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

REPLY 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 reply to the Declaration of Franz Werro, dated May 22, 2017 ("Werro Decl."), which responded to my first declaration, dated March 21, 2017 ("Roberto Decl.").

2. In addition to the materials that I identified in paragraph 6 of my first declaration, I have more recently been provided with the Werro Declaration, Exhibit A to that declaration, and pages 39 and 40 of Plaintiffs' Opposition to Defendants' Motion to Dismiss the Second Amended Complaint, dated May 22, 2017 ("Opp."), in the United States District Court, Southern District of New York, by Kashef, et al. (the "Plaintiffs") against BNP Paribas S.A., et al. (the "Bank").

3. Having reviewed the Werro Declaration and the two pages of Plaintiffs' Opposition Brief, I have been asked to provide the Court with this Reply Declaration.

4. Unless otherwise stated, capitalized terms have the same meaning as in my first declaration.

II. Scope And Structure Of This Reply

5. My first declaration contains an analysis of the 20 different claims asserted by Plaintiffs in the Complaint. As I explained in my first declaration, Counts III-XIV and XIX-XX of the Complaint state claims for secondary liability, which under Swiss law are analyzed based on art. 50 CO in connection with art. 41 section 1 CO. Roberto Decl. ¶¶ 9-10. Counts I-II and XV-XVII in turn state primary liability claims, which are analyzed under different frameworks. *Id.* ¶ 11. The Werro Declaration only discusses the Complaint's secondary liability claims, which I analyzed in Section IV of my first declaration. Since Professor Werro's Declaration does not discuss the primary liability claims, I infer that that he has no disagreement with my analysis of those claims in Section V of my first declaration, and I will not address them in this Reply Declaration.

6. In my analysis of the secondary liability claims in Section V of my first declaration, I focused on Swiss case law relating to joint and several liability under art. 50 section 1 CO in connection with specific tort claims under art. 41 section 1 CO ("collective liability"). In particular, I focused on the requirements established by the Swiss Supreme Court for establishing collective liability. This analysis is necessary in order to determine how a Swiss court would decide the question of whether the Bank is secondarily liable for the alleged injuries to Plaintiffs inflicted by the Government of Sudan ("GOS").

7. In preparing my first declaration, I researched all decisions of the Swiss Supreme Court from 1954 onwards, as published in the official case digest of the Swiss Supreme Court, "SCD." The Swiss Supreme Court has also published all of its decisions on its website since 2000. I therefore searched on the SCD and in the Swiss Supreme Court's

website for the terms "art. 50 OR", "art. 50 abs. 1 OR", "art. 50 CO" and "art. 50 al. 1 CO" in order to find all decisions relating to this provision in all three official languages (German, French, Italian). I reviewed all of the relevant decisions and noted the basic requirements that the Swiss Supreme Court set forth in affirming or denying each claim. Based on my extensive analysis of the case law, I came to the conclusion that the Supreme Court affirmed liability only in cases where the parties' contributions were either **willful and substantial** or **immediate and substantial**. *See* Roberto Decl. ¶ 20.

8. The Werro Declaration reflects a different approach. It contains two main areas of legal analysis. First, it discusses whether art. 50 section 1 CO establishes an independent basis for liability, separate from art. 41 section 1 CO. Werro Decl. ¶¶ 19-22. This discussion relies exclusively on opinions of legal scholars in law reviews and textbooks; however, it does not accurately characterize the relevant statements in these publications.

9. Second, the Werro Declaration discusses the requirements for collective liability. Werro Decl. ¶¶ 23-48. This analysis includes caselaw as well as legal doctrine. It differs from my analysis in a fundamental aspect: the Werro Declaration does not clearly distinguish between the secondary party's knowledge (of what the other parties might do), tortious cooperation (the secondary party's consciousness and willingness to take part in a common act), and adequate causal contribution (a legally meaningful and relevant contribution by the secondary party to the acts of the primary tortfeasor).

