UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| ENTESAR OSMAN KASHEF, *et al.*,<br><br>Plaintiffs,<br><br>-against-<br><br>BNP PARIBAS S.A., BNP PARIBAS S.A. NEW YORK BRANCH, BNP PARIBAS NORTH AMERICA, INC., and DOES 2-10,<br><br>Defendants. | Civil No. 1:16-Civ-03228-AJN<br><br>Hon. Alison J. Nathan |

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

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March 21, 2017

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Defendants BNP Paribas S.A. ("BNP Paribas") and BNP Paribas North America, Inc. ("BNPP-NA") (collectively, the "BNPP Defendants") respectfully move, under Federal Rule of Civil Procedure 12(b)(6), to dismiss the Second Amended Complaint ("Complaint" or "SAC").[1]

## PRELIMINARY STATEMENT

The acts of violence alleged in the Complaint are deplorable. But the BNPP Defendants are not responsible for those acts. The BNPP Defendants did not commit them, nor did they assist the Sudanese government in perpetrating abuses against its citizens.

What matters for purposes of this motion is that the Complaint is based principally on theories of secondary liability that have been rejected both in this Circuit and under applicable Sudanese and Swiss law, which—as shown below—govern Plaintiffs' claims. The Complaint leaps from allegations of a conspiracy among the BNPP Defendants, Sudan and Sudanese banks to process U.S. dollar-denominated transactions in violation of U.S. sanctions—as to which Plaintiffs cannot assert a private right of action—to alleging that the BNPP Defendants are liable under New York tort law for having conspired with and aided and abetted Sudan in committing atrocities against its citizens. The Second Circuit rejected a similar claim—based on the same theory—under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS") in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, stating that:

> [t]here is evidence that southern Sudanese were subjected to attacks by the Government, that those attacks facilitated the oil enterprise, and that the Government's stream of oil revenue enhanced the military capabilities used to persecute its enemies. But if ATS liability could be established by knowledge of those abuses coupled only with such commercial activities as resource development, the statute would act as a vehicle for private parties to impose embargos or international sanctions through civil actions in United States courts.

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[1] Plaintiffs have also named as a defendant "BNP Paribas S.A. New York Branch" (the "Branch"), which is not a separate legal entity. The Court should dismiss Plaintiffs' claims against the Branch for the reasons shown in Part VI, *infra* at 34.

> Such measures are not the province of private parties but are, instead, properly reserved to governments and multinational organizations.

582 F.3d 244, 264 (2d Cir. 2009). Faced with this clear Second Circuit bar, the Complaint tries to avoid it by predicating its secondary liability claims on New York tort law rather than the ATS. But as shown below, this effort fails for several reasons.

First, Plaintiffs' claims are time-barred, and the Complaint does not properly plead grounds for tolling the limitations periods for all but two of Plaintiffs.

Second, the act of state doctrine bars Plaintiffs' claims, because those claims are not viable unless this Court finds Sudan primarily liable for torts against its own citizens in its own territory, which would violate fundamental principles of comity.

Third, all of Plaintiffs' claims premised on secondary liability fail as a matter of law. Sudanese law, which applies to these claims because Sudan is the location of the alleged torts, does not impose liability on secondary actors where the act of the direct tortfeasor is necessary to cause the alleged injury and the secondary actors' conduct is merely part of a sequence of events that led to the act of the direct tortfeasor. If the Court were to look instead to the locus of defendants' alleged conduct, Swiss law would govern because the conduct of the BNPP Defendants primarily occurred through BNP Paribas's Swiss-based subsidiary. However, Plaintiffs have not adequately pled any claim under Swiss law. And even under New York law, the Complaint fails to adequately plead claims for conspiracy and aiding and abetting liability, because it makes no plausible and non-conclusory allegations that the BNPP Defendants agreed with the Sudanese government to perpetrate the alleged abuses against Plaintiffs, shared a common goal with the Sudanese government to perpetrate those abuses or had any actual knowledge of those abuses, or that the provision of financial services in connection with commercial activities constitutes substantial assistance.

Fourth, the Complaint's grab-bag of primary liability claims are inadequately pled under any relevant law.

Last, the Complaint contains no non-conclusory factual allegations of wrongdoing by BNPP-NA and improperly names the Branch as a separate defendant.

BNP Paribas does not minimize the seriousness of its violations of U.S. sanctions against Sudan, and has already been punished by federal and state authorities and fined more than $8 billion for its actions. But those violations do not entitle Plaintiffs to bootstrap tort claims that are not proximately related to these violations. The Complaint should therefore be dismissed.

## THE ALLEGATIONS OF THE COMPLAINT

The Complaint is premised on an alleged conspiracy among the BNPP Defendants, Sudanese financial institutions, the Sudanese government and various of its agents and affiliates. See SAC ¶¶ 101-51. The Complaint asserts that, in violating U.S. sanctions by processing financial transactions on behalf of sanctioned Sudanese entities, the BNPP Defendants "knowingly facilitated and supported the crimes of a lawless regime by providing the financial means by which [Sudan] committed widespread human rights violations," id. ¶ 194, including violent acts over the course of more than a decade (between 1997 and 2009) in southern Sudan, Darfur and Khartoum by members of the Sudanese security forces, para-military forces or proxy militia. See, e.g., id. ¶¶ 69, 135-40, 152-69. The Complaint contends that:

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

*Id.* ¶ 1.

The allegations in the Complaint concerning the BNPP Defendants are based almost exclusively on BNP Paribas's June 2014 guilty pleas to federal and New York State criminal charges and related civil settlements with federal and New York State banking regulators and the U.S. Office of Foreign Assets Control addressing violations of U.S. sanctions that prohibit certain financial transactions with designated countries and SDNs (collectively, the "June 2014 Agreements"). *See, e.g., id.* ¶¶ 3, 101-14, 191-218.[2] The financial services that are the subject of the Complaint were processed by a Swiss subsidiary of BNP Paribas, BNP Paribas (Suisse) S.A. ("BNPP Geneva"). *See, e.g.*, SOF ¶¶ 19, 23-25, 27.

The Complaint, however, does not contain any non-conclusory allegations sufficient to support the inference that the BNPP Defendants entered into an agreement with the government of Sudan ("GOS") to "engage[] in a persistent campaign of terrible atrocities against Sudanese civilian groups, including genocide." SAC ¶ 152. Nor does it contain any non-conclusory allegations supporting the claim that the BNPP Defendants shared a common goal with Sudan to commit the alleged abuses. Likewise, there are no non-conclusory allegations that the BNPP Defendants had actual knowledge of the tortious acts that injured Plaintiffs.

Furthermore, the Complaint contains only conclusory allegations that the BNPP Defendants' conduct caused Plaintiffs' injuries. Generalized allegations such as "BNPP Geneva

[2] These agreements are included as exhibits to the Complaint, which may be considered by the Court on a motion to dismiss. *See Roth v. Jennings*, 489 F.3d 499, 509 (2d Cir. 2007); *see, e.g.*, Ex. A, Information with the U.S. District Court for the Southern District of New York, dated July 9, 2014 ("S.D.N.Y. Information"); Ex. C, Stipulated Statement of Facts between BNP Paribas S.A. and the U.S. Department of Justice, dated June 30, 2014 ("SOF"); Ex. E, Exhibit A to Plea Agreement by BNP Paribas S.A. with the District Attorney for New York County, dated June 30, 2014 ("DANY Factual Statement"); Ex. F, Cease and Desist Order Issued Upon Consent Pursuant to the Federal Deposit Insurance Act, as Amended, dated June 30, 2014 ("Joint Cease and Desist Order"); Ex. H, Settlement Agreement between BNP Paribas S.A. and the U.S. Office of Foreign Asset Control, dated June 30, 2014 ("OFAC Settlement Agreement"); Ex. I, Consent Order Under New York Banking Law § 44, dated June 30, 2014 ("DFS Consent Order").

also took on a central role in Sudan's foreign commerce market," *id.* ¶ 106, that "the GOS could otherwise not have funded the military at the nearly same level [*sic*] without BNPP's Sanctions violations," *id.* ¶ 120, or that BNP Paribas provided "letters of credit for Sudanese banks that in turn facilitated the GOS's ability to buy imports . . . thereby increasing the GOS's available resources to acquire goods," *id.* ¶ 107, cannot substitute for individualized allegations of causation with respect to each tort alleged.[3]

Critically, the Complaint does not identify a single banking transaction processed by the BNPP Defendants for Sudanese banks that purportedly provided funds that were actually used to perpetrate the alleged torts against Plaintiffs. The Complaint does not allege that, in processing U.S. dollar-denominated transactions for Sudanese banks, the BNPP Defendants transferred any funds allocated specifically to fund military operations. At most, the Complaint contains general allegations that, during the years that the BNPP Defendants violated U.S. sanctions, "GOS revenues from Sudan's export of oil . . . grew significantly," *id.* ¶ 117, that the increased oil revenue "enabled the GOS to grow its military spending and to keep the war going," *id.* ¶ 125, and that compliance with U.S. sanctions would have "limit[ed] the GOS's ability to commit atrocities," *id.* ¶ 9 (emphasis added). But nothing in the Complaint sufficiently links the BNPP Defendants' alleged actions to the acts that injured Plaintiffs. Doing business in violation of U.S. sanctions with a regime that commits human rights abuses is not enough to make a person liable for those abuses under the causation standards of an relevant law.

