UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ENTESAR OSMAN KASHEF, *et al.*,

Plaintiffs,

v.

BNP PARIBAS S.A., BNP PARIBAS S.A. NEW YORK BRANCH, BNP PARIBAS NORTH AMERICA, INC., and DOES 2-10,

Defendants.

No. 1:16-cv-03228-AJN

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO THE SUPPLEMENTAL BRIEF OF DEFENDANTS BNP PARIBAS S.A. AND BNP PARIBAS NORTH AMERICA, INC. IN FURTHER SUPPORT OF THEIR MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

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BNPP Suppl. Br.	Supplemental Brief of Defendants in Further Support of Their Motion to Dismiss the Second Amended Complaint, dated August 17, 2020 (Dkt. 172)
Feldman Decl.	Declaration of Shira Lauren Feldman, dated August 31, 2020
Roberto Tr.	Transcript of the June 26, 2020 deposition of Vito Roberto (Ex. D)
Werro Tr.	Transcript of the July 31, 2020 deposition of Franz Werro (Ex. E)
Swiss Code of Obligations	CODE DES OBLIGATIONS [CO] [CODE OF OBLIGATIONS] Mar. 30, 1911, RS 220 (Switz.) (Ex. F)

[†]All citations to numbered exhibits are Exhibits to the Supplemental Declaration of Professor Franz Werro, unless otherwise indicated. All citations to lettered exhibits are Exhibits to the Declaration of Shira Lauren Feldman, unless otherwise indicated.

Swiss Civil Code	CODE CIVIL [CC] [CIVIL CODE] Dec. 10, 1907, RS 210 (Switz.) (Ex. G)
Swiss Criminal Code	CODE PENAL SUISSE [CP] [CRIMINAL CODE] Dec. 21, 1937, RO 311 (Switz.) (Ex. H)

INTRODUCTION

BNPP[1] became the chief financier of genocide in Sudan by conspiring with the regime of Omar al-Bashir to break a U.S. embargo designed to prevent atrocities. *See Kashef v. BNP Paribas S.A.*, 442 F. Supp. 3d 809, 813-16 (S.D.N.Y. 2020). BNPP has already pleaded guilty to that intentional criminal conspiracy. *See id.* Now the same bank that admitted its conspiracy with Sudan was its "dirty little secret" insists it did not "consciously" cooperate and cannot be liable to its victims. BNPP's argument is unsupported by Swiss law and contrary to BNPP's own admissions. This Court should deny BNPP's motion and allow discovery into Plaintiffs' claims.

This Court has already accepted Plaintiffs' "well-pleaded allegations" as true. *Id.* at 813-14. The question now is whether they "state a claim for relief under Swiss law." *Id.* at 825. Both experts agree that Article 50 of the Swiss Code of Obligations ("CO") ("Art. 50") applies. Under Art. 50, a plaintiff must prove that: "(1) a main perpetrator committed an illicit act, (2) the accomplice consciously assisted the perpetrator and knew or should have known that he was contributing to an illicit act, and (3) their culpable cooperation was the natural and adequate cause of the plaintiff's harm or loss." Werro Suppl. Decl. ¶ 28; *see* Roberto Suppl. Reply ¶ 6 (concurring with these elements); Ex. F art. 50, para. 1.

These elements are met. BNPP does not dispute that its client, the Sudanese regime, committed atrocities against Plaintiffs, including torture, rape, and genocide, *see* Compl. ¶ 1, while BNPP acted as Sudan's "de facto Central Bank." *Id.* ¶ 106. It does not dispute these are actionable illicit acts under Art. 50. And it cannot dispute what it admitted in its guilty pleas.[2] BNPP knew

[1] Defendants BNP Paribas S.A., BNP Paribas S.A. New York Branch, and BNP Paribas North America, Inc., are referred to collectively as "Defendants" or "BNPP."

[2] When BNPP pleaded guilty, it agreed that "[a]ny [ ] authorized or approved contradictory statement by BNPP, its present or future attorneys, partners, agents, or employees shall constitute a material breach" of its plea agreements. Compl. Ex. B, Dkt. 49-2 at 8; *see* Compl. Ex. D, Dkt. 49-4 ¶ 22. Whether BNPP is estopped from denying its conspiracy admissions is best left for summary judgment. *See, e.g.*, *Levi v. Commonwealth Land Title Ins. Co.*, No.

"the purpose of the sanctions was to prevent Sudan from acquiring funds with which to carry out . . . atrocities," and knew "Sudan's likely purpose in using the U.S. financial markets for illegal oil sales was to acquire billions of U.S. dollars to purchase the weapons and materials used . . . ." *Kashef v. BNP Paribas S.A.*, 925 F.3d 53, 57 (2d Cir. 2019). It was objectively foreseeable that thwarting an atrocity-prevention embargo would facilitate atrocities.

Nothing more is required. BNPP's expert has stated in *three* declarations that Art. 50 is satisfied if the accomplice (1) "knew ***or should have known*** of the other party's contribution" and (2) "acted willfully ***or negligently***." Roberto Decl. I ¶ 14; Roberto Decl. II ¶ 14; Roberto Reply ¶ 21 (emphasis added).

Contradicting its own expert, BNPP asserts that Art. 50 requires more: specific intent and that all accomplices must be *perpetrators*. *See* BNPP Suppl. Br. at 10 ("The SAC does not even remotely allege that the BNPP defendants and the primary tortfeasors were committing human rights violations together"); *id.* at 9 ("liability extends only to the results of the type intended by the cooperation"). BNPP ad libs at least 14 additional purported requirements under Art. 50, not one quoted from an actual Swiss case holding.[3] Then it relies on NY and U.S. federal law to argue points unsupported by and irrelevant to Swiss law.

As a result, there are three disputed issues of Swiss law for the Court to resolve:

(1) whether BNPP must have co-perpetrated the atrocities to be liable as an accomplice, or whether Art. 50 applies to a "perpetrator or accomplice," as the statute says;

(2) whether BNPP must have specifically intended to commit the atrocities, or whether "even negligent complicity can establish joint and several liability pursuant to Article

09-CV-8012 (SHS), 2013 WL 5708402, at *5 (S.D.N.Y. Oct. 21, 2013) (granting summary judgment to plaintiff and estopping defendant from denying conspiracy admissions in New York state guilty plea).

[3] These 14 "requirements" are examined below at 14. In just one example, BNPP claims Plaintiffs fail to show "intentional, deliberate cooperation in a particular injurious course of conduct." BNPP Suppl. Br. at 15. Defendants do not cite, much less quote, a single case where the Swiss Supreme Court expresses this four-part requirement.

50," as the Swiss Supreme Court held in the *Carpenters' Strike Case*, FSC, Sept. 15, 1931, BGE 57 II 417 (Ex. 27) at 420 c. 2; and

(3) whether it was objectively foreseeable that BNPP's 10-year conspiracy to undermine an atrocity-prevention embargo would facilitate the commission of atrocities, as Plaintiffs have more than sufficiently alleged.

The Court has a choice of two Swiss law experts. One is Plaintiffs' expert, Professor Franz Werro, who has published extensively on Art. 50, has been cited by the Swiss Supreme Court on Art. 50, and whose expert opinions have been accepted in their entirety in this District. The other is Professor Vito Roberto, who has published a few paragraphs on Art. 50, never been cited by the Swiss Supreme Court on Art. 50, and in this case failed to consider an entire source of law required by the Swiss Civil Code. BNPP asks this Court to adopt Roberto's *ipse dixit* conclusion that Art. 50 imposes a set of incoherent additional requirements (somehow complicity must be willful or immediate and also substantial, and although it can be negligent, it must be done with the aim to commit the violation). Roberto, however, admitted in his deposition that the Swiss Supreme Court has never actually stated these requirements—in fact, he discovered them for this case.