10. As I explain further below, my first declaration and the Werro Declaration do not differ considerably with respect to the definition of the three criteria for collective liability. They do differ, however, with respect to the clear distinctions between the three criteria, as well as with respect to the analysis regarding how the Swiss Supreme Court has applied the three criteria for collective liability, and which conditions the Swiss Supreme

Court required in the various decisions to find collective liability. I mentioned a number of relevant decisions in my first declaration, Roberto Decl. ¶¶ 19-26, and I will discuss the decisions mentioned in the Werro Declaration further below.

11. I will first address the Werro Declaration's argument that art. 50 section 1 CO provides an independent basis for liability, and will demonstrate that the opinions of the scholars cited in the Werro Declaration state the opposite of what is claimed in that declaration (*infra* section III). Second, I will analyze the distinctions between the requirements for collective liability: knowledge, tortious cooperation, and adequate causal contribution that the Werro Declaration does not adequately address (*infra* section IV). Third, I will address the requirements for collective liability under art. 50 section 1 CO in connection with art. 41 section 1 CO and address the statements made in the Werro Declaration on that subject (*infra* section V). Fourth, I will correct a few incorrect assertions in the Werro Declaration and in Plaintiffs' Opposition Brief regarding the contents of my first declaration (*infra* section VI). Finally, I will conclude by restating my findings and applying them to Plaintiffs' allegations in the present case (*infra* section VII).

III. The Werro Declaration Incorrectly States That Art. 50 CO Provides An Independent Basis For Liability

12. In my first declaration, I explained that "[c]laims 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)." Roberto Decl. ¶ 9.

13. The Werro Declaration contends, however, that art. 50 section 1 CO "establishes an independent basis for liability ('Haftungsnorm')." Werro Decl. ¶ 20, *see also*

id. ¶ 16. This contention is incorrect. As I will demonstrate, the authorities that the Werro Declaration cites do not support this proposition.

14. The first authority on which the Werro Declaration relies is volume 1 of the comprehensive textbook series of W. Fellmann/A. Kottmann on Swiss torts law.[1] Werro Decl. ¶ 20. However, this textbook volume states the opposite of what the Werro Declaration claims. Paragraph 2760 of that textbook, which is the section cited in the Werro Declaration, states:

- "Richtig ist aber, dass die Grundlage der Haftung, die Art. 50 OR im Auge hat, in Art. 41 OR geregelt ist. Für jeden Beteiligten müssen daher zunächst einmal die Tatbestandvoraussetzungen des Art. 41 OR (Schaden, Kausalzusammenhang, Widerrechtlichkeit und Verschulden) erfüllt sein."
- My translation: "It is however true that the basis of the liability, which is addressed in art. 50 CO, is contained in art. 41 CO. The conditions of liability of art. 41 CO (damage, causality, unlawfulness and fault) must therefore be fulfilled for each participant."

15. The W. Fellmann/A. Kottmann textbook also refers to the authors cited in the Werro Declaration, S. Weber and H.-U. Brunner. Werro Decl. ¶ 20. However, neither author stated that art. 50 CO provides an independent basis for liability. Each author only addressed the proposition that collective liability imposes joint and several liability for damages, even where one of the involved parties caused only a part of the total damages. The W. Fellmann/A. Kottmann textbook explains this in a concise manner in the same paragraph 2760:

- "Art. 50 OR ist also im Grundsatz kein eigenständiger Haftungstatbestand. Er regelt bloss den einen Fall, dass mehrere Personen aus Verschulden haftbar sind. Hans-Ulrich Brunner und Stephan Weber weisen aber zu Recht darauf hin, soweit Art. 50 Abs. 1 OR unabhängig vom eigenen Kausalbeitrag eine Haftung für den gesamten Schaden begründe, komme der Bestimmung auch eine, haftungsbegründende

[1] Walter Fellmann/Andrea Kottmann, Schweizerisches Haftpflichtrecht, vol. 1-3, 2012/2013/2015 (in total 2243 pages).

Funktion' zu. Nach der hier vertretenen Auffassung ist dieser Einwand richtig. Er bildet sogar den Kern der Unterscheidung zwischen Art. 50 und 51 OR."

