UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
SPRINGFIELD DIVISION

SEXUAL MINORITIES UGANDA,	:	**CIVIL ACTION**
	:	
Plaintiff,	:	**3:12-CV-30051-MAP**
	:	
v.	:	**JUDGE MICHAEL A. PONSOR**
	:	
SCOTT LIVELY,	:	**MAGISTRATE JUDGE**
	:	**KATHERINE A. ROBERTSON**
Defendant.	:	
	:	**ORAL ARGUMENT REQUESTED**

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT SCOTT LIVELY'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

"The summary judgment stage is the put up or shut up moment in litigation." *Jakobiec v. Merrill Lynch Life Ins. Co.*, 711 F.3d 217, 226 (1st Cir. 2013). Through effusive rhetoric and optimistic surmise, Plaintiff Sexual Minorities Uganda ("SMUG") obtained permission from this Court to embark on a three-year transatlantic fishing expedition, which generated almost 40,000 pages of documents, tens of thousands of air miles, thousands of pages of deposition transcripts from over a dozen witnesses, and hundreds (if not thousands) of hours of work from SMUG's imposing army of no fewer than fourteen lawyers. The singular objective of SMUG's titanic mission was to find in the murky and treacherous waters of "international law" some – indeed *any* – connection between Defendant Scott Lively ("Lively") and the fourteen incidents of "persecution" allegedly perpetrated in Uganda, by and against Ugandans whom Lively has never even met. Disclaiming any concern for the ultimate destination of its groundbreaking lawsuit, SMUG sought to delay for as long as possible its inevitable impact with the inconvenient and immovable icebergs that stood in its way – the Constitution and the facts. The goal, according to SMUG, was never about the outcome but about the "advocacy" along the way, meaning the sufficiently severe punishment of opposing viewpoints with expensive litigation so that no one else, including Lively, would dare speak their conscience ever again.

SMUG's complaint survived dismissal because SMUG alleged a fantastic story of Lively, criminal mastermind, expertly manipulating the sovereign Parliament and homophobic illuminati of Uganda to hunt down Uganda's gays for violence, intimidation, and sport. But when it came time to "put up" the evidence for its farfetched fairytale, SMUG was instead forced to admit – over and over again, by and through each and every last one of its testifying officers and directors – that SMUG came to this Court with nothing, and that SMUG's expansive expedition has revealed nothing. Rarely do a plaintiff's own witnesses sing such an uninterrupted and uniform chorus of

hundreds of "I don't knows" in response to *the same* unsurprising questions about the who, what, when and where of a supposed "conspiracy," that it takes over *thirty pages* to merely *summarize* them. But here, SMUG's witnesses did precisely that, testifying repeatedly and unambiguously that they and SMUG "don't know" of "*any* connection" whatsoever between Lively and the fourteen persecutory incidents or their alleged perpetrators. Leaving no room for creative word games about what "any connection" means, SMUG's witnesses admitted, time and time again, that SMUG has no knowledge of any "communications," let alone "agreements," between Lively and the alleged perpetrators; that SMUG has no knowledge of "*any assistance at all*" provided by Lively to the alleged perpetrators; and that SMUG has no knowledge of "any facts that would show that Scott Lively was responsible" for any of these fourteen incidents.

And then, there's David Kato. Ever since the tragic and truly regrettable 2011 death of SMUG's co-founder, SMUG's leaders have made him the centerpiece of their worldwide claims of persecution, unashamedly claiming – at international fundraisers and through media channels as diverse as the *New York Times* and *Pink News* – that Kato was killed "because of his work," two years after Lively fomented unprecedented levels of homophobia and hysteria in Uganda. Even in this litigation, SMUG implied in no uncertain terms that Kato was killed because of Lively's speech, and, on the day that SMUG's lawsuit was filed, SMUG's advocates in Springfield paraded and planted a life-size coffin with Kato's picture in front of Lively's ministry. Under oath at their depositions, however, SMUG's officers admitted that they have all known since 2011 – a year before filing this lawsuit – that Kato was killed by a homosexual acquaintance over a sexual dispute, and most certainly not "because of his work" or because of anything that Lively has ever said. Caught in a sanctionable misrepresentation, SMUG's lawyers have tried to maintain, incredibly, that they only included the allegations about Kato in the Amended Complaint for

context, not to insinuate that Kato was killed because of homophobia but simply to let the Court know why Kato would not be in the courtroom. SMUG, however, eviscerated that implausible explanation by testifying, under oath, that SMUG itself believes (along with any objective reader) that the allegations in paragraphs 10, 221 and 222 of its Amended Complaint did, in fact, wrongly suggest that Kato was killed because of his LGBT status and advocacy, at a time when SMUG knew otherwise. This gross deception alone is worthy of a dismissal sanction.

SMUG's deception and evidentiary failures, however, are the least of the problems for its "groundbreaking" lawsuit. Before the Court can even get to the "merits" of SMUG's claims, the Court must grant summary judgment on numerous jurisdictional, constitutional and legal grounds which sink SMUG's ship.

First, as shown in Section II, SMUG's claims are precluded by the jurisdictional presumption against extraterritoriality, because SMUG has no knowledge of any wrongful domestic conduct by Lively whatsoever, and SMUG also does not allege any domestic injury. SMUG admits that it has no knowledge of any action taken by Scott Lively in the United States directed towards assisting any of the specific persecutory acts it alleges, and SMUG further admits that it has no knowledge of any action taken by Lively in the United States to deprive any Ugandan person of fundamental rights based on sexual orientation and gender identity. These admissions conclusively establish that SMUG's claims do not "touch and concern" the United States, thereby depriving this Court of subject-matter jurisdiction.

Second, as demonstrated in Section III, SMUG's claims are barred by the act of state doctrine, because they would require this Court to inquire into the legality of official acts of the sovereign government of Uganda and its officials, which this Court cannot do.

Third, Section IV demonstrates that this Court lacks subject-matter jurisdiction over SMUG's claims under the Alien Tort Statute because SMUG has no evidence that Lively has violated any universally accepted and clearly defined international legal norms.

Fourth, as shown in Section V, even if this Court had jurisdiction over SMUG's claims, those claims are firmly foreclosed by the First Amendment, because Lively's alleged conduct is core political speech and is neither incitement nor integral to the commission of any crime. Moreover, the First Amendment precludes the imposition of guilt by association against Lively, and SMUG cannot in any way show that Lively personally agreed to employ the illegal means of the fourteen persecutory acts it alleges. Lively's interactions with the Ugandan government are not only legal, but also immune from liability under the *Noerr-Pennington* doctrine.

Fifth, SMUG lacks standing to bring this action because it has no evidence of any concrete and particularized injury, it cannot demonstrate any causal connection between its non-existent injuries and Lively, and its claimed injuries are not redressable by this Court in any event. These additional jurisdictional bars are discussed in Section VI.

Sixth, all of SMUG's claims sound in tort and require SMUG to prove damages as an essential element. But, as demonstrated in Section VII, SMUG has no admissible and competent evidence of any damages. SMUG withheld its damages computation from Lively during the entire period of fact discovery, because SMUG swore under oath that it needed an expert to calculate them. SMUG then utterly failed to disclose any expert witness on damages. Instead SMUG tried to sneak in its damages computation through a lay witness more than four months after close of fact discovery, but its lay witness could not answer a single question about SMUG's damages because those purported damages had been calculated by a financial expert whom SMUG did not

disclose. SMUG has utterly deprived Lively of any meaningful opportunity to probe and rebut SMUG's damages in discovery.

Seventh, as shown in Section VIII, all of SMUG's tort claims also fail as a matter of law because SMUG has no competent or admissible evidence as to causation, another indispensable element. SMUG's own witnesses have repeatedly disclaimed any knowledge of any facts connecting Scott Lively to any of the persecutory acts alleged by SMUG.

Eighth, SMUG's claims also fail as a matter of law because SMUG has no competent evidence to prove any of their other essential elements, besides damages and causation. This is demonstrated in Section IX.

Finally, Section X shows that SMUG's state law claims fail as a matter of law because the Court lacks diversity jurisdiction; because the Court should not exercise supplemental jurisdiction; and because the claims are time barred. SMUG has admitted that it believed as of March 7, 2009 at the latest that Lively was persecuting and injuring it, and SMUG considered suing Lively at that time, but it did not file this lawsuit until March 14, 2012, more than three years later and outside of the applicable statute of limitations.

In sum, SMUG came to this Court with nothing, found nothing, and should be given nothing. Lively's motion for summary judgment should be granted.

MATERIAL FACTS OF RECORD AS TO WHICH THERE IS NO GENUINE ISSUE TO BE TRIED

Pursuant to L.R. D. Mass. 56.1, Lively identifies the following material facts of record as to which there is no genuine issue to be tried:

LIVELY'S BACKGROUND AND CHRISTIAN VIEWS ABOUT HOMOSEXUALITY.

1. Scott Lively is an American pastor and pro-family activist. (Declaration of Scott Lively ("Lively Decl.,") ¶ 4, attached hereto as **MSJ Exhibit A**). In his teenage and young adult

years, Lively was an alcoholic and drug addict, whose life was eventually changed radically by his faith in Jesus Christ. (*Id*. at ¶ 5).

2. Lively believes that the purpose of life is to be conformed to the character of Jesus Christ, through a life-long series of challenges uniquely designed for each person by God Himself. (*Id*. at ¶ 6(a)). He believes that same-sex attraction is a challenge faced by many, and is no more or less immoral than the temptation to steal or to commit adultery. (*Id*. at ¶ 6(b)).

3. In Lively's Christian worldview, what distinguishes homosexuality (the indulgence of same-sex attraction) from other sins is that some of those who practice it have created a social and political movement to normalize and legitimize it, sometimes referred to, variously, as the "homosexual movement," "homosexual agenda," "gay movement," or "gay agenda." (*Id*.)

4. Lively believes that it is his Christian duty to oppose the gay agenda, because it is counter to Judeo-Christian civilization as God designed it for the benefit of mankind. (*Id*. at ¶ 6(f)).

5. However, Lively draws a clear distinction between the gay movement and those persons who struggle with same-sex attraction and homosexual conduct. (*Id*.). Lively believes it is his Christian duty to love as individuals all persons who identify as homosexual or commit the sin of homosexuality. (*Id*.) Lively does not believe that homosexuals should be singled out for condemnation, and certainly never for threats or violence. (*Id*. at ¶ 6(d)). Lively is firmly opposed to any violence against, or ridicule, ostracism or vilification of, any person, including any person who identifies as homosexual. (*Id*. at ¶ 6(i)). Lively abhors the idea of forcibly "outing" persons who want to keep their consensual, adult sexual activities private and discrete. (*Id*. at ¶ 6(j)).

6. Lively believes the law should allow consenting adults to make wrong choices in their private sexual conduct. (*Id*. at ¶ 6(g)). To encourage traditional man-woman marriage, which he believes to be the best and most optimal societal arrangement for the raising of children, Lively

would favor misdemeanor criminalization of any sexual act outside of marriage, including adultery, fornication, and homosexual conduct. (*Id*.) Lively, however, would urge for very modest penalties for such conduct in the letter of the law, and even more relaxed and minimal application of such laws to preserve the ability of all individuals to live their lives privately and discretely. (*Id*.)

7. Lively is opposed to the government spying on people, barging into bedrooms, or otherwise intruding into private sexual conduct between consenting adults. (*Id*. at ¶ 6(h)).

8. Lively is firmly opposed to any attempt to criminalize or punish any form of "status" or sexual "identity" or "orientation," separate and apart from sexual conduct. (*Id*. at ¶ 6(k)).

9. While Lively would be in favor of prohibiting the promotion of homosexual conduct to children and youth, he would be against prohibiting homosexual persons or organizations from using legal means and the democratic process to advocate for changes to laws they oppose. (*Id*. at ¶ 6(l)).

SMUG HAS NO KNOWLEDGE THAT LIVELY DID ANYTHING UNLAWFUL DURING HIS 2002 TRIPS TO UGANDA.

