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

SUPPLEMENTAL DECLARATION OF VITO ROBERTO

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

I. Introduction

This declaration makes several non-substantive corrections to my Supplemental Declaration of April 30, 2020.

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

2. I am a Professor at the University of St. Gall (Switzerland) since 1997, where I teach primarily torts and contract law. I hold a PhD degree from the University of Zurich, an LL.M. degree from the University of California in Berkeley and was admitted to the Zurich Bar in 1993 (attached as Exhibit 1 is a copy of my CV).

3. I have authored various articles and books in the fields of torts and damages. A list of publications I have authored in the previous ten years is attached as Exhibit 2.

4. In my capacity as a professor of law, I have written various legal opinions in the fields of torts and contracts, testified as an expert in pretrial proceedings, and acted in different functions in arbitration proceedings.

5. I am being compensated for my work on this declaration at a rate of 650 Swiss francs per hour. My compensation is not dependent on the opinions expressed in this declaration or on the outcome of this case. Neither I nor the University of St. Gall has a present or contemplated future interest in the outcome of this case. I am aware that in making this declaration, my duty is to the Court and not to the persons from whom I received instructions or compensation.

II. Scope And Structure Of The Legal Opinion

6. I have been provided with the Second Amended Complaint (the "Complaint" or "SAC") filed in the United States District Court, Southern District of New York, on January 20, 2017 by Kashef et al. (the "Plaintiffs") against BNP Paribas S.A. et al. (collectively, "BNPP"), the Werro Declaration in response to my earlier Declaration, dated May 22, 2017, Dkt. No. 81, Exhibit A to that declaration, and pages 39 and 40 of Plaintiffs' Opposition to Defendants' Motion to Dismiss the Second Amended Complaint, dated May 22, 2017.

7. I have also been provided with the opinion and order dated March 3, 2020 by District Judge Alison J. Nathan, United States District Court, Southern District of New York, Dkt. No. 151, and with Judge Nathan's order on the schedule to govern discovery regarding Swiss law, Dkt. No. 155.

8. Based on these orders, I understand that my supplemental expert report and testimony must address the following question: "Does Plaintiffs' Second Amended Complaint state a claim for relief under Swiss law?" Dkt. No. 151 at 21.

9. Based on Judge Nathan's opinion, I understand that the Court must determine whether Plaintiffs have stated a claim that meets the legal standard necessary to survive a motion to dismiss. Judge Nathan explains this legal standard as follows: The "complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" Dkt. No. 151 at 7 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable interference that [BNPP] is liable for the misconduct alleged." *Id.* It is not enough that such liability is conceivable; it must be plausible. *Id.*

10. In the light of this standard and based on Swiss tort law, I understand that the supplemental expert reports and testimony must answer the following question:

If the facts pleaded by the Plaintiffs in the Complaint were accepted as true, have Plaintiffs asserted a plausible claim under Swiss law that BNPP is liable to Plaintiffs?

11. As I explain in my prior declaration dated March 21, 2017, Dkt. No. 68, and reply declaration dated July 6, 2017, Dkt. No. 87, my answer to the above question is "no." This supplemental declaration will reiterate and expand upon my reasons for this conclusion. I will explain this answer in three main steps:

- In a first step (*infra* Section III), I list the Complaint's alleged causes of action and explain the grounds for liability under Swiss law to which these causes of action correspond. I will show that from a Swiss law perspective, the Complaint's alleged causes of action can be divided into two groups. The first and larger group concerns BNPP's liability as a secondary tortfeasor by contributing to the primary tortfeasor's, i.e., the Government of Sudan's ("GOS"), conduct. The causes of action falling within the second group allege that BNPP is a primary tortfeasor.

- In a second step (*infra* Section IV), I explain why, even if the facts pleaded by Plaintiffs were accepted as true, it would not be plausible that BNPP is liable as a secondary tortfeasor. I will state the three requirements for such liability and analyze the Swiss Supreme Court's case law in order to identify the types of cases in which these

requirements have been met, and the cases in which these requirements have not been met. I will then apply these findings to the case at hand.

– In a third step (*infra* Section V), I set forth why, even if the facts pleaded by Plaintiffs were accepted as true, it would not be plausible that BNPP is liable as a primary tortfeasor.

III. The Complaint's Causes Of Action And Corresponding Grounds For Liability Under Swiss law

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

13. The Complaint lists 20 different causes of action. SAC ¶¶ 257-529. They correspond to the following grounds for liability and restitution under the Swiss Code of Obligations ("CO"), *see* Ex. 3, Swiss Code of Obligations Arts. 41-51:

Causes of action listed by the Complaint	**Corresponding grounds for liability under Swiss Law**
III. Conspiracy to Commit Battery IV. Aiding and Abetting Battery V. Conspiracy to Commit Battery in Performance of Public Duty or Authority	**Art. 41 section 1 CO** "Any person who unlawfully causes damage to another, whether willfully or negligently, is obliged to provide compensation."

VI. Aiding and Abetting Battery Committed in Performance of Public Duty or Authority VII. Conspiracy to Commit Assault VIII. Aiding and Abetting Assault IX. Conspiracy to Commit False Arrest and False Imprisonment X. Aiding and Abetting False Arrest and False Imprisonment XI. Conspiracy to Commit Conversion – Wrongful Taking XII. Aiding and Abetting Conversion – Wrongful Taking XIII. Conspiracy to Commit Conversion – Wrongful Detention, Use or Disposal Where Possession Lawfully Obtained XIV. Aiding and Abetting Conversion – Wrongful Detention, Use or Disposal Where Possession Lawfully Obtained	In connection with **art. 50 CO**, concerning secondary liability in tort: Section 1: "Where two or more persons have together caused damage, whether as instigator, perpetrator or accomplice, they are jointly and severally liable to the person suffering damage." Section 2: "The court determines at its discretion whether and to what extent they have right of recourse against each other." Section 3: "Abettors are liable in damages only to the extent that they received a share in the gains or caused damage due to their involvement."
XIX. Conspiracy to Commit Wrongful Death XX. Aiding and Abetting Wrongful Death Caused by Intentional Murder	**Art. 41 section 1 CO**, in connection with **art. 50 CO**, concerning secondary liability. Additional provisions specifically addressing quantum and standing in cases of death: **Art. 45 CO**, concerning the damages for homicide: Section 1: "In the event of homicide, compensation must cover all expenses arising and in particular the funeral costs." Section 2: "Where death did not occur immediately, the compensation must also

