18-1304-cv

United States Court of Appeals
for the
Second Circuit

ENTESAR OSMAN KASHEF, ALFADEL MOSABAL, ABUBAKAR ABAKAR, SIAMA ABDELNABI HAMAD, ABBO AHMED ABAKAR, HAWA MOHAMED OMAR, JANE DOE, NYANRIAK TINGLOTH, REVEREND ANDERIA LUAL, NICOLAS HAKIM LUKUDU, TURJUMAN RAMADAN ADAM, JOHNMARK MAJUC, JOSEPH JOK, HALIMA SAMUEL KHALIFA, AMBROSE MARTIN ULAU, SANDI (SUNDAY) GEORGARI MARJAN, SHAFIKA G. HASSAN, JANE ROE, JUDY DOE, SARA NOURELDIRZ ABDALLA, AMIR AHMED,

Plaintiffs-Appellants,

– v. –

BNP PARIBAS S.A., BNP PARIBAS NORTH AMERICA, INC., DOES 1-10, BNP PARIBAS, S.A., NEW YORK BRANCH

Defendants-Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANTS-APPELLEES BNP PARIBAS S.A. AND BNP PARIBAS NORTH AMERICA, INC.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned counsel for Defendants-Appellees BNP Paribas S.A. and BNP Paribas North America, Inc. certifies that BNP Paribas is a publicly traded company organized under the laws of France and has no parent company, and no publicly-held corporation owns 10% or more of its shares. BNP Paribas North America, Inc. is a wholly-owned subsidiary of BNP Paribas USA, Inc. (formerly Paribas North America, Inc.).

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COUNTERSTATEMENT OF THE ISSUES

1. Did the district court correctly conclude that the act of state doctrine bars nearly all of the Complaint's claims because they require this Court to sit in judgment of the acts of a foreign sovereign within its own territory?

2. Did the district court correctly hold that Plaintiffs' intentional tort claims are time-barred, and that New York C.P.L.R. § 213-b does not apply to make them timely?

COUNTERSTATEMENT OF THE CASE

The acts of violence alleged in the Complaint are abhorrent. But Defendants BNP Paribas S.A. ("BNP Paribas") and BNP Paribas North America, Inc. ("BNPP-NA") (collectively, the "the BNPP Defendants") are not responsible for those acts. The BNPP Defendants did not commit those acts, nor did they assist the Sudanese government in perpetrating abuses against its citizens.

The Complaint asks this Court to fashion a class action remedy under New York common law for injuries allegedly caused by a foreign sovereign against its own citizens in its own territory. It leaps from allegations of a conspiracy among the BNPP Defendants, Sudan and Sudanese banks to process U.S. dollar-denominated transactions for Sudan in violation of U.S. sanctions (for which Plaintiffs cannot assert a private right of action) to alleging that the BNPP Defendants are liable for having conspired with and aided and abetted Sudan in

committing atrocities against its citizens. This Court rejected a similar claim also in the context of human rights violations in Sudan—based on the same theory—under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), refusing to allow that statute to "act as a vehicle for private parties to impose embargos or international sanctions through civil actions in United States courts." *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 264 (2d Cir. 2009). This Court explained that "[s]uch measures are not the province of private parties but are, instead, properly reserved to governments and multinational organizations." *Id.*

The same is true here: the U.S. government imposed sanctions on Sudan that BNP Paribas violated, but the U.S. political branches did not create a private civil action for that violation. Presumably recognizing this, and faced with clear bars to suit under the ATS and any other potentially applicable statutory framework, the Complaint predicates its claims solely on what it alleges to be New York common law torts. But because adjudicating these common law claims would require determining whether Sudan was a tortfeasor in its conduct toward its own nationals in its own territory, the district court properly rejected this invitation to intrude into the realm of the political branches, and found that the act of state doctrine bars this suit.

The district court also properly dismissed the Complaint's intentional tort claims on the alternative ground that they are time-barred.

A. The Legal Framework

U.S. courts have long adhered to the act of state doctrine, which provides that "[e]very sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not 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). The act of state doctrine "is not some vague doctrine of abstention but a '*principle of decision* binding on federal and state courts alike.'" *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400, 406 (1990) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 (1964)). It stems from the "domestic separation of powers, reflecting 'the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder' the conduct of foreign affairs." *Id.* (quoting *Sabbatino*, 376 U.S. at 423).

B. The Allegations Of The Complaint

The Second Amended Complaint ("Complaint" or "Compl.") is premised on an alleged conspiracy among the BNPP Defendants, Sudanese financial institutions, the Sudanese government and various of its agents and affiliates. *See* Compl. ¶¶ 101-190 (JA-81-110). The Complaint asserts that, in violating U.S. sanctions by processing financial transactions on behalf of sanctioned Sudanese entities, the BNPP Defendants "knowingly facilitated and supported the crimes of

a lawless regime by providing the financial means by which [Sudan] committed widespread human rights violations," Compl. ¶ 194 (JA-112), including violent acts over the course of more than a decade (between 1997 and 2009) in southern Sudan, Darfur and Khartoum by members of the Sudanese security forces, para-military forces or proxy militia, known as the "Janjaweed." *See, e.g.*, Compl. ¶¶ 68-70, 120, 135-143, 167-69 (JA-69-70, 88, 93-96, 103-104). The Complaint contends that:

> [f]rom 1997 to 2007, in criminal violation of U.S. sanctions that were intended to stop Sudan's terrorist activities and human rights abuses and of New York law, [the BNPP Defendants] secretly conspired with the rogue government of Sudan and gave it forbidden access to the U.S. financial markets and U.S. dollar clearing services in New York. . . . . With [the BNPP Defendants'] assistance, rather than being crippled by the U.S. sanctions, the government of Sudan exploited its oil resources by harming, killing, and displacing civilians living in oil rich regions and saw its revenues from oil dramatically increase, revenues it used to buy planes, helicopters and weapons, to fund its military and militias, and to escalate its campaign of unspeakable atrocities against its own people.

Compl. ¶1 (JA-34).

The allegations in the Complaint concerning the BNPP Defendants are based almost exclusively on BNP Paribas's June 2014 guilty pleas to federal and New York state criminal charges, and related civil settlements with federal and New York state banking regulators and the U.S. Office of Foreign Assets Control, addressing violations of U.S. sanctions that prohibit certain financial transactions with designated countries and Specially Designated Nationals (collectively, the

"June 2014 Agreements").[1] *See, e.g.*, Compl. ¶¶ 19, 193-218 (JA-42, 111-122). The financial services that are the subject of the Complaint were processed by a Swiss subsidiary of BNP Paribas, BNP Paribas (Suisse) S.A. ("BNPP Geneva"). *See, e.g.*, Compl. ¶ 209 (JA-118-119).

The Complaint purports to assert against the BNPP Defendants 20 causes of action under New York tort law. *See* Compl. ¶¶ 257-529 (JA-29-31, 102-190). Fourteen of these claims are premised on theories of secondary liability, and seek to hold the BNPP Defendants liable for purportedly aiding and abetting and conspiring with the government of Sudan to commit battery (Claims 3-6), assault (Claims 7-8), false arrest and false imprisonment (Claims 9-10), conversion (Claims 11-14) and wrongful death (Claims 19-20).

The Complaint premises each of these secondary liability claims on direct tortious actions carried out by the government of Sudan. *See, e.g.*, Compl. ¶ 330 (JA-151) ("The GOS [government of Sudan] used its state power and resources to commit such intentional, offensive bodily contacts against its own civilians, including Plaintiffs and the Class"); Compl. ¶ 355 (JA-156) ("the GOS intentionally threatened to cause harmful and offensive contact to Plaintiffs and the Class"); Compl. ¶ 387 (JA-161) ("the GOS intentionally falsely arrested and

[1] BNP Paribas pled guilty to one count of conspiracy to violate the International Emergency Economic Powers Act and the Trading with the Enemy Act under federal law, JA-194, and one count of falsifying business records in the first degree and conspiracy in the fifth degree under New York criminal law, JA-253.

falsely imprisoned civilians"); Compl. ¶ 445 (JA-172) ("the GOS converted property from civilians in Sudan"); Compl. ¶ 516 (JA-187) ("the GOS engaged in a campaign of violence that included the intentional and negligent killing of civilians"). Accordingly, these claims require the Court to rule that the acts of a sovereign within its territory are unlawful.

While the Complaint describes these acts of Sudan at great length, it does not contain any non-conclusory allegations sufficient to support the inference that the BNPP Defendants entered into an agreement with the government of Sudan to "commit[] widespread human rights violations against vulnerable citizens, including women and children." Compl. ¶ 194 (JA-112). Nor does it contain any non-conclusory allegations supporting the theory that the BNPP Defendants shared a common goal with Sudan to commit the alleged abuses. Likewise, there are no non-conclusory allegations that the BNPP Defendants had actual knowledge of the Sudanese government's tortious acts that injured Plaintiffs. For these reasons, the secondary liability claims would fail to state a claim under any potentially applicable common law (a separate ground for dismissal not reached by the district court), even if they were not already barred by the act of state doctrine.