10. In March 2002, Lively accepted a last-minute invitation to fill-in for a speaker at a conference in Kampala organized by Stephen Langa, covering the subject of "The Threat of Pornography and Obscenity in Uganda." (Lively Decl., ¶ 8) (Declaration of Stephen Langa ("Langa Decl.") ¶ 4, attached hereto as **MSJ Exhibit B**).

11. While Lively may have referenced homosexuality in passing at the March 2002 conference, the focus of the conference was pornography and obscenity, not homosexuality. (Lively Decl., ¶ 9; Langa Decl., ¶ 5).

12. At Langa's invitation, Lively returned to Uganda in June 2002, to do several public speaking events focusing on pornography, obscenity, abstinence, God's design for marriage and family, and Christian living. (Lively Decl., ¶¶ 10-13; Langa Decl., ¶¶ 6-9).

13. As with the prior trip, in June 2002 Lively touched briefly upon homosexuality as one of many topics, but the focus of the trip was pornography, obscenity, abstinence and Christian living, not homosexuality. (Lively Decl., ¶ 14; Langa Decl., ¶ 10).

14. During either of his 2002 visits to Uganda, Lively did not discuss the concepts of "promotion of homosexuality" or "recruitment" of youth into homosexuality. (Lively Decl., ¶ 15; Langa Decl., ¶ 11). Lively also did not discuss or advocate strategies on the criminalization of "promotion of homosexuality." (*Id*.)

15. SMUG is aware that Lively visited Uganda in 2002 to speak at a conference. (Deposition of Plaintiff Sexual Minorities Uganda Pursuant to Fed. R. Civ. P. 30(b)(6), through its designee Pepe Onziema ("Onziema"), 204:7-10). SMUG does not know, and has no evidence about, what was said at the conference. (*Id*. at 206:10-207:8; 209:12-15) (*See also*, Deposition of SMUG's Executive Director Frank Mugisha ("Mugisha"), 140:4-141:10; 148:14-149:17; Deposition of SMUG's Chairman of the Board, Samuel Ganafa ("Ganafa"), 118:6-21).

16. SMUG also does not know, and has no evidence about, what Lively might have discussed with Stephen Langa or Martin Ssempa in 2002. (Onziema 209:16-24).

17. At its deposition, SMUG could not identify any specific statements made by Lively in Uganda in 2002. (Onziema 209:25-210:9) (*See also*, Ganafa 162:13-16; 201:5-203:5).

18. SMUG also could not identify what evidence it could or would present at trial to show what Lively said in Uganda in 2002. (Onziema 210:10-211:21).

19. The only thing that SMUG knows today about Lively's visit to Uganda in 2002 is what may be contained on a recording of a TV show appearance by Lively and Ugandan Pastor Martin Ssempa following the June 2002 conference. (Onziema 204:11-24). SMUG claimed that it did not have a copy of this video at the time of its deposition (*id*. at 205:12-14), but produced it subsequently, after the close of fact discovery.

20. The 2002 TV show was about pornography's role in the sexual revolution. (Lively Decl. ¶ 13; Langa Decl. ¶ 9). The show did not focus on the gay agenda. (*Id*.) During the 2002 TV show, Lively did not discuss the criminalization of homosexuality, nor the criminalization of the "promotion of homosexuality," nor the toughening or changing of laws dealing with homosexuality. (*Id*.)

LIVELY HAD NO SUBSTANTIVE CONTACT WITH UGANDA OR UGANDANS BETWEEN JUNE 2002 AND MARCH 2009, AND SMUG HAS NO KNOWLEDGE THAT LIVELY DID ANYTHING UNLAWFUL IN THIS TIMEFRAME.

21. SMUG has no knowledge of anything Lively did or said in or toward Uganda between June 2002 and March 2009. (Onziema 216:5-13; Ganafa 203:6-13).

22. Between June 2002 and March 2009, Lively did not have substantive contact with Uganda or Ugandans. (Lively Decl. ¶¶ 16-18; Langa Decl. ¶¶ 12-15). Lively had a brief social meeting with Langa when Langa visited the United States in 2005 or 2006 – they went to a museum (with Lively's wife), and did not engage in any ministry, advocacy or other public activities. (Lively Decl. ¶ 17; Langa Decl. ¶ 12).

23. Beyond the social visit with Langa, Lively's only other contact with Uganda prior to March 2009 was through a handful of sporadic emails with Langa and a representative of Martin Ssempa, all of which are attached as Exhibits 1, 2, 3, and 4 to the Lively Declaration. (Lively Decl. ¶¶ 18(a)-(e); Langa Decl. ¶¶ 13-15). In these communications, Lively, Langa and Ssempa's

representative discussed the timing and logistics of a conference on homosexuality in Uganda, which was eventually scheduled for March 5-7, 2009. (*Id*.)

24. Other than providing Langa with a cursory and general outline of his presentation for the upcoming seminar in late February 2009, Lively's communications with Langa and Ssempa's representative did not involve substantive discussions of strategies, polices or laws regarding homosexuality. (Lively Decl. ¶¶ 18(a)-(e), 19, and Exhibits 1-4; Langa Decl. ¶¶ 13-15, and Exhibit 1).

SMUG CLAIMS THAT "HOMOPHOBIA," "PERSECUTION," AND ATTEMPTS TO CRIMINALIZE "PROMOTION OF HOMOSEXUALITY" AND "RECRUITMENT" OF CHILDREN INTO HOMOSEXUALITY WERE PREVALENT IN UGANDAN SOCIETY BETWEEN 1999 AND MARCH 2009, AND SMUG HAS NO KNOWLEDGE OF ANY FACTS LINKING ANY OF IT TO LIVELY.

25. SMUG is aware that in 1999, the President of Uganda "launched a fierce attack on homosexuality and said gays should be sent to jail." (Onziema 173:4-12; Mugisha 226:4-18; Ganafa 114:9-115:9). SMUG is not aware of any facts showing that Lively influenced this "fierce attack." (Ganafa 115:10-14).

26. SMUG's Chairman of the Board acknowledged that in 2002 "homophobic sentiment," "abuse" and "fear" were already prevalent in Ugandan society, such that homosexuals were experiencing denial of health services. (Ganafa 19:8-20:13; 22:5-23).

27. In 2002, it was already "not possible, according to the laws of Uganda, to register a homosexual organization." (Ganafa 24:14-16).

28. SMUG does not doubt that Ugandan press and media were reporting in 2003 stories about gay people "preaching homosexuality" to youth. (Onziema 172:14-173:3; Mugisha 227:7-18).

29. "Homophobia" and "Persecution" were present in Uganda in 2004, and SMUG's co-founder, Victor Mukasa, does not know of any connection between Lively and the "homophobia" and "persecution." (Deposition of SMUG co-founder Victor Mukasa ("Mukasa"), 96:2-98:5).

30. SMUG is aware that, in 2004, a Ugandan radio station was fined for featuring openly gay guests who said homosexuality is an acceptable way of life, which led Uganda's information minister to declare that "we are not going to give [homosexuals] the opportunity to **recruit** others." (Onziema 173:4-175:11) (emphasis added) (Mukasa 133:8-134:12).

31. SMUG is aware that, in 2005, Uganda's Media Council banned the performance of a play because it was "a **promotion** of homosexuality, lesbianism, and worship of the female sex organ." (Onziema 175:12-176:24) (emphasis added) (*See also*, Mugisha 229:6-230:20). The Ugandan government was discussing its opposition to the "promotion of homosexuality" in 2005. (Ganafa 120:3-121:3). SMUG has no knowledge of any connection between Lively and this incident or related statements. (Onziema 176:25-177:4; Mugisha 230:8-20; Ganafa 121:7-10).

32. SMUG agrees that, "as of 2006 persecution of homosexuals was not new in Uganda." (Onziema 182:4-13; Ganafa 127:3-8; Mukasa 123:21-124:8).

33. SMUG agrees that, in 2006, Uganda was already engaged in "an active campaign of legislative overkill" against LGBTI rights "to silence an emerging community." (Ganafa 127:24-128:23; Mukasa 126:4-127:3). SMUG has no knowledge of "any connection between Scott Lively and any of those things." (Ganafa 128:24-129:3) (*See also*, Mukasa 127:4-8).

34. SMUG is aware that, in 2006, Muslim leaders in Uganda were publically calling for the arrest of those engaged in homosexual conduct. (Onziema 184:17-186:4; Ganafa 121:11-

122:8; Mukasa 119:1-120:7). SMUG is not aware of "any connection between [those] statements and Scott Lively." (Onziema 186:5-10) (*See also*, Ganafa 123:11-17; Mukasa 120:4-121:10).

35. According to SMUG, in 2007 the Ugandan President's attitude towards LGBTI persons was "consenting to kill them." (Deposition of SMUG Research and Documentation Manager Richard Lusimbo ("Lusimbo"), 257:9-258:12). SMUG has no knowledge that Lively informed the Ugandan President's attitude towards LGBTI people in 2007. (*Id*. at 258:13-20).

36. SMUG is aware that, in an opinion column in 2007, a former minister of justice and constitutional affairs wrote that "[h]omosexuality, lesbianism, and the like are a morally corrupting influence on the youth." (Onziema 177:5-178:9 and Deposition Exhibit F; Ganafa 145:7-146:12; 146:17-23). SMUG has no knowledge of any communication or connection between that author or statement and Scott Lively. (Onziema 178:10-13; Mugisha 232:3-9; Ganafa 146:13-16; 146:24-147:5).

37. SMUG is aware that, in 2007, the Nigerian Parliament was considering a bill that would have "**criminalize[d] advocacy** or associations supporting the rights of lesbian and gay people." (Onziema 186:11-188:17 (emphasis added); Mukasa 193:6-21). SMUG is not aware of "any connection between Scott Lively and the Nigerian bill." (Onziema 189:6-9) (*See also*, Mukasa 194:4-195:14).

38. SMUG is aware that, in 2008, Ugandan newspapers were writing that homosexuals "want to **recruit** our children through sex education programs," and calling upon "[a]ll Ugandans and Africans … to **stop the homosexual agenda**." (Onziema 178:14-179:21) (emphasis added).

39. Indeed, SMUG has "no doubt" that "ideas such as the promotion of homosexuality, or homosexual recruitment of children, or the idea of stopping the homosexual agenda appeared

in Ugandan media in 2008." (Onziema 179:22-180:3). The idea of recruitment of children into homosexuality was being talked about in Uganda in September of 2008. (Ganafa 150:6-10).

40. SMUG acknowledges that it is possible for Ugandans to formulate their own ideas on LGBTI advocacy – both pro and con – without having those ideas "pumped into them by people from the west." (Ganafa 144:10-145:6) (*See also*, Mukasa 121:6-10).

IN 2007, SMUG CONDUCTED A VISIBLE, 45-DAY "LET US LIVE IN PEACE" MEDIA CAMPAIGN, WHICH TRIGGERED "ANGRY RESPONSE," "A LOT OF BACKLASH," AND CALLS FOR LEGISLATIVE ACTION, AND SMUG HAS NO KNOWLEDGE OF ANY FACTS LINKING ANY OF IT TO LIVELY.

41. In the summer of 2007, SMUG conducted a visible, 45-day public relations campaign it called "Let us Live in Peace." (Onziema 155:18). The campaign triggered backlash from both the government and citizens of Uganda. (Onziema 155:19-23; Mukasa 95:17-96:20). "There was a lot of backlash that [SMUG] did not anticipate." (Onziema 201:7-19). "There [was] an angry response to the event. Churches and mosques preached and rallied against it." (Onziema 217:5-219:22 and Deposition Exhibit 5G[1] at p. 6).