	include the costs of medical treatment and losses arising from inability to work." Section 3: "Where others are deprived of their means of support as a result of homicide, they must also be compensated for that loss." **Art. 47 CO**, concerning satisfaction: "In cases of homicide or personal injury, the court may award the victim of personal injury or the dependents of the deceased an appropriate sum by way of satisfaction."
I. Negligence *Per Se* II. Negligence *Per Se* XV. Outrageous Conduct Causing Emotional Distress XVI. Negligent Infliction of Emotional Distress (Bystander/Zone of Danger Theory)	**Art. 41 section 1 CO**
XVII. Commercial Bad Faith	N/A
XVIII. Unjust Enrichment	**Art. 62–66 CO**

14. I have been informed that Plaintiffs have abandoned count XVII, asserting commercial bad faith, and count XVIII, asserting unjust enrichment. Thus, I will not discuss these two counts in this Report.

15. As noted, the remaining counts can be divided into two groups:

- the first group contains the counts according to which BNPP would be liable as a secondary tortfeasor by contributing to the primary tortfeasor's, i.e., the GOS's, conduct;
- the causes of action falling within the second group allege that BNPP is a primary tortfeasor.

16. The first group contains Counts III-XIV and XIX-XX. These counts do not allege that BNPP is the primary tortfeasor. Rather, the Complaint states:

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

SAC ¶ 13, *see also id.* ¶¶ 295-472, 503-529. Thus, the Complaint alleges that the GOS has committed the tortious acts listed in Counts III-XIV, XIX-XX, and that BNPP is liable because it has conspired with and aided and abetted the GOS. Under Swiss law, BNPP can only be held liable for these acts if, by conducting financial transactions on behalf of Sudanese banks owned and controlled by the GOS, it is deemed to have caused the damage to the Plaintiffs together with the GOS, "whether as instigator, perpetrator or accomplice." Ex. 3, art. 50 section 1 CO. In other words, BNPP cannot be held liable for Counts III-XIV, XIX-XX solely based on art. 41 section 1 CO (which applies to primary tortfeasors), but only based on art. 50 CO in connection with art. 41 section 1 CO. For these claims, secondary liability is the only possible basis for liability under Swiss law. The parameters for secondary liability under Swiss tort law are therefore the focus content of this Report (*infra* section IV).

17. The second group consists of Counts I-II and XV-XVI. These counts have a different character. For these claims, Plaintiffs advance the causes of action as grounds for primary liability. This would mean that, even if BNPP's conduct did not amount to conspiring with or aiding or abetting the GOS's tortious acts, BNPP is still alleged to be independently liable. Because these claims allege primary liability against BNPP, I will analyze them separately (*infra* Section V).

IV. Requirements For BNPP's Liability As A Secondary Tortfeasor Based On Art. 50 CO In Connection With Art. 41 Section 1 CO (Counts III-XIV, XIX-XX)

18. Art. 50 CO deals with multiple liable parties in tort. The provision states:

> Section 1: "Where two or more persons have together caused damage, whether as instigator, perpetrator or accomplice, they are jointly and severally liable to the person suffering damage."
>
> Section 2: "The court determines at its discretion whether and to what extent they have right of recourse against each other."
>
> Section 3: "Abettors are liable in damages only to the extent that they received a share in the gains or caused damage due to their involvement."

Ex. 3, art. 50 CO.

19. Only section 1 of art. 50 is relevant here. The second section deals with the potential claims among the tortfeasors. The third section refers to beneficiaries that were involved only after the tortfeasor's tortious conduct by securing the advantages drawn from the conduct, typically by receiving and/or handling stolen goods.

20. Art. 50 section 1 CO refers to perpetrators, instigators, and accomplices. The Complaint does not allege that BNPP is a co-perpetrator, i.e., a primary tortfeasor of the tortious acts listed in Counts III-XIV, XIX-XX, or that it instigated the GOS to commit the tortious acts listed in Counts III-XIV, XIX-XX. *See* SAC ¶¶ 295-472, 503-529.

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

22. First, I will explain the requirements of art. 50 section 1 CO (*infra* Section A). Second, I will present the case law dealing with liability according to art. 50 section 1 CO (*infra*

Section B). Third, I will apply the findings from the preceding analysis to the question at hand (*infra* Section C).

A. The Three Requirements Of Collective Responsibility In Accordance With Art. 50 Section 1 CO

1. In General

23. Liability in torts always requires a willful or negligent act (or omission) and an adequate cause between the act and the loss or damage. This is true for both primary and secondary liability claims.

24. There are three requirements for joint and several liability based on art. 50 section 1 CO: There must be (1) collective conduct; (2) collective fault; and (3) collective causation. The definition of the three requirements, especially of collective conduct, and the distinction among them is important in order to understand the scope of joint and several liability under art. 50 CO. The three requirements are occasionally confused and even the Swiss Supreme Court has not always clearly distinguished between them.

25. In order for two or more parties to be jointly and severally liable for torts under art. 50 CO, their participation in the harmful acts must, as in any liability case, be willful or negligent – this is what is meant by "collective fault." Each party's act must also be an adequate cause of the loss or damage – this is meant by "collective causation." These two requirements do not differ from the usual requirements of liability in tort.