The remainder of the claims in the Complaint seek to hold the BNPP Defendants primarily liable for Plaintiffs' injuries they allege were caused by the government of Sudan. These claims are founded on theories of negligence (Claims

1-2), intentional and negligent infliction of emotional distress (Claims 15-16), commercial bad faith (Claim 17) and unjust enrichment (Claim 18). Although these are pleaded as primary liability claims, each of them, like the overtly secondary liability claims, is also predicated on direct injuries unlawfully inflicted not by the BNPP Defendants but by the government of Sudan in Sudan. *See, e.g.*, Compl. ¶ 482 (JA-180) ("Defendants knew or should have known that the GOS was using their transactions to perpetrate violence, so as to prop up the GOS economy, without which such mass brutality toward Plaintiffs and the Class could not have occurred."). Accordingly, these claims too require the Court to sit in judgment of the acts of a sovereign in its own territory. Notably, in its attempt to avoid the limits of the ATS and the lack of any private right of action for sanctions violations, the Complaint alleges no claims against the BNPP Defendants for any violation of any principle of international law or predicated on any statutory cause of action.

Furthermore, the Complaint contains no non-conclusory allegations that the BNPP Defendants' conduct caused Plaintiffs' injuries. Generalized allegations that "BNPP Geneva took on a central role in Sudan's foreign commerce market," Compl. ¶ 19 (JA-222-223), or that "the GOS could otherwise not have funded the military at the nearly same level without BNPP's Sanctions violations," Compl. ¶ 120 (JA-88), cannot substitute for plausible individualized allegations of

causation by the BNPP Defendants as to each tort alleged.[2] Critically, the Complaint does not identify a single banking transaction processed by the BNPP Defendants for Sudanese banks that purportedly provided funds *actually used* to perpetrate the alleged torts against Plaintiffs.

Finally, anticipating a statute of limitations defense, the Complaint asserts that Plaintiffs did not know and could not have reasonably known of their claims against the BNPP Defendants until the sentencing of BNP Paribas for its sanctions violations on May 1, 2015. Compl. ¶ 253 (JA-134). However, the Complaint attaches as exhibits the public settlement documents that form the basis of the June 2014 Agreements, which were published and publicized shortly after BNP Paribas entered into them, on June 30, 2014. *See* Compl. Exs. A-K (JA-193-373). These documents demonstrate that the Complaint's claims accrued at the very latest in June 2014, not May 2015 as the Complaint contends.

[2] The Complaint contains several other conclusory allegations of causation: that Plaintiffs were injured "[a]s a direct and proximate result of Defendants' negligence," *see, e.g.*, Compl. ¶ 274 (JA-140); and the BNPP Defendants' conduct was "a substantial factor in causing harm to Plaintiffs," *see, e.g.*, Compl. ¶ 346 (JA-154). These are "legal conclusion[s] couched as [ ] factual allegation[s]," which a court is "not bound to accept as true." *Pension Benefit Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 717 (2d Cir. 2013) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

C. The District Court's Ruling

On March 30, 2018, the district court issued a final order granting the BNPP Defendants' motion to dismiss the Complaint. *See* SPA-19. The district court held that: (1) the act of state doctrine bars consideration of all but two of Plaintiffs' claims (Claims 1-16, 19-20); (2) nine of the claims barred by the act of state doctrine should also be dismissed as untimely (Claims 3-10, 15); and (3) the remaining two claims, for commercial bad faith and unjust enrichment, failed to state any claims upon which relief may be granted (Claims 17, 18). *Id.*

As to the act of state doctrine, the district court applied longstanding precedents from the Supreme Court and this Court to conclude that the doctrine bars all but two of the claims against the BNPP Defendants because "the Court cannot rule on these claims without 'sit[ting] in judgment on the acts of the government of another, done within its own territory." SPA-9 (quoting *Underhill*, 168 U.S. at 252). The court noted that the secondary liability claims "ask the Court to find that the Government of Sudan's actions amounted to battery, assault, wrongful takings, and other common law claims. This is what the act of state doctrine prohibits the Court from doing." SPA-8. The district court similarly concluded that the act of state doctrine bars Plaintiffs' claims for negligence *per se*, outrageous conduct causing emotional distress, and negligent infliction of

emotional distress because those claims too are legally predicated on findings that the government of Sudan is responsible for Plaintiffs injuries. SPA-8-9.

After determining that the act of state doctrine applies to these claims, the district court concluded that the policy considerations established by the Supreme Court in *Sabbatino* supported application of the doctrine. SPA-4-5. The district court rejected Plaintiffs' contention that the international consensus around human rights norms weighed against application of the act of state doctrine, because Plaintiffs brought "only common law claims under the laws of New York" and not "causes of action arising under international law for human rights abuses." SPA-8. Further, to the extent that Plaintiffs' claims rest upon violations of U.S. sanctions, those issues are "properly left to the judgment of the Executive Branch rather than the courts." SPA-6-7.

The district court also held that the Complaint's intentional tort claims are untimely. SPA-10. The district court rejected Plaintiffs' assertions that they are entitled to the seven-year statute of limitations in N.Y. C.P.L.R. § 213-b for crime victims. SPA-11. As the court noted, "Rule 213-b is only applicable if the plaintiff is a direct victim of the crime to which the defendant pled guilty," but "the victim of the crime to which [BNP Paribas] pled guilty was the United States – not the individual Plaintiffs." SPA-12. The district court then proceeded to consider whether Plaintiffs were entitled to equitable tolling. The court determined that the

Plaintiffs were entitled to such tolling only until June 2014, when the June 2014 Agreements were "widely publicized." SPA-14. Accordingly, the Complaint's intentional tort claims "expired in June 2015, nearly a year before the first complaint was filed in this action . . . . except for Plaintiffs who were minors at the time of their injuries." SPA-15.

The district court also held that Plaintiffs failed to state a claim upon which relief could be granted for commercial bad faith or unjust enrichment (Claims 17 and 18). *See* Fed. R. Civ. P. 12(b)(6). Regarding commercial bad faith, the district court "decline[d] to expand the doctrine in such an unprecedented way" to encompass "case[s] such as this" in which plaintiffs were harmed at most "only indirectly" by the alleged fraud for which they seek to hold the bank liable. SPA-16-17. The district court rejected the unjust enrichment claim because "Plaintiffs cannot allege facts" showing that the Plaintiffs and the BNPP Defendants "had a knowledge of each other and a relationship" nor that there had "been a transfer of something that belonged to the [P]laintiff[s] but wound up in the [BNPP Defendants'] possession." SPA-17-19. Plaintiffs do not appeal the district court's dismissal of the commercial bad faith and unjust enrichment claims. Br. of Plaintiffs-Appellants ("App. Br.") 11 n.3.

D. Grounds For Dismissal Not Reached By The District Court

Because the district court dismissed the Complaint on the foregoing grounds, it did not need to reach several other grounds on which the Complaint should be dismissed. The BNPP Defendants demonstrated that New York law does not govern the Complaint's claims. Rather, Sudanese law governs Plaintiffs' non-negligence claims, and Swiss law governs their negligence claims, because (a) the primary torts at issue, and all of Plaintiffs' injuries, occurred in Sudan, Compl. ¶ 24 (JA-44), and (b) BNP Paribas's conduct primarily occurred in Switzerland, Compl. ¶ 209 (JA-118-119).[3] The BNPP Defendants also demonstrated, with the support of expert reports, that the Complaint fails to state any claim under either Sudanese or Swiss law.

Furthermore, the Complaint does not adequately plead under New York law that the BNPP Defendants conspired with or aided and abetted the government of Sudan to injure Plaintiffs.

First, Plaintiffs mistakenly conflate BNP Paribas's admitted participation in a conspiracy to violate U.S. sanctions with its alleged participation in a conspiracy

[3] In negligence actions involving a bank's duty of care to protect against the intentional torts of its customers, courts typically emphasize the jurisdiction in which the bank's conduct occurred in determining choice of law. *See Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 739 F.3d 45, 50 (2d Cir. 2013) (New York law governed because the defendant bank was based in New York and none of its challenged conduct occurred elsewhere); *Wultz v. Bank of China Ltd.*, 865 F. Supp. 2d 425, 429 (S.D.N.Y. 2012) ("China's interest in regulating bank conduct within its borders [was] dispositive.").

with the GOS to harm Plaintiffs. *See* App. Br. 56. Plaintiffs then predicate their causal theory on the "*post hoc, ergo propter hoc* proposition" rejected by this Court in *Rothstein v. UBS AG*, 708 F.3d 82, 96 (2d Cir 2013), 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. *See also Owens v. BNP Paribas S.A.*, No. 17 Civ. 7037, 2018 WL 3595950, at *1 (D.C. Cir. July 27, 2018) (following *Rothstein* and affirming dismissal of civil claims against the BNPP Defendants based on the same sanctions violations at issue here).

Second, the Complaint also does not adequately allege that the BNPP Defendants provided substantial assistance to the government of Sudan's torts, which requires more than just proof of general assistance to the tortfeasor. *Mastafa v. Australian Wheat Bd. Ltd.*, No. 07 Civ. 7955 (GEL), 2008 WL 4378443, at *4 (S.D.N.Y. Sept. 25, 2008) ("[A]iding the Hussein regime is not the same thing as aiding and abetting its alleged human rights abuses").

