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, BNP PARIBAS NORTH AMERICA, INC., and DOES 2-10, Defendants.	Civil No. 1:16-Civ-03228-AJN Hon. Alison J. Nathan

DECLARATION OF VITO ROBERTO

I, Vito Roberto, declare the following pursuant to 28 U.S.C. § 1746:

I. Introduction

1. I submit this declaration as a Swiss lawyer and professor of private and commercial law.

2. I am a Professor at the University of St. Gall (Switzerland), where I teach primarily torts and contract law. I hold a PhD degree from the University of Zurich, an LL.M. degree from the University of California in Berkeley, and was admitted to the Zurich Bar in 1993 (attached as Exhibit A is a copy of my CV).

3. I have authored various articles and books in the fields of torts and damages. A list of publications I have authored in the previous ten years is attached as Exhibit B.

4. In the last four years I have written various legal opinions in the fields of banking, insurance, transportation and sports law. In the last two years I have testified as an

expert in pretrial proceedings between a railroad company and a manufacturer of railroads, between insurance companies, between a bankruptcy authority and board members, and in a proceeding with the Court of Arbitration for Sport between a sport association and an executive member of the association.

5. I am being compensated for my work on this declaration with a flat fee of 25,000 Swiss francs.

II. Scope and structure of the legal opinion

6. I have been provided with the Second Amended Complaint (the "Complaint" or "SAC") filed in the United States District Court, Southern District of New York, on January 20, 2017 by Kashef et al. (the "Plaintiffs") against BNP Paribas S.A. et al. (the "Bank"). Having reviewed the Complaint, I have been asked to provide the Court with a description of the legal principles and rules that would apply to the types of claims asserted by the Plaintiffs in the Complaint if they or their analogues were asserted under Swiss law.

7. Swiss tort law, like that of all other civil law jurisdictions, provides doctrines and rules prohibiting certain types of conduct that injures persons or property or otherwise causes economic loss. Swiss law does not, for the most part, distinguish among various specific categories of tort claims, in contrast to those set forth in the Complaint. Rather, Swiss law sets forth more general principles, which a court will then apply, based on the way those principles have been elaborated and interpreted by the courts and commentators, to the facts presented to it to determine whether those facts could give rise to a legally valid claim. Accordingly, this report groups the different categories of causes of action alleged in the Complaint under the more general headings that they would most resemble if asserted under Swiss law, and describes for each category how Swiss law would treat such claims.

III. The Complaint's causes of action and corresponding grounds for liability under Swiss law

8. The Complaint lists 20 different causes of action. SAC ¶¶ 257-529. They correspond to the following grounds for liability and restitution under Swiss law:

Causes of action listed by the Complaint	**Corresponding grounds for liability under Swiss Law**
III. Conspiracy to Commit Battery IV. Aiding and Abetting Battery V. Conspiracy to Commit Battery in Performance of Public Duty or Authority VI. Aiding and Abetting Battery Committed in Performance of Public Duty or Authority VII. Conspiracy to Commit Assault VIII. Aiding and Abetting Assault IX. Conspiracy to Commit False Arrest and False Imprisonment X. Aiding and Abetting False Arrest and False Imprisonment XI. Conspiracy to Commit Conversion – Wrongful Taking XII. Aiding and Abetting Conversion – Wrongful Taking XIII. Conspiracy to Commit Conversion – Wrongful Detention, Use or Disposal Where Possession Lawfully Obtained XIV. Aiding and Abetting Conversion – Wrongful Detention, Use or Disposal Where Possession Lawfully Obtained	Art. 41 section 1 CO • "Any person who unlawfully causes loss or damage to another, whether willfully or negligently, is obliged to provide compensation" In connection with art. 50 CO, concerning secondary liability • "In tort: 1. Where two or more persons have together caused damage, whether as instigator, perpetrator or accomplice, they are jointly and severally liable to the injured party. 2. The court determines at its discretion whether and to what extent they have right of recourse against each other. 3. Beneficiaries are liable in damages only to the extent that they received a share in the gains or caused loss or damage due to their involvement."

