18-1304

In the United States Court of Appeals
for the Second Circuit

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Plaintiffs- Appellants,

v.

BNP Paribas S.A., a French corporation, BNP Paribas North America, Inc., a Delaware corporation, 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
No. 16-cv-3228

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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INTRODUCTION

BNPP spends much of its response brief asking this Court to focus on issues that are not the subject of this appeal: the plausibility standard under *Twombly* and *Iqbal*, the limitations that would exist on claims different from those Plaintiffs have asserted, and the causation analysis that courts have made in cases with facts different from the facts in this case. Plaintiffs offer a response on these matters later in this brief, but we focus primarily on the issues actually raised in this appeal.

The Supreme Court set forth a threshold requirement in *W.S. Kirkpatrick*: In order for the act of state doctrine to apply at all, an official act or decree of a foreign sovereign must be denied the effect in U.S. courts that it would receive in the rendering forum. The burden rests on the party invoking the doctrine to satisfy that requirement. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 694 (1976). Merely asserting that a U.S. court will have to make factual findings concerning wrongful conduct by a foreign sovereign or its agents is insufficient. The party invoking the act of state doctrine must demonstrate that an official act or decree of a foreign sovereign will be the subject of the U.S. suit and will be invalidated or treated as a nullity. This Court recently reaffirmed that requirement in *Petersen Energia Inversora S.A.U. v. Argentine Republic and YPF S.A.*, 895 F.3d 194 (2d Cir. 2018). BNPP has failed to satisfy that burden.

On the application of the act of state standard, BNPP offers no argument at all about the primary question posed by the Supreme Court in *Sabbatino*: Whether any legitimate disagreement can exist about the status of the foreign sovereign's actions under international law. Judicial abstention under act of state is only possible where room for such disagreement exists. BNPP sidesteps the issue. Having invoked the human rights abuses of the Government of Sudan in an attempt to shield itself from civil liability for the impact of its crimes, BNPP now seeks to avoid any discussion of the legal status of those abuses. As Plaintiffs explained in their opening brief, BNPP may not avoid the heart of the issue that it has raised.

Concerning New York statute of limitations law, BNPP makes several erroneous claims about New York case law that Plaintiffs correct below, and it raises a waiver argument with respect to one of the applicable provisions that merits a response, which we provide. But BNPP offers no response to the comprehensive treatment of New York case law that Plaintiffs have set forth.

ARGUMENT

I. *W.S. Kirkpatrick* Forecloses Application of the Act of State Doctrine.

Much of BNPP's response to the act of state question is structured around a mischaracterization of *W.S. Kirkpatrick & Co. v. Environmental Corp., Int'l,* 493 U.S. 400 (1990). BNPP asserts that *W.S. Kirkpatrick* involved 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." Response Brief at 16. *W.S. Kirkpatrick* states the opposite proposition.

The appellant in *W.S. Kirkpatrick* specifically grounded its invocation of the act of state doctrine on an argument that plaintiffs would be required to "prove" that an illegal bribe "was actually received by one or more [Nigerian government] officials" and that "the bribe caused the Nigerian government to issue" the construction contract that was the basis for that dispute. Opening Brief at 18 (quoting Br. for Pet'rs, *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp. Int'l*, 1989 WL 1127461, at *25. (Aug. 24, 1989)). The Supreme Court acknowledged the appellant's position that "in order to prevail respondent must prove that petitioner Kirkpatrick made, and Nigerian officials received, payments that violate Nigerian law, which would, they assert, support a finding that the contract is invalid under Nigerian law." The Court embraced that assumption and unanimously held: "Assuming that to be true, it still does not suffice." *W.S. Kirkpatrick*, 493 U.S. 400 at 406.

The same principle controls the present case. BNPP grounds its act of state defense on the assertion that Plaintiffs' claims "depend on a finding of wrongful conduct by Sudan." Response Brief at 16. "Assuming that to be true, it still does not suffice." *W.S. Kirkpatrick*, 493 U.S. at 406. When a U.S. court entertains a claim that will require proof of wrongful, illegal or tortious conduct by a foreign

sovereign or its agents, the act of state doctrine plays no role unless some official act, decree, or authoritative pronouncement of that sovereign would have to be invalidated or denied effect in the proceeding. *W.S. Kirkpatrick*, 493 U.S. at 404–407. BNPP bears the burden of identifying such an official act. *Alfred Dunhill*, 425 U.S. at 694. It has not done so. "When that question is not in the case, neither is the act of state doctrine." *W.S. Kirkpatrick*, 493 U.S. at 406.[1]