Accordingly, this Court should adopt the expert opinion of Werro as to the elements of accomplice liability under Swiss law and his opinion that the Complaint states a claim under Art. 50. Plaintiffs respectfully request a hearing on these issues.[4]

[4] Four years into litigating this case without evincing any inconvenience, BNPP now claims it reserves the right to seek dismissal on the grounds of *forum non conveniens*. *See* BNPP Suppl. Br. at 1 n.1. Should BNPP make this motion, substantial briefing will be required on whether it should be denied for all the reasons stated in *In re Assicurazioni Generali S.p.A. Holocaust Insurance Litigation*. *See* 228 F. Supp. 2d 348, 350-53 (S.D.N.Y. 2002). Every named Plaintiff and the entire Class are U.S. residents, so Plaintiffs' choice of forum is entitled to great deference. *See id.* at 351-52. Litigation abroad would impose substantial cost and inconvenience on refugees and survivors of traumatic violence. And much, if not all, of the necessary liability evidence has either been stipulated to by BNPP in its guilty pleas or already transferred to the United States in connection with the sister criminal cases. *See, e.g.*, Compl. Ex. C, Dkt. 49-3. The fact that Swiss law applies is of no moment: "[f]ederal courts . . . often apply foreign law and courts should 'guard against an excessive reluctance' to undertake that task." *Volkswagen de Mexico, S.A. v. Germanischer Lloyd*, Nos. 90-CV-1248 (MGC), 90-CV-1298, 1991 WL 230622, at *4 (S.D.N.Y. Oct. 29, 1991) (quoting *Manu Int'l, S.A. v. Avon Prods., Inc.*, 641 F.2d 62, 68 (2d Cir. 1981)).

FACTS

From 1997 to 2007, BNPP and the regime of Sudanese dictator Omar al-Bashir (the "regime") conspired to break a U.S. embargo designed to prevent atrocities. BNPP has pleaded guilty to that conspiracy. *See* Compl. Ex. B, Dkt. 49-2; Compl. Ex. D, Dkt. 49-4. Through that conspiracy, BNPP facilitated the Sudanese regime's exploitation and sale of oil, and enabled it to acquire weapons, mobilize armed forces—and commit mass atrocities. *See* Compl. ¶¶ 7, 11, 106-09. These atrocities allowed the regime to further exploit and sell oil, forming a "macabre feedback loop." *Id.* ¶ 11. BNPP processed some $190 billion of transactions for the regime, *see id.* ¶ 1, becoming the "de facto central bank of the Government of Sudan." *Id.* ¶ 106. During this period, and because of BNPP's help, Sudan's military spending grew "nearly ten-fold: from $282 million in 1997 to $2.7 billion in 2006," *id.* ¶ 121, while the U.S. State Department explicitly recognized the inseparable relationship between oil exploitation and this military spending. *See id*. ¶ 144.

By BNPP's own admission, it knew that the consequences of breaking the embargo were the mass atrocities committed against Plaintiffs and the Class. *See id*. ¶¶ 14, 194. Its own compliance officials provided warnings, even referring to collaborating with the Sudanese regime as "the dirty little secret." *Id.* ¶¶ 183-86. BNPP knew it was maintaining a situation so dangerous that in 2005 the UN Security Council referred Sudan to the International Criminal Court for genocide. *See id.* ¶ 141. Yet BNPP took ever increasing measures to conceal its involvement, and to continue its flow of U.S. dollars and dollar-denominated letters of credit to the regime. *See id.* ¶ 114. As BNPP's compliance personnel noted, the reason was simple: "the relationship with this body of counterparties is a historical one and the commercial stakes are significant." *Id.* ¶ 187. In other words: BNPP did all of this because of greed.

To state a claim for relief under Swiss law, Plaintiffs' Complaint must plead "more than a sheer possibility" that BNPP is liable for its facilitation of the regime's mass atrocities. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation omitted). It has more than done so.[5]

ARGUMENT

I. The Second Amended Complaint states a claim for relief under Article 50 of the Swiss Code of Obligations.

This case is governed by Article 50 CO, paragraph 1, which sets forth accomplice liability: "Where two or more persons have together caused damage, whether as instigator, perpetrator or accomplice, they are jointly and severally liable to the person suffering damage." Ex. F art. 50, para. 1. As Werro explains, Article 1 of the Swiss Civil Code ("CC") mandates that courts apply three sources of law: "statutes," "scholarly works," and "cases previously decided." Werro Suppl. Decl. ¶ 17; Ex G. art. 1. Thus, the elements of Art. 50 have the meaning "courts have given them in the process of deciding cases with the help of scholarly writing." Werro Suppl. Decl. ¶ 18.[6]

A. Element One: The regime's atrocities were illicit acts and Plaintiffs were its victims.

Article 50 requires that "a main perpetrator committed an illicit act." Werro Suppl. Decl. ¶ 28; Roberto Suppl. Reply ¶ 6. The Sudanese regime is the main perpetrator in this case. It must have committed an illicit act within the meaning of Article 41 CO, the primary liability statute.[7]

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[5] Although the subject of this supplemental briefing is the application of Swiss law, Defendants also repeat their unrelated arguments that Defendants BNP Paribas North America, Inc. and BNP Paribas S.A. New York Branch should be dismissed from this litigation. *See* BNPP Suppl. Br. at 23. They should not be, for the reasons set forth in the prior briefing on this issue. *See* Mem. in Opp'n to Mot. to Dismiss at 40, Dkt. 80.

[6] Werro relies upon 30 cases and 11 scholarly works. Nevertheless, BNPP claims he "focuses more on scholarly writings than on case law." BNPP Suppl. Br. at 6 n.3. In a non sequitur, BNPP then claims Werro abandoned his view that Art. 50 provides an "independent basis for imposing liability on joint tortfeasors." *Id.* Just the opposite: Roberto concedes that Art. 50 creates independent accomplice liability, by agreeing that only the main perpetrator must commit an illicit act. *See* Roberto Suppl. Reply ¶ 6.

[7] Article 41 CO states: "Any person who unlawfully causes damage to another, whether wilfully or negligently, is obliged to provide compensation." Ex. F art. 41; *see* Werro Suppl. Decl. ¶ 21 (explaining that Article 41 imposes liability on "a person who directly causes harm . . . through his personal unlawful conduct").

An act is illicit when it violates an "absolute right, such as life, bodily integrity, or property." *Nervous Shock Case*, FSC, Mar. 11, 1986, BGE 112 II 118 (Ex. 11) at 128 c. 5.e; Werro Suppl. Decl. ¶¶ 30-31. As this Court stated, "[t]his case arises out of horrific human-rights abuses committed by the Government of Sudan and militias operating in Sudan between 1977 and 2009. Plaintiffs are the victims of these abuses." *Kashef*, 442 F. Supp. 3d at 813. Defendants do not dispute this: "By BNPP's own concession, the acts of Sudan . . . are . . . atrocities committed against innocent civilians," including "mass rape and genocide." *Kashef*, 925 F.3d at 60 (internal citation and ellipsis omitted). Defendants also do not dispute that violations of the rights to life, bodily integrity, privacy, and property, including rape, torture, and genocide, are illicit acts actionable under Art. 50.

B. Element Two: BNPP's conspiracy with Sudan constitutes collective fault.

The second element of Article 50 is collective fault. Collective fault requires that the accomplice (1) consciously assisted the perpetrator, and (2) knew or should have known that he was contributing to an illicit act. *See* Werro Suppl. Decl. ¶¶ 26, 33-45; Roberto Suppl. Reply ¶ 6.[8] Under Art. 50, "each person can be held liable for the collective fault, because each acted intentionally or negligently, and in conscious cooperation with the others." H.-U. BRUNNER, DIE ANWENDUNG DELIKTSRECHTLICHER REGELN AUF DIE VERTRAGSHAFTUNG [THE APPLICATION OF TORT RULES IN CONTRACT LIABILITY] 129 (1991) (Ex. 41) ¶ 310.

