No.

In the Supreme Court of the United States

BNP PARIBAS SA AND B.N.P. PARIBAS US WHOLESALE HOLDINGS CORP. (F/K/A BNP PARIBAS NORTH AMERICA, INC.),
PETITIONERS,

v.

ENTESAR OSMAN KASHEF, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal Rule of Civil Procedure 23(f) provides that a court of appeals "may permit" an immediate appeal from an order granting or denying class-action certification. The district court here certified a sprawling class of up to 23,000 Sudanese refugees and asylees who were injured in any way, anywhere in Sudan, by any government actor or a wide group of private actors, over a 14-year period. When petitioners filed a Rule 23(f) petition challenging that manifestly erroneous certification decision, the court of appeals denied it, suggesting that class certification may not sound the "death knell" for a large bank and thus cannot qualify for immediate review under Rule 23(f). The question presented is:

Whether the courts of appeals have discretion under Rule 23(f) to grant interlocutory review solely because a district court's class-certification order is manifestly erroneous.

PARTIES TO THE PROCEEDING

Petitioners are BNP Paribas SA, a French corporation, and B.N.P. Paribas US Wholesale Holdings Corp. (f/k/a BNP Paribas North America, Inc.), a Delaware corporation.

Respondents are Entesar Osman Kashef, Abubakar Abakar, Abbo Ahmed Abakar, Hawa Mohamed Omar, Jane Doe, Shafika G. Hassan, Nyanriak Tingloth, Jane Roe, Nicolas Hakim Lukudu, Turjuman Ramadan Adam, Judy Doe, Ambrose Martin Ulau, Halima Samuel Khalifa, John Doe, Hamdan Juma Abakar, Judy Roe, Abulgasim Suleman Abdalla, Isaac Ali, and Kuol Shbur.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner BNP Paribas SA is a publicly traded company organized under the laws of France. It has no parent company and no publicly held corporation owns 10% or more of its shares.

Petitioner BNP Paribas US Wholesale Holdings Corp. is a wholly owned, indirect subsidiary of BNP Paribas SA. No other publicly held corporation owns 10% or more of BNP Paribas US Wholesale Holdings Corp.

RELATED PROCEEDINGS

United States Court of Appeals (2d Cir.):

Kashef v. *BNP Paribas SA*, No. 24-1446 (Sept. 6, 2024)

Kashef v. *BNP Paribas S.A.*, No. 18-1304 (May 22, 2019)

United States District Court (S.D.N.Y.):

Kashef v. *BNP Paribas SA*, 16 Civ. 3228

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PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 348 (2011) (citation omitted). A certified class can "sue about literally millions of [claims] at once." *Id.* at 352. As this Court has long recognized, a district court's class-certification decision is thus "of critical importance": it may "so increase the defendant's potential damages liability

and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978).

Given the unusual nature and extraordinary impact of class-certification decisions, Congress and the judiciary together opted to relax their ordinary preference for allowing appeals of only final decisions. *See* Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 Wm. & Mary L. Rev. 1531, 1563-1564 (2000). Congress authorized this Court to allow immediate appeals of interlocutory class-certification decisions. *See Microsoft Corp.* v. *Baker*, 582 U.S. 23, 30-31, 42 (2017) (citing 28 U.S.C. §§ 1292(e), 2072). This Court, in turn, approved Rule 23(f), which provides a critical safety valve. *Id.* at 30. Under Rule 23(f), a court of appeals "may permit" the immediate appeal of a class-certification decision.

The courts of appeals have split over how to interpret their authority under Rule 23(f). Most courts—including the Third, Fourth, Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits—have properly recognized that they have "unfettered discretion" to grant immediate appeals of class-certification decisions. *Microsoft*, 582 U.S. at 31 (citation omitted). These courts use Rule 23(f) as a safety valve for many reasons, including correcting manifest errors. But a few courts—the First, Second, and Seventh Circuits—have articulated narrower tests. The Second Circuit in particular has indicated that immediate review is appropriate only for (1) "death knell" cases where "the certification

order will effectively terminate the litigation and there has been a substantial showing that the district court's decision is questionable," or (2) cases in which "the certification order implicates a legal question about which there is a compelling need for immediate resolution." *Sumitomo Copper Litig.* v. *Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 139-140 (2d Cir. 2001). The result is that even the most glaring errors can go uncorrected, forcing defendants to choose whether to spend years in court or "to settle and to abandon a meritorious defense." *Coopers & Lybrand*, 437 U.S. at 476.

This case is Exhibit A for the problems with the Second Circuit's constrained approach. The district court certified a sprawling class of an estimated 23,000 Sudanese refugees and asylees, who allege that BNPP violated Swiss law by providing financial services to the Government of Sudan. The theory goes that by providing financial services, BNPP enabled the government to gain access to new oil revenues that it used to carry out tortious acts against the Sudanese people. These thousands of class members experienced different forms of persecution by different entities over a 14-year period. Some lived in Sudan's capital, others in villages in Darfur or what is now South Sudan or the contested borderlands; some may have faced persecution at the hands of the government, others at the hands of militia members or rival groups; some lost their homes, others lost family members, still others were detained. Their only shared feature is their immigration status in the United States.

Yet the district court certified a single class, stringing together all of the harms that the class members suffered as one "campaign of persecution." App. 4a.

Pitching all of these events at such a high level of generality, however, is plainly inconsistent with *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338 (2011). Just as proof that one Wal-Mart employee was discriminated against would not resolve all employees' discrimination claims, any proof that BNPP proximately caused one Darfur resident to flee to the United States would not show that all asylees and refugees from Sudan and South Sudan can trace their injuries to BNPP. *See id.* at 350. Any fair reading of *Dukes* dictates that these claims cannot "productively be litigated at once." *Ibid.*

BNPP sought to correct that manifestly erroneous class-certification decision by petitioning for Rule 23(f) review. The panel held a rare oral argument on the petition, asking how it could "allow[] exercise of jurisdiction" when BNPP has an estimated "$3 trillion of assets." Oral Arg. 2:51-3:50. As the panel appeared to understand it, a defendant with such extensive assets could not claim that it would be forced to settle and thus could not invoke *Sumitomo*'s narrow "death knell" prong. *Id.* And when BNPP argued that the class-certification order was manifestly erroneous, one judge observed that she "wasn't able to find any case" where the Second Circuit had permitted an appeal under Rule 23(f) to correct "an egregious error." *Id.* 2:51-3:22. Following the hearing, the Second Circuit denied leave to appeal, citing its two-pronged *Sumitomo* standard.

The panel's denial here was standard fare for the Second Circuit. That court, like the First and Seventh Circuits, routinely disregards manifest errors in class-certification decisions. And because Rule 23(f) denials

typically contain little to no reasoning, this Court seldom has an opportunity to review them.

This case is a rare exception. The combination of circumstances here—an unusual Rule 23(f) oral argument, an order citing *Sumitomo*'s two-pronged test, and the magnitude of the district court's error—make clear that the Second Circuit denied immediate review because that court improperly limits its discretion under Rule 23(f). This Court should seize the opportunity to correct this long-simmering error and make clear that Rule 23(f) vests courts of appeals with broad discretion, including the discretion to correct manifestly erroneous class-certification orders like the one here.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-2a) and the district court order under review (App. 3a-6a) are not reported.

JURISDICTION

The court of appeals entered judgment on September 6, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1). *See Hohn* v. *United States*, 524 U.S. 236, 246 (1998).

RULE INVOLVED

Federal Rule of Civil Procedure 23(f) provides:

> A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered or within 45 days

> after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

STATEMENT OF THE CASE

The Second Circuit has denied BNPP a fair opportunity to seek the relief it urgently needs. The district court entered a manifestly erroneous class-certification order, certifying a sweeping class of 23,000 plaintiffs asserting different harms at the hands of different agents from across Sudan and South Sudan over a 14-year period. Yet the Second Circuit ignored those errors entirely, suggesting that BNPP was too well resourced to be eligible for interlocutory review under Rule 23(f). It then denied BNPP an ordinary opportunity to ask for en banc review, leaving BNPP with no recourse until after it reaches final judgment in the classwide suit and 23,000 individualized proceedings.

A. Merits Proceedings

The named plaintiffs in this putative class action are 19 "black-Africans who come from non-Arab indigenous black African communities in South Sudan, Darfur, and the Nuba Mountains in Central Sudan." App. 13a. In relevant part, the plaintiffs allege that BNPP and its U.S. subsidiary provided financial services to the Government of Sudan that allowed it to evade a U.S. trade embargo. *Id.* at 7a, 13a-14a. They claim that as a result of BNPP's assistance, Sudan was able

to sell its oil reserves and thereby generate revenues to purchase weapons and carry out tortious acts "against the black, non-Islamist population" between 1997 and 2011. *Id.* at 13a, 18a n.6. Plaintiffs sued BNPP in U.S. court, asserting (as relevant) 12 tort claims, including aiding and abetting and conspiring to commit battery, assault, false imprisonment, false arrest, conversion, and wrongful death. *Id.* at 43a-44a. The district court determined that Swiss law governs those claims. *Ibid.*

BNPP moved to dismiss and moved for summary judgment, but the district court denied both motions. App. 20a, 44a-45a. The court found that material disputes of fact existed over whether "BNPP consciously assisted Sudan and knew or should have known that it was contributing to Sudan's illicit acts," and whether BNPP's financial services were the adequate and proximate cause of the plaintiffs' injuries. *Id.* at 10a, 13a, 17a. The court observed that, at trial, the causation inquiry would turn on questions like whether the plaintiffs "live[d] on oil-rich lands," whether they "were harmed by simple and not sophisticated weaponry," and whether Sudan had "non-oil forms of revenue on which to draw." *Id.* at 16a.

B. Class-Certification Proceedings

1. Over BNPP's objection, the district court then certified a damages class of approximately 23,000 plaintiffs under Federal Rule of Civil Procedure 23(b)(3). The court defined the class to include "[a]ll refugees or asylees admitted by the United States who formerly lived in Sudan or South Sudan between November 1997 and December 2011." App. 3a-4a.

BNPP had argued that there were no classwide "common questions"—or at a minimum, none that would predominate over individual issues. *See* Opp. to Class Cert. at 2, 3, ECF No. 483. In its three-page order, the district court said little about commonality or predominance. It acknowledged that there would also be "questions affecting individual members," but stated that certifying certain issues for classwide trial would "substantially shorten individual trials." App. 5a. The court specified the following "common questions for trial":

a. Whether the Government of Sudan persecuted class members, or caused them to have reasonable fear of persecution, because of their race, religion, or ethnicity between November 1997 and December 2011.
b. Whether the BNP Paribas Defendants ("BNPP") consciously aided, abetted, and enabled the Government of Sudan to carry out such acts.
c. Whether BNPP knew or should have known that its aiding, abetting, and enabling would contribute to the Sudanese government's campaign of persecution.
d. Whether such acts of BNPP proximately caused the forcible displacement of members of the class from their homes and property, and other injuries to be tried in individual cases.
e. Other issues ancillary to the issues above.

Id. at 4a.

BNPP filed a timely Rule 23(f) petition. The petition explained that the district court's order rested on two "fundamental legal errors": it failed to explain how the four so-called "common questions" could result in "common answers," as *Dukes* requires, 564 U.S. at 350 (citation omitted), and it failed to evaluate how any common questions would predominate over individualized inquiries. C.A. Pet. 9. As the petition pointed out, even the 19 named plaintiffs' claims varied widely: some fled from Darfur and alleged that "their villages were attacked by militias," others fled from South Sudan and alleged that "they were targeted in connection with political activity related to the civil war," and still others fled from Khartoum and alleged "abuse at the hands of police or security services." *Id.* at 4-5. No single trial could decide whether Sudan targeted the plaintiffs based on their "race, religion, or ethnicity"; whether BNPP consciously aided such acts or should have known that it was contributing to such acts; or whether BNPP proximately caused the plaintiffs' forced displacement to the United States. *See id.* at 11-15. And again, that is just 19 of 23,000 class members.

2. A panel of the Second Circuit held a rare hearing on whether to grant the Rule 23(f) petition. One judge questioned whether the panel could exercise jurisdiction under the circumstances, as the case did not seem to fit the narrow two-pronged test from the Second Circuit's decision in *Sumitomo*. Oral Arg. 2:55-3:26. The case would not satisfy either prong 1's "death-knell standard" or prong 2's "compelling need for immediate resolution" standard if, as the plaintiffs alleged, BNPP had "$3 trillion of assets." Oral Arg. 2:51-3:46. And outside those two prongs, the judge

"wasn't able to find any case" where the Second Circuit had ever granted permission to appeal based on a district court's "egregious error" or other special circumstances. *Id.* 2:51-3:22.

Three days later, the panel denied leave to appeal. App. 2a. The order states, in relevant part:

> Upon due consideration, it is hereby ORDERED that . . . the Rule 23(f) petition is DENIED because an immediate appeal is not warranted. *See Sumitomo Copper Litig.* v. *Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 139-40 (2d Cir. 2001).

3. Two days before BNPP's deadline to file a petition for rehearing, the panel prematurely issued its mandate. BNPP filed an immediate motion to recall the mandate and for leave to file a petition for rehearing, which was denied. BNPP was thus denied an opportunity even to request rehearing. With that, this unwieldy class marches toward eventual trial.

