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 MEMORANDUM OF LAW 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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PRELIMINARY STATEMENT[1]

Plaintiffs' defectively pleaded claims suffer from five fundamental flaws.

First, Plaintiffs' claims are barred by the statute of limitations.

Second, Plaintiffs' claims are barred by the act of state doctrine.

Third, Plaintiffs conflate the criminal conspiracy to which BNP Paribas pleaded guilty—which concerned dollar-denominated transactions that the bank processed on behalf of Sudanese banks in violation of U.S. sanctions and the falsification of related records—with a purported conspiracy among the BNPP Defendants and the GOS to commit battery, assault, false arrests and imprisonments and conversions of property against Plaintiffs. SAC ¶¶ 331, 361, 393, 421, 451, 509. But the Complaint contains no well-pleaded, non-conclusory factual allegations concerning this second alleged conspiracy, on which all of Plaintiffs' claims depend.

Fourth, because the only well-pleaded, non-conclusory allegations of any misconduct by the BNPP Defendants concern BNP Paribas's sanctions violations, Plaintiffs are impermissibly seeking to assert a private right of action for those sanctions violations by alleging common law tort liability based on those violations. But no such private right of action exists.

Fifth, Plaintiffs do not state any claims under Sudanese, Swiss or New York law.

I. THE COMPLAINT IS TIME-BARRED

Plaintiffs Do Not Plead Any Diligence. To equitably toll the limitations period, which began running no later than March 2009, Plaintiffs must show that they exercised reasonable diligence in investigating potential claims. *Koch v. Christie's Int'l PLC*, 699 F.3d 141, 157 (2d Cir. 2012). But the Complaint contains no allegations of diligence of any kind, let alone reasonable diligence. This fact alone precludes Plaintiffs' tolling arguments.

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[1] Capitalized terms not defined herein have the meaning ascribed to them in the BNPP Defendants' opening brief ("BNPP Br."), ECF No. 69. Plaintiffs' opposition to this motion, ECF No. 80, is cited as "Opp."

Plaintiffs Do Not Allege They Relied On Misrepresentations By The BNPP Defendants. To invoke equitable estoppel, Plaintiffs must allege that "subsequent and specific actions by defendants somehow kept them from timely bringing suit." *Zumpano v. Quinn*, 6 N.Y.3d 666, 674 (2006). Moreover, those actions must have been "specifically directed at preventing the plaintiff from bringing suit." *Twersky v. Yeshiva Univ.*, 993 F. Supp. 2d 429, 442 (S.D.N.Y. 2014). Plaintiffs have not alleged any such actions.

Further, those actions must not be "the same act[s] which form[] the basis of plaintiff's underlying cause of action." *Abercrombie v. Andrew Coll.*, 438 F. Supp. 2d 243, 265 (S.D.N.Y. 2006) (citation omitted). Plaintiffs' efforts to distinguish concealment of BNP Paribas's misconduct from its sanctions violations, Opp. 16, all fail because a "plaintiff [must] demonstrat[e] that the defendant conducted himself in such an overt manner, after his wrongdoing," that is, in a subsequent, separate act of concealment. *Burpee v. Burpee*, 578 N.Y.S.2d 359, 362 (Sup. Ct. Nassau Cty. 1991); *see also Smith v. Smith*, 830 F.2d 11, 13 (2d Cir. 1987) (there must be "some conduct by a defendant after his initial wrongdoing [that] has prevented the plaintiff from discovering or suing upon the initial wrong"). Plaintiffs have made no such allegation.[2]

Plaintiffs May Not Invoke CPLR § 213-b. In order to extend the limitations period under CPLR § 213-b, Plaintiffs must establish a direct nexus between the criminal conduct at issue and Plaintiffs' injuries. *See Respass v. Dean*, 775 N.Y.S.2d 576 (2d Dep't 2004). They have not done so.[3] Moreover, Plaintiffs are not victims of BNP Paribas's admitted crimes, because

[2] Plaintiffs misconstrue the statement in *Veltri v. Bldg. Serv. 32B-J Pension Fund*, 393 F. 3d 318, 323 (2d Cir. 2004), that "[t]he relevant question is not the intention underlying defendants' conduct," which addresses equitable tolling, not estoppel.

[3] Plaintiffs rely on *Cavanaugh v. Watanabe*, 806 N.Y.S.2d 848, 849 (Sup. Ct. Westchester Cty. 2005), but that case applied § 213-b only because the crime there (attempted assault) gave rise to the plaintiff's claims (battery and IIED

sanctions regulations are intended to benefit the public generally, not specifically foreign victims of targeted regimes. *See infra* at 9-12.[4] We are aware of no authority for extending the limitations period under § 213-b based on sanctions violations or falsification of business records.