XIX. Conspiracy to Commit Wrongful Death XX. Aiding and Abetting Wrongful Death Caused by Intentional Murder	Art. 41 section 1 CO, in connection with art. 50 CO, concerning secondary liability. Art. 45 CO: 1. "Homicide and personal injury a. Damages for homicide 1. In the event of homicide, compensation must cover all expenses arising and in particular the funeral costs. 2. Where death did not occur immediately, the compensation must also include the costs of medical treatment and losses arising from inability to work. 3. Where others are deprived of their means of support as a result of homicide, they must also be compensated for that loss." Art. 47 CO: c. "Satisfaction In cases of homicide or personal injury, the court may award the victim of personal injury or the dependents of the deceased an appropriate sum by way of satisfaction."
I. Negligence Per Se II. Negligence Per Se XV. Outrageous Conduct Causing Emotional Distress XVI. Negligent Infliction of Emotional Distress (Bystander/Zone of Danger Theory)	Art. 41 section 1 CO
XVII. Commercial Bad Faith	N/A
XVIII. Unjust Enrichment	Art. 62–66 CO

9. Claims for secondary liability based on conspiracy or aiding and abetting are only viable under art. 50 CO (describing liability shared among multiple parties) in connection with specific tort claims under art. 41 CO (describing liability for torts generally).

10. Counts III-XIV, XIX-XX do not allege that the Bank is the primary tortfeasor. Rather, the Complaint states:

> *By conspiring with the government of Sudan and giving it access to the U.S financial system in the pursuit of illicit profits, BNPP enriched itself, undermined U.S. Sanctions and prevented their intended and expected effect, and assisted the terrorist, genocidal government of Sudan. Thus, BNPP's Sanctions violations were a natural result of its conspiring with the government of Sudan and were a substantial factor in causing the atrocities suffered by Plaintiffs and the Class.*

SAC ¶ 13, *see also id.* ¶¶ 295-472, 503-529. Thus, the Complaint alleges that the Government of Sudan ("GOS") has committed the tortious acts listed in Counts III-XIV, XIX-XX, and that the Bank is liable because it has conspired with and aided and abetted the GOS. Under Swiss law, the Bank can only be held liable for these acts if, by conducting financial transactions on behalf of Sudanese banks owned and controlled by the GOS, it is deemed to have caused the damage to the Plaintiffs together with the GOS, "whether as instigator, perpetrator or accomplice." Art. 50 section 1 CO. In other words, the Bank cannot be held liable for Counts III-XIV, XIX-XX solely based on art. 41 section 1 CO, but only based on art. 50 CO in connection with art. 41 section 1 CO.

11. Counts I-II and XV-XVIII have a different character. For these claims, Plaintiffs advance the causes of action as grounds for primary liability. This would mean that, even if the Bank's conduct did not amount to conspiring with or aiding or abetting the GOS's tortious acts, the Bank is still alleged to be independently liable. Because these claims allege primary liability against the Bank, I will analyze them separately below.

IV. Requirements for the Bank's liability based on art. 50 CO in connection with art. 41 section 1 CO (Counts III-XIV, XIX-XX)

12. Art. 50 CO deals with multiple liable parties in tort: the provision refers in the pertinent section to perpetrators, instigators, and accomplices. The Complaint does not allege that the Bank is a co-perpetrator, i.e. a primary tortfeasor of the tortious acts listed in Counts III-XIV, XIX-XX, or that it instigated the GOS to commit the tortious acts listed in Counts III-XIV, XIX-XX. *See* SAC ¶¶ 295-472, 503-529.

13. Instead, the Complaint submits that the Bank gave "substantial assistance" to the GOS. *E.g.* SAC ¶¶ 314, 318, 341, 345, 346, 374. Thus, the allegation is that the Bank is an accomplice to the acts committed by the GOS listed in Counts III-XIV, XIX-XX. Therefore, the following analysis will focus on the requirements of being held liable as an accomplice in accordance with art. 50 section 1 CO.[1]

A. The three requirements of collective responsibility in accordance with art. 50 section 1 CO

14. Art. 50 section 1 CO requires that two or more parties have together caused damage and that they have done so willfully or negligently ("*schuldhaftes Zusammenwirken bei der Schadenverursachung*," SCD 104 [1978] II 225, 230 f. cons. 4a). Thus, there are three requirements for joint and several liability based on art. 50 section 1 CO: There must be (1) collective conduct; (2) collective fault; and (3) collective causation (SCD 55 [1929] II 310, 4A_185/2007 cons. 6.2).