It is therefore telling that the principal case BNPP urges on this Court in trying to bolster its argument is *Hourani v. Mirtchev*, 796 F.3d 1 (D.C. Cir. 2015), a dispute involving an attempt by a defamation plaintiff to declare invalid and fraudulent an official pronouncement by the government of Kazakhstan issued by its embassy. BNPP presents *Hourani* as standing for the proposition that the act of state doctrine forecloses any claim in which a finding of wrongful conduct on the

[1] BNPP appears to be making a purely formal argument—that a finding of liability on Plaintiffs' conspiracy and aiding and abetting claims would necessarily entail a finding that the elements of an intentional tort could be established against Sudan with respect to the atrocities committed by its officials and agents. Such formalisms give BNPP's argument no additional force, but they do make clear that the argument has no application at all to Plaintiffs' claims sounding in negligence. The district court's ruling on these claims was based on the assertion that Plaintiffs would have to show a "cognizable injury" resulting from the atrocities inflicted by Sudan. *See* Opening Brief at 21–22; SPA 8–9. The Supreme Court has specifically held that the act of state doctrine fails at the threshold when a plaintiff is "not trying to undo or disregard the governmental action [of a foreign sovereign] but only to obtain damages from private parties who had procured it." *W.S. Kirkpatrick*, 493 U.S. at 407. Any plaintiff seeking to "obtain damages" from "private parties who had procured" government action would need to show that the government action had inflicted a "cognizable injury". *W.S. Kirkpatrick* holds that the act of state doctrine imposes no barrier in such a case.

part of a foreign sovereign is an "essential predicate for liability." Response Brief at 23–24 (quoting *Hourani*, 796 F.3d at 14). That is not accurate. The result in *Hourani* depended on the official, binding status of the embassy pronouncement that was the subject of the plaintiff's claim.

The D.C. Circuit grounded its act of state ruling on the special status of ambassadorial pronouncements. "[W]hen an ambassador speaks in his or her official capacity," the court found, "that statement must be regarded as an authoritative representation by the foreign government itself" that is "binding and conclusive." *Hourani*, 796 F.3d at 13. "When it comes to that type of sovereign speech," it continued, "courts of the United States must treat the Ambassador's statements 'as an authoritative representation by the [foreign] government.'" *Id.* at 14. Notwithstanding BNPP's insistence that it is "baseless" to suggest that "the act of state doctrine applies only to claims stemming from officially recorded government acts such as decrees, judgments and transfers of title," Response Brief at 25–26, BNPP places primary reliance on a case that involved precisely that: an official statement of policy by a foreign ambassador that, the appellate court believed, must be treated as "binding and conclusive in the courts of the United States against that government." *Hourani* at 13.[2]

[2] The D.C. Circuit's conclusion that an official public statement by an ambassador about the content of his government's policy must be treated as "binding and conclusive in the courts of the United States" now stands in tension

No party in *W.S. Kirkpatrick* suggested that the actions of Nigerian officials receiving bribes constituted official government acts "binding and conclusive in the courts of the United States." The bribery co-conspirators were officials of the Nigerian government cloaked with the authority of the state, but their receipt of bribes had no conclusive or binding status. The construction contract signed as the result of their criminal conduct might well have been a binding official act, but—as the Supreme Court explained—that contract was not the subject of the plaintiffs' claim in *W.S. Kirkpatrick* and U.S. courts did not have to rule on the contract's validity in order to rule on the illegal conduct of the Nigerian officials. Therefore, the act of state doctrine was not implicated. "Act of state issues only arise when a court *must decide*—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign. When that question is not in the case, neither is the act of state doctrine." *W.S. Kirkpatrick*, 493 U.S. at 406.

BNPP has never argued—and cannot argue—that the acts of mass rape, torture and genocide perpetrated by the Government of Sudan and its agents constitute official acts "binding and conclusive in the courts of the United States." *Hourani*, 796 F.3d at 13. As Plaintiffs have explained, there are no decrees of

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with the ruling of the Supreme Court in *Animal Science Products v. Hebei Welcome Pharmaceuticals*, 138 S. Ct. 1865, 1869 (2018), which held in a related context that U.S. courts are "not bound to accord conclusive effect to [a] foreign government's statements" about the interpretation of its own laws when asked to adjudicate a foreign law question. *See also Petersen*, 895 F.3d at 208 (discussing *Animal Science*).

parentage resulting from mass rape that need to be disregarded in this case, no probates of estates following acts of genocide that must be declared invalid for Plaintiffs to recover. Therefore, the act of state doctrine fails at the threshold. The result in *Hourani* does not call these core principles into question.[3]

This Court recently emphasized the distinction between a claim that seeks to invalidate or disregard an official sovereign act and a claim that merely seeks compensation for the wrongful behavior of a foreign sovereign. In *Petersen,* the Court heard an appeal in a commercial dispute involving YPF, an Argentine petroleum company that had transferred from state to private control in 1993. In 2008 plaintiff Petersen became a 25% owner in YPF, but in 2012 the Argentine government decided to reacquire the firm. The acquisition involved two intertwined courses of conduct by Argentina. The first was an official act of