The accomplice's cooperation with the perpetrator must be conscious: "Culpable cooperation in causing damage requires . . . that each participant is aware of the other's contribution or could have been aware if he had exercised due care." *Art Dealer Case*, FSC, Dec.

[8] Contrary to BNPP's strawman, Werro has never said that knowledge is "all that is required." BNPP Suppl. Br. at 14 n.7. The accomplice must also consciously assist. *See* Werro Suppl. Decl. ¶ 25. The parties agree that an accomplice is not liable for a tort it does not contribute to, even if it knows it is occurring. *See* below at 20-21.

14, 1978, BGE 104 II 225 (Ex. 9) at 230 c. 4.a; *see* Werro Suppl. Decl. ¶¶ 33-34; Roberto Decl. I ¶ 14 ("Collective conduct requires that each party knew or should have known of the other party's contribution."). The cooperation must be willing—not inadvertent or involuntary.[9]

Further, the accomplice's complicity in the illicit act must at least be negligent: "Either all of the perpetrators sought that the damage should occur (intent), or have at least considered that the damage may occur (recklessness), or could have prevented it had they paid due attention to the circumstances (negligence)." *Locksmith Case*, FSC, Sept. 20, 2007, 4A_185/2007 (Ex. 19) at 11 c. 6.2.2.[10] The resulting harm need not be intentional, knowing, or reckless on the part of the accomplice: "even negligent complicity can establish joint and several liability pursuant to Article 50." *Carpenters' Strike*, Ex. 27 at 420 c. 2.

Art. 50 does not require a prior agreement. *See Whisky Bottle Case*, FSC, Feb. 21, 2013, 6B_473/2012 (Ex. 45) at c. 3. The accomplice need not intend to commit the violation. *See Shooting Contest Case*, FSC, May 22, 1945, BGE 71 II 107 (Ex. 29) at 114 c. 3 (holding innkeeper negligently complicit for failing to prevent customers shooting at glassware). The accomplice need not commit the violation itself. *See id.* (imposing liability even though "[i]t cannot be said . . . that by tolerating this dangerous game, the defendant has also joined in it"). The accomplice's contribution need not be substantial: "The ***intensity*** of the tortfeasor's involvement is irrelevant,

[9] In 1929, the Swiss Supreme Court held there is "no collective fault . . . when multiple persons cause a damage by different actions that are independent from each other without ['*Bewusstsein des Zusammenwirkens*']." *Hay Cart Case*, FSC, Dec. 10, 1929, BGE 55 II 310 (Dkt. 169-7) at 315 c. 2. Roberto admits that "*Bewusstsein des Zusammenwirkens*" means "awareness of cooperation." Roberto Tr. at 34:12-14. Yet BNPP mistranslates "awareness" as "intentionality." *Hay Cart*, Dkt. 169-7. This conscious element, even if translated as deliberateness, "reflects the idea of willing, of resting on the will, as opposed to someone who acts [in] an automated [manner]." Werro Tr. at 76:23-25. Thus, *Hay Cart*, under Roberto's translation, confirms Art. 50 only requires awareness, not a specific intent to commit a violation. It also confirms that conscious cooperation (what BNPP calls "collective conduct") is part of collective fault, not a separate element. *See* Werro Suppl. Decl. ¶ 33.

[10] *See* Brunner, Ex. 41 ¶ 310 n.583 ("Negligence is sufficient"); Roland Brehm, *Art. 50 / Erster Teil Art. 50 Abs. 1: Die Solidarhaftung* [*Art. 50 / First Part Art. 50 Para. 1: Joint and Several Liability*], *in* DIE ENTSTEHUNG DURCH UNERLAUBTE HANDLUNGEN [EMERGENCE THROUGH UNLAWFUL ACTIONS] (4d ed. 2013) (Ex. 39) at 631 ¶ 12 ("Collective negligence is also sufficient.").

with respect to the injured party . . . ." *Locksmith*, Ex. 19 at 11 c. 6.2.1 (citing Werro) (emphasis added). The accomplice's contribution need only be "generally suitable to facilitate" the illicit act of the perpetrator. *Swisscom Case*, FSC, Feb. 8, 2019, BGE 145 III 72 (Ex. 16) at 73 c. 2.1.

1. Breaking the embargo: BNPP admitted it consciously cooperated with the Sudanese regime.

No conspiracy is required to be pleaded, yet here one is admitted. For 10 years, between 1997 and 2007, BNPP conspired with the Sudanese regime to break an economic embargo put in place by the United States to prevent atrocities. *See* Compl. ¶¶ 10-12. BNPP pleaded guilty to that conspiracy: it intentionally broke the embargo by falsifying bank records, deceiving regulators, and concealing the origins of unlawful proceeds and transactions. *See id.* ¶¶ 18, 111-14, 215, 270. BNPP did this to give Sudan access to "U.S. financial markets for illegal oil sales," knowing that "Sudan's likely purpose" was "to acquire billions of U.S. dollars to purchase the weapons and materials" needed by regime military and militia forces. *Kashef*, 925 F.3d at 57. The regime used the weapons and materials that BNPP helped it acquire to wage a campaign of atrocities, including mass rape, torture, and extermination "condemned by both the United States and the international community as genocide." *Id.* at 55. Plaintiffs and the Class are victims of those atrocities who now reside in the United States. *See* Compl. ¶ 220.

It is a "general principle" of Swiss law "that a person who creates or maintains a dangerous state of affairs for another person is liable if the third party suffers damage." *Shooting Contest*, Ex. 29 at 112 c. 2. As BNPP's expert puts it: a "shopkeeper selling a weapon where he knows and is told that it's only used to kill somebody is creating a dangerous situation." Roberto Tr. at 52:17-20. By breaking the embargo, BNPP "contribute[d] to creating or maintaining," a situation so dangerous that in 2005 the UN Security Council referred Sudan to the International Criminal Court. *Shooting Contest*, Ex. 29 at 113 c. 3; *see* Compl. ¶ 141.

Incredibly, BNPP now claims it did not do so consciously. *See* BNPP Suppl. Br. at 11. But as the Swiss Supreme Court and scholars have long held, Art. 50 "requires . . . that each participant is aware of the other's contribution or could have been aware if he had exercised due care." *Art Dealer*, Ex. 9 at 230 c. 4a.[11] BNPP knew who its clients were. It knew they were sanctioned. It knew why they were sanctioned. It freely and consciously chose to falsify business records, clear transactions in billions of U.S. dollars, extend billions in credit, and then enjoyed fees from oil sales linked to and enabled by genocide and ethnic cleansing in Sudan.[12] *See* Compl. ¶¶ 1, 14, 101, 105. BNPP did not accidentally or inadvertently do these things; its cooperation was conscious.

BNPP dismisses Plaintiffs' factual allegations as "conclusory," *see* BNPP Suppl. Br. at 4, 5 n.2, 11-12, but that claim is foreclosed by this Court's Order. The Court has already accepted as true Plaintiffs' well-pleaded allegations that BNPP and the regime consciously cooperated.[13] *See Kashef*, 442 F. Supp. 3d at 813-14. Defendants now characterize this conscious collaboration as merely "transactions with Sudanese banks that are alleged to have resulted in more 'hard currency' coming into [Sudan]." BNPP Suppl. Br. at 2. But money laundering that results in more "hard currency" coming into a joint criminal enterprise is also a mere transaction—an unlawful one.