42. Among the immediate backlash was a statement in August 2007 by Ethics and Integrity Minister Nsaba Buturo that "[t]he government will not tolerate anyone who **lures others into lesbianism** and homosexuality. It should not be allowed to pursue an agenda of **indoctrinating our children** to homosexuality." (Onziema 198:8-199:23 and Deposition Exhibit ZZZ) (emphasis added) (*See also*, Ganafa 133:5-25). These statements were disseminated widely in Ugandan media. (Onziema 199:24-200:8). As of August 2007, the idea of homosexual

[1] SMUG initially designated Exhibit 5G as "CONFIDENTIAL" under the Protective Order. (*See* Confidentiality Order, dkt. 106). However, at its deposition SMUG acknowledged that the report had been shared publicly. (Onziema 232:6-18). Lively objected to the designation (*id*. at 232:24-233:4), and SMUG did not move the Court to retain the designation. Accordingly, the document is no longer confidential under the Protective Order. (*See* Confidentiality Order, dkt. 106, ¶ 9, p.7).

"recruitment of children" "was part of the public discussion in Uganda." (Ganafa 134:2-6; 157:12-158:3). **SMUG has no knowledge of any connection between Scott Lively and these statements**. (Onziema 200:9:19; Ganafa 134:7-19).

43. A few weeks after SMUG's media campaign, SMUG publicly expressed its "serious concern" that Ugandan minister Buturo had said in a newspaper interview that "the government was considering changing the laws so that **promotion of homosexual conduct itself becomes a crime**." (Onziema 191:14-193:7 and Deposition Exhibit XX) (emphasis added) (*See also*, Ganafa 136:10-138:6; Mukasa 205:17-206:19). Thus, in 2007 the Ugandan government was already engaged in attempting to criminalize "promotion of homosexual conduct," and SMUG was actively advocating against those efforts. (Ganafa 134:2-6; 138:3-6). **SMUG has no knowledge of any communications between Lively and Buturo, or "any assistance at all provided by Scott Lively to Minister Buturo in connection with making these statements."** (Onziema 408:10-409:15) (emphasis added) (*See also*, Ganafa 134:7-15; Mukasa 206:2-7).

44. SMUG's leaders, including co-founder David Kato, Programs Director Pepe Onziema, Chairman of the Board Sam Ganafa and Research and Documentation Manager Richard Lusimbo did **not** attribute the 2007 backlash to Scott Lively. (Onziema 156:15-157:11; Ganafa 134:7-20; 157:8-11; Lusimbo 262:7-262:15). In fact, **SMUG does not have "any knowledge of any facts that would show that Scott Lively was involved in any backlash against SMUG or the LGBTI community following the 2007 campaign**." (Onziema 202:6-10) (emphasis added).

45. Instead, SMUG attributed the backlash to the fact that, in 2007, "95 percent of Ugandans are against homosexuals and homosexuality" (Onziema 220:4-10, and Deposition Exhibit 5G at p. 6).

46. SMUG also attributed the backlash to the fact that, as of 2007, "myths such as [homosexuals] are **recruiting** others into homosexuality" were prevalent in Ugandan society. (Onziema 220:19-221:9, and Deposition Exhibit 5G at p. 6) (emphasis added). SMUG noted the prevalence of these arguments in a report it submitted to the Ugandan government. (*Id*.)

SMUG HAS NO KNOWLEDGE THAT LIVELY DID ANYTHING UNLAWFUL DURING HIS MARCH 5-7, 2009 VISIT TO UGANDA.

47. Lively returned to Uganda for his third and final trip during March 5-7, 2009, at the invitation of Stephen Langa, to be one of several speakers at a conference on homosexuality. (Langa Decl. ¶¶ 13, 15).

48. Langa's purpose in holding the conference was "to provide correct information on homosexuality and expose homosexual lies, agenda and propaganda." (Langa Decl. ¶ 13 and Exhibit 1).

49. Langa's purpose was not to change Ugandan laws on homosexuality, and none of his pre-conference communications with Lively discussed governmental strategies, policies or laws regarding homosexuality, except to inform Lively in a passing reference on the week before the conference that homosexuality was illegal in Uganda. (Lively Decl. ¶ 19; Langa Decl. ¶ 15).

50. When he agreed to speak at the March 2009 conference, Lively did not contemplate Ugandan law regarding homosexual conduct, and had no intention of influencing new Ugandan law on homosexuality. (Lively Decl. ¶ 19).

51. Prior to arriving in Uganda, Lively had no knowledge of any desire or effort to change Ugandan laws on homosexuality. (Lively Decl. ¶ 19).

52. If Lively had known prior to the March 2009 conference that anyone intended to use his participation to advance a law containing the death penalty for homosexual conduct, he would not have participated in the conference. (Lively Decl. ¶ 33).

53. On the day after he arrived in Uganda, Lively gave an informal talk to a few members of the Ugandan Parliament, which lasted about an hour. (Lively Decl. ¶ 20; Langa Decl. ¶ 15).

54. SMUG does not know how many Members of Parliament were present at the talk given by Lively. (Onziema 414:9-19; Mukasa 314:2-8). No one at SMUG has knowledge of a four-hour meeting between Lively and Members of Parliament, as alleged in paragraph 78 of SMUG's Amended Complaint. (Mugisha 189:18-190:19; Mukasa 314:9-13).

55. SMUG has no admissible evidence about what Lively said to Members of Parliament, because SMUG's entire knowledge about that event comes from the alleged hearsay report of a "commentator or the news anchor" in a news broadcast that SMUG can't remember specifically, and which SMUG has not produced in this litigation. (Onziema 414:20-416:11) (*See also,* Mugisha 188:19-189:17; Ganafa 204:10-19; Mukasa 313:21-314:1).

56. **Less than ten (out of 385) Members of Parliament were present for Lively's talk**, although there were a few other people present. (Declaration of Principal Research Officer for the Parliament of Uganda, Charles Tuhaise ("Tuhaise Decl.,"), ¶ 4, attached hereto as **MSJ Exhibit C**).

57. After he arrived in Uganda, but before he gave the talk at Parliament, Lively learned from Langa that some members of Parliament were contemplating a new law, but neither Lively nor Langa knew the details or timing of the legislative proposal. (Lively Decl. ¶ 20; Langa Decl. ¶ 16).

58. With this in mind, Lively urged the handful of Parliament members present and the others in the audience that they should liberalize Uganda's criminal ban on homosexuality, and

that they should focus on voluntary counseling and education instead of incarceration for those who violate the law. (Lively Decl. ¶ 20; Langa Decl. ¶ 16; Tuhaise Decl. ¶ 4).

59. Lively also told his audience that those struggling with homosexuality do not deserve to be jailed, as under the existing law, but deserve the chance to overcome homosexual conduct through voluntary counseling and education. (Lively Decl. ¶ 20; Langa Decl. ¶ 16; Tuhaise Decl. ¶ 4).

60. At the same meeting, Lively also urged tolerance, restraint and respect for persons struggling with homosexuality in any new law dealing with homosexual conduct. (Tuhaise Decl. ¶ 4).

61. At the meeting at Parliament, Lively did not advocate for tougher criminal punishments for homosexual conduct; did not advocate for the death penalty for any form of homosexual conduct or sexual crimes; and did not advocate for the punishment of life imprisonment for any form of homosexual conduct of sexual crimes. (Lively Decl. ¶ 21; Langa Decl. ¶ 16).

62. The Principal Research Officer of Uganda's Parliament, Charles Tuhaise, disagreed with Lively's view, because Tuhaise was of the opinion that Uganda's laws against homosexual conduct, and the criminal punishments prescribed, should be strengthened, not relaxed. (Tuhaise Decl. ¶ 5).

63. Tuhaise had not met Lively up to this point, and Tuhaise's views on homosexual conduct and the law were not informed from, or based upon, Lively's views, opinions, speeches and writings, but were instead based upon Tuhaise's own experience in and observations of Ugandan society. (Tuhaise Decl. ¶¶ 3, 6). Tuhaise is personally aware that many members of Parliament share his views. (*Id*. at ¶ 7).

64. Following his talk at Parliament, Lively attended the conference itself, where he was one of three speakers. (Lively Decl. ¶ 23 and Exhibit 6.).

65. Lively estimates that there were thirty to forty people present for his lectures. (Lively Decl. ¶ 23). SMUG estimates the number of attendees to be closer to seventy. (Onziema 394:24-395:9). At least five of the attendees were SMUG personnel. (Onziema 372: 15-19).

66. The two speakers before Lively, Caleb Brundidge and Don Schmierer, talked about healing, love and caring for people who identify as homosexual. (Lively Decl. ¶ 24).

67. In Lively's lectures at the conference, he presented his views, opinions and research regarding homosexuality. (Lively Decl. ¶ 25 and Exhibit 6). Lively repeatedly cautioned his audience that he does not hate anyone or want violence against anyone; that there is a clear distinction between homosexual people and the homosexual movement; and that they have a responsibility to treat people as fellow human beings, and creations of God, who deserve our respect, even if we disagree with everything the people do or say. (Lively Decl. ¶¶ 25(a)-(b) and Exhibit 6).

68. Specifically when discussing Lively's views regarding variance from "gender normalcy" and the "very few" people who experience extreme dysfunction, Lively again cautioned and emphasized that "I don't want anybody to get the wrong idea . . . I don't want to dehumanize these people. They are human beings suffering extreme forms of dysfunction." (Lively Decl. ¶¶ 25(d) and Exhibit 6).

69. Lively had been made aware by Langa in advance of the conference that people who support expansion of LGBTI rights would be in attendance. (Langa Decl. ¶ 15). Lively was also informed that the conference would be recorded, and he observed several attendees who

appeared to be recording his lectures, which he did not mind. (Lively Decl. ¶ 23 and Exhibit 4, p. 2).

70. Lively had an open and cordial exchange of opposing viewpoints and differing ideas with the people in the audience who supported expansion of homosexual rights and who disagreed with his views. (Lively Decl. ¶ 26, and Exhibit 6).

71. Bishop Christopher Senyonjo – a highly visible local religious figure who openly advocates for homosexual rights in Uganda, and who was excommunicated by the Anglican Church of Uganda – was in attendance, and was allowed to freely express his viewpoints, some of which were quite contrary to Lively's. (Lively Decl. ¶ 26, and Exhibit 6). In the end, the Bishop thanked Lively for being there and for expressing his views, saying that the Bishop was "very, very grateful" for becoming "more educated in this area." (*Id*.) The Bishop said that "we may have different views, be we need to learn from each other." (*Id*.)

72. In connection with the March 2009 conference, Lively also spoke to several church, university, and school assemblies, met with local Christian leaders, and made several media appearances. (Lively Decl. ¶ 27). When discussing homosexuality, Lively repeated his message that those involved in homosexual conduct should be treated with dignity and respect because they are fellow human beings made in the image of God. (*Id*.)

LIVELY'S ONLY CONTRIBUTION TO THE ANTI-HOMOSEXUALITY BILL OF 2009 AND THE ANTI-HOMOSEXUALITY ACT OF 2014 WAS TO REPEATEDLY URGE THEIR MODERATION AND THE DRASTIC REDUCTION OF CRIMINAL PENALTIES, TO MAKE THEM EVEN LOWER THAN EXISTING LAW.

73. Lively does not recall meeting or speaking with member of Parliament David Bahati during Lively's talk at Parliament, or at any other time during any of his visits to Uganda. (Lively Decl. ¶ 22).

74. The Principal Research Officer of Uganda's Parliament, who is personally familiar with the inception, drafting and debate of Uganda's Anti-Homosexuality Bill of 2009 ("AHB"), and with the passage, enactment and annulment of Uganda's Anti-Homosexuality Act of 2014 ("AHA"), believes that the notion that Scott Lively introduced the concepts of homosexual recruitment of children, or promotion of homosexuality to children, or homosexual abuse of children into a Ugandan society previously unaware of such things is false and ridiculous. (Tuhaise Decl. ¶ 14).

75. In 2008, **almost one year prior to the March 2009 conference**, some members of Parliament perceived a need to toughen Uganda's law against homosexual conduct, based upon a number of serious problems they were hearing about from Ugandan citizens and Ugandan media, including rising sex tourism, the abuse and "recruiting" of young boys by wealthy males from outside Uganda, the "promotion" of homosexual practices to youths through literature, money and gifts, and the knowing and intentional spread of HIV/AIDS through unprotected homosexual contacts. (Tuhaise Decl. ¶ 15). Based upon these reports, some members of Parliament began the process of drafting the AHB in 2008. (*Id*. at ¶ 16).