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[3] *Hourani* also contains an inaccurate description of *W.S. Kirkpatrick*. The D.C. Circuit says of *W.S. Kirkpatrick*: "There, deciding the case would not have required the court to declare the government contract legally invalid since liability could attach regardless of the validity of the contract that the bribery secured *or even whether government officials had accepted the proffered bribe*." *Hourani*, 796 F.3d at 15 (emphasis added; citation omitted). The first half of that sentence is accurate; the second half, in italics, is not. *W.S. Kirkpatrick* proceeds on the express assumption that "in order to prevail respondent must prove that petitioner Kirkpatrick made, *and Nigerian officials received, payments that violate Nigerian law*." *W.S. Kirkpatrick*, 493 U.S. at 406 (emphasis added). Thus, when the D.C. Circuit says that the act of state doctrine "did not apply [in *W.S. Kirkpatrick*] because the case could be decided without directly adjudicating the lawfulness of the Nigerian government's conduct," *Hourani*, 796 F.3d at 15, it makes a serious error. To the extent that *Hourani* depends on this misreading of *W.S. Kirkpatrick*, it should not be followed.

expropriation by which Argentina directly acquired a controlling interest in YPF. The second was a forced sale of Petersen's minority share without a proper tender offer, in violation of bylaws that Argentina had a contractual obligation to observe. Petersen sued Argentina and YPF for breach of contract following the forced sale, alleging that Argentina had violated its contractual obligations. The sovereign defendants filed a motion to dismiss, claiming a lack of subject-matter jurisdiction under the Foreign Sovereign Immunities Act and asserting an act of state defense. The district court denied the motion and the defendants then filed an interlocutory appeal, invoking the collateral order doctrine for the FSIA issue and obtaining certification under 28 U.S.C. § 1292(b) from the district court on the act of state ruling. This Court affirmed the denial of the motion to dismiss on FSIA grounds and declined the discretionary appeal on act of state.

Jurisdiction under the FSIA in *Petersen* depended on the commercial activities exception. *See* 28 U.S.C. § 1605(a)(2). In explaining why that exception applied, the Court emphasized the distinction between "a foreign state's repudiation of a contract," which is "precisely the type of activity in which a private player within the market engages," and the expropriation of property by government decree, which "is a decidedly sovereign—rather than commercial—activity." *Petersen*, 895 F.3d at 205 (citations and quotation marks omitted). Expropriation of property was a predicate of the dispute: Argentina's sovereign act

of expropriation gave it control of YPF and empowered it to impose a forced sale on Petersen. Nonetheless, looking to "the core of the plaintiffs' suit, i.e., the acts that actually injured them," this Court concluded that "Petersen seeks relief for injuries caused by commercial, rather than sovereign, activity." *Id.* at 206 (citation and quotation marks omitted).

Turning to the district court's denial of the act of state defense, this Court declined to hear the appeal. "As discussed above" in its FSIA analysis, the Court explained, "the face of Petersen's complaint makes clear that it is not challenging Argentina's official acts—the expropriation of property—and the complaint's allegations that Argentina and YPF breached their obligations by failing to engage in a tender offer did not require the district court to rule on the validity of any of Argentina's official acts." *Id.* at 212. That being so, there was no valid act of state defense raised at the pleading stage and therefore no "controlling question of law" warranting an interlocutory appeal. *Id.*

Petersen reaffirms *W.S. Kirkpatrick*'s threshold requirement. A party invoking the act of state doctrine must do more than show that adjudication of a plaintiff's claims will require a finding of wrongful or tortious conduct by a sovereign or its agents. The defendant must demonstrate that adjudication of the claims will require a U.S. court "to rule on the validity of [a sovereign's] official acts." *Petersen*, 895 F.3d at 212. The breach of contract claim in *Petersen* alleged

wrongful commercial conduct by Argentina that was intertwined with an official act, but the sovereign act of expropriation was not the subject of the lawsuit. Petersen's contract claims unquestionably required the district court to find that Argentina had engaged in wrongful behavior on its own territory, but it did not levy any challenge to the validity of the expropriation. The act of state defense therefore failed at the inception.

Petersen also held that, "As a substantive rather than a jurisdictional defense, the Act of State doctrine is more appropriately raised in a motion for summary judgment than in a motion to dismiss." *Id*. at 12 (quoting *Daventree Ltd. v. Republic of Azerbaijan*, 349 F. Supp. 2d 736, 755 (S.D.N.Y. 2004)). If BNPP believes that discovery would enable it to identify binding decrees or other official sovereign acts by the Government of Sudan in conjunction with its human rights atrocities that might support an act of state defense, it can pursue the issue following a remand.

