bases for their sealing proposal, and clarifying that the BNPP Defendants did not ask that certain other documents be sealed. (*See id.* (Mar. 7, 2024 Email from O. Engebretson-Schooley to K. Nelson).) The BNPP Defendants did not hear again from Plaintiffs until they filed the instant motion.

C. BNPP's Prior Guilty Pleas Concerned Violations of U.S. Sanctions Law.

The guilty pleas referenced in Plaintiffs' Motion date from 2014. On June 27, 2014, BNP Paribas S.A. ("BNPP") pleaded guilty in the Southern District of New York to a one count information charging Conspiracy To Violate the International Emergency Economic Powers Act and the Trading With the Enemy Act, 18 U.S.C. § 371. (ECF No. 490-2 at 1; ECF No. 241-1.) This plea agreement was the culmination of a lengthy investigation into BNPP's compliance with U.S. sanctions laws as to Sudan, Iran, and Cuba. On June 30, 2014, BNPP pleaded guilty in New York Supreme Court to similar charges. The government's investigation and BNPP's pleas solely concerned sanctions; neither concerned the fact of or responsibility for specific acts of violence or abuses in Sudan.

ARGUMENT

I. PLAINTIFFS' MOTION IS PROCEDURALLY DEFICIENT.

Plaintiffs' Motion should never have been brought. *First*, Plaintiffs ignore that there are already pending, fully briefed motions *to seal* these documents—motions that the Court currently

has under consideration while the parties were in the process of negotiating a compromise. *Second*, Plaintiffs' filing is a thinly veiled attempt to supplement its summary judgment and class certification papers, and filed without leave and over six months after briefing concluded. Plaintiffs' Motion should be denied on these grounds alone.

A. Plaintiffs' Motion To Unseal Judicial Documents Disregards the Court's Ruling at Oral Argument and the Pending Motions To Seal.

In their motion to "unseal judicial documents," Plaintiffs demand the Court order certain exhibits be publicly filed on the docket. (Mot. at 1–2, 12.) But these exhibits are *already* subject to pending sealing motion (*see* ECF Nos. 416, 428, 432, 455, 468)—motions that the parties have fully briefed and that the Court has taken under consideration (*see also* ECF Nos. 427, 430, 445, 446, 467). The documents at issue are provisionally sealed until such time that the Court issues a ruling on the request. *See, e.g.*, *Richards* v. *Kallish*, 2023 WL 4883461, at *2 (S.D.N.Y. Aug. 1, 2023) (provisionally sealing exhibits pending the outcome of the parties' pending disputes). There is currently nothing for Plaintiffs to "unseal."[1]

Only further underscoring the impropriety of the filing, Plaintiffs' Motion raises a number of issues and arguments that Plaintiffs never raised over the course of the parties' sealing submissions to the Court. Plaintiffs claim for the first time, for example, that the identities of

[1] Perhaps recognizing the lack of any procedural footing for this maneuver, Plaintiffs in violation of Local Rule 6.1 failed to file or serve any notice of motion. *See* S.D.N.Y. Local Civil Rule 6.1(b). That is not surprising, as Plaintiffs' "motion" is, for all intents and purposes, a brief raising additional arguments on pending motions that they never sought leave to file. This defect alone is a sufficient basis to deny the Motion. *See, e.g.*, *Yelle* v. *Mount St. Mary College*, 2021 WL 311213, at *3 (S.D.N.Y. Jan. 29, 2021) (declining to consider first motion for reconsideration because it "did not include a notice of motion 'specify[ing] the applicable rules or statutes pursuant to which the motion is brought'" as required by the federal and local rules); *Antolini* v. *McCloskey*, 2021 WL 3076698, at *1 n.1 (S.D.N.Y. July 20, 2021) (noting, after holding plaintiff's motion moot and legally deficient, that "Plaintiff's motion fails to comport with the requirements of Local Civil Rule 6.1 as it fails to attach a notice of motion").

certain Iranian and Cuban transaction parties are evidence of the BNPP Defendants' purported "modus operandi"—an argument that Plaintiffs did not raise in opposition to the BNPP Defendants' motion for summary judgment or in their prior oppositions to sealing. Moreover, during the course of the parties' negotiations, not once did Plaintiffs raise any concerns regarding purported inconsistencies with BNPP's guilty pleas, which is unsurprising given that Plaintiffs' meritless arguments have little to do with sealing at all.