76. The members of Parliament did not consult Scott Lively, or any of his speeches or writings, in concluding that there was a need for the AHB, or in developing or drafting any of its provisions. (Tuhaise Decl. ¶ 13).

77. Neither Stephen Langa nor Martin Ssempa were involved in the initial drafting of the AHB. (Tuhaise Decl. ¶ 17; Langa Decl. ¶ 21). They only became involved in late-April 2009. (*Id*.)

78. By the time Langa and Ssempa became involved with the AHB, the draft was already in progress, and it already included the opening principles, the discussion of the need to protect children and youth from sexual abuse, the death penalty for aggravated offenses, the prohibition on the

promotion of homosexuality, and the reporting requirements for persons in authority. (Tuhaise Decl. ¶ 17; Langa Decl. ¶ 21). Those provisions did not originate with either Langa or Ssempa. (*Id*.)

79. Six weeks after the March 2009 conference, Martin Ssempa forwarded the draft AHB to Lively, and requested his comments. (Lively Decl. ¶¶ 30-31; Langa Decl. ¶ 22). This was the first time Lively saw the draft AHB, and it was already constituted to include the opening principles, the discussion of the need to protect children and youth from sexual abuse, the death penalty for aggravated offenses, the prohibition on the promotion of homosexuality, and the reporting requirements for persons in authority. (Lively Decl. ¶ 31; Langa Decl. ¶ 22).

80. Lively had no involvement whatsoever in the drafting of the AHB up to that point. (Lively Decl. ¶ 31).

81. Lively was appalled at seeing the AHB, because it and its draconian penalties were not at all consistent with his beliefs or advocacy. (Lively Decl. ¶ 31). Lively suggested drastic reductions in the proposed penalties (to even lower levels than under existing law), proposed two new provisions focusing on education and counseling, and issued a blanket admonition to reconsider the approach of the AHB to focus on counseling instead of punishment. (Lively Decl. ¶ 31 and Exhibit 10; Langa Decl. ¶ 22).

82. Langa, Tuhaise, members of Parliament and other Ugandans disagreed with Lively's suggestions for moderation, leniency, reduction of criminal punishments to even lower levels than under existing laws, and emphasis on education and counseling. (Tuhaise Decl. ¶¶ 19, 21; Langa Decl. ¶ 23).

83. Lively's suggestions were ultimately rejected, and not included in the final AHB. (Tuhaise Decl. ¶¶ 19, 22; Langa Decl. ¶ 23).

84. The AHB that was introduced in Parliament in October 2009 contained no input from Lively, and contained none of Lively's suggestions and modifications. (Tuhaise Decl. ¶ 22).

85. After the AHB was introduced in October 2009, and until the AHA was ultimately passed by the Parliament four years later in December 2013, Lively continually pleaded with Langa, Ssempa, Tuhaise and others to moderate the proposed law, to remove the death penalty, and to focus on education and counseling rather than jail sentences. (Lively Decl. ¶¶ 32(a)-(j) and Exhibits 11-20; Langa Decl. ¶ 22; Tuhaise Decl. ¶ 20).

86. Langa, Tuhaise, members of Parliament and other Ugandans continued to disagree with Lively and rejected his proposals. (Langa Decl. ¶¶ 23-24; Tuhaise Decl. ¶ 21; Lively Decl. ¶¶ 32(a)-(j) and Exhibits 11-20).

87. Tuhaise and members of Parliament appreciated Lively's interest, but dismissed his views as being based on his experience in the United States. (Tuhaise Decl. ¶ 21). Tuhaise and members of Parliament believed that they, as Ugandans, knew better than Lively, an American, what was best for Uganda and Ugandans. (*Id*.)

88. The AHA passed by Parliament in December 2013 contained no input from Lively, and contained none of Lively's suggestions or modifications. (Tuhaise Decl. ¶ 23; Langa Decl. ¶ 24).

89. The AHB was the subject of many vigorous democratic debates in the Ugandan Parliament, with many lawmakers speaking both in favor and against the bill. (Tuhaise Decl. ¶ 9). Lively was not involved in or present for any of those debates. (*Id*. at ¶ 11).

90. Uganda's members of Parliament are smart, strong-willed, independent, and fully capable of considering legislative proposals, thinking and speaking for themselves, and debating proposals in a democratic process. (Tuhaise Decl. ¶ 11).

91. Indeed, members of Parliament made substantial modifications to the AHB that was initially proposed, before they passed it as the AHA. (Tuhaise Decl. ¶ 12).

92. As with any other law, the AHA that was ultimately passed by Parliament in December 2013 was no longer the product of any individual member of Parliament, but the joint product of a democratically elected legislature, accountable to the sovereign people of Uganda. (Tuhaise Decl. ¶ 12).

93. As with any other law, the enactment of the AHA was the exclusive work of Uganda's sovereign Parliament. (Tuhaise Decl. ¶ 11).

94. The AHB was invalidated by Uganda's Constitutional Court in August 2014, and Uganda's Attorney General did not appeal the decision. (Tuhaise Decl. ¶ 9).

95. No person was convicted or punished under the AHA while it was in effect. (Tuhaise Decl. ¶ 10).

SMUG HAS NO KNOWLEDGE THAT LIVELY DID ANYTHING UNLAWFUL WITH RESPECT TO THE AHA OR AHB.

96. SMUG is not aware of any evidence of any meeting between Lively and member of Parliament David Bahati, ever. (Onziema 362:15-18).

97. SMUG's only knowledge about Lively's participation in the drafting of the 2009 Anti-Homosexuality Bill comes from what SMUG read or saw in alleged media reports. (Onziema 365:14-22). SMUG does not remember any sources that might have been cited in these "media reports." (Onziema 365:9-13).

98. SMUG does not know who wrote the first draft of the 2009 Anti-Homosexuality Bill. (Onziema 427:25-428:3).

99. SMUG does not know any "specific contribution" that Lively made to the 2009 Anti-Homosexuality Bill. (Onziema 428:18-22).

100. SMUG's Chairman does not know of anything that Lively did between the introduction of the 2009 Anti-Homosexuality Bill and its passage four years later. (Ganafa 188:22-189:2).

101. SMUG's Chairman, "one of the backbones of [the LGBTI] movement" in Uganda (Ganafa 62:2-63:4), is "not sure" whether Lively is responsible for the 2013 passage of the Anti-Homosexuality Bill/Act. (Ganafa 189:3-8).

SMUG HAS NO KNOWLEDGE OF ANY INVOLVEMENT OR ASSISTANCE PROVIDED BY LIVELY IN ANY OF THE FOURTEEN SPECIFIC INSTANCES OF PERSECUTION ALLEGED BY SMUG.

102. SMUG claims that 14 specific instance of "persecution" took place in Uganda between Lively's first visit in 2002 and 2016. Eight of these events are discussed in SMUG's Amended Complaint (dkt. 27, ¶¶ 165-228), and six additional events are identified in SMUG's Response to Lively Interrogatory 2, and supplements thereto. (SMUG Second Supplemental Response to Lively Interrogatory 2, pp. 2-7, redacted copy attached hereto as **MSJ Exhibit D**).

103. Lively had no knowledge, provided no support for, and did not otherwise participate whatsoever in, whether directly or indirectly, any event or incident of persecution alleged by SMUG. (Lively Decl. ¶¶ 34(a)-(m)).

104. **The June 18, 2012 Raid**. SMUG claims that Ugandan police raided a "skills-building workshop for LGBTI rights advocates" on June 18, 2012 (hereinafter the "June 18, 2012 Raid"). (Amended Complaint, dkt. 27, ¶¶ 165-175). SMUG has no knowledge of any direct assistance offered by Lively to the Ugandan police with respect to the June 18, 2012 Raid. (Onziema 294:2-295:11; Mugisha 196:2-15). Nor does SMUG know of any communication between Lively and anyone on the Ugandan police force with respect to this incident. (Onziema 295:16-20; Ganafa 207:3-6). Nor does SMUG know of any communications or agreements about

this incident between Scott Lively and "the antigay leaders in Uganda," to wit Martin Ssempa, Steven Langa, Nsaba Buturo or Simon Lokodo. (Onziema 296:13-297:18). Nor does SMUG know of any communications about this incident between the Ugandan police and Martin Ssempa, Steven Langa, Nsaba Buturo or Simon Lokodo. (*Id*. at 298:9-25). SMUG has no knowledge of any agreement between Scott Lively and the Ugandan police with regard to the raiding of any workshop, including this specific incident. (*Id*. at 299:8-300:6). In sum, SMUG has no knowledge of "any facts that would show that Scott Lively was in any way connected with that raid." (Ganafa 206:16-25) (*See also*, Mukasa 315:11-316:8).

105. **The February 14, 2012 Raid**. SMUG claims that Simon Lokodo and the Ugandan police raided an LGBTI conference on February 14, 2012 (hereinafter the "February 14, 2012 Raid." (Amended Complaint, dkt. 27, ¶¶ 176-185). SMUG does not know of any communication between Lively and Ugandan police or any of the individuals allegedly involved in that event. (Onziema 301:18-302:3; 303:10-304:5). SMUG does not know of any agreement between Scott Lively and Simon Lokodo or the Ugandan police. (Onziema 304:6-19). SMUG has no knowledge of "any assistance provided by Scott Lively to Simon Lokodo or the Ugandan police in connection with [this] event." (Onziema 304:25-305:6). No one at SMUG has "any knowledge of any involvement by Scott Lively in that raid." (Mugisha 202:9-15). SMUG is not "aware of any facts that would show that Scott Lively was responsible for" the February 14, 2012 Raid. (Ganafa 208:10-14) (*See also*, Mukasa 316:9-317:8).

106. **The June 4, 2008 Arrests**. SMUG claims that Ugandan police arrested three LGBTI rights activists on June 4, 2008, charged them with trespass, and released them after two days. (hereinafter the "June 4, 2008 Arrests") (Amended Complaint, dkt. 27, ¶¶ 186-193). SMUG is not aware of any communication between Scott Lively and the Ugandan police or Ugandan

leaders about these arrests. (Onziema 305:21-306:7). SMUG is not aware of any agreements between Scott Lively and the Ugandan police regarding these arrests. (Onziema 306:8-12). SMUG does not know of "any assistance at all provided by Scott Lively to the Ugandan police in connection with the [June 4, 2008 Arrests]." (Onziema 306:18-22). SMUG is not "aware of any facts that would show Scott Lively was responsible for" the June 4, 2008 Arrests. (Ganafa 209:24-210:3) (*See also*, Mukasa 317:9-318:8; Lusimbo 100:9-25).

107. **The Threats to Criminalize Health Services for LGBTI Persons**. SMUG claims that on July 11, 2012, Minister Lokodo "told a news conference that he intends to investigate" a health clinic opened by SMUG to service LGBTI people (hereinafter the "July 11, 2012 Threat to Criminalize Health Services"). (Amended Complaint, dkt. 27, ¶¶ 194-198). No adverse action was ever taken against SMUG's clinic, by the police or any other part of the Ugandan government. (Onziema 309:20-310:8). SMUG has no knowledge of any communication between Lively and Minister Lokodo or other Ugandan leaders regarding Lokodo's alleged intent to investigate the clinic. (Onziema 308:2-14). SMUG has no knowledge of any agreement between Lively and Minister Lokodo regarding any investigation or intent to investigate the clinic. (Onziema 308:15-20). SMUG has no knowledge of "any assistance at all provided by Scott Lively to Minister Lokodo in connection with investigating the clinic." (Onziema 309:5-9) (*See also*, Mugisha 209:23-210:18). SMUG does not have "knowledge of any facts that would show that Scott Lively is responsible for Minister Lokodo's statement or investigation of the clinic." (Ganafa 210:21-25) (*See also*, Mukasa 318:14-319:19; Lusimbo 101:22-102:6).