Third, the Complaint's primary liability negligence claims fail because the BNPP Defendants owed no duty of care to Plaintiffs. *See Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 286 (2d Cir. 2006) ("[B]anks do not owe non-customers a duty to protect them from the intentional torts of their customers.") (citation omitted). *Further*, the Complaint's claim for intentional infliction of emotional distress fails because, among other reasons, this Court has held that processing financial

transactions—even for state sponsors of terrorism—is neither extreme nor outrageous conduct. *See In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 118, 126 (2d Cir. 2013).

The BNPP Defendants also demonstrated that the claims against BNPP-NA, an indirect subsidiary of BNP Paribas, should be dismissed because the Complaint contains no non-conclusory allegations against that entity. *Twombly*, 550 U.S. at 554-58. A complaint cannot "lump[ ] all the defendants together in each claim" without providing "each defendant 'fair notice of what the [ ] claim is and the ground upon which it rests.'" *Atuahene v. City of Hartford*, 10 F. App'x 33, 34 (2d Cir. 2001) (citation omitted). Additionally, the BNPP Defendants demonstrated that the claims against the BNP Paribas New York Branch must be dismissed because it is "well-settled that the domestic branch of a foreign bank is not a separate legal entity under either New York or federal law." *Greenbaum v. Handlesbanken*, 26 F. Supp. 2d 649, 652 (S.D.N.Y. 1998).

These considerations provide alternate grounds for affirmance, although this Court need not reach them if it concludes, as it should, that the district court's decision was correct.

SUMMARY OF THE ARGUMENT

The Court should affirm the district court's dismissal of 18 claims in the Complaint as barred by the act of state doctrine and its dismissal of the Complaint's intentional tort claims as untimely.[4]

A. The Act Of State Doctrine Bars Plaintiffs' Claims

The act of state doctrine bars the Complaint's claims because the Court cannot hold the BNPP Defendants liable under New York tort law without first passing judgment on the actions of the Sudanese government within its territory. This is precisely what the act of state doctrine precludes.

First, the act of state doctrine applies as a threshold matter because the Complaint's claims against the BNPP Defendants are necessarily premised on findings that the government of Sudan violated New York tort law in carrying out actions against Plaintiffs that constituted assault, battery, false arrest and other intentional torts. That in turn is because, under New York tort law, common law conspiracy and aiding and abetting claims are not viable as independent torts, but instead must be predicated on the liability of a primary tortfeasor. The same reasoning applies to the Complaint's primary liability claims for negligence *per se*, outrageous conduct causing emotional distress and negligent infliction of emotional distress. Each of these claims is predicated on injuries caused by actions

[4] As noted, Plaintiffs do not appeal the dismissal of the two remaining claims, for commercial bad faith and unjust enrichment. *See supra* at 11.

carried out by the government of Sudan, and would require the district court to "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 misconstrue the Supreme Court's ruling in *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400 (1990), as purportedly rendering the act of state doctrine inapplicable to the Complaint's claims. *Kirkpatrick* involved federal and state *statutory* conspiracy claims, the elements of which did not require a United States court to make any rulings that another sovereign's conduct was wrongful in order to hold the defendant liable. By contrast, Plaintiffs' common law claims here do depend on a finding of wrongful conduct by Sudan. Plaintiffs' related contention that the act of state doctrine does not apply to claims predicated on tortious actions by a sovereign also flies in the face of Supreme Court precedent.

Second, all of the policy considerations laid out by the Supreme Court in *Sabbatino* support application of the act of state doctrine here. The Complaint states no claims for violations of international law that would weigh against application of the doctrine; instead it is deliberately predicated on ordinary torts to which the doctrine has been applied on numerous occasions. Moreover, this case implicates sensitive foreign relations concerns that weigh in favor of application of the doctrine because the Complaint asks the Court to impose liability where the

political branches have declined to do so. Finally, the Sudanese regime that engaged in the acts in question remains in power today.

B. New York's Statute Of Limitations For Crime Victims Does Not Apply To Appellants' Intentional Tort Claims

The district court correctly concluded that Plaintiffs' intentional tort claims are also time-barred, and Plaintiffs' assertions that these claims are timely under either New York C.P.L.R. § 213-b or § 215(8)(a) are meritless. Section 213-b is inapplicable because Plaintiffs are not within the statutory class of direct victims of the crimes to which BNP Paribas pled guilty. Moreover, the precedents that Plaintiffs cite to avoid this "directness" requirement actually affirm it.

Plaintiffs also seek to avoid the statute of limitations based on C.P.L.R. § 215(8)(a), which allows intentional tort claims arising from the same "event or occurrence" as a criminal action against the same defendant to be brought within one year from the termination of the criminal action. Any argument based on that provision was not raised before the district court, and was therefore forfeited. Forfeiture aside, this argument fails because the criminal action did not commence "with respect to the event or occurrence" from which Plaintiffs' intentional torts claims arose, as § 215(8)(a) requires.

STANDARD OF REVIEW

This Court reviews an order granting a motion to dismiss *de novo*, and will affirm where the plaintiff-appellant has failed "to raise a right to relief above the

speculative level." *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). While the Court "must accept as true all of the allegations contained in a complaint," it need not accept "'threadbare recitals of the elements of a cause of action', supported by mere conclusory statements." *Lanier v. Bats Exch., Inc.*, 838 F.3d 139, 150 (2d Cir. 2016) (citation omitted). This Court "may properly grant a motion to dismiss on the basis of [the act of state] doctrine when its applicability is shown on the face of the complaint." *Konowaloff v. Metro. Museum of Art*, 702 F.3d 140, 146 (2d Cir. 2012).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY RULED THAT THE ACT OF STATE DOCTRINE BARS PLAINTIFFS' CLAIMS

Whenever "the validity of the act of a foreign sovereign within its own territory is called into question," the act of state doctrine applies unless the policy considerations laid out by the Supreme Court in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964), fail to "justify its application." *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400, 409 (1990). The district court properly applied this binding principle of decision in ruling that the act of state doctrine "mandates dismissal of nearly all of Plaintiffs' claims." SPA-4. *First*, the act of state doctrine applies as a threshold matter because Plaintiffs' claims challenge the validity of the Sudanese government's actions in its own

territory. *Second*, all of the *Sabbatino* factors justify the doctrine's application to Plaintiffs' claims against the BNPP Defendants.

A. The Act Of State Doctrine Bars Plaintiffs' Claims Because They Require This Court To Decide That Sudan Committed Torts Within Its Own Territory

Plaintiffs seek to hold the BNPP Defendants both primarily and secondarily liable under New York tort law for injuries allegedly perpetrated by the government of Sudan against Sudanese citizens in the sovereign territory of Sudan. As the district court recognized, in order for Plaintiffs to hold the BNPP Defendants liable, "the Court would be obligated to conclude that the actions of the Government of Sudan, occurring within the then-existing territorial borders of Sudan, against the people of Sudan, amounted to state law violations of the law of battery, assault, false arrest and imprisonment, wrongful taking, and wrongful death." SPA-6.

The act of state doctrine requires this Court to "deem[] valid" all of Sudan's actions taken within its sovereign territory. *Kirkpatrick*, 493 U.S. at 409. Further, "the doctrine applies regardless of whether the foreign government is named as a party to the suit or whether the validity of its actions are directly challenged in the pleadings." *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, SA.*, 830 F.2d 449, 452 (2d Cir. 1987). "So long as the act is the act of the foreign sovereign, it matters not how grossly the sovereign has transgressed its own laws."

Fed. Treasury Enter. Sojuzplodoimport v. Spirits Int'l B.V., 809 F.3d 737, 743 (2d Cir. 2016). Because "[e]ven an inquiry" by this Court into the legality of actions taken by Sudan in its own territory would be a "breach of comity," *id.*, the district court correctly recognized that it was "explicitly barred from ruling on some of these claims under binding precedent," SPA-6.

Plaintiffs misconstrue Supreme Court precedent and the district court's analysis in a failed attempt to assert that the act of state doctrine has no applicability to their claims. *First*, Plaintiffs' assertion that *Kirkpatrick* "identified a strict, categorical limitation on the act of state doctrine that [the BNPP Defendants] cannot satisfy," App. Br. 15, misreads their own Complaint, which falls squarely within *Kirkpatrick's* definition of that doctrine. *Second*, Plaintiffs ignore precedent by contending that the act of state doctrine does not apply to claims predicated on tort law violations. *See, e.g.*, App. Br. 12, 16, 23-24. Plaintiffs' arguments therefore fail.

1. The District Court's Ruling Is Entirely Consistent With The Holding Of Kirkpatrick

Kirkpatrick concerned a question that is not present in this case: "whether the act of state doctrine bars a court in the United States from entertaining a cause of action that does not rest upon the asserted invalidity of an official act of a foreign sovereign, but that does require imputing to foreign officials an unlawful motivation (the obtaining of bribes) in the performance of such an official act."