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[3] The Complaint contains several other conclusory, boilerplate allegations of causation: that Plaintiffs were injured "[a]s a direct and proximate result of Defendants'" conduct, *e.g.*, *id.* ¶¶ 274, 294, and the BNPP Defendants' conduct was "a substantial factor in causing Plaintiffs' injuries," *id.* ¶ 2; *see, e.g.*, *id.* ¶¶ 13, 51. These are "legal conclusion[s] couched as [ ] factual allegation[s]," which a court is "not bound to accept as true." *Tufaro v. City of New York*, No. 12-CV-7505 (AJN), 2014 WL 4290631, at *2 (S.D.N.Y. Aug. 28, 2014) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

## ARGUMENT

### I. THE COMPLAINT IS TIME-BARRED

The initial Complaint was filed on April 29, 2016, more than seven years after the last of Plaintiffs' alleged injuries occurred in March 2009, and more than 18 years after the earliest injuries alleged in 1997. *See* SAC ¶¶ 40, 46, 48. Under New York law,[4] the maximum limitations period for any of the claims asserted is six years, arguably applicable to Plaintiffs' commercial bad faith and unjust enrichment claims. *See* N.Y. C.P.L.R. § 213. These claims expired, at the latest, in March 2015. The other claims are subject to either a three-year, two-year or one-year limitations period. *See* N.Y. C.P.L.R. §§ 214, 215; N.Y. E.P.T.L. § 5-4.1(1).

Presumably recognizing this time bar, Plaintiffs seek to avoid it, alleging that C.P.L.R. § 213-b's longer crime victims' limitations period applies to them, and alleging equitable tolling of the statute of limitations. Both efforts fail.[5]

#### A. Plaintiffs Are Not Victims Of The Crimes To Which BNP Paribas Pled Guilty

Plaintiffs first try to invoke C.P.L.R. § 213-b, which allows a crime victim to recover damages resulting from that crime within seven years of the date of the crime, or within ten years of the conviction for that crime. But this effort fails for the simple reason that Plaintiffs are not within the class of statutory victims of the crimes to which BNP Paribas pled guilty. *See* SAC ¶¶ 249-50. New York courts have consistently declined to apply § 213-b where, as here, a plaintiff "sustained no direct injury . . . as a result of that crime, or the actions upon which

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[4] New York law applies because New York's borrowing statute provides that where, as here, an action accrues outside New York, the court must apply the shorter statute of limitations period of either New York or the state where the cause of action accrued. *See* N.Y. C.P.L.R. § 202.

[5] Plaintiffs Abdalla and Ahmed plead that they were minors when their claims accrued and thus may avail themselves of C.P.L.R. § 208 at the pleading stage. *See* SAC ¶¶ 31, 50. Accordingly, their claims alone are not time-barred, although those claims should be dismissed for the other reasons detailed below.

defendant's conviction was predicated." *Boice v. Burnett*, 667 N.Y.S.2d 100, 101 (3d Dep't 1997).[6] Thus, where "[t]here was no causal connection between the plaintiff's injuries and the defendant's criminal conviction," § 213-b does not apply. *Respass v. Dean*, 775 N.Y.S.2d 576, 576 (2d Dep't 2004).

Here, BNP Paribas's guilty pleas were for violations of U.S. sanctions and falsification of business records, not attacks against Plaintiffs. These criminal provisions do not give rise to private causes of action, *see infra* at 18, 22, and their violation was not what caused Plaintiffs' injuries, within the meaning of § 213-b or otherwise. To the contrary, at BNP Paribas's sentencing hearing, an Assistant United States Attorney stated that, under federal terror victim restitution guidelines, the victims of terror attacks allegedly funded by Sudan are not victims of the violations to which BNP Paribas pled guilty "and cannot show that they were directly harmed by [BNP Paribas's] conduct."[7] The same is true for Plaintiffs here.

**B. The Complaint Fails To Allege A Basis To Toll The Statute Of Limitations**

The Complaint also asserts that "Plaintiffs' claims are timely," SAC ¶ 252, because "[t]he elaborate care taken by BNPP to conceal its corrupt partnership with the GOS," *id.* ¶ 270, was such that "Plaintiffs could not have reasonably known of their claims against Defendants until May 1, 2015," when the Justice Department's press release and informational website concerning a new victims compensation program "made clear that BNPP's financial crimes not only violated U.S. Sanctions but also caused quantifiable, compensable harm to the victims of

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[6] *See also Williams v. Congregation Yetev Lev*, No. 01CV2030, 2004 WL 2924490, at *6 (S.D.N.Y. Dec. 16, 2004); *Volt Viewtech, Inc. v. D'Aprice*, 831 N.Y.S.2d 357, 357 (Sup. Ct. N.Y. Cty. 2006) (because "crime of making a false statement . . . did not injure plaintiff . . . CPLR 213–b does not apply.")

[7] Tr. of Sentencing Hr'g at 9:20-21, *United States v. BNP Paribas S.A.*, 14 Cr. 460 (LGS) (S.D.N.Y. May 1, 2015), attached as Exhibit A to the Declaration of Mark S. Grube, dated March 21, 2017.

the GOS's abuses," *id.* ¶¶ 254-55. Based on these allegations, Plaintiffs try to invoke the doctrines of equitable tolling and equitable estoppel. *Id.* ¶ 252. This effort also fails.

These equitable remedies should be "invoked sparingly and only under exceptional circumstances." *Abercrombie v. Andrew Coll.*, 438 F. Supp. 2d 243, 265 (S.D.N.Y. 2006) (citation omitted) (equitable estoppel); *see also A.Q.C. ex rel. Castillo v. United States*, 656 F.3d 135, 144 (2d Cir. 2011) (equitable tolling). These "rare and exceptional circumstances" are absent here, for at least two reasons. *Id.* at 144 (citation omitted).

First, to invoke these "drastic remedies," Plaintiffs must show that they exercised reasonable diligence in pursuing their claims. *See Twersky v. Yeshiva Univ.*, 993 F. Supp. 2d 429, 442-43 (S.D.N.Y. 2014) (equitable estoppel), *aff'd*, 579 F. App'x 7 (2d Cir. 2014); *Koch v. Christie's Int'l PLC*, 699 F.3d 141, 157 (2d Cir. 2012) (equitable tolling). But the Complaint fails to allege that Plaintiffs exercised any due diligence. "General assertions of ignorance and due diligence without more specific explanation . . . will not satisfy the [ ] pleading requirements." *Gander Mountain Co. v. Islip U-Slip LLC*, 923 F. Supp. 2d 351, 364 (N.D.N.Y. 2013), *aff'd*, 561 F. App'x 48 (2d Cir. 2014) (citation omitted). The allegation that "Plaintiffs proceeded with reasonable diligence" after May 1, 2015, SAC ¶ 256, is conclusory and irrelevant, because it does not claim any diligence before May 1, 2015.

Second, to invoke equitable estoppel, Plaintiffs must show that they failed to bring timely claims because they reasonably relied on misrepresentations made by the BNPP Defendants, *Veltri v. Bldg. Serv. 32B-J Pension Fund*, 393 F.3d 318, 326 (2d Cir. 2004), and that those misrepresentations were "affirmative and specifically directed at preventing [Plaintiffs] from bringing suit; failure to disclose the basis for potential claims is not enough, nor are broad misstatements to the community at large." *Twersky*, 993 F. Supp. 2d at 442. Further, "equitable

estoppel does not apply where the misrepresentation or act of concealment underlying the estoppel claim is the same act which forms the basis of plaintiff's underlying cause of action." *Abercrombie*, 438 F. Supp. 2d at 265 (citation omitted); *see also Corsello v. Verizon N.Y., Inc.*, 18 N.Y.3d 777, 789 (2012) (same).

The Complaint does not contain a single factual allegation that satisfies any of these requirements. The allegations that "BNPP took elaborate, successful, and illegal efforts to keep its actions secret" and that it failed to cooperate with law enforcement investigations, SAC ¶¶ 189, 252, do not allege any actions that were "specifically directed" toward Plaintiffs. *See Twersky*, 993 F. Supp. 2d at 445. General concealment of illegal conduct or failure to cooperate with a law enforcement investigation cannot support a finding of equitable estoppel. *See, e.g.*, *Zumpano v. Quinn*, 6 N.Y.3d 666, 675 (2006). Finally, Plaintiffs' concealment allegations improperly rely on the same acts that form the basis of Plaintiffs' underlying claims. *See Corsello*, 18 N.Y.3d at 789.

### C. The Complaint's Intentional Tort Claims (Counts III-X and XV) Are Barred By The One-Year Statute of Limitations, Regardless Of Whether Any Tolling Doctrine Applies

Plaintiffs' intentional tort claims are time-barred after one year from the date of injury. N.Y. C.P.L.R. § 215. Therefore, even if the Complaint satisfied the requirements to toll Plaintiffs' claims until the publication of the June 2014 Agreements—which it does not—at a minimum all of Plaintiffs' intentional tort claims are barred by the one-year statute of limitations.

Fraudulent concealment tolls the statute of limitations only "until such time as the plaintiff discovers the fraud, or could with reasonable diligence have discovered it." *Rafter v. Liddle*, 704 F. Supp. 2d 370, 377 (S.D.N.Y. 2010).[8] Plaintiffs allege that May 1, 2015 was the

[8] Plaintiffs allege that their individual personal circumstances account for their failure to identify their claims prior to May 1, 2015, SAC ¶ 255, but that allegation is irrelevant under this objective standard.

earliest date on which they could have discovered their claims against the BNPP Defendants, *see* SAC ¶¶ 253-55, but that allegation is contradicted by the exhibits to the Complaint, which demonstrate that, at the latest, Plaintiffs knew or should have known of the facts they allege when the June 2014 Agreements were widely published, on June 30, 2014.[9] The Complaint cites from a May 1, 2015 Justice Department press release as evidence that "Plaintiffs first learned" of their potential claims against the BNPP Defendants on that date, *id.*, but the identical language appeared 11 months earlier, in the Justice Department's July 2014 press release.[10] Plaintiffs' assertion that they learned in May 2015 that the BNPP Defendants' conduct "could provide a basis under the U.S. legal system to seek redress" is irrelevant in this context. *Id.* ¶ 255. The limitations period begins to accrue when a plaintiff discovers an injury, not the existence of a legal right, "regardless of how complex or difficult to discover the elements of the cause of action may be." *Twersky*, 993 F. Supp. 2d at 440.