Plaintiffs' unwarranted new "motion" should not be countenanced. Given that the sealing dispute is already the subject of multiple pending motions, the appropriate course after reaching an impasse on the Court's direction to come to an agreement, under the Court's rules and according to past practice in this matter, is for the parties to *jointly* inform this Court of such and make a proposal for further briefing should the Court request it. *See* Rule 2(E) of the Individual Rules of the Hon. Alvin K. Hellerstein ("Unless directed otherwise, counsel shall describe their disputes in a single letter, jointly composed. . . . Strict adherence to the meet and confer rule is required and should be described in the joint submission as to time, place and duration, naming the counsel involved in the discussion."); (*see also* ECF No. 414 (May 3, 2023 Joint Letter to the Court)).

B. Plaintiffs' Attempt To Submit a Sur-Reply Styled as a Motion Should Be Rejected.

Not only have Plaintiffs added to the docket an unnecessary "motion" purportedly to unseal documents already subject to pending sealing requests, but the contents of Plaintiffs' filing have little to do with the actual sealing negotiations at all. Rather, Plaintiffs use this Motion as a pretense to put before the Court a number of new assertions and arguments concerning the parties' summary judgment and class certification motions that have been fully briefed and are currently under the consideration by the Court. Plaintiffs' maneuver should be rejected.

For example, Plaintiffs now claim that documents referencing Iran and Cuba are "modus operandi" evidence that demonstrates that BNP Paribas S.A. was "the conspiracy's ringleader" and demonstrate "the 'existence of a pattern.'" (Mot. at 5–6 (citation omitted).) This is, at best, a misguided argument, but it is one that could have been made in Plaintiffs' opposition to summary judgment—not now as part of a purported "unsealing" motion.

Courts in this district routinely decline to consider and strike from the docket unauthorized sur-replies, such as the one Plaintiffs make here. *See, e.g.*, *Endo Pharms. Inc.* v. *Amneal Pharms., LLC*, 2016 WL 1732751, at *9 (S.D.N.Y. Apr. 29, 2016) (striking unauthorized sur-reply and stating that filing party "neither sought nor received permission from the court to file a surreply"); *Garver* v. *Brown & Co. Sec. Corp.*, 1998 WL 54608, at *2 n.1 (S.D.N.Y. Feb. 10, 1998) ("[T]he plaintiff's letter is procedurally deficient because she did not seek the Court's permission to file a sur-reply memorandum. Accordingly, the Court is not required to entertain such an untimely supplemental submission before deciding a summary judgment motion."); *Houston Cas. Co.* v. *Prosight Specialty Ins. Co.*, 462 F. Supp. 3d 443, 449 n.5 (S.D.N.Y. 2020) ("Had a reply been necessary, HCC was at liberty to seek leave soon after New York Marine filed its opposition in December 2019. Instead, HCC's request came five months after its motion was fully briefed."). Plaintiffs' unauthorized sur-reply six months after the close of briefing is no different, and it should be rejected accordingly.

II. PLAINTIFFS FAIL TO DEMONSTRATE THAT THE REMAINING EXHIBITS SHOULD NOT BE SEALED.

Even if Plaintiffs' Motion were procedurally proper, their demand that the Court "unseal" the exhibits in question fails for several reasons. *First*, the transactions relating to entities in Iran and Cuba that appear in several of the exhibits at issue were never referenced in Plaintiffs' summary judgment and class certification briefing, let alone relied on as part of their arguments,

and thus they are not judicial documents subject to a presumption of public access. *Second*, Plaintiffs conflate the requirements of U.S. sanctions regimes and fail to offer support for the proposition that these materials are "evidence of crimes" that demand public disclosure. *Third*, Plaintiffs never explain how the government's substantial interest in preventing disclosure of the transaction review documents is outweighed by the need for public disclosure.