The district court failed to apply *W.S. Kirkpatrick* faithfully. BNPP's act of state defense fails at the threshold.

II. BNPP Fails to Conduct Any Act of State Analysis Under *Sabbatino*.

BNPP makes no attempt to argue that there is any room for disagreement about the *jus cogens* status of the atrocities that Sudan inflicted on Plaintiffs, apparently admitting that those atrocities are universally condemned and that the

prohibition against them under international law constitutes a non-derogable principle. If this Court reaches the substance of the act of state defense, that admission should end the analysis.

When the act of state doctrine requires a U.S. court to refrain from hearing a dispute, it is because the dispute will require the court to treat as a nullity the official act of a foreign sovereign in a setting where nations may have different social, cultural or economic philosophies that lead them to disagree about the applicable norms of international law. Opening Brief at 25–34. International law does not provide the basis for the plaintiff's recovery in such a case. The plaintiffs in *Sabbatino* were not suing under any international law cause of action; they were asserting common-law claims for conversion of property under New York law. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 406 (1964); Opening Brief at 39–40. Rather, the status of the governing international norm goes to a foreign relations question. If a plaintiff's cause of action would require a U.S. court to deny effect to a foreign decree or official act, that refusal must be justified by a showing that the decree violates norms of international law so well established and widely accepted that the danger of interference with the foreign relations activities of the political branches is minimized. Principles of international law measure the respect that a foreign decree or official act should receive when it is interposed to block a cause of action in U.S. courts, not the substantive requirements of the cause

of action itself. The plaintiffs in *Sabbatino* lost, but they lost only after an examination of the status of Cuba's expropriation decree under applicable standards of international law. *Sabbatino*, 376 U.S. at 428.

Thus, when BNPP asserts that "[c]ommon law tort claims, such as those alleged here, fall squarely within the act of state doctrine," Response Brief at 31, they misstate the issue. *See also id*. at 33 ("[A]s Plaintiffs themselves point out, the district court followed extensive precedent that previously applied the act of state doctrine to common law claims."). Common law torts, like any other cause of action, are subject to analysis under the act of state doctrine if the defendant can show that the threshold requirements of the defense are satisfied. That is where *Sabbatino* analysis begins. BNPP instead attempts to avoid *Sabbatino* by arguing that state common law claims are always foreclosed by the act of state doctrine. That proposition is sheer invention and was rejected by *Sabbatino*, which refused to "lay[] down or reaffirm[] an inflexible and all-encompassing rule" and conducted a substantive international law analysis of the expropriation decree being challenged under New York law. *Id.* at 428; Opening Brief at 40–42.

Similarly, when BNPP asserts some fancied prejudice or unfair surprise—"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"—it exhibits confusion. Response Brief at 31.

Plaintiffs' analysis of *jus cogens* principles does not constitute the assertion of "international law claims." Plaintiffs are responding to the affirmative defense that BNPP has introduced and now refuses to support with substantive analysis.

Because BNPP has rested so much of its position on this invented argument, we reiterate:

- BNPP has invoked an act of state defense in an attempt to shield itself from liability in U.S. courts for the injuries that its criminal conspiracy helped to cause in Sudan.

- In order to assert a valid defense, BNPP must identify some decree or official act of a foreign sovereign that would be declared a nullity or given no effect in U.S. courts. It has not done so.

- Instead, BNPP has invoked in general terms the atrocities that Sudan committed against its vulnerable populations as the basis for its act of state argument.

- Having invoked Sudan's atrocities as a shield, asserting that a judicial finding that these atrocities were wrongful acts would usurp the role of the political branches, BNPP now argues that it need not make any arguments about the status of those atrocities under international law. The status of the atrocities is "irrelevant to this suit," they say, even as they invoke them to shield their own criminal conduct from liability. Response Brief at 31–32.

This is abdication masquerading as analysis. Human rights atrocities cannot support an act of state defense. BNPP does not even try to argue the contrary.

BNPP justifies this side-stepping of the analysis that *Sabbatino* demands by expressing disdain for state common law causes of action. *See, e.g.*, Response Brief at 7 (asserting that "the Complaint alleges no claims . . . predicated on any

statutory cause of action"); *id.* at 16 ("*Kirkpatrick* involved federal and state *statutory* conspiracy claims") (emphasis in original). In so doing, they place themselves at odds with a foundational principle of *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938): the equal dignity of statutory enactments and the common law as statements of state liability policy. As Justice Frankfurter later wrote for the Court, *Erie* "overruled a particular way of looking at the law" that had treated state common law rulings as "merely evidence" of the content of substantive policy "and not themselves the controlling formulations." *Guaranty Trust v. York*, 326 U.S. 99, 101–102 (1945). *Erie* and its progeny leave it to the states whether to express liability policies through statutory enactments or common-law doctrine and guarantee that both will receive equal weight in the federal courts.