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[1] Only section 1 of Art. 50 is relevant here. The second section deals with the relations among the tortfeasors. The third section refers to beneficiaries that were involved only after the tortfeasor's tortious conduct by securing the advantages drawn from the conduct (officially published Supreme Court Decisions, "SCD", 101 [1975] II 102, 107 cons. 4a), typically by handling stolen goods.

- **Collective conduct** requires that each party knew or should have known of the other party's contribution (SCD 127 [2001] III 257, 264 cons. 6a; SCD 115 [1989] II 42, 45 cons. 1b; SCD 104 [1978] II 225, 230 f. cons. 4a). Thus, the parties have to be **conscious** of their cooperation (SCD 55 [1929] II 310, 314 f. cons. 2; Supreme Court 4A_185/2007 cons. 6.2.1).
- **Collective fault** requires that each party has acted **willfully or negligently**: Each party must have wanted the loss or damage, must have taken it into account or should have known that the collective conduct might lead to loss or damage (Supreme Court 4A_185/2007 cons. 6.2.2; see also SCD 104 [1978] II 184, 187 f. cons. 2).
- **Collective causation** requires that each party's conduct has contributed, in a legally meaningful way, to the loss or damage that has occurred. The contribution in question must be an **"adequate" cause** for the loss or damage (similar to the concept of "proximate cause")—that is, the contribution must be substantial enough in order to attribute the loss or damage to the tortfeasor. In view of the fact that the legal definition of cause-in-fact is notoriously confusing and due to the relevance of this requirement for liability, I will explain the definition of adequacy of a cause in torts further in the next section.

B. Collective causation: The requirement of "adequate" cause

15. Swiss tort law (as most civil law jurisdictions) restricts liability by requiring that a plaintiff demonstrate adequate causality. Such a showing requires proof of a substantial contribution to the causal link. Swiss courts adopt a restrictive approach to the legal definition of adequate causality. Borderline cases where other European jurisdictions have found legal causality (cases of unclear as well as minimal causality) have been rejected by Swiss courts.

16. According to the general principles applied by the Swiss Supreme Court, an act is an adequate cause for a loss or damage if, based on the usual course of events and common experience, it can fairly be considered the cause of the kind of loss or damage that occurred (Supreme Court 4A_637/2015 cons. 4.5 – the decision is scheduled for official publication in the SCD-Volumes; SCD 123 [1997] III 110, 112 cons. 3a). As the Supreme Court has stated, this formula boils down to the test of whether the loss or damage can, in good faith, be attributed to the tortfeasor (Supreme Court 4A_637/2015 cons. 4.5, SCD 123 [1997] III 110, 112 cons. 3a).

17. According to Swiss case law, a contributor to a tort is only liable if his **contribution is substantial**. As noted above, Swiss courts tend to apply this requirement more vigorously than courts in other jurisdictions. The principle of "the loss lies where it falls"—except when a special reason can be shown for interference—carries greater importance in Switzerland than in other jurisdictions. As the Swiss Supreme Court has restated recently, courts have to be cautious that liability (to use the terminology of the Swiss Supreme Court) does not "get out of hand."

18. Recent case law of the Swiss Supreme Court concerning adequate causation shows and underlines this restrictive view of legal causality:

- In the decision of the Supreme Court 4A_7/2007, a man sued the manufacturer of a "barbecue 6000" grill. The man's neighbor was using such a grill and, due to a defect, the grill caught fire. The fire spread over to the house. The man tried to help his neighbor to extinguish the fire. In doing so, the man fell from his neighbor's balcony and was injured. The Swiss Supreme Court decided that the man was not injured by the fire and that he did not fall while trying to get away from the fire; but that it was his own decision to help extinguish the fire. In so deciding, the man created an independent cause for his accident. The Supreme Court explained that if adequate causation was found in such a case, the adequacy requirement would not serve its purpose to reasonably restrict liability.

- In the very recent decision Supreme Court 4A_637/2015, a wife and her husband were driving in a car that was hit by a third person. The wife was severely injured, forcing the husband to take care of her. Due to pressures of caring for his wife, he developed a somatoform pain disorder. The Court cited Supreme Court 4A_7/2007 and explained that although the man was legally obliged to help his wife, his pain disorder could not be attributed to the driver who caused the accident, because otherwise liability would "get out of hand" (in the words of the Supreme Court, there would be a "*Haftungsausuferung*") and the requirement of adequacy would not serve its purpose of reasonably restricting liability.

