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 REPLY BRIEF OF DEFENDANTS BNP PARIBAS S.A. AND BNP PARIBAS NORTH AMERICA, INC. IN FURTHER SUPPORT OF THEIR MOTION TO DISMISS THE SECOND AMENDED COMPLAINT**

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September 7, 2020

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[1] Capitalized terms are defined in BNPP Supp. Br. (Aug. 17, 2020), ECF No. 172.

[2] Unless otherwise noted, exhibits accompany the Supplemental Decl. of Vito Roberto (Aug. 17, 2020), ECF No. 169, and/or the Supplemental Reply Decl. of Vito Roberto (Aug. 17, 2020), ECF No. 170.

## PRELIMINARY STATEMENT

The Complaint does not state a claim against the BNPP Defendants under Art. 50(1) CO, and plaintiffs fail to demonstrate otherwise. The conspiracy that BNP Paribas S.A. engaged in (and pled guilty to) was to violate U.S. sanctions against Sudan. The BNPP Defendants *did not* consciously cooperate with Sudan in the human rights violations that plaintiffs suffered, as required for liability under Art. 50(1) CO, and plaintiffs do not plausibly allege to the contrary. Plaintiffs try to avoid this core defect in their pleading by asserting that the BNPP Defendants had knowledge of Sudan's human rights violations. But the Swiss Supreme Court has consistently ruled that a defendant's mere knowledge of a primary tortfeasor's conduct will not support the finding of collective conduct or collective fault that Art. 50(1) CO requires. Accordingly, plaintiffs fail to state a claim against the BNPP Defendants.

As the BNPP Defendants have demonstrated, plaintiffs also fail to plead collective causation, another necessary element under Art. 50(1) CO. The relevant causation standards that the Swiss Supreme Court described just last year are not met here, where the only purported relationship between the BNPP Defendants' conduct and plaintiffs' injuries is that the sanctions violations enabled Sudan to access the U.S. financial market; Sudan's oil revenues increased; Sudan purchased military weapons and other materials; Sudan armed various militant groups; and those groups committed various crimes against the civilian population. *Accord* Pl. Supp. Br. at 8 (describing the same purported chain). This is far too attenuated a "causal" chain to satisfy Art. 50(1) CO. Accordingly, the Court should dismiss the Complaint with prejudice.

## ARGUMENT

### I. Plaintiffs Fail To Plead Collective Conduct And Collective Fault.

As the Swiss Supreme Court's Art. 50(1) CO jurisprudence demonstrates, plaintiffs fail to plead the willful and substantial, or immediate and substantial conduct by the BNPP

Defendants that is necessary to establish collective conduct. *See* BNPP Supp. Br. at 10-11.[1] Plaintiffs themselves rely on certain cases illustrating these requirements, but ignore the key distinctions between those cases and the present matter that demonstrate the inadequacy of the SAC's claims. For example, plaintiffs ignore that in the Locksmith Case, the Swiss Supreme Court imposed liability based on its finding that the accomplices closely managed the locksmith business and themselves took part in the primary violations. Supreme Court 4A_185/2007 at 7 (6.2.1) (Ex. 5). In the Carpenters' Strike Case, the union leader intentionally instigated striking workers "to attempt to intimidate the strikebreakers by using physical violence." SCD 57 [1931] II 417 at 420 (Ex. 28). As to the Shooting Contest Case, the innkeeper was found liable for "maintaining *in his establishment* a state of affairs . . . which he was in a position to prevent or halt." SCD 71 [1945] II 107 at 113 (Ex. 25) (emphasis added); *cf.* Pl. Supp. Br. at 8, 10 (quoting the Court's discussion of the liability of a separate defendant who was a participant in the shooting contest). The Swiss Supreme Court repeatedly emphasized that the injuries to the innkeeper's customers and all relevant conduct took place *on the inn's premises while the innkeeper was at the inn*. Shooting Contest Case at 113 (innkeeper "was conscious of the shooting organized and carried out in his garden"); *id.* at 114 (innkeeper neglected "to monitor or to have monitored what was happening in the garden of his establishment"); *id.* at 115 (innkeeper violated his contractual duty to maintain a safe environment for his patrons) (Ex. 25).[2]

[1] Plaintiffs create a strawman when they accuse the BNPP Defendants of arguing that Art. 50(1) CO liability attaches *only* to co-perpetrators. Pl. Supp. Br. at 2, 13, 15 n.20. Rather, consistent with the Swiss case law, and as explained by Professor Roberto, the BNPP Defendants correctly argue that the elements necessary to establish accomplice liability do not exist here. *See* BNPP Supp. Br. at 2 ("The BNPP Defendants . . . did not engage in the same activity as the primary tortfeasors, or otherwise contribute willfully or immediately to the harm suffered by plaintiffs.").