108. **The 2007 Crack-Down**. SMUG alleges that, as a result of a media campaign it conducted in August 2007, it experienced a general backlash and "crack-down" in Uganda

(hereinafter the "2007 Crack Down"). (Amended Complaint, dkt. 27, ¶¶ 199-208). According to SMUG, the 2007 Crack Down consisted of:

a. Deputy Attorney General Fred Ruhindi called upon government agencies to take appropriate action because homosexual was illegal in Uganda. (Amended Complaint, dkt. 27, ¶ 200). However, SMUG has no knowledge of any communication between Lively and Ruhindi or other Ugandan leaders regarding Ruhindi's call for appropriate action to taken. (Onziema 312:5-17). SMUG has no knowledge of any agreement between Lively and Ruhindi regarding the 2007 Crack Down. (Onziema 312:18-23). SMUG has no knowledge of "any assistance provided by Scott Lively to Ruhindi." (Onziema 313:5-9). SMUG is not "aware of any facts that would show that Scott Lively was responsible for what the deputy attorney general said." (Ganafa 211:14-17) (*See also*, Mukasa 319:20-320:12).

b. Minister Buturo stated that government was "considering changing the law so that promotion itself becomes a crime." (Amended Complaint, dkt. 27, ¶ 201). However, SMUG does not know of any communication or meeting between Lively and Buturo prior to this alleged statement. (Onziema 313:23-314:11). SMUG is not aware of any communication between Lively and either Martin Ssempa, Steven Langa, or Simon Lokodo regarding changing the law to outlaw promotion of homosexuality in 2007. (Onziema 315:23-316:5). SMUG is aware of no agreement between Lively and Buturo regarding changing the laws so that promotion of homosexuality became a crime in 2007. (Onziema 315:4-10). SMUG has no knowledge of "any assistance at all provided by Scott Lively to Minister Buturo in connection with changing the laws to make promotion a crime in 2007." (Onziema 315:17-22).

c. Martin Ssempa held an anti-gay rally. (Amended Complaint, dkt. 27, ¶¶ 202-204). However, SMUG has no knowledge of any communications between Scott Lively and

Martin Ssempa between their last meeting in 2002 and the 2007 anti-gay rally. (Onziema 319:20-25). SMUG has no knowledge of any agreement between Lively and Ssempa concerning the anti-gay rally or any of the related events. (Onziema 320:2-8). SMUG has no knowledge of "any assistance at all provided by Scott Lively to Martin Ssempa in connection with the actions and events" surrounding the anti-gay rally. (Onziema 320:15-20).

d. The Ugandan Broadcasting Council suspended a radio station manager for interviewing a lesbian activist. (Amended Complaint, dkt. 27, ¶ 205). However, SMUG has no knowledge of any communication between Lively and the Ugandan Broadcasting Council or Ugandan leaders regarding the suspension. (Onziema 321:20-322:7). SMUG has no knowledge of any agreement between Lively and the Ugandan Broadcasting Council. (Onziema 322:8-11). SMUG has no knowledge of "any assistance at all provided by Scott Lively to the Ugandan Broadcasting Council in suspending" the radio station manager. (Onziema 323:3-7).

e. The Ugandan tabloid *Red Pepper* published the names and photos of LGBTI activists. (Amended Complaint, dkt. 27, ¶ 206). However, SMUG has no knowledge of any communications between Lively and the tabloid or Ugandan leaders regarding the outing. (Onziema 323:17-324:3). SMUG has no knowledge of any agreement between Lively and the tabloid regarding the outing. (Onziema 324:4-10). SMUG has no knowledge of "any assistance at all provided by Scott Lively to the Red Pepper in connection with the" publication. (Onziema 324:17-21) (*See also*, Mugisha 216:2-17; Mukasa 320:13-321:2).

f. In sum, **SMUG does not have "any knowledge of any facts that would show that Scott Lively was involved in any backlash against SMUG or the LGBTI community following the 2007 campaign**." (Onziema 202:6-10) (emphasis added).

109. **The July 20, 2005 Raid**. SMUG alleges that, on July 20, 2005, local Ugandan authorities raided the home of Victor Mukasa, a founding member of SMUG, seized documents and files, and arrested his house guest and took her to the police station where she was "touched and fondled" before being released the same day (hereinafter the "July 20, 2005 Raid"). (Amended Complaint, dkt. 27, ¶¶ 209-214). Mukasa has no knowledge of any involvement whatsoever by Lively in the July 20, 2005 Raid. (Mukasa 252:6-19; 321:3-11). SMUG also has no knowledge of any communications between Lively and the Ugandan authorities allegedly involved in this event or other Ugandan leaders. (Onziema 327:11-24). SMUG has no knowledge of any agreement between Lively and the Ugandan authorities regarding this incident. (Onziema 327:25-328:8). SMUG has no knowledge of "any assistance at all provided by Scott Lively to the Ugandan authorities to carry out the events" surrounding the July 20, 2005 Raid. (Onziema 328:16-21) (*See also,* Mugisha 217:5-16). SMUG is not "aware of any facts that would show that Scott Lively was responsible for [the July 20, 2005] Raid." (Ganafa 212:6-9) (*See also,* Lusimbo 103:14-104:8).

110. **The Tabloid Outings**. SMUG alleges that Ugandan tabloids frequently published lurid stories about, and the photos and addresses of, LGBTI persons (hereinafter the "Tabloid Outings"). (Amended Complaint, dkt. 27, ¶¶ 215-225; SMUG Second Supplemental Response to Lively Interrogatory 2, pp. 4-6). SMUG has no knowledge of "any assistance that Scott Lively has provided in connection with [the Tabloid Outings]." (Onziema 334:17-22) (*See also,* Mugisha 221:17-222:4; Lusimbo 104:19-105:10; 122:7-123:17). SMUG does not have "knowledge of any facts that would show that Scott Lively was responsible for any of these" Tabloid Outings. (Ganafa 212:23-213:11; 217:22-218:6).

111. **Discrimination by Private Actors**. SMUG alleges that the criminalization of homosexuality in Uganda along with discriminatory government policies, media outings and

public statements against homosexuals contributes to discrimination by private actors in housing, employment, health and education (hereinafter "Private Discrimination"). (Amended Complaint, dkt. 27, ¶¶ 226-228). SMUG is not aware of any communication between Lively and any private actor regarding discriminating against LGBTI persons in housing, employment, health or education. (Onziema 336:5-10). SMUG is not aware of any such communications between Lively and Martin Ssempa, Steven Langa, Nsaba Buturo, Simon Lokodo or George Oundo. (Onziema 336:19-26; 337:13-17). SMUG has no knowledge of "any assistance at all provided by Scott Lively to private actors to carry out discrimination against LGBTI persons in Uganda in the areas of housing, employment, health or education." (Onziema 337:24-338:6). SMUG is not "aware of any instances of discrimination" in "housing," "employment," "healthcare," or "education" "that Scott Lively is responsible for." (Ganafa 214:9-215:8). In any event, SMUG does not represent individual persons who allegedly suffered Private Discrimination (Onziema 136:19-22; 136:23-137:2), and is not looking to recover damages for any such individual persons. (Onziema 338:7-339:4).

112. **The August 4, 2012 Raid**. SMUG alleges that Ugandan police raided an August 4, 2012 gay pride parade, after being informed that there was an illegal gay wedding in progress, and arrested several of the participants, who were released after two hours (hereinafter the "August 4, 2012 Raid"). (SMUG Second Supplemental Response to Lively Interrogatory 2, p. 3) (Lusimbo 108:4-110:21). SMUG has no knowledge of any communication between Lively and the police or Ugandan leaders regarding this incident. (Onziema 340:6-19; Lusimbo 109:11-15). SMUG has no knowledge of "any assistance at all provided by Scott Lively to the police in raiding and arresting persons at the 2012 pride gathering." (Onziema 341:2-6). SMUG is not "aware of any facts that

would show that Scott Lively was responsible for" the August 4, 2012 Raid. (Ganafa 215:25-216:4).

113. **The Passage and Enactment of the Anti-Homosexuality Bill**. SMUG alleges that the Ugandan Parliament passed an Anti-Homosexuality Act on December 20, 2013, which was signed into law by the Ugandan President on February 24, 2014, and invalidated by a Ugandan Court on August 1, 2014 (hereinafter the "AHA Passage and Enactment"). (SMUG Second Supplemental Response to Lively Interrogatory 2, p. 3). SMUG has no knowledge of any communications between Scott Lively and members of Parliament or Ugandan leaders regarding the passage of the AHA in 2013. (Onziema 341:20-342:6). SMUG has no knowledge of any communication between Lively and the President of Uganda in connection with the signing of the law. (Onziema 342:17-21). SMUG has no knowledge of "any involvement by Scott Lively in the passage of the AHA by parliament or the signing of the AHA into law by the President." (Lusimbo 116:9-21). SMUG has no knowledge of "any assistance at all provided by Scott Lively to the Ugandan Parliament" or "any assistance at all provided by Scott Lively to the Ugandan president" in connection with the AHA Passage and Enactment. (Onziema 342:12-16; 343:3-7). **SMUG has no knowledge of anyone who was charged or convicted for any violation of the AHA while it was in effect**. (Onziema 343:22-344:12; Ganafa 218:23-219:5). No one "in Uganda received any legal punishment under the Anti-Homosexuality Act that was signed in 2014." (Ganafa 219:7-10). "The presence of the anti-homosexuality law has not prevented … SMUG from continuing its activities and claiming its space in the global human rights realm with its centrality on liberating LGBT persons in Uganda." (Onziema 475:9-476:17).

114. **Investigation of the Refugee Law Project**. SMUG alleges that in 2014, the Refugee Law Project at Makerere University was investigated in connection with the passage of

the AHA (hereinafter "RLP Investigation"). (SMUG Second Supplemental Response to Lively Interrogatory 2, pp. 3-4). SMUG has no knowledge of any communication between Lively and any member of the Ugandan government or Ugandan leaders regarding this investigation. (Onziema 347:17-348:3). SMUG has no knowledge of "any assistance at all provided by Scott Lively to the Ugandan government in investigating RLP." (Onziema 348:10-14) (*See also*, Mugisha 136:19-24). SMUG is not "aware of any facts that would show that Scott Lively is responsible for [the RLP] Investigation." (Ganafa 216:8-17).

115. **The Walter Reed Clinic Raid**. SMUG alleges that, on April 3, 2014, Ugandan police raided a U.S.-funded clinic in Kampala and arrested one staff member (hereinafter the "Walter Reed Clinic Raid"). (SMUG Second Supplemental Response to Lively Interrogatory 2, p. 4). SMUG has no knowledge of any communication between Lively and the Ugandan police or Ugandan leaders regarding this raid. (Onziema 350:3-15). SMUG has no knowledge of "any assistance at all provided by Scott Lively to the Ugandan police in connection with the Walter Reed Clinic" Raid. (Onziema 350:22-351:3) (*See also*, Mugisha 138:21-139:20; Lusimbo 121:15-21). SMUG does not have "knowledge of any facts that would show that Scott Lively is responsible for" the Walter Reed Clinic Raid. (Ganafa 217:16-21).

116. **Surveillance of LGBTI Organizations**. SMUG alleges that, following the enactment of the AHA, SMUG and some of its member organizations were put under surveillance and threatened with closure (hereinafter the "Surveillance of LGBTI Organizations"). (SMUG Second Supplemental Response to Lively Interrogatory 2, p. 4). SMUG has no knowledge of any communication between Lively and anyone conducting surveillance of SMUG or its member organizations or Ugandan leaders. (Onziema 351:11-23). SMUG has no knowledge of "any

assistance at all provided by Scott Lively to any person conducting surveillance of SMUG or any of its member organizations." (Onziema 352:6-10).