Plaintiffs' Intentional Tort Claims Are Time-Barred Regardless Of Tolling. The widespread publicity received by the June 2014 Agreements on June 30, 2014 and thereafter explicitly identified BNP Paribas and the conduct to which it pleaded guilty. Plaintiffs' conclusory contention that, despite that publicity, they could not reasonably have known of a possible claim until the U.S. government's May 2015 announcement of a victims' compensation fund, Opp. 15, is meritless. The existence of that fund has no bearing on the underlying facts, which were widely publicized in June 2014.[5]

II. THE ACT OF STATE DOCTRINE BARS THIS SUIT

The act of state doctrine applies whenever a court must "sit in judgment on the acts of the government of another, done within its own territory." *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). Plaintiffs seek to narrowly construe this doctrine to apply only when a court must declare sovereign conduct void. Opp. 19-20. But the doctrine also applies whenever a U.S. court must pass judgment on the legality of a sovereign's conduct in its own territory.[6]

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as a result of the assault). *Id.* at 849. No such direct relationship exists between the processing of financial transactions and the torts Plaintiffs allege. *See infra* at 9-11.

[4] The U.S. government has stated that victims of the GOS "cannot show that they were directly harmed by [BNP Paribas's] conduct." BNPP Br. 7 (citation omitted). Plaintiffs mistakenly try to recast that statement as applying only to a single "self-described victim." Opp. 17 n.87. *But see* Declaration of Mark S. Grube. Ex. A, at 9:10-12, 19-21 ("[N]umerous individuals. . . who suffered grievous harm at the direction of the regime[] in Sudan . . . are not victims of [BNPP] and cannot show that they were directly harmed by BNPP's conduct."), ECF No. 66-1.

[5] Because Plaintiffs Abdalla and Ahmed were minors when their claims accrued, they may rely on CPLR § 208 to assert timely claims. *See* BNPP Br. 5. But Plaintiffs' contention that "thousands of individuals" are similarly situated, Opp. 14 n.71, is immaterial, because no class has been certified.

[6] *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400, 405 (1990) (noting that, in *Underhill*, "holding the defendant's detention of the plaintiff to be tortious would have required denying legal effect to" acts of Venezuelan government); *see also Hourani v. Mirtchev*, 796 F.3d 1, 15 (D.C. Cir. 2015) (applying doctrine where

Here, the Court could not hold the BNPP Defendants liable without first finding that the GOS is primarily liable for Plaintiffs' injuries. *See* BNPP Br. 11. The act of state doctrine precludes such a finding. *Kirkpatrick*, 493 U.S. at 409.[7] By contrast, in *Kirkpatrick* there was no such need—the "factual predicate for application of the act of state doctrine [did] not exist" because the RICO claims at issue were based on offers of bribes to the Nigerian government, and the government's response to those offers was immaterial to the claims. *Kirkpatrick*, 493 U.S. at 405-06; *see also Hourani*, 796 F.3d at 14-15 (distinguishing *Kirkpatrick*). Finally, Plaintiffs have not disputed that the *Sabbatino* balancing factors justify applying the doctrine here. *See* BNPP Br. 11-14.

III. PLAINTIFFS' ALLEGATIONS THAT THE BNPP DEFENDANTS INTENDED TO INJURE THEM FAIL TO SATISFY BASIC FEDERAL PLEADING RULES

It is black-letter law that, to be accepted as true on a motion to dismiss, factual allegations must be "well-pleaded," and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also Worldwide Directories, S.A. de C.V. v. Yahoo! Inc.*, No. 14-CV-7349 (AJN), 2016 WL 1298987, at *5 (S.D.N.Y. Mar. 31, 2016) ("[C]onclusory representations of Yahoo's involvement [in an alleged RICO enterprise] are 'not entitled to be assumed true,' and are insufficient to 'plausibly suggest an entitlement to relief.'" (*quoting Iqbal*, 556 U.S. at 681)). Accordingly, contrary to Plaintiffs' assertion that they need only to assert plausible allegations, *see* Opp. 10-13, they must both (1) make well-pleaded, non-conclusory factual allegations, and

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suit required determination that statements by Kazakh government were "defamatory"); *Sea Breeze Salt, Inc. v. Mitsubishi Corp.*, No. 16-CV-2345 (DMG) (AGRX), 2016 WL 8648638, at *4 (C.D. Cal. Aug. 18, 2016) (barring claims dependent on finding Mexican government conspired to restrain trade); BNPP Br. 11-12.

[7] Having acknowledged that they may not assert international law claims against the BNPP Defendants, Opp. 4 n.19, Plaintiffs cannot assert that the Sudanese government's "human rights abuses like genocide" bar the application of the act of state doctrine, Opp. 20. *See* BNPP Br. 12 n.11. The other precedents on which Plaintiffs rely, Opp. 20 n.102, demonstrate only that private acts of government officials are not acts of state.