493 U.S. at 401. The defendant in *Kirkpatrick* faced federal and state racketeering claims stemming from the company's contract for the construction of an aeromedical center in Nigeria that allegedly was secured by agreeing to pay kickbacks that would be disbursed as bribes to Nigerian government officials. *Id.*; *see also* App. Br. 18. The defendant asserted that the act of state doctrine barred the plaintiff's claims because "the facts necessary to establish [plaintiff's] claim [would] also establish that the contract was unlawful." *Kirkpatrick*, 493 U.S. at 406.

The Supreme Court ruled that the doctrine did not bar the claims. *Id.* In so holding, the Court distinguished between cases such as the instant case in which "a court *must decide*—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign," and cases such as *Kirkpatrick* in which "the facts necessary to establish" the claim would merely "support a finding" that a sovereign violated the law. *Id.* In *Kirkpatrick*, the "factual predicate for application of the act of state doctrine [did] not exist." *Id.* at 405.[5] The Court did not *need* to decide the validity of the Nigerian government's actions because the defendant could be held independently liable under RICO *regardless* of whether or

[5] As the U.S. State Department explained in a letter submitted to the lower court in *Kirkpatrick*, "[j]udicial inquiry into the *purpose* of a foreign sovereign's acts would not require a court to rule on the *legality* of those acts, and a finding concerning purpose would not entail the particular kind of harm that the act of state doctrine is designed to avoid." *Envtl. Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1061 (3d Cir. 1988) (emphasis added), *aff'd*, *Kirkpatrick*, 493 U.S. at 406.

not the Nigerian government's actions were illegal. As Justice Scalia explained, "[r]egardless of what the court's factual findings may suggest as to the legality of the Nigerian contract, its legality [wa]s simply not a question to be decided" in that suit, and thus there was "no occasion to apply the rule of decision that the act of state doctrine requires." *Id*. at 406. Contrary to Plaintiffs' assertions, the claims in *Kirkpatrick* did *not* require the Court to decide "that Nigerian officials had illegally received bribes in order to establish defendant's liability." App. Br. 20.

Under *Kirkpatrick*, the act of state doctrine *does* apply where—as here—the claims against a private defendant are predicated on a necessary *legal* conclusion that a sovereign's act was invalid. As the district court recognized, the crucial distinction is that the common law claims Plaintiffs purport to assert against the BNPP Defendants—unlike the RICO claims in *Kirkpatrick*—are not independently viable unless the Court reaches the legal conclusion that Sudan was the primary tortfeasor. SPA-7-8. In contrast to statutory conspiracy claims such as those under RICO, a common law conspiracy claim is not "an independent tort," but rather "can only survive if 'an underlying, actionable tort is established.'" SPA-7 (quoting *Sepenuk v. Marshall*, No. 98 Civ. 1568 (RCC), 2000 WL 1808977, at *6 (S.D.N.Y. Dec. 8, 2000)). The same applies for common law aiding and abetting claims, which require proof of "the existence of a violation committed by a primary party." SPA-7-8 (quoting *Barnet v. Drawbridge Special Opportunities*

Fund LP, No. 14 Civ. 1376 (PKC), 2014 WL 4393320, at *19 (S.D.N.Y. Sept. 5, 2014)).

The district court also was correct to conclude that the result would be no different under the act of state doctrine for Plaintiffs' primary liability claims for negligence *per se*, outrageous conduct causing emotional distress and negligent infliction of emotional distress (Counts 1-2, 15-16). SPA-8. Under New York tort law, each of these claims requires proof of "a causal connection between the conduct [alleged] and the injury." SPA-9 (quoting *Francis v. Kings Park Manor, Inc.*, 91 F. Supp. 3d 420, 434-35 (E.D.N.Y. 2015)). As with the secondary liability claims, the district court could not rule on any of these primary liability claims predicated on "injuries inflicted by the Government of Sudan . . . . without 'sit[ting] in judgment on the acts of the government of another, done within its own territory.'" SPA-9 (quoting *Underhill*, 168 U.S. at 252). In this case, unlike in *Kirkpatrick*, the Court *must decide* the validity of Sudan's actions in order to hold the BNPP Defendants civilly liable.

The district court's analysis is supported by that of the Court of Appeals for the District of Columbia Circuit in applying the act of state doctrine to a post-*Kirkpatrick* tort claim. In *Hourani v. Mirtchev*, plaintiffs brought claims against private defendants based on the defendants' alleged conspiracy to have defamatory statements concerning the plaintiffs published on the website of the Kazakh

Embassy in the United States. 796 F.3d 1, 11 (D.C. Cir. 2015). The D.C. Circuit rejected the claims as barred by the act of state doctrine because the court could not hold the defendants liable without first "necessarily finding that the Kazakhstan government's speech" in publishing the statements on its website "was itself defamatory." *Id.* at 14. Because an "essential predicate for liability" was a finding that the Kazakh government committed a tort within its territory, the claims against the private defendant were barred. *Id.*[6]

In so holding, the D.C. Circuit distinguished the facts of *Hourani* from the claims in *Kirkpatrick* in the same way that the district court distinguished the claims against the BNPP Defendants from the *Kirkpatrick* claims. The *Hourani* court explained that the act of state doctrine did not apply in *Kirkpatrick* because "liability could attach regardless of the validity of the contract that the bribery secured or even whether government officials had accepted the proffered bribe." *Id.* at 15. By contrast, the *Hourani* plaintiffs could recover damages "for the Ambassador's statements on the Embassy website only if they can persuade a factfinder that those official foreign government statements published on a foreign

[6] The D.C. Circuit rejected the argument that the speech was not within Kazakh territory, because "when an Ambassador speaks through official Embassy channels, like the Embassy website, he or she 'speaks as the sovereign authority for the territory' the sending government controls, and gives voice to the foreign government speaking from within its own territory." *Hourani*, 796 F.3d at 13-14 (quoting *Sabbatino*, 376 U.S. at 410).

sovereign's own communication platform were themselves defamatory, and thus invalid." *Id*.

Here, as in *Hourani*, the Court *must decide* Sudan's liability in order to hold the BNPP Defendants liable. Because an essential predicate for the claims against the BNPP Defendants is tortious action by a sovereign in its territory, those claims must be dismissed. *See also Glen v. Club Méditerranée, S.A.*, 450 F.3d 1251, 1254 (11th Cir. 2006) (act of state doctrine barred trespass and unjust enrichment claims against private defendant because they required ruling on the validity of Cuban government property expropriations). The district court therefore properly rejected as "unpersuasive" Plaintiffs' strained attempt to analogize their claims to the facts of *Kirkpatrick*. SPA-7.

2. The Act Of State Doctrine Is Not Limited To Claims Predicated On Official Government Decrees

Relying on a further misreading of *Kirkpatrick*, Plaintiffs ask the Court to disregard over a century of precedent by asserting that the act of state doctrine applies only to claims stemming from officially recorded government acts such as decrees, judgments and transfers of title. *See, e.g.*, App. Br. 12, 16, 23-24. This assertion is baseless. As an initial matter, Plaintiffs contradict the allegations in their own Complaint by asserting in their brief to this Court that Sudan's actions were not official public acts—the Complaint alleges that Plaintiffs' injuries arise from acts "committed in performance of public duty." *See* Compl. ¶¶ 324-351

(JA-150-155) (claims for conspiracy and aiding and abetting battery committed in the performance of public duty); *see also, e.g.*, Compl. ¶ 330 (JA-151) ("The GOS used its state power and resources to commit such intentional, offensive bodily contacts against its own civilians[.]"). Moreover, several of Plaintiffs' claims are predicated on government expropriations. *See* Compl. ¶¶ 414-72 (JA-165-178) (secondary liability claims for conversion). As explained in *Kirkpatrick*, the act of state doctrine requires that *all* "acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid." 493 U.S. at 409.

Kirkpatrick did not overrule any of the Supreme Court's long-standing precedent applying the doctrine to tort claims, including *Underhill*, the 1897 foundational case for the act of state doctrine. *See* 168 U.S. at 252. In *Underhill*, the Supreme Court confronted precisely the scenario presented in this case—allegedly tortious acts committed by a sovereign in its own territory. *Id.* The *Underhill* plaintiff brought suit against the military commander of a revolutionary army in Venezuela, seeking damages for "false imprisonment and assault and battery" by his soldiers. 65 F. 577, 578 (2d Cir. 1895), *aff'd*, 168 U.S. at 252. The Supreme Court concluded that those allegedly tortious acts "were the acts of the government of Venezuela, and as such are not properly the subject of adjudication in the courts of another government." *Underhill*, 168 U.S. at 254; *see also Kirkpatrick*, 493 U.S. at 405 (stating that in *Underhill*, "holding the defendant's

detention of the plaintiff to be tortious would have required denying legal effect to" the acts of a government).