New York has extended the privilege of doing business within its borders to financial institutions wishing to take advantage of its singular opportunities for profit. BNPP exploited and then abused that privilege, engaging in a criminal conspiracy consisting largely of transactions processed through New York that violated federal and state law. As this Court has held, when a financial institution doing business in New York is alleged to have violated New York's conduct-regulating rules in a scheme that causes injury across the globe, New York "'has an overriding interest in regulating' the conduct of banks operating 'within its borders'" and will apply its law to that dispute. *Licci ex rel. Licci v. Lebanese*

Canadian Bank, 739 F.3d 45, 51 (2d Cir. 2013) (per curiam) (quoting *Allstate Ins. Co. v. Stolarz*, 613 N.E.2d 936, 939 (N.Y. 1993)). *Erie* vouchsafes to New York the prerogative to express that "overriding interest" through either statutory enactments or common-law doctrine.

BNPP's disdainful treatment of state common law is one component of an overall posture of hostility it adopts toward state law claims, winking and nodding toward an argument it never squarely makes. BNPP is inviting this Court to hold that state causes of action are categorically foreclosed in international human rights litigation. It is arguing for *sub rosa* preemption. BNPP never makes the preemption argument directly, presumably because no federal statute could satisfy the demanding preemption standard here. *See, e.g.*, *Altria Group v. Good*, 555 U.S. 70, 77 (2008) ("When addressing questions of express or implied pre-emption, we begin our analysis 'with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'") (citation omitted). Instead, BNPP invites this Court to gerrymander the act of state doctrine into a *de facto* preemption result. Hence BNPP's insistence that Plaintiffs could not assert private rights of action directly under the sanctions imposed against Sudan by the U.S. Government, *see* Response Brief at 34, which Plaintiffs have never attempted to do. Hence its discussion of the obstacles that victims of atrocities would encounter if they sued a defendant

like BNPP under the Alien Tort Statute, *see id*. at 7, 30–31—a provision that Plaintiffs have never invoked, as most of the Plaintiffs and members of the proposed class are American citizens. And hence the condescension that BNPP directs toward common-law causes of action, treating them as a lesser exercise of state sovereign authority in an attempt to suggest, without actually arguing, that preempting that authority would be a matter of no great consequence in this case.

Whatever limitations exist on federal statutory causes of action, state law stands on its own foundation, and the laws of New York stand as a bulwark against financial institutions that seek to profit from doing business in the State and then abuse that privilege. This Court should not accept BNPP's invitation to disrespect New York common law as a substitute for conducting the analysis of international law principles that *Sabbatino* requires and that BNPP has failed to provide.

Finally, as to the atrocities committed in what was once the southern region of Sudan, the formal recognition of South Sudan as a new sovereign by the United States offers a further reason for rejecting BNPP's act of state defense. "Courts have found the act of state doctrine inapplicable based on a change of government . . . where the subsequent government has actively repudiated the acts of the former regime." *Konowaloff v. Metro. Museum of Art*, No. 10 Civ. 9126 (SAS), 2011 WL 4430856, at *6 (S.D.N.Y. Sept. 22, 2011), *aff'd*, *Konowaloff v. Metro. Museum of Art*, 702 F.3d 140, 148 (2d Cir. 2012); *see also, e.g.*, *Bigio v.*

Coca-Cola Co., 239 F.3d 440, 453 (2d Cir. 2001) (repudiation of prior government's acts). South Sudan's repudiation of the atrocities committed against its ethnic and religious minorities by the prior regime is not merely one factor in the analysis, as BNPP suggests, it is a cornerstone of South Sudan's origin as a nation. *See* Brief of Southern Sudanese Community Center of San Diego, at 12–13. Sudan's human rights violations in that region must be doubly rejected as any basis for an act of state defense.

III. The Other Substantive Issues That BNPP Raises Highlight the Merits of Plaintiffs' Claims.

BNPP raises other matters that are not the subject of this appeal. While this Court need not address these issues, the cases that BNPP invokes in fact place the strength of Plaintiffs' claims in sharp relief.

First, BNPP urges this Court to consider the plausibility standard that the Supreme Court articulated in *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). A comparison to *Twombly* and *Iqbal* is revealing. Both cases involved allegations against defendants as to whom there had been no prior finding of wrongdoing. The Court had to assess whether the plaintiffs alleged a plausible case for culpable behavior in the face of "obvious alternative explanations" suggesting that the defendants' behavior was wholly innocent: in *Twombly*, whether parallel business conduct was the product of a conspiracy or merely the result of independent competitive choices; in *Iqbal*,

whether the federal government's arrest of Muslim and Arab men following the 9/11 attacks resulted from a policy of discrimination or from legitimate criminal and intelligence investigations. In each case, the Court found the innocent explanations compelling in the absence of any specific allegations suggesting culpable behavior. *Twombly*, 550 U.S. at 567; *Iqbal*, 556 U.S. at 682.