REASONS FOR GRANTING THE PETITION

Class certification is an exceptional decision with extraordinary import. Even when plaintiffs have "weak merits claims," "class certification often leads to a hefty settlement." *Microsoft*, 582 U.S. at 38. Rule 23(f) operates as a safety valve, allowing courts of appeals to permit immediate review of appeal-worthy orders. *See id.* at 31-32. Some courts have restricted the use of that safety valve to a few narrow circumstances, like when the parties are so under-resourced that the certification order sounds the "death knell" for litigation, or when a case presents a

"legal question about which there is a compelling need for immediate resolution." *Sumitomo*, 262 F.3d at 139-140. But even if those are common justifications for immediate review, they need not be the only justifications. It is critically important that Rule 23(f) review remains available as "protection against improvident certification decisions." *Microsoft*, 582 U.S. at 31 (citation omitted).

This Court should grant certiorari to bring uniformity to the circuits and make clear that courts of appeals have discretion to grant Rule 23(f) review for any reason. The gravity of the district court's error below—certifying a class of 23,000 people with little in common and without any discussion of predominance—and the unusually robust record make this case an ideal vehicle for this Court's review. By contrast, allowing this circuit split to persist benefits no one: it sows confusion, incentivizes settlements in unmeritorious cases, wastes the judiciary's resources, encourages strategic litigants to forum-shop, and thwarts Rule 23(f)'s common-sense purposes.

I. THE DECISION BELOW IS WRONG

Precedent and practice together make clear that the Second Circuit does not consider pure manifest error to be a permissible ground for immediate review under Rule 23(f). Instead, the Second Circuit requires that petitioners "must demonstrate either (1) that the certification order will effectively terminate the litigation and there has been a substantial showing that the district court's decision is questionable, or (2) that the certification order implicates a legal question about which there is a compelling need for immediate resolution."

Sumitomo, 262 F.3d at 139. That two-part test excludes a critical category of cases: certification decisions that are manifestly erroneous under settled legal principles, but where the party seeking review has sufficient resources that the litigation could continue. Treating *Sumitomo*'s two prongs as exclusive runs counter to the text and purposes of Rule 23(f), which grants courts of appeals "unfettered discretion" to permit an appeal "on the basis of *any* consideration." *Microsoft*, 582 U.S. at 32-33 (citations omitted).

A. Rule 23(f) Allows Immediate Appeals For Manifest Class-Certification Errors

1. The text of Rule 23(f) makes clear that interlocutory appeal is discretionary. Rule 23(f) provides that "[a] court of appeals *may permit* an appeal from an order granting or denying class-action certification," full stop. Fed. R. Civ. P. 23(f) (emphasis added). As the Reporters' Committee underscored, a court of appeals may grant an appeal on the basis of "*any* consideration" that it finds "persuasive." Fed. R. Civ. P. 23(f), committee note to 1998 amendment (emphasis added).

That broad discretion is "akin" to a court of appeals' unfettered authority to accept an interlocutory appeal under 28 U.S.C. § 1292(b), *Microsoft*, 582 U.S. at 31, or to this Court's power to hear a case on writ of certiorari, *see* Fed. R. Civ. P. 23(f), committee note to 1998 amendment. Both of those mechanisms allow for error correction, even if it is sparingly given. This Court has described the Section 1292(b) "discretionary review mechanism[]" as a "useful safety valve[] for promptly correcting serious errors." *Mohawk Inds., Inc.* v. *Carpenter*, 558 U.S. 100, 111 (2009) (internal

quotation marks omitted). Likewise, this Court "properly exercises broad discretion" in deciding whether to grant a writ of certiorari, *Carpenter* v. *Gomez*, 516 U.S. 981, 981 (1995) (opinion of Stevens, J., respecting denial of certiorari), and will sometimes do so for the sole purpose of correcting errors, *see*, *e.g.*, *Idaho Dep't of Emp.* v. *Smith*, 434 U.S. 100, 101 (1977) (per curiam). Indeed, it is routine for courts considering whether to grant a discretionary appeal to at least ask whether the underlying decision is wrong. *See, e.g.*, Sup. Ct. R. 10 (certiorari); *Cheney* v. *U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 381 (2004) (mandamus); Fed. R. App. P. 35(a)(1) (rehearing en banc).

2. Rule 23(f) allows for the same discretionary error-correction. The Rule's drafters envisioned a "careful calibration" between the tremendous costs of erroneous class-certification decisions on the one hand, and the risk of wasteful appeals on the other. *See Microsoft*, 582 U.S. at 31-32. As they saw it, it was too difficult for petitioners to "satisfy the extraordinary-circumstances test" for mandamus or to get a district court to certify an interlocutory appeal under Section 1292(b), so a new safety valve was needed to "protect[] against improvident certification decisions." *Id.* at 30-31 (citation omitted). But allowing interlocutory appeals as of right would create "delay and expense over routine class certification decisions unworthy of immediate appeal." *Id.* at 32 (internal quotation marks omitted). The drafters accordingly left the courts of appeals with discretion to determine whether a case "show[s] appeal-worthy certification issues." Fed. R. Civ. P. 23(f), committee note to 1998 amendment.

Although there may be many factors that contribute to whether a case is "appeal-worthy," whether a decision is plainly wrong should be at the top of the list. That is precisely the consideration that this Court identified in *Microsoft*: whether the class-certification decision is "improvident" or "routine." 582 U.S. at 31-32 (citations omitted). Indeed, manifest error should be a more compelling reason for reviewing a class-certification decision than, say, granting a Section 1292(b) motion because class actions are "a special kind of litigation." *Coopers & Lybrand*, 437 U.S. at 470; *see Microsoft*, 582 U.S. at 31. Class certification is such a stark "exception" to ordinary practice that courts have a "duty" to employ a particularly "rigorous analysis" to make sure that all the Rule 23 criteria are satisfied. *Comcast Corp.* v. *Behrend*, 569 U.S. 27, 33-34 (2013) (citations omitted).

B. The Second Circuit Has Incorrectly Cabined Its Discretion Under Rule 23(f)

1. Since 2001, the Second Circuit has misread Rule 23(f). In what is now the canonical case on that court's Rule 23(f) authority, *Sumitomo Copper Litigation* v. *Credit Lyonnais Rouse, Ltd.*, the court concluded that it has discretion to permit an appeal in two narrow circumstances: when (1) "the certification order will effectively terminate the litigation and there has been a substantial showing that the district court's decision is questionable," or (2) "the certification order implicates a legal question about which there is a compelling need for immediate resolution." 262 F.3d at 139. The court emphasized that a Rule 23(f) petitioner "must" meet one of these two stringent prongs to be eligible for an

immediate appeal. *Ibid.* And under the first prong, whether a litigant can immediately appeal may become a question of resources: a defendant with too many assets will not automatically need to settle certified claims, and will have a harder time claiming a "death knell." *See id.* at 138, 140. *Sumitomo* thus cautioned that it "anticipate[s]" that "the standards of Rule 23(f) will rarely be met." *Id.* at 140. Instead of allowing review whenever a certification order is "appeal-worthy," as the Advisory Committee intended, *see* Rule 23(f), committee note to 1998 amendment, *Sumitomo* restricts Rule 23(f) review to only the most extreme circumstances.

To be sure, one line in *Sumitomo* "le[ft] open" the question of whether the Second Circuit would have discretion to permit an appeal in some other "special circumstances." 262 F.3d at 140; *see Hevesi* v. *Citigroup Inc.*, 366 F.3d 70, 76 n.4 (2d Cir. 2004) (noting *Sumitomo*'s "special circumstances" language). But over two decades of unbroken practice show that any "special circumstances" door that *Sumitomo* left open is now closed and boarded up. Indeed, one of the judges on the panel below commented at oral argument that she "wasn't able to find any case" where the Second Circuit had ever granted permission to hear a 23(f) appeal to correct an "egregious error." Oral Arg. 2:51-3:22.

Nor has BNPP. Counsel for BNPP has canvassed every Rule 23(f) petition that the Second Circuit has decided in the last five years, and has not found one order granting an appeal to fix a manifest error, or any other "special circumstance" beyond the two *Sumitomo* factors. In the (admittedly small sample size of)

three Rule 23(f) petitions that the Second Circuit granted, petitioners asked for Rule 23(f) review under one or both of *Sumitomo*'s two prongs.*

2. The Second Circuit's restrictive view of Rule 23(f) is a legal error correctable by this Court, not just an exercise of the court of appeals' discretion. When a court of appeals has authority to engage in discretionary review, the "court may take steps to use [that] power sparingly, but it may not take steps to curtail its use indiscriminately." *W. Pac. R. Corp.* v. *W. Pac. R. Co.*, 345 U.S. 247, 261 (1953). This Court has thus observed that a court of appeals "necessarily abuse[s] its discretion" to grant or deny a permissive appeal "if it base[s] its ruling on an erroneous view of the law." *Dart Cherokee Basin Operating Co., LLC* v. *Owens*, 574 U.S. 81, 91 (2014) (citation omitted).

Western Pacific illustrates that a court of appeals commits legal error in imposing artificial restrictions on its own authority to grant review. In that case, the Ninth Circuit had held that the full court could hear a case only sua sponte, and that the full court could not grant or deny a petition for rehearing en banc. *See* 345 U.S. at 249-250, 264-265. It accordingly rejected a petition for rehearing en banc that was mistakenly addressed to the full court. *Ibid.* This Court vacated that decision, explaining that nothing prevented the full court from hearing the case—whether it ultimately

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* *See* Pet. 10, *City of Philadelphia* v. *Bank of Am. Corp.*, No. 23-7328 (2d Cir. Oct. 5, 2023); Pet. 11-12, *Goldman Sachs Grp., Inc.* v. *Ark. Tchrs. Ret. Sys.*, No. 21-3105 (2d Cir. Dec. 22, 2021); Pet. 22-24, *Tchrs. Ins. & Annuity Ass'n* v. *Haley*, No. 20-4117 (2d Cir. Dec. 9, 2020).

chose to or not. *Id.* at 259, 266-267. As this Court explained, the court of appeals had improperly "turned a deaf ear" to a request that was within its authority based on a "misconception of the breadth of its powers." *Id.* at 266-267.

That is what the Second Circuit has done here. It has relinquished its Rule 23(f) discretion to treat as "appeal-worthy" a class-certification decision plagued by manifest error—but only manifest error. For the last 20 years, the Second Circuit has not just used its Rule 23(f) authority "sparingly"; it has "curtail[ed] its use indiscriminately." *W. Pac. R. Corp.*, 345 U.S. at 261. But Congress and this Court already "settle[d]" the availability of interlocutory review "by adopting Rule 23(f)[]," and "[i]t is not the prerogative of litigants or federal courts to disturb that settlement." *Microsoft*, 582 U.S. at 42. A court of appeals can no more constrain its power to consider critical categories of Rule 23(f) petitions than it can curtail its power to consider an en banc request. *See W. Pac. R. Corp.*, 346 U.S. at 261. This Court's review is necessary to make clear to the Second Circuit that Rule 23(f) permits an appeal in cases of manifest error, even when *Sumitomo*'s two narrow prongs are not satisfied.

II. THE CIRCUITS ARE SPLIT ON WHETHER MANIFEST ERROR IS A PERMISSIBLE GROUND FOR RULE 23(f) REVIEW

The question presented has been percolating in the courts of appeals for two decades, and there is a deep and acknowledged circuit split on whether manifest error alone can justify Rule 23(f) review. The First, Second, and Seventh Circuits share the

misunderstanding that "manifest error" is not a ground for granting review under Rule 23(f). By contrast, the Third, Fourth, Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits all treat manifest error as a permissible basis for interlocutory review.

Practitioners have long observed this circuit split. *See, e.g.*, 7B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1802.2 (3d ed.) (pointing out the circuits' "difference in approach"); Tanner Franklin, Note, *Rule 23(f): On the Way to Achieving Laudable Goals, Despite Multiple Interpretations*, 67 Baylor L. Rev. 412, 430 (2015) (noting that "the circuits are split in regard to whether or not to hear a Rule 23(f) appeal"). Courts have, too. *See, e.g.*, *Chamberlan* v. *Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005) (per curiam) ("Unlike the courts in [the First and Seventh Circuits], we view interlocutory review as warranted when the district court's decision is manifestly erroneous—even absent a showing of another factor."); *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 104 (D.C. Cir. 2002) (distinguishing the First and Seventh Circuits from the Third and Fourth Circuits).

A. The First, Second, And Seventh Circuits Require More Than Manifest Error

Like the Second Circuit, the First Circuit does not recognize manifest error as a justification for Rule 23(f) review. Instead, it allows Rule 23(f) review for a few categories only slightly broader than *Sumitomo*'s: (1) "when a denial of class status effectively ends the case," (2) "when the grant of class status raises the

stakes of the litigation so substantially that the defendant likely will feel irresistible pressure to settle," and (3) when it "will permit the resolution of an unsettled legal issue that is important to the particular litigation as well as important in itself and likely to escape effective review if left hanging until the end of the case." *Waste Mgmt. Holdings, Inc.* v. *Mowbray*, 208 F.3d 288, 293-294 (1st Cir. 2000). The First Circuit has described those requirements—which do not include manifest error—as "stringent." *Barrett* v. *Option One Mortg. Corp.*, No. 12-8033, 2013 WL 7137776, at *1 (1st Cir. Feb. 7, 2013).