A. The Materials Relating to Iran and Cuba Are Not Judicial Documents.

Plaintiffs argue that portions of certain documents reflecting transactions related to Iran and Cuba—information that Plaintiffs never cited in their summary judgment and class certification briefing—should be "unsealed" because the public presumptively has a right to access them. But Plaintiffs' demands rest on a misunderstanding of the applicable standard.

In determining whether to grant a request to file documents under seal, the Court balances the weight of the presumption of public access to judicial documents against the various "competing considerations against it," including "the privacy interests of [the party] resisting disclosure." *United States* v. *Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995). But before balancing interests, the Court first must decide the threshold question of whether the information comprises a judicial document. The Second Circuit has defined a judicial document to be material "relevant to the performance of the judicial function and useful in the judicial process," meaning "it would reasonably have the tendency to influence a district court's ruling on a motion or in the exercise of its supervisory powers." *Brown* v. *Maxwell*, 929 F.3d 41, 49 (2d Cir. 2019) (emphasis omitted). "[D]ocuments submitted to a court for its consideration in a summary judgment motion" will often fall within that category. *Id.* at 47 (quoting *Lugosch* v. *Pyramid Co. of Onondaga*, 435 F.3d 110, 121 (2d Cir. 2006)). But the Circuit has cautioned that "the mere filing of a paper or document with the court is insufficient to render that paper a judicial document subject to the right of public access." *Id.* at 49. For example, in circumstances where the court has determined that such

information is "redundant, immaterial, impertinent, or scandalous," and thus should be stricken from the record, the presumption "may not apply." *Id.* at 47 n.12, 51–52.

The circumstances here are no different. Plaintiffs demand that four documents containing information related to Iran and Cuba be unsealed, but not one of these exhibits was cited by Plaintiffs in their briefs on the pending motions for summary judgment and class certification for references to Iran or Cuba. That is because such material is irrelevant to Plaintiffs' claims. Indeed, Magistrate Judge Willis already recognized as much in previously granting the BNPP Defendants' request to redact documents related to Iran and Cuba for scope. (*See* ECF No. 351 (Tr. of May 26, 2022 Status Conference) at 24:6-7 ("[T]hat definitely seems reasonable to me.").)

Plaintiffs' exhibits were cited exclusively for their transaction data related to *Sudanese* entities, information that the BNPP Defendants have already agreed to publicly disclose. (*See* ECF No. 490-7 (Mar. 7, 2024 Email from O. Engebretson-Schooley to K. Nelson).) Indeed, these are lengthy documents—some spanning over 40 pages—reflecting hundreds of outstanding credit arrangements with numerous third parties. And Plaintiffs posted the entirety of each one on the docket, only to cite to just a handful of lines.[2] This is part of a pattern by Plaintiffs. As noted in

[2] The specific documents at issue are: Landau Ex. 78 (BNPP-KASHEF-00003882) (ECF No. 422-66); Landau Ex. 109 (BNPP-KASHEF-00024439) (ECF No. 422-97); Landau Ex. 111 (BNPP-KASHEF-00027592) (ECF Nos. 422-99, -100); and Gilmore Ex. 33 (BNPP-KASHEF-00003542) (ECF Nos. 464-27, -28). These documents are cited in Plaintiffs' brief in support of class certification and in Plaintiffs' opposition to summary judgment (*see* ECF No. 480 at 31 nn.170–71; ECF No. 482 at 37 nn.149–50), or in Plaintiffs' Rule 56.1 Counterstatement of Material Facts (*see* ECF No. 463 ¶¶ 253–54, 313–14) and Statement of Additional Material Facts (*id.* ¶¶ 227, 230), and in each case for a handful of alleged transactions with *Sudanese* entities.

Plaintiffs include a fifth document in their demand to unseal the "Appendix B" materials. (*See* ECF No. 490-15 (Landau Ex. 118, BNPP-KASHEF-00031347).) But the parties already reached agreement on the treatment of that document. (*See* ECF No. 490-7 (Feb. 23, 2024 Email from K. Nelson to O. Engebretson-Schooley) (noting Plaintiffs' agreement with the BNPP Defendants' proposal to unseal the document (except for individual names) but redact a memo

the BNPP Defendants' earlier submissions concerning sealing (*e.g.*, ECF No. 467 at 6; ECF No. 428 at 2, 6–7), Plaintiffs needlessly filed the entirety of every deposition transcript that they cited—each spanning hundreds of pages—despite only citing to a handful of lines from them in support of their motion. (*See, e.g.*, ECF No. 480 at 50 n.260 (citing a single page from a 283-page transcript).) Circumstances like these are when "the tools available to district courts" to mitigate potential harms to privacy interests are particularly important. *Maxwell*, 929 F.3d at 47.