(2) show that those allegations plausibly assert a claim. *Iqbal*, 556 U.S. at 678-79.[8]

Plaintiffs' allegations that the BNPP Defendants conspired with the GOS with the intention that the GOS would perpetrate human rights abuses against Plaintiffs do not satisfy the first prong of this test. Rather, Plaintiffs' non-conclusory allegations assert only that BNP Paribas pleaded guilty to engaging in transactions that violated U.S. sanctions against the GOS, that the sanctions were intended to deprive the GOS of funds, that the transactions that BNP Paribas processed allowed GOS to sell its oil at higher prices than it otherwise would, and that the GOS committed torts against Plaintiffs. *See* Opp. 11. But these allegations do not state actionable claims that, among other things, (a) the BNPP Defendants actually agreed with the GOS to commit those torts against Plaintiffs, or that those torts were committed in furtherance of and within the scope of an agreement to violate U.S. sanctions (conspiracy); (b) they had actual knowledge of the tortious acts that injured Plaintiffs (aiding and abetting); and (c) their financial transactions and falsification of records proximately caused any of Plaintiffs' injuries (proximate causation element of all claims). *See* BNPP Br. 19-34; *infra* at 9-11.

IV. SUDANESE AND SWISS LAW GOVERN PLAINTIFFS' CLAIMS

Sudanese law governs Plaintiffs' non-negligence claims, and Swiss law governs their negligence claims. Plaintiffs incorrectly assert that New York law governs their claims, Opp. 21, ignoring that (a) the primary torts at issue, and all of Plaintiffs' injuries, occurred in Sudan, SAC ¶¶ 30-52, and (b) BNP Paribas's conduct primarily occurred in Switzerland. *See* BNPP Br. 18. The minimal alleged New York contacts do not "relate to the purpose of the particular law in conflict," *Schultz v. Boy Scouts of Am., Inc.*, 65 N.Y.2d 189, 197 (1985) (citation omitted), which is tort law—not, as Plaintiffs assert, the "U.S. federal and state laws that regulate financial

[8] The availability of subsequent discovery, *see* Opp. 12, does not "relieve [them] of the requirement [to] state a facially plausible claim." *Thayil v. Fox Corp.*, No. 11 CIV. 4791 (SAS), 2012 WL 364034, at *4 (S.D.N.Y. Feb. 2, 2012).

conduct," Opp. 21. "New York's interest in its banking system 'is not a trump to be played whenever a party to such a transaction seeks to use our courts for a lawsuit with little or no apparent contact with New York.'" *Mashreqbank PSC v. Ahmed Hamad Al Gosaibi & Bros. Co.*, 23 N.Y.3d 129, 137 (2014) (citation omitted).

Sudan has the most significant contacts with this litigation and the most compelling interest in the adjudication of the non-negligence claims. *See* BNPP Br. 15-19.[9] *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 739 F.3d 45, 50 (2d. Cir. 2013), dictates that Swiss law should apply to the negligence claims, which are the only claims that concern "the defendant's exercise of due care." Post-*Licci* negligence decisions have focused on the location of the defendants' conduct—here, Switzerland[10]—and courts applying New York choice-of-law rules for other tort claims have continued to recognize that the place of injury generally has the greatest interest in the litigation, even where the wrongful conduct occurred elsewhere.[11]

V. THE COMPLAINT DOES NOT STATE SECONDARY LIABILITY CLAIMS

A. Sudanese Law Does Not Recognize Secondary Liability Under These Circumstances

Plaintiffs' secondary liability claims against the BNPP Defendants fail under Sudanese law. First, Sudanese law provides that tort liability rests exclusively with the primary actor where, as here, the act of the direct tortfeasor, the GOS, is necessary to cause the alleged injury and the secondary actors' conduct is merely part of a sequence of events that led to the act of the

[9] That certain injuries occurred in what is now the Republic of South Sudan, Opp. 20 n.108, is irrelevant, because "the pertinent time for purposes of choice-of-law analysis is the time of the tort rather than any later time." *Youngman v. Robert Bosch LLC*, 923 F. Supp. 2d 411, 420 (E.D.N.Y. 2013).

[10] *See AHW Inv. P'ship, MFS, Inc. v. Citigroup, Inc.*, 661 F. App'x 2, 5 (2d Cir. 2016) (summary order) (applying New York law because Citigroup's conduct "took place in New York"); *Wultz v. Bank of China Ltd.*, 865 F. Supp. 2d 425, 429 (S.D.N.Y. 2012) (applying Chinese law where misconduct occurred there, despite transfers through New York).