To be sure, the First Circuit (again, like the Second Circuit) has also acknowledged a carve-out for "special circumstances." *Mowbray*, 208 F.3d at 294. But the First Circuit does not treat manifest error as a "special circumstance." Instead, it has granted review under that category only where it prematurely ordered full briefing on the merits issue before considering the Rule 23(f) petition. *Id.* at 295; *see Tilley* v. *TJX Cos., Inc.*, 345 F.3d 34, 39 (1st Cir. 2003).

The Seventh Circuit largely mirrors the Second Circuit. It applies a test similar to *Sumitomo*'s framework, allowing interlocutory appeal (1) when a questionable class-certification decision sounds a "death knell" for the case, or (2) when it will "facilitate the development of the law." *Blair* v. *Equifax Check Servs., Inc.*, 181 F.3d 832, 834-836 (7th Cir. 1999). It categorically denies Rule 23(f) petitions that "do[] not raise a novel issue of class-certification law" or "signal[] the death knell of the[] action." *Howard* v. *Pollard*, 814 F.3d 476, 478 (7th Cir. 2015) (per curiam); *see Arnold Chapman & Paldo Sign & Display Co.* v. *Wagener*

Equities Inc., 747 F.3d 489, 491 (7th Cir. 2014) (requiring Rule 23(f) petitioners to show both "that they'll be forced to settle" and "a significant probability that the order was erroneous").

B. The Third, Fourth, Sixth, Ninth, Tenth, Eleventh, And D.C. Circuits Allow Review For Manifest Error

Other courts of appeals appropriately recognize their discretion to grant interlocutory appeal of manifestly erroneous class-certification decisions. The Third, Fourth, Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits have all recognized that a significant error can be a permissible and sensible basis for a Rule 23(f) appeal, even in the absence of the two *Sumitomo* factors. Indeed, the Second Circuit has in dicta acknowledged that manifest error is a relevant consideration in these other circuits, while still emphasizing the need for "death-knell" circumstances and "legal question[s]" that present a "compelling need for resolution." *See Weber* v. *United States*, 484 F.3d 154, 159-160 (2d Cir. 2007) (comparing *Sumitomo*'s two-pronged inquiry to standards in the Third, Fourth, and D.C. Circuits).

To start, the Third Circuit has held that a mere error in a class-certification order can justify Rule 23(f) review. *Newton* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164 (3d Cir. 2001). The error need not even be manifest: sometimes a "likely" error can be a sufficient basis for an immediate appeal. *Ibid.* And the Third Circuit has expressly criticized the Second Circuit's more "limited approach[]," explaining that the *Sumitomo* standard "is hardly the 'unfettered'

discretion to permit appeals envisioned by the Committee Notes." *Laudato* v. *EQT Corp.*, 23 F.4th 256, 260 (3d Cir. 2022).

The Fourth Circuit likewise acknowledges that a district court's error may be a sufficient ground for Rule 23(f) review. *See Lienhart* v. *Dryvit Sys., Inc.*, 255 F.3d 138, 145-146 (4th Cir. 2001). As that court has reasoned, "[w]here a district court's certification decision is manifestly erroneous and virtually certain to be reversed on appeal," allowing the "self-evidently defective classes [to] proceed through trial to final judgment" would be a waste of judicial resources. *Id.* at 145. The Fourth Circuit thus adopted a position that it recognized was broader than the First Circuit's decision in *Mowbray*: that "the weakness of the certification order may alone suffice to permit the Court of Appeals to grant review." *Id.* at 143-145 (citing *Mowbray*, 208 F.3d at 294).

In the Sixth Circuit, too, errors in a certification decision are "always relevant" to the question of whether to grant interlocutory review. *In re Delta Air Lines*, 310 F.3d 953, 960 (6th Cir. 2002) (per curiam). That court has explained that "some assessment of the merits of a class certification decision *must* weigh into the initial determination of whether to grant the interlocutory appeal." *Ibid.* (emphasis added). Earlier this year, for example, the Sixth Circuit reversed a class-certification decision on Rule 23(f) review because the district court applied an "insufficiently rigorous" analysis of the Rule 23 requirements for each claim. *See In re Lee*, No. 23-0502, 2024 WL 559072, at *1 (6th Cir. Feb. 8, 2024) (per curiam).

Similarly, the Ninth Circuit considers manifest error. *Chamberlan* v. *Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005) (per curiam). And like the Third and Fourth Circuits, the Ninth Circuit has expressly rejected the other side of the split. *See id.* at 959. The Ninth Circuit observed that the Second Circuit's *Sumitomo* framework "confin[es]" Rule 23(f) review to "death knell" situations and "legal questions that are important to class action law and likely to evade effective review." *Id.* at 958-959 (citing *Sumitomo*, 262 F.3d at 139-140). It refused that straitjacket. Instead, the Ninth Circuit held that "interlocutory review [is] warranted when the district court's decision is manifestly erroneous—even absent a showing of another factor." *Ibid.* The court explained that when an error is "manifest" even on the face of the petition, then Rule 23(f) offers parties a critical escape hatch from "the costs of litigation." *Ibid.*

The Tenth Circuit has expressly adopted the Ninth Circuit's reasoning in *Chamberlan*. *See Vallario* v. *Vandehey*, 554 F.3d 1259, 1263 (10th Cir. 2009) (citing *Chamberlan*, 402 F.3d at 959). As it recognized, "where the deficiencies of a certification order are both significant and readily ascertainable . . . interlocutory review is appropriate to save the parties from a long and costly trial that is potentially for naught." *Ibid.*

Same for the Eleventh Circuit. That court considers "whether the petitioner has shown a *substantial* weakness in the class certification decision." *Prado-Steiman ex rel. Prado* v. *Bush*, 221 F.3d 1266, 1274-1275 (11th Cir. 2000). In *Prado-Steiman*, the court recognized manifest error as an "additional consideration[]" beyond the narrower framework of

the First and Seventh Circuits. *Id.* at 1272-1275 (citing *Mowbray*, 208 F.3d at 294, and *Blair*, 181 F.3d at 835). It thus explained that "[i]nterlocutory review may be appropriate when it promises to spare the parties and the district court the expense and burden of litigating the matter to final judgment only to have it inevitably reversed by this Court on an appeal after final judgment." *Id.* at 1274-1275.

Finally, the D.C. Circuit agrees that interlocutory appeal is appropriate "when the district court's class certification decision is manifestly erroneous." *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 105 (D.C. Cir. 2002). Specifically distinguishing the Third and Fourth Circuits' consideration of manifest error from the First and Seventh Circuits' tests, the *Lorazepam* court sided with the former. *Id.* at 104 (comparing *Newton*, 259 F.3d at 165, and *Lienhart*, 255 F.3d at 145-146, with *Mowbray*, 208 F.3d at 293-294, and *Blair*, 181 F.3d at 834-835). It explained that "Rule 23(f) review would be warranted even in the absence of a death-knell situation if for no other reason than to avoid a lengthy and costly trial that is for naught once the final judgment is appealed." *Id.* at 105.

All told, the count among the courts of appeals is 7-3, with the Second Circuit in the minority. And the courts of appeals are well aware of the divide: at least five of them have specifically rejected the discretion-constraining view embodied by *Sumitomo*, *Mowbray*, and *Blair*—and by the decision below.

III. THIS CASE IS AN IDEAL VEHICLE TO REVIEW THIS RECURRING AND IMPORTANT QUESTION

This is a rare and ideal vehicle for this Court to review an important and recurring question. The district court's class-certification decision was manifestly erroneous, and the Second Circuit's constrained Rule 23(f) standard prevented immediate correction. And unlike most Rule 23(f) denials, the hearing below and denial order indicate that the *Sumitomo* standard made all the difference.

This Court's review is urgently needed. By artificially limiting the availability of Rule 23(f) review, the First, Second, and Seventh Circuits are forcing litigants like BNPP to choose between settling unmeritorious cases and spending years in costly litigation. In this case alone, BNPP faces the grim prospect of trial in one classwide proceeding, followed by 23,000 individualized injury proceedings, before it can at last appeal the district court's indefensible class-certification decision. That outcome is as bad for the judiciary as it is for the parties.

A. The District Court Manifestly Erred

There are few better examples of a class-certification decision that breaks from this Court's settled precedent. The certified class here is breathtaking in scope: 23,000 people who share only the status of being asylees or refugees who lived in Sudan or South Sudan at some point over a 14-year period. That class raises 12 tort claims governed by Swiss law, each of which requires showing that the Government of Sudan engaged in particular acts, BNPP consciously aided such acts,

BNPP knew or should have known of such acts, and BNPP was the proximate cause of each injury. Those fact-intensive questions require reference to the circumstances of every specific instance of wrongdoing. They are plainly ill-suited for classwide adjudication.

Under Rule 23(b)(3), courts may certify a damages class only when "the questions of law or fact common to class members predominate over any questions affecting only individual members." "[C]ertification is proper only if the trial court is satisfied, after a rigorous analysis, that the[se] prerequisites" are "satisfied." *Comcast*, 569 U.S. at 33 (citation omitted). But neither of these requirements—commonality and predominance—is satisfied here.

1. For commonality, class members must present claims that "depend upon a common contention" "capable of classwide resolution." *Dukes*, 564 U.S. at 350. In other words, "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Ibid.* It is not enough, for example, for "employees of the same company" to claim that they have suffered "a disparate-impact Title VII injury"; their claims must share in the particulars, like asserting "discriminatory bias on the part of the same supervisor." *Ibid.*

The four questions that the district court called "common" cannot be determined classwide; the plaintiffs are so differently situated that the answer for each depends on her own unique circumstances. Take, for example, the question of whether "BNPP proximately caused the forcible displacement of members of the class from their homes and property." App. 4a. At the summary-judgment stage, the district

court explained that the question of proximate cause would depend on the causal chain between BNPP's provision of financial services, the Government of Sudan's ability to increase its oil revenues, and the use of those oil revenues to cause each individual plaintiff's injuries and ultimate decision to leave Sudan. In other words, the proximate-cause inquiry will turn on questions including whether a plaintiff was "harmed by simple" weaponry that the Government of Sudan already owned, or "sophisticated" weaponry that it purchased with its new oil revenues; whether a plaintiff was injured on "oil-rich lands," where the Government of Sudan was allegedly using its new oil revenues to displace citizens; and whether, at the time of the plaintiff's injury, Sudan had "non-oil forms of revenue on which to draw." App. 16a. Those questions will play out differently for each class member depending on his or her individual circumstances; they cannot be answered "in one stroke." *Dukes*, 564 U.S. at 350.

The same problems plague the other questions that the district court certified as "common" to the entire class. *See* App. 4a. How can BNPP litigate "[w]hether the Government of Sudan persecuted class members" on account of "their race, religion, or ethnicity" when some plaintiffs in the class allege that their villages were attacked by militias and others allege that they were targeted in connection with political activity related to the civil war? *Ibid.* How can BNPP litigate whether it "consciously aided" in Sudan's acts when those acts differ across every member of the class and took place in a geographical area the size of Texas and Mexico combined, over a period of 14 years? *Ibid.* And how can BNPP litigate whether it "knew or should

have known" that it was contributing to Sudan's actions when it is not even clear which actions are relevant? *Ibid.* The district court plainly erred by calling each of these "common questions." *Ibid.*

2. The class equally fails Rule 23(b)(3)'s predominance requirement. To establish predominance, the party seeking certification must "satisfy through evidentiary proof" that the "common questions predominate over individual ones." *Comcast*, 569 U.S. at 33-34. Courts must take a particularly "close look" to ensure that this requirement is satisfied before certifying a class. *Id.* at 34 (citation omitted). In *Comcast*, for example, the Court held that common questions did not predominate because there was no one model that could estimate how much the shared theory of harm had cost each class member in damages. *See id.* at 35, 38.

Here, the district court did not even attempt to explain how any common questions would predominate. App. 4a-5a. That failure to "take a close look" at predominance alone is a manifest error. *Comcast*, 569 U.S. at 34 (internal quotation marks omitted). Nor could the common questions predominate when each element of plaintiffs' claims—the illicit acts, conscious aid, knowledge or constructive knowledge, and proximate causation—all depend entirely on the facts and circumstances of what caused each person to flee Sudan or South Sudan.

The district court thought it could get around these issues by slicing and dicing based on the plaintiffs' injuries. It bifurcated the action into one classwide proceeding on forcible displacement and thousands of individualized proceedings on plaintiff-specific

"damages claims." App. 5a. But just because every class member has the same immigration status does not mean that they suffered the same kind of forcible displacement or that BNPP had the same role, or any role, in that displacement. Every class member's flight was still precipitated by a different chain of causation. Some may have fled because of fear of militias, others police, and others civil war. Some may have experienced persecution themselves, and others may claim refugee or asylee status based on the persecution of a family member. The district court could not manufacture predominance by pushing the many classwide differences into individualized inquiries set aside for separate proceedings. *See Harris* v. *Med. Transp. Mgmt.*, 77 F.4th 746, 762 (D.C. Cir. 2023); *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996); *Gunnels* v. *Healthplan Servs., Inc.*, 348 F.3d 417, 441 (4th Cir. 2003).