C. Case Law

19. Art. 50 CO requires that the conduct of each joint tortfeasor constitutes a tort in itself. As mentioned above, there are three fundamental requirements for parties to be held jointly and severally liable for a tort based on art. 50 section 1 CO:

- there must be *collective conduct*, i.e. the parties must be conscious of their cooperation;
- there must be *collective fault*, i.e. each party must have wanted the loss or damage, must have taken it into account or should have known that the collective conduct might lead to loss or damage; and
- there must be *collective causation*, i.e. each party's contribution must be substantial in causing the loss or damage.

20. A simple consciousness of collective but negligent conduct where the conduct of the secondary actor contributes to damage or loss, is still not sufficient to find joint and several liability based on art. 50 section 1 CO. The following cases illustrate that the Swiss Supreme Court will only find liability under art. 50 section 1 CO in cases with multiple parties when the secondary actor's contributions are either **willful and substantial** or **immediate and substantial**.

21. The Swiss Supreme Court cases addressing art. 50 section 1 CO are relatively few and typically fall within one of several broad factual scenarios. I have reviewed all of the case law and there are no cases where claims based on facts similar to those at issue here have even been asserted. However, regardless of the context in which art. 50 section 1 CO is

evaluated, and regardless of distinguishing facts and circumstances, the requirement that a party's contributions be either willful and substantial or immediate and substantial is common to all of them.

1. Physical altercations with multiple participants and dangerous situations

22. In the cases concerned with physical altercations involving multiple participants and dangerous situations, the contributions of the parties taking part in the physical altercations (not those acting only in self-defense) or in the dangerous situation may not all have been willful, i.e. not all of them participated with the intention to cause the loss or damage that occurred. However, their contribution was always very immediate—they physically added to a dangerous situation in the present. This is also why their contributions are deemed substantial—the parties created the dangerous situation collectively. In many of these cases, the parties had an equal share in propounding the dangerous situation, and the harm could have been inflicted by any one of the parties.

- In SCD 42 [1916] II 473, three people were roaming the streets throwing hand blaster balls (typically used by drivers to frighten animals blocking the road). One of them threw a ball at a woman standing on the balcony of her apartment. The ball hit the woman in the face and exploded next to her right ear. The woman, who was pregnant in the fourth month, became unconscious and had to be carried away. She suffered hearing loss and a nervous disorder that caused her to lose her child. The Supreme Court set forth that, even though it was not clear who had thrown the ball, all three were liable. The three had caused the damage together. It was not possible to determine who was instigator, perpetrator or accomplice, for each aided and abetted the others. Their contributions were thus equal.
- In SCD 57 [1931] II 417, the Court held collectively liable a group of striking workers involved in the assault of a non-striking colleague, during which the colleague was dealt a severe blow to the head. Even though it was known which individual tortfeasor had dealt the severe blow to the victim (as in SCD 31 [1905] II 248), and even though the Court recognized that the other workers may not have shared the intent to assault the victim in such a brutal way, the Court nonetheless held that they had all been at least negligent accomplices to the tort: they collectively planned the

violent action against the victim, encouraged each other in the process, and carried on the ambush and raid together in the knowledge that some in their midst carried weapons. The high level of contribution by each actor was necessary to find negligent accomplice liability.

- In SCD 100 [1974] II 332, three nine year old boys were playing with matches. When scolded by an adult and told to go home, they entered a barn, where one of them lit the last match and threw it into the air. It landed in the hay and caused a fire that burnt down the barn and parts of the adjacent house. The Supreme Court decided that even though only one of the boys threw the match, the three children acted in concert, animated by the common intention to take part in a dangerous game the adults had forbidden. Again, each contributed equally in creating the dangerous situation.
- In SCD 79 [1953] II 66, a seminal case involving Swiss tort law, some ice hockey players from one team organized and took part in a game that was held without adequate safety measures to protect the audience from the action on the skating rink. In the course of the game, one player lost his balance and fell on a spectator, causing her to lose sight in one eye. The Supreme Court held all players liable for the tort, both those who organized the game and those who merely took part in it. Even though they had not organized the game, the participating players had collaborated in the illicit act by taking part in the game held in an improper setting without taking any precautions.

2. Construction cases

23. In the cases dealing with construction disputes, the Court has required that, in order for parties to share liability under art. 50 section 1 CO, they must share in the same conduct.