## II. THE COMPLAINT SHOULD BE DISMISSED UNDER THE ACT OF STATE DOCTRINE BECAUSE IT REQUIRES THIS COURT TO CONDEMN THE ACTS OF A FOREIGN SOVEREIGN WITHIN ITS OWN TERRITORY

U.S. courts have long adhered to the act of state doctrine, which provides that "[e]very sovereign state is bound to respect the independence of every other sovereign state, and the

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[9] *See, e.g.*, Compl. Exs. B-D, H-I; Ben Protess & Jessica Silver-Greenberg, *BNP Paribas Admits Guilt and Agrees to Pay $8.9 Billion Fine to U.S.*, N.Y. TIMES, June 30, 2014, at B1, http://dealbook.nytimes.com/2014/06/30/bnp-paribas-pleads-guilty-in-sanctions-case; Devlin Barrett, Christopher M. Matthews & Andrew R. Johnson, *BNP Paribas Draws Record Fine for 'Tour de Fraud'*, WALL ST. J., June 30, 2014, https://www.wsj.com/articles/bnp-agrees-to-pay-over-8-8-billion-to-settle-sanctions-probe-1404160117; Danielle Douglas, *France's BNP Paribas to Pay $8.9 Billion to U.S. for Sanctions Violations*, WASH. POST, June 30, 2014, https://www.washingtonpost.com/business/economy/frances-bnp-paribas-to-pay-89-billion-to-us-formoney-laundering/2014/06/30/6d99d174-fc76-11e3-b1f4-8e77c632c07b_story.html.

[10] *Compare* SAC Ex. K, *with* Press Release, Dep't of Justice, *BNP Paribas Pleads Guilty to Conspiring to Violate U.S. Economic Sanctions in Manhattan Federal Court* (July 9, 2014), https://www.justice.gov/opa/pr/bnp-paribas-pleads-guilty-conspiring-violate-us-economic-sanctions-manhattan-federal-court.

courts of one country will not sit in judgment on the acts of the government of another, done within its own territory," *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897), subject to consideration of the factors enumerated in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), none of which, for the reasons detailed below, weighs against applying the doctrine here. The act of state doctrine "is not some vague doctrine of abstention but a '*principle of decision* binding on federal and state courts alike.'" *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400, 406 (1990) (quoting *Sabbatino*, 376 U.S. at 427). Based on this principle, the Court should dismiss Plaintiffs' claims, which require the Court to pass judgment on the acts of a foreign state in order to impose secondary liability for them on the BNPP Defendants.

### A. Plaintiffs' Claims Require The Court To Sit In Judgment Of Official Acts Of The Government Of Sudan

The act of state doctrine applies "regardless of whether the foreign government is named as a party to the suit or whether the validity of its actions are directly challenged in the pleadings." *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449, 452 (2d Cir. 1987). Claims against private defendants are barred "[w]hen the causal chain between a defendant's alleged conduct and plaintiff's injury cannot be determined without an inquiry into the motives of the foreign government." *Id.* at 453; *see also Konowaloff v. Metro. Museum of Art*, 702 F.3d 140, 147-48 (2d Cir. 2012) (barring claim against museum over title to painting expropriated by foreign government). Here, plaintiffs' theory of liability rests on allegations that Sudan perpetrated a number of torts against its citizens. *See* SAC ¶¶ 238, 257-529. Because "[e]ven an inquiry" by this Court into the legality of actions taken by Sudan would be a "breach of comity," *Fed. Treasury Enter. Sojuzplodoimport v. Spirits Int'l B.V.*, 809 F.3d 737, 743 (2d Cir. 2016), the act of state doctrine bars Plaintiffs' claims.

### B. The *Sabbatino* Factors Do Not Weigh Against Application Of The Act of State Doctrine

The act of state doctrine applies unless three policy factors set forth in *Sabbatino* weigh "against application of the doctrine." *Kirkpatrick*, 493 U.S. at 409. These factors are:

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

*Sabbatino*, 376 U.S. at 428. None of these factors requires the Court to hear Plaintiffs' claims.

First, the Complaint states no claims for violations of international law that would weigh against application of the act of state doctrine. Rather, in order to skirt *Talisman*, it deliberately pleads only common law tort claims that fall squarely within the act of state doctrine. *See Underhill*, 168 U.S. at 251 (applying doctrine to tort claims involving assaults and false imprisonment of U.S. citizen by Venezuelan soldiers); *Mezerhane v. Republica Bolivariana de Venez.*, 785 F.3d 545, 552 (11th Cir. 2015) (applying doctrine to suit involving various common law torts), *cert. denied*, 136 S. Ct. 800 (2016).[11]

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[11] Although the Complaint describes "widespread human rights abuses . . . in contravention of international law" by Sudan, SAC ¶ 136, it alleges only common law tort claims, in tacit recognition of the many bars to this suit under the ATS, 28 U.S.C. § 1350. *See Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013) (ATS claims must "touch and concern" the United States "with sufficient force to displace the presumption against extraterritorial application"); *In re Arab Bank, PLC Alien Tort Statute Litig.*, 808 F.3d 144, 158 (2d Cir. 2015), *as amended* (Dec. 17, 2015) (no corporate liability under ATS); *see also Talisman*, 582 F.3d at 262 (dismissing secondary liability claims against Canadian oil corporation operating in Sudan for violations of international law committed by Sudan for lack of evidence that corporation acted with purpose of aiding human rights abuses). In *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003), the *Sabbatino* factors weighed against application of the act of state doctrine because that case was brought under the ATS, and the Complaint alleged "acts of genocide, war crimes, enslavement and torture," which are the types of "clear-cut" violations of international law that the *Sabbatino* court concluded did not merit judicial abstention, *id.* at 345. The Complaint here, by contrast, deliberately pleads only common law claims, to which the act of state doctrine is routinely applied. Indeed, the conversion claims in the Complaint (Counts XI-XIV), which allege that the GOS "converted property from civilians in Sudan," SAC ¶ 417, are premised on takings by a sovereign in its territory to which the holding of *Sabbatino* specifically applies. *See* 376 U.S. at 428. Having chosen for strategic reasons not to allege ATS claims, Plaintiffs cannot in the same breath use references to international law violations relevant to the ATS to side step the application of the act of state doctrine to their exclusively common law claims.

Second, Sudan need not be a close ally of the United States for the act of state doctrine to apply. The foreign relations prong "is but one of the several factors that the Sabbatino Court advised taking into consideration." *Konowaloff v. Metro. Museum of Art.*, No. 10 Civ. 9126 (SAS), 2011 WL 4430856, at *8 (S.D.N.Y. Sept. 22, 2011). In *Sabbatino*, the doctrine applied despite the "severance of diplomatic relations, commercial embargo, and freezing of Cuban assets in this country." 376 U.S. at 410; *see also Fed. Treasury*, 809 F.3d at 743 (applying doctrine to Russian Federation). Here, by contrast, the United States maintains diplomatic relations with Sudan and has worked to improve this relationship, recently laying the groundwork to revoke certain Sudanese sanctions and issuing a general license authorizing previously prohibited transactions in recognition of positive "ongoing U.S.-Sudan bilateral engagement" and "positive developments in the country."[12] Moreover, foreign relations considerations are not limited to the relationship between the United States and Sudan. The Court in *Sabbatino* recognized that a U.S. court's review of foreign sovereign expropriations could affect foreign relations with other countries. *See* 376 U.S. at 432. Here, the adjudication of tort disputes regarding actions by a foreign sovereign in its own territory could impact foreign relations with other countries and impinge on the role of the Executive Branch.[13]

Third, the final *Sabbatino* factor further tips the scale in favor of dismissal because the Sudanese government that the Complaint accuses of perpetrating the attacks remains in power.

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[12] Sudanese Sanctions Regulations, 82 Fed. Reg. 4793 (Jan. 17, 2017) (to be codified at 31 C.F.R. part 538). The general license was issued by OFAC concurrently with an executive order, which directs that sections of Executive Orders 13067 and 13412, which largely form the basis of the Sudanese sanctions regime, *see* SAC ¶¶ 88-89, 96-97, be revoked effective July 2017, so long as the GOS "has sustained the positive actions that gave rise to [the] order," Exec. Order No. 13761, 82 Fed. Reg. 5331 (Jan. 13, 2017).

[13] *Cf. Sosa v. Alvarez–Machain*, 542 U.S. 692, 727 (2004) ("It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens . . . ."); *Kiobel*, 133 S. Ct. at 1668 ("No nation has ever yet pretended to be the *custos morum* of the whole world . . . ." (citation omitted)).

*See* SAC ¶ 4.[14] Thus, the Complaint presents sensitive political questions reserved for the political branches of our government.