26. The third requirement, which is decisive for the applicability of joint and several liability under art. 50 CO, is tortious cooperation—this is what is meant by "collective conduct."

It requires that each party knew or should have known of the other's contribution. The cooperation must be conscious and intentional.[1]

2. Collective Conduct

27. The requirement that the cooperation in the harmful act between the primary and secondary tortfeasors must be conscious and intentional is well founded in the Swiss Supreme Court's decisions. Based on the decisions of the Swiss Supreme Court, it is clear that the requirement of collective conduct is only met if the parties cooperate consciously and intentionally, i.e. deliberately. *See, e.g.*, Ex. 4, Supreme Court 4C.27/2003 cons. 3.2.2. (art. 50 section 1 CO "presupposes a common tortious fault on the part of the co-responsible parties within the meaning of Art. 41 CO, between whom there must be a sufficiently close common bond"[2]); Ex. 5, Supreme Court 4A_185/2007 cons. 6.2.1 ("[T]he tortfeasors must have cooperated deliberately to arrive at this result [the result being the harmful act]."[3]); Ex. 6, Supreme Court 4A_455/2014 cons. 5.1 ("Where two or more persons have together caused damage, they are jointly and severally liable to the injured party (art. 50 section 1 CO). This perfect joint and several liability presupposes a common fault, i.e. association in the harmful activity and, consequently, the awareness of collaborating in the result."[4]).

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[1] Courts as well as academics occasionally do not sufficiently distinguish between "collective conduct" and "collective fault," which are two distinct requirements of joint and several liability under art. 50 CO.

[2] "La solidarité parfaite présuppose une faute délictuelle commune des coresponsables au sens des art. 41 ss CO, entre lesquels doit exister un lien communautaire suffisamment étroit."

[3] "Autrement dit, les auteurs doivent avoir coopéré consciemment pour parvenir à ce résultat."

[4] "Lorsque plusieurs ont causé ensemble un dommage, ils sont tenus solidairement de le réparer (art. 50 al. 1 CO). Cette solidarité parfaite suppose une faute commune, à savoir une association dans l'activité préjudiciable et, par conséquent, la conscience de collaborer au résultat."

28. This requirement can also be traced back through decades of Swiss Supreme Court case law. *See, e.g.*, Ex. 7, SCD 55 [1929] II 310, 314 f. cons. 2 ("[C]ollective fault can only be said to exist if a collective conduct caused the damage, i.e. if the cooperation of the parties involved was deliberate."[5]); Ex. 8, SCD 82 [1956] II 544, 547 cons. 1 (liability based on art. 50 section 1 CO requires that the act "was committed collectively, i.e. in a conscious cooperation with the main perpetrator."[6]); Ex. 9, SCD 89 [1963] II 239, 248 f. cons. 6 (Two parties "caus[ing] the damage with collective fault under art. 50 CO, i.e. in a deliberate cooperation, are jointly and severally liable according to the mentioned provision."[7]).

29. In Swiss tort law, the requirement of collective conduct is decisive for differentiating between the two different forms of joint and several liability. If the parties cooperated consciously and intentionally, the parties can be jointly and severally liable according to art. 50 section 1 CO. This type of liability is called "perfect joint and several liability" ("echte Solidarität", "solidarité parfaite"). If there is no collective conduct, but mere concurrence of claims against two or more parties who independently contributed to the same injury, art. 50 CO does not apply. Instead, there is "imperfect joint and several liability" pursuant to art. 51 section 1 CO.[8] Examples of a mere concurrence of claims include instances

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[5] "Von einem gemeinsamen Verschulden aber kann nur gesprochen werden, wenn ein gemeinsames Unternehmen den Schaden herbeigeführt hat, d.h. wenn das Zusammenwirken der Beteiligten bewusst war."

[6] "Auch ist die Tat, wie Miturheberschaft und Gehilfenschaft im Sinne des Art. 50 OR voraussetzen, gemeinsam, d.h. in bewusstem Zusammenwirken mit dem Haupturheber, begangen worden […]."

[7] Haben zwei Parteien "den Schaden im Sinne von Art. 50 OR gemeinsam verschuldet, d.h. in bewusstem Zusammenwirken herbeigeführt, so haften sie nach der eben genannten Bestimmung solidarisch; andernfalls besteht ihnen gegenüber blosse Anspruchskonkurrenz."

[8] Ex. 3, art. 51 CO states:

> Section 1: Where two or more persons are liable for the same damage on different legal grounds whether under tort law, contract law or by statute, the provision governing recourse among persons who have jointly caused damage is applicable mutatis mutandis.

in which multiple drivers each independently make mistakes that contribute to the same accident, or a scenario in which a contractor and an architect are both liable to the same client for defective work, but each based on his individual contract with the client.[9] Art. 51 CO thus governs fact patterns where several tortfeasors are liable for the same damage, but where the collective conduct requirements of art. 50 section 1 CO are not fulfilled. In such scenarios, each tortfeasor must be independently liable as a primary tortfeasor in order to establish a joint and several liability.

3. Collective Fault

30. Collective fault requires that each party's conduct must be willful or negligent with respect to the harm, *i.e.,* each party must have intended the loss or damage that occurred or should have known that the collective conduct could lead to such loss or damage.[10]

31. For example, the Swiss Supreme Court has stated that there is collective fault between children who directly participated in an activity "whose dangerous character they could and should have recognized."[11]

4. Collective Causation

32. Collective causation requires that each party's conduct has contributed, in a legally meaningful way, to the loss or damage that has occurred. The Swiss Supreme Court

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Section 2: As a rule, compensation is provided first by those who are liable in tort and last by those who are deemed liable by statutory provisions without being at fault or in breach of contractual obligation.

[9] *See, e.g.*, Ex. 10, SCD 127 [2001] III 257 and Ex. 11, SCD 115 [1989] II 42 as examples of imperfect joint and several liability in cases concerning construction projects.