[2] Plaintiffs nevertheless try to diminish immediacy by partially quoting this case. Pl. Supp. Br. at 15; *see also id.* at 17. The full phrase is that an accomplice's conduct need not be "the single, direct and immediate cause of the injury suffered by the plaintiff," merely confirming that, under appropriate circumstances, liability can attach to someone other than the primary tortfeasor. Shooting Contest Case at

Plaintiffs try to avoid the Swiss Supreme Court's analysis by asserting that it has not used the specific phrases "willful and substantial" and "immediate and substantial" in its decisions. *See, e.g.*, Pl. Supp. Br. at 14. This is wordplay. At his deposition, plaintiffs' expert Professor Werro explicitly conceded that the Swiss Supreme Court's 2019 Swisscom decision was based on consideration of "immediacy." Werro Tr. at 145:21-146:2 (Ramamurthi Decl. Ex. A). In a footnote, plaintiffs blithely assert that the BNPP Defendants have somehow imposed 14 additional requirements onto Art. 50(1) CO, Pl. Supp. Br. 14 n.17, but this is not the case. Plaintiffs' various quotes from the BNPP Defendants' opening brief are to descriptions of the facts and reasoning in the relevant cases (or arguments based on those cases), the exact methodology championed by Professor Werro, who counseled at his deposition that one must go "back and analyze[] every single Supreme Court decision on the subject matter." Werro Tr. at 34:22-25 (Ramamurthi Decl. Ex. A). As both experts agree, Art. 50(1) requires that the secondary tortfeasor possess "consciousness of collaborating in the result." Werro, La responsabilite civile, 3rd ed. 2017 ¶ 1701 (Ex. 37); Roberto Supp. Reply ¶¶ 20-21. In light of that requirement, the cases are consistent in finding liability only where the secondary tortfeasor's contribution to the tort was willful and substantial or immediate and substantial.

Plaintiffs now also invoke the Rediffusion Case, cited in passing in Professor Werro's Supplemental Declaration, Werro Supp. Decl. ¶ 30 (and not at all by him in his prior declaration or at his deposition). But that case does not help plaintiffs. There, the accomplice-distributor PTT's involvement was so closely related to the harm that "[i]nitially, the plaintiff also accused [PTT] of directly violating its copyrights"; co-defendant cable company Rediffusion asserted that

112 (Ex. 25). And this language appears in the discussion of the liability of a separate defendant—not the innkeeper, but a high-ranking military officer who was a participant in the shooting contest.

PTT was the primary violator; and the Court framed the dispute as "whether the defendants [Rediffusion *and* PTT] are permitted . . . to transmit the plaintiff's broadcasts." SCD 107 II 82 at 86, 91 (Werro Supp. Decl. Ex. 10). Even on an accomplice theory, it was undisputed that PTT's network would itself be used in perpetrating the violations. *Id.* at 84-86, 93. Here, by contrast, the SAC does not link a single banking transaction involving the BNPP Defendants to any injury suffered by any plaintiff, *accord* Werro Tr. at 55:5-9 (Ramamurthi Decl. Ex. A), and the only relationship claimed is through an attenuated chain, *see* Pl. Supp. Br. at 8.

Plaintiffs otherwise assert incorrectly and without citation that immediacy exists here because the sanctions violations occurred contemporaneously with plaintiffs' injuries. *Id.* at 15. But that temporal connection is insufficient. *See* Father-Son Robbery Case, Supreme Court 4A_573/2010 at 8(5) (robber's son not jointly liable for robberies committed by his father in another city, even though the father and son collaborated on other robberies during that same time period) (Ex. 34). In other words, conscious cooperation in one course of conduct does not create accomplice liability for actions separately undertaken by a primary tortfeasor. *Id.* (son not liable even if he "knew, or could have known" of father's robberies in a different city, given that son was "not personally involved in" those damages). In a footnote, plaintiffs try to distinguish this case by claiming that the son was not held liable for certain robberies that he did not assist. Pl. Supp. Br. at 16 n.23. But this proves the BNPP Defendants' point. Even if the joint robberies indirectly facilitated the father's separate conduct, perhaps through greater financial resources or expertise, this would not support a finding of joint liability for that separate conduct, absent conscious assistance. The same is true here. *Cf. Id.* at 8 (referring to sanctions violations as "that conspiracy" and then purporting to connect them to the separate human rights abuses).