## III. SUDANESE AND SWISS LAW APPLY TO PLAINTIFFS' CLAIMS UNDER NEW YORK'S CHOICE-OF-LAW RULES

There is no basis for applying New York law to adjudicate claims against a French bank arising from torts committed by the Sudanese government against Sudanese citizens in Sudan. "It is a basic premise of our legal system that, in general, 'United States law governs domestically but does not rule the world,'" *RJR Nabisco, Inc., v. European Cmty.*, 136 S. Ct. 2090, 2100 (2016) (citation omitted). For this reason, courts "ordinarily 'apply *foreign* law to determine the tortfeasor's liability' to 'a plaintiff injured in a foreign country,'" *id.* at 2109 (quoting *Sosa*, 542 U.S. at 706), and the Court should do the same here.

The conclusion that New York law should not be applied here is dictated by basic New York choice-of-law principles.[15] For tort claims, if an actual conflict of law[16] exists between the jurisdictions involved, "[t]he law of the jurisdiction having the greatest interest in the litigation will be applied." *Schultz v. Boy Scouts of Am., Inc.*, 65 N.Y.2d 189, 197 (1985) (quoting *Miller v. Miller*, 22 N.Y.2d 12, 15-16 (1968)). The "greatest interest" analysis confirms that Sudanese

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[14] The Complaint alleges that some Plaintiffs were injured in South Sudan, SAC ¶ 23, which is now independent from Sudan, but ongoing strife in the region supports application of the act of state doctrine in order to avoid "embroil[ing] the court in a seemingly rather political evaluation of the character of regime change itself . . . ." *Konowaloff*, 2011 WL 4430856, at *7 (citation omitted). Further, the Second Circuit has not hesitated to apply the act of state doctrine even where the regime that committed the challenged acts has departed. *See Konowaloff*, 702 F.3d at 147-48 (applying act of state doctrine in 2012 in suit seeking return of painting seized by the Bolsheviks).

[15] "A federal court sitting in diversity . . . must apply the choice of law rules of the forum state." *Rogers v. Grimaldi*, 875 F.2d 994, 1002 (2d Cir. 1989).

[16] For an "actual conflict" to exist, "the laws in question must provide different substantive rules in each jurisdiction that are 'relevant' to the issue at hand and have a 'significant possible effect on the outcome of the trial.'" *Elmaliach v. Bank of China Ltd.*, 971 N.Y.S.2d 512 (1st Dep't 2013) (quoting *Finance One Pub. Co. v. Lehman Bros. Special Fin., Inc.*, 414 F.3d 325, 331 (2d Cir. 2005)).

law should apply, or in the alternative, Swiss law should apply, because those countries have a greater interest in this litigation than New York.

**A. There Is An Actual Conflict Between New York And Sudanese/Swiss Law**

There is an actual conflict between New York and Sudanese/Swiss law here because the latter bar, or impose more stringent standards on, the types of liability that the Complaint alleges.

First, the Complaint relies on theories of secondary liability but under Sudanese law, as described further below, liability is not imposed on secondary actors where the act of the direct tortfeasor is necessary to cause the alleged injury, and the secondary actors' conduct is merely part of a sequence of events that led, in a "but for" sense, to the act of the direct tortfeasor. *See* Declaration of Tayeb Hassabo ("Hassabo Decl.") ¶¶ 52-59, filed herewith. Thus, while, as shown below, *infra* at 21, these secondary liability claims all fail under New York law too, a substantive conflict of law exists because Sudanese law imposes a greater burden on a plaintiff to establish secondary liability. Sudanese law also separately bars liability arising from what it deems to be "lawful exercises of rights," such as a bank's provision of financial services that are lawful under Sudanese law. *See* Hassabo Decl. ¶¶ 60-62.

Second, neither Sudanese nor Swiss law recognizes liability for commercial bad faith, and have stricter requirements than New York law for intentional infliction of emotional distress ("IIED"), negligent infliction of emotional distress ("NIED") and unjust enrichment claims. Hassabo Decl. ¶ 74(b)-(d); Declaration of Vito Roberto ¶¶ 34-43 ("Roberto Decl."), filed herewith. A conflict exists because New York law recognizes commercial bad faith and has more lenient standards for proving IIED, NIED and unjust enrichment.

**B. Sudan Has The Greatest Interest In The Litigation**

The "greatest interest" analysis considers: "(1) what are the significant contacts and in which jurisdiction are they located; and (2) whether the purpose of the law [at issue] is to

regulate conduct or allocate loss." *Elmaliach*, 971 N.Y.S.2d at 514 (citation omitted). The only relevant contacts for both conduct-regulating and loss allocating rules "are, almost exclusively, the parties' domiciles and the locus of the tort." *Id.* (citation omitted).

The significant contacts in this case, *see Padula v. Lilarn Props. Corp.*, 84 N.Y.2d 519, 522 (1994), point towards applying Sudanese law. First, at the time of the alleged torts, all Plaintiffs were domiciled in Sudan, *see* SAC ¶¶ 23-24,[17] and BNP Paribas is and was domiciled in France, SAC ¶ 53. *See Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014). None of the relevant parties was domiciled in New York.[18] Second, Plaintiffs were injured in Sudan. SAC ¶ 24. The first step of this analysis thus points to applying Sudanese law to Plaintiffs' claims.

Under the second step, it is immaterial whether the legal principle underlying one of Plaintiffs' claims "is to regulate conduct or allocate loss," *Elmaliach*, 971 N.Y.S.2d at 514 (citation omitted), because in both instances this factor points to the application of the law of Sudan. For loss-allocating rules in split-domicile cases where local law does not favor a domiciliary—as is the case here—the "usually governing law will be that of the place where the accident occurred." *Cooney v. Osgood Mach., Inc.*, 81 N.Y.2d 66, 73-74 (1993). For conduct-regulating rules, "the law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders." *Id.* at 72.[19]

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[17] "The pertinent time" to determine a party's domicile is "the time of the tort rather than any later time." *Youngman v. Robert Bosch LLC*, 923 F. Supp. 2d 411, 420 (E.D.N.Y. 2013).

[18] The domicile of BNPP-NA is not relevant because it was not a party to, or mentioned at all in, any of the June 2014 Agreements. *See infra* at 35; SAC Exs. A-I. The New York Branch of BNP Paribas, not BNPP-NA, is the entity referred to as "BNPP New York" in BNPP's plea agreement with the Justice Department. *See* SOF ¶ 1. This Branch is not a separate legal entity capable of being sued, *see infra* at 34, and, thus does not have a separate domicile from BNP Paribas, *Daimler*, 134 S. Ct. at 160.

[19] Under New York law, when tortious conduct occurs in a jurisdiction other than where the injury occurred, the locus of the tort is "the place where the last event necessary to make the actor liable occurred," which is "determined by where the plaintiffs' injuries occurred." *Schultz*, 65 N.Y.2d at 195. *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 739 F.3d 45, 50 (2d Cir. 2013), distinguished the

Because Plaintiffs' injuries occurred in Sudan, and no state has a greater interest in adjudication of these claims, Sudanese law applies.

### C. Swiss Law Applies To Any Claims To Which Sudanese Law Does Not Apply

Much of the BNPP Defendants' processing of transactions in violation of U.S. sanctions took place in Switzerland.[20] Swiss law thus governs the three negligence claims, and any other claim for which the Court concludes Sudanese law does not apply. *See Licci*, 739 F.3d at 50.

In negligence actions involving a bank's duty of care to protect against the intentional torts of its customers, courts place greater weight on the jurisdiction in which the bank's conduct occurred. *See Licci*, 739 F.3d at 50-51 (New York law governed because the defendant bank was based in New York and none of its challenged conduct occurred elsewhere); *Wultz v. Bank of China Ltd.*, 865 F. Supp. 2d 425, 429 (S.D.N.Y. 2012) ("China's interest in regulating bank conduct within its borders [was] dispositive.") Applying *Licci* and *Wultz* here, the locus of Plaintiffs' negligence claims is Switzerland because the conduct giving rise to the Complaint's allegations took place "predominantly through . . . BNPP Geneva." SOF ¶ 17.

### D. New York Has Almost No Nexus To The Alleged Conduct

New York, by contrast, is neither the domicile of any relevant party nor the locus of any tort, and thus has no significant interest in applying its laws here because it has no significant

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traditional rule in cases in which "the defendant's exercise of due care . . . is in issue," holding that in such instances "the jurisdiction in which the allegedly wrongful conduct occurred will usually have a predominant, if not exclusive, concern," *id.* (citation omitted). However, "*Licci* eschewed a bright-line rule" and "aim[ed] to give effect to the law of the jurisdiction with 'the greatest concern with the specific issue raised in the litigation.'" *Benefield v. Pfizer Inc.*, 103 F. Supp. 3d 449, 459 (S.D.N.Y. 2015) (citation omitted) (applying Georgia law in case where tortious activity took place in New York but injury occurred in Georgia). At most, *Licci* suggests applying non-Sudanese law only to Plaintiffs' negligence claims, which, as shown below, should be evaluated under Swiss law. *See infra* at 18.

[20] *See, e.g.*, SOF, SAC Ex. C ¶¶ 17-19; OFAC Settlement Agreement, SAC Ex. H ¶¶ 3, 7; DANY Factual Statement, SAC Ex. E ¶ 17; DFS Consent Order, SAC Ex. F ¶¶ 10-12.

contacts with Plaintiffs' claims. *Schultz*, 65 N.Y.2d at 197. The Complaint relies heavily on government enforcement actions that were pursued in New York, SAC ¶¶ 191-218, but those contacts are not "relate[d] to the purpose of the" the tort laws in conflict, *Schultz*, 65 N.Y.2d at 197, and New York has already vindicated the enforcement of its laws with the June 2014 Agreements, which impose significant penalties on BNP Paribas. The Complaint further alleges that New York has a "continuing interest in regulating BNPP's conduct, after its convictions," SAC ¶ 218, but this interest will be defended by New York and federal agencies, not Plaintiffs. Moreover, the New York criminal law violations to which BNP Paribas pleaded guilty do not give rise to any private rights of action, *see McFadden v. Ortiz*, No. 5:12-CV-1244 (MAD/ATB), 2013 WL 1789593, at *3 (N.D.N.Y. Apr. 26, 2013) (no private right of action for falsifying business records), nor do any of the relevant U.S. sanctions regulations, *see infra* at 22.