[10] *See, e.g.*, Ex. 12, SCD 104 [1978] II 184, 187 f. cons. 2; Ex. 13, SCD 104 [1978] II 225, 230 f. cons. 4a; Ex. 5, Supreme Court 4A_185/2007 cons. 6.2.2.

[11] Ex. 12, SCD 104 [1978] II 184, 187 cons. 2: "En participant ensemble à une activité dont ils pouvaient et devaient reconnaître le caractère dangereux, les trois enfants ont commis une faute commune […]."

held: "Joint and several liability implies a preceding liability: a person who is not liable for damage cannot be held joint and severally liable."[12]

33. Joint and several liability requires, therefore, that the primary tortfeasor's conduct as well as the contribution of the secondary tortfeasor are both adequate causes of the loss or damage. The concept of an "adequate" cause is similar to the concept of "proximate cause"—that is, the contribution must be substantial enough in order to attribute the loss or damage to the tortfeasor.

34. Thus, the relevant question in this proceeding is not whether there is any form of adequate or substantial link between the acts of the *primary* tortfeasor and the loss or damage. Rather, the decisive question is whether the *secondary* party's contribution is an adequate cause of that loss or damage.

35. The Swiss Supreme Court has confirmed the requirement that the secondary party's contribution has to be an adequate cause of the loss or damage in a recent decision, Ex. 15, SCD 145 [2019] III 72, which dealt with joint and several liability according to art. 50 section 1 CO: "The applicant rightly does not question that not only the claim for damages (art. 41 in conjunction with art. 50 CO), but also the claim for injunctive relief against the participant in a copyright infringement presupposes that this infringement is an adequate causal consequence of his [*i.e.*, the participant's] contribution."[13]

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[12] Ex. 14, SCD 130 [2004] III 362, 370 cons. 5.2: "Or, la solidarité implique une responsabilité préalable: celui qui ne répond pas d'un dommage, ne saurait en répondre solidairement."

[13] Ex. 15, SCD 145 [2019] III 72, 78 cons. 2.2.1: "Die Beschwerdeführerin stellt zu Recht nicht in Frage, dass nicht nur der Schadenersatzanspruch (Art. 41 i.V.m. Art. 50 OR), sondern auch der Unterlassungsanspruch gegen den Teilnehmer einer Urheberrechtsverletzung voraussetzt, dass diese adäquat kausale Folge seines Beitrags ist."

36. BNPP's acts must, in order to establish liability as a secondary tortfeasor under art. 50 CO, be an adequate cause of the alleged human rights violations.

37. The requirement of adequate causation can be explained as follows: Swiss tort law (as most civil law jurisdictions) restricts liability by requiring that a plaintiff demonstrates adequate causality. Such a showing requires proof of a substantial contribution to the causal chain leading to the injury alleged. Swiss courts adopt a restrictive approach to the legal definition of adequate causality.

38. According to the general principles applied by the Swiss Supreme Court, an act is an adequate cause for a loss or damage if, based on the usual course of events and common experience, it can fairly be considered the cause of the kind of loss or damage that occurred.[14] As the Supreme Court has stated, this formula boils down to the test of whether the loss or damage can, in good faith, be attributed to the tortfeasor.[15]

39. According to Swiss case law, a contributor to a tort is only liable if his **contribution is substantial**. As noted above, Swiss courts tend to apply this requirement more restrictively than courts in other jurisdictions. The principle of "the loss lies where it falls"—except when a special reason can be shown for interference—carries greater importance in Switzerland than in other jurisdictions. As the Swiss Supreme Court has restated recently,

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[14] SCD 142 [2016] III 433, 438 cons. 4.5 (in my earlier Declaration dated March 21, 2017 Dkt. No. 68, this decision was cited as unpublished Ex. 16, Supreme Court 4A_637/2015; in the meantime, the decision has been officially published in the SCD-Volumes as SCD 142 III 433); see also Ex. 17, SCD 123 [1997] III 110, 112 cons. 3a.

[15] SCD 142 [2016] III 433, 439 cons. 4.5 (in my earlier Declaration cited as Ex. 16, Supreme Court 4A_637/2015); Ex. 17, SCD 123 [1997] III 110, 112 cons. 3a.

courts have to be cautious that liability (to use the terminology of the Swiss Supreme Court) does not "get out of hand."[16]

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

- In the decision of the Ex. 18, Supreme Court 4A_7/2007, a man sued the manufacturer of a "barbecue 6000" grill. The man's neighbor was using such a grill and, due to a defect, the grill caught fire, spreading to the neighbor's house. In trying to help his neighbor to extinguish the fire, the man fell from his neighbor's balcony and was injured. The Swiss Supreme Court decided that the man was not injured by the fire and that he did not fall while trying to get away from the fire; but that it was his own decision to help extinguish the fire. In so deciding, the man created an independent cause for his accident. The Supreme Court explained that if adequate causation were found in such a case, the adequacy requirement would not serve its purpose to reasonably restrict liability.

- In SCD 142 [2016] III 433[17], a wife and her husband were driving in a car that was hit by a third person. The wife was severely injured, forcing the husband to take care of her. Due to pressures of caring for his wife, he developed a somatoform pain disorder. The Court cited Ex. 18, Supreme Court 4A_7/2007 and explained that although the man was legally obliged to help his wife, his pain disorder could not be attributed to the driver who caused the accident, because otherwise liability would "get out of hand" (in the words of the Supreme Court, there would be a "*Haftungsausuferung*") and the requirement of adequacy would not serve its purpose of reasonably restricting liability.

- In Ex. 15, SCD 145 [2019] III 72 the Supreme Court decided that Swisscom, a Swiss telecommunication company, was not liable for copyright infringing content that third parties uploaded on the internet, because there was not adequate causation between its conduct, namely providing internet access, and the infringement (the case is discussed in further detail infra, section B/3).