The gravity of the district court's error vividly illustrates that the Second Circuit refuses to grant interlocutory review outside the *Sumitomo* test. The Second Circuit, along with the First and Seventh Circuits, simply looks past a fundamental error like this one. By contrast, the Third, Fourth, Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits would all have given significant weight to the district court's failure to properly assess commonality and predominance. The magnitude of the district court's error thus makes the split all the more concrete, and makes this Court's guidance all the more necessary.

B. The Record Below Provides Unusual Insight Into The Second Circuit's Rule 23(f) Analysis

This case is also an ideal vehicle for tackling the question presented because the record below sheds more light than usual on the Second Circuit's reasons for denying review.

The question presented may elude this Court's review because it is often difficult to discern whether a court of appeals' approach to Rule 23(f) informed its denial of review. Courts, after all, often decide Rule 23(f) petitions without explanation, and rarely grant oral argument on whether to grant a petition. *See, e.g.*, Pet. App. 2a, *FCA US LLC* v. *Flynn* (No. 18-398) (2018). The record in this case, however, provides two unique data points.

First, the Second Circuit issued an order—albeit a brief one—in denying leave to appeal. App. 1a-2a. And the sole justification in that order is a citation to *Sumitomo*. *Ibid.* The court thus strongly suggested that it was denying leave to appeal based on *Sumitomo*'s narrow, two-pronged inquiry.

Second, the panel focused on *Sumitomo* at oral argument. One judge commented that the Second Circuit had *never* considered "egregious error" as a basis for granting a Rule 23(f) petition. Oral Arg. 2:51-3:22. The panel's only questions for BNPP went to whether litigating 23,000 individualized trials would be burdensome to BNPP, and whether BNPP would need to cave to settlement pressure when it had an estimated "$3 trillion of assets." Oral Arg. 1:50-2:07, 2:51-3:22, 3:41-3:50, 4:02-4:23.

Together, the order and the hearing commentary demonstrate that the panel construed *Sumitomo* as a

straitjacket. Despite some occasional hedging language, the Second Circuit does not grant review—and the panel appeared to believe that it could not grant review—if a class-certification order is manifestly erroneous, without more. Future cases implicating this well-established circuit split are unlikely to have similarly strong indicia of the importance of the legal standard to the case at hand.

C. The Question Presented Is Important And Recurring

The question presented arises frequently in almost every circuit. This Court's review is essential to ensure that litigants facing manifestly erroneous class-certification proceedings have a fair opportunity to seek appellate review *before* they spend years grappling with unwieldy and unjustified classes—or settling to avoid the mess.

1. The question presented arises often. Just between 2013 and 2017, courts of appeals decided 771 Rule 23(f) petitions. Bryan Lammon, *An Empirical Study of Class-Action Appeals*, 22 J. of App. Prac. & Process 283, 303 (2022). More than a quarter of these were filed in the First, Second, and Seventh Circuits. *Id.* at 320. Given the sheer number of these cases, it is no surprise that multiple petitioners have previously asked this Court for guidance—albeit in less promising vehicles—on whether manifest error can be a sufficient basis for granting a Rule 23(f) appeal. *See, e.g.*, Pet., *Gospel For Asia, Inc.* v. *Murphy* (No. 18-969) (2019); Pet., *FCA US LLC* v. *Flynn* (No. 18-398) (2018); Pet., *McReynolds* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* (No. 10-1534) (2011).

2. The question presented is also important. The First, Second, and Seventh Circuits' blanket refusal to treat manifestly erroneous decisions as "appeal-worthy" wastes judicial resources. Just as granting frivolous interlocutory appeals "increas[es] delay and expense," *Microsoft*, 582 U.S. at 32 (citation omitted), dragging out improvident class actions forces the district courts to spend scarce judicial resources on what will inevitably culminate in a reversal. As the D.C. Circuit has thus observed, Rule 23(f) review of manifest errors can be important simply "to avoid a lengthy and costly trial that is for naught once the final judgment is appealed." *Lorazepam*, 289 F.3d at 105.

This case serves as a bleak illustration. At this point, BNPP is careening toward a trial on four class-wide questions that are so inherently fact-intensive and plaintiff-specific that BNPP cannot hope to litigate them in the aggregate while achieving both (i) progress toward resolving individual claims and (ii) fairness to BNPP in making a full defense. Absent this Court's intervention, only after trial—and after as many as 23,000 individualized proceedings—will BNPP have any right to appeal the class-certification order. And because that order is so plainly wrong, the Second Circuit will inevitably reverse it, sending the parties back to square one.

A grudging standard for reviewing class actions also imposes enormous costs and settlement pressures on *all* litigants—even the well-resourced ones. As the Third Circuit has observed, "the certification decision is typically a game-changer, often the whole ballgame." *Marcus* v. *BMW of North America, LLC*, 687 F.3d 583, 591 n.2 (3d Cir. 2012). Currently, litigants across the

First, Second, and Seventh Circuits have little recourse when district courts enter manifestly erroneous class certification orders. *See Microsoft*, 582 U.S. at 30. Even if a litigant has enough assets that those orders do not sound the "death knell" for litigation, they will often choose settlement over an expensive gamble and years of costly, pointless litigation. *See* Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497, 566-567 (1991) (explaining that when "adjudication before trial" is "unavailable," "settlement becomes a foregone conclusion").

Moreover, the clear and well-publicized circuit split encourages forum shopping. Because of the conflicting standards, commentators advise "sophisticated litigants" to "expect to evaluate Rule 23(f) appealability as part of strategic forum shopping during class action litigation." Charles R. Flores, *Appealing Class Action Certification Decisions Under Federal Rule of Civil Procedure 23(f)*, 4 Seton Hall Cir. Rev. 27, 57 (2007).

None of this is the "low cost" process that Rule 23(f) contemplates. Fed. R. Civ. P. 23(f), committee note to 1998 amendment. Twenty years ago, Congress and this Court attempted to settle the problem of improvident class-certification orders by adopting Rule 23(f). *See Microsoft*, 582 U.S. at 42. Three circuit courts have exceeded their "prerogative" by "disturb[ing] that settlement." *Ibid.* This Court should take the opportunity to rectify their mistake and clarify that courts of appeals have the discretionary authority to grant immediate review of class-certification decisions for any reason, including manifest error.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 5, 2024

APPENDIX

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 6th day of September, two thousand twenty-four.

Present:

Denny Chin,
Susan L. Carney,
Richard J. Sullivan,
Circuit Judges.

24-1446
Filed: September 6, 2024

BNP Paribas SA, a French corporation, et al.,
Petitioners,

v.

Entesar Osman Kashef, et al.,
Respondents.

Petitioners request, pursuant to Federal Rule of Civil Procedure 23(f), leave to immediately appeal the district court's order granting class certification. They also move for leave to file a reply. Upon due consideration, it is hereby ORDERED that the motion for leave to file a reply is GRANTED, but the Rule 23(f) petition is DENIED because an immediate appeal is not warranted. *See Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 139–40 (2d Cir. 2001).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court
/s/ Catherine O'Hagan Wolfe

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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16 Civ. 3228 (AKH)
Filed: May 9, 2024

ENTESAR OSMAN KASHEF, et al.,
Plaintiffs,

-against-

BNP PARIBAS SA, a French corporation; and B.N.P. Paribas US Wholesale Holdings, Corp. (f/k/a BNP Paribas North America, Inc.), a Delaware corporation,
Defendants.

ALVIN K. HELLERSTEIN, U.S.D.J.:

Plaintiffs' motion to certify the class is granted for the reasons described in the transcript of the oral argument held on May 7, 2024, and as provided below.

1. The class is defined as follows: All refugees or asylees admitted by the United States who formerly lived in Sudan or South Sudan between

November 1997 and December 2011.

2. The common questions for trial are the following:

   a. Whether the Government of Sudan persecuted class members, or caused them to have reasonable fear of persecution, because of their race, religion, or ethnicity between November 1997 and December 2011.

   b. Whether the BNP Paribas Defendants ("BNPP") consciously aided, abetted, and enabled the Government of Sudan to carry out such acts.

   c. Whether BNPP knew or should have known that its aiding, abetting, and enabling would contribute to the Sudanese government's campaign of persecution.

   d. Whether such acts of BNPP proximately caused the forcible displacement of members of the class from their homes and property, and other injuries to be tried in individual cases.

   e. Other issues ancillary to the issues above.

3. The Court finds that the class, estimated to be over 23,000 individuals, is sufficiently numerous such that joinder is impracticable under Fed. R. Civ. P. 23(a)(l). The foregoing questions are common to the class under Fed. R. Civ. P. 23(a)(2). Plaintiffs' claims are typical of the claims and defenses with respect to the class under Fed. R. Civ. P. 23(a)(3). The nineteen plaintiffs in this action will fairly and adequately protect the interests of the class under Fed. R. Civ. P. 23(a)(4).

4. Questions of law or fact common to class members,

as described above, predominate over questions affecting individual members, and a class action is the superior method to fairly and efficiently adjudicate these claims under Fed. R. Civ. P. 23(b)(3). Although each individual member has an interest in prosecuting their own damages claims, and success with regard to the class issues may required them to do so, proceeding by a class action should substantially shorten individual trials and avoid inconsistent determinations.

5. The combination of common and individual trials will be manageable using procedural techniques common to class and aggregate actions. *See* Alvin K. Hellerstein et al., *The 9/11 Litigation Database: A Recipe for Judicial Management,* 60 Wash. U. L. Rev. 653 (2013).

6. The following issues also shall be addressed by the parties:

   a. Identification of the procedure to provide the "best notice that is practicable under the circumstances" to members of the class, including how they can be identified, how to send individual notices, and how to give adequate notice to those who cannot be identified. *See* Fed. R. Civ. P. 23(c)(2)(B). The parties also shall propose dates and procedures to be accomplished before the Final Pre-Trial Conference and class trial. Plaintiffs are to serve their proposals on Defendants by May 17, 2024. If the parties agree, the court shall be advised by joint submission by May 21, 2024. If there is disagreement, they are to be addressed in separate briefs by May 23, 2024, and in

replies by May 28, 2024.

b. The parties shall brief the question, whether determinations of refugee and asylee status by USCIS or other immigration determinations as to the same are 1) admissible, 2) presumptive, or 3) binding on all class members and BNPP, filing their respective briefs on May 21, 2024, and their replies by May 28, 2024.

7. The parties shall appear for a status conference on June 11, 2024 at 2:30 p.m.

8. The Clerk shall terminate the open motion at ECF No. 417.

SO ORDERED.

/s/ Alvin K. Hellerstein
ALVIN K. HELLERSTEIN
United States District Judge

Dated: May 9, 2024
New York, New York

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ORDER AND OPINION DENYING IN PART AND GRANTING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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16 Civ. 3228 (AKH)
Filed: April 18, 2024

ENTESAR OSMAN KASHEF et al.,
Plaintiffs,

-against-

BNP PARIBAS SA, a French corporation; BNP Paribas, S.A. New York Branch, a foreign branch; and B.N.P. Paribas US Wholesale Holdings, Corp. (f/k/a BNP Paribas North America, Inc.), a Delaware Corporation,
Defendants.

ALVIN K. HELLERSTEIN, U.S.D.J.:

Plaintiffs, lawful residents of the United States who fled Sudan because of genocidal acts committed by the Government of Sudan ("Sudan") against them and the class they seek to represent, filed this lawsuit April 29, 2016 against defendants BNP Paribas SA and affiliated

companies ("BNPP"). Plaintiffs allege that defendants unlawfully aided and abetted the Government of Sudan in committing acts of genocide between 1997 and 2011 and are liable under Article 50 of the Switzerland Code of Obligations ("SCO").

The record contains decisions and rulings by Hon. Alison J. Nathan, who presided over the case until she was appointed a Circuit Judge of the U.S. Court of Appeals,[1] the Second Circuit Court of Appeals[2], and myself after the case was transferred to me.[3] Discovery has been completed. I now rule on defendants' motion for summary judgment. Plaintiffs' motion for class certification also is pending, awaiting argument and decision.[4] The underlying facts have been sufficiently described in these earlier decisions, and need not be repeated.

LEGAL STANDARD FOR SUMMARY JUDGMENT

A court should grant summary judgment if there "is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317,

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[1] *See Kashef v. BNP Paribas S.A.*, 316 F. Supp. 3d 770 (S.D.N.Y. 2018) *("Kashef I"*); *Kashef v. BNP Paribas S.A.*, 442 F. Supp. 3d 809 (S.D.N.Y. 2020) ("*Kashef III*") and *Kashef v. BNP Paribas S.A.*, 16 Civ. 3228 (AJN), 2021 WL 603290 (S.D.N.Y. Feb. 16, 2021) ("*Kashef IV*").

[2] *See Kashef v. BNP Paribas S.A.*, 925 F.3d 53 (2d Cir. 2019) ("*Kashef II*").

[3] See ECF No. 338 ("*Kashef V*")

[4] Three related cases—23cv4986, 23cv5552, and 23cv7468—containing hundreds of plaintiffs, have been stayed pending resolution of Plaintiffs' class certification motion. This case is brought by approximately 20 named plaintiffs.