That is what happened here. BNPP's financial crimes supplied currency *to the regime*, and BNPP intentionally broke an embargo designed to prevent atrocities by starving the regime of hard currency. "BNPP Geneva served as the sole correspondent bank for the Sudanese government and the primary European correspondent bank for all major Sudanese commercial banks." *Kashef*, 442

[11] *See, e.g.*, WALTER FELLMANN & ANDREA KOTTMANN, SCHWEIZERISCHES HAFTPFLICHTRECHT, 984 (vol. I, 2012) (Dkt. 170-2) ¶ 2779 ("According to the case law . . . , it is sufficient for the acceptance of participation within the meaning of art. 50 . . . that someone could have known of a change in conduct in contradiction to his obligations.") (BNPP's exhibit); Brehm, Ex. 39 at 630 ¶¶ 7c-7e.

[12] "BNPP knew that the [Sudanese regime] wanted BNPP's assistance to increase its ability to exploit its oil resources which directly involved human rights abuses." Compl. ¶ 14.

[13] The argument also is foreclosed by Defendants' own plea agreements. *See Kashef*, 442 F. Supp. 3d at 814.

F. Supp. 3d at 814; *see also* Compl. ¶¶ 10, 102. "BNPP Geneva successfully used the Regional Bank structure," with the sole purpose to "evade the U.S. embargo." *Kashef*, 442 F. Supp. 3d at 815 (quoting Compl. Ex. I ¶ 19). And "BNPP Geneva offered letters of credit that helped finance Sudanese exports and imports," which "enabled the Sudanese government to import weapons." *Id.* (internal quotation and alteration omitted). BNPP does not deny any of this conscious activity.

The Swiss Supreme Court has found culpable cooperation in joint endeavors less deliberate, less criminal, and less enduring than BNPP's 10-year scheme to break an atrocity-prevention embargo. In *Locksmith*, the Court affirmed Art. 50 liability on an accounts manager that provided "administrative and financial assistance" for a client, simply because the client had a trademark infringement in its branding and letterhead. Ex. 19 at 11 c. 6.2.1. The *Locksmith* accomplice did not design the logo or plan to infringe the mark. But it handled the documents, and it profited from the infringement—just as BNPP handled unlawful oil sales secured by atrocities in the oil regions. Similarly, in *Shooting Contest*, the Court upheld Art. 50 liability of an innkeeper who simply served drinks, but failed to stop his customers from improvising a shooting contest that he did not participate in, was not present for, and was not fully aware of. *See* Ex. 29 at 113-14 c. 3. The innkeeper did not shoot anyone or intend for anyone to be shot, but he assumed the risk of "maintain[ing] a dangerous state of affairs." *Id.* at 112 c. 2. So did BNPP.

Art. 50 imposes liability on an accomplice who, like BNPP, gives a perpetrator the means to carry out a violation. This is so even if the accomplice did not intend the violation or commit the unlawful act. In the *Rediffusion Case*, for example, the Court held antenna operators liable under Art. 50 for facilitating a cable company's unlicensed distribution of copyrighted works. *See* FSC, Jan. 20, 1981, BGE 107 II 82 (Ex. 10) at 83-84 c. A. The antenna operators gave the cable company the means to acquire copyrighted work: a broadcast transmitter network. But the actual

infringement was done later, by the cable company, when it re-transmitted content to its subscribers. Like BNPP, the defendants neither intended to infringe rights, nor carried out the wrongful act of infringement. Nonetheless, the defendants were accomplices under Art. 50 because they made their client's violations possible: the cable company was "only able to effectively distribute ORF programs in the Bern area using the directional beam network made available to it by the [antenna operators]." *Id.* at 93 c. 9.a. Here, the Sudanese regime was only able to effectively sustain a widespread, genocidal campaign by using BNPP's financial crimes to access U.S. financial markets. *See* Compl. Ex. C ¶ 24; Compl. Ex. E ¶ 24.

BNPP's complicity is even worse, because its own conduct was unlawful. BNPP already pleaded guilty to conspiring to violate U.S. sanctions and falsifying business records. *See* Compl. Ex. B; Compl. Ex. D. And while there were no Swiss sanctions for BNPP to breach, it did breach corporate supervisory law: Swiss financial regulators found that BNPP's embargo-breaking scheme "seriously violated its duty to identify, limit and monitor the inherent risks, subsequently breaching supervisory provisions."[14] The Swiss Criminal Code ("CP"), moreover, prohibits (1) supporting a criminal organization, Art. 260ter CP, (2) falsifying documents, Art. 252 CP, and (3) money laundering, Art. 305bis CP. Ex. H. And complicity in genocide is a crime under international law, which is directly incorporated into Swiss law.[15] *See* Werro Suppl. Decl. ¶ 31.

These allegations establish conscious cooperation. BNPP admitted it conspired to thwart measures put in place to prevent the atrocities suffered by Plaintiffs. When someone knowingly helps another thwart a crime-prevention measure, we can safely call that person an accomplice.

[14] Press Release, FINMA, Inadequate risk management of US sanctions: FINMA closes proceedings against BNP Paribas (Suisse) (July 1, 2014), *available at* https://www.finma.ch/en/news/2014/06/mm-abschluss-verfahren-bnp-paribas-suisse-20140701/

[15] Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277, art. III(e). The Swiss Supreme Court has stated that "the prohibition of genocide is part of mandatory customary international law." *Second World War Case*, FSC, Jan. 21, 2000, BGE 126 II 145 (Ex. 15) at 165 c. 4.d.

This would be true for a smuggler who hides a terrorist's contraband; true for a locksmith who hands a pick to a burglar; and true for a hacker who cracks digital-rights management code so that a client can infringe copyright. It is true here.

2. The "dirty little secret": BNPP admitted it knew, or should have known, that breaking the embargo would facilitate atrocities in Sudan.

The Second Circuit "accept[ed] as true[ ] that BNPP circumvented U.S. sanctions and provided Sudan with financial resources *knowing* that Sudan was committing atrocities, *knowing* that the purpose of the sanctions was to prevent Sudan from acquiring funds with which to carry out those atrocities, and *knowing* that Sudan's likely purpose in using the U.S. financial markets for illegal oil sales was to acquire billions of U.S. dollars to purchase the weapons and materials used by militia forces." *Kashef*, 925 F.3d at 57 (emphases added).

Contrary to their own guilty pleas and Plaintiffs' well-pleaded allegations, Defendants claim Plaintiffs operate from a "false premise that the U.S. sanctions violated by the BNPP Defendants had been issued to protect the victims from the crimes that the government of Sudan was engaging in." BNPP Suppl. Br. at 13 (quotation omitted). Notably, they fail to quote any of the language in the Executive Order they cite (and which is cited in the Complaint), which clearly references "policies and actions of the Government of Sudan ***that violate human rights***, in particular with respect to the conflict in Darfur" and "the pervasive role played by the Government of Sudan in the petroleum and petrochemical industries in Sudan." Exec. Order No. 13412, 71 Fed. Reg. 61369 (Oct. 17, 2006) (emphasis added); *see also* Compl. ¶¶ 98-100. The embargo had two stated goals: preventing human rights abuses and blocking oil sales. BNPP undermined both.

The Second Circuit's recital of the Complaint's well-pleaded allegations stands on its own. BNPP "conceded that it had knowledge of the atrocities being committed in Sudan and of the consequences of providing Sudan access to U.S. financial markets. Specifically, BNPP admitted

that its central role in providing Sudanese financial institutions access to the U.S. financial system, despite the Government of Sudan's role in supporting terrorism and committing human rights abuses, was recognized by BNPP employees." *Kashef*, 925 F.3d at 56 (internal quotation omitted). Internally, BNPP downplayed the atrocities. The "Head of Ethics and Compliance for BNPP North America wrote, 'the dirty little secret isn't so secret anymore, oui?'" Compl. ¶ 186.