- My translation: "Art. 50 CO is therefore in principle not an independent basis of liability. It merely governs the single case where multiple persons are liable for their own fault. Hans-Ulrich Brunner and Stephan Weber indicate, however, rightly that art. 50 section 1 CO, insofar as it establishes a liability for the total damage independently of the own causal contribution, also has a 'function of establishing liability.' According to our opinion, this objection is correct. It is even the core of the difference between art. 50 and 51 CO."

16. Stephan Weber, who developed the remarks of Hans-Ulrich Brunner in a law review article,[2] discusses the same concept on page 123 of his article:

- "Die Besonderheit, die OR 50 durch den Grundsatz der solidarischen Haftung anordnet, liegt nämlich darin, dass jeder Beteiligte nicht nur für den von ihm verursachten Schadensanteil einzustehen hat, sondern unabhängig vom eigenen Kausalbeitrag für den gesamten gemeinsam verursachten Schaden. Auch wer nur einen begrenzten (additiven) Tatbeitrag leistet, wird mit der ganzen Ersatzverbindlichkeit belastet. Der Bestimmung kommt insofern eine haftungsbegründende Funktion zu. "
- My translation: "The particularity which art. 50 CO creates through the principle of joint and several liability lies in the fact that each of the participants is responsible not only for the part of the damage caused by him but, regardless of the own causal contribution, for the total damage that has been caused together. Somebody who causes only a confined (additive) contribution to the tort is liable for the total damage. As such, the provision has a function of establishing liability."

17. The whole discussion has been intensified by a decision of the Swiss Supreme Court which, despite the opinions of certain authors, re-confirmed the more restrictive concept of liability in SCD 127 [2001] III 257, cons. 5a. The court stated:

- "Die Verantwortlichkeit als Solidarschuldner wird durch die Reichweite der ihn treffenden Haftung beschränkt. Haftet jemand von vornherein überhaupt nicht oder nur für einen Teil des Schadens, weil sein Verhalten nicht für den gesamten eingetretenen Schaden adäquat-kausal ist, hat er auch nicht als Solidarschuldner neben anderen Mitschädigern für mehr einzustehen, als er aufgrund seiner eigenen Haftung verpflichtet ist."

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[2] Stephan Weber, Kausalität und Solidarität – Schadenszurechnung bei einer Mehrheit von tatsächlichen oder potenziellen Schädigern, in: HAVE/REAS 2010, p. 115-127.

– My translation: "The responsibility of a joint and severally liable party is confined by the reach of his own liability. If somebody is from the outset not liable at all or liable only for a portion of the damage because his acts were not an adequate cause for the total of the damage, then he is not liable either as a joint and severally liable party among other co-authors of the damage, for more than he owes based on his own liability."

18. These extensive citations show that the common opinion of Swiss legal doctrine and the Swiss Supreme Court is the opposite of what is stated in the Werro Declaration, and both confirm that art. 50 section 1 CO does not establish an independent basis for liability. The comprehensive textbook on torts of W. Fellmann/A Kottmann, cited in the Werro Declaration, as well as the Swiss Supreme Court, explicitly state that art. 50 section 1 CO is not an independent basis of liability.

19. The only issue that is controversial among certain legal authors and the Swiss Supreme Court is whether a party who is collectively liable has a responsibility for parts of the total damages which were not caused by him. While the authors cited above are in favor of establishing liability for the total damages, the Swiss Supreme Court has always favored a more restrictive liability and has reconfirmed this opinion in the cited decision. I infer this discussion is the reason for the misunderstanding reflected in the Werro Declaration.

IV. The Werro Declaration Confuses The Elements Of Collective Liability

20. As I discussed in my first declaration, there are three requirements for collective liability based on art. 50 section 1 CO: "(1) collective conduct; (2) collective fault; and (3) collective causation." Roberto Decl. ¶ 14. These three elements can also be described as the secondary party's knowledge (of what the other parties might do), tortious cooperation (the secondary party's consciousness and willingness to take part in a common act), and adequate causal contribution (a legally meaningful and relevant contribution to the acts of the primary tortfeasor). The Werro Declaration does not dispute that these three basic

requirements must be satisfied, but disagrees as to their scope. *See* Werro Decl. ¶¶ 27-29. I will discuss the first two elements together, and then turn to the third element of causation.