As Plaintiffs never cited the irrelevant information related to Iran and Cuba contained in these documents in their pending motions, such information does not satisfy the *Maxwell* definition of a judicial document and should not be afforded a strong presumption of public access. Should either of the parties actually put this information in dispute before the Court, the parties can revisit whether public disclosure is warranted. But Plaintiffs cannot use a *post-hoc* justification for making these materials public on the basis that they might become relevant to arguments raised by the parties in the future.

B. Plaintiffs Fail To Establish a Sufficient Public Interest in Disclosure of the Handful of Transactions Referencing Iran and Cuba.

In demanding that the Iran and Cuba information be unsealed, Plaintiffs also do not meaningfully engage in the balancing of interests as required by the Second Circuit. *See Maxwell*, 929 F.3d at 48–49. Rather, Plaintiffs simply argue that the Iran and Cuba information should be unsealed because (i) the information does not contain the names of individuals and (ii) the information is "evidence of crimes" such that "BNPP has no legitimate commercial interest in shielding crimes from public view [and] cannot override the strong presumption of public access." (Mot. at 6.)

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concerning BNP Paribas (Canada)).) To the extent Plaintiffs now retract that agreement, the BNPP Defendants submit that this memo should remain redacted for the same reasons articulated above.

Plaintiffs fail to demonstrate that the interests of the public outweigh the specific privacy interests in keeping this information confidential. *See Maxwell*, 929 F.3d at 49–50. Again, because this information was not relied on at summary judgment, only a "low presumption" of public access attaches. *Id.* ("[W]hile evidence introduced at trial or in connection with summary judgment enjoys a strong presumption of public access, documents that play only a negligible role in the performance of Article III duties are accorded only a low presumption that amounts to little more than a prediction of public access absent a countervailing reason." (internal citation omitted)). But even assuming these were judicial documents with a greater presumption of public access, this information reflects specific transactions with third parties not at issue in this litigation. Courts have repeatedly acknowledged and protected such third-party interests. *See In re Search Warrant Dated Nov. 5, 2021*, 2021 WL 5830728, at *6 (S.D.N.Y. Dec. 7, 2021) (explaining that "courts in the Second Circuit have . . . recognized that the privacy interests of third parties . . . should be given careful consideration in the balancing analysis"); *City of Providence* v. *BATS Glob. Markets, Inc.*, 2022 WL 539438, at *2 (S.D.N.Y. Feb. 23, 2022) ("The filings contain confidential customer information of a type that is commonly sealed.").

Plaintiffs never dispute that asserted interest. Rather, the *only* argument Plaintiffs put forth for why no privacy interest should attach is their assumption that any reference to Iran or Cuba in a document must be "evidence of crimes." Indeed, although BNPP pled guilty to violations of U.S. sanctions laws as to Iran and Cuba, those are different regimes with different rules and regulations governing when a particular transaction is impermissible. For instance, as the Statement of Facts itself explains, the U.S. government provided for an Iranian "U-Turn exemption," which permitted banks to participate in certain transactions involving Iranian entities. (*See* ECF No. 490-4 ¶¶ 8, 44.) Similarly, transactions involving Cuban entities would not violate

U.S. sanctions law if licensed by the Office for Foreign Asset Control, a scenario also acknowledged by the Statement of Facts. (*See id.* ¶ 52.) And transactions in currencies other than U.S. dollars would not implicate U.S. sanctions at all. (*See id.* ¶ 5 (describing that U.S. sanctions on Sudan applied to "U.S. dollar transactions"); *see also* ECF Nos. 464-27, -28, Gilmore Ex. 33 (BNPP-KASHEF-00003542) (listing outstanding risk related to loans in *euros*).) At bottom, what these disputes over the complexities of U.S. sanctions laws underscore is that these issues, including the relevance of conduct related to Iran and Cuba, should not be litigated through the guise of a *sealing* motion, when none of this information was put at issue in connection with the pending motions in the first place.