There are no innocent explanations in this case—no argument that BNPP has not engaged in culpable behavior. BNPP pled guilty to a years-long conspiracy with the Government of Sudan to violate a set of U.S. sanctions that sought to prevent Sudan from committing atrocities against its vulnerable populations. BNPP admits that its employees knew about the atrocities Sudan was committing while they were conspiring together and knew that its illicit transfer of funds played a major role in funding Sudan. *See* Opening Brief at 4–5; JA-88-99. Indeed, BNPP's Federal and State of New York Plea Agreements expressly anticipate civil litigation and make any contradiction of the admissions in the Stipulated Statement of Facts a material breach of that agreement. JA-210 and JA-255, 265-66. The only question here is the extent and impact of BNPP's admitted criminal activity. The "plausibility" question in this case goes to the scope of the admitted criminal conspiracy between BNPP and Sudan and the causal connection between BNPP's illicit provision of billions of dollars to Sudan and the atrocities Sudan perpetrated using those funds.

Plaintiffs are not required to identify specific banking transactions in their Complaint, as BNPP suggests, *see* Response Brief at 7–8, but Plaintiffs do make specific allegations concerning the causal link between BNPP's illegal conduct and funding of Sudanese military hardware and personnel. In their Complaint, Plaintiffs allege that BNPP enabled Sudan to sell its oil at U.S. dollar-denominated market prices and thereby to enlarge Sudan's oil revenues significantly. *See, e.g.*, JA-72-74; JA-81-93. The Complaint identifies a U.S. Diplomatic Cable that establishes a causal connection between the money from illicit sales of oil processed through a "Central Bank of Sudan account at [BNPP Geneva]" and Sudan's consequent ability to direct "substantial revenue to military and security expenditures." JA-83 and JA-89 (quoting Diplomatic Cable). Sudan used these weapons and militia forces against Plaintiffs and the Class. JA-93-99. Plaintiffs thus allege ample basis for concluding that BNPP's admitted criminal conspiracy included substantial, knowing steps taken in furtherance of the atrocities that Sudan was committing with the illicit funds BNPP was providing.

BNPP also urges this Court to consider *Owens v. BNP Paribas, S.A.*, No. 17-7037, 2018 WL 3595950 (D.C. Cir. July 27, 2018), a recent decision of the D.C. Circuit that dismissed claims against BNPP very different from those asserted here. Plaintiffs welcome the comparison. The infirmities that the D.C. Circuit identified to explain the dismissal in *Owens* provide a roadmap for the opposite result here.

The plaintiffs in *Owens* sought damages from BNPP under the Anti-Terrorism Act [ATA] for injuries inflicted by al Qaeda in Kenya and Tanzania. They alleged that (i) BNPP provided illicit funds to Sudan through the criminal conspiracy that is also the subject of the present suit, (ii) Sudan in turn provided some part of those funds to branches of al Qaeda to support their activities, and (iii) al Qaeda made use of those illicit funds in 1998 when it bombed the U.S. Embassies in Nairobi and Dar es Salaam. *Id.* at *1–*2. The district court dismissed the claims at the pleadings stage, and the D.C. Circuit affirmed. The appellate court based its ruling on infirmities that are absent in the present case.

The first infirmity in *Owens* was a time-frame problem. The wrongful acts in that case—the embassy bombings—were committed in 1998, but most of the allegations "involved conduct after the embassy bombings, which have no bearing on what actions 'caused' the bombings." *Id.* at *6. The *Owens* plaintiffs made only a handful of allegations concerning the period before the attacks, and even there the court found that plaintiffs had "misrepresent[ed] the timeline." *Id.* Plaintiffs here, in contrast, describe a series of atrocities perpetrated against them by Sudan from 1997 through at least 2009, squarely aligning with the 1997-2007 period during which BNPP engaged in its criminal conspiracy with Sudan and during which the effects of BNPP's crimes were felt. *See, e.g.*, JA-38.

The second infirmity in *Owens* was a causal chain problem. The perpetrators of the plaintiffs' injuries were branches of al Qaeda located in Kenya and Tanzania—entities wholly separate from the Government of Sudan. The allegation was that Sudan was a state sponsor of terror and was funding independent terrorist organizations that, in turn, committed terrorist crimes. The D.C. Circuit found that this extra step in the causal chain made plaintiffs' claims too attenuated to support liability. *Owens*, at *7.