Consistent with *Underhill*, courts have over the years applied the act of state doctrine to tort claims. *See, e.g.*, *Oetjen v. Cent. Leather Co.*, 246 U.S. 297 (1918) (conversion); *Ricaud v. Am. Metal Co.*, 246 U.S. 304 (1918) (conversion); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 70 (2d Cir. 1977) (conspiracy to commit antitrust violations). Post-*Kirkpatrick* jurisprudence is no different. *See Mezerhane v. Republica Bolivariana de Venezuela*, 785 F.3d 545, 552 (11th Cir. 2015) (emotional distress and other torts), *cert. denied*, 136 S. Ct. 800 (2016); *Hourani*, 796 F.3d at 13 (defamation); *Glen*, 450 F.3d at 1254 (trespass and unjust enrichment). The fact that many act of state cases deal with government expropriations rather than the types of intentional tort claims Plaintiffs bring here speaks more to the unusual nature of Plaintiffs' theory of liability than to the act of state doctrine's applicability to their claims.

This Court also has recognized the continued vitality post-*Kirkpatrick* of the Supreme Court's statement in 1918 that, "when it is made to appear that the foreign government has acted in a given way . . . the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision." *Konowaloff*, 702 F.3d at 146 (quoting *Ricaud*, 246 U.S. at 309). Here, the district court faithfully followed this precedent in applying the act

of state doctrine to Plaintiffs' claims. *See* SPA-5 (quoting *Konowaloff*, 702 F.3d at 146).[7]

Finally, Plaintiffs' invocation of the Full Faith and Credit clause of the United States Constitution to justify their narrow interpretation of the act of state doctrine, *see* App. Br. 23-24 (citing U.S. Const. art. IV § 1), ignores that Full Faith and Credit and act of state are wholly distinct doctrines with distinct legal sources and distinct applications. The Full Faith and Credit clause "requires each State to recognize and give effect to *valid* judgments rendered by the courts of its sister States." *V.L. v. E.L.*, 136 S. Ct. 1017, 1020 (2016) (emphasis added). By contrast, the act of state doctrine is a separation of powers-based concept that *forbids* that threshold inquiry into validity when the act in question is taken by a foreign

[7] This Court's recent decision in *Petersen Energía Inversora, S.A.U. v. Argentine Republic*, 895 F.3d 194 (2d Cir. 2018), that the applicability of the act of state doctrine in that case was "a merits determination that turns on the facts," *id.* at 212, does not contradict the district court's dismissal of the claims here. *Peterson Energía* reaffirmed that it is appropriate to rule on the act of state doctrine at the motion to dismiss stage where, as here, "the doctrine's applicability [i]s 'shown on the face of the complaint.'" *Id.* (quoting *Konowaloff*, 702 F.3d at 146). In *Peterson Energía*, it was not clear "from the face of the [c]omplaint" that the case "turn[ed] on the validity of [a sovereign's] official acts" because the claims involved Argentina's purely commercial "contractual obligations." *Petersen Energía Inversora, S.A.U. v. Argentine Republic*, No. 15 Civ. 2739 (LAP), 2016 WL 4735367, at *8 (S.D.N.Y. Sept. 9, 2016) (invoking commercial exception to act of state doctrine). This Court declined to exercise its jurisdiction to review the district court's non-appealable interlocutory order on the act of state doctrine. 895 F.3d. at 212. Here, Plaintiffs' tort claims as pleaded all hinge on finding that the Sudanese government's conduct was unlawful, and there is no allegation by them of any facts suggesting that the government's conduct was commercial in character.

sovereign. The Supreme Court expressly distinguished these two concepts in *Sabbatino*, stating that "an inquiry by United States courts into the validity of an act of an official of a foreign state under the law of that state would not only be exceedingly difficult but, if wrongly made, would be likely to be highly offensive to the state in question." 376 U.S. at 415 n.17. By contrast, "such review can take place between States in our federal system, but in that instance there is similarity of legal structure and an impartial arbiter, this Court, applying the full faith and credit provision of the Federal Constitution." *Id*. In short, the Full Faith and Credit clause has no bearing on the applicability of the act of state doctrine to Plaintiffs' claims.

The district court therefore correctly determined that it was bound to dismiss Plaintiffs' claims pursuant to the act of state doctrine because they require a court to "necessarily conclude that the Government of Sudan's actions amounted to tortious conduct." SPA-7.

B. The *Sabbatino* Factors Support Application Of The Act Of State Doctrine Here

The district court also properly considered the policies underlying the act of state doctrine in applying it to Plaintiffs' claims. *See* SPA 5-8. When "the validity of the act of a foreign sovereign within its own territory is called into question," the act of state doctrine applies unless "the policies underlying the act of state doctrine" fail to "justify its application." *Kirkpatrick*, 493 U.S. at 409. In

Sabbatino, the Supreme Court laid out several factors for courts to consider in determining whether the doctrine should be invoked. These factors are:

> (1) "the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it;" (2) "the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches;" and (3) "[t]he balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence."

376 U.S. at 428. Here, the district court correctly concluded that none of these factors provides a basis to decline to apply the act of state doctrine.

1. The Complaint Asserts No International Law Claims

The district court correctly determined that the first *Sabbatino* factor weighs in favor of applying the act of state doctrine because "Plaintiffs do not ask the Court to determine whether the Government of Sudan violated international law; they only ask the Court to find that the Government of Sudan's actions amounted to battery, assault, wrongful takings, and other common law claims," which is exactly "what the act of state doctrine prohibits the Court from doing." SPA-8. Plaintiffs' reliance on the international consensus that Sudan committed human rights abuses is therefore beside the point, because their claims do not arise under international law.

The Complaint states *no* claims for violations of international law. Rather, Plaintiffs deliberately plead *only* common law tort claims, no doubt because of the

many bars to a suit for violations of international law under the ATS. *See Jesner v. Arab Bank, PLC,* 138 S. Ct. 1386, 1389 (2018) (no corporate liability under ATS)*; Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124-25 (2013) (ATS claims must "touch and concern" the United States "with sufficient force to displace the presumption against extraterritorial application"); *see also Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 262 (2d Cir. 2009) (dismissing ATS secondary liability claims against Canadian oil corporation operating in Sudan for violations of international law committed by Sudan for lack of evidence sufficient to create a factual question of whether that corporation acted with purpose of aiding human rights abuses). Common law tort claims, such as those alleged here, fall squarely within the act of state doctrine. *See Underhill*, 168 U.S. at 251 (applying doctrine to tort claims involving assaults and false imprisonment of U.S. citizen by Venezuelan soldiers); *Mezerhane*, 785 F.3d at 552 (applying doctrine to suit involving various common law torts); *see also supra* at 27.

Plaintiffs nonetheless devote multiple pages of their brief to demonstrating a consensus that Sudan's actions violated international law. App. Br. 28-31. But having chosen for strategic reasons not to allege violations of international law under the ATS, Plaintiffs cannot now rely on international law claims that are pleaded nowhere in the Complaint to sidestep the application of the act of state doctrine. Accordingly, Plaintiffs' extensive arguments concerning what actions

constitute violations of *jus cogens* norms under international law are simply irrelevant to this suit. *See* App. Br. 26-34. Equally beside the point are the cases discussing the application of the act of state doctrine to claims brought under the ATS, which—unlike Plaintiffs' claims against the BNPP Defendants—actually *are* predicated on violations of international law. *See id*. at 32-34.

Furthermore, the cases from this Circuit on which Plaintiffs rely do not support Plaintiffs' argument that they can escape the act of state doctrine by asserting purported violations of *jus cogens* norms. In those cases, declining to apply the act of state doctrine, the courts relied on reasons other than that the claims alleged violations of international law. *See Sharon v. Time, Inc.*, 599 F. Supp. 538, 544 (S.D.N.Y. 1984) (acts by Israeli military officer outside the scope of his authority were not acts of state); *Kadic v. Karadzic*, 70 F.3d 232, 250 (2d Cir. 1995) (act of state defense forfeited below, and in any event, acts of Bosnian-Serb insurgency leader "wholly unratified by th[e] nation's government" were not acts of state); *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 130 (E.D.N.Y. 2000) (court not "asked to pass judgment on the acts of a foreign state" in suit seeking return of assets looted by Vichy Government during World War II). Plaintiffs' assertion that applying the act of state doctrine to this case would "undermine" the "peremptory and non-derogable status of . . . *jus cogens* norms," App. Br. 31-32, is also baseless. There is no general cause of action for *jus cogens*

violations—to the contrary, this Court has repeatedly declined to create a "general *jus cogens* exception" to the Foreign Sovereign Immunities Act. *Carpenter v. Republic of Chile*, 610 F.3d 776, 779 (2d Cir. 2010) (quoting *Matar v. Dichter*, 563 F.3d 9, 15 (2d Cir. 2009)).

Plaintiffs' assertion that "clear precedent forecloses [the district court's] analysis," App. Br. 39, is therefore incorrect. In ruling that the first *Sabbatino* factor was not implicated by Plaintiffs' common law claims, the district court did not treat the act of state doctrine "as an absolute bar on all common-law and statutory causes of action except those directly grounded in international law." App. Br. 39. Rather, as Plaintiffs themselves point out, the district court followed extensive precedent that previously applied the act of state doctrine to common law claims. *See* App. Br. 39-40 (noting the common law claims in *Sabbatino*, *Oetjen* and *Underhill*). Whether the common law claim is barred depends on whether it turns on the lawfulness of a foreign state's acts in its own territory; here Plaintiffs' claims require such a determination.