- The essential case is SCD 115 [1989] II 42. Water had flooded an excavation and architect A and engineer B together ordered measures to be taken to secure the hillside/ground. The measures were ultimately insufficient—after a rain storm, a landslide filled the excavation and destroyed the casings. Construction company C, having incurred losses after being sued by the owner for the damage to the site, brought claims against A, arguing that A, B and C together caused the owner's injury (which consisted of additional construction costs). The Court held that the construction company had not taken part in ordering the insufficient measures. Thus, it could not be said that A and C made the same mistake at the same time and they could not share liability under art. 50 CO.
- In another case, SCD 127 [2001] III 257, the construction activity of three parties (A, B and C) allegedly caused damage to the neighboring property of D. C's construction

project was carried out two years after the projects of A and B had been completed. The Supreme Court stated that the requirement of collective fault is only met when each party knew or should have known of the other party's unlawful conduct. A and B could not possibly have known about C's subsequent contribution. Thus, there was no collective fault shared by A, B and C, and A and B could not be liable under art. 50 CO.

3. Taking part in a criminal activity

24. In the cases concerned with the civil consequences of having been criminally liable for contributing to a crime, the parties have uniformly acted willfully. In order to be criminally liable for contributing to a crime, the contribution must have been intentional (see art. 24 and art. 25 Swiss Criminal Code). A negligent contribution is not a crime.

– In Supreme Court 4A_573/2010, newspaper company Z paid A to fill newspaper-machines with newspapers. Sometimes A's son B distributed the newspapers for him. At a certain point, they both acquired keys to open the coin-boxes and started to steal money. Each of them knew that the other would steal coins whenever given the opportunity. Thus, the Supreme Court held them jointly and severally liable for the stolen money. A had stolen money also in another city. However, the Court found that even if B had known about A's stealing-tours in this other city, he was not personally involved in these actions and thus not liable for the amounts stolen there. This case demonstrates that knowledge of a tortious behavior for itself is not sufficient for the application of art. 50 CO.

4. Infringement of personality rights and intellectual property

25. In the cases concerned with infringement of personality rights or intellectual property, to find secondary liability the parties' conduct must be willful or very close to it and in any case immediate:

– In SCD 104 [1978] II 225, a gallerist sued for libel over the publication of an article. He sued the journalist, his lawyer (for his alleged contribution in the development of the article) and the editor of the newspaper. The question was, whether the lawyer and the editor had caused the infringement together. The Supreme Court held that parties must have caused the damage together either willfully or negligently ("*schuldhaftes Zusammenwirken bei der Schadenverursachung*"). The requirement of collective fault was met only when each party knew or should have known of the other party's

contribution. The claimant did not substantiate to the satisfaction of the cantonal court (which are the triers of fact) that the lawyer and the editor cooperated. Thus, the Supreme Court based its assessment on the fact that the editor did not know of the lawyer's contribution. Hence, there was no collective fault and art. 50 CO did not apply.

5. Miscellaneous

26. In other cases the Swiss Supreme Court consistently holds that the parties' collective conduct and fault can only be present in conscious and willful actions—i.e. **conscious cooperation** among parties in order to cause a damage or loss.

– In SCD 90 [1964] II 501, certain companies boycotted another one. The question arose whether a third company was liable for these events. The Supreme Court held that in case of a boycott, collective conduct and fault can only be found in consciously and willfully taking part in the boycott.

D. Analysis of the case law and application to cases such as the case presented in the Complaint

27. With respect to Counts III-XIV, XIX-XX, where the Bank's liability is based on having purportedly conspired with and/or aided and abetted the GOS in its commission of tortious acts, the Complaint alleges that the Bank contributed to the GOS's human rights violations by providing financial services to banks owned by the GOS, which allowed these banks to make transactions in U.S. dollars. Claims under this theory can only succeed if the requirements of art. 50 CO are met.

28. As stated above, Swiss case law requires that the contribution of the Bank be either **willful and substantial** or **immediate and substantial** in order for the Bank to be liable under art. 50 CO. The cited case law shows that the Swiss Supreme Court has never found liability where a defendant negligently and indirectly contributed to tortious acts of another party. And it is a longstanding requirement of Swiss law that a party's contribution in joint liability cases must be substantial. *See supra*, Section IV.B.