322 (1986). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The court must "view the evidence in the light most favorable to the party opposing summary judgment . . . draw all reasonable inferences in favor of that party, and . . . eschew credibility assessments." *Amnesty Am. v. Town of West Hartford*, 361 F.3d 113, 122 (2d Cir. 2004). However, the non-moving party may not rely on conclusory allegations or unsubstantiated speculation to defeat the summary judgment motion. *Scotto v. Almenas*, 143 F.3d 105, 114 (2d Cir. 1998). "If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact . . . that is not genuinely in dispute and treat[] the fact as established in the case." Fed. R. Civ. P. 56(g).

THE LAW OF SWITZERLAND IS THE GOVERNING LAW

Judge Nathan determined that Swiss law is the law governing BNPP's liability, and I adopt that ruling as the law of the case and my own determination. *Kashef III*, 442 F. Supp. 3d at 818–25; *Kashef IV*, 2021 WL 603290, at *4–5; *see also Waverly Props., LLC v. KMG Waverly*, No. 09 Civ. 3940 (PAE), 2011 WL 13322667, at *1 (S.D.N.Y. Dec. 19, 2011) ("upon reassignment, the new judge is well advised to pay particular heed to the doctrine of law of the case, and not attempt a de novo of . . . decisions made over a lengthy period by diligent and experienced judicial officers who have handled the case previously.") (quotations omitted). Article 50(1) of the SCO is the governing section of the Swiss Code of Law.

Resolving a dispute between Swiss experts presented by plaintiffs and by defendants, Judge Nathan held the plaintiffs had to prove three elements for BNPP's secondary liability under Article 50(1): "(1) a main perpetrator committed an illicit act, (2) the accomplice consciously assisted the perpetrator and knew or should have known that he was contributing to an illicit act, and (3) their culpable cooperation was the natural and adequate cause of the plaintiff's harm or loss." *Kashef IV*, 2021 WL 603290, at *2. Plaintiffs have the burden to prove that the Government of Sudan committed illicit acts, that BNPP consciously assisted Sudan and knew or should have known that it was contributing to Sudan's illicit acts, and that their culpable cooperation was the natural and adequate cause of the injury suffered by plaintiffs.

PROCEDURAL HISTORY

Judge Nathan initially dismissed the case based on U.S. law, holding that Sudan, as the alleged primary tortfeasor, could not be held liable because of the "Acts of State" doctrine, and that the action was time-barred under N.Y. C.P.L.R. § 215. The Second Circuit reversed and remanded, holding that the Sudanese government's actions violated *jus cogens* and was not immune from suit, and that N.Y. C.P.L.R. § 215(8), providing a one-year period from the termination of a criminal action against the defendant within which to file suit, was the applicable statute of limitations, and made the lawsuit timely. Plaintiffs' claims, having been filed within a year of BNPP's guilty plea and judgment of conviction by this court, are timely.

Following remand, Judge Nathan carefully considered the reports of Sudanese and Swiss law

experts and applied them to the facts of this case. She held that Swiss law governs BNPP's conduct, and that plaintiffs were seeking recovery from BNPP under SCO Article 50(1), providing for secondary liability of an accomplice, and not Article 41, for tortfeasor's direct acts. She dismissed the counts of the Second Amended Complaint ("SAC") alleging BNPP's direct liability, and upheld the claims alleging BNPP's secondary liability.

Subsequently, defendants moved to dismiss for *forum non conveniens*. I denied that motion, holding that plaintiffs were entitled to substantial deference in their choice of forum, and that defendants did not show that Switzerland was an available nor appropriate forum.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. Article 50(1) Liability

a. BNPP's Secondary Liability

Defendants argue that plaintiffs cannot prove that the Government of Sudan committed unlawful acts because Swiss law would consider acts of a government as immune from suit under the doctrine of *jure impeii*, and that BNPP cannot be culpable as an accomplice if the primary actor cannot be held as a tortfeasor. The argument is without merit. The Second Circuit ruled in this case that Sudan violated *jus cogens* by its genocidal acts, and that BNPP can be sued for aiding and abetting Sudan. As the Second Circuit held, the illicit acts in question—"genocide, mass rape, and ethnic cleansing"—violated *jus cogens* norms, which are "peremptory norm[s] of international law . . . accepted and recognized by the international community of states as a whole . . . from which no derogation is permitted."

Kashef II, 925 F.3d at 60. The holding of the Court of Appeals is the law of the case.

Next, defendants argue that that plaintiffs have not offered proof that BNPP committed unlawful acts or consciously performed acts that harmed plaintiffs. As defendants put it, "Plaintiffs do not allege that the BNPP Defendants violated Swiss sanctions on Sudan, that the BNPP Defendants engaged in any violent acts that injured them, nor have they alleged that the BNPP Defendants engaged in any unlawful conduct that in itself resulted in an attack on any Plaintiff." Defts' Memo, ECF No. 484 at 28. But defendants' argument misstates the standard. SOC Article 50(1) provides the standard of secondary liability. As Judge Nathan held, plaintiffs have to prove, not that BNPP itself committed unlawful acts, but that BNPP consciously assisted Sudan and knew or should have known that it was contributing to Sudan' illicit acts. And plaintiffs point to a multitude of proofs to show BNPP's "conscious assistance" and knowledge of Sudan' genocidal acts, none of which defendants conclusively challenge. Indeed, BNPP admitted its conscious cooperation. In a stipulated statement of facts supporting its plea of guilty to a U.S. federal prosecution, BNPP admitted that its own employees recognized BNPP's "central role in providing Sudanese financial institutions access to the U.S. financial system, despite the Government of Sudan's role in supporting terrorism and committing human rights abuses . . . ." *United States v. BNP Paribas, S.A.*, No. 14-cr-00460-LGS (S.D.N.Y. 2015), ECF 13, Ex. 2 ¶20 (Stipulated Statement of Facts between BNPP and the United States, and plea and judgment of guilt for conspiring to violate the International Emergency Economic Powers Act and the Trading with the Enemy

Act). As the Second Circuit held, BNPP "conceded that it had knowledge of the atrocities being committed in Sudan and of the consequences of providing Sudan access to U.S financial markets." *Kashef II*, 925 F.3d at 56.

Clearly, there are, at least, material issues of fact to be tried. Indeed, BNPP cannot now argue the issue that it already has admitted, that it knowingly and consciously assisted the Government of Sudan in its commission of unlawful acts and knew or should have known that it was enabling these illicit acts.

B. Natural and Adequate Causation

BNPP argues in its motion that plaintiffs cannot prove that its assistance was the natural and adequate cause of the injuries about which plaintiffs complain, that is, that plaintiffs' injuries "would not have occurred at the same time or in the same way or magnitude" except for BNPP's assistance. *Kashef IV*, 2021 WL 603290, at *12. Again, BNPP's motion is denied, for the issues of causation present material issues for the jury to decide.

Plaintiffs are black-Africans who come from non-Arab indigenous black African communities in South Sudan, Darfur, and the Nuba Mountains in Central Sudan. TAC ¶12, ECF 241. They are able to prove, largely from publicly available information, the following. The genocidal acts of the Sudanese Bashir regime against the black, non-Islamist population had become notorious by 1997. On November 3, 1997, the U.S. imposed a trade embargo on Sudan "to deny the Bashir Regime access to the U.S. financial system and deprive it of U.S. dollars as a means to defund its support for terrorism and human rights violations."

Exec. Order. No. 13,067, 62 Fed. Reg. 59989 (Nov. 3, 1997). The Sudanese economy, already in turmoil, soon faced an external debt of over $15 billion and a weakening Sudanese pound as countries closed their doors to commerce with Sudan. The country lacked the capital to exploit its rich oil reserves.

BNPP came to its rescue. Using its banking network, it set up an infrastructure to evade U.S. sanctions and finance Sudan with U.S. dollars. BNPP engaged in a practice of "wire stripping," that is, "deliberately modifying and omitting references to Sudan in the payment messages accompanying these transactions." ECF No. 435-1, SSOF ¶¶ 18, 22. BNPP's financing enabled Sudan's oil infrastructure to become operative by 1999 and, with increasing oil revenues, Sudan was able to "increase the tempo and lethality of the war" against the Black-African people. Sudan Peace Act of 2002, Pub. L. 107-245, 116 Stat. 1505. The oil funds created a "macabre-feedback loop" of committing human rights abuses, chasing Black-Africans from their villages in the oil areas to extract more oil, and using oil revenues to commit further human rights abuses. *Kashef III*, 442 F. Supp. 3d at 815–16. Plaintiffs' evidence provides graphic accounts of killing, sexual violence, and property damage. A Sudanese militia group, the "Janjaweed" attacked the Black-African communities to destroy their communities and drive them away from oil-rich regions. They burned their villages, covered by helicopter gunships, engaged in frequent aerial bombing and kidnappings, raped mothers (including some of the plaintiffs) in front of their children, and tortured and endlessly questioned captives in clandestine detention centers ("ghost

houses"). See ECF No. 465, Annex A and accompanying citations; TAC ¶¶30–50e.

In 2004, the United States recognized the Sudanese conflict as a genocide. Pub L. 108-497 § 3(6). In 2015, BNPP Paribas pleaded guilty to conspiring with the Sudanese government to break U.S. sanctions. As part of its guilty plea, BNPP admitted that it knew that its assistance enabled the GOS to perform a genocide against its black population, and paid fines and forfeitures reflecting its culpability of almost nine billion dollars, the "largest financial penalty ever imposed in a criminal case." *Kashef II*, 925 F.3d at 56. Plaintiffs, those who managed to escape and gain asylum in the United States, brought this lawsuit to seek financial recovery for their injuries arising out of BNPP's conduct.

Judge Nathan held that Plaintiffs could establish a presumptive causal link between the financial assistance given by BNPP to Sudan and the atrocities about which plaintiffs complain, and that Plaintiffs can invoke the presumption by showing that 1) " the revenue generated for the Sudanese government through BNPP's assistance exceeded the Sudanese government's entire military budget, leading to a massive increase in military expenditure," and that 2) "[t]he government of Sudan used its newfound access to U.S. financial markets provided by BNPP to import sophisticated weapons from major arms suppliers in China, Russia, Ukraine, Iran and Belarus." *Kashef IV*, 2021 WL 603290, at *8.

Plaintiffs present proofs that BNPP, using clandestine techniques to evade U.S. sanctions, funneled 22.2 billion in U.S. dollars to Sudan, an amount exceeding and increasing its military budget by 3,000 percent. The U.S. dollars enabled the GOS to exploit its

oil reserves to gain more revenue, and to increase its military operations to terrorize, kill and chase the Black populations from the oil lands on which they lived, and to destroy the lives and property of plaintiffs and of the black population of Sudan.

Whether the abuses by the GOS would have occurred in the same way and magnitude without BNPP's financing and access to western market presents material issues of fact. BNPP argues that discovery showed that most Plaintiffs did not live on oil-rich lands, that some Plaintiffs were harmed by simple and not sophisticated weaponry, and that the GOS had non-oil forms of revenue on which to draw, but such facts, even if proved, are not determinative on summary judgment. There are too many facts showing a relationship between the dollar financing provided by BNPP, and the atrocities perpetrated by the GOS. Causation cannot be decided in defendants' favor by summary judgment.

Causation also must be "adequate," that is, as Judge Nathan articulated the standard, "whether it would be 'reasonable' to hold BNPP responsible for causing at least some of the human rights abuses in Sudan," and "whether those atrocities were foreseeable to BNPP at the time." *Kashef IV*, 2021 WL 603290, at *7. This reasonableness determination is to be made based on examining the quality of the casual links: namely, Defendants' knowledge that Sudan was committing human rights abuses, "that those abuses were committed with weapons and soldiers that were bought with funds generated by its relationship to BNPP," and that Sudan would not have been able to obtain those funds absent Defendants' skirting of U.S. sanctions. Judge Nathan added another consideration, whether BNPP was motivated to *increase* and *continue* its

profitable business relationship with Sudan and thus was indifferent to the human rights violations that BNPP's financing enabled Sudan to commit. *Id.* at 17.

Whether or there was adequate, as well as proximate, causation, presents material issues of fact. Again, Defendants' motion for summary judgment is denied.

II. Statute of Limitations

Defendants argue that Plaintiffs' actions are untimely, and that they are entitled to summary judgment[5]. Defendants' motion is denied.

The right to sue is governed by the law of the forum. *Kashef III*, 442 F. Supp. 3d at 817 (applying *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941)). The Second Circuit, reviewing various sections of the CPLR dealing with applicable statutes of limitations argued by the parties, held that Plaintiffs had standing to sue and brought timely claims under § 215(8)(a). *Kashef II*, 925 F.3d at 63. New York CPLR § 215(8)(a) provides that victims of a crime, as Plaintiffs surely were, have one year from sentencing to file a civil action arising out of the same event or transaction. The judgment of conviction was entered on May 1, 2015. These lawsuits were filed on April 29, 2016, within one year from BNPP's sentencing. The Second Circuit's holding establishes the law of the case, and I follow it.

Notwithstanding the Second Circuit's holding, Defendants argue that NY CPLR § 202 should apply, not § 215(8)(a). CPLR § 202 provides:

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[5] Defendants do not move against two of the plaintiffs, Sara Noureldirz and Amir Ahmed, both minors entitled to tolling until they reached majority. See NY CPLR §208.