[11] *See Negri v. Friedman*, No. 1:14-CV-10233 (GHW), 2017 WL 2389697, at *4 (S.D.N.Y. May 31, 2017) (law of place of injury governed unjust enrichment claims); *Winter v. Pinkins,* No. 14-CV-8817 (RJS), 2016 WL 1023319, at *4 (S.D.N.Y. Mar. 8, 2016) (same re: IIED and other tort claims); *In re ICP Strategic Credit Income Fund Ltd.*, No. 13-12116 (REG), 2015 WL 5404880, at *11 (Bankr. S.D.N.Y. Sept. 15, 2015), *aff'd,* No. 15-CV-7962 (VSB), 2017 WL 1929546 (S.D.N.Y. May 9, 2017) (same re: secondary liability claims).

direct tortfeasor. *See* BNPP Br. 19-20; Hassabo Decl. ¶¶ 52-59. The case law relied on by Plaintiffs' expert, Idris Decl. ¶¶ 73-105, is inapposite. Reply Declaration of Tayeb Hassabo, ("Hassabo Reply") ¶¶ 62-66.

Second, Plaintiffs fail to make non-conclusory allegations that the BNPP Defendants acted with intent or premeditation to cause Plaintiffs' injuries. *See* BNPP Br. 20; Hassabo Decl. ¶¶ 47-48; Hassabo Reply ¶ 15. Plaintiffs' expert's opinion that Sudanese law does not require intent or causation to hold the BNPP Defendants secondarily liable, Idris Decl. ¶¶ 49-72, 87-90,[12] is incorrect. Hassabo Decl. ¶¶ 33-39, 47-48; Hassabo Reply ¶¶ 40, 45-47.

Third, Sudanese law bars liability for the "lawful exercise of rights" such as BNP Paribas's provision of financial services, which were permissible under Sudanese law. *See* BNPP Br. 20; Hassabo Decl. ¶¶ 60-62. Plaintiffs offer no credible grounds for alleging that the BNPP Defendants violated Sudanese law. Hassabo Reply ¶¶ 67-78.

B. The Complaint Does Not Plead Secondary Liability Under Swiss Law

Plaintiffs have not plausibly alleged that the BNPP Defendants' conduct satisfies the requirements for collective liability under Swiss law: (1) collective conduct, (2) collective fault and (3) collective causation. *See* BNPP Br. 21-22. Plaintiffs' attenuated theory that the BNPP Defendants' U.S. dollar transactions allowed the GOS to sell its oil at higher prices, grow its military and commit torts against Plaintiffs, *see* Opp. 39 & n.221, does not satisfy the Swiss law requirements that a secondary actor's conduct must be substantial and willful or immediate. *See* Reply Declaration of Vito Roberto ¶¶ 47-53 ("Roberto Reply").[13]

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[12] From his CV and public records, it is unclear whether Mr. Idris has ever practiced before Sudanese courts. Hassabo Reply ¶ 4.

[13] Plaintiffs' expert's assertions that Professor Roberto has misstated Swiss law, *see e.g.*, Declaration of Franz Werro ("Werro Decl.") ¶¶ 17, 21, are unsupported by caselaw and Professor Werro's own authorities. Roberto Reply ¶¶ 20-44.

C. The Complaint Does Not Adequately Plead Under New York Law That The BNPP Defendants Conspired With The GOS To Injure Plaintiffs Or That Plaintiffs' Injuries Were Within The Scope Of The Conspiracy To Violate U.S. Sanctions

BNP Paribas's Federal Guilty Plea Does Not Establish A Conspiracy To Injure Plaintiffs. Because Plaintiffs mistakenly conflate BNP Paribas's admitted conspiracy to violate U.S. sanctions with its alleged participation in a conspiracy with the GOS to harm Plaintiffs, they are wrong that BNP Paribas's guilty plea proves each element of the latter except for foreseeability, and that BNP Paribas is estopped from contending otherwise. Opp. 24. An action for civil conspiracy requires that the substance of the agreement be specifically alleged, *Chrysler Capital Corp. v. Century Power Corp.*, 778 F. Supp. 1260, 1267 (S.D.N.Y. 1991), and a guilty plea is only "an admission of the essential elements of the conspiracy charged," *UCAR Int'l, Inc. v. Union Carbide Corp.*, No. 00CV1338 (GBD), 2004 WL 137073, at *16 (S.D.N.Y. Jan. 26, 2004), *aff'd*, 119 F. App'x 300 (2d Cir. 2004). BNP Paribas never admitted to conspiring to harm or injure Plaintiffs, or entering into an agreement "to enable and facilitate" the GOS's "commission of human rights abuses and other crimes." SAC ¶ 296. Thus, its guilty plea neither establishes any of the elements of such a conspiracy, nor estops BNP Paribas. *Compare id. with* SOF ¶ 14.[14]