- In order to establish the requirement that the Bank's contribution was **willful**, Plaintiffs must plead and prove that the Bank provided financial services to Sudanese banks for the purpose and with the intent of aiding the GOS in committing tortious acts. Plaintiffs would have to offer specific reasons and circumstances indicating that the Bank did in fact act with the purpose and the intent to aid the GOS in committing tortious acts.

- As an alternative to the willfulness requirement, Plaintiffs can instead plead and prove that the Bank's contribution to the tortious conduct by the GOS was an **immediate** one. An indirect contribution would not suffice under the criteria of immediateness required for liability under art. 50 section 1 CO.

- Regardless of the requirements of willfulness or immediateness, Plaintiffs must additionally plead and prove a **substantial** contribution of the Bank to the GOS's tortious acts. Plaintiffs must plead and prove that a substantial amount of the money raised by the Sudanese banks went to the GOS (instead of using the money, e.g., for extending credit to Sudanese businesses and mortgages to Sudanese citizens); that a substantial amount of the money that went to the GOS was used for the purpose of violating human rights (and not for legal and legitimate purposes such as building and maintaining infrastructure like roads, sewage systems, hospitals, and schools; or paying public servants like doctors or teachers; or maintaining an army); and that the income facilitated by the Bank was a substantial portion of the resources which the GOS has at its disposal.

29. In sum, in order for Counts III-XIV, XIX-XX to survive under Swiss law, the Complaint must allege in specific detail how the Bank's conduct was willful or immediate, and how it was a substantial contributor to the tortious conduct of the GOS, in addition to specifically alleging the threshold requirements of collective conduct, collective causation, and collective fault.

E. Additional requirements for wrongful death claims (Counts XIX-XX)

30. Two of the secondary liability claims in this case, Counts XIX-XX, are for wrongful death. Swiss law provides for wrongful death claims pursuant to articles 45 and 47 CO in certain circumstances when the tortfeasor is liable for the death of the decedent.

31. To state a claim that the Bank is liable as an accomplice to the GOS in connection with Plaintiffs' wrongful death claims, Plaintiffs must satisfy the general

requirements for proving secondary liability, which are described above, in addition to the requirements of either article 45 or article 47 CO.

32. Art. 45 sec. 3 CO grants a claim against the tortfeasor by persons who have lost their means of support as a result of a homicide. This is an exception to the general rule that one can only claim damages if he was directly injured. The decedent must have made **regular payments** to the claimant for the claimant to recover pursuant to art. 45 sec. 3 CO.

33. Art. 47 CO grants **dependents with a close relationship** to the decedent a satisfaction against the tortfeasor. Only spouses, children, and parents are assumed to have a close relationship with the decedent. In exceptional cases, more distant relatives, engaged persons, and persons living in a common law partnership have shown a close relationship sufficient to recover pursuant to art. 47, but compensation has, as a rule, only been awarded in cases where the decedent and claimant lived together in the same household.

V. Requirements for the Bank's liability as a primary tortfeasor (Counts I-II, XV-XVIII)

A. Liability under art. 41 CO only (Counts I-II, XV-XVI)

34. The Complaint alleges that the Bank is liable for Negligence Per Se (Counts I-II, SAC ¶¶ 257-294), Outrageous Conduct Causing Emotional Distress (Count XV, SAC ¶¶ 473-480) and Negligent Infliction of Emotional Distress (Count XVI, SAC ¶¶ 481-489).

35. As already noted in Section III, *supra*, these causes of actions are alleged as independent torts against the Bank. This would mean that granting Sudanese banks access to USD transactions *by itself* caused Plaintiffs' loss or damage and pain and suffering.

36. Counts I and II allege liability for "negligence per se," which also exists as a form of liability under Swiss Law. Swiss courts recognize that violations of various criminal and administrative provisions in Swiss statutes can give rise to negligence per se claims by the

persons those statutory provisions were designed to protect. However, only violations of Swiss statutory provisions can trigger liability for negligence per se under Swiss law. Swiss law requires compliance only with Swiss statutory provisions; it is neither required nor possible to comply with all statutes of any country worldwide. The claims in Counts I and II are based only on violations of United States statues. Because no violations of Swiss statutes are alleged, the claims for negligence per se are not possible under Swiss law.[2]

37. "Outrageous conduct causing emotional distress" and "negligent infliction of emotional distress" in Counts XV and XVI are not cognizable legal concepts under Swiss law. In order to establish a primary tort claim against the Bank for these causes of action, Plaintiffs must meet the requirements of liability under art. 41 CO.