> An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply.

CPLR § 215(8)(a) provides:

> Whenever it is shown that a criminal action against the same defendant has been commenced with respect to the event or occurrence from which a claim governed by this section arises, the plaintiff shall have at least one year from the termination of the criminal action as defined in section 1.20 of the criminal procedure law in which to commence the civil action notwithstanding that the time in which to commence such action has already expired or has less than a year remaining.

Defendants argue in favor of the 15-year period of limitations provided by Sudanese law, without equitable tolling. ECF 444, Ex. 100 ¶ 12 ("Hassabo Opening Report"). If adopted, according to Defendants' calculation, all claims for injuries that occurred before April 29, 2001, fifteen years before this action was filed, are time-barred.[6]

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[6] Defendants' argument is premised on the proposition that the injuries incurred before April 29, 2001 are not part of continuing

I hold that the Second Circuit's holding, that § 215(8) is the law of the case, is the law that I hold to be applicable. Its one-year statute also is shorter than the 15-year statute of Sudanese law, thus complying with § 202. And, in terms of public policy, it would be arbitrary to apply Sudanese law when the courts of Sudan were not open to the Plaintiffs and lacked the capacity to control a genocidal government. Defendants' motion is denied.

III. BNPP NY & BNPP US Wholesale Holdings, Corp

The parties agree that the BNPP subsidiary in New York, BNP Paribas S.A. New York Branch, should be dismissed, as it had no role in the matters alleged in the FAC. *See* ECF No. 482 at 120 n.481. I so order. All the other BNPP entities will remain. The issues of fact related to the inter-corporate movement of funds and tactics of evasion make all of them proper defendants, jointly and severally.

IV. Punitive Damages

Defendants move to dismiss Plaintiffs' claims for punitive damages as unavailable under Swiss law. Punitive damages are conduct-regulating and, therefore, as Judge Nathan held, are governed by Swiss law. The experts presented by both sides agree that punitive damages are unavailable under Swiss law, and I so hold. Plaintiffs' claims for such are stricken.

V. Property Damages

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violations. Plaintiffs claim that there were continuing violations throughout the class period, from 1997 to 2011.

Defendants argue that Plaintiffs' claims of property damage are not supported by proofs and move to strike those allegations. However, Plaintiffs have described the personal and real properties that they lost —their lands, homes, mills, livestock, vehicles, and personal items destroyed, and their use, size, and approximate values. *See* ECF No. 444, Ex. 16, Pls.'s Suppl. Initial Disclosures (Dec. 21, 2022), at 6–7. Plaintiffs have provided sufficient alternative methods of establishing their damages. *Cheng v. Guo*, 20 Civ. 5678 (KPF), 2022 WL 4237079, at * 8 (S.D.N.Y. Sept. 13, 2022) (disclosures sufficient for Fed. R. Civ. P. 26(a) where Plaintiff "disclosed the nature of his claimed damages in his initial disclosures and in his deposition" absent evidentiary materials). Defendants' motion is denied.

CONCLUSION

For the reasons discussed above, Defendants' motion is denied except as to dismissing BNPP NY from the lawsuit, and striking plaintiffs' claim for punitive damages. Various motions to seal remain open. See ECF Nos. 416, 417, 432, 445, 455, 468. The parties shall meet and confer, and advise the Court by joint letter which portions of which documents remain in dispute. Plaintiffs' motions at ECF Nos. 489 and 490 are denied as academic in light of the pending sealing motions. The joint letter shall be filed by plaintiffs by May 1, 2024.

Plaintiffs' motion for class certification and any remaining sealing issues shall be argued May 7, 2024 at 2:30 p.m. in Courtroom 14D. The parties shall submit joint appearances to the Chambers email by May 3, 2024 at 12 p.m. The Clerk shall terminate the open motions at ECF No. 433, 489, and 490.

SO ORDERED.

/s/ Alvin K. Hellerstein
ALVIN K. HELLERSTEIN
United States District Judge

Dated: April 18, 2024
New York, New York

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

16-cv-3228 (AJN)
Filed: February 16, 2021
OPINION & ORDER

Entesar Osman Kashef, *et al.*,

Plaintiffs,

-v-

BNP Paribas SA, *et al.*,

Defendants.

ALISON J. NATHAN, District Judge:

This putative class action is brought on behalf of victims of the Sudanese government's campaign of human rights abuses from 1997 to 2009. Plaintiffs bring various state law claims against Defendant financial institution and its subsidiaries for assisting the Sudanese government in avoiding U.S. sanctions, which Plaintiffs claim provided the Regime with funding used to perpetrate the atrocities. The Court previously granted the Defendants' motion to dismiss in light of the act of state doctrine and timeliness, but that decision was reversed by the Second Circuit. Dkt. Nos. 101, 106. Following remand, the Defendants renewed their motion to dismiss Plaintiffs' Second Amended Complaint for

failure to state a claim. For the reasons described in this opinion, the motion is granted in part and denied in part.

I. Background

A. Factual Background

Plaintiffs were victims of horrific human rights abuses undertaken by the Government of Sudan between 1997 and 2009, including "beatings, maiming, sexual assault, rape, infection with HIV, loss of property, displacement from their homes, and watching family members be killed." Second Amended Complaint ("SAC"), Dkt. No. 49, ¶ 24; *see also* SAC ¶¶ 30-50 (outlining specific abuses suffered by each representative Plaintiff). The Defendants are BNP Paribas S.A., a French financial institution, as well as several of its branches and subsidiaries, as well as individual defendants working for the bank (collectively "BNPP").

Between 1992 and 1997, in response to the Government of Sudan's human rights abuses against its own people, the United States government took a series of steps aimed at stemming the abuses, including formal condemnation, designation as a state sponsor of terrorism, and eventually economic sanctions. SAC ¶¶ 85-89. In 2002, Congress passed the Sudan Peace Act, again condemning the ongoing atrocities in the Sudan and requiring the President to implement additional sanctions. SAC ¶¶ 90-92. Additional legislation and executive orders implemented further sanctions between 2004 and 2006. SAC ¶¶ 93-97.

Beginning in 1997 and continuing through 2007, BNPP became the primary bank of the Government of Sudan, through which it accessed U.S. financial markets and circumvented U.S. sanctions. SAC ¶¶ 102-14. BNPP

created several schemes to avoid the sanctions, including removing information from financial documents identifying that a Sudanese entity was one of the parties involved in the financial transaction, SAC ¶ 111, and using satellite banks in the United States through which to funnel money, SAC ¶¶ 112-13. According to the Second Amended Complaint, Sudan's access to U.S. financial markets was critical to funding the government, including its continued atrocities against its people. SAC ¶¶ 115-51.

BNPP's actions were investigated by numerous state and federal agencies in the United States, and in 2014, BNPP pled guilty to conspiring to violate the laws of the United States in connection with circumventing U.S. sanctions on behalf of Sudan, Iran, and Cuba. SAC ¶¶ 191-98. BNPP also pled guilty to falsifying business records and conspiracy under New York law. SAC ¶¶ 199-201.

B. Procedural Background

The operative complaint alleges twenty state-law claims against Defendants, including negligence per se, conspiracy to commit battery, aiding and abetting assault, and intentional infliction of emotional distress. *See* SAC ¶¶ 247-529. Defendants moved to dismiss the Second Amended Complaint in its entirety. Dkt. No. 65.

On March 30, 2018, the Court granted Defendants' Motion to Dismiss. Dkt. No. 101. The Court determined that the Act of State Doctrine barred Plaintiffs claims sounding in secondary liability, negligence per se, intentional infliction of emotional distress, and negligent infliction of emotional distress. *Id.* at 9-10. The Court dismissed the remaining claims because they were either

time-barred or because Plaintiffs had failed to state a claim. *Id.* at 15. Plaintiffs appealed. Dkt. No. 103.

The Second Circuit reversed the Court's decision, holding that Plaintiffs' claims were not barred by the Act of State Doctrine nor were they untimely. Dkt. No. 106. This Court then ordered supplemental briefing on the remaining claims in Defendants' Motion to Dismiss that were not addressed in the Court's original opinion, including the issue of whether New York, Sudanese, or Swiss Law applies to Plaintiffs' claims. Dkt. No. 115.

In a prior Opinion & Order, this Court held that Swiss Law applies to Plaintiffs' claims. Dkt. No. 151. The parties then conducted expert discovery on the meaning of Swiss law and submitted supplemental briefing on the issue of whether Plaintiffs had stated a claim under Swiss Law. Dkt. No. 155.

II. DISCUSSION

For the reasons explained below, the Court adopts Plaintiffs' expert's descriptions of the applicable Swiss law and determines that the Second Amended Complaint sufficiently states a claim for relief for all of Plaintiff's claims except those sounding in primary tort liability.

A. Summary of the Swiss Law Applicable to this Case

Pursuant to Federal Rule of Civil Procedure 44.1, the parties provided the Court testimony of experts in Swiss Law on the question of whether the complaint should be dismissed. Plaintiffs' expert is Franz Werro, a tenured Professor of Law at the University of Fribourg and Georgetown University Law Center and President of the Council of the Swiss Institute of Comparative Law.

See Werro Dec., Dkt. No. 174. Defendants have retained Vito Roberto, a Swiss lawyer and Professor at the University of St. Gall in Switzerland. *See* Roberto Dec., Dkt No. 169. Both experts have considerable experience and expertise in the area of Swiss tort law.

The parties' experts agree that the operative provision of Swiss Law in this case is Article 50.1 of the Swiss Code of Obligations. *See* Dkt. No. 172 at 7-8, Defendant's Supplemental Brief ("Def. Supp."); Dkt. No. 73 at 5, Plaintiff's Supplemental Brief in Opposition ("Pl. Opp."). Article 50.1 provides for secondary tort liability. The article requires that: "Where two or more persons have together caused damage, whether as instigator, perpetrator or accomplice, they are jointly and severally liable to the person suffering damage." Roberto Dec. ¶ 13 (quoting the Swiss Code of Obligations, Art 50.1). The parties also agree that the Second Amended Complaint alleges that BNPP is an "accomplice" and not a "perpetrator" as those terms are used in the article. Def. Supp. at 8.

The parties' experts also agree on the basic elements required to establish a claim under Article 50.1. They are: "(1) a main perpetrator committed an illicit act, (2) the accomplice consciously assisted the perpetrator and knew or should have known that he was contributing to an illicit act, and (3) their culpable cooperation was the natural and adequate cause of the plaintiff's harm or loss." Roberto Reply Dec., Dkt. No. 170 ¶ 6.

B. Plaintiffs' Primary Liability Tort Law Claims

A number of Plaintiffs' claims in the Second Amended Complaint sound in primary tort liability. The parties' experts agree that Article 50.1 provides for secondary tort liability, as explained above, and that the

provision in Swiss Law for primary tort liability is Article 41 of the Swiss Code of Obligations, which states that "[a]ny person who unlawfully causes damage to another, whether willfully or negligently, is obliged to provide compensation." Roberto Dec. ¶ 13 (quoting the Swiss Code of Obligations, Article 41). However, in their supplemental briefing, Plaintiffs do not claim that Article 41 applies to any of the claims in their Second Amended Complaint. *See* Pl. Opp. at 5. Therefore, Plaintiffs' claims alleging the independent torts of negligence *per se*, outrageous conduct causing emotional distress, and negligent infliction of emotional distress are dismissed for failure to state a claim under Swiss Law.

C. Plaintiff's Secondary Tort Law Claims

That leaves the Defendants' motion to dismiss Plaintiffs' remaining claims for failure to state a claim under Swiss Law. As a preliminary matter, in determining the applicable legal standard, the Court generally found Professor Werro's testimony on the requirements of Article 50.1 to be credible and more accurate than Professor Roberto's. Professor Werro has written extensively on Article 50.1 and has been cited by the Swiss Supreme Court on this precise provision. Werro Dec. ¶ 10. His authority has been recognized by other courts in this district. *See Mastercard Intern. Inc. v. FIFA*, 464 F. Supp. 2d 246, 303 (Judge Preska found Professor Werro's conclusions "to be the most persuasive and informative," and called him "eminently qualified" and adopted his opinions and conclusions "in their entirety."). Though Professor Roberto is a respected scholar and generally qualified to opine on matters of Swiss Tort Law, for the reasons explained in

this section, the Court did not find his descriptions of the legal requirements of Article 50.1 to be persuasive.

The Court instead primarily adopts Professor Werro's description of the elements and applies them to the claims in Plaintiffs' Second Amended Complaint. To survive Defendants' motion to dismiss, Plaintiffs must "state a claim for relief that is plausible on its face" under Swiss law. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim achieves "facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). When considering a motion to dismiss for failure to state a claim, "a court must accept as true all of the [factual] allegations contained in [the] complaint." *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937.

1. Element One

The first element of an Article 50.1 claim is that a "main perpetrator commit an illicit act." Roberto Reply Dec. ¶ 6. The parties stipulate that this element is satisfied here. *See* Def. Supp. at 8. The main perpetrator is the Sudanese government and the illicit acts are the atrocious genocide and human rights violations it perpetrated for over a decade beginning in the early 1990s. *See* SAC ¶ 4.