A. Knowledge And Tortious Cooperation

21. The Werro Declaration agrees that that there must be "collective conduct" or knowledge in the sense that each party knew or should have known of the other party's contribution. Werro' Decl. ¶ 31; Roberto Decl. ¶ 14.

22. The Werro Declaration also agrees that collective liability in accordance with art. 50 section 1 CO requires "collective fault," which the Werro Declaration terms "tortious cooperation." Werro Decl. ¶¶ 23, 24.

23. The Werro Declaration, however, does not properly distinguish between what a party knew or should have known about the acts of the other party ("collective conduct"), and the requirements of "tortious cooperation," the consciousness and willingness to take part in a common act. The Werro Declaration mixes the two elements and discusses them together under the title "collective fault." Werro Decl. ¶¶ 30-34.

24. The summary of "collective fault" in the Werro Declaration also mixes the element of causality together with the other requirements by stating: "What is required is that an accomplice engages intentionally or unintentionally in a tortious cooperation and that there is causation between the collective fault and the damage incurred." *Id.* ¶ 34.

25. This assessment is incorrect. The knowledge aspect is distinct from the tortious cooperation, which requires that the secondary party **consciously and willingly** participates with the primary tortfeasor.

26. The decisive aspect for the purpose of liability is the secondary party's conscious and willing "tortious cooperation." It is not necessary that the secondary party

knows about the details of what the other parties will do. And it is also not necessary that all inflicted injuries or that the magnitude of the injuries were intended. If there is a tortious cooperation, a party is liable even if it did not intend the excesses of the other parties. This is what the courts address by stating "that each party knew or should have known of the other party's contribution" or, as stated in the Werro Declaration ¶ 32, that the party "was 'unintentionally ignorant' of the consequences of its actions."

27. An example of the distinction between the two aspects is the case of the Swiss Supreme Court mentioned in the Werro Declaration at ¶ 42: If a union leader instigates workers to use force against workers who are not willing to participate in a labor strike, his collective liability can be established even if he does not know what kind of injuries the workers will inflict to these other workers. The tortious cooperation between the union leader and the workers inflicting the injury, i.e. that the union leader consciously and willingly acted together with the workers, is decisive, even though the union leader might not have anticipated the consequences of his instigation. This Swiss Supreme Court decision is discussed in further detail below.

28. Bernard Corboz, the former president of the first civil chamber of the Swiss Supreme Court, has nicely summarized the difference between the tortious cooperation, which requires that all parties consciously and willingly participate with the other parties, and the intent or negligence with regard to the inflicted injuries:

- "Il faut absolument distinguer deux étapes dans le raisonnement: il y a d'une part la coopération dans l'accomplissement de l'acte dommageable, et d'autre part la faute en regard de la survenance du dommage. Les deux choses ne vont pas de paire, parce que l'on peut *participer intentionnellement* à un acte imprudent et commettre ainsi une *faute* sous la forme de la *négligence*. Il importe peu que la faute en regard du résultat soit un dol ou une négligence. En revanche, la coopération doit être consciente et

volontaire. Chacun doit avoir voulu son acte et celui d'autrui; même s'il n'a pas envisagé, par négligence, l'issue dommageable."[3]

- My translation : "It is absolutely necessary to distinguish two stages in the analysis: there is, on the one hand, the cooperation in the accomplishment of the tortious act, and, on the other hand, the fault with regard to the occurrence of the damage. The two aspects do not go hand in hand because one can *intentionally participate* in a reckless act and thereby commit a fault by way of *negligence*. It is not relevant whether the fault with regard to the outcome was intentional or by way of negligence. However, the cooperation must be conscious and intentional. Each party must have intended his or her own act as well as those of the other parties; even though one may have negligently not contemplated the damage which would ensue."