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[16] SCD 142 [2016] III 433, 438 cons. 4.5 (in my earlier Declaration cited as Ex. 16, Supreme Court 4A_637/2015).

[17] SCD 142 [2016] III 433 (in my earlier Declaration cited as Ex. 16, Supreme Court 4A_637/2015).

B. Case Law Analysis

41. The preceding section established that an accomplice's liability for a primary tortfeasor's conduct according to art. 50 section 1 CO requires that: (1) the secondary tortfeasor cooperates consciously and intentionally with the primary tortfeasor in committing the injury ("collective conduct"); (2) the accomplice intended the loss or damage or should have known that the collective conduct could lead to such loss or damage ("collective fault"); and (3) the accomplice's contribution is an adequate cause of the resulting loss or damage, i.e., that the accomplice's contribution is substantial enough in order to attribute the loss or damage to the accomplice ("collective causation").

42. This section discusses and cites the majority of the Swiss Supreme Court's decisions regarding the requirements of art. 50 section 1 CO. The extensive analysis is thus representative of the Supreme Court's opinions on this provision, as well as of the types of cases that are brought in Swiss courts under this provision.[18]

43. The analysis of the case law confirms what I have described in the preceding section and leads to two conclusions:

44. First, in the instances in which the Swiss Supreme Court has affirmed liability according to art. 50 section 1 CO, the contributor has actively participated in the harmful conduct either:

– immediately and substantially (*infra* Section 1); or

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[18] My research has included all officially published decisions (SCD) from 1954-1999 and all decisions from 1999 onwards that reacted to search term combinations (in German, French and Italian) of art. 50 CO (e.g. "art. 50 section 1 CO") and the key words "perfect joint and several liability." It further included SCD from 1875-1954 based on reference in the case law and in literature (for these older decisions, the electronic search is not reliable). Decisions which referred to liability under art. 50 CO only in an "*obiter dictum*" or which concerned the liability of joint owners or of legal entities and its managers are omitted.

– willfully and substantially, i.e., the contributor participated with the intent of causing the loss or damage (*infra* Section 2);

– and in both instances the contributor's conduct was sufficiently substantial to attribute the loss or damage to it.

45. Second, in the instances in which the Swiss Supreme Court has denied liability according to art. 50 section 1 CO, it has generally done so because it found that there was no collective conduct and in one case, because there was no collective causation. Thus, the requirement of a conscious and intentional or immediate cooperation has been decisive in practice (*infra* Section 3).

1. Cases Where The Contributor Participated Immediately And Substantially In The Harmful Conduct

46. The first group of cases in which liability has been affirmed are those in which the secondary tortfeasor participated immediately and substantially in the harmful conduct. Typically, the secondary tortfeasor participated physically and directly in a dangerous situation (*infra* Section a), but there are other fact patterns as well (*infra* Section b).

a. Physical Participation In Dangerous Situations

47. In these cases, the secondary tortfeasor's contribution was always very immediate—the tortfeasor physically added to a dangerous situation in the present. This is also why the secondary actor's contributions were deemed substantial—the parties created the dangerous situation collectively. In many of these cases, the parties had an equal share in propounding the dangerous situation, and the harm could have been inflicted by any one of the parties.

48. Several of the cases in which secondary actors were found liable involved injury resulting from violent conduct engaged in by multiple defendants where it was not clear which defendant had committed the actual injury producing act.

- In Ex. 19, SCD 42 [1916] II 473, three people were roaming the streets throwing hand blaster balls (typically used by drivers to frighten animals blocking the road). One of them threw a ball that hit a pregnant woman, who suffered hearing loss and a nervous disorder that caused her to lose her child. The Supreme Court held that, even though it was not clear who had thrown the ball, all three were liable. The three had caused the damage together.

- *See also* Ex. 20, SCD 25 [1899] II 817 (every participant in a brawl liable for a wound to the eye where it was unclear which participant had inflicted the injury).

49. In cases where it was clear which participant committed the actual injury, other participants have nonetheless been held jointly and severally liable where the secondary actors' conduct immediately and substantially contributed to the dangerous situation.

- One seminal case is Ex. 12, SCD 104 [1978] II 184, which concerns three nine year old boys who played a game involving shooting at each other with a bow and arrow. The boys were supposed to aim low, i.e. below each other's heads. Nevertheless, one hit the other in his right eye causing him to lose the eye completely. The Supreme Court held that the three children committed a collective fault, because they participated together in a dangerous activity, whose risks they knew or should have known. The conduct of the shooter was not of a quality so as to interrupt collective causation. Even though he aimed too high and shot from too close a distance, violating the implicit rules of the game, his actions were within the risk of the game, for it is well known that in the heat of the moment children may lose caution. Thus, the contributions of the other children remained contributing causes.

- In Ex. 21, SCD 79 [1953] II 66, some ice hockey players from one team organized and took part in a game that was held without adequate safety measures to protect the audience from the action on the skating rink. In the course of the game, one player lost his balance and fell on a spectator, causing her to lose sight in one eye. The Supreme Court held all players liable for the tort, both those who organized the game and those who merely took part in it. Even though they had not organized the game, the participating players had collaborated in the illicit act by taking part in the game held in an improper setting without taking any precautions.

– *See also* Ex. 22, SCD 45 [1919] II 304 (all participants in a brawl liable for injury caused by one brawler by throwing a stone that hit another in the eye); Ex. 23, SCD 38 [1912] II 471 (two boys throwing stones at each other jointly and severally liable for injury caused by one of the stones hitting an innocent bystander); Ex. 24, SCD 100 [1974] II 332 (boys playing with matches jointly and severally liable for fire caused by match thrown by one child that burnt down a barn and parts of the adjacent house).

50. Secondary actors have also been found liable for their contribution to a dangerous situation in which they did not physically participate, so long as the contribution was immediate and substantial.