The Complaint attempts to place New York at the center of the events that allegedly injured Plaintiffs. *See, e.g.*, SAC ¶¶ 16-18, 204-18. Indisputably, Plaintiffs' claims are based on actions allegedly taken by the GOS against Sudanese citizens in Sudan, *id.* ¶ 24. Plaintiffs' assertion that "New York was central to BNPP's illegal activities," *id.* ¶ 18, is contradicted by the June 2014 Agreements, which indicate that the BNPP Defendants' relevant conduct was centered in Geneva.[21] Moreover, the routing of transfers through banks located in New York does not give New York a greater interest in adjudicating Plaintiffs' claims than the jurisdiction in which Plaintiffs' injuries occurred, or even the jurisdiction in which BNP Paribas's conduct

[21] *See supra* at 17. Plaintiffs' descriptions of the 2014 Agreements are also riddled with assertions that are false on the face of these documents. The Joint Cease and Desist order does not require relocation of part of BNP Paribas's compliance office to New York specifically, *see* SAC ¶ 205. Instead, it merely requires a move to the United States, SAC Ex. F ¶ 1(a). Further, the Branch did not "structure financial transactions on behalf of blocked entities," or use "false and fraudulent transaction descriptions and transmittal messaging," SAC ¶ 18. Instead, transactions were structured in Europe to "conceal the involvement of Sanctioned Entities from BNPP New York," S.D.N.Y. Information, SAC Ex. A ¶ 4(e).

primarily occurred. *See Wultz*, 865 F. Supp. 2d at 429 (China's interest "outweigh[ed] the interest of New York, through which the wire transfers passed only briefly"). The New York Court of Appeals has confirmed that New York has no interest in adjudicating every injury abroad that a plaintiff can tangentially trace to its banking system. *Mashreqbank PSC v. Ahmed Hamad Al Gosaibi & Bros. Co.*, 23 N.Y.3d 129, 137 (2014) ("Our state's interest in the integrity of its banks is indeed compelling, but it is not significantly threatened every time one . . . moves dollars through a bank in New York."); SAC ¶ 63 ("95% of all cross-border U.S. dollar payments" pass through New York City).

## IV. THE COMPLAINT DOES NOT STATE CLAIMS FOR SECONDARY LIABILITY UNDER SUDANESE, SWISS OR NEW YORK LAW (COUNTS III-XIV, XIX-XX)

The Complaint relies on theories of secondary liability, but nowhere does it allege that the BNPP Defendants directly participated in the human rights abuses that Plaintiffs allegedly suffered. Rather, it asserts that the BNPP Defendants conspired with and aided and abetted the intentional torts by the GOS that injured Plaintiffs. But the laws of neither Sudan nor Switzerland recognize the type of secondary liability Plaintiffs assert. Even under New York law, the Complaint fails to plead any of the requirements for secondary liability.

### A. Sudanese Law Does Not Recognize Secondary Liability For The Claims Alleged In The Complaint

The Complaint clearly and repeatedly distinguishes between Sudan, which is alleged to have committed the tortious acts that injured Plaintiffs, and the BNPP Defendants, which allegedly provided indirect "assistance and encouragement" to Sudan. *See, e.g.*, SAC ¶¶ 313, 340, 373, 404. But under Sudanese law, tort liability rests exclusively with the primary actor where, as here, the act of the direct tortfeasor is necessary to cause the alleged injury and the secondary actors' conduct is merely part of a sequence of events that led to the act of the direct

tortfeasor. Hassabo Decl. ¶¶ 52-59. Because the Complaint alleges that Sudan directly caused Plaintiffs' injuries, and does not allege that Plaintiffs' injuries flowed without interruption from the BNPP Defendants' conduct, the BNPP Defendants cannot be liable for those alleged torts.

Moreover, under Sudanese tort law, Plaintiffs would need to plead and prove that the BNPP Defendants acted with premeditation or specific intent, Hassabo Decl. ¶¶ 47-48, which they have not done. As described further below, *infra* at 22, the Complaint does not make any non-conclusory allegation that the BNPP Defendants knowingly acted to injure Plaintiffs, let alone that they did so with premeditation or specific intent. In addition, Sudanese law bars liability for the "exercise of lawful rights" such as BNP Paribas's provision of financial services, which were permissible under Sudanese law. Hassabo Decl. ¶¶ 60-62.

### B. The Complaint Fails To Plead The Requirements For Secondary Liability Under Swiss Law

Under Swiss law, where claims involve both primary and secondary actors that allegedly acted in concert, secondary actors are treated as accomplices for purposes of determining liability, and both the primary and secondary tortfeasors can be liable only if they exhibit (1) collective conduct, (2) collective fault and (3) collective causation. Roberto Decl. ¶¶ 14-21. Here, Plaintiffs have not plausibly alleged that the BNPP Defendants' conduct satisfies the causal requirements of Swiss tort law, which require that such conduct (1) "can fairly be considered the cause of the kind of loss or damage that occurred," (2) was "substantial" and (3) was either willful or immediate. *Id.* ¶¶ 16, 20.

First, under the Swiss courts' restrictive approach to causation, there is no precedent suggesting that financial transactions "can fairly be considered the cause of" the types of injury Plaintiffs allege. *Id.* ¶ 16.

Second, to meet the "restrictive approach" to interpreting the "substantial" conduct standard under Swiss law, Plaintiffs would need to plead that: (1) a substantial proportion of the proceeds from the financial transactions at issue was received by the GOS; (2) the funds thus provided constituted a substantial portion of the GOS's resources; and (3) most decisive here, a substantial amount of the funds received by the GOS were used for the purpose of harming Plaintiffs, and not for legitimate governmental purposes. *Id.* ¶¶ 27-29. Plaintiffs' allegations do not satisfy the latter two requirements.

Third, even if the BNPP Defendants' contributions to Plaintiffs' injuries were substantial, Plaintiffs' allegations fail to meet the requirements of willfulness or immediacy, at least one of which is necessary. To establish willfulness, Plaintiffs would need to plead and prove that the BNPP Defendants acted "for the purpose and with the intent of aiding the GOS in committing tortious acts." *Id.* ¶ 28. As described further below with respect to the requirements of New York law, the Complaint fails to plausibly allege any such intent. *See infra* at 23. Nor does the Complaint plead the requisite immediateness. Plaintiffs claim that the BNPP Defendants are indirectly liable, but "an indirect contribution would not suffice under the criteria of immediateness required" under Swiss law. Roberto Decl. ¶ 28.[22]

### C. The Complaint Fails To Plead The Requirements For Secondary Liability Under New York Law

#### 1. The Complaint Fails To Plead Conspiracy Liability (Counts III, V, VII, IX, XI, XIII, and XIX)

The Complaint alleges that the BNPP Defendants "conspired with SDNs . . . to violate [U.S.] Sanctions against [Sudan] by providing Sudanese banks with access to the U.S. financial

[22] Plaintiffs have also failed to state any wrongful death claims under Swiss law, which require, in addition to the general requirements for proving secondary liability, an allegation that the claimant either lost a means of support as a result of the death of the decedent (art. 45 CO), or was a dependent with a close relationship to the decedent (art. 47 CO). *See* Roberto Decl. ¶¶ 31-33.

system through its New York branch." SAC ¶ 196. But there is no private right of action for a conspiracy to violate U.S. sanctions.[23] Tacitly acknowledging this fact, the Complaint then leaps from this contention to alleging that the BNPP Defendants "entered into a Conspiracy with [Sudan]," "intentionally engaged in numerous overt acts in furtherance of the Conspiracy," and that the BNPP Defendants "agreed with [Sudan] and intended that the [torts] be committed. . . ." *See, e.g.*, *id.* ¶¶ 298, 325-31, 353-61, 385-93, 415-21, 443-51, 505-09. But Plaintiffs have made no plausible, non-conclusory allegations to support a finding of such a conspiracy.[24]

"To state a claim for civil conspiracy under New York law, a plaintiff, in addition to alleging an underlying tort, must plead facts sufficient to support an inference of the following elements: (1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury." *Bigio v. Coca-Cola Co.*, 675 F.3d 163, 176 (2d Cir. 2012) (citation omitted). "Conspiracy claims premised upon 'conclusory, vague or general' allegations will not withstand a motion to dismiss." *Stutts v. De Dietrich Grp.*, No. 03-CV-4058, 2006 WL 1867060, at *14 (E.D.N.Y. June 30, 2006) (quoting *Boddie v. Schneider*, 105 F.3d 857, 862 (2d Cir. 1997)); *see also Goldstein v. Siegel*, 244 N.Y.S.2d 378, 382 (1st Dep't 1963) (plaintiff must "allege at least some of the facts of agreement or separable acts, if any, of the alleged co-

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[23] *See Peterson v. Islamic Republic of Iran*, No. 13-CV-9195 (KBF), 2015 WL 731221, at *7 (S.D.N.Y. Feb. 20, 2015) (no private right of action for violating sanctions against Iran); *Am. Bank & Tr.Co. v. Bond Int'l Ltd.*, 464 F. Supp. 2d 1123, 1127 (N.D. Okla. 2006) (no remedial right under The Trading With the Enemy Act ("TWEA")); *Glen v. Club Méditerranée SA*, 365 F. Supp. 2d 1263, 1272 (S.D. Fla. 2005) (same); *Vasile v. Dean Witter Reynolds Inc.*, 20 F. Supp. 2d 465, 481 (E.D.N.Y. 1998) (no private right of action for criminal conspiracy or for civil conspiracy).