B. The Werro Declaration's Discussion Of Causation Improperly Focuses On The Causal Link Between The Acts Of The Primary Tortfeasor And The Plaintiffs' Injuries Rather Than The Secondary Party's Adequate Causal Contribution To A Tortious Cooperation

29. The section of the Werro Declaration entitled "Causation between collective fault and the loss," Werro Decl. ¶¶ 35-48, covers two different topics:

- The section first addresses collective liability on the basis of two Swiss Supreme Court Cases, SCD 57 [1931] II 417 and SCD 71 [1945] II 107. *Id.* ¶¶ 37-43. I will discuss in detail these two decisions in the next section of this reply declaration.
- The Werro Declaration next provides a summary of the theory on natural and adequate causation. *Id.* ¶¶ 44-48. The statements in that section are correct, but are not relevant because they do not address the required adequate causal contribution to the tortious cooperation.

30. The Werro Declaration's discussion of natural and adequate causation explains the requirements of an adequate causation between a person's act and the inflicted harm. *Id.* I do not dispute these statements. I fully agree that there must be an adequate causality between the acts of the primary tortfeasor and the harms which were inflicted.

31. The Werro Declaration does not, however, address the relevant question, which concerns the adequacy of the contribution of the **secondary** party to the tortious

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[3] Bernard Corboz, La distinction entre solidarité parfaite et solidarité imparfaite, thesis University of Genève, 1974, p. 44.

cooperation with the primary tortfeasor (the "adequate causal contribution"). The question of adequate causality between acts of the primary tortfeasor and the resulting injuries should not be mixed with the question of whether a secondary party is collectively liable for acts of a primary party, i.e. whether there is an adequate causal contribution by the secondary party to the tortious cooperation.

32. I described in my first declaration the requirements for affirming an adequate causal contribution and stated that "[a]ccording to Swiss case law a contributor to a tort is only liable if his contribution is substantial." Roberto Decl. ¶ 17. My analysis of all cases decided in the last six decades by the Swiss Supreme Court concerning collective liability, many of which are discussed my first declaration, *id.* ¶¶ 19-29, shows that the Swiss Supreme Court requires a **substantial** contribution in order to affirm collective liability. The Werro Declaration does not mention any decision which rebuts this finding.

33. I will analyze the decisive question concerning the requirements of collective liability under art. 50 section CO in connection with art. 41 section 1 CO on the basis of the two decisions mentioned in the Werro Declaration in the next section.

V. The Decisions Cited In The Werro Declaration Support My Conclusion That The Secondary Party's Conduct Must Be Substantial And Willful Or Immediate To Be An Adequate Causal Contribution To The Injury

34. The Werro Declaration and my first declaration are not in agreement with regard to the question of what requirements must be satisfied in order to affirm the collective liability of a secondary party.

35. In my first declaration I concluded, based on my review of Swiss case law, that the contribution of the secondary party must be **substantial** and in addition either **willful or immediate** in order to establish collective liability. Roberto Decl. ¶ 20. The Werro

Declaration is in disagreement, and contends that the Swiss Supreme Court would find collective liability even where the "contribution to the victim's actual injury was not immediate, willful, or substantial." Werro Decl. ¶ 42. The Werro Declaration mentions two cases in support of this position: SCD 57 [1931] II 417 and SCD 71 [1951] II 107. As demonstrated below, these cases do not contradict my assessment of the necessary requirements for collective liability.

A. SCD 57 [1931] 417

36. I summarize below the details of SCD 57 [1931] II 417, which is the main case cited in support of the Werro Declaration's argument that a contribution which is not immediate, willful, or substantial can nevertheless lead to collective liability.

- Workers went on strike. The union leader repeatedly instigated the workers in the meetings to use force ("wiederholt zu Gewalttätigkeiten aufgefordert"), he repeatedly explained that the workers must be more vigorous ("mehrmals erklärt, sie müssten energischer sein"), and that there has never been a strike of carpenters without violent brawls ("es sei noch nie ein Schreinerstreik durchgeführt worden, an dem es nicht zu Prügeleien gekommen sei"). Three workers declined to take part in the strike and continued to work. Six other workers attacked the three strikebreakers. One of the six workers hit one of the strikebreakers on the head with brass knuckles, causing severe injuries.