Plaintiffs Do Not Adequately Plead The BNPP Defendants' Agreement To A Conspiracy That Encompasses Their Injuries. Plaintiffs' argument that "foreseeability" can substitute for their failure to plead any relationship between the BNPP Defendants' understanding of the scope of the alleged conspiracy and the alleged acts injuring Plaintiffs, Opp. 25, ignores that a conspirator is liable only for acts committed within the scope of the conspiracy "as he

[14] A criminal conviction only forecloses issues that are "expressly or necessarily decided in [the] criminal proceeding." *Allstate Ins. Co. v. Zuk*, 78 N.Y.2d 41, 45 (1991) (collateral estoppel appropriate only where "the issue is identical in both actions," and "necessarily decided in the prior criminal action"); *see also Abacus Fed. Sav. Bank v. Lim*, 905 N.Y.S.2d 585, 588 (1st Dep't 2010).

understands it."[15] The essence of civil conspiracy liability is that the torts by which a plaintiff was injured must have been committed "in pursuance of [the defendant's] agreement."[16] For example, in *Stutts v. De Dietrich Grp.*, No. 03-CV-4058 (ILG), 2006 WL 1867060, at *15 (E.D.N.Y. June 30, 2006), the court dismissed New York common law claims because the defendant bank's processing of financial transactions "in no way suggests that the banks intended to further [Saddam] Hussein's use of chemical weapons."[17] Plaintiffs have made no non-conclusory allegations that the acts that injured them were committed within the scope of, and "in pursuance of," any conspiracy other than the one to which BNP Paribas pleaded guilty.[18] *See, e.g.*, SAC ¶¶ 10-11, 13-14.[19]

Plaintiffs Do Not Adequately Allege That Their Injuries Were Caused By A Conspiracy Between The BNPP Defendants And The GOS. Plaintiffs resort to arguing, without supporting

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[15] *United States v. McDermott*, 245 F.3d 133, 137 (2d Cir. 2001); *see also Cofacredit, S.A. v. Windsor Plumbing Supply Co.*, 187 F.3d 229, 240 (2d Cir. 1999) (imputing to all co-conspirators only those misrepresentations made "within the scope of the conspiracy").

[16] *Pittman ex rel. Pittman v. Grayson*, 149 F.3d 111, 122 (2d Cir. 1998) (citation omitted); *see also Rastelli v. Goodyear Tire & Rubber Co.*, 79 N.Y.2d 289, 295 (1992).

[17] Plaintiffs' attempt to distinguish *Stutts* as not involving an unlawful act, *see* Opp. 27, is a red herring—the court dismissed the complaint for failing to allege a basis for concluding the bank defendants and Hussein "shared a common goal relating to the proliferation and use of chemical weapons," irrespective of the legality of the transactions, 2006 WL 1867060, at *14. Plaintiffs' claim that *Stutts* is inapposite because it addresses only ATA claims, *see* Opp. 27, is wrong—*Stutts* separately addressed the scope of civil conspiracy liability under New York common law, 2006 WL 1867060, at *14. Plaintiffs' reliance on *Kashi v. Gratsos*, 790 F.2d 1050, 1055 (2d Cir. 1986), Opp. 25-26, is misplaced, because it addresses the liability of a defendant who deliberately participated "in an agreement between himself and his co-defendants" to commit the underlying tort alleged. Here, by contrast, the only non-conclusory allegations concern BNP Paribas's conspiracy "to violate sanctions." *See, e.g.*, SAC ¶¶ 3, 10; Opp. 25.

[18] Further, the "scope of the conspiracy" must be construed narrowly. *Lindsay v. Lockwood*, 625 N.Y.S.2d 393, 398 (Sup. Ct. Monroe Cty. 1994) (no conspiracy liability where the primary tortfeasor's acts were not "foreseeable by the other defendants as being within the scope of the agreement"). Thus, the BNPP Defendants may not be held liable for torts committed outside the scope of an agreement to violate U.S. sanctions. BNPP Br. 18, 22, 30. Plaintiffs' attempt to distinguish *Bigio v. Coca-Cola Co.*, 675 F.3d 163, 176 (2d Cir. 2012), because "[t]here was no conspiracy," Opp. 25, fails, because the court there dismissed claims of conspiracy liability on the ground that—as is true here—the complaint "allege[d] no facts suggesting the existence of an agreement" to commit the underlying torts, *Bigio*, 675 F.3d at 176.