Finally, even if the Court concludes that Plaintiffs' common law claims plead international law violations (and they intentionally do not, to avoid *Talisman*), *Sabbatino* makes clear "the act of state doctrine is applicable even if international law has been violated." 376 U.S. at 430-31.

2. Plaintiffs' Claims Implicate Important Foreign Relations Considerations Reserved For The Political Branches

The district court also correctly determined that the second *Sabbatino* factor weighs in favor of invoking the act of state doctrine because this case presents sensitive foreign relations considerations. *See* SPA-6. Plaintiffs ask this Court to impose damages under New York common law for injuries perpetrated by a sovereign against its own citizens in its own territory based on violations of U.S. sanctions for which there is no private right of action. Plaintiffs and their amici point to both the Executive Branch and Congressional condemnations of Sudan's serious human rights violations as reasons not to invoke the act of state doctrine, *see* App. Br. 34-35; Members of Cong. Br. 6-9, but those very political branches have declined to create a remedy for Plaintiffs. *See Hourani*, 796 F.3d at 15 (dismissing on act of state grounds where "Congress did not pass the statute at issue, nor did the President sign it into law" and thus the "Political Branches… [had] not made the sensitive decision" to apply the type of law at issue to foreign sovereigns). Accordingly, the district court correctly concluded that the resolution of BNP Paribas's sanctions violations is "properly left to the judgment of the Executive Branch rather than the courts." SPA-6.

First, Plaintiffs' claims are predicated on BNP Paribas's violations of U.S. sanctions, but the federal laws and regulations establishing the U.S. sanctions regime against Sudan do not provide for a private right of action for violations of

that sanctions regime. *See* 50 U.S.C. § 1705; 31 C.F.R. §§ 538.701, 538.704. The Executive Orders imposing the Sudanese sanctions contain explicit language stating that they do not create any right or benefit enforceable against any person.[8] Courts have consistently refused to imply a private right of action from executive orders and statutes containing the same unambiguous language. *Peterson v. Islamic Republic of Iran*, No. 13 Civ. 9195 (KBF), 2015 WL 731221, at *7 (S.D.N.Y. Feb. 20, 2015) (Iranian sanctions orders); *see also In re Surface Mining Regulation Litig.*, 627 F.2d 1346, 1357 (D.C. Cir. 1980) (executive orders create no private rights of action when they manifest no intent to do so). Nor has any court found a private right of action under any of the statutes under which the BNPP Defendants pleaded guilty. *See Vasile v. Dean Witter Reynolds Inc.*, 20 F. Supp. 2d 465, 481 (E.D.N.Y. 1998) (no private right of action for criminal conspiracy or for civil conspiracy); *Glen v. Club Méditerranée SA*, 365 F. Supp. 2d 1263, 1272 (S.D. Fla. 2005) (no remedial right under the Trading With the Enemy Act); *Am. Bank & Tr. Co. v. Bond Int'l Ltd.*, 464 F. Supp. 2d 1123, 1127 (N.D. Okla. 2006) (same); *see also Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979)

[8] *See* Exec. Order No. 13067 § 6, 62 Fed. Reg. 59989 (Nov. 3, 1997), *reprinted in* 31 C.F.R. 538 (62 Fed. Reg. 59989, Nov. 5, 1997) ("Nothing contained in this order shall create any right or benefit, substantive or procedural, enforceable by any party against the United States, its agencies or instrumentalities, its officers or employees, or any other person."); *see also* Exec. Order No. 13400 § 8, 71 Fed. Reg. 25483 (Apr. 26, 2006); Exec. Order No. 13412 § 9, 71 Fed. Reg. 61369 (Oct. 13, 2006); Exec. Order No. 13761 § 9, 82 Fed. Reg. 5331 (Jan. 13, 2017); Exec. Order 13804 § 2, 82 Fed. Reg. 32611 (July 11, 2017).

("[T]his Court has rarely implied a private right of action under a criminal statute"). This Court has also rejected attempts by private litigants to "impose embargos or international sanctions through civil actions in United States courts" because "[s]uch measures are not the province of private parties but are, instead, properly reserved to governments and multinational organizations." *Talisman*, 582 F.3d at 264.

Only the U.S. government can bring suit against individuals or entities that violate its economic sanctions, and here it has already done so, and has imposed significant penalties on BNP Paribas. *See* JA-363-365. Indeed, at BNP Paribas's sentencing hearing, an Assistant United States Attorney stated that, under federal terror victim restitution guidelines, the victims of terror attacks allegedly funded by Sudan are not victims of the violations to which BNP Paribas pled guilty "and cannot show that they were directly harmed by [BNP Paribas's] conduct." JA-387.

Congress has in fact repeatedly declined to create a legislative remedy for persons in the position of Plaintiffs. The Anti-Terrorism Act, 18 U.S.C. § 2333(a) ("ATA"), provides a remedy for U.S. nationals injured by acts of terrorism abroad, but not for foreign plaintiffs. Further, when Congress enacted the Torture Victim Prevention Act, 106 Stat. 73, note following 28 U.S.C. § 1350, which created a claim for certain international law violations, it deliberately imposed liability only

against individuals, and not corporations. *See Mohamad v. Palestinian Auth.*, 566 U.S. 449, 452 (2012).

The Supreme Court's reasoning in *Jesner*, in declining to read corporate liability into the ATS, applies with equal force to Plaintiffs' claims against the BNPP Defendants:

> The detailed regulatory structures prescribed by Congress and the federal agencies charged with oversight of financial institutions reflect the careful deliberation of the political branches on when, and how, banks should be held liable for the financing of terrorism. It would be inappropriate for courts to displace this considered statutory and regulatory structure by holding banks subject to common-law liability . . . .

138 S. Ct. at 1405. Here, Congress and the Executive Branch have carefully crafted the contours of the U.S. sanctions regime. The fact that Congress has declined to provide a statutory remedy for Plaintiffs' claims—and not the views expressed by 17 of its members, *see* Members of Cong. Br. 6-9—is the best expression of Congress's intent with respect to this type of litigation.

In the face of these repeated decisions by the political branches, it would be more than incongruous for this Court to permit this suit under state law against a foreign bank for alleged complicity in a foreign state's human rights violations where the Supreme Court has twice declined to impose statutory liability for similar claims under the ATS, *see Jesner*, 138 S. Ct. at 1389; *Kiobel*, 569 U.S. at 124-25, and where Congress has expressly drafted the ATA and other potentially relevant statutory claims to exclude claims such as those brought here. *Cf.*

Sabbatino, 376 U.S. at 424 (stating that the "purpose behind the doctrine" would be "undermined" if "the state courts are left free to formulate their own rules"); *Mashreqbank PSC v. Ahmed Hamad Al Gosaibi & Bros. Co.*, 23 N.Y.3d 129, 137 (2014) ("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'") (citation omitted).

As the Eleventh Circuit noted even before *Jesner* was decided, "the trend in recent Supreme Court cases . . . signals the Supreme Court's reluctance" to preempt the political branches by allowing claims "arising from events taking place exclusively on foreign soil and with a nexus to the United States that is at best marginal." *Mezerhane*, 785 F.3d at 550; *see also Kiobel*, 569 U.S. at 115 (rejecting an invitation to "make the United States a uniquely hospitable forum for the enforcement of international norms"); *Sosa v. Alvarez–Machain*, 542 U.S. 692, 727 (2004) ("It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits."). This is precisely what Plaintiffs ask the Court to do here.

Second, the act of state doctrine is not reserved only for this country's allies, as Plaintiffs suggest. *See* App. Br. 34-38. In *Sabbatino*, the doctrine applied despite the "severance of diplomatic relations, commercial embargo, and freezing of Cuban assets in this country." 376 U.S. at 410; *see also Fed. Treasury*, 809 F.3d at 743 (applying doctrine to Russian Federation); *Hunt*, 550 F.2d at 73 (applying doctrine to Libyan oil expropriations). Even if the quality of the diplomatic relationship at stake were relevant to the doctrine's applicability, the United States does maintain diplomatic relations with Sudan, and has recently lifted many of the U.S. economic sanctions on Sudan in recognition of "Sudan's positive actions" and "cooperation with the United States." Exec. Order No. 13761, 82 Fed. Reg. 5331 (Jan. 13, 2017); *see also* Notice Regarding Positive Actions by the Government of Sudan, 82 Fed. Reg. 47287-01 (Oct. 11, 2017).[9] Furthermore, adjudication of Sudan's role in this litigation could also impact foreign relations with other countries. *See Sabbatino*, 376 U.S. at 432 ("Relations with third countries which have engaged in similar expropriations would not be immune from effect.").

[9] The foreign relations factor also is not dispositive; but rather "is but one of the several factors that the *Sabbatino* Court advised taking into consideration." *Konowaloff v. Metro. Museum of Art.*, No. 10 Civ. 9126 (SAS), 2011 WL 4430856, at *8 (S.D.N.Y. Sept. 22, 2011), *aff'd*, *Konowaloff*, 702 F.3d at 147.

All of these considerations "strongly reinforce the appropriateness of" the district court's "decision not to tread in an area where the Political Branches have waved the courts off." *Hourani*, 796 F.3d at 16.