Plaintiffs here allege that they are the victims of atrocities committed by Sudan itself, perpetrated in Sudan, and undertaken using equipment and militia acquired and funded using the billions of illegal dollars that BNPP made available to Sudan with knowledge that the regime was committing atrocities and that the sanctions BNPP was violating were designed to prevent those harms. There is no extra step in the causal chain, no independent intervening third party, no severe attenuation between the crimes committed by BNPP and Plaintiffs' injuries. *Owens* is the counterexample that demonstrates the Plaintiffs' ability to satisfy any applicable standard of proximate cause in this case. *See, e.g.*, *Owens*, at *7 (contrasting the facts in *Owens* with a case in which "a supporter of terrorism provides funds directly to a terrorist organization").

IV. The Intentional Tort Claims of the Adult Plaintiffs are Timely.

A. N.Y. C.P.L.R. § 213-b Applies to Plaintiffs' Intentional Tort Claims.

BNPP does not offer any response to most of the discussion of New York statute of limitations law that Plaintiffs set forth in the Opening Brief. Instead, BNPP rests much of its argument on the assertion that N.Y. C.P.L.R. § 213-b silently adopted the restrictive definition of "crime victim" contained in the provisions of the Executive Law relating to compensation by New York to injured crime victims from public funds. *See* Response Brief at 44–45 & n.10. As Plaintiffs explained, *see* Opening Brief at 44–47, this argument was rejected by the Second Department in *Elkin v. Cassarino*, 248 A.D.2d 35 (N.Y. App. Div. 2d Dep't 1998).

Elkin provides a comprehensive analysis of N.Y. C.P.L.R. § 213-b. It addresses the core provisions of the statute—the definition of "crime" and "crime victim"—and rejects the attempt to import the restrictive approach of the Executive Law's public compensation scheme into § 213-b's expansive provision for private remedies. BNPP responds that the dispute in *Elkin* turned on the construction of "crime" rather than "crime victim" and then insists that § 213-b does refer to the Executive Law on a peripheral matter (who can sue in a "representative" capacity on behalf of an injured person), claiming that "Plaintiffs offer no reason" why the Executive Law's restrictive definition of "crime victim" should not also be grafted

onto § 213-b. BNPP ignores the Second Department's integrated analysis of the terms "crime" and "crime victim" and the respective purposes of the two statutes.

Since *Elkin* is the most thorough examination of the issue, we reproduce in full and without alteration the passages containing the court's analysis of the construction of "crime" and "crime victim."

> Contrary to the defendant's contention, CPLR 213-b does not expressly or impliedly mandate that the "crime" in question be a conviction in a New York State Court, or one defined by the laws of the State of New York. It does not specifically define "crime", does not limit the crimes to which it is applicable, and does not limit the term "crime victim".
>
> Nor is there any basis, as the defendant argues, for importing the definition of "crime" as defined in Executive Law § 632-a(1)(a), merely because that law, which limits "crime" to felonies defined in the Penal Law or other laws of New York State, was enacted simultaneously with CPLR 213-b. The two statutes serve two totally different purposes. Executive Law § 632-a(1)(a) is part of the statute setting forth which crimes, and under what circumstances, New York State may provide some monetary compensation to, inter alia, crime victims. There, by reference to the Penal Law, the Legislature specifically limited and defined the crimes for which New York would recompense the injuries and losses suffered by certain of its citizens. Such a limitation on expenditures from the public fisc is eminently practical and sensible.
>
> In contrast, in enacting CPLR 213-b, which does not require the expenditure of public funds, the Legislature did not add such a definition, nor did it refer to the Penal Law or the aforementioned section of the Executive Law. Clearly, the Legislature could have expressly made reference to Executive Law § 632-a(1)(a), if it had so wanted to define "crime" (*see, Matter of Jamie D.*, 59 N.Y.2d 589, 466 N.Y.S.2d 286, 453 N.E.2d 515). Since it did not do so, it follows that the terms "crime" and "crime victim" were not intended to be restricted as they are in the Executive Law.

Elkin, 248 A.D.2d at 38. The Second Department held that the restrictive definitions of "crime" and "crime victim" contained in the Executive Law are tied to the discrete purpose of that statute: direct public compensation of victims. That purpose is distinct from the "expansive" and "broad" goal of C.P.L.R. § 213-b that "all crime victims receive compensation for injuries" from criminals themselves. *Id.* at 38–39 (citation omitted). *Elkin* forecloses BNPP's attempt to splice the restrictive provisions of the Executive Law into C.P.L.R. § 213-b.