[19] Plaintiffs argue that "purpose" is not an element of common law conspiracy, Opp. Br. 27, but the caselaw they cite contradicts them. *See Kashi*, 790 F.2d at 1055. Plaintiffs suggest that the BNPP Defendants have "confuse[d] motive with the object of the conspiratorial agreement," Opp. 26, but they do not adequately allege either that the BNPP Defendants had the motive of harming Plaintiffs or that such harm was the object of the conspiracy to which BNP Paribas pled guilty.

authority, that liability flows from the mere purported foreseeability of their injuries from the conspiracy to violate U.S. sanctions. But New York law requires that a plaintiff's injuries must "result" from the conspiracy alleged, and foreseeability is only one part of the proximate causation inquiry. *See* Opp. 24; BNPP Br. 22. "[A] person is not liable to all those who may have been injured by his conduct, but only those with respect to whom his acts were a substantial factor in the sequence of responsible causation and whose injury was reasonably foreseeable or anticipated as a natural consequence." *Rothstein v. UBS AG*, 708 F.3d 82, 91 (2d Cir. 2013) (citation omitted) (emphasis added); *see also Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 283 (2d Cir. 2006).

Plaintiffs' causal theory rests on the "*post hoc, ergo propter hoc* proposition that … any provider of U.S. currency to a state" alleged to have harmed a plaintiff "would be strictly liable for injuries subsequently caused" by that state or entities associated with it. *Rothstein* explicitly rejected that proposition, 708 F.3d at 96, as did Judge Bates in the District of Columbia when he dismissed civil claims against the BNPP Defendants based on the same sanctions violations at issue here, *Owens v. BNP Paribas S.A.*, No. CV 15-1945 (JDB), 2017 WL 394483, at *10 (D.D.C. Jan. 27, 2017). Moreover, funds provided to a sovereign state are not "fungible" because states provide legitimate services and "certain transactions with state sponsors of terrorism are allowed by law." *Id.* at *10; *see also Rothstein v. UBS AG*, 772 F. Supp. 2d 511, 516 (S.D.N.Y. 2011), *aff'd*, 708 F.3d 82 (2d Cir. 2013).

In short, Plaintiffs' claims rest on the false premise that overt acts taken in furtherance of one conspiracy (to violate U.S. sanctions) also create liability for the results of a different alleged conspiracy (to harm Plaintiffs). Opp. 25-27. Accepting Plaintiffs' theory would effectively permit them to assert a private right of action for BNP Paribas's sanctions violations. But

Executive Orders, such as those imposing sanctions, cannot "be enforced privately unless they were intended by the executive to create a private right of action," *Zhang v. Slattery*, 55 F.3d 732, 748 (2d Cir.1995), and the Sudan sanctions orders explicitly state that they do not create any right or benefit enforceable against any person, *see* BNPP Br. 30 n.31. Courts have consistently refused to infer a private right of action from executive orders containing the same unambiguous language. *See, e.g.*, *Peterson v. Islamic Republic of Iran*, No. 13-CV-9195 (KBF), 2015 WL 731221, at *7 (S.D.N.Y. Feb. 20, 2015).

D. The Complaint Does Not Adequately Plead Under New York Law That The BNPP Defendants Aided And Abetted The GOS In Injuring Plaintiffs

Plaintiffs Do Not Adequately Allege That The BNPP Defendants Had Actual Knowledge Of The GOS's Torts. Plaintiffs' allegations that the BNPP Defendants should have known that their conduct could cause injuries to Plaintiffs, or were on notice of this possibility—due to "wide-spread contemporaneous reporting," Opp. 28—are insufficient to establish the required actual knowledge.[20] Likewise, Plaintiffs' allegations concerning the GOS's general propensity to commit torts are inadequate to allege that the BNPP Defendants actually knew about the torts alleged in the Complaint. *See Kirschner v. Bennett*, 648 F. Supp. 2d 525, 544 (S.D.N.Y. 2009).[21]

Plaintiffs Do Not Adequately Allege That The BNPP Defendants Provided Substantial Assistance To The GOS's Torts. Substantial assistance must "advance the [tort's] commission," and it is insufficient to claim only that a defendant provided general assistance to a tortfeasor. *Lerner*, 459 F.3d at 292 (citation omitted); *see also Mastafa v. Australian Wheat Bd. Ltd.*, No. 07 CIV. 7955 (GEL), 2008 WL 4378443, at *4 (S.D.N.Y. Sept. 25, 2008). Plaintiffs allege that the

[20] *See* BNPP Br. 24-25; *see also Terrydale Liquidating Tr. v. Barness*, 611 F. Supp. 1006, 1027 (S.D.N.Y. 1984) (mere notice or a "strong suspicion" are inadequate to allege actual knowledge).