C. Plaintiffs Fail To Explain How the Public Interest Outweighs the Government's Interests in Keeping the Transaction Reviews Under Seal.

Plaintiffs separately request that the Court unseal certain materials that were created in response to or that reflect requests and communications with the U.S. government during its investigation. But as with Plaintiffs' prior sealing briefing, Plaintiffs' arguments still do not address the U.S. government's asserted interests in keeping these materials confidential.

As the BNPP Defendants have explained, these documents comprise internal work product related to the U.S. government's sanctions investigation and reveal the means by which BNPP reviewed and responded to requests from U.S. government authorities. (*See* ECF No. 428 at 5.) The public disclosure of these documents presents the heightened risk of revealing law enforcement techniques and dissuading investigative subjects from being fully candid with the government. For that very reason, prosecutors objected to the production of this and other materials in the FOIA litigation brought by Plaintiffs' counsel seeking their disclosure. *See* Declaration of Courtney J. O'Keefe ¶ 33, ECF No. 70-3, *Majuc* v. *U.S. Dep't of Justice*, No. 1:18-CV-00566 (APM) (D.D.C. Mar. 5, 2021) ("Public disclosure of that information, which BNPP

does not customarily disclose, would likely make other banks and companies less forthcoming when they submit records to DOJ under similar circumstances and less likely to cooperate in these investigations."); *see also id.* ¶ 49 ("[T]he identification of locations (whether in the United States or elsewhere) where the Criminal Division is focusing their investigations and collecting investigative and source material could reveal the overall scope of the investigations, and further identify the suspects, witnesses, and evidence that are at issue in these investigations.").

Plaintiffs simply ignore those interests, and instead again invoke Magistrate Judge Willis' prior ruling that the BNPP Defendants waived attorney-client privilege as to these documents upon production to the U.S. government. (Mot. at 7–8.) But as the BNPP Defendants have repeatedly pointed out to Plaintiffs, whether the documents are *privileged* has nothing to do with whether the documents should be filed on the public docket. Plaintiffs otherwise present no basis for why the particularized interests in maintaining the confidentiality of these documents do not prevail here, and Plaintiffs' demands to unseal these materials should therefore be denied.

III. PLAINTIFFS CANNOT "ENFORCE" THE GUILTY PLEAS.

In a transparent attempt to improperly supplement their arguments on the class certification and summary judgment motions, Plaintiffs claim that "BNPP has repeatedly violated its plea agreements." (Mot. at 1–2.) Plaintiffs ask the Court to "enforce" these plea agreements by striking statements in the BNPP Defendants' summary judgment and class certification briefing that are purportedly "inconsistent" with those plea agreements, and to "bar" the BNPP Defendants from making any future such statements. (*Id.* at 1, 12.)

That is a *de facto* motion *in limine*. The Court has not even ruled on the BNPP Defendants' motion for summary judgment, let alone set a schedule for pre-trial motions and trial, if necessary. Indeed, litigating these demands before pending motions have been decided and before the parties know whether a trial will proceed, what claims will survive, and what allegations will be at issue

makes little sense. At the very least, a motion ostensibly directed to the parties' *sealing* negotiations is not the proper vehicle to address these issues. Plaintiffs' premature motion *in limine*, however Plaintiffs have decided to style it, should be denied.

In any event, Plaintiffs have no standing to "enforce" plea agreements to which they are not a party. And even if they could, Plaintiffs identify no "violat[ion]" that would warrant the drastic relief that they seek. Plaintiffs cite no case law supporting the proposition that third parties, who were not signatories to a plea agreement with the United States government or another prosecutorial entity, have the right or power to request judicial enforcement of a plea agreement. Rather, as this Circuit has explained, "a consent decree is not enforceable directly or in collateral proceedings by those who are not parties to it even though they were intended to be benefited by it," unless "otherwise authorized by the federal rules of civil procedure." *Berger* v. *Heckler*, 771 F.2d 1556, 1565 (2d Cir. 1985) (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 750 (1975)). Courts in this district have relied on this principle to reject attempts by third parties to enforce agreements that defendants have made with the government in court. *See, e.g.*, *Sec. & Exch. Comm'n* v. *Rajaratnam*, 2018 WL 562940, at *1 (S.D.N.Y. Jan. 24, 2018) (accepting that third party "does not have standing" to enforce a Final Judgment under *Blue Chip Stamps*); *see also Shatteen* v. *JP Morgan Chase Bank, N.A.*, 519 F. App'x 320, 321 (5th Cir. 2013) ("Moreover, Shatteen has no standing to enforce consent decrees to which she is not a party.").