Plaintiffs more than adequately allege that Defendants "knew or should have known that [they were] contributing to an illicit act." Werro Suppl. Decl. ¶ 28; *see id.* ¶¶ 37-44 (explaining at length that the Complaint alleges negligent, reckless, and even knowing complicity); Roberto Suppl. Reply ¶ 6 (agreeing with requisite mental state). Nothing more is needed to plead collective fault. *See* Werro Suppl. Decl. ¶ 42.

3. Art. 50 is not an intentional tort and is not limited to co-perpetrators.

BNPP offers a host of reasons why it did not consciously cooperate with its co-conspirator, despite pleading guilty to conspiracy. Each shares the same basic premise: Defendants insist that Art. 50 is an intentional tort and that all tortfeasors must commit the violation. *See* BNPP Suppl. Br. at 2, 10 ("The SAC does not even remotely allege that the BNPP defendants and the primary tortfeasors were committing human rights violations together."); *id.* at 9 ("liability extends only to the results of the type intended by the cooperation"). In other words, BNPP claims that all accomplices must be perpetrators. But BNPP fails to cite, much less quote, a single case stating that Art. 50 requires a specific intent to commit the violation and actual perpetration.[16]

The plain language of the statute makes clear that BNPP need not perpetrate any of the human rights violations in this case. Art. 50 applies to a "perpetrator ***or accomplice***." Ex. F art. 50

[16] BNPP appears to base this specific intent theory on Roberto, who recently asserted—for the first time in *five* declarations—that Plaintiffs must prove "BNPP consciously cooperated with Sudanese banks with the aim to commit human rights violations." Roberto Suppl. Reply ¶ 39. But he corrected his position at deposition: "I'm certain that there must be intent or negligence with regard to the act." Roberto Tr. at 37:12-13.

(emphasis added). The Swiss Supreme Court expressly holds that "even negligent complicity can establish joint and several liability pursuant to Article 50." *Carpenters' Strike*, Ex. 27 at 420 c. 2. And *Shooting Contest* is proof that an accomplice need not intend to cause harm, participate in the injurious conduct, nor even be present. *See* Ex. 29 at 113-14 c. 3 (holding innkeeper liable for failing to prevent a shooting contest where he "should have anticipated negligent acts").

BNPP does not stop with specific intent. By Plaintiffs' count, BNPP claims that least 14 additional requirements must be met for it to be liable under Art. 50.[17] Not one is quoted from an actual holding by the Swiss Supreme Court. BNPP's own expert admitted in his deposition that he only discovered these purported requirements after BNPP hired him to work on this case:

> Q. Has the Federal Supreme Court ever stated explicitly that a contribution must be willful or immediate to satisfy Article 50?
>
> A. The Swiss Supreme Court didn't know about my findings and my analysis of his own case law [sic], so it hadn't opportunity to take over my wording.

Roberto Tr. at 99:14-20.

Nevertheless, BNPP claims, as one of its additional requirements, that it must have participated "in the injurious course of conduct." BNPP Suppl. Br. at 8 (using a phrase not found in any case). But *Shooting Contest* held the innkeeper liable under Art. 50, even though he had not "joined in" the perpetrators' "dangerous game." Ex. 29 at 114 c. 3. And *Carpenters' Strike* held a union leader liable for a brawl, even though he did not participate or intend the injuries, but merely gave a reckless speech the day before.[18] *See* Ex. 27.

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[17] BNPP urges the Court to impose the following criteria, not supported by any authority: (1) "willful," BNPP Suppl. Br. at 8; (2) "substantial," *id.*; (3) "immediate," *id.*; (4) "in the injurious course of conduct," *id.*; (5) "in the relevant course of conduct," *id.* at 9; (6) "committing . . . violations together," *id.* at 10; (7) "encouraged or directed," *id.*; (8) "closely manage or control," *id.* at 11, (9) commit "analogous" "primary" violations, *id.*; (10) "close proximity," *id.*; (11) "directly interacted," *id.*; (12) "for the purpose and with the intent to aid," *id.*; (13) not "through a separate course of conduct," *id.* at 13; and, if we count compounds, (14) "intentional, deliberate cooperation in a particular injurious course of conduct," *id.* at 15. At this point, BNPP is asking the Court to reform Art. 50.

[18] BNPP likely claims that a criminal conviction means *ipso facto* the accomplice must have acted intentionally. Not so. True, the Swiss Criminal Code states that an accomplice must act "wilfully." Ex. H art. 25. But it defines "wilfully"

Similarly, BNPP claims the Swiss Supreme Court does not apply a "knew or should have known" test for conscious cooperation. BNPP Suppl. Br. at 15. But "knew or should have known" is *verbatim* the standard written in Roberto's own declaration. Roberto Decl. I ¶ 14 ("each party knew or should have known of the other party's contribution") (citing cases).

BNPP claims that the accomplice's contribution must be "immediate." BNPP Suppl. Br. at 8. But Roberto admits the Swiss Supreme Court has never announced this requirement. *See* Roberto Tr. at 99:14-23, 103:2-4. In fact, the Swiss Supreme Court has said ***no*** immediacy is required. *See Shooting Contest*, Ex. 29 at 112 c. 2 (accomplice need not be "immediate cause of the injury"). In any event, BNPP's 1997 to 2007 conspiracy was not just immediate, it was ***contemporaneous*** with the atrocities committed against Plaintiffs and the Class from 1997 until at least 2009. *See* Compl. ¶ 220.

BNPP also claims its contribution was not "substantial"—another of Roberto's "findings" that the Swiss Supreme Court did not know about and never stated in a case. But BNPP already admitted in its plea deals that its contribution was massive.[19] Finally, BNPP claims "the Complaint does not allege that the BNPP Defendants had *any* interaction with the militia members, policemen, and other Sudanese individuals who injured plaintiffs." BNPP Suppl. Br. at 11. But these actors are all part of the genocidal regime with which BNPP admitted to conspiring. *Kashef*, 442 F. Supp. 3d at 814.[20]

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as including recklessness: "A person acts wilfully as soon as he regards the realisation of the act as being possible and accepts this." *Id.* art. 12, para. 2.

[19] *See* Compl. Ex. C ¶¶ 17-19, 24; Compl. ¶¶ 118, 121-23.

[20] BNPP makes a last-ditch effort to create a sheen of specific intent and co-perpetration with a barely summarized string cite. *See* BNPP Suppl. Br. at 9. To be fair, some of these cases involve actual co-perpetrators, who each performed the wrongful act and could have caused the damage. This only proves co-perpetration is sufficient, but not necessary. This is all the more so in Swiss law, where "[s]tare decisis . . . is not . . . a rule that courts have to obey," Werro Tr. at 40:6-8, and where "judges will not consider that because the facts have never come up, that they're not at liberty to decide the way in which they see fit because their reference will be the statute and not previous cases." Werro Tr. at 43:25-44:4.

In the end, Swiss case law shows just three circumstances where there is no conscious cooperation, and hence no collective fault: (1) when the tortfeasors are unaware of each other's roles;[21] (2) when they independently cause the same harm;[22] and (3) when they are aware of another's torts but do not provide any assistance.[23] This is not one of those cases.

No surprise then that BNPP resorts to U.S. law, itemizing New York causes of action and claiming Plaintiffs fail to plead corresponding grounds for liability under Swiss law. BNPP Suppl. Br. at 6-8, 8 n.5. But the parties already agree that Art. 50 governs this case. BNPP Suppl. Br. at 7. Hunting for analogs is pointless because Swiss law does not define specific torts. *See* Werro Supp. Decl ¶ 7. And regardless, Plaintiffs need only allege the "factual basis of their complaint," not the "legal theory." *Johnson v. City of Shelby*, 574 U.S. 10, 12 (2014) (per curiam) (holding that naming § 1983 is not required). Here, the Complaint alleges the factual basis of collective fault.