[21] *See also Stutts*, 2006 WL 1867060, at *6. Plaintiffs err in referring to the DFS's reliance on an email as evidence of BNP Paribas's "criminal intent," Opp. 28-29, because that email shows, at most, an intent to violate sanctions, not to aid the GOS's torts against Plaintiffs.

BNPP Defendants provided the GOS with access to "petrodollars" in violation of U.S. sanctions, but they have not made any non-conclusory allegation that those funds facilitated the torts that injured them. *See supra* at 5, 9-11. Plaintiffs cite no authority for the proposition that transferring funds on behalf of a government constitutes "substantial assistance" to torts perpetrated by that government, Opp. 29-30, and *Mastafa* is precisely to the contrary, 2008 WL 4378443, at *4 ("[A]iding the Hussein regime is not the same thing as aiding and abetting its alleged human rights abuses"). "[A] bank is generally not liable for injuries done with money that passes through its hands," *In re Terrorist Attacks on Sept. 11, 2001*, 464 F. Supp. 2d 335, 340 (S.D.N.Y. 2006), *aff'd*, 714 F.3d 118 (2d Cir. 2013) (citation omitted), especially where the counterparty is a government, *Rothstein*, 708 F.3d at 97; *Owens*, 2017 WL 394483, at *10.

Plaintiffs Do Not Adequately Allege That The BNPP Defendants Caused Their Injuries. Throughout their brief, Plaintiffs either ignore the numerous precedents requiring that they allege in non-conclusory terms a proximate causal link between BNP Paribas's sanctions violations and Plaintiffs' injuries, or they try to distinguish these precedents on immaterial grounds. Plaintiffs have failed to adequately plead this causal connection. *See supra* at 9-11.

VI. THE COMPLAINT DOES NOT STATE CLAIMS FOR PRIMARY LIABILITY

Sudanese law. The IIED, commercial bad faith and unjust enrichment claims fail under governing Sudanese law. *See* BNPP Br. 28-33; Hassabo Decl. ¶¶ 74-78; Hassabo Reply ¶¶ 87-89. Plaintiffs' Sudanese law expert does not deny that there is no claim under Sudanese law for commercial bad faith and IIED. As to unjust enrichment, the Complaint fails to allege, as it must, that Plaintiffs transferred money to the BNPP Defendants or that any such transfer occurred under a contract between Plaintiffs and the BNPP Defendants. Hassabo Reply ¶¶ 88-89.

Swiss law. Swiss law applies to the negligence *per se* and NIED claims, *see supra* at 5-6, but Plaintiffs have stated no primary liability claims under Swiss law, *see* BNPP. Br. 28-33; Roberto Decl. ¶¶ 34-43, a conclusion that Plaintiffs' own Swiss law expert does not contest.

New York law. (a) Negligence *per se*. Plaintiffs argue that the statutes and regulations BNP Paribas violated create standards of care giving rise to claims for negligence *per se*. *See* BNPP Br. 30-31; Opp. 31. "[T]he terms of a regulatory statute should not receive automatic construction as a standard of care in negligence litigation," *Dance v. Town of Southampton*, 467 N.Y.S.2d 203, 206 (2d Dep't 1983), and statutes do not create a standard of care where, as here, they provide no benefit to a class of persons more limited than the public at large.[22]

Contrary to Plaintiffs' assertion that consideration of whether a private right of action exists "misses the point," Opp. 33, the existence of a private right of action for the violation of a statute and the existence of a duty of care are two sides of the same coin. "If mere proof of a violation of [a statute] were to establish negligence per se, [a] plaintiff would effectively be afforded a private right of action that the [statute] does not recognize." *Lugo v. St. Nicholas Assocs.*, 772 N.Y.S.2d 449, 454-55 (Sup. Ct. N.Y. Cty. 2003), *aff'd,* 795 N.Y.S.2d 227 (1st Dep't 2005). Plaintiffs' own authorities recognize this principle,[23] and numerous other courts have found there to be no cause of action for negligence *per se* where the statute that was violated provided no private right of action, as is the case here.[24]

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[22] *See* BNPP Br. 31 n.32; *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001) ("Statutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons." (citation omitted)).

[23] *See Prohaska v. Sofamor, S.N.C.*, 138 F. Supp. 2d 422, 448 (W.D.N.Y. 2001) (test for determining whether negligence *per se* claim exists includes consideration of whether private right of action exists); *Loewy v. Stuart Drug & Surgical Supply, Inc.*, No. 91 CIV. 7148 (LBS), 1999 WL 76939, at *4 (S.D.N.Y. Feb. 11, 1999), *adhered to on reconsideration,* No. 91 CIV. 7148 (LBS), 1999 WL 216656 (S.D.N.Y. Apr. 14, 1999) (same).