38. The requirements of art. 41 section 1 CO are (1) fault, (2) unlawfulness (illegality), (3) damage, and (4) causality, in the specific circumstances of the case at hand, between the unlawful act and the damage.

39. Under Swiss law, the Bank was allowed to provide financial services to the Sudanese banks and the Complaint does not allege the contrary. Neither the Bank nor its employees are alleged to have directly committed human rights violations in the Complaint. The Bank is not alleged to have itself directly caused the emotional distress. Under Swiss law, if the Bank did not violate legal provisions forbidding it to provide financial services to banks owned by the GOS (no such Swiss provisions exist), and if the Bank did not itself

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[2] The Swiss Financial Market Supervisory Authority ("FINMA") conducted an investigation of BNP Paribas (Suisse) S.A. ("BNPP Geneva") and concluded that BNPP Geneva's provision of financial services to Sudanese banks did not violate Swiss sanctions. FINMA separately concluded that BNPP Geneva did not identify, limit or monitor the risks associated with violating U.S. sanctions, but that does not give rise to a finding of negligence vis-a-vis third-parties such as Plaintiffs under Swiss tort law. *See* Press Release, FINMA, Inadequate Risk Management Of US Sanctions: FINMA Closes Proceedings Against BNP Paribas (Suisse) (July 1, 2014), https://www.finma.ch/en/~/media/finma/dokumente/dokumentencenter/8news/20140701-mm-abschluss-verfahren-bnp-paribas-suisse.pdf?la=en.

commit the actions that injured the Plaintiffs, then there can be no unlawfulness, and a claim based on art. 41 section 1 CO must fail. There is thus no need to further elaborate on the other requirements of art. 41 section 1 CO.

B. Liability for Commercial Bad Faith (Count XVII)

40. The Complaint alleges that the Bank is liable for Commercial Bad Faith (Count XVII, SAC ¶¶ 490-496). I understand that under New York law, this doctrine applies to claims that "allege fraud in the making and cashing of checks," and was created as an "exception to the general rule that a bank is absolved of liability for a check made out to a fictitious payee when the maker knows that the payee is fictitious." *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 293 (2d Cir. 2006). The claim "requires that the bank have 'actual knowledge of facts and circumstances that amount to bad faith, thus itself becoming a participant in a fraudulent scheme.'" *Id.* (quoting *Prudential-Bache Securities, Inc.*, 73 N.Y.S.2d 263, 275 (N.Y. 1989)). There is no analogous claim under Swiss law.

C. Liability for Unjust Enrichment under art. 62-66 CO (Count XVIII)

41. The Complaint alleges that the Bank is liable for Unjust Enrichment (Count XVIII, SAC ¶¶ 497-502). Unjust enrichment is defined under Swiss law as conferring a benefit without legal cause. A claim in unjust enrichment requires a direct link between the defendant's enrichment on the one hand and the claimant's loss on the other hand: The enrichment causes the disadvantage and, vice versa, the disadvantage must be the consequence of the enrichment. Art. 62 section 1 CO provides that a person who has enriched himself without just cause at the expense of another is obliged to make restitution.

42. The Swiss Supreme Court defined the requirements of an unjust enrichment claim in a case in which a creditor of a sports association obtained as security the right to transfer a particular player to a different team. Supreme Court 4C.418/2004 cons. 3.1. After a

corporation purchased all of the assets of the sports association and transferred the player in question, the creditor raised a claim for unjust enrichment against the corporation. The Cantonal Court ruled that the creditor had no recourse against the corporation because the corporation had legal cause to transfer the assets it had purchased. In denying the claim on appeal, the Swiss Supreme Court added, "The condition of causality or connexity between the enrichment and the loss . . . supposes a relation which goes further than the ordinary causality in its ordinary meaning: the enrichment must be the corollary of the loss and vice versa."

43. In the present case there is, first, no allegation that Plaintiffs enriched the Bank. Thus, the Bank did not enrich itself at the expense of Plaintiffs. Any gain of the Bank has no corollary with losses of Plaintiffs. Second, the Bank did not obtain an enrichment without legal cause under Swiss law. It allegedly received compensation from the GOS-owned banks in exchange for services provided to them.