117. **The 2014 Arrests**. Lastly, SMUG alleges that, in 2014, four individuals were arrested and charged with violations of Penal Code 145, a law that has been on the books in Uganda for several decades (hereinafter the "2014 Arrests"). (SMUG Second Supplemental Response to Lively Interrogatory 2, pp. 6-7). Charges against three of the four individuals were dismissed. (*Id*.) SMUG is not aware of any communications between Lively and the Ugandan police, or local council authorities, or Ugandan leaders regarding these arrests. (Onziema 353:2-21; 356:24-357:12). SMUG has no knowledge of "any assistance provided by Scott Lively to either the Ugandan police or any local council authorities or even any private citizens" in connection with the 2014 Arrests. (Onziema 353:22-354:5; 357:19-24). SMUG is not "aware of any facts that would show that Scott Lively was responsible for [the 2014 Arrests]." (Ganafa 219:11-24) (*See also*, Lusimbo 123:21-125:6).

SMUG HAS NO KNOWLEDGE OF ANY "CONSPIRACY" OR AGREEMENT BETWEEN LIVELY AND ANY OTHER PERSON TO CRIMINALIZE "STATUS" OR "IDENTITY," OR TO OTHERWISE DEPRIVE PERSONS OF FUNDAMENTAL RIGHTS ON THE BASIS OF THEIR SEXUAL ORIENTATION OR GENDER IDENTITY.

118. At no time when Lively travelled to Uganda in 2002 or 2009, or at any time before, during, in between or after such travels, did Lively ever enter into any campaign, agreement, conspiracy, or enterprise with Langa, Ssempa, Buturo, Bahati or any other person to effect, incite or facilitate: "persecution," in Uganda, including the specific incidents of persecution alleged by SMUG; nor the criminalization or punishment of any form of sexual "identity" or "orientation" or "status" or existence of any LGBTI or other person in Uganda. (Lively Decl. ¶¶ 37(a)-(e)).

119. SMUG claims that Stephen "Langa has worked in concert with Lively and other co-conspirators named in [SMUG's Amended] Complaint on a campaign to systematically persecute LGBTI individuals and deny them fundamental human rights." (Amended Complaint, dkt. 27, ¶ 94).

120. The only activities of this alleged "campaign" that SMUG's Rule 30(b)(6) designee could identify are: a) "They've written and delivered petitions to Parliament;" b) "They've held rallies and sermons riling Ugandans against homosexuality;" c) "They've taunted and humiliated LGBT individuals in public spaces;" and d) "they've used the media to continue to call … the public's attention to promotion of homosexuality." (Onziema 385:14-24; 387:5-19).

121. SMUG has no knowledge of any participation by Lively in the writing of petitions to the Ugandan Parliament regarding LGBTI persons. (Onziema 401:10-19).

122. SMUG has no knowledge of any participation by Lively in any rallies or sermons regarding homosexuality in Uganda apart from the 2009 conference. (Onziema 401:23-402:3).

123. SMUG has no knowledge of any participation by Lively in the taunting or humiliation of LGBTI persons in public spaces in Uganda. (Onziema 402:7-11).

124. SMUG has no knowledge of anything Lively personally has done to use the Ugandan media to call public attention to the promotion of homosexuality. (Onziema 403:2-7).

125. SMUG's Executive Director, Frank Mugisha, who is in charge of the day-to-day operations of SMUG, testified under oath that he is not aware of any "unlawful agreement that Lively entered into with other people to deprive people of rights based on sexual orientation or gender identity," and **there is not anyone at SMUG "who has knowledge of what's described in the Amended Complaint as an unlawful agreement between Scott Lively and others to**

deprive persons of their fundamental rights on the basis of their sexual orientation and gender identity." (Mugisha 145:7-146:6) (emphasis added).

126. SMUG's Chairman of the Board, one of the "backbones" of the LGBTI movement in Uganda, has no knowledge of any unlawful agreement that Lively entered into with anyone to deprive persons of fundamental rights on the basis of their sexual orientation and gender identity. (Ganafa 200:20-201:4).

127. **Apart from Lively's alleged drafting of the 2009 Anti-Homosexuality Bill, which SMUG claims to have read about in unspecified "media reports," SMUG has no knowledge of any agreement between Lively and another person to deprive persons of fundamental rights on the basis of their sexual orientation and gender identity**. (Onziema 365:23-366:5).

128. SMUG does not believe that Lively has coerced or forced SMUG to do anything. (Onziema 374:22-375:2).

LIVELY HAS NEVER HAD ANY INTENT TO CRIMINALIZE "STATUS" OR "IDENTITY," OR TO OTHERWISE "PERSECUTE" ANYONE ON THE BASIS OF THEIR SEXUAL ORIENTATION OR GENDER IDENTITY.

129. At no time when Lively travelled to Uganda in 2002 or 2009, or at any time before, during, in between or after such travels, did Lively ever have any intention to effect, incite or facilitate: "persecution," in Uganda, including the specific incidents of persecution alleged by SMUG; nor the criminalization or punishment of any form of sexual "identity" or "orientation" or "status" or existence of any LGBTI or other person in Uganda. (Lively Decl. ¶¶ 37(a)-(e)).

SMUG HAS NO KNOWLEDGE OF ANY WRONGFUL CONDUCT BY LIVELY IN THE UNITED STATES

130. Lively did not engage in any conduct in the United States (or anywhere else in the world) in connection with any campaign, agreement, conspiracy, enterprise, or other effort to

effect, incite or facilitate any "persecution" in Uganda, including the specific incidents of persecution alleged by SMUG. (Lively Decl. ¶¶ 35(a)-(e)).

131. Lively did not engage in any conduct in the United States (or anywhere else in the world) in connection with any campaign, agreement, conspiracy, enterprise, or other effort to effect, incite or facilitate the criminalization or punishment of any form of sexual "identity" or "orientation" or "status" or existence of any LGBTI or other person in Uganda. (Lively Decl. ¶¶ 35(c)-(d)).

132. SMUG has no knowledge of anything Scott Lively did or said in the United States between 2002 and March 2009. (Onziema 216:14-217:4).

133. SMUG has no knowledge of anything Lively did in the United States directed to helping the Ugandan police carry out the June 18, 2012 Raid. (Onziema 300:7-12).

134. SMUG has no knowledge of anything Lively did in the United States directed to helping Simon Lokodo or the Ugandan police carry out the February 14, 2012 Raid. (Onziema 304:20-24).

135. SMUG has no knowledge of any action by Scott Lively in the United State directed towards assisting the Ugandan police with the June 4, 2008 Arrests. (Onziema 306:13-17).

136. SMUG has no knowledge of anything Scott Lively did in the United States directed towards assisting Minister Lokodo with the July 11, 2012 Threat to Criminalize Health Services. (Onziema 308:23-309:4).

137. SMUG has no knowledge of any action taken by Scott Lively in the United States directed towards assisting the 2007 Crack Down, including: towards assisting Deputy Attorney General Fred Ruhindi with his call for appropriate action (Onziema 312:24-313:4); or towards assisting Minister Buturo with changing the laws to make promotion of homosexuality a crime

(Onziema 315:11-16); or towards assisting Martin Ssempa with his anti-gay rally (Onziema 320:9-14); or towards assisting the Ugandan Broadcasting Council to suspend a radio station manager (Onziema 322:21-323:2); or towards assisting the outing of homosexuals by a Ugandan tabloid (Onziema 324:11-16).

138. SMUG has no knowledge of any action taken by Scott Lively in the United States directed towards helping the Ugandan authorities carry out the July 20, 2005 Raid. (Onziema 328:9-15).

139. SMUG has no knowledge of anything that Scott Lively did in the United States towards assisting with the Tabloid Outings in Uganda. (Onziema 334:23-335:5).

140. SMUG has no knowledge of any actions taken by Scott Lively in the United States to assist Private Discrimination or to reinforce discrimination by private actors in housing, employment, health or education in Uganda. (Onziema 337:18-23).

141. SMUG has no knowledge of any actions taken by Scott Lively in the United States directed towards helping the police carry out the August 4, 2012 Raid. (Onziema 340:20-25).

142. SMUG has no knowledge of any action taken by Scott Lively in the United States directed towards aiding the Ugandan Parliament in the AHA Passage and Enactment. (Onziema 342:7-11). SMUG also has no knowledge of any action taken by Scott Lively in the United States directed towards helping the Ugandan President sign the AHA into law. (Onziema 342:22-343:2). **SMUG does not have "any knowledge of any action ever taken by Scott Lively in the United States directed towards getting the AHA enacted in Uganda."** (Onziema 343:8-16) (emphasis added).

143. SMUG has no knowledge of any action taken by Scott Lively in the United States directed towards helping the Ugandan government initiate the RLP Investigation. (Onziema 348:4-9).

144. SMUG has no knowledge of any action taken by Scott Lively in the United States directed towards assisting the Ugandan police with the Walter Reed Clinic Raid. (Onziema 350:16-21).

145. SMUG has no knowledge of any action taken by Scott Lively in the United States directed towards assisting the Surveillance of LGBTI Organizations. (Onziema 351:24-352:5).

146. SMUG has no knowledge of any action taken by Scott Lively in the United States directed towards assisting the Ugandan police or local council authorities or Ugandan citizens in the 2014 Arrests. (Onziema 354:6-13; 357:13-18).

147. SMUG has no knowledge of any action taken by Lively in the United States in connection with the drafting of the 2009 Anti-Homosexuality Bill. (Onziema 366:6-10).

148. **SMUG has no knowledge of any action taken by Scott Lively in the United States to deprive any Ugandan person of fundamental rights based on sexual orientation or gender identity**. (Onziema 366:11-16).

SMUG IS ABLE TO ENGAGE IN PUBLIC ADVOCACY IN UGANDA, ENJOYS THE PROTECTION OF THE POLICE AND THE LAW, AND IS ABLE TO SEEK REDRESS IN UGANDAN COURTS AGAINST ANY ALLEGED WRONGDOERS.

149. The Ugandan President's attitude towards LGBTI people has changed, from "consenting to kill them" in 2007, to now acknowledge that LGBTI people are present in Uganda and should not be persecuted. (Lusimbo 257:9-258:5.) SMUG attributes this change to the ability of the local and international LGBTI community to advocate for change in Uganda. (*Id*.)

150. SMUG is "no longer afraid of anything." (Onziema 149:13-150-16).

151. SMUG's leaders and their friends are able to go out in public places in Uganda, identify themselves as members of the LGBTI community in public places, and freely post pictures of themselves and their friends on their social media accounts. (Lusimbo 209:17-219:24 and Deposition Exhibit W).

152. According to SMUG's leaders, LGBTI "activists sometimes arrange large parties where hundreds of LGBT people participate." (Lusimbo 245:16-246:17). They are able to rent bars in Kampala for such parties. (*Id*.) Police officers come on their own to such parties to "ensure that the guests can enter and leave the place safely," not to "raid and close down [the] parties." (*Id*.)

153. The Ugandan Police Force does not monitor what goes on in people's bedrooms, and does not arrest consenting adults for homosexual activity. (Lusimbo 227:22-228:13; 229:9-16). If an individual police offer acts errantly or abusively, the Ugandan Police Force has established a human rights team as well as a hotline for LGBTI members to call in case they are arrested arbitrarily. (Lusimbo 228:14-22). The Ugandan police leadership has assured SMUG's members that it will protect their human rights. (Lusimbo 232:24-233:6).

154. Uganda's highest ranking police officer, the Inspector General of Police ("IGP"), is against the calls of the Minister of Ethics of Integrity for the police to disrupt the seminars of LGBTI organizations. (Lusimbo 243:9-21). **The IGP has given SMUG's leaders his personal cell phone number, responds to their text messages, and provides assistance if any issues arise**. (Lusimbo 243:15-244:17).

155. SMUG agrees that security concerns for LGBTI persons in Uganda do not arise from abusive police officers, but rather from "being disowned by the family, poverty, false accusations resulting from private rivalries, fear of being outed by neighbors or colleagues and

discrimination regarding education, health and job opportunities." (Lusimbo 230:18-231:7). SMUG has no information or knowledge that Lively is involved in or responsible for any such acts. (Lusimbo 231:8-24).

156. After 2012, no LGBTI workshops were disrupted by government authorities in 2013, 2014 or 2015. (Lusimbo 244:18-245:9).