[24] Under New York law, "[a]n action sounding in conversion does not lie where the property involved is real property." *Dickinson v. Igoni*, 908 N.Y.S.2d 85, 88 (2d Dep't 2010). For this additional reason, Counts XI-XIV are not cognizable to the extent they allege conversion of real property. *See, e.g.*, SAC ¶¶ 417-418, 429-430, 448, 461.

conspirators in order to support the responsibility of each for the acts of all the others."). The Complaint's conspiracy allegations fail to fulfill any of these requirements.

First, the Complaint does not allege any facts concerning any agreement between the BNPP Defendants and Sudan to commit torts against Plaintiffs. In order to hold the BNPP Defendants liable, the agreement underlying the conspiracy must relate to the tortious conduct that injured Plaintiffs. *See, e.g.*, *Lindsay v. Lockwood*, 625 N.Y.S.2d 393, 397-98 (Sup. Ct. Monroe Cty. 1994) (proof of agreement must "encompass the act which resulted in the plaintiff's injury"). Plaintiffs' conclusory assertions, repeated in boilerplate fashion for each conspiracy claim, that the BNPP Defendants "agreed with [Sudan] and intended that the [torts] be committed," SAC ¶¶ 331, 361, 393, 421, 451, 509, fail to meet this pleading requirement. *See, e.g.*, *Bigio*, 675 F.3d at 176 (affirming dismissal of conspiracy claim where no allegations supported the existence of an agreement between defendant and third party to perpetrate relevant torts).

Second, the Complaint provides no basis for inferring that the BNPP Defendants shared a common goal with Sudan to commit torts against Plaintiffs. Courts routinely dismiss conspiracy claims that do not plausibly allege defendants acted with the purpose of supporting the primary offenses. *See, e.g.*, *Talisman*, 582 F.3d at 263 (no conspiracy liability absent allegations that defendant acted with purpose of advancing the GOS's attacks on plaintiffs); *Stutts*, 2006 WL 1867060, at *14-15 (dismissing conspiracy claim against banks that provided letters of credit to suppliers of chemical weapons to Iraq absent allegations that banks shared common goal with Saddam Hussein to proliferate and use chemical weapons); *Ungar v. Islamic Republic of Iran*, 211 F. Supp. 2d 91, 100 (D.D.C. 2002) (conspiracy claim against Iran failed absent proof that Iran reached an agreement or, at a minimum, shared common goal with terrorists to murder

plaintiffs' children). Without plausible, non-conclusory allegations that the BNPP Defendants intended to harm Plaintiffs, the Complaint retreats to contending only that the BNPP Defendants processed "thousands of illegal financial transactions in the United States" and that "[Sudan] directed [the BNPP Defendants] to take steps to conceal the fact that [the BNPP Defendants were] processing transactions in New York on their behalf." SAC ¶¶ 298-99 (defining "the Conspiracy"). But that is irrelevant. The U.S. sanctions regime against Sudan does not create a private right of action for sanctions violations, *see* 50 U.S.C. § 1705 (2007); 31 C.F.R. §§ 538.701, 538.704 (2008), as courts have consistently ruled.[25] Therefore, the Complaint must – but does not – adequately allege that these transactions were done in furtherance of an agreement to commit torts against Plaintiffs, and not to provide commercial banking services to Sudan. Indeed, for this very reason, another federal court recently dismissed claims against the BNPP Defendants based on the same underlying conduct. *See Owens v. BNP Paribas S.A.*, No. CV 15-1945 (JDB), 2017 WL 394483, at *9-10 (D.D.C. Jan. 27, 2017) (no non-conclusory allegations that the BNPP Defendants "knew the money they processed for Sudan would end up with" perpetrators of attacks, "Sudan and [the BNPP Defendants] ever agreed to provide funds to" perpetrators of the attacks, or BNPP "knew what Sudan was doing with the funds BNPP processed").[26]

Third, the Complaint fails to plausibly allege a causal connection between the BNPP Defendants and each attack that resulted in Plaintiffs' injuries. Even assuming the existence of a

[25] *See supra* at 18.

[26] *Talisman* likewise involved claims that the defendant's support of the GOS in connection with commercial activities indicated an intention to support the government's human rights abuses. 582 F.3d at 264. The Second Circuit rejected this attempt "for private parties to impose embargoes or international sanctions through civil actions in United States courts . . . . [that] are properly reserved to governments and multinational organizations." *Id.* This Court should do the same.

conspiracy, Plaintiffs still "would have to prove that . . . each attack was the product of joint action by the defendants and [Sudan], *i.e.*, that there was a substantial degree of cooperative action between corporate defendants and [Sudan] in the alleged violations[.]" *Kiobel v. Royal Dutch Petroleum Co.*, No. 02-CV-7618, 2004 WL 5719589, at *10 (S.D.N.Y. Mar. 31, 2004) (citation omitted); *see also Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 226 F.R.D. 456, 482 (S.D.N.Y. 2005) (plaintiffs must prove that corporate defendant proximately caused each attack allegedly carried out by the GOS). Even if the financial services provided by the BNPP Defendants to Sudanese banks were deemed "overt acts" in furtherance of an agreement to commit human rights violations, nothing in the Complaint links a single banking transaction involving the BNPP Defendants to any attack that injured Plaintiffs. "[T]here is simply no basis in logic to conclude that every alleged human rights violation that took place" throughout the relevant period in all the geographical regions defined in the Complaint "was the product of the alleged conspiracy between [Sudan] and the defendants." *Kiobel*, 2004 WL 5719589, at *13.

**2. The Complaint Fails To Plead Aiding And Abetting Liability (Counts IV, VI, VIII, X, XII, XIV, and XX)**

The Complaint's allegations that the BNPP Defendants aided and abetted Sudan's human rights abuses likewise fail. *See* SAC ¶¶ 18, 313, 340, 373, 404, 431, 462, 518. Under New York law, aiding and abetting requires: "(1) the existence of an underlying tort; (2) the defendant's knowledge of the underlying tort; and (3) that the defendant provided substantial assistance to advance the underlying tort's commission." *Bigio*, 675 F.3d at 172 (quoting *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 292 (2d Cir. 2006)).

First, the Complaint does not adequately plead that the BNPP Defendants had the requisite knowledge of the acts alleged to have caused Plaintiffs' injuries. New York law requires actual knowledge; constructive knowledge is insufficient. *See, e.g.*, *Weshnak v. Bank of*

*Am., N.A.*, 451 F. App'x 61, 61-62 (2d Cir. 2012); *Lerner*, 459 F.3d at 292-93; *Kolbeck v. LIT Am., Inc.*, 939 F. Supp. 240, 246 (S.D.N.Y. 1996) (citing cases), *aff'd*, 152 F.3d 918 (2d Cir. 1998). Although the Complaint offers scores of conclusory assertions that the BNPP Defendants had actual knowledge, it provides no factual basis to support any of these claims.[27] The Complaint's only specific allegation regarding the BNPP Defendants' purported knowledge concerns a 2007 note by a senior BNP Paribas compliance officer "that Sudanese banks with which BNPP dealt 'play[ed] a pivotal part in the support of the Sudanese government which . . . refuses the United Nations intervention in Darfur.'" SAC ¶ 188.[28] But this statement regarding the GOS's political stance vis-a-vis U.N. intervention is not remotely akin to a well-pleaded, non-conclusory allegation that the BNPP Defendants knew of the acts alleged to have caused Plaintiffs' injuries.

The Complaint "must offer facts sufficient to demonstrate that the defendants had actual knowledge of wrongful conduct that harmed the [plaintiffs]—the alleged [intentional torts that injured plaintiffs]—not actual knowledge of different wrongful conduct that might have harmed others." *Kirschner v. Bennett*, 648 F. Supp. 2d 525, 545 (S.D.N.Y. 2009). The Complaint fails to satisfy this requirement.

Second, the BNPP Defendants' provision of commercial banking services to Sudanese banks cannot constitute "substantial assistance" under New York law. "The mere maintenance of a bank account and the receipt or transfer of funds do not . . . constitute substantial assistance"

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[27] *See, e.g.*, SAC ¶¶ 306, 320 ("Defendants knew or should have known that by providing the GOS with access to more resources and by assisting the GOS in its exploitation of its oil resources, the GOS would use those resources to secure its hold on power over Sudan and increase the intensity of its atrocities.").