– Ex. 25, SCD 71 [1951] II 107 involved a shooting competition by a group of soldiers and some civilians in the garden of a restaurant after having drunk a significant amount of alcohol. The patron who was injured by a stray bullet entered the restaurant at a later stage and was seated at a table some meters away from the targets. The landlord in this case was physically present and made a conscious, immediate and substantial contribution to the victim's injuries by selling alcohol to soldiers and letting the drunken soldiers conduct a shooting competition at the landlord's establishment while other patrons were sitting nearby at other tables of the restaurant.

b. Others

51. While most of the decisions in which liability has been affirmed concern secondary tortfeasors that participated physically and directly in a dangerous situation, there were some cases without a physical participation, but still the elements of collective conduct, collective fault and collective causation were satisfied based on the secondary tortfeasor's cooperation in the injurious conduct itself:

– In Ex. 26, SCD 64 [1938] II 24, the editor and printer of a magazine were held jointly and severally liable for not preventing the publication of a series of articles over the period of two months infringing the plaintiff's personality rights. Both parties should and could have stopped the defamatory campaign.

– In Ex. 5, Supreme Court 4A_185/2007, a corporation, Y Ltd, and its intermediary, X, who closely managed a locksmith business, were found jointly and severally liable with C, the owner of the locksmith business, for trademark infringement because the locksmith business used a logo on its vehicles, advertisements and invoices that was substantially similar to a logo trademarked by plaintiff, who ran a competing service.

Y used notes for invoicing, held a bank account and was financing vehicles containing a similar name than the trademark of the plaintiff. Applying art. 50 section 1 CO, the Supreme Court determined, based on the substantial administrative and financial participating of X and Y Ltd in the business affairs of C, that they knowingly cooperated with C in the wrongdoing.

2. Cases Where The Contributor Participated With The Intent Of Causing Harm And Made A Substantial Contribution

52. The second group of cases are those in which the secondary tortfeasor participated with the intent of causing harm. Typically, in these cases, the secondary tortfeasor is not only liable in tort, but also criminally liable (*infra* Section a), but there are other fact patterns as well (*infra* Section b).

a. Taking Part In A Criminal Activity

53. In the cases concerned with the civil consequences of having been criminally liable for contributing to a crime under Swiss law, the secondary actors found liable have uniformly acted willfully, i.e., with the intent of causing the harm or, where creating a dangerous situation is itself a crime, with the intent of creating the dangerous situation. In order to be criminally liable for contributing to a crime, the contribution must have been intentional (see Ex. 27, art. 24 and art. 25 Swiss Criminal Code). A negligent contribution is not a crime.

– In Ex. 28, SCD 57 [1931] II 417, carpenters went on strike. The union leader "repeatedly instigated the workers in the preceding strike meetings to use force," he "repeatedly explained that the workers must be more vigorous", and that "there has never been a strike of carpenters without violent brawls."[19] Three workers declined to take part in the strike and continued to work. Six other workers attacked the three strikebreakers. One of the six workers hit one of the strikebreakers on the head with brass knuckles, causing severe injuries. According to the Swiss Supreme Court, even

[19] Ex. 28, SCD 57 [1931] II 417, 418 f. cons. B.: "[…] wiederholt zu Gewalttätigkeiten aufgefordert […] mehrmals erklärt, sie müssten energischer sein […] es sei noch nie ein Schreinerstreik durchgeführt worden, an dem es nicht zu Prügeleien gekommen sei […]."

though it was clear who had injured the victim, all six attackers and the union leader were collectively liable, either perpetrators, instigators, or accomplices. They may not all have had in mind the injuries that occurred. They all, however, should have foreseen that instigating the use of force or the participation in actions to intimidate workers who are not committed to the common cause can lead to grave consequences. This was particularly so in this case due to the general animosity among the workers and the fact that there were hotheads among them. Prior to the civil claims the Criminal Court of first instance held all six workers and the union leader criminally liable for causing personal injury to the victim, either as perpetrators, as accomplices, or as instigators. The Swiss Supreme Court held all convicted persons, including the union leader, civilly liable for the damages of the victim according to art. 50 section 1 CO in connection with art. 41 section 1 CO.

– Ex. 29, Supreme Court 6B_473/2012 concerned a brutal brawl between two brothers and two friends. One brother attacked one of two friends. When the other friend tried to separate the two, the other brother entered the fight, attacking the other friend. One of the friends was badly injured. The two brothers were criminally convicted as co-perpetrators and found civilly liable as co-perpetrators according to art. 50 section 1 CO.

b. Others

– Ex. 30, SCD 100 [1974] II 167, a confectioner and baker ordered plans from a contractor for the renovation of the bakery, but the baker ultimately used another company for the renovation. The contractor alleged a copyright infringement stating that the renovation work had been done exactly according to his plans. The Supreme Court did not have enough information to rule conclusively on the infringement, but it stated that in case of an infringement, both the other company and the baker would be liable according to art. 50 section 1 CO, because the other company could not have used the plans without the willful participation of the baker.

3. Cases Where The Swiss Supreme Court Denied Liability According To Art. 50 Section 1 CO

54. In several cases, the Swiss Supreme Court has denied liability according to art. 50 section 1 CO. In all cases except one, it did so because there was no collective conduct. In one case (Ex. 15, SCD 145 [2019] III 72), the Swiss Supreme Court ruled the collective causation element was not satisfied.

– In Ex. 31, SCD 93 [1967] II 317, the damage in dispute was due to the fact that both the plaintiff (contractor) and the architect (construction manager) violated their respective

contractual duties of care towards the defendant (client). However, there was no collective conduct and thus no liability according to art. 50 CO. Rather, this was a case of so-called imperfect joint and several liability or concurrence of claims according to art. 51 CO.