157. SMUG is able to meet with Ugandan members of Parliament and politicians to advance its goals, and met with 43 such individuals by August 2013. (Onziema 486:5-17).

158. SMUG's Chairman of the Board had been promoted in management positions by the large company that employs him, and experienced no adverse employment actions after being outed or coming out as a homosexual. (Ganafa 34:8-35:10; 70:5-21). When a manager at work attempted to harass Ganafa, the company sided with Ganafa and the manager was fired. (Ganafa 275:2-275:22).

159. SMUG believes that the Ugandan judiciary is independent from the forces advocating against SMUG. (Ganafa 232:3-233:21). **SMUG has won all but one of the cases it has brought to vindicate the rights of its members**, and the one case it lost in the trial court is now on appeal. (Mugisha 199:20-200:18; Ganafa 263:2-16; 232:23-233:10).

160. SMUG's co-founder, Victor Mukasa, and his house guest won a civil rights lawsuit against the Ugandan police in connection with the July 20, 2005 Raid, and the house guest was awarded 10 million Ugandan shillings in damages. (Mukasa 249:9-250:22).

161. SMUG successfully challenged the Anti-Homosexuality Act of 2014 in a Ugandan court, and the law was invalidated. (Lusimbo 198:18-23).

162. The Ugandan President has indicated that he will not sign any new anti-gay law. (Ganafa 264:2-14).

163. SMUG has been able to hold gay Pride parades in Uganda in 2013, 2014 and 2015. (Lusimbo 111:14-114:15). SMUG received police protection for these events, and they took place uninterrupted. (*Id.*) SMUG has no knowledge of any interference or attempted interference by Lively with any Pride parades. (*Id*. at 114:16-24).

164. "**The presence of the anti-homosexuality law has not prevented … SMUG from continuing its activities and claiming its space in the global human rights realm with its centrality on liberating LGBT persons in Uganda**." (Onziema 475:9-476:17) (emphasis added).

SMUG HAS GROSSLY MISREPRESENTED AND EXPLOITED THE TRAGIC DEATH OF DAVID KATO, IN THIS LAWSUIT AND IN ITS INTERNATIONAL ADVOCACY, AND SMUG NOW AGREES THAT SUCH CONDUCT IS WRONG.

165. Since 2011, SMUG has been aware that its co-founder, David Kato, was killed by Sidney Nsubuga Enoch, a homosexual acquaintance of Kato's who publicly confessed to killing Kato over a sexual dispute. (Onziema 161:4-162:9; 203:23-204:6). SMUG's Research and Documentation manager, who is responsible for investigating incidents of violence against LGBTI persons, believes that Sidney Nsubuga Enoch "is in fact the person who killed David Kato." (Lusimbo 106:5-15). "SMUG has no evidence that David Kato was killed as a result of his LGBT activism." (Onziema 163:15-18). SMUG's Programs Director testified that "what we've established was that SMUG has no evidence that David was killed for his work with SMUG." (*Id*. at 180:20-22). In fact, SMUG had no such evidence in 2012 when it filed this lawsuit, nor later when it filed its Amended Complaint. (*Id*. at 163:19-164:2; 443:10-23). (*See also*, Ganafa 189:15-190:14; Mukasa 310:1-9).

166. SMUG agrees that "it would be wrong for SMUG to suggest that [Kato] was killed as a result of his advocacy." (Onziema 169:8:12). Nevertheless, SMUG agrees that the allegations in paragraphs 10, 221, and 222 of its Amended Complaint do, in fact, suggest that Kato was killed

because his LGBTI status and advocacy were revealed in an Ugandan tabloid. (*Compare* Onziema 170:8-171:9 *with* Amended Complaint, dkt. 27, ¶¶ 10, 221-222).

167. In fact, in addition to the allegations in its Amended Complaint, SMUG has internationally promoted the idea that David Kato was killed "because of this work." (Mugisha 240:15-242:19 and Deposition Exhibit I).

168. In spite of the fact that it lacks any evidence that David Kato's murder was a hate crime, SMUG has complained publicly that Ugandan "law enforcement has not admitted that [Kato's] death was a hate crime." (Onziema 449:7-451:3) (Lusimbo 258:21-260-11).

169. SMUG's Chairman agrees that it is not in the best interests of SMUG for SMUG leadership to publicly claim that David Kato was killed because of his advocacy work, as SMUG's Executive Director did in the *New York Times*, because this is "divergent" from what actually happened and what was established in Ugandan courts. (Ganafa 193:17-194:2).

SMUG'S STATED GOALS FOR THIS LAWSUIT, AND THE INJUNCTIVE RELIEF SMUG SEEKS FROM THIS COURT.

170. "It's [SMUG's] goal to make sure that [Lively] does not continue to influence society to hate us for being who we are." (Onziema 154:3-8).

171. SMUG wants this Court to enjoin Lively from selling or giving away his books in Uganda. (Onziema 435:19-436:7).

172. SMUG wants this Court to enjoin Lively from going to Uganda and preaching at Martin Ssempa's church that homosexuality is a sin, that God offers forgiveness to those who repent, but that unrepentant homosexuals are destined for hell. (Onziema 436:8-15).

173. SMUG wants this Court to enjoin Lively from going to Uganda to speak to a group of high school students about what Lively perceives to be the many and serious health hazards of homosexual conduct. (Onziema 436:23-437:5).

174. SMUG wants this Court to enjoin Lively from going to Uganda to train lawyers on how to use the law to oppose the legalization of same-sex marriage. (Onziema 437:6-13).

175. SMUG wants this Court to enjoin Lively from going to Uganda to lobby the Ugandan Parliament not to legalize same-sex marriage. (Onziema 437:14-19).

176. SMUG wants this Court to enjoin Lively from going to Uganda to lobby the Ugandan Parliament not to extend non-discrimination laws to cover sexual orientation and gender identity. (Onziema 438:4-10).

SMUG'S COMPLETE FAILURE TO SUBSTANTIATE ANY DAMAGES DURING FACT AND EXPERT DISCOVERY

177. SMUG's Chairman of the Board, who is "supposed to approve the budgets," is "not aware" of any damages that SMUG has suffered. (Ganafa 181:25-185:12). As the Chairman of the Board and a described "backbone of the LGBT movement in Uganda," Ganafa was not able to identify even one way that Lively has damaged SMUG monetarily. (Ganafa 185:2-12).

178. Nevertheless, SMUG does seek damages, but "SMUG only seeks damages for harm it suffered as an organization." (SMUG Fifth Supplemental Response to Lively Interrogatory 4, p. 2, attached hereto as **MSJ Exhibit E**). SMUG does not claim damages for any of its members. (*Id*.)

179. SMUG only seeks damages it alleges to have suffered in Uganda. (*Id*. at pp. 2-3). SMUG alleges no injuries in the United States, and seeks no damages for any injuries in the United States. (*Id*.)

180. Throughout the entire period of fact discovery in this case, SMUG refused to provide its damages calculation to Lively, maintaining instead that its damages would be calculated by an expert and disclosed with its expert reports after the close of fact discovery:

a. "Plaintiff has not yet finalized its computation of damages, but will provide this information to Defendant as soon as expert reports are delivered and damages are computed." (SMUG Initial Disclosures served December 10, 2013, p. 5, relevant part attached hereto as **MSJ Exhibit F**).

b. "Plaintiff will provide its computation of damages as soon as expert reports are delivered and damages are computed." (First Supplement to SMUG Initial Disclosures, served December 20, 2013, p. 3, attached hereto as **MSJ Exhibit G**).

c. "SMUG … is undertaking to quantify the damages it has suffered to date and will disclose to Defendant such information once it is complete." (SMUG Supplemental Response to Lively Interrogatory 4, MSJ Exhibit E, p. 3).

d. "the specific amount of damages will be calculated by an expert witness and reflected in an expert report" (SMUG Second Supplemental Response to Lively Interrogatory 4, MSJ Exhibit E, p. 3).

181. Believing that it would need an expert witness to calculate its damages in this case, SMUG in fact retained an expert witness for that purpose. (Onziema 236:2-10). SMUG retained this expert witness because its damages calculations "required a person with specialized financial knowledge in order to make the calculation." (*Id.* at 239:2-7).

182. However, SMUG neither disclosed an expert witness nor provided an expert witness report on damages prior to its expert witness designation and report deadline. (Onziema 236:11-17). SMUG does not know why it did not timely disclose an expert witness on damages. (*Id.*).

183. SMUG's Rule 30(b)(6) deposition took place over two consecutive days, on November 10 and 11, 2015. On the first day, the witness designated by SMUG to testify on the

topic of damages unambiguously reaffirmed under oath that "an expert witness is required to prepare SMUG's damages calculations for this case," (Onziema 239:16-20), and that there is no one at SMUG that could have made the actual calculations without consulting with a financial expert because "SMUG does not have that exact expertise to do the calculations." (*Id*. at 240:7-12).

184. On the evening after the first day of testimony, SMUG's designee discussed this specific subject with SMUG's attorneys. (Onziema 281:6-283:24). Based specifically and entirely upon that conversation with SMUG's attorneys, the testimony of SMUG's designee changed on the second day, such that now there **was** someone within SMUG who could theoretically (but did not actually) perform the damages calculations – SMUG's in-house accountant. (*Id*.) SMUG's designee did not speak with SMUG's in-house accountant to confirm that the accountant could indeed perform the calculations, but nonetheless testified – based only upon what SMUG's attorneys had told the designee – that the accountant could do the task. (*Id*. at 283:13-24).

185. Notwithstanding its repeated insistence, under oath, throughout the entirety of fact discovery, that an expert was required to calculate its damages, SMUG provided for the first time its purported damages calculations (via a two-page worksheet attached to a supplemental interrogatory response), four months after the close of fact discovery, four days after SMUG's expert disclosure deadline, and only 2 business days prior to its Rule 30(b)(6) deposition. (Onziema 234:10-17).

186. The calculations on SMUG's worksheet were performed by the expert financial firm that SMUG had retained, not SMUG's in-house accountant, because no one at SMUG had the expertise to perform the calculations themselves. (Onziema 237:25-238:7; 240:7-12; 244:21-23).

187. The financial figures from which SMUG's undisclosed outside expert purportedly calculated SMUG's damages were available to SMUG many years prior – as far back as 2007. (Onziema 242:14-244:9). "There is no reason" why SMUG could not have provided those figures sooner. (*Id*.).

188. On the second day of testimony, SMUG's designee testified that SMUG could have performed its own damages calculations several years prior, but was too busy to do so, or "it probably was an oversight." (Onziema 284:12-288:9).

189. Also, according to SMUG, there was no reason why SMUG could not have performed its damages calculations for the years 2007 to 2013 in July of 2014. (Onziema 290:2-8).

190. SMUG did not designate its in-house accountant to testify on SMUG's behalf on the subject of damages. (Onziema 279:7-18).

191. The only witness SMUG did designate and produce for deposition on the subject of damages was not able to answer a single question about how SMUG's purported damages were calculated. (Onziema 271:14-277:25; 280:4-21). Specifically, SMUG's damages designee could not explain how the financial figures from its 2007 documents were used to come up with its calculated damages for 2007, nor for any other year between 2007 and 2014. (*Id*.) "That's why we engaged an accountant to help with the calculation." (*Id*. at 280:19-21).

SMUG DOES NOT REPRESENT IN THIS LAWSUIT THE LGBTI COMMUNITY AT LARGE.

192. SMUG does not know the membership requirements for individuals who belong to its member organizations. (*Id*. at 106:4-8).

193. SMUG believes that there are "absolutely more" than 415,000 LGBTI persons in Uganda. (Onziema 105:4-12). Of these, only 500 or so are members of organizations represented

by SMUG. (*Id*. at 104:5-105:3). Thus, "SMUG's organizations include just a small fraction," about one-tenth of one percent, "of the total LGBTI population in Uganda." (*Id*. at 105:24-106:3).

194. SMUG does not represent all LGBTI persons in Uganda in this lawsuit. (Onziema 136:19-22). It does not represent the LGBTI community at large in Uganda. (*Id*. at 136:23-137:2). SMUG agrees that not all LGBTI persons in Uganda speak with one voice. (Onziema 491:21-492:8).