Plaintiffs nevertheless appear to suggest that this is a question of collateral estoppel, citing their summary judgment papers. (Mot. at 4 n.12.) Again, Plaintiffs are attempting to make arguments that could have been made in their briefing. But Plaintiffs also continue to ignore the fundamental differences between the U.S. government's sanctions investigation and Plaintiffs' claims in this case. Collateral estoppel requires identity of issues, as Plaintiffs' own cited case

makes clear. *See Digilytic Int'l FZE* v. *Alchemy Fin., Inc.*, 2023 WL 4288154, at *2, 7 (S.D.N.Y. June 30, 2023) (defendant collaterally estopped from arguing that he did not knowingly make a misrepresentation when he pleaded guilty to making that *same misrepresentation* in a securities fraud proceeding). Here, BNPP previously pleaded guilty to intentionally and willfully processing U.S. dollar transactions on behalf of certain Sanctioned Entities in violation of U.S. sanctions laws covering Sudan, Iran, and Cuba. (ECF No. 490-4 ¶ 14.) What BNPP *did not* plead guilty to, and what the BNPP Defendants vigorously dispute in this case, is conspiring with the Government of Sudan to commit human rights abuses. (*See* ECF No. 485 at 17–18.)

Even the purported "contradictions" identified by Plaintiffs in the Motion and accompanying appendix—which tellingly do not concern any of the documents at issue in the sealing dispute—reflect a fundamental misunderstanding of what BNPP's plea agreements contained and a distortion of what the BNPP Defendants have argued in this litigation. For instance, Plaintiffs contend that "BNPP now denies it knew the Sudanese government committed mass atrocities and human rights abuses," and that the BNPP Defendants claim that abuses committed by the Government of Sudan "were not illegal." (Mot. at 9.) But the sole quote Plaintiffs cite is from the BNPP Defendants' summary judgment reply pointing out that, under Swiss law, the conduct by the Government of Sudan is "*subject* to public law" rather than the private law provision advanced by Plaintiffs. (ECF No. 485 at 2 (emphasis added).) Plaintiffs similarly argue that the BNPP Defendants cannot deny that their "financial conspiracy knowingly supported the Government of Sudan in its human rights atrocities." (Mot. at 9.) Tellingly, Plaintiffs here do not cite to the Statement of Facts at all. That is because the guilty pleas say nothing about whether the U.S. dollar clearing services provided by BNPP and its affiliates proximately and adequately caused the specific injuries claimed by the 19 Plaintiffs under Swiss

law. For similar reasons, Plaintiffs' assertion that the BNPP Defendants "def[y] the findings of two courts" is unfounded. (*Id.* at 2.) The cited statement at the plea hearing from the judge overseeing the criminal proceeding is not only not a "finding," but also *does not assert* that the BNPP Defendants are liable for human rights abuses committed against the Plaintiffs under Swiss law. Likewise, and contrary to Plaintiffs' insinuation, the Second Circuit in its opinion in this case did not state that the BNPP Defendants "conceded" that they knew, for purposes of Swiss tort law, that their violations of U.S. sanctions would cause the alleged human rights abuses suffered by the 19 Plaintiffs in this case over the course of a 12-year class period. (*See id.* at 2–3.)