Lacking case support, plaintiffs resort to asserting that the BNPP Defendants are estopped from disputing that they consciously cooperated with Sudan due to their sanctions conspiracy plea. *Id.* at 1 n.2, 8-11. There is no dispute that BNP Paribas S.A. conspired with Sudanese banks to violate the U.S. embargo. While BNP Paribas S.A. pled guilty to violations of U.S. sanctions on Sudan, plaintiffs are not suing for the sanctions violations. Nor could they.[3] Swiss law does not create a private right of action for violations of other countries' sanctions, Swiss supervisory provisions, or international law. *See also Ofisi v. BNP Paribas S.A.*, 278 F. Supp. 3d 84, 108-10 (D.D.C. 2017) (dismissing because the same sanctions violations did not constitute aiding and abetting of international law violations, which requires *inter alia* assistance "to a criminal's human rights abuses, not simply to the criminal himself"). Plaintiffs are also incorrect that "[t]he Court has already accepted as true Plaintiffs' well-pleaded allegations that BNPP and the [Sudanese] regime consciously cooperated." Pl. Supp. Br. at 9. The Court has merely made its choice of law determination. Order at 1 (Mar. 3, 2020), ECF No. 151. The very question before it now is whether the SAC adequately alleges facts sufficient to show conscious cooperation as Swiss law requires to defeat the BNPP Defendants' motion to dismiss. *Id.* at 20.

Plaintiffs' remaining arguments contradict each other. For example, plaintiffs correctly state that "an accomplice is not liable for a tort it does not contribute to, even if it knows it is occurring" unless the accomplice also consciously assists. Pl. Supp. Br. at 6 n.8. But then plaintiffs assert that "conscious assistance" is established when the purported accomplice simply knows or should have known of the primary tortfeasor's conduct. *Id.* at 6, 9 ("Culpable

[3] Although the relevant Executive Orders reference Sudan's human rights violations and oil sales, they were not "put in place" to confer any rights on plaintiffs, Pl. Supp. Br. at 11-12, but rather to "deal with" the "unusual and extraordinary threat to the national security and foreign policy of the United States," Exec. Order Nos. 13067; 13400 (same); 13412 (citing "the continuation of the threat to the national security and foreign policy of the United States" as the reason for "tak[ing] additional steps").

cooperation" "requires . . . that each participant is aware of the other's contribution or could have been aware if he had exercised due care") (citing Art Dealer Case (Werro Supp. Decl. Ex. 9)). This is circular and incorrect. As Professor Roberto's declarations make clear—read in full, rather than selectively excerpted, *see* Pl. Supp. Br. at 2, 13, 15—knowledge of the primary tortfeasor's actions is necessary, but is insufficient where, as here, the purported accomplice has not consciously contributed to the tort. *E.g.*, Roberto Supp. Reply ¶¶ 10-13; Steel Boycott Case, SCD 90 [1964] II 501 at 508 (No liability "even if [defendants] knew about the conducts of the suppliers and these conducts indirectly worked to their advantage" because "[j]oint and several liability under art. 50 requires a collective conduct.") (Ex. 32). And the fact that conscious cooperation cannot be found where multiple parties are unaware of each other's contributions, Pl. Supp. Br. at 7 n.9, 16 n.21, does not mean it *is* established wherever there is such awareness.

Similarly, plaintiffs at first recognize that statements about negligence in the Swiss Supreme Court's Art. 50(1) CO jurisprudence pertain to the nature of the specific damage, a "further" requirement that is relevant *only if* conscious cooperation is established, Pl. Supp. Br. at 7; BNPP Supp. Br. at 15-16. Plaintiffs nevertheless cite such statements to claim that negligence is all that is required (although they have not shown negligence by the BNPP Defendants as to their alleged injuries). Pl. Supp. Br. at 2, 13-14. Contrary to plaintiffs' assertion, *id.* at 13 n.16, Professor Roberto correctly explains this distinction. *See, e.g.*, Roberto Suppl. Reply ¶¶ 6-8.