3. The Sudanese Regime Remains In Power And Acted Within Its Own Territory

The final *Sabbatino* factor further supports the district court's dismissal of Plaintiffs' claims because the Sudanese government accused by the Complaint of perpetrating the attacks remains in power. *See* Compl. ¶ 4 (JA-36). Plaintiffs and their amicus the Southern Sudanese Community Center of San Diego ("SSCCSD") argue that the act of state doctrine should not apply to Plaintiffs who were allegedly injured in the territory that is now South Sudan because that was a disputed territory that is now independent. App. Br. 38; SSCCSD Br. 9-13. The SSCCSD's description of how the government of Sudan's legitimacy over the region was the subject of a decades-long civil war in fact only highlights the appropriateness of applying the act of state doctrine here to avoid "embroil[ing] the court in a seemingly rather political evaluation of the character of regime change itself." *Konowaloff*, 2011 WL 4430856, at *7 (citation omitted). Indeed, the United States did not recognize South Sudan as an independent nation until 2011, App. Br. 38, well after the last of Plaintiffs' alleged injuries, *see* Compl. ¶ 24 (JA-44), and deference to the Executive Branch is required on the matter of Sudan's territorial bounds, *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2094

(2015) ("[T]he power to recognize or decline to recognize a foreign state and its territorial bounds resides in the President alone.").

Further, replacement of a regime is not dispositive but simply "may be a factor in the analysis of whether the act of state doctrine should be applied." *Konowaloff*, 702 F.3d at 147. This Court has not hesitated to apply the act of state doctrine even where the regime that committed the challenged acts has long departed. *See id.* at 147-48 (applying act of state doctrine in 2012 in suit seeking return of painting seized by the Bolsheviks). And unlike in other cases involving regime change, the al-Bashir government is not "long gone," *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 453 (2d Cir. 2000), but remains a recognized sovereign power. The U.S. government did not cease to recognize Sudan upon its recognition of South Sudan. It is well-settled that as long as a government is currently recognized by the United States, that government's actions fall within the act of state doctrine regardless of historical political changes. *See, e.g.*, *Ricaud*, 246 U.S. at 309 (act of state doctrine applies to "all the actions of the [recognized] government from the commencement of its existence" despite past regime changes).

The SSCCSD also invokes the Second Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2), in support of its argument that the act of state doctrine should not apply to acts in the territory that the United States later recognized as South Sudan and/or acts in Sudanese territory that violated international law. SSCCSD Br. 7-8.

But Plaintiffs have forfeited any arguments in reliance on that statute by failing to raise them to the district court. *See, e.g.*, *In re Residential Capital, LLC*, 698 F. App'x 34, 35 (2d Cir. 2017) ("[I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal.") (citation omitted), *cert. denied sub nom. Silver v. ResCap Borrower Claims Tr.*, 138 S. Ct. 1579 (2018); JA-412-464. Moreover, the Second Hickenlooper Amendment has no relevance to this litigation because it applies narrowly to bar application of the act of state doctrine to "a case in which a claim of title or other right to property is asserted . . . based upon (or traced through) a confiscation or other taking . . . by an act of that state in violation of the principles of international law." 22 U.S.C. § 2370(e)(2). The expropriations by the Sudanese government alleged in this case do not implicate this statute because "it is settled doctrine" that "confiscations by a state of the property of its own nationals, no matter how flagrant and regardless of whether compensation has been provided, do not constitute violations of international law." *F. Palicio y Compania, S. A. v. Brush*, 256 F. Supp. 481, 487 (S.D.N.Y. 1966), *aff'd*, 375 F.2d 1011 (2d Cir. 1967); *accord Bahgat v. Arab Republic of Egypt*, No. 13 Civ. 8894, 2015 WL 13654006, at *5 (S.D.N.Y. Mar. 31, 2015), *aff'd*, 631 F. App'x 69 (2d Cir. 2016).

For all of these reasons, the act of state doctrine bars Plaintiffs' claims, and thus the Court should affirm the district court's dismissal of those claims on that ground.

II. NEW YORK'S STATUTE OF LIMITATIONS FOR CRIME VICTIMS DOES NOT APPLY TO PLAINTIFFS' INTENTIONAL TORT CLAIMS

Plaintiffs assert that the district court erred in dismissing their intentional tort claims, and argue that these claims should be considered timely under either C.P.L.R. § 213-b or C.P.L.R. § 215(8)(a). App. Br. 43-55. As to § 213-b, it is inapplicable because Plaintiffs are not within the class of statutory victims of the crimes to which BNP Paribas pled guilty. As to § 215(8)(a), this argument was not raised before the district court, and is thus forfeited; moreover, forfeiture aside, this argument fails because § 215(8)(a) applies only where the criminal acts out of which the plaintiff's claim arises were sufficient by themselves to cause plaintiff's injuries.

A. C.P.L.R. § 213-b Is Inapplicable To Plaintiffs' Intentional Tort Claims

Under New York Civil Practice Law § 213-b, a seven-year limitations period applies when "(1) the plaintiff is a crime victim, (2) the defendant has been convicted of a crime, (3) the defendant's crime is the subject of the civil action, and (4) the plaintiff's injury resulted from that crime." *Boice v. Burnett*, 245 A.D.2d 980, 981-82 (3d Dep't 1997). The district court correctly held that, in light

of *Boice* and other authorities, "Rule 213-b is only applicable if the plaintiff is a direct victim of the crime to which the defendant pled guilty," and that Plaintiffs failed to establish the necessary causal connection "that they were victims of the crimes for which Defendants pled guilty." SPA-12.

The district court determined that Plaintiffs were not "crime victims" within the scope of § 213-b for a number of reasons: (1) BNP Paribas was convicted of a conspiracy against the United States, and Plaintiffs are not the statutory victims of that crime; (2) as illustrated by the prosecutor's statement at sentencing, the federal government did not consider Plaintiffs to be victims of that crime (*see infra* at 48); and (3) Plaintiffs' excessively expansive theory of the word "victim" would encompass "any person *affected*," which would not create a credible limitation on who a "victim" could be. SPA-12-13. The district court was correct, and Plaintiffs' criticisms miss the mark.

To invoke § 213-b, *Boice* explicitly requires that a plaintiff show "direct injury . . . as a result" of defendant's crimes. 245 A.D.2d at 981. This aligns with the applicable statutory definition[10] of "victim," which the district court emphasized means "a person who suffers . . . as a *direct result* of a crime." SPA-

[10] Section 213-b incorporates the meaning of "representative of a crime victim, as defined in subdivision six of section six hundred twenty-one of the executive law." Other than misreading *Elkin v. Cassarino*, 248 A.D.2d 35 (2d Dep't 1998), *see infra* at 45-46, Plaintiffs offer no reason why § 621(5)'s definition of "victim" should not be relevant here as well.

13. And, in fact, *Boice* denotes the outer limit of what constitutes a direct injury: The facts in the cases discussed by Plaintiffs are in each instance more direct than those in *Boice*, which itself fails to find a sufficiently direct injury. 245 A.D.2d at 981-82 (§ 213-b did not apply; defendants' crime of tax evasion did not injure plaintiffs, who had been named in false statements about business deductions made in defendants' tax forms). The facts alleged in the Complaint are even more attenuated than in *Boice*.

Plaintiffs are wrong to claim that in *Elkin v. Cassarino*, 248 A.D.2d 35 (2d Dep't 1998), "the Second Department repudiated a similar attempt to impose a 'direct injury' requirement on § 213-b." App. Br. 45. *Elkin* had nothing to do with the directness of the causal link between the defendant's underlying crime and the victim's resultant injury; rather, the court's discussion solely concerned the defendant's arguments that § 213-b should "apply only where the defendant was convicted in a New York State court of a crime defined by the laws of New York, and not where . . . the defendant was convicted of a Federal offense in a Federal court." 248 A.D.2d at 37. Moreover, the applicability of § 213-b was supported by the fact that the connection between the criminal conduct and the civil claims was more direct than in either *Boice* or the instant case. In *Elkin*, "the issue of whether the defendant committed the civil torts of assault and conversion were

necessarily decided in the criminal prosecution." 248 A.D.2d at 40.[11] That a criminal conviction for assault proves civil liability for harm resulting from that assault is worlds away from implying that a criminal conviction for sanctions violations makes the defendant civilly liable to any person injured by the actions of the sanctioned state.