Plaintiffs next claim that the BNPP Defendants wrongfully "den[y] that [BNPP] intentionally violated U.S. sanctions." (*Id.* at 10.) But they cite a statement taken out of context from an expert discussing the *inception* of one of BNPP's predecessor's commercial relationships with Sudanese entities (*see* ECF No. 435-91 ¶¶ 25, 60), and one that the BNPP Defendants did not even cite in their papers. Moreover, Plaintiffs continue to overlook that the Statement of Facts itself states that BNPP "relied on [an incorrect] 2004 legal opinion" and that only by "the summer of 2006"—near the end of Plaintiffs' proposed class period—did it become "clear" that BNPP's conduct violated U.S. law. (ECF No. 490-4 ¶ 35.)

Plaintiffs also argue that the BNPP Defendants cannot "den[y] that without [the] conspiracy, Sudan would not have had access to U.S. financial markets and the U.S. dollars it required." (Mot. at 10.) But Plaintiffs again resort to distortion. The Statement of Facts never purported to conclude that the Government of Sudan could not have obtained U.S. dollars by other means—the purportedly contradictory statement expressed by the BNPP Defendants' expert. (*See id.*) Moreover, the relevant issue for purposes of the BNPP Defendants' summary judgment motion is whether the Government of Sudan obtained from the BNPP Defendants the funds—

whether U.S. dollars or not—to purchase weapons purportedly used to harm the Plaintiffs, a fact that the Statement of Facts did not address.

Finally, Plaintiffs claim that the BNPP Defendants "proffer[] contradicting expert testimony" about the effectiveness of U.S. sanctions in preventing human rights abuses in Sudan. (Mot. at 11.) But again, the only quote from the Statement of Facts that they cite states that BNPP and its affiliates' conduct "significantly undermin[ed] the U.S. embargo." (*Id.*) What that statement does *not* say is that this conduct, in undermining the United States' embargo on processing U.S. dollar transactions through the United States on behalf of Sudanese entities, caused the alleged human rights violations suffered by Plaintiffs. Plaintiffs may disagree with the BNPP Defendants' expert's opinion, but that does not make the opinion contrary to the guilty plea.

Plaintiffs' fallback argument that the BNPP Defendants contradict testimony made by the BNPP Defendants through their Rule 30(b)(6) witness likewise fails. As an initial matter, Plaintiffs already had ample opportunity to make this argument in their 201-page summary judgment opposition and 308-page Rule 56.1 "Counterstatement." (ECF Nos. 463, 465.) Moreover, the witness testimony repeatedly cited by Plaintiffs was in response to questions outside the scope of the Rule 30(b)(6) because the BNPP guilty pleas were not a noticed 30(b)(6) deposition topic. Indeed, the witness was himself a non-lawyer with no personal knowledge of the facts underlying the plea agreements, further showing the impropriety of Plaintiffs' attempts to have him make legal interpretations of the language in the Statement of Facts. *See Falchenberg* v. *N.Y. State Dept. of Educ.*, 642 F. Supp. 2d 156, 164 (S.D.N.Y. 2008) ("Questions and answers exceeding the scope of the 30(b)(6) notice will not bind the corporation, but are merely treated as the answers of the individual deponent."). The BNPP Defendants will address the scope of the 30(b)(6) witness's testimony in a motion *in limine* at the appropriate time, if necessary. In any

event, the cited portions of the witness's testimony do not contradict the BNPP Defendants' briefing, for the reasons described above.

This is not a case where BNPP is running from its prior guilty pleas for violations of U.S. sanctions. Plaintiffs should be litigating *this* case, which claims that the BNPP Defendants in violation of Swiss tort law assisted the Sudanese government in committing human rights abuses against the Plaintiffs in Sudan. As to those claims, which were not at issue in the sanctions proceedings, the BNPP Defendants have demonstrated that Plaintiffs are not entitled to judgment as a matter of law. Plaintiffs' time for raising those assertions was during summary judgment briefing, or, if necessary, will be during pre-trial motion practice and at trial. The parties should not be litigating these issues now through what was ostensibly a motion concerning the parties' sealing disputes.

CONCLUSION

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

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CLEARY GOTTLIEB STEEN & HAMILTON LLP

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

SULLIVAN & CROMWELL LLP

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

Oliver W. Engebretson-Schooley
SULLIVAN & CROMWELL LLP
1700 New York Avenue, N.W., Suite 700
Washington, D.C. 20006
(202) 956-7500
engebretsono@sullcrom.com

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