2. Element Two

The Second Element of Article 50.1 requires that "the accomplice consciously assisted the perpetrator and knew or should have known that he was contributing to an illicit act." Roberto Reply Dec. ¶ 6.

The Court first determines the meaning of this standard under Swiss Law. While the parties' experts

agree on this definition of the element, they provide varying interpretations of the culpable mental state required by it. Professor Werro argues Article 50.1 requires that the accomplice either knew or should have known both that it was providing assistance and that the assistance was contributing to an illicit act. Werro Dec. ¶ 33. The accomplice need not desire or intend the assistance, nor need there be an express agreement. *Id.* Thus, as Professor Werro explains, "conscious assistance" includes various "culpable states of mind," including not only intentionality but also knowledge, recklessness and negligence. *Id.* Professor Roberto, however, disagrees with this interpretation. He asserts that "conscious" assistance means cooperating "intentionally" and "deliberately." Roberto Dec. ¶ 27. Therefore, negligence, recklessness, or even "[m]ere knowledge" do not "establish joint liability" under his view. *Id.*[1] He also claims that that the accomplice's participation must be either "willful or immediate" and must also be "substantial." *Id.* at ¶ 59.

The Court determines that Professor Werro's position that an accomplice need only be negligent as to its cooperation in tort is the accurate description of how the Swiss Supreme Court has interpreted Article 50.1. In contrast, Professor Roberto's interpretations of the Swiss case law in the record are flawed. For his interpretation that "conscious assistance" means cooperating "intentionally or deliberately," Professor Roberto cites to what the experts refer to as "the

[1] Moreover, while the *act* of assistance must be intentional or deliberate, according to Professor Roberto the accomplice need only be negligent as to the "loss or damage that occurred," in that the accomplice either knew "or should have known that the collective conduct could lead to such loss or damage." Roberto Dec. ¶ 30-31.

Locksmith case." In the Locksmith case, the Swiss Supreme Court said—according to Professor Roberto's own English translation—that an accomplice must have "cooperated deliberately" under Article 50.1. Dkt. No. 169, Def. Exhibit 5. But as Professor Werro explains in response, in this precise paragraph of the Locksmith case, the court was in fact citing *his own* scholarly work, and he is confident that the court was not referring to intentional conduct. The confusion, he argues, comes from Professor Roberto's mistranslation of that language. Professor Roberto translates "les auteurs doivent avoir coopéré consciemment," to "the tortfeasors must have cooperated deliberately." Werro Dec. ¶ 25. But the proper translation of "consciemment" is actually "consciously," which Professor Werro explains includes unintentional conduct. Werro Dec. ¶ 60.

Aside from whether his translation is accurate, Professor Roberto's selective quotation to the words "cooperating deliberately" for his proposition that intentionality is required under Article 50.1 is problematic. The remainder of that paragraph of the opinion suggests that negligence is sufficient: "each perpetrator must have known *or been capable of knowing, when exercising due care*, that the others were involved in the harmful act" and that Article 50.1 requires that "[e]ither all of the perpetrators sought that the damage should occur (intent), or they have at least considered that the damage may occur (recklessness), or they could have prevented it had they had paid due attention to the circumstances (negligence)." *Id.* (emphasis added).

In addition to the Locksmith case, another case provided by Defendants, the "Shooting Contest Case," is demonstrably incompatible with Professor Roberto's

contention that negligence is insufficient. In that case, the innkeeper of a hotel was found liable under Article 50.1 when inebriated soldiers organized a shooting contest in the hotel garden and a nearby guest was struck in the eye by a stray bullet. Dkt. No. 169, Def. Exhibit 23. The Court held him liable despite a finding that the innkeeper may not have even known about the contest, reasoning that "[f]or there to be conscious collaboration, it is not necessary for the participants to consult with each other," instead "[i]t is sufficient that they *should* recognize that their actions or their omissions are the cause of the damage that occurs subsequently." *Id.* (emphasis added).

The Court also declines to adopt Professor Roberto's view that an accomplice's participation must be either "willful or immediate," as well as "substantial." Roberto Dec. ¶ 59. Professor Roberto does not cite to any case law or even a secondary source for this proposition. In response to this criticism in Professor Werro's testimony, Professor Roberto admits in his reply that these "requirements" are not elements articulated by the Swiss courts, but are instead his own interpretation of the law as he believes it *should* be applied based on his analysis of the cases. Roberto Reply Dec. ¶ 25 ("My Supplemental Declaration presents the willfulness and substantiality or immediateness and substantiality requirements as *descriptions* of the elements . . . these elements demonstrate how art. 50 section 1 CO should be applied.").

The Court therefore finds Professor Werro's descriptions of Article 50.1 and the surrounding case law to be coherent, credible, and supported by Swiss case law. In contrast, Professor Roberto's interpretation is unsupported by, and at times inconsistent with, those

cases. The Court adopts Professor Werro's view that Article 50.1 allows liability if an accomplice "intentionally or unintentionally assists the illicit act of the perpetrator who himself is also at fault." Werro Dec. ¶ 33. And the Court agrees that, as applied to this case, Plaintiffs must "allege, at a minimum, that BNPP consciously cooperated with the Sudanese government by providing financial support and that it knew or should have known, had it exercised due care, that its support would contribute to the Sudanese government's violation of human rights." Werro Dec. ¶ 35.

Next, the Court applies this standard to the facts alleged in the Second Amended Complaint. Plaintiffs have plausibly alleged that BNPP was, at the very least, negligent as to its contribution to the Sudanese regime's tortious conduct. First, the Second Amended Complaint contains sufficient facts showing BNPP was well aware (or at least should have been aware) of the horrific events in Sudan, and that it knew that the country had been sanctioned by the U.S. at least in part for that reason. Plaintiffs allege that, beginning in the late 1990s, there was widespread, contemporaneous reporting in the international media and world governments on the human rights abuses being perpetrated by the Sudanese regime. SAC ¶¶ 153-169. They allege it was also well known at the time that the atrocities were being committed in pursuit of developing oil rich lands against the inhabitants there. Indeed, Plaintiffs allege that a number of other Western companies doing business Sudan—in particular in the financial and oil industries—were chastised by the international media and their home governments to the point where they were forced to withdraw from Sudan because of public pressure. SAC ¶¶ 170-190.

Moreover, Plaintiffs allege that the United States government had taken an open and clear stance condemning the Sudanese regime's atrocities at this point and had specifically recognized the link between the Sudanese government's oil industry and its perpetration of violence. SAC ¶¶ 83-100. To that end, Congress passed legislation and two Presidents issued a series of executive orders aiming to cut off all assistance and aid to the Sudanese government, in particular it's most critical industry—oil. *Id.* An Executive Order announcing the sanctions explicitly recognized that the "policies and actions of the Government of Sudan . . . violate human rights, in particular with respect to the conflict in Darfur." SAC ¶ 111. Most importantly, Plaintiffs allege that internal communications at BNPP will show that senior officials *expressly* recognized the human rights abuses in Sudan, referring to it as a "human catastrophe." SAC ¶ 184. Thus, based on the information that was allegedly available to BNPP at the time as an entity doing business in Sudan, Plaintiffs have sufficiently alleged that BNPP either knew or at the very least should have known that the Sudanese government was engaging in a campaign of human rights abuses that was linked to its oil industry and that the U.S. Sanctions that Defendant was violating were imposed at least in part for the purpose of preventing the Regime's ability to continue that campaign.

To demonstrate negligence even further, Plaintiffs have also plausibly alleged that BNPP actively sought to hide its business activity in Sudan, suggesting that BNPP was in fact aware of the human rights atrocities going on there and that its financial assistance was contributing to those atrocities in violation of U.S. sanctions. According to the Second Amended Complaint,

BNPP used "deceptive procedures and transaction structures" to avoid detection by the U.S. government, such as omitting references to Sudanese entities in its transactions and using unaffiliated banks. SAC ¶¶ 111-112. Plaintiffs also point to alleged internal communications at BNPP where senior officials acknowledge that they were violating U.S. sanctions (a fact BNPP also pled guilty to in U.S. Court, SAC ¶ 17), referred to their activity in Sudan as a "dirty little secret," and acknowledged that their provision of financial services "played a pivotal part in the support of the Sudanese government which . . . refuses the United Nations intervention in Darfur." SAC ¶ 183-189.

The Court therefore agrees with Plaintiffs that, assuming these factual allegations are true, it is at least plausible that BNPP knew or should have known: that the Sudanese regime was engaged in a campaign of human rights abuses, that it was massively enriching the Regime by providing it access to U.S. dollars to sell its oil, that the profits from the relationship were being used to fund the military, that the military was committing atrocities in pursuit of obtaining more oil (which BNPP again would then allegedly help the Regime sell as part of their profitable business relationship), that its assistance to the Regime was in violation of U.S. sanctions, and that those sanctions had been imposed in part to prevent the Regime's atrocities. Plaintiffs have therefore plausibly alleged that BNPP was at least negligent under Swiss law as to its contribution to tortious conduct.

3. Element Three

The third element of an Article 50.1 claims is that the accomplice's "culpable cooperation was the natural and

adequate cause of the plaintiff's harm or loss." Roberto Reply Dec. ¶ 6. The parties' experts agree that the concepts of "natural" and "adequate" cause are similar to the concepts of "but for" and "proximate" cause in United States tort law. Werro Dec. ¶ 27; Roberto Reply Dec. ¶ 29.

a. Natural Causation

Professor Werro describes "natural cause" as the requirement that "[a] natural causal link exists where the harm would not have occurred at the same time or in the same way or magnitude without the conduct alleged." Werro Dec ¶ 47. Professor Roberto does not address the issue of natural cause as it pertains to this case in his testimony, but Defendants argue in their motion to dismiss that "Plaintiffs likely haven't even satisfied the requirement of pleading but for causation" because "Sudan was committing human rights violations before and after the period in which the BNPP Defendants were violating U.S. sanctions." Def. Supp. at 20. Defendants point to no authority from either the Swiss or United States courts for their proposition that an accomplice is not a "but for" cause if the primary tortfeasor was still able to commit some torts against the plaintiff without the help of the accomplice. To the contrary, under Professor Werro's uncontested definition, Plaintiff's need only allege that the human rights abuses "would not have occurred at the same time or in the same way or magnitude without the conduct alleged" in order to satisfy natural causation. Werro Dec. ¶ 47; Roberto Reply Dec. ¶ (noting that he and Mr. Werro's testimony differ with regard to their understanding of adequate causation but not disputing natural causation).

Plaintiffs have adequately alleged that the deaths, rapes, assaults, displacements, and other instances of tortious conduct would not have occurred in the same magnitude or frequency if BNPP had not provided the Sudanese regime with financial services. The Second Amended Complaint explains that BNPP's role as the Sudanese government's "de facto central bank" directly fueled the atrocities: BNPP helped the Regime subvert its ban from U.S. financial markets, which generated massive revenues in oil sales that allowed the Regime to "equip and mobilize armed forces," which then "committed ethnic cleansing in oil regions to obtain and sell more oil." Pl. Opp. at 18. In short, Plaintiffs' allege that BNPP was a core piece of the "oil-genocide nexus as its chief financier." *Id.* at 19.

Though Defendants argue that "it cannot be presumed the funds accessed by Sudan through the BNPP Defendants' financial services were actually used for the attacks that injured plaintiffs," Def. Supp. at 19, that is in fact precisely what Plaintiffs here allege. Plaintiffs claim that the revenue generated for the Sudanese government by BNPP's assistance exceeded its entire military budget, leading to a massive increase in military expenditures (ten times what it had been prior to the Sudanese government's partnership with BNPP), which is why the Regime's "attacks on civilian populations . . . occurred with greater frequency and velocity after BNPP agreed to partner with" it. SAC ¶ 103, 120. Plaintiffs also allege that the government of Sudan used its newfound access to U.S. financial markets provided by BNPP to import sophisticated weapons from major arms suppliers in China, Russia, Ukraine, Iran and Belarus. *Id.* at ¶¶ 127-128. At this stage, those allegations are sufficient to demonstrate a

factual causal link between BNPP and the increase in human rights abuses.

b. Adequate Causation

The parties' experts agree on the fundamental definition of adequate cause. Professor Werro explains that "[a]n adequate causal link exists when the wrongdoer's conduct was capable, in the ordinary course of events and common experience, of leading to the kind of result that occurred." Werro Dec. ¶ 48. According to Professor Roberto, "an act is an adequate cause for a loss or damage if, based on the usual course of events and common experience, it can fairly be considered the cause of the kind of loss or damage that occurred." Roberto Dec. ¶ 38. In other words, the ultimate question of adequate cause is similar to that of proximate cause in United States common law, which is whether it is reasonable to consider this person's conduct the cause of the result that occurred. *See CSX Transp., Inc. v. McBride*, 564 U.S. 685, 692, 131 S. Ct. 2630, 2637, 180 L. Ed. 2d 637 (2011) ("The term 'proximate cause' is shorthand for a concept: Injuries have countless causes, and not all should give rise to legal liability."). Thus, also like proximate cause, the requirement of adequate cause works as a limit on legal liability in an otherwise infinite chain of but-for causal effects. *See* Roberto Dec. ¶ 36. According to Professor Roberto's (uncontested) translation of a Swiss Federal Supreme court case, "the answer to the question of adequacy is therefore based on a value judgment" in which the court decides whether a result "can reasonably be attributed the liable party." *Id.*

However, the experts disagree on how a court is to make this value judgment. Professor Werro argues that

the test is whether the result was "objectively foreseeable." Werro Dec. ¶ 50.[2] Professor Roberto argues that adequate cause "requires more than just foreseeability," as the contribution must also be "substantial," Roberto Dec. ¶¶ 31, 39. Again, Professor Roberto provides no citations to support his claim that a conduct must be a "substantial" contribution to the harm in order to be an adequate cause, and instead this appears to be his own interpretation of when the Swiss courts have found liability based on his reading of those cases. Professor Werro, who the Court determines to be credible, denies that the Swiss courts demand that an act be "substantial" in order to constitute adequate cause. Werro Dec. ¶ 49. The Court therefore determines, based on the experts reports, that a finding of adequate cause under Swiss tort law requires determining whether it would be "reasonable" to hold BNPP responsible for causing at least some of human rights abuses in Sudan, which includes looking at the factor of whether those atrocities were foreseeable to BNPP at the time.