C. Element Three: There is an adequate causal link between BNPP's actions and Plaintiffs' harms.

Art. 50 requires "that there be an adequate causal relationship between the damages suffered by the injured party and the culpable collective cause." *Locksmith*, Ex. 19 at 12 c. 6.2.3 (citing Werro). An adequate causal link requires an accomplice's contribution, in conjunction with the perpetrator's illicit act, to be a natural and adequate cause of harm. *See* Werro Suppl. Decl. ¶¶ 46-49. Although the causation must be "collective," Roberto Suppl. Decl. ¶ 24, "it is not required

[21] *See, e.g.*, *Art Dealer*, Ex. 9 at 230 c. 4 (affirming no conscious cooperation under Art. 50 where publisher of defamatory article did not know of lawyer's role in authoring it).

[22] *See, e.g.*, *Steel Boycott Case*, FSC, Dec. 1, 1964, FSC 90 II 501 (Dkt. 169-32) at 508-09 c. 3 (holding that steelworks was not jointly liable for cartel's boycott of the plaintiff because it did not join the cartel and it had independent business reasons for not supplying the plaintiff).

[23] *See, e.g.*, *Father & Son Robberies Case*, FSC, Mar. 28, 2011, 4A_573/2010 (Dkt. 169-34) (holding a father and son jointly liable when they assisted each other in stealing cash from post offices, but not when the father independently stole cash in a different region, without the son's assistance and possibly without the son's knowledge).

that every tortfeasor be directly involved in the causation of the damage." Brehm, Ex. 39 at 632 ¶ 16; *see Shooting Contest*, Ex. 29 at 112 c. 2.[24]

Causation is natural when the harm "could not have occurred without the relevant behavior, or it could not have occurred in the same way or at the same time." *Boat Collision Case*, FSC, Mar. 22, 2011, 4A_444/2010 (Ex. 21) at 4-5 c. 2.1. Causation is adequate "if, in the ordinary course of events and common experience, the act in question was capable of leading to the kind of effect that occurred, and generally seems to have furthered the occurrence of that result." *Employment Certificate Case*, FSC, Apr. 29, 1975, 101 II 69 (Ex. 8) at 73 c. 3.a.

Adequate causation is an objective foreseeability test. *See* VITO ROBERTO, HAFTPFLICHTRECHT [TORT LAW] 75 (2d ed. 2018) (Ex. C) ¶ 6.38. The key question is whether the "consequence remains within the reasonable scope of objectively foreseeable possibilities, if need be, in the eyes of an expert." *Vascular Accident Case*, FSC, Oct. 31, 2003, 5C.125/2003 (Ex. A) at 5 c. 4.1.[25] A "legally relevant contribution" is one that is "generally suitable to facilitate the unlawful [act]." *Swisscom*, Ex. 16 at 73 c. 2.1. It need not be the "sole or immediate" cause. *Boat Collision*, Ex. 21 at 5 c. 2.1.[26]

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[24] *See also* Stephan Weber, *Kausalität und Solidarität - Schadenszurechnung bei einer Mehrheit von tatsächlichen oder potentiellen Schädigern* [*Causation and Joint and Several Liability - Damage Attribution in a Multiplicity of Actual or Potential Injurers*], *in* REAS 115-27 (2010) (Ex. 52) at 11 ("The peculiarity [of Art. 50] is that everyone involved has to account . . . for all the damage collectively caused, independently of their own causal contribution."); Frederic Krauskopf, *Art. 144 / III. Pflicht jedes Solidarschuldners zur Leistung (Art. 144 Abs. 2 OR)* [*Art. 144 / III. Obligation of all joint and several debtors to perform (Art. 144 para. 2 CO)*], *in* DIE SOLIDARITÄT, ART. 143 - 150 OR (3d ed. 2016) (Ex. 43) ¶¶ 43, 50 (same).

[25] *See also Injured Pedestrian Case*, FSC, May 18, 2005, 131 IV 145 (Ex. 44) at 147-48 c. 5.1-5.2 (same standard).

[26] The test sets a reasonable limit so that causal chains are not infinite and entirely unforeseeable causes are discounted. FRANZ WERRO, LA RESPONSABILITE CIVILE [CIVIL LIABILITY] (2d ed. 2011) (Ex. 37) at 80-81 ¶¶ 262-63.

1. The "macabre feedback loop": BNPP's embargo-breaking scheme naturally and adequately caused the atrocities.

As this Court recognized, "BNPP Geneva's financial chicanery created 'a macabre feedback loop'": BNPP gave the regime access to U.S. financial markets, allowing it to "realize market value for its oil"; oil sales in petrodollars allowed the regime to equip and mobilize armed forces; these forces, in turn, committed ethnic cleansing in oil regions to obtain and sell more oil. *Kashef*, 442 F. Supp. 3d at 815-16 (quoting Compl. ¶ 11, citing Compl. ¶¶ 7, 30, 69, 126).

Because of BNPP's help, Sudan's "military spending grew nearly ten-fold: from $282 million in 1997 to $2.7 billion in 2006." Compl. ¶ 121. Without that growth, Sudan could not have sustained a campaign of mass destruction across its vast territory. In 2006 alone, Sudan would have lost 30 percent of its defense budget without the assistance of BNPP. *See* Compl. ¶ 118. The mass atrocities committed against Plaintiffs and the Class could not have occurred "in the same way or at the same time" without BNPP's support. *Boat Collision*, Ex. 21 at 4-5 c. 2.1. Plaintiffs' allegations thus meet the natural causation requirement.

They also meet the adequate causation requirement. In Swiss law terms, a neutral observer of this "macabre feedback loop," viewing it in the "normal course of events and general life experience," *Swisscom*, Ex. 16 at 77 c. 2.3.1, would reasonably believe that the violation of Plaintiffs' rights "appears to be generally facilitated by" BNPP's contribution. *Id.* at 73 c. 2.1. The link between Sudan's oil and human rights abuses was reported in the international press and documented in official reports of the UN. *See* Compl. ¶¶ 144, 152-69, 170-82. The writing was certainly on the wall in 2005, when the UN Security Council referred Sudan to the International

Criminal Court for genocide. *See* Compl. ¶ 141. And while subjective foreseeability is not determinative, BNPP admitted it actually foresaw these risks.[27]

As the Second Circuit noted, BNPP knew it was breaking an atrocity-prevention embargo and knew "Sudan's likely purpose" was "to purchase the weapons and materials used by militia forces." *Kashef*, 925 F.3d at 57. It was thus clearly "within the reasonable scope of objectively foreseeable possibilities" that a scheme to thwart atrocity-prevention measures would facilitate atrocities. *Vascular Accident*, Ex. A at 5 c. 4.1. Plaintiffs have alleged adequate causation.

2. As the "de facto central bank" of Sudan, BNPP's contribution was closely related to the oil-genocide nexus.

BNPP objects that the "SAC does not link a single banking transaction involving the BNPP Defendants to any attack that injured Plaintiffs." BNPP Suppl. Br. at 18. But Swiss law is not so narrow. BNPP's scheme is linked to *all* of the attacks under Art. 50 because, as a leading scholar explains: "The requirement of a legally significant (adequate) causal relationship is already met if the actions of a [defendant] are embedded into the structure of the actions (and omissions) that together represent the damaging act." Krauskopf, Ex. 43 ¶ 50.

BNPP embedded itself into the structure of the oil-genocide nexus as its chief financier. *See* Compl. ¶¶ 126-46. And the liability of financiers is established in international criminal law, which is part of Swiss law. *See* Werro Suppl. Decl. ¶ 31. In *The Flick Trial*, the Nuremberg Tribunal found a German industrialist guilty of complicity in crimes against humanity for, among other things, joining a circle of bankers who financed the Nazi regime: "each of them gave to Himmler, the Reich Leader SS, a blank check. His criminal organization was maintained and we

[27] *See Kashef*, 925 F.3d at 56 (citing BNPP's stipulations that it knew of the atrocities and "of the consequences of providing Sudan access to U.S. financial markets." (citing Compl. Ex. C. ¶ 20).)

have no doubt that some of this money went to its maintenance. It seems to be immaterial whether it was spent on salaries or for lethal gas."[28] BNPP gave the Sudanese regime that same blank check.