– In Ex. 32, SCD 90 [1964] II 501, a group of companies alleged that certain steel mills did not supply them and that certain other suppliers, which had decisive positions in the main association of this industry, were liable for this boycott. The Supreme Court held that "[j]oint and several liability under art. 50 requires a collective conduct which in case of a boycott can only consist in consciously and intentionally taking part in the boycott. The fact that certain suppliers refuse to supply the plaintiffs cannot give rise to any liability on the part of the defendants, even if they knew about the conducts of the suppliers and these conducts indirectly worked to their advantage. What is decisive is that they were not involved in the business decisions of these suppliers, but that, as has already been explained, the decisions were taken by the suppliers in order to protect their own interests, and that therefore the causal connection between the conduct of the defendant and the harmful acts of the suppliers is also missing."[20]

– In Ex. 33, SCD 112 [1986] II 138, an employer failed to take the necessary precautions to prevent a household employee from being injured by another household employee tampering with a loaded firearm displayed in the home. The employee tampering with the firearm was liable in tort and the employer was liable in contract and tort. As there was no collective conduct between the employer and the employee tampering with the firearm, liability under art. 50 CO was denied.

– In Ex. 34, Supreme Court 4A_573/2010, the newspaper company Z paid A to fill newspaper-machines with newspapers. Sometimes A's son B distributed the newspapers for him. At a certain point, both A and B acquired keys to open the coin-boxes and started to steal money. Each of them knew that the other would steal coins whenever given the opportunity. Thus, the Supreme Court held them jointly and severally liable for the stolen money. A had stolen money also in another city. However, the Court found that even if B had known about A's stealing-tours in this

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[20] Ex. 32, SCD 90 [1964] II 501, 508 f. cons. 3: "Die solidarische Haftung mehrerer Schädiger nach Art. 50 OR setzt ein gemeinsames Handeln voraus, das im Falle eines Boykottes nur in einer bewussten und gewollten Teilnahme an diesem bestehen kann. Der Umstand, dass die Werke, also Dritte, eine Belieferung der Klägerinnen ablehnen, vermag keine Deliktshaftung der Beklagten zu begründen, selbst wenn sie vom Vorgehen der Werke Kenntnis hatten und dieses sich indirekt zu ihrem Vorteil auswirkte. Entscheidend ist, dass sie nicht beteiligt waren an der Beschlussfassung über diese Massnahmen, sondern dass diese, wie bereits ausgeführt wurde, von den Werken aus eigenem Entschluss, zur Wahrung ihrer eigenen Interessen getroffen wurden, und daher auch der Kausalzusammenhang zwischen dem Verhalten der Beklagten und der in Frage stehenden schädigenden Handlung der Werke fehlt."

> other city, he was not personally involved in these actions and was thus not liable for the amounts stolen there. Knowledge of a tortious behavior is not in itself sufficient to establish liability under art. 50 CO.

55. In Ex. 15, SCD 145 [2019] III 72, the Supreme Court had to decide whether Swisscom, a Swiss telecommunication company, was liable as an access provider according to art. 50 CO for copyright infringing content that third parties uploaded on the internet. The Supreme Court denied this liability. It stated:

> Respondent does not make a concrete contribution to the act of making the data accessible on the (foreign) computers. Its involvement is solely due to the fact that it – together with numerous other access providers – provides the technical infrastructure to enable access to the worldwide internet from Switzerland. This is not sufficient for civil liability as a participant in the copyright infringements of unknown third parties under discussion. The approach advocated in the complaint, based on art. 50 section 1 CO, would establish a responsibility of all the numerous access providers in Switzerland for all content made available on the worldwide Internet in violation of copyright law. Such 'system liability' with corresponding obligations to verify and cease and desist in the form of technical access blocks cannot be based on the civil law liability of participants, which presupposes a concrete contribution to the direct copyright infringement. There is no adequate causal link to the copyright infringement in question which could justify a claim for injunctive relief against the respondent.[21]

4. Conclusion

56. The case law evidences three points: First, the three requirements of art. 50 section 1 CO were only met where the secondary tortfeasor's contribution was either (i)

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[21] Ex. 15, SCD 145 [2019] III 72, 84 f. cons. 2.3.2: "Am entsprechenden Zugänglichmachen auf den (ausländischen) Rechnern liefert die Beschwerdegegnerin keinen konkreten Tatbeitrag. Ihre Beteiligung liegt einzig darin begründet, dass sie - zusammen mit zahlreichen weiteren Access Providern - die technische Infrastruktur bereitstellt, damit ein Zugang zum weltweiten Internet von der Schweiz aus überhaupt möglich ist. Dies reicht für eine zivilrechtliche Verantwortlichkeit als Teilnehmerin an den zur Diskussion stehenden Urheberrechtsverletzungen unbekannter Dritter nicht aus. Der in der Beschwerde vertretene Ansatz würde gestützt auf Art. 50 Abs. 1 OR eine Verantwortlichkeit sämtlicher der zahlreichen Access Provider in der Schweiz für alle auf dem weltweiten Internet urheberrechtswidrig zur Verfügung gestellten Inhalte begründen. Eine derartige 'Systemhaftung' mit entsprechenden Überprüfungs- und Unterlassungspflichten in Form technischer Zugangssperren lässt sich nicht auf die zivilrechtliche Teilnehmerhaftung stützen, die einen konkreten Beitrag zur direkten Urheberrechtsverletzung voraussetzt. Ein adäquater Kausalzusammenhang zur fraglichen Urheberrechtsverletzung, der einen Unterlassungsanspruch gegen die Beschwerdegegnerin begründen könnte, liegt nicht vor."

immediate and substantial or (ii) willful and substantial. Second, where the requirements of art. 50 section 1 CO were not satisfied, it was mostly because there was no collective conduct. Third, collective causation means that the contributions not only of the primary tortfeasor but also of the secondary tortfeasor must each be an "adequate" cause of the loss or damage—that is, the contribution of the secondary tortfeasor must be substantial enough to attribute the full loss or damage to the tortfeasor.