  Even though it was clear who had injured the victim, all six attackers and the union leader were collectively liable according to the Swiss Supreme Court. They were all either perpetrators, instigators, or accomplices. They may not all have had in mind the injuries that occurred. They all, however, should have foreseen that instigating to use force or the participation in actions to intimidate workers who are not committed to the common cause can lead to grave consequences. This was particularly so in this case due to the general animosity among the workers and the fact that there were hotheads among them.

  It has to be noted that prior to the civil claims the Criminal Court of first instance held all six workers and the union leader criminally liable for causing personal injury to the victim, either as perpetrators, as accomplices, or as instigators. The Swiss Supreme Court held all convicted persons, including the union leader, liable for the damages of the victim according to art. 50 section 1 CO in connection with art. 41 section 1 CO.

37. The Werro Declaration does not dispute the assessment in paragraph 22 of my first declaration that the acts of the workers fulfill the requirements of being immediate, willful, and substantial. *See* Werro Decl. ¶ 41. However, the Werro Declaration states that the acts of the union leader do not meet the criteria mentioned in my declaration. *Id.* ¶ 42.

38. I disagree with this assessment. The fact that the Swiss Supreme Court explicitly mentioned in its decision that the union leader was criminally convicted as an instigator for the injury of the victim supports the conclusion that the criteria of immediateness, willfulness, and substantiality were satisfied with respect to the union leader's actions.

39. Someone criminally convicted for assault, as instigator, perpetrator, or accomplice, will always also be liable for the damages the assault caused to the victim. This is not the case if the criminal conviction concerns another crime. Had the union leader been convicted, for example, for hate speech, then the conviction would have been irrelevant for the question whether he was liable for the assault of the victim. However, in this case, the union leader was convicted for participation in the assault.

B. SCD 71 [1951] II 107

40. The second decision mentioned in the Werro Declaration is SCD 71 [1951] II 107. Werro Decl. ¶ 43, *see also id.* ¶ 33. The case involved a shooting competition by a group of soldiers and some civilians in the garden of a restaurant after having drunk a significant amount of alcohol. The shooting competition lasted almost an hour before the incident happened. The patron who was injured by a stray bullet entered the restaurant at a later stage and was seated at a table some meters away from the targets.

41. The important point of this case, according to the Werro Declaration, is that the landlord was, together with the soldiers, liable for the injury of the patron because "he let the shooting competition take place in the garden of his restaurant without taking the proper safety measures. Thus, the Tribunal found that the restaurant owner was liable as an accomplice, even though the owner did not act immediately, willfully, or substantially." *Id.* ¶ 43.

42. Again, I disagree with the Werro Declaration's assessment that the behavior of all parties in this case did not fulfill the requirements of a "willful and substantial" or "immediate and substantial" contribution to the injury. The landlord in this case made a willful and substantial contribution to the victim's injuries by selling alcohol to soldiers and letting the drunken soldiers conduct a shooting competition at the landlord's establishment while other patrons were sitting nearby at other tables of the restaurant.

C. Conclusions Regarding Collective Liability

43. The two cases of the Swiss Supreme Court cited in the Werro Declaration underline my analysis of Swiss law governing art. 50 section 1 CO. These two cases, as well as the other cases of the Swiss Supreme Court noted in my first declaration, show that the Swiss Supreme Court finds collective liability, regardless of distinguishing facts and circumstances, only when the secondary party's contributions are either **willful and substantial** or **immediate and substantial**.

44. The Werro Declaration does not cite any cases that contradict these findings. The two cases discussed in the Werro Declaration do not contradict, but rather further confirm the statement of the law in my declaration.

VI. Ancillary Matters Regarding My First Declaration

45. The Werro Declaration contends that my first declaration "conceded that BNPP would be the accomplice of the Government of Sudan ("GOS")." Werro Decl. ¶ 24 (citing Roberto Decl. ¶ 13). That is not the case. That statement in my declaration simply summarized the allegation of Plaintiffs with regard to the Bank:

- "Thus, the allegation is that the Bank is an accomplice to the acts committed by the GOS listed in Counts VI-XI. Therefore, the following analysis will focus on the requirements of being held liable as an accomplice in accordance with art. 50 section 1 CO."