**II. Plaintiffs Also Fail To Plead Collective Causation.**

The BNPP Defendants have already shown that the attenuated chain purporting to connect them to plaintiffs' injuries does not satisfy Art. 50(1) CO's causation requirements, most recently articulated in the Swiss Supreme Court's 2019 Swisscom decision. *See* BNPP Supp. Br. at 17-19. There, the Swiss Supreme Court rejected accomplice liability where Swisscom allegedly facilitated the primary copyright infringement by "grant[ing] . . . access" to

"infrastructure to enable access" to content because this purported contribution was not "sufficiently closely related to the [harmful] act itself." Swisscom Case at 79-80 (2.3.1, 2.3.2) (Ex. 15). So too here—the BNPP Defendants' enabling of Sudanese banks to access hard currency purportedly used to obtain other resources that may have been used by others against plaintiffs is even more distant from plaintiffs' harm. *See* BNPP Supp. Br. at 18-20.

The Swisscom Case confirms the restrictive nature of adequate causation. *See* Swisscom Case at 78 (2.3.1) (adequate causation "serves as a corrective factor to the concept of causes in science, which may need to be restricted in order to be acceptable for legal responsibility.") (Ex. 15); Roberto Supp. Decl. ¶¶ 35-36. It also confirms that causation must be established between the accomplice's conduct and the harm. Swisscom Case at 76 (2.2.1) (injury must be "an adequate causal consequence of [the purported accomplice's] contribution") (Ex. 15); BNPP Supp. Br. at 21.

Plaintiffs seek to reduce the Swisscom Case to "the uncontroversial proposition that an accomplice cannot be liable for a tort that has already occurred," claiming that Swisscom's customers did not commit any violations due to the personal use copyright exception, so "Swisscom did not make a 'legally relevant contribution' because the infringement had already occurred" before Swisscom or its customers were involved. Pl. Supp. Br. at 20-21. Not so. The Court stated that *if Swisscom's customers had infringed copyrights* (as primary tortfeasors acting later in time after Swisscom), "it would also have to be checked whether [Swisscom] would make a legally relevant contribution"; and the Court's causation analysis proceeded from there. Swisscom Case at 73-74 (2.1) (Ex. 15). The Court's analysis cannot be interpreted to mean that Swisscom was "at the end" of the causal chain in a temporal sense, Pl. Supp. Br. at 21, since Swisscom's actions clearly did not follow in time "after the person who . . . consumes

copyrighted works," *i.e.*, its customer, but rather occurred "after" the various contributions described by the Court in terms of proximity to the harm. Swisscom Case at 74 (2.1) (Ex. 15).

Plaintiffs next assert that they need only demonstrate "objective foreseeability," but the authorities they cite involve primary liability claims where the defendant's direct role is undisputed—often transportation accidents with known perpetrators and questions of liability for health complications (with foreseeability establishing an eggshell-plaintiff type rule). Pl. Supp. Br. at 17, 21-22 (citing Vascular Accident Case at 1-2(A-D) (health complications following car accident) (Feldman Decl. Ex. A); Injured Pedestrian Case at 145-47 (same) (Werro Supp. Decl. Ex. 44); Boat Collision Case at 1(A-D) (same, boating accident) (Werro Supp. Decl. Ex. 21); Sibling Murder Case at 1-2 (¶¶1-2) (liability of murderer for victim estate expenses) (Feldman Decl. Ex. B)). The cited publications by Professors Roberto and Werro also involve primary liability scenarios, *id.* at 17, 20, 22 (citing Vito Roberto, Haftpflichtrecht 75 ¶¶ 6.38, 6.39 (2d ed. 2018) (Feldman Decl. Ex. C); Franz Werro, La Responsabilite Civile (2d ed. 2011) at 80-81 ¶¶ 262-63 (Ex. 37 (3rd ed.)), as Professor Roberto stated at his deposition, Roberto Tr. at 109:8-112:17 (explaining that "objective retrospective prognosis" is the standard for a "perpetrator" but "we are not assessing the adequate causality of a result from a perpetrator; we are deciding on the adequate causality of an accomplice.") (Feldman Decl. Ex. D).

As plaintiffs' own expert explains, authorities that "do not deal with joint liability" are "clearly irrelevant" because the Swiss "approach to causation" for Art. 50(1) CO is "significantly different." Werro Decl. ¶ 38. The only Art. 50(1) CO decision plaintiffs cite is the Locksmith Case, where the secondary tortfeasors undoubtedly contributed directly to the harm, even committing violations themselves. In context, the Locksmith Case's analysis does not suggest that foreseeability alone satisfies causation where, as here, there are no such circumstances.