VI. Summary

44. In accordance with the overview of the claims in the Complaint described in Section III, the requirements for liability under Swiss law described in Sections IV and V, *supra*, can be summarized using the below table:

Causes of action listed by the Complaint	**Corresponding grounds for liability under Swiss Law and requirements for these grounds**
– Conspiracy to Commit Battery – Aiding and Abetting Battery – Conspiracy to Commit Battery in Performance of Public Duty or Authority – Aiding and Abetting Battery Committed in Performance of Public Duty or Authority	Art. 50 CO in connection with art. 41 CO: – Collective conduct, (parties must be conscious of their cooperation) – Collective fault (each party must have wanted the loss or damage, must have taken it into account or should have known that the collective conduct might lead to loss or damage)

– Conspiracy to Commit Assault – Aiding and Abetting Assault – Conspiracy to Commit False Arrest and False Imprisonment – Aiding and Abetting False Arrest and False Imprisonment – Conspiracy to Commit Conversion – Wrongful Taking – Aiding and Abetting Conversion – Wrongful Taking – Conspiracy to Commit Conversion – Wrongful Detention, Use or Disposal Where Possession Lawfully Obtained – Aiding and Abetting Conversion – Wrongful Detention, Use or Disposal Where Possession Lawfully Obtained	– Collective causation (each party's contribution must be substantial for causing the loss or damage) – A party's actions must be either willful or immediate – A party's actions must substantially contribute to the tortious activity
– Conspiracy to Commit Wrongful Death – Aiding and Abetting Wrongful Death Caused By Intentional Murder	Art. 41 section 1 CO, in connection with art. 50 CO, concerning secondary liability. Art. 45 CO: – lost means of support Art. 47 CO: – dependent – close relationship
Negligence Per Se Outrageous Conduct Causing Emotional Distress Negligent Infliction of Emotional Distress (Bystander/Zone of Danger Theory)	Art. 41 CO – fault – unlawfulness – damage – causality (including adequate causality)
Commercial Bad Faith	– No analogous claim recognized under Swiss law.
Unjust Enrichment	Art. 62-66 CO – Enrichment without just cause – at the expense of another.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 21 day of March, 2017.

VITO ROBERTO

EXHIBIT A

CURRICULUM VITAE

Prof. Dr. Vito Roberto, LL.M.

PROFESSIONAL EXPERIENCE

1987 - 1989	Research Assistant, UNIVERSITY OF ZURICH (Contract law and Torts)
1990	Law Clerk, DISTRICT COURT ZURICH
1991 - 1992	Law Clerk, PESTALOZZI GMÜR & PATRY, Zurich
1992 - 1995	Assistant Lecturer, SWISS FEDERAL INSTITUTE OF TECHNOLOGY (ETH), Zurich
1995 - 1997	Associate, FRORIEP RENGGLI, Zurich
1997 - 2000	Partner, BILL, ISENEGGER & ACKERMANN, Zurich
since 1997	Professor for Private and Commercial Law, UNIVERSITY OF ST. GALLEN
since 2000	Of Counsel, BAKER & McKENZIE, Zurich
2000 to 2010	Delegate of the UNIVERSITY OF ST. GALLEN at the Foundation Board of the PROFESSOR WALTHER HUG-STIFTUNG
Spring 2000 to 12.2010	President of the Academic Commission at the UNIVERSITY OF ST. GALLEN
fall 2004 to fall 2006	Dean of the Faculty of Law at the UNIVERSITY OF ST. GALLEN
09.2006 to 09.2012	Committee member of the SWISS LAWYERS' ASSOCIATION
since 2007	Director at the INSTITUTE FOR LEGAL STUDIES AND LEGAL PRACTICE (IRP) at the UNIVERSITY OF ST. GALLEN
02.2011 to 01.2015	Vice President at the UNIVERSITY OF ST. GALLEN

EDUCATION

1987	lic. iur. UNIVERSITY OF ZURICH
1989	Dr. iur. UNIVERSITY OF ZURICH
1991	LL.M. UNIVERSITY OF CALIFORNIA, Berkeley
1993	Admitted to the Zurich Bar
1997	Habilitation UNIVERSITY OF ZURICH

PERSONAL DATA

Born in Switzerland, 1960, Swiss and Italian citizen

PUBLICATIONS

See separate list.

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Publications

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