46. Plaintiffs' Opposition also states that I misstated the requirements of art. 50 section 1 CO mentioned in SCD 104 [1978] II 225 by alleging that the parties must have together caused the damage "willfully" and not including that the parties also could have caused the damage negligently. Opp. 39 n.220. This is an oversight by Plaintiffs. My discussion of that case explicitly mentions the "willfully or negligently" standard. Roberto Decl. ¶ 14.

VII. Conclusions

47. Contrary to what is stated in the Werro Declaration, art. 50 section 1 CO does not establish an independent basis for liability under Swiss tort law. In order to be liable, a party must also fulfill all requirements of liability in accordance with the general provision of art. 41 section 1 CO. The only ambiguity in the law concerns the question whether a party can be liable not only for damages he caused, but also for damages which he did not cause if he is liable together with other parties (as some legal scholars maintain and what they describe as "the liability function of art. 50 section 1 CO") or whether the liability is not expanded by the fact that other parties are liable as well. Professor Werro's description of art. 50 section 1 CO as an independent basis for liability and his references to Swiss legal scholars are not correct.

48. Also contrary to what is stated in the Werro Declaration, collective liability requires that the secondary party (i) knows or should know of the other party's contribution, (ii) that a "tortious cooperation" can be found, which requires consciousness and willingness to participate together with the primary tortfeasor in causing a loss or damage to somebody, and (iii) that there is an adequate causal contribution to the tortious cooperation.

49. An extensive analysis of the decisions of the Swiss Supreme Court demonstrates that collective liability has only been affirmed in cases where the contribution of the secondary party was either "willful and substantial" or "immediate and substantial." This finding is affirmed by the two Swiss Supreme Court decisions cited in the Werro Declaration.

50. Therefore, as I stated in my first declaration, in order for the Complaint to succeed with the claims based on a collective liability based on art. 50 section 1 CO in connection with art. 41 section 1 CO, it 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 knowledge, tortious cooperation, and adequate causal contribution to the tortious cooperation. Roberto Decl. ¶¶ 27-29. The Complaint does not contain these allegations.

51. Based on my review of all of the relevant caselaw, I have no doubt that any claim against a bank involved in commercial activities or financing of the government of a foreign country accused of human rights abuses based on the concept of collective liability would—as long as such trades were not forbidden by specific Swiss legal provisions—be dismissed by a Swiss court without elaborating in detail the analysis made in my declaration simply by denying an "adequate" causality between the commercial activities of the bank and

the alleged acts of the foreign government.[4] I have no doubt that this would be true with regard to the present case involving the Bank and the GOS.

52. Even if a Swiss court would elaborate the conditions of a collective liability of the Bank with the GOS for the alleged acts committed by the GOS, the facts described in the Complaint are not even close to the facts of the cases cited in the Werro Declaration. The financial activities of the Bank with the GOS cannot be compared to a union leader who has been criminally convicted because he repeatedly instigated workers to use force against strikebreakers, or a landlord of a restaurant selling various alcoholic beverages to soldiers and letting them conduct a shooting competition on his premises without taking adequate precautions for the safety of his other patrons. The facts of other cases discussed in my first declaration are even more remote to the facts described by Plaintiffs in their Complaint against the Bank.

53. I am therefore convinced that a Swiss court and, in any event, the Swiss Supreme Court, would dismiss the claims described in the Complaint either for the lack of the required conditions of art. 50 section 1 CO in connection with art. 41 section 1 CO or (even more likely) simply by denying an adequate causality between the acts of the Bank and the claimed losses and damages of Plaintiffs allegedly caused by the GOS.

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[4] As I noted in my first declaration, the Complaint does not allege that any of BNPP's conduct violated Swiss laws, and in fact the Swiss Financial Market Supervisory Authority investigated the provision of financial services to Sudanese banks by BNP Paribas (Suisse) S.A. and concluded that this conduct did not violate Swiss sanctions. Roberto Decl. ¶ 36 & n.2.

VIII. Declaration

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 6 day of July, 2017

VITO ROBERTO