C. Application Of The Case Law To The Case At Hand

57. Based on the Swiss Supreme Court case law regarding art. 50 CO, if a secondary tortfeasor's contribution is not both substantial and either immediate or made with the intention of causing the loss or damage, the complaint would not succeed based on art. 50 CO in connection with art. 41 CO.

58. The case law shows that the Swiss Supreme Court has never found liability under art. 50 CO where a defendant only negligently and indirectly contributed to tortious acts of another party. And it is a longstanding requirement of Swiss law that a party's contribution in joint liability cases must be sufficiently substantial in order to attribute the loss or damage to the party as a causal matter.

59. In order for Plaintiffs' Complaint against BNPP to succeed under Swiss law, it must therefore allege collective conduct, i.e., allege in specific detail how BNPP's participation in the conduct that caused the harm was *willful or immediate*, and how it was a *substantial* contributor to GOS's tortious conduct, in addition to specifically alleging the threshold requirements of collective fault, i.e., that BNPP has *intended* the human right violations *or should have known* that its acts could lead to such damage, and collective causations *i.e.*, that BNPP's contribution to the human right violations was in the causal chain leading to the injury

alleged substantial enough to attribute Plaintiff's losses to BNPP. Thus, Plaintiffs must plead and prove the following requirements of liability:

a. Collective Conduct

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

- As an alternative to the willfulness requirement, Plaintiffs can instead plead and prove that BNPP's contribution to the tortious conduct by the GOS was an immediate one; this requirement is typically satisfied in cases in which the secondary tortfeasor participated physically and directly. An indirect contribution would not suffice under the criteria of immediateness required for liability under art. 50 section 1 CO.

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

b. Collective Fault

- Plaintiffs must in addition plead and prove that BNPP has intended the human rights violations or should have known that providing financial services to Sudanese banks could lead to tortious acts committed by the GOS.

c. Collective Causation

- Finally, Plaintiffs must plead and prove that the financial services BNPP provided to Sudanese banks were an adequate cause of the human rights violations committed by GOS, i.e. that such services were substantial enough in order to attribute the responsibility for such acts to BNPP.

60. After having reviewed all of the case law of the Swiss Supreme Court, I can state that there are no decisions where claims based on facts similar to those at issue here have been upheld. The Swiss Supreme Court has consistently refused in the last few decades to broaden the scope of art. 50 section 1 CO. I have therefore no doubt that any claim based on the concept of collective liability directed against a bank for provision of financial services to a foreign government-owned entity where the relevant foreign government is accused of human rights abuses, would—even more so where such financial services were not forbidden by specific Swiss legal provisions—be dismissed by a Swiss court without elaborating in detail the analysis made in my declaration simply by denying either or all of "collective conduct," "collective fault" or an "adequate" causality between the commercial activities of the bank and the alleged acts of the foreign government.

61. I have no doubt that this would be true with regard to the present case involving BNPP and GOS-owned banks, particularly because the Complaint does not allege that any of BNPP's conduct violated Swiss laws. In fact, the Swiss Financial Market Supervisory Authority investigated the provision of financial services to Sudanese banks by BNPP's Swiss affiliate, BNP Paribas (Suisse) S.A., and concluded that this conduct did not violate Swiss sanctions. *See infra* n.22.

62. I am therefore convinced that a Swiss court and, in any event, the Swiss Supreme Court, would dismiss the claims for Counts III-XIV and XIX-XX described in the Complaint for the lack of the required conditions of art. 50 section 1 CO.

D. Additional Requirements For Wrongful Death Claims (Counts XIX-XX)

63. Two of the secondary liability claims in this case, Counts XIX-XX, are for wrongful death.

64. To state a claim that the Bank is liable as an accomplice to the GOS in connection with Plaintiffs' wrongful death claims, Plaintiffs must satisfy the general requirements for proving secondary liability, which are described above.

65. In addition, Plaintiffs must satisfy the specific requirements under Swiss law applicable to wrongful death claims governing the scope of damages (which is not relevant here) and the standing of third parties to bring a claim. These specific rules are contained in art. 45 and 47 CO.

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

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

68. Under Swiss law, the Plaintiffs would have to state the facts giving rise to their standing to pursue claims under art. 45 Section 3 and/or 47 CO. Their claims would be dismissed under Swiss law for lack of such elements in the Complaint.

V. Requirements For BNPP's Liability As A Primary Tortfeasor Under Art. 41 CO (Counts I-II, XV-XVI)

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

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

71. Counts I and II allege liability for "negligence *per se*," which also exists as a form of liability under Swiss law. The statutes referenced in Counts I and II that Plaintiffs allege give rise to claims for negligence *per se* are United States, rather than Swiss, statutes. Swiss courts recognize that violations of various criminal and administrative provisions in Swiss statutes can give rise to negligence *per se* claims by the persons those statutory provisions were designed to protect. However, only violations of Swiss statutory provisions can trigger liability for negligence *per se* under Swiss law, since Swiss law requires compliance only with Swiss statutory provisions. Because no violations of Swiss statutes are alleged, the claims for negligence *per se* are not possible under Swiss law.[22]

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

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

73. One of the requirements for establishing primary liability under art. 41 CO is that the act at issue was unlawful. Here, neither BNPP nor its employees are alleged to have directly committed the human rights violations giving rise to the emotional distress claims in the Complaint. The Complaint alleges that BNPP is liable based on its provision of financial services to the Sudanese banks. Under Swiss law, however, BNPP was allowed to provide financial services to the Sudanese banks (and the Complaint does not allege otherwise). Since BNPP did not violate any Swiss legal provisions forbidding it to provide those financial services to banks owned by the GOS (no such Swiss provisions exist), and since BNPP is not alleged to have directly committed the acts that injured the Plaintiffs, then there can be no unlawfulness and a claim based on art. 41 section 1 CO must fail. There is thus no need to further elaborate on the other requirements of art. 41 section 1 CO.

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

Executed on this 13__ day of August, 2020.

VITO ROBERTO