Critically, Swisscom, a joint liability decision, demonstrates that purported foreseeability is insufficient where, as here, the defendant's alleged contribution is at best indirect—not only was the harm foreseeable, Swisscom actually knew it was occurring. BNPP Supp. Br. at 14-15.

### III. Professor Roberto Provides A More Accurate And Reliable Description And Application Of Swiss Law Than Professor Werro.

Professor Roberto is a professor at a reputable Swiss university, who has "published extensively" on Swiss tort law, including on Art. 50 CO. *Cf.* Pl. Supp. Br. at 23. He has written tort law textbooks, which, like Professor Werro's textbooks, "dedicate only a few paragraphs to the requirements of art. 50 section 1 CO," Roberto Supp. Reply ¶ 19, and he has been cited by the Swiss Supreme Court, Roberto Tr. at 15:23-25 (Feldman Decl. Ex. D). Professor Werro himself expressed that Professor Roberto "is a well-regarded tort law specialist" and that there is no basis "to question in any way his qualifications." Werro Tr. 16:3-10 (Feldman Decl. Ex. E).

Plaintiffs nonetheless ask the Court to reject Professor Roberto's opinion because he has "failed to apply one of the three sources of law required by Article 1 CC: scholarly works." Pl. Supp. Br. at 24-25. That is incorrect. To be clear, Professor Roberto trained his focus on the undisputed central source for any discussion of Swiss law—the statute and Swiss case law. *E.g.*, Roberto Supp. Reply ¶ 2; Werro Supp. Decl. ¶¶ 16, 18; Werro Tr. at 35:17-19 ("[O]n the basis of these cases" one is "able to come up with a deep understanding of the whole thing"); *id.* at 37:6-8 ("I think you understand really the law if you go back to the cases") (Ramamurthi Decl. Ex. A). Contrary to plaintiffs' unsupported assertion now, Professor Roberto in fact reviewed Swiss legal scholarship and concluded *that it supports his analysis*. Roberto Supp. Reply ¶¶ 14-23 (in a section titled "Scholarly Writing," analyzing the three "publications of the leading academic authorities on torts" followed by "other legal publications" and concluding that "Swiss scholarly publications . . . do[] not strengthen Plaintiffs' claim" since "[t]he majority of the leading legal

authors is in agreement with regard to the requirement of a conscious cooperation, i.e., the cooperation must be with knowledge and willful . . . [and] directed to a common end.").

It is Professor Werro's opinion that contravenes Swiss law. *See* BNPP Supp. Br. at 14-16, 21-22. Plaintiffs note that the Swiss Supreme Court has cited Professor Werro, Pl. Supp. Br. at 23, omitting that the Court has *rejected* his views, including on a precise question here. BNPP Supp. Br. at 14-15, 21 (the Swisscom Case's rejection of Professor Werro's views on sufficiency of knowledge for joint liability).

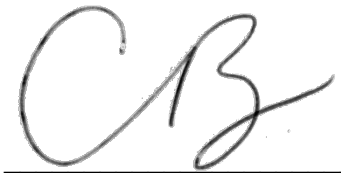
Professor Werro has been remarkably inconsistent in describing how Swiss cases should be analyzed, taking positions as they suit him. In a prior case, he recognized the importance of analyzing the facts underlying Swiss decisions, *Kaufman* Report at *11 (Ramamurthi Decl. Ex. D), a position he jettisoned at his deposition when confronted with case facts that undermined plaintiffs' position. Werro Tr. at 91:2-3 ("So, to me, it doesn't really matter what happened in" the Locksmith Case.) (Feldman Decl. Ex. E). Not liking the Swiss Supreme Court's analysis in the Swisscom Case, he took the incredible position that a case explicitly discussing causation at length is somehow "not really a case that deals with adequate causation." *See id.* at 127:25-128:12. While plaintiffs accuse the BNPP Defendants of wanting to "reform" Art. 50(1), Pl. Supp. Br. at 14 n.17, it is Professor Werro who published an article with this case in mind, concluding that the "bank" should be liable, citing no authority, in the "hope" that his article "will influence [Swiss] courts" into accepting his view of "how the law should be applied." Werro Tr. at 105:2-6; BNPP Supp. Br. at 16-17. Accordingly, it is Professor Werro's opinion that the Court should reject.

## CONCLUSION

The Court should dismiss the Complaint with prejudice.

Dated: New York, New York
September 7, 2020

CLEARY GOTTLIEB STEEN & HAMILTON LLP

By: 

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