Nevertheless, BNPP claims that unlike Flick, it cannot be held liable merely for financing genocide, citing U.S. terrorism cases in a brief that is supposed to be about Swiss law. *See* BNPP Suppl. Br. at 19-20. U.S. case law is irrelevant to Art. 50. Regardless, none of BNPP's U.S. cases is on point: each involves one accomplice aiding another; none involves an accomplice directly aiding the perpetrator, as BNPP confessed it did. [29] Moreover, each involved isolated attacks, not ten years of mass atrocities that mobilized the "whole State apparatus," in the words of the prosecutor of the International Criminal Court.[30]

3. *Swisscom* illustrates the causal link in this case.

BNPP claims that Swiss law takes a "restrictive approach" to causation. BNPP Suppl. Br. at 22. Yet its own expert disagrees. "In case law, inadequacy is only rarely found," Roberto writes in his treatise *Tort Law*. Ex. C ¶ 6.39a. Indeed, in surveying 100 years of Art. 50 case law, Roberto could only find *one* case dismissed for inadequate causation: *Swisscom. See* Roberto Suppl. Decl. ¶ 42 n.18. And *Swisscom* actually supports Plaintiffs' claims.

Swisscom stands for the uncontroversial proposition that an accomplice cannot be liable for a tort that has already occurred. An internet access provider, Swisscom was sued to enjoin its

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[28] *United States v. Flick*, U.S. Military Tribunal (Dec. 22, 1947) in *VI Trials of War Criminals Before The Nuremberg Military Tribunals Under Control Council Law No. 10* (1952) at 1221, *available at* http://www.worldcourts.com/imt/eng/decisions/1947.12.22_United_States_v_Flick1.pdf

[29] *See, e.g.*, *Rothstein v. UBS AG*, 708 F.3d 82, 97 (2d Cir. 2013) (defendant funding terrorist accomplices, not perpetrators). BNPP's string cite left out the only case on point: *Boim v. Holy Land Foundation for Relief & Development*, where the Seventh Circuit held *en banc* that "monetary contributions to a wrongdoer" satisfy causation even if no death could be traced to any specific contribution. 549 F.3d 685, 697-98 (7th Cir. 2008) ("The knowing contributors as a whole would have significantly enhanced the risk . . . and thus the probability that the plaintiff's decedent would be" killed.).

[30] Seventh Report of the Office of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005) ¶ 98, *see* Compl. n.71 (*International Criminal Court - Situation in Darfur, Sudan*, ICC-02/05, *available at* https://bit.ly/2QG3b0M).

customers from lawfully accessing copyrighted works that unknown parties had already uploaded without using Swisscom's services. *See Swisscom*, Ex. 16 at 78 c. 2.3.2. But here is the critical distinction: Swiss copyright law only prohibits unauthorized publication, not personal use by consumers. *See id.* at 73 c. 2.1. So the uploaders, not Swisscom's customers, were the infringers, and the infringement occurred *before* Swisscom or its customers even entered the picture: "There was therefore no infringement of copyright by the respondent's customers, which means that already the first prerequisite for the respondent's liability is not met." *Id.*

Swisscom did not make a "legally relevant contribution" because the infringement had already occurred. It was at the end ("very far to the back") of the causal chain, not the beginning. *Id.* at 73, 78-79. Nor was Swisscom a participant in *collective* causation: its actions were "automated," and it had no relationship with the "unknown lawbreakers." *Id.* at 78-79.

BNPP stresses that Swisscom received takedown requests, but Swisscom had no legal duty to block customers' access to content they had a right to view. Since the infringing uploaders were not its customers, Swisscom could not be enjoined to stop them. The Swiss Supreme Court made clear this would be a different case if, as with BNPP, "the service was provided directly to the main perpetrator." *Id.* at 79 c. 2.3.2 (citing FSC, Feb. 17, 1995, BGE 121 IV 109) (telecom allowed users to host child pornography). BNPP is thus liable for all the reasons Swisscom was not. As a financier of atrocities, BNPP sat at the beginning of the causal chain, not at the end, like Swisscom. And unlike Swisscom, its client was the perpetrator.

BNPP's fallback arguments fall short.[31] It claims the Swiss Supreme Court rejected the objective foreseeability test in *Swisscom* but fails to cite, much less quote, where exactly this

[31] BNPP makes much of the fact that a Georgetown comparative law professor has compared adequate causation to proximate causation. *See* BNPP Suppl. Br. at 17. But just because the doctrines serve similar purposes does not mean they have the same standards. Similarly, BNPP devotes a full page to the policy purposes of the doctrine, but the question presented is what Swiss law requires, not why it requires it. *See id.* at 17-18.

happens. *See* BNPP Suppl. Br. at 21. Nor can BNPP explain why foreseeability would even be considered in a case where the infringement occurred *before* the alleged contribution. BNPP also failed to search the Swiss Supreme Court's docket: far from rejecting the objective foreseeability test in 2019, the court applied the test *verbatim* in February 2020. *See Sibling Murder Case*, FSC, Feb. 28, 2020, 4A_22/2020 (Ex. B) at 3 c. 7.

BNPP also asserts, *ipse dixit*, that objective foreseeability only applies in primary liability cases. *See* BNPP Suppl. Br. at 21. But *Locksmith* found adequate causation because it was "reasonably foreseeable" that the accomplice's cooperation with the perpetrator would result in the harm. Ex. 19 at 12 c. 6.2.3. Plaintiffs can find no scholar, besides Roberto, who disputes that Swiss causation tests foreseeability (or, in Swiss terms, "objective retrospective prognosis"). Indeed, Roberto seems to have crafted this theory specifically for this case. When writing for Swiss jurists, not for this Court, he states that: "according to the prevailing view in Switzerland, adequacy is assessed by means of an objective retrospective prognosis." Roberto Tr. at 109:14-19; Roberto (*Tort Law*), Ex. C ¶ 6.38. At his deposition, however, he attempted to rewrite his own opinion, claiming he meant to limit this statement to primary liability but may have been too "tired" to make his written opinion clear. Roberto Tr. at 118:18-23.

In short, as Werro explains, BNPP's financial crimes were a natural and adequate cause of the mass atrocities that were their objectively foreseeable consequences. *See* Werro Suppl. Decl. ¶¶ 48-55. The element of natural and adequate causation is established.

II. The Court should adopt Professor Werro's opinions as informative and persuasive.

Plaintiffs respectfully request that the Court adopt the opinions of Professor Werro, as "it is the 'persuasive force of the opinions' . . . that is conclusive under Rule 44.1." *MasterCard Int'l Inc. v. Fed'n Internationale De Football Ass'n*, 464 F. Supp. 2d 246, 303 (S.D.N.Y. 2006) (quoting

Itar-Tass Russian News Agency v. Russian Kurier, Inc., 153 F.3d 82, 92 (2d Cir. 1998)) (*vacated in part on other grounds*) (adopting Werro's "opinions and conclusions" "in their entirety").