[28] The Complaint also cites "international reporting of GOS atrocities" and excerpts from a 2014 press release and a 2005 email as examples of the BNPP Defendants' knowledge that they were violating sanctions and of conditions in Sudan in the abstract—not knowledge of Sudan's tortious acts against Plaintiffs, as New York law requires. *See* SAC ¶¶ 183-90.

for the perpetration of a violent act, including the acts that injured Plaintiffs. *Weiss v. Nat'l Westminster Bank PLC*, 453 F. Supp. 2d 609, 621 (E.D.N.Y. 2006); *Strauss v. Credit Lyonnais, S.A.*, No. CV-06-0702 (CPS), 2006 WL 2862704, at *9 (E.D.N.Y. Oct. 5, 2006) (same); *Goldberg v. UBS AG*, 660 F. Supp. 2d 410, 425 (E.D.N.Y. 2009) (same).[29]

Third, the Complaint contains no well-pled allegations that connect any financial transactions processed by the BNPP Defendants for Sudanese banks with any of the acts that injured Plaintiffs. The Complaint at most alleges that "[t]he GOS's vast increase in oil revenue, made possible only because of BNPP[,] enabled the GOS to grow its military spending and to keep the war going." SAC ¶ 125. But that conclusory allegation is insufficient to connect any funds processed by the BNPP Defendants to Plaintiffs' injuries. Likewise, allegations that "BNPP's letters of credit covered a significant part of Sudanese imports and therefore enabled the GOS to import weapons and other goods sold in dollars," *id.* ¶ 108, fail to connect any letters of credit provided by the BNPP Defendants to the specific acts that injured Plaintiffs. Finally, the Complaint details Sudan's military expenditures at length, but at no point does it allege particular transactions that facilitated particular military purchases or particular funds that were used for particular tortious acts.

In short, there is no allegation that the transactions that the BNPP Defendants processed, whether substantial or not, are sufficiently connected to the acts that caused Plaintiffs' injuries, and thus those transactions cannot serve as a basis for aiding and abetting liability. *See, e.g.*, *Bigio*, 675 F.3d at 175 ("[S]uch generalized assistance is too far removed from the underlying alleged torts to satisfy any of the standards for aiding and abetting[.]"); *In re Terrorist Attacks on*

[29] Nor does the fact that these financial services were in violation of U.S. sanctions change the analysis. *See, e.g.*, *Mazzaro de Abreu v. Bank of Am. Corp.*, 525 F. Supp. 2d 381, 391 (S.D.N.Y. 2007) ("violation of a federal regulation . . . does not of itself constitute substantial assistance").

*Sept. 11, 2001*, 714 F.3d 118, 124 (2d Cir. 2013) (affirming dismissal of common law tort claims for failure to allege that defendants' provision of financial services proximately caused attacks that injured plaintiffs). Indeed, in the *Owens* case cited above, *supra* at 24, concerning the same underlying conduct by the BNPP Defendants, the court ruled that conduct is too remote to sustain claims against the BNPP Defendants arising from Sudanese state-sponsored terrorism. *See Owens*, 2017 WL 394483, at *10 (allegations that the BNPP Defendants provided financial services to Sudan and "Sudan might give some of that money" to entities that cause plaintiffs' injury is insufficient to allege proximate causation).

## V. THE COMPLAINT DOES NOT STATE CLAIMS FOR PRIMARY LIABILITY

### A. The Complaint Fails To State A Claim For Intentional Infliction Of Emotional Distress (Count XV)

The Complaint asserts a claim for IIED on the basis that "Defendants intentionally, recklessly, and with the purpose of causing severe emotional distress conducted themselves toward Plaintiffs [ ] in a manner so shocking and outrageous that it exceeds all reasonable bounds of decency." SAC ¶ 476. Under Sudanese law, the BNPP Defendants cannot be liable for IIED based on allegations that they provided financial services that are lawful under Sudanese law, and the Complaint fails to allege that the sole intent of the BNPP Defendants was to commit tortious acts against the Plaintiffs. Hassabo Decl. ¶ 74(b). Under Swiss law, IIED is not a cognizable claim. Roberto Decl. ¶ 37. In any event, Plaintiffs cannot establish any claims for primary liability because they have not alleged that the BNPP Defendants committed the human rights violations alleged in the Complaint, directly caused Plaintiffs' alleged emotional distress or violated any Swiss laws in providing financial services to Sudanese banks. *Id.* ¶¶ 38-39.

Nor have Plaintiffs pleaded the requirements of an IIED claim under New York law, which are "rigorous, and difficult to satisfy." *Howell v. N.Y. Post Co.*, 81 N.Y.2d 115, 122 (1993) (citation omitted). IIED requires: (1) "extreme and outrageous conduct;" (2) "intent to cause, or disregard of a substantial probability of causing, severe emotional distress;" (3) "a causal connection between the conduct and injury;" and (4) "severe emotional distress." *Id.* at 121. The Complaint's allegations fail this test. First, the BNPP Defendants' conduct does not satisfy IIED's definition of extreme and outrageous conduct. The Complaint alleges that the BNPP Defendants' provision of financial services "g[ave] the GOS and the SDNs unlawful access to the New York-based U.S. financial system," SAC ¶ 474, but the Second Circuit has held that processing financial transactions – even for state sponsors of terrorism – is neither extreme nor outrageous conduct. *See In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d at 126.

Second, the Complaint lacks any plausible allegation that the BNPP Defendants "intentionally directed" their actions at Plaintiffs to cause emotional distress. *See Three Crown Ltd. P'ship. v. Caxton Corp.*, 817 F. Supp. 1033, 1048 (S.D.N.Y. 1993). Aside from bald allegations that the BNPP Defendants "intentionally . . . conducted themselves toward Plaintiffs," *e.g.*, SAC ¶ 476, which allege no factual basis and thus are not entitled to a presumption of truth, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), the Complaint does not demonstrate that the BNPP Defendants were motivated by an intent to cause Plaintiffs harm. Finally, the Complaint does not adequately assert that the BNPP Defendants caused Plaintiffs' injuries. Allegations based solely on the provision of financial services to a third party that directly injured Plaintiffs fail to satisfy IIED's causation requirement. *See In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d at 121-22, 126.

### B. The Complaint Fails To State Any Claims For Negligence Because The BNPP Defendants Owed No Duty To Plaintiffs (Counts I-II, XVI)

Under the Swiss law that applies to these claims, *see supra* at 17, Plaintiffs have failed to state a claim for NIED because Swiss law does not recognize such a claim, and because the allegations fail to establish primary liability under Swiss law for the reasons articulated in Part V.A., *supra*. *See* Roberto Decl. ¶¶ 37-39. Moreover, Swiss law recognizes negligence per se only to impose liability for violations of Swiss law, not U.S. law. *Id.* ¶ 36.

Nor does the Complaint state any claim for NIED or negligence per se under New York law, which requires a showing that the BNPP Defendants owed a duty to Plaintiffs.[30] *See Lerner*, 459 F.3d at 286. First, "[a]s a general matter [under New York law], '[b]anks do not owe non-customers a duty to protect them from the intentional torts of their customers.'" *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d at 126 (quoting *Lerner*, 459 F.3d at 286). Second, the Court should reject Plaintiffs' legally baseless assertion that the U.S. sanctions regime and New York criminal law at issue created "legal duties and standards of care" that are privately enforceable against the BNPP Defendants, SAC ¶ 259; *id.* ¶¶ 278-79, because under New York law "a plaintiff cannot maintain a common law negligence claim based on conduct governed by statute when that statute offers no private right of action." *Martinez v. Capital One, N.A.*, 863 F. Supp. 2d 256, 268 (S.D.N.Y. 2012), *aff'd and remanded sub nom.*, *Cruz v. TD Bank, N.A.*, 742 F.3d 520 (2d Cir. 2013). As shown *supra* at 18, 22, courts have repeatedly held that none of the federal or state laws at issue provide for a private right of action.[31] To allow a claim for

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[30] Plaintiffs have also failed to establish a claim for NIED under New York law for the reasons stated in Part V.A.

[31] Moreover, each of the three executive orders regarding the U.S. sanctions against Sudan, *see* SAC ¶¶ 258-59, explicitly states that it creates no privately enforceable rights. Exec. Order No. 13067 § 8, 62 Fed. Reg. 59989 (Nov. 3, 1997), *reprinted in* 31 C.F.R. 538 (62 Fed. Reg. 59989, Nov. 5, 1997); Exec.

negligence per se based on violations of these statutory provisions "would, in effect, impermissibly permit [Plaintiffs] to maintain a private cause of action" where the courts and legislatures have already determined that none exists. *Broder v. Cablevision Sys. Corp.*, 418 F.3d 187, 201 (2d Cir. 2005) (citation omitted); *see also Christian v. Town of Riga*, 649 F. Supp. 2d 84, 91 (W.D.N.Y. 2009) (dismissing claims "premised on [New York] Penal Law, as a criminal charge cannot be prosecuted by a private person.").[32]

Because Plaintiffs have not plausibly alleged that the BNPP Defendants owed any duty to Plaintiffs, their negligence claims must be dismissed.[33] *See Martinez*, 863 F. Supp. 2d at 268 (dismissing New York law negligence claim predicated on statutory violation where no private right of action existed under statute and plaintiffs "identified no duty owed by [the defendant] apart from its obligations under [the statute].")

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Order No. 13400 § 8, 71 Fed. Reg. 25483 (Apr. 26, 2006); Exec. Order No. 13412 § 9, 71 Fed. Reg. 61369 (Oct. 17, 2006).

[32] New York's test for determining whether an implied private right of action exists confirms that there is none here. Plaintiffs cannot be part of a protected class, as they allege, SAC ¶¶ 258, 291, because the statutes at issue merely "proscribe certain conduct," and are not intended to "provide a benefit to any class of persons more limited than the public at large." *Dubai Islamic Bank v. Citibank, N.A.*, 126 F. Supp. 2d 658, 668 (S.D.N.Y. 2000) (citation omitted); *see also* Exec. Order Nos. 13067 (citing general threats to national security), 13400 (same), 13412 (same). Moreover, a private right of action will not promote the legislative purpose where, as here, the "Legislature specifically considered and expressly provided for enforcement mechanisms in the statute itself." *Cruz v. TD Bank, N.A.*, 22 N.Y.3d 61, 70 (2013) (citation omitted).