The cases Plaintiffs cite do not suggest otherwise. In fact, they specifically support the concept that "directness" is a required factor. *See, e.g.*, *Hemmerdinger Corp. v. Ruocco*, 976 F. Supp. 2d 401, 410 (E.D.N.Y. 2013) (holding that the facts admitted in a defendant's plea "*directly relate*[] to plaintiff's instant action *and the injuries alleged therein*" (emphasis added), and rejecting another defendant's claim that his acts did not "directly injur[e]" the plaintiff, given that he was convicted in connection with the same conspiracy to defraud that specific plaintiff); *Rosado v. Estime*, 76 N.Y.S.3d 391, 397 (Sup. Ct. Kings Cty. 2018) (concluding that although defendant was specifically convicted of driving away from the collision with the decedent, the victim was directly harmed by wrongful conduct upon

[11] Plaintiffs also assert that "the Second Department thoroughly rejected the suggestion that any limitation from Executive Law § 621(5) should be imported into § 213-b," App. Br. 46, when the court does not even mention § 621(5). As mentioned above, § 621(5) defines a "victim" as "a person who suffers personal physical injury as a direct result of a crime"—again, a subject not considered by the *Elkin* court—while the court discussed Executive Law § 632-a(1)(a), which defines and establishes the jurisdictional applicability of the term "crime" under that provision. The *Elkin* court's narrow focus on the applicability of § 632-a(1)(a) says nothing about the meaning of the term "victim" in the general definitions provision of § 621(5).

which the conviction was predicated: "This civil action is clearly based on the same conduct as the crime, and the victim of the crime, Rosado, is the same party as the plaintiff in the tort action, which was not the case in *Boice*").[12]

These cases illustrate the type of direct causal nexus that New York courts have recognized in interpreting § 213-b—a nexus lacking here. The Complaint contains no well-pled allegations that connect any financial transactions processed by the BNPP Defendants for Sudanese banks with any of the acts that injured Plaintiffs. The Complaint at most alleges that "[t]he GOS's vast increase in oil revenue, made possible only because of BNPP enabled the GOS to grow its military spending and to keep the war going." Compl ¶ 125 (JA-90). But that conclusory allegation is insufficient to connect any funds processed by the BNPP Defendants to Plaintiffs' injuries. In order to prove the requisite causal nexus, Plaintiffs "would have to prove that . . . each attack was the product of 'joint action' by the defendants and [Sudan], *i.e.*, that there was 'a substantial degree of cooperative action between corporate defendants and [Sudan] in the alleged violations,'" *Kiobel v. Royal Dutch Petroleum Co.*, No. 02 Civ. 7618, 2004 WL 5719589, at *10 (S.D.N.Y. Mar. 31, 2004) (citation omitted), but "there is simply

[12] Plaintiffs also cite *Nat'l Union Fire Ins. Co. v. Erazo*, 721 N.Y.S.2d 720 (Civ. Ct. N.Y. Cty. 2001), in their challenge to the directness requirement. However, that case only addresses the question of whether an insurance company could, through assignment, stand as a crime victim in place of a hospital that had suffered from embezzlement—it does not address the issue of directness.

no basis in logic to conclude that every alleged human rights violation that took place" throughout the relevant period in all the geographical regions defined in the Complaint "was the product of the alleged conspiracy between [Sudan] and the defendants," *id.* at *13. Under Plaintiffs' erroneous reading, any victim of any tort committed by Sudan or Sudanese state actors could sue BNP Paribas, without alleging any facts connecting BNP Paribas's acts to their specific injuries. The cases interpreting and applying § 213-b simply do not support such an outcome, and neither does this Court's precedent on sanctions violations, *see Rothstein*, 708 F.3d at 96 (rejecting strict liability for sanctions violations).

Finally, Plaintiffs are wrong when they claim that the district court inappropriately considered statements made by an Assistant United States Attorney ("AUSA") at BNP Paribas's sentencing that those harmed by the Sudanese regime were not victims of BNP Paribas's conduct. App. Br. 54-55. For this argument, Plaintiffs cite only *Mandarino v. Mandarino*, 180 F. App'x 258 (2d Cir. 2006), which is inapposite. In *Mandarino*, this Court ruled that the district court erred in resolving a factual question regarding the mental capacity of one of the parties at the motion to dismiss stage. 180 F. App'x at 261. There was no equivalent factual question resolved by the district court in this case. In citing the May 2015 transcript of BNP Paribas's sentencing, the district court merely characterized the AUSA's public statement as being in accord with the court's legal conclusion that

the United States was the victim of BNP Paribas's conduct, in light of the plain language of 18 U.S.C. § 371. SPA-12. Further, since the district court did not rely on the AUSA's statement in reaching its holding, its reference to this public statement was not prejudicial. *See Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 75 (2d Cir. 1998).

Regardless, the sentencing transcript is a document of public record upon which the district court was entitled to rely in resolving a motion to dismiss. *Id.*; *see also Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991) (district court could consider documents of which the plaintiff had notice in ruling on motion to dismiss even though those documents were not incorporated into the complaint by reference).

B. Plaintiffs' Arguments Concerning C.P.L.R. § 215(8)(a) Are Forfeited, And, In Any Event, Incorrect

Plaintiffs assert for the first time in this appeal that C.P.L.R. § 215(8)(a) provides an alternate route to tolling their claims. App. Br. 55. However, "[i]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal." *Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 114 (2d Cir. 2005) (citation omitted). Plaintiffs have offered no reason for their failure to raise this argument below, nor can they, since § 215(8)(a) is part of the very provision setting forth the applicable one-year statute of limitations that was briefed below. JA-441. While this Court has discretion to consider issues that

were not raised in the district court, it should decline to do so unless the party affected articulates some "manifest injustice" that would result otherwise. *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 615 (2d Cir. 2016) (citation omitted); *see also id*. ("[T]he circumstances normally do not militate in favor of an exercise of discretion to address new arguments on appeal where those arguments were available to the parties below and they proffer no reason for their failure to raise the arguments below") (citation omitted). This Court has found "manifest injustice" only in extremely limited situations not applicable here. *Compare Bogle-Assegai v. Connecticut*, 470 F.3d 498, 505 (2d Cir. 2006) (no manifest injustice in declining to consider an argument not raised below because "[t]he mere citation to a statute that provides alternative filing periods" is insufficient to preserve other arguments arising out of that statute), *with Sojak v. Hudson Waterways Corp.*, 590 F.2d 53, 54-55 (2d Cir. 1978) (possibility of "manifest injustice" only where a jury ruling was "wholly without legal support"), and *United States v. Thomas-Hamilton*, 907 F.2d 282, 284 (2d Cir. 1990) (finding "manifest injustice" where the facts established were legally insufficient to support the criminal conviction at issue).

Even if the Court determines that Plaintiffs have not forfeited their argument under § 215(8)(a), their argument fails on its merits. This tolling statute applies "[w]henever it is shown that a criminal action against the same defendant has been

commenced with respect to the event or occurrence from which a claim governed by this section arises[.]" N.Y. C.P.L.R. § 215(8)(a). This provision addresses "circumstances where specific conduct by an individual both subjects the individual to potential liability for an intentional tort and constitutes criminal activity which becomes the subject of criminal proceedings." *Courtman v. Hudson Valley Bank*, 11 Misc.3d 1068(A), at *2 (Sup. Ct. N.Y. Cty. 2006). The purpose of the tolling provision in § 215(8)(a) is "to relieve the criminal victim of the burden of participating simultaneously in two totally separate legal proceedings based on identical facts." *Alford v. St. Nicholas Holding Corp.*, 218 A.D.2d 622, 622 (1st Dep't 1995); *Courtman*, 11 Misc.3d, at *2. This alone serves to demonstrate § 215(8)(a)'s inapplicability to this case, since that purpose would not be served here. Plaintiffs played no role in the proceedings surrounding BNP Paribas's plea agreement; likewise, that proceeding required no investigation of or briefing on any injuries sustained by Plaintiffs. Moreover, the facts in the two prospective cases would hardly be "identical," as entirely separate issues of fact and law are presented.

As with their attempts to seek application of § 213-b, Plaintiffs cite a number of cases purporting to suggest that their injuries need not be directly related to the conduct that was the subject of the criminal action. As with those attempts, the cases cited state the opposite: They demonstrate that New York law

restricts the meaning of "event or occurrence" to acts that were, by themselves, sufficient to cause plaintiffs' injuries. In *Dynamic Chems., Inc. v. Ackerman Mech. Servs., Inc.*, the defendant forged the plaintiff's signature on documents submitted to government authorities. 58 A.D.3d 153, 153 (4th Dep't 2008). The defendant was then convicted of making false statements on the basis of these forgeries, and was sued by plaintiff under a law providing for damages in the event that one's name or likeness is used without consent. *Id.* Unlike the circumstances here, § 215(8) applied because plaintiff incurred his injury by virtue of the exact same "specific conduct" that constituted the criminal act; no further intervening acts were necessary, and no causation issues could be raised, since the "event or occurrence" was a single, uninterrupted act that was by itself sufficient to cause plaintiff's injury.

Similarly, in *Clemens v. Nealon*, 202 A.D.2d 747 (3d Dep't 1994), the defendant was convicted of criminal mischief for inflicting damage upon two boats while plaintiffs were aboard them. The defendant argued that the tolling provision should only benefit the boat owners, but the Third Department disagreed, ruling that the defendant's acts in damaging the boats were the same that caused injury to plaintiffs. *Id.* at 748. Again, plaintiffs' claimed injuries, and the damage to the boats, arose out of a single "event or occurrence" that bore no trace of intervening acts or interruptions in the causal chain.

CONCLUSION

For the foregoing reasons, the BNPP Defendants respectfully request that this Court affirm the district court's ruling dismissing the Complaint.

Dated: New York, New York
August 9, 2018

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Local Rule 32.1(a)(4)(A), because it contains 13,062 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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