In making its affirmative argument, BNPP attempts to rely on *Boice v. Burnett*, 245 A.D.2d 980 (N.Y. App. Div. 3d Dep't 1997), but its analysis improperly grafts Executive Law provisions onto § 213-b and does not reflect how New York courts have actually cited and interpreted *Boice*. *See* Opening Brief at 51–55. To reiterate, *Boice* was a case in which the crime in question had "no causal connection" to the plaintiff's civil claims. *See, e.g.*, *Respass v. Dean*, 7 A.D.3d 503, 504 (N.Y. 2d Dep't App. Div. 2004) (citing *Boice* as a "no causal connection" case); Opening Brief at 52–53. *Boice* used the term "direct injury" once to capture that idea, explaining that the events surrounding the crime for which the defendant had been convicted "do not form the basis" for the plaintiff's civil action. *Boice*, 245 A.D.2d at 981–982. In contrast, the criminal conduct to which BNPP pled guilty "form[s] the basis" of Plaintiffs' claims here. *See* Opening Brief at 49–51.

The *Boice* standard is satisfied and Plaintiffs' claims sounding in intentional tort are timely under C.P.L.R. § 213-b.

B. N.Y. C.P.L.R. § 215(8)(a) Applies to Plaintiffs' Intentional Tort Claims and This Court Can and Should Apply the Provision.

BNPP correctly points out that Plaintiffs did not specifically advance § 215(8)(a) as an alternative ground in their briefing before the district court, an omission we acknowledge. But that omission does not justify a finding that the provision has been forfeited, and it certainly does not call for the application of a manifest injustice standard. The timeliness of the adult plaintiffs' intentional tort claims was fully joined below, the parties contested the application of N.Y. C.P.L.R. § 215, the district court relied on another section of that same statute in its ruling on the issue, and the facts demonstrating the applicability of § 215(8)(a) are all contained in the record before the Court: BNPP's date of conviction and sentencing; the stipulated Statement of Facts describing the nature of BNPP's crimes; and the facts underlying Plaintiffs' claims. *See* Opening Brief at 3–11; JA-133-135; JA-110-122 and JA-202-303. As this Court explained in *Bogle-Assegai v. Connecticut*, 470 F.3d 498, 504 (2d Cir. 2006), one of the cases on which BNPP relies, the Second Circuit has exercised discretion to consider arguments not raised below "where necessary to avoid a manifest injustice *or* where the argument presents a question of law and there is no need for additional fact-finding." (emphasis added; citation omitted). This case falls into the second category.

Under the second *Bogle-Assegai* category, this Court has declined to find an argument forfeited even where a party failed explicitly to assert a specific provision before the district court so long as the party implicitly urged the requested relief on the court below. In *Cortlandt Street Recovery Corp. v. Hellas Telecommunications S.a.r.l.*, 790 F.3d 411, 421–422 (2d Cir. 2015), the Court permitted plaintiff Cortlandt to invoke Federal Rule of Civil Procedure 17(a)(3) for the first time on appeal to argue that its claims should not have been dismissed for lack of standing without an opportunity to add parties whom it believed would cure the standing defect. The plaintiff there "did not explicitly refer to Rule 17 or specify a means by which it hoped to remedy any standing deficiency in the action as filed" before the district court. Nonetheless, the Second Circuit found that Cortlandt had placed the issue in contention by invoking Rule 17 in general terms at another point in the dispute. This was enough to conclude either that the district court had "reach[ed] and reject[ed] Cortlandt's implied 17(a)(3) objection" despite its failure to invoke that provision or, in the alternative, that it was proper for the appellate court to "exercise [its] discretion to consider an issue raised for the first time on appeal." *Id.* at 421–422 (citing *Bogle-Assegai*, 470 F.3d at 504). The same principle should control here.

On the merits, § 215(8)(a) applies by its terms. *See* Opening Brief at 55–57. In seeking to contest that fact, BNPP relies primarily on the assertion that the

purpose of that provision would not be advanced in this case because "Plaintiffs played no role in the proceedings surrounding BNP Paribas' plea agreement" and "that proceeding required no investigation of or briefing on any injuries suffered by Plaintiffs." Response Brief at 51. The argument disregards the fact that the district court found it appropriate to toll the statute of limitations until June 2014 precisely because BNPP had concealed its role in the infliction of Plaintiffs' injuries and Plaintiffs had sufficiently alleged that they did not in fact learn of BNPP's role "until their sentencing for federal crimes on May 1, 2015." *Kashef v. BNP Paribas*, 16-cv-3229 (AJN), 2018 WL 1627261, at *6 (March 20, 2018). Plaintiffs are entitled to the additional one-year tolling period from the date of sentencing that New York provides to the victims of crimes.

CONCLUSION

Plaintiffs respectfully request that this Court reverse the ruling of the district court and remand for further proceedings.

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Respectfully submitted,

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