Werro is eminently qualified to opine on Swiss law, as prior courts in this District have found. *See, e.g.*, *id.* at 303; *Weiss v. La Suisse, Société D'Assurances Sur La Vie,* 293 F. Supp. 2d 397, 405 (S.D.N.Y. 2003). Currently a professor at the Faculté de droit, University of Fribourg, as well as a tenured professor of comparative law at Georgetown University Law Center, Werro has published extensively on tort law, and specifically on Art. 50.[32] The Swiss Supreme Court has cited Werro as a legal authority on Art. 50.[33] *Locksmith*, for example, cites Werro twice and relies on him as the Court's sole authority on adequate causation under Art. 50. *See* Ex. 19 at 12 c. 6.2.3. Werro, moreover, has done what this Court instructed. The Court ordered supplemental briefing on Swiss law, and "Swiss-law primary sources." *Kashef*, 442 F. Supp. 3d at 825. Werro has done just that. His Supplemental Declaration presents all three primary sources a Swiss court would apply—statutes, case law, and scholarly works—pursuant to Article 1 CC. *See* Werro Suppl. Decl. ¶¶ 15-28. The Court should thus adopt his opinions and conclusions.

In finding foreign law, U.S. courts must "evaluate[ ] experts' credibility" and assess "experts' opinions and the basis of such opinions as supported by the foreign country's civil law,

[32] *See* FRANZ WERRO, LA RESPONSABILITE CIVILE (3d ed. 2017); Franz Werro, Vincent Perritaz, *La pluralité des responsables: nouvelles conceptions et changements de jurisprudence* [*Joint liability: new concepts and changes in the case law*], *in* MELANGES À LA MEMOIRE DE BERNARD CORBOZ 279 (Grégory Bovey & Benoît Chappuis & Laurent Hirsch eds. 2019); Franz Werro, Vincent Perritaz, *Droit suisse des obligations : La responsabilité contractuelle et la responsabilité plurale selon le projet CO2020 : une nouvelle approche ?* [*Contractual Liability and Shared Liability Under the Draft 2020 Code of Obligations: A New Approach?*], 3 REVUE DE DROIT DES AFFAIRES INTERNATIONALES [Int'l Bus. L.J.] 217 (2018); Franz Werro, *La pluralité des responsables – quelques principes et distinctions* [*Joint Liability – some principles and distinctions*], *in* PLURALITE DES RESPONSABLES : COLLOQUE DE DROIT DE LA RESPONSABILITE CIVILE 2007, UNIVERSITE DE FRIBOURG, BERN 15 (Franz Werro ed. 2009).

[33] Werro presents to the Court the same interpretation of Art. 50 that he presents to Swiss jurists. His scholarship now teaches this case's fact pattern as a paradigmatic illustration of Art. 50: "I could not think of any bank's conduct being more unreasonable and actually criminal than the conduct in which BNPP engaged." Werro Tr. at 60:15-61:17; *see* Werro & Perritaz, Dkt. 171-55 at 291 ¶ 32.

cases, treatises, and logic." *In re Bozel S.A.*, 434 B.R. 108, 111 (Bankr. S.D.N.Y. 2010).[34] This Court should decline to adopt Professor Roberto's opinions for three reasons: (1) he has no prior experience with Art. 50; (2) he failed to apply the three sources of law mandated by Article 1 CC, and failed to employ the interpretative method of the Swiss Supreme Court; and (3) his conclusions are based on his own *ipse dixit* theory, which by his own admission, the Swiss Supreme Court has never adopted. *See* Werro Suppl. Decl. ¶¶ 59-74; Roberto Tr. at 99:14-23.

A court may reject foreign law experts when they lack expertise in the relevant legal issues. *See, e.g.*, *MasterCard Int'l Inc.*, 464 F. Supp. 2d at 304. Roberto is not an expert on Art. 50. He has written about it only twice, and only briefly.[35] He drafted his "short section" solely by summarizing other authors. *See* Roberto Tr. at 100:24-101:10. He admits that he had never performed "an extensive analysis of the case law of the Swiss Supreme Court [on Art. 50] in the last century," apparently until BNPP hired him for this case. *Id.* at 101:3-8.

A court may also reject foreign law experts when they fail to rely on the required sources of law in a particular legal system. *See, e.g.*, *Ancile Inv. Co. v. Archer Daniels Midland Co.*, No. 08-CV-9492 (KMW), 2012 WL 6098729, at *5 (S.D.N.Y. Nov. 30, 2012) (finding failure to consider a uniquely Brazilian source of legal authority and a "lack of judicial precedent" a "weakness" in expert's opinion). Roberto admits that he ***failed to apply one of the three sources of law*** required by Article 1 CC: scholarly works.[36] He attempted to rehabilitate his credibility in

[34] Judge Roger Miner (2d. Cir., ret.) put it colorfully: "If we think that we are getting some 'junk' foreign law from an expert, we can take a leaf from the book given to us by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals*. . . a federal judge can also act as a gatekeeper in deciding whether to accept the foreign law opinion of an expert." *The Reception of Foreign Law in the U.S. Federal Courts*, 43 Am. J. Compar. L. 581, 588 (1995).

[35] *See* Roberto Tr. at 14:2-8, 14:15-21, 15:14-17 ("Q. Approximately how much of these publications are devoted to a discussion of Article 50? A. Just short section.").

[36] *See* Roberto Suppl. Reply ¶ 2; Roberto Tr. at 33:6-13 ("Q. And professor, you cited all the authorities you relied upon in your supplemental declaration; is that correct? A. That's correct. Q. You did not cite scholarly works in your supplemental declaration; is that correct? A. That's correct.").

his Supplemental Reply by discussing four scholars—one of whom was Werro, and none of whom has announced Roberto's illogical theory that an accomplice must have the specific intent to commit a violation, but may, at the same time, be merely negligent.[37]

Finally, a court may reject an expert when their conclusions are an "ingenious interpretation" "unsupported by further authority interpreting these provisions." *Application of Chase Manhattan Bank*, 191 F. Supp. 206, 207 (S.D.N.Y. 1961) (discrediting Panamanian law experts). Roberto's interpretation of Art. 50 is certainly innovative. He maintains that Plaintiffs must prove that BNPP acted "with the aim to commit human rights violations," Roberto Suppl. Reply ¶ 39, and that its contributions must have been "willful and substantial" or "immediate and substantial." Roberto Suppl. Decl. ¶ 24. But he apparently discovered these purported requirements for the first time when hired for this case. And as he admitted in his deposition, the Swiss Supreme Court has never stated they are actually required. *See* Roberto Tr. at 99:14-20. As Werro explains, Roberto presents an "idiosyncratic proposal of how [Swiss law] *should* be applied, not a faithful description of how it is *actually* applied." Werro Suppl. Decl. ¶ 74.

CONCLUSION

The Complaint states a claim under Swiss law: BNPP's scheme to break the atrocity-prevention embargo was inextricably linked to the cycle of violence in Sudan; it consciously conspired with the regime; its financial crimes had a massive impact on the regime's ability to commit a sustained campaign of mass atrocities; and BNPP embedded itself in the structure of that collective criminality, establishing collective fault. The Court should deny the motion to dismiss.

[37] Even these scholars contradict Roberto: "Culpable cooperation in causing the damage can be intentional, deliberate, contingent ***or negligent***." Fellmann & Kottmann, Dkt. 170-2 ¶ 2781 (emphasis added). "Neither the intensity of the involvement, nor the time of the respective contribution . . . , nor the individual fault plays a role." *Id.* ¶ 2783.

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Respectfully Submitted,

Kathryn Lee Boyd
Shira Lauren Feldman
HECHT PARTNERS LLP
125 Park Avenue, 25th Floor
New York, NY 10017
(646) 502-9515
(646) 480-1453
lboyd@hechtpartners.com
sfeldman@hechtpartners.com

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

Michael D. Hausfeld
Richard S. Lewis
Scott Gilmore
Amanda Erin Lee-DasGupta
HAUSFELD LLP
1700 K Street NW, Suite 650
Washington, DC 20006
(202) 540-7200
(202) 579-1089
(202) 540-7200
(202) 540-7200
mhausfeld@hausfeldllp.com
rlewis@hausfeldllp.com
sgilmore@hausfeld.com
alee@hausfeld.com

Counsel for Plaintiffs