[24] *See, e.g., C.T. v. Valley Stream Union Free Sch. Dist.*, 201 F. Supp. 3d 307, 327 (E.D.N.Y. 2016) (no negligence *per se* claim where New York statute creates no private right of action); *Stutts*, 2006 WL 1867060, at *19 (no negligence *per se* claim where treaties and laws create no private rights of action).

Further, even if the sanctions regime created a standard of care, Plaintiffs would not be in the class of intended beneficiaries. That regime was created for the benefit of U.S. national security, not the foreign victims of intentional torts perpetrated by their own governments. *See* BNPP Br. 31 n.32. And since Plaintiffs were not defrauded by the BNPP Defendants, they cannot be victims of a violation of N.Y. Penal Law § 175.10, as the statute requires an "intent to defraud." Finally, as demonstrated *supra* at 9-11, Plaintiffs have not shown that the BNPP Defendants' violations proximately caused their injuries.[25]

(b) IIED. Plaintiffs attempt to save their IIED claim by asserting that "*In re Terrorist Attacks* and other cases dealing with banks acting in the ordinary course are inapposite." Opp. 35. In fact, that case involved more extreme conduct—claims that the defendants processed financial transactions for a designated FTO (al Qaeda)—but still found no IIED liability. *See In re Terrorist Attacks*, 714 F.3d at 118. Plaintiffs do not explain how processing financial transactions for the GOS is more egregious than doing so for al Qaeda. *See id.* at 126. Moreover, the BNPP Defendants have demonstrated that allegations based solely on the provision of financial services to a third party that in turn causes an injury do not satisfy IIED's causation requirement. *See id.* at 121-22, 126.

(c) NIED. Plaintiffs again fail to show that the BNPP Defendants owed them a duty of care. Contrary to Plaintiffs' assertion that "the Sanctions violations and § 175.10 . . . provide evidence of a duty and standard of care," Opp. 36-37, "[b]anks do not owe non-customers a duty to protect them from the intentional torts of their customers." *Lerner*, 459 F.3d at 286 (citation omitted).

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[25] Contrary to Plaintiffs' assertion, Opp. 32, "[t]he issue of proximate cause may be determined as a matter of law where no reasonable person could find causation based on the facts alleged in the complaint." *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512, 538 (S.D.N.Y. 2003) (citing *Smith v. Stark*, 67 N.Y.2d 693, 694 (1986)).

(d) Commercial Bad Faith. Plaintiffs' argument that *Lerner* "merely described one application of the [commercial bad faith] doctrine," Opp. 37, is belied by the opinion, which states that the Court had "considerable doubt" whether commercial bad faith applies to claims that "do not allege fraud in the making and cashing of checks," 459 F.3d at 293. All of the authorities Plaintiffs cite involve fraudulent bank transfers resulting in theft or embezzlement, even if physical checks were not involved. *See* Opp. 37 n.210.

(e) Unjust Enrichment. The basic elements of an unjust enrichment claim require that the defendant be enriched at the plaintiff's expense. *See* BNPP Br. 32; Opp. 38. Plaintiffs' allegations in this regard are conclusory, *see* SAC ¶ 501, and assert no right to the transaction fees that were paid to the banks, *Bigio*, 675 F.3d at 177. Moreover, BNP Paribas has not been unjustly enriched; instead, the penalties it incurred for its violations included complete disgorgement of all profits earned in connection with those violations, and substantial fines. *See* SAC Ex. B, at 1-2. Finally, Plaintiffs must, but cannot, allege a "sufficiently close relationship with the" Defendants that is not "too attenuated," such as one sufficiently close to "cause[] reliance or inducement." *Georgia Malone & Co. v. Rieder*, 19 N.Y.3d 511, 516 (2012).

VII. PLAINTIFFS HAVE NO CLAIMS AGAINST BNPP-NA AND THE BRANCH

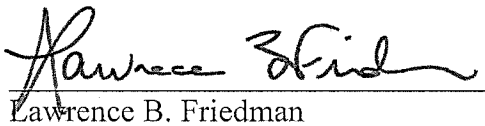
Plaintiffs' sole support for their claims against BNPP-NA consists of a statement attributed to a BNPP-NA executive that purportedly indicates his knowledge of BNP Paribas's criminal conduct. Opp. Br. 40. But Plaintiffs do not allege any specific wrongdoing by BNPP-NA, which was not charged and was not a party to the June 2014 Agreements. *See* BNPP Br. 35. Plaintiffs' claims against the Branch also fail because they do not dispute that the Branch is not a juridical entity that is amenable to suit. *See* BNPP Br. 34.

CONCLUSION

The Court should dismiss the Complaint with prejudice.

Dated: New York, New York
July 6, 2017

CLEARY GOTTLIEB STEEN & HAMILTON LLP



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