[33] Even if Plaintiffs had adequately alleged that the BNPP Defendants breached a duty of care, they cannot plausibly allege that this breach proximately caused their injuries. *See supra* at 24; *see also Dance v. Town of Southampton*, 467 N.Y.S.2d 203, 205-06 (2d Dep't 1983) ("Negligence per se is not liability per se, however, because the protected class member still must establish that the statutory violation was the proximate cause of the occurrence."); *Owens*, 2017 WL 394483, at *10 (the BNPP Defendants' provision of financial services to Sudanese entities was not the proximate cause of injuries allegedly resulting from Sudanese state-sponsored terrorism). *Cf. Rothstein v. UBS AG*, 708 F.3d 82, 96 (2d. Cir. 2013) ("[P]laintiffs' contention that proximate cause is established because they were injured after UBS violated federal law is a *post hoc, ergo propter hoc* proposition that would mean that any provider of U.S. currency to a state sponsor of terrorism would be strictly liable for injuries subsequently caused by a terrorist organization associated with that state.").

### C. The Complaint Fails To State A Claim for Unjust Enrichment (Count XVIII)

Plaintiffs likewise fail to state a claim for unjust enrichment. First, under Sudanese law, only unlawful actions can form the basis of an unjust enrichment claim. The BNPP Defendants' conduct as alleged in the Complaint did not violate any Sudanese law. Hassabo Decl. ¶ 78. Second, under Swiss law, Plaintiffs cannot assert an unjust enrichment claim because the Complaint contains no non-conclusory allegations that the BNPP Defendants were enriched at Plaintiffs' expense. Roberto Decl. ¶¶ 41-43.

Under New York law, unjust enrichment "is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff." *Corsello*, 18 N.Y.3d at 790. To state an unjust enrichment claim under New York law, a plaintiff must allege: "(1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered." *Georgia Malone & Co. v. Rieder*, 19 N.Y.3d 511, 516 (2012) (citation omitted). Further, there must be a sufficiently close relationship between the parties that could have caused reliance or inducement. *See, e.g.*, *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 183 (2011). Moreover, "the plaintiff must have an interest in or right to the benefit . . . conferred in order to recover for unjust enrichment." *Chevron Corp. v. Donziger*, 871 F. Supp. 2d 229, 260 (S.D.N.Y. 2012). In the absence of allegations that the defendant "actually received any portion" of a plaintiff's property, the court must dismiss an unjust enrichment claim. *Kaye v. Grossman*, 202 F.3d 611, 616 (2d Cir. 2000).

Here, the Complaint does not allege any relationship between Plaintiffs and the BNPP Defendants at all, much less one that caused reliance or inducement. *See Mandarin Trading Ltd.*, 16 N.Y.3d at 183. Nor does it assert that Plaintiffs had an interest in or right to the fees and

income the BNPP Defendants earned from processing financial transactions. *See IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 142 (2009) (rejecting unjust enrichment claim for investment banking fees received by defendant where plaintiff did not pay those fees). Plaintiffs' conclusory assertion that the BNPP Defendants' sanctions violations give rise to a claim for unjust enrichment, *see* SAC ¶ 501, fails because "[w]hen a plaintiff does not possess a private right of action under a particular statute, and does not allege any actionable wrongs independent of the requirements of the statute, a claim[ ] for ... unjust enrichment [is] properly dismissed as an effort to circumvent the legislative preclusion of private lawsuits for violation of the statute." *Broder*, 418 F.3d at 203 (citation omitted).

### D. The Complaint Fails To State A Claim For Commercial Bad Faith (Count XVII)

The Complaint purports to state a claim for commercial bad faith on the theory that the financial transactions processed by the BNPP Defendants aided and abetted "Sudan's campaign of violence and human rights abuses against . . . Plaintiffs." SAC ¶ 491. But neither Sudanese nor Swiss law recognizes such a claim. *See* Hassabo Decl. ¶ 74(c); Roberto Decl. ¶ 40. Moreover, under New York law, commercial bad faith claims relate to "fraud in the making and cashing of checks," and were created as an "exception to the general rule that a bank is absolved of liability for a check made out to a fictitious payee when the maker knows that the payee is fictitious." *Lerner*, 459 F.3d at 293. The Complaint alleges nothing of this kind.

Further, "[e]ven if a claim for commercial bad faith were available in this context," it "would fail for the same reason as do [the Complaint's] claims for aiding and abetting[.]" *Id.* "A claim of commercial bad faith requires that the bank have actual knowledge of facts and circumstances that amount to bad faith, thus itself becoming a participant in a fraudulent scheme." *Id.* (citation omitted). The Complaint does not allege any facts giving rise to an

inference, much less a "strong inference," that the BNPP Defendants had actual knowledge of the events that injured Plaintiffs. *See supra* at 25.[34]

## VI. DOMESTIC BRANCHES OF FOREIGN BANKS ARE NOT LEGAL ENTITIES CAPABLE OF BEING SUED UNDER NEW YORK LAW

Plaintiffs' claims against the Branch rely on a fundamental misconception about the legal status of a bank branch. The Branch is not a "subsidiary" of BNP Paribas, as alleged, SAC ¶ 54, but rather is a legal and operational extension of BNP Paribas.[35] It is "well-settled that the domestic branch of a foreign bank is not a separate legal entity under either New York or federal law." *Greenbaum v. Handlesbanken*, 26 F. Supp. 2d 649, 651-52 (S.D.N.Y. 1998); *see also First Nat'l Bank of Bos. (Int'l) v. Banco Nacional de Cuba*, 658 F.2d 895, 900 (2d Cir. 1981) ("federal law regards a national bank and its branches as a single entity"). The court in *Greenbaum* further noted that, in New York, "a foreign banking corporation authorized to operate a branch or agency in New York may sue and be sued, but there are no similar provisions for the branch itself." 26 F. Supp. 2d at 653. This "well-established line of precedent, holding that unincorporated subdivisions of a corporate entity have no legal personality and cannot . . . be sued," *In re Beacon Assocs. Litig.*, 818 F. Supp. 2d 697, 706 (S.D.N.Y. 2011), requires that the Court dismiss the Branch from this action.

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[34] To the extent the Complaint describes the sanctions violations themselves as the fraud upon which to base a claim for commercial bad faith, there are no facts alleged that would satisfy any elements of fraud. The Complaint identifies no misrepresentation or omission of fact by the BNPP Defendants to Plaintiffs, no intent by the BNPP Defendants to defraud Plaintiffs, and no reliance, reasonable or otherwise, by Plaintiffs, and the damage Plaintiffs suffered did not result from the sanctions violations but from the independent acts of the GOS. *See Prickett v. N.Y. Life Ins. Co.*, 896 F. Supp. 2d 236, 246 (S.D.N.Y. 2012) In effect, here too Plaintiffs seek to assert a private right of action for violations of U.S. sanctions, which would be contrary to settled law. *See supra* at 18, 22.

[35] BNP Paribas 165(d) Resolution Plan at 21, filed with the Federal Deposit Insurance Corporation (Dec. 31, 2015), https://www.fdic.gov/regulations/reform/resplans/plans/bnp-idi-1512.pdf.

## VII. THE COMPLAINT DOES NOT ALLEGE ANY WRONGDOING BY BNPP-NA

Finally, the claims against BNPP-NA, an indirect subsidiary of BNP Paribas, should be dismissed because the Complaint contains no non-conclusory allegations against that entity. *Twombly*, 550 U.S. at 554-58. A complaint cannot "lump[ ] all the defendants together in each claim" without providing "each defendant 'fair notice of what the [ ] claim is and the ground upon which it rests.'" *Atuahene v. City of Hartford*, 10 F. App'x 33, 34 (2d Cir. 2001) (citation omitted). Instead, "a [c]omplaint should provide 'specification of any particular activities by any particular defendant.'" *Ludwig's Drug Store, Inc. v. Forest City Enters., Inc.*, No. 13-CV-6045 (MKB), 2016 WL 915102, at *10 (E.D.N.Y. Mar. 4, 2016) (quoting *In re Elevator Antitrust Litig.*, 502 F.3d 47, 50 (2d Cir. 2007)); *see also In re Digital Music Antitrust Litig.*, 812 F. Supp. 2d 390, 417 (S.D.N.Y. 2011) ("The complaint alleges direct involvement of [certain defendants] by way of generic references to 'defendants.' This approach is insufficient." (citation omitted)).

Here, the Complaint includes BNPP-NA in all of the allegations concerning the BNPP Defendants' purported conspiracy, but fails to include any non-conclusory allegations about BNPP-NA's involvement in any of the wrongful conduct alleged. *See* SAC ¶ 1 (including BNPP-NA in the defined term "BNPP"). Further, the June 2014 Agreements that provide the factual basis for the Complaint do not mention BNPP-NA at all, BNPP-NA was not a party to these agreements, and it was never charged with or convicted of violations of U.S. sanctions against Sudan.[36]

## CONCLUSION

For all of the foregoing reasons, the Court should dismiss the Complaint with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6).

[36] BNPP-NA is not the entity referred to as "BNPP New York" in BNPP's plea agreement with the U.S. Department of Justice. "BNPP New York" refers to the Branch. *See* SOF ¶ 1.

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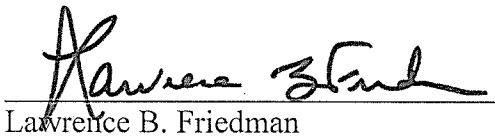

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