In applying this standard to the instant case, the Court notes that this type of fact- intensive inquiry is not usually resolved on a motion to dismiss for failure to state a claim. In U.S. courts, the similar issue of proximate cause "generally remains an issue of fact for the jury," *Am. Tissue, Inc. v. Donaldson, Lufkin &*

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[2] Professor Werro cites only to a criminal law case for this proposition, which is not binding in the civil context. Werro Dec. ¶ 50, ¶ 48 n. 49. However, he maintains that the civil courts nonetheless adhere to this framework, and Professor Roberto appears to agree that the concept of foreseeability is one aspect of the determination, though as explained above, he argues more is required.

Jenrette Sec. Corp., 351 F. Supp. 2d 79, 91 (S.D.N.Y. 2004) (citing *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 840-41 (1996)), and thus is not decided at the pleadings stage "unless only one conclusion may be drawn from the established facts and the question of legal cause may be decided as a matter of law." *Johnson v. Bryco Arms*, 304 F. Supp. 2d 383, 395 (E.D.N.Y. 2004). A plaintiff need only plausibly allege facts from which a jury could find that the defendant's conduct should reasonably be considered a cause of the subsequent harm. *See, e.g., In re Barclays Liquidity Cross & High Frequency Trading Litig.*, 390 F. Supp. 3d 432, 450 (S.D.N.Y. 2019) ("Plaintiffs plausibly allege that the Exchanges' alleged misconduct was a proximate cause of the economic loss they suffered by trading in the manipulated securities markets" because "the zone of foreseeable risk created by the Exchanges' allegedly manipulative scheme included the risk that investors trading on the Exchanges' platforms would be victimized by the very products and services that the scheme allegedly concealed."). Nonetheless, a court may dismiss a compliant for failure to allege proximate clause if those allegations are wholly conclusory or if the set of facts alleged, even if true, are "too attenuated to satisfy the proximate cause requirement," or if the "chain of causation . . . is far too long to constitute proximate cause" or "rest[s] on mere conjecture" or "depend[s] on the intervention of multiple parties." *MF Glob. Holdings Ltd. v. PricewaterhouseCoopers LLP*, 43 F. Supp. 3d 309, 314-15 (S.D.N.Y. 2014). *See also In re Aluminum Warehousing Antitrust Litig.*, 833 F.3d 151, 163 (2d Cir. 2016) (affirming dismissal where plaintiffs had not alleged that defendant "proximately cause[d] the claimed injury . . . because [plaintiffs'] alleged injuries are too remote."). Here too, the Court will not dismiss

Plaintiffs' claim for lack of adequate cause unless the facts alleged demonstrate a causal link that is far too attenuated or remote to be considered reasonable.

The Court determines that Plaintiffs have plausibly alleged adequate cause, meaning that, assuming those allegations to be true, a jury could find that BNPP's provision of illegal financial services to the Sudanese regime can be reasonably considered to have directly resulted in at least some of the harm done to Plaintiffs. To be sure, Defendants correctly point out that the causal chain between BNPP conducting transactions for Sudan and the acts of murder, rape, assault, battery, displacement, and other horrendous acts of violence perpetrated on Plaintiffs has multiple links: BNPP provided the Sudanese government with a means to evade U.S. sanctions so it could access U.S. financial markets, in turn this allowed the Sudanese regime to generate significant profits from its oil industry, which permitted them to mobilize and equip armed forces that the Regime then directed to commit violent atrocities to secure more oil. SAC ¶¶ 101-135.

However, it is not just the mere *number* of links in the chain that determines whether it is reasonable to hold BNPP responsible, but also whether each subsequent link was the natural and foreseeable result of the former. The facts alleged in Plaintiffs' Second Amended Complaint, assuming they are true, demonstrate that BNPP knew or at least should have known that the Sudanese government was committing horrific abuses, that those abuses were committed with weapons and soldiers that were bought with funds generated by its relationship with BNPP, that the Regime would not otherwise be able to obtain those funds without BNPP deciding to break the law, and that

the purpose of that law was at least in part to prevent the Regime from continuing those abuses—which is why BNPP undertook measures to evade detection of its activities from the U.S. government, its shareholders, and the world. SAC ¶¶ 101-114.

Moreover, according to the Second Amended Complaint, the violence committed by the Sudanese government and the transactions with BNPP are linked by more than just one-way flows of cash. The Sudanese government was using its newly funded military force to monopolize the oil rich regions of Sudan, and in doing so engaged in ethnic cleansing, displacement, and murder of inhabitants of those regions. SAC ¶ 143-147. In other words, it was using the profits from its oil to obtain more oil. *Id.* at ¶ 143 ("Much of the focus of the [regime's] attacks was on civilians living in the path of oil development."). And the oil-centered focus of Sudan's human rights abuses, Plaintiffs allege, was widely reported at the time. SAC ¶¶ 153-162.

This is a key part of the cycle alleged by Plaintiffs: the more BNPP helped the Regime access U.S. dollars, the more money the Regime made from its oil industry, the more it could fund its military, the more oil it could produce by using armed forces to seize and develop oil rich lands, the more it needed access to U.S. dollars to sell the oil, the more money the Regime and BNPP made, the more BNPP helped the Regime access U.S. dollars. *See id.* Thus, BNPP allegedly knew or should have known not just that the profits it was helping generate would go towards genocide, but that it was able to generate those profits for the Regime (taking a cut for itself) in part *because of* genocide. In other words, it is more reasonable to consider BNPP the adequate cause of the violence when the violence was allegedly

perpetrated to *increase* and *continue* that profitable business relationship.

Defendants' remaining arguments are unpersuasive. First, they argue that Plaintiff has failed to state an Article 50.1 claim under what the parties refer to as the "Swisscom case." Def. Supp. at 18-19. In that case, which is the only case that Defendants' experts provided where a Swiss court has found that there was no adequate cause, the Swiss Federal Supreme Court declined to hold an internet servicer liable for the copyright infringement of third parties, even though it was aware of the infringement happening through the use of its platform and declined to block those webpages. *Id.* Defendants argue that this factual scenario is analogous to BNPP's conduct here, as it provided a "service" to the government of Sudan and thus should not be held liable as an accomplice for whatever the Regime did next. *Id.*

As Professor Werro persuasively explains, however, that case is factually distinguishable from this one. For one, the primary illegal conduct in that case under Swiss law was only the original uploading of the infringing material, not the subsequent consumption, and Swisscom did not become aware of the material until after it had already been uploaded. Werro Dec. ¶ 52, Pl. Opp. at 21. To the contrary, here, the atrocities were committed continually over almost a decade, allegedly both as a result of and in furtherance of BNPP's profitable financial relationship with the Regime. Most importantly, unlike the internet service provider in Swisscom and its hundreds of thousands of users, BNPP and the government of Sudan had a direct contractual and *illegal* relationship. It is therefore more reasonable to determine that BNPP is responsible for the harm caused by its transactions—transactions that were

illegal specifically because they would result in that harm—than the internet company that provided a legal service to members of the general public through automated transactions, only some of whom decided to use that service nefariously. The Court therefore cannot determine that the distinguishable Swisscom case alone bars Plaintiffs' claims at this stage of the litigation.

Lastly, Defendants point to cases in the United States in which BNPP and similar defendants prevailed on proximate cause at the motion to dismiss stage. Defendants cite *Osifi v. BNP Paribas*, where the District Court for the District of Columbia declined to find BNPP liable for a 1998 terrorist bombing of the U.S. embassies in Africa by al Qaeda as a result of its transactions with the Sudanese government (which allegedly had a financial relationship with the al Qaeda). *Ofisi v. BNP Paribas, S.A.*, 278 F. Supp. 3d 84, 91-92 (D.D.C. 2017). The court in *Osifi* determined that the element of proximate cause, as that concept is defined in United States' common law, had not been met because plaintiffs failed to allege that "BNPP participated in the attacks or provided money directly to any terrorist group, that any money BNPP processed for Sudan or Sudanese banks was transferred to al Qaeda prior to the attacks, or that Sudan would have been unable to assist al Qaeda without the funds that BNPP processed." *Id.* at 102. This non-binding authority is factually distinct from Plaintiffs' claim here. In their Second Amended Complaint, Plaintiffs allege that BNPP *directly* funded the perpetrator, i.e., the Sudanese regime itself, when it either knew or should have known what the perpetrator would do with those funds. That is sufficient to state a claim under Swiss law.

Similarly, Defendants point to *Rothstein v. UBS AG*, where the Second Circuit affirmed a decision to dismiss plaintiffs' claims against a bank for engaging in transactions with Iran that they alleged resulted in terrorist attacks by Hizbollah and Hamas, in part because the traditional proximate cause standard was not satisfied. 708 F.3d 82, 97 (2d Cir. 2013). This case is binding authority but readily distinguishable. The defendants in *Rothstein* were not alleged to have directly transacted with the perpetrators of the violence, Hamas and Hezbollah, and plaintiffs were not claiming that the government of Iran itself inflicted the atrocities. To the contrary, here, according to Plaintiffs' complaint, BNPP directly transacted with the Sudanese regime, which itself perpetrated the human rights abuses through its military, both with official armed forces and surrogate armed forces, which Plaintiffs sufficiently allege acted as de facto military. SAC ¶ 7, 14, 30, 120; *id.* at ¶ 33 (describing "backed militias wearing uniforms with a GOS insignia and carrying weapons, which he had seen them obtain from the police station and army barracks."). Plaintiffs have therefore sufficiently plead adequate causation under Swiss law.

* * *

Plaintiffs have plausibly alleged that BNPP consciously cooperated with the Sudanese regime, either knew or should have known that its assistance was contributing to the Regime's human rights abuses, and that this assistance was the natural and adequate cause of Plaintiffs' injuries. Plaintiffs have therefore stated a claim for relief under the Article 50.1 of the Swiss Code of obligations. The following claims therefore survive: Conspiracy to Commit Battery, Aiding and Abetting Battery, Conspiracy to Commit Battery in Performance

of a Public Duty or Authority, Aiding and Abetting Battery Committed in Performance of a Public Duty or Authority, Conspiracy to Commit Assault, Aiding and Abetting Assault, Conspiracy to Commit False Arrest and False Imprisonment, Aiding and Abetting False Arrest and False Imprisonment, Conspiracy to Commit Conversion, Aiding and Abetting Conversion, Conspiracy to Commit Wrongful Death, and Aiding and Abetting Wrongful Death Caused by Intentional Murder.

III. CONCLUSION

For the reasons stated above, Defendants motion to dismiss Plaintiffs claims for failure to state a claim under Swiss law is GRANTED IN PART AND DENIED IN PART. This resolves Dkt. No. 65. Discovery in this case was postponed pending resolution of the instant motion. Dkt. No. 24. The Court will schedule an initial pretrial conference by subsequent order and provide instructions for submitting a proposed case management plan.

SO ORDERED.

/s/ Alison J. Nathan
ALISON J. NATHAN
United States District Judge

Dated: February 16, 2021
New York, New York

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 24th day of October, two thousand twenty-four.

Before:

Denny Chin,
Susan L. Carney,
Richard J. Sullivan,
Circuit Judges.

ORDER
Docket No. 24-1446
Filed: October 24, 2024

BNP Paribas SA, a French corporation, BNP Paribas US Wholesale Holdings, Corp., F.K.A BNP Paribas North America, Inc.,

Petitioners,

v.

Entesar Osman Kashef, Abubakar Abakar, Abbo Ahmed Abakar, Hawa Mohamed Omar, Jane Doe, Nyanriak Tingloth, Nicolas Hakim Lukudu, Turjuman Ramadan Adam, Halima Samuel Khalifa, Ambrose Martin Ulau, Shafika G. Hassan, Jane Roe, Judy Doe,

Abulgasim Suleman Abdalla, Isaac Ali, Kuol Shbur, Judy Roe, Hamdan Juma Abakar, John Doe,
Respondents.

Petitioners move for a recall of the Court's mandate and for leave to file a petition for rehearing and rehearing en banc of the denial of their Rule 23(f) petition.

IT IS HEREBY ORDERED that the motion is DENIED.

For the Court:
Catherine O'Hagan Wolfe, Clerk of Court
/s/ Catherine O'Hagan Wolfe