AS OF MARCH 7, 2009 AT THE LATEST, SMUG BELIEVED THAT IT WAS BEING PERSECUTED AND HARMED BY LIVELY, AND WAS CONSIDERING SUING HIM.

195. SMUG's Program Director has been aware of Lively's 2002 visit to Uganda since the visit took place in 2002. (Onziema 367:5-17).

196. SMUG had five representatives in attendance during Lively's speeches at the March 5-7, 2009 Conference in Uganda. (Onziema 372: 15-19).

197. SMUG knew everything that Lively said at the March 2009 conference at the moment he said it. (*Id*. at 372:20-373:2).

198. Upon hearing Lively's speeches during the March 2009 conference, SMUG believed that it was being persecuted and harmed by Lively. (*Id*. at 373:3-14).

199. SMUG was considering suing Lively "since he came here [to Uganda] in March 2009." (Onziema 151:10-18).

200. SMUG did not file this lawsuit until March 14, 2012. (Compl., dkt. 1).

LAW AND ARGUMENT

I. THE SUMMARY JUDGMENT STANDARD.

"Faced with a defendant's motion for summary judgment, a plaintiff must come forward with some evidence showing a genuine dispute of material fact if he wants to get in front of a jury. A plaintiff's failure to produce any evidentiary proof concerning one of the essential elements of

his claim is grounds for summary judgment." *Jakobiec*, 711 F.3d at 226 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)). Once a party has properly supported its motion for summary judgment by demonstrating "an absence of evidence to support the non-moving party's case," *Celotex*, 477 U.S. at 325, the "burden shifts to the non-moving party, who 'may not rest on mere allegations or denials of his pleading, but must set forth specific facts showing there is a genuine issue for trial.'" *Barbour v. Dynamics Research Corp.*, 63 F.3d 32, 37 (1st Cir. 1995) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986); *see also Hootstein v. Collins*, 928 F. Supp. 2d 326, 335 (D. Mass. 2013) (Ponsor, J.) ("[N]on-movant cannot rest upon mere allegations; rather, it must set forth specific, provable facts demonstrating that there is a triable issue."). The factual issue must be both "material" (affects the outcome of the litigation) and "genuine" (a reasonable jury could return a favorable verdict for the nonmovant). *Anderson*, 477 U.S. at 248; *see also Hootstein*, 928 F. Supp. 2d at 335. Summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

Although the Court is "obliged to review the record in the light most favorable to the nonmoving party, and to draw all reasonable inferences in the nonmoving party's favor," *LeBlanc v. Great Am. Ins. Co.*, 6 F.3d 836, 841 (1st Cir. 1993), the Court is to "ignore 'conclusory allegations, improbable inferences, and unsupported speculation.'" *Prescott v. Higgins*, 538 F.3d 32, 39 (1st Cir. 2008) (quoting *Medina-Muñoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990)). Neither "effusive rhetoric" nor "optimistic surmise" will establish a genuine issue of material fact. *Cadle Co. v. Hayes*, 116 F.3d 957, 960 (1st Cir. 1997); *see also Lawton v. State Mut. Life Assur. Co. of Am.*, 101 F.3d 218, 223 (1st Cir. 1996) (nonmovant obligated to offer "more than steamy rhetoric and bare conclusions"). Instead, the "party opposing summary judgment must

present definite, competent evidence to rebut the motion, or the district court is obligated to grant the motion in favor of the moving party." *Mendez-Laboy v. Abbot Lab.*, 424 F.3d 35, 37 (1st Cir. 2005) (internal quotations and citations omitted). "The nonmovant must 'produce specific facts, in suitable evidentiary form' sufficient to limn a trial-worthy issue. Failure to do so allows the summary judgment engine to operate at full throttle." *Lawton*, 101 F.3d at 223 (internal citation omitted); *see also Mack v. Great Atl. & Pac. Tea Co.*, 871 F.2d 179, 181 (1st Cir. 1989) (holding that "[t]he evidence illustrating the factual controversy cannot be conjectural or problematic; it must have substance in the sense that it limns differing versions of the truth which a fact finder must resolve"). This court must grant a motion for summary judgment "if it determines there are no genuine issues to be resolved at trial because there is not 'sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.'" *Hootstein*, 928 F. Supp. 2d at 335 (quoting *Anderson*, 477 U.S. at 249-50); *see also Lawton*, 101 F.3d at 222 ("The proper province of summary judgment 'is to pierce the boilerplate of the pleadings and assay the parties' proof in order to determine whether trial is actually required.'") (citation omitted).

II. THE COURT LACKS SUBJECT-MATTER JURISDICTION OVER SMUG'S CLAIMS BECAUSE SMUG HAS NO KNOWLEDGE OF ANY WRONGFUL DOMESTIC CONDUCT BY LIVELY OR ANY DOMESTIC INJURY TO SMUG.

A. The Court Lacks Subject-Matter Jurisdiction Over SMUG's International Law Claims Under The Alien Tort Statute Because SMUG Has No Evidence Of Any Wrongful Domestic Conduct By Lively.

"Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514, 19 L.Ed. 264 (1868). This rule "'springs from the nature and limits of the judicial power of the United States' and 'is inflexible and without exception.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998) (quoting *Mansfield, C. & L. M. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884)).

On April 17, 2013, a "seismic shift" altered the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS") landscape, and it was "an earthquake that has shaken the very foundation of [SMUG's] claims against [Lively]." *Giraldo v. Drummond Co., Inc.*, 2:09-CV-1041-RDP, 2013 WL 3873960, *1 (N.D. Ala. July 25, 2013), *aff'd sub nom. Doe v. Drummond Co.*, 782 F.3d 576 (11th Cir. 2015). The Supreme Court decided *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), in which it held that the ATS does not "reach conduct occurring in the territory of a foreign sovereign." *Id*. at 1664. Because "the ATS … is strictly jurisdictional," the Court held that it does not provide federal courts with jurisdiction over international law claims in which "all of the relevant conduct took place outside the United States." *Id*. at 1664, 1669. The Supreme Court made clear that "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application." *Id.* at 1669.

Prior to *Kiobel*, the Supreme Court held in *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010), that neither the U.S. citizenship of a defendant, nor the mere fact that **some** conduct occurs in the United States, such as preparatory acts, is sufficient to overcome the extraterritorial bar, because "it is a rare case of prohibited extraterritorial application that lacks all contact with the territory of the United States," and "the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case." *Id*. at 2884 (italics in original). According to the *Morrison* Court, the determinative question is not whether "some domestic activity" took place, but whether **the conduct that was the "focus of congressional concern"** took place domestically. *Id*. (emphasis added).

The "focus of congressional concern" in the ATS is conduct violating the law of nations. 28 U.S.C. § 1350. Accordingly, *Kiobel* and *Morrison* together require this Court to dismiss SMUG's ATS claims for lack of subject-matter jurisdiction, unless SMUG shows "relevant

conduct" on the part of Lively in the United States – that is, conduct of [Lively] which is … either a direct violation of the law of nations or … constitutes aiding and abetting another's violation of the law of nations. *Mastafa v. Chevron Corp.*, 770 F.3d 170, 185 (2d Cir. 2014). "[N]either the U.S. citizenship of [Lively], nor [his] presence in the United States, is of relevance for jurisdictional purposes." *Id*. at 188. Lively's "citizenship is pertinent only insofar as it relates to [his] alleged U.S. conduct." *Id*. at 190.

Numerous post-*Morrison* and post-*Kiobel* courts have dismissed ATS claims brought against **U.S. citizens**, **even where there was significant domestic conduct alleged**, because that conduct was not undertaken with the knowledge and purpose of facilitating crimes against humanity abroad. *See e.g.*, *Mastafa*, 770 F.3d at 191-194 (dismissing ATS claims against U.S. corporation headquartered in New York, even though it allegedly engaged in significant financial transactions in the U.S. related to the alleged torture of victims in Iraq, because the U.S. conduct itself was not taken with the purpose of facilitating the torture); *Balintulo v. Ford Motor Co.*, 796 F.3d 160, 167-171 (2d Cir. 2015), *cert. denied sub nom. Ntsebeza v. Ford Motor Co.*, No. 15-1020, 2016 WL 561746 (U.S. June 20, 2016) (affirming dismissal of ATS claims against U.S. entities alleged to have developed specialized vehicles and software in the U.S. which were used by South African actors to implement apartheid in South Africa, because the alleged domestic conduct, although very significant, was not taken with the purpose of facilitating the commission of international law crimes by actors in South Africa); *Drummond*, 782 F.3d at 597-600 (affirming summary judgment on ATS claims for crimes against humanity against U.S.-based corporate officers alleged to have made funding policy decisions in the U.S. that ultimately assisted crimes against humanity by paramilitaries in Colombia, because the actual planning and execution of the alleged crimes themselves took place in Colombia); *Cardona v. Chiquita Brands Int'l, Inc.*, 760 F.3d 1185, 1189 (11th Cir. 2014), *cert. denied,* 135 S. Ct. 1842, 1189-91 (2015) (reversing order denying motion to dismiss ATS torture claims against U.S. entity alleged to have engaged in U.S.

conduct, because the torture occurred outside of the U.S.).

Under the foregoing authorities, and in light of SMUG's own admissions, there is no doubt that this Court lacks subject-matter jurisdiction over SMUG's ATS claims. SMUG can no longer argue, as it did without proof at the motion to dismiss stage, that Lively masterminded, orchestrated and puppeteered widespread criminal abuses in Uganda from "homophobia central" in Springfield, Massachusetts, because SMUG and its witnesses have admitted under oath, readily, repeatedly and unambiguously that: (a) SMUG has no knowledge of **anything** Lively did or said in the United States between 2002 and March 2009 (MF ¶ 132)[2]; (b) SMUG has no knowledge of **anything** Lively did or said in the United States directed to helping Ugandans in carrying out any of the fourteen persecutory incidents in suit (MF ¶¶ 133-146); (c) SMUG has no knowledge of **any** action taken by Lively in the United States in connection with the drafting of the 2009 AHB (MF ¶ 147); (d) SMUG does not have "**any** knowledge of **any** action **ever** taken by Scott Lively in the United States directed towards getting the [2014] AHA enacted in Uganda" (MF ¶ 142); and, most fatally for SMUG's ATS claims, (e) SMUG has no knowledge of **any** action taken by Scott Lively in the United States to deprive any Ugandan person of fundamental rights based on sexual orientation or gender identity. (MF ¶ 148).

At some point, crafty arguments of counsel must give way to the facts, especially when those facts are so clearly and indisputably related by SMUG itself and all of its witnesses, under oath. If even substantial and significant conduct in the United States, by United States citizens, is insufficient to confer ATS jurisdiction because it was not in violation of international law, or because it was not taken with the specific purpose of facilitating crimes against humanity, then

[2] For brevity and clarity, in the argument section of this brief each factual assertion is supported by a pinpoint cite to the relevant paragraphs in Lively's Statement of Material Facts of Record as to Which There Is No Issue To Be Tried ("MF"), *supra*, which in turn contain the exhaustive pinpoint cites to the record materials.

how could **no conduct whatsoever** in the United States ever be sufficient? It can't. If this Court could retain jurisdiction over SMUG's claims in this case, on this clear record, then *Kiobel* and *Morrison* have no meaning. Summary judgment on all of SMUG's ATS claims (Counts I, II and III) should be granted.

B. The Court Lacks Subject-Matter Jurisdiction Over SMUG's International Law Claims Under The Alien Tort Statute Because SMUG Has No Evidence Of Any Domestic Injury.

This Court also lacks subject-matter jurisdiction over SMUG's international law claims under the ATS because SMUG has no evidence of any **domestic injury**. In a recent decision adopting and extending *Kiobel*, the Supreme Court applied the presumption against extraterritoriality to bar a cause of action against a U.S. company brought by the European Community and 26 member states under the federal Racketeer Influenced and Corrupt Organizations Act (RICO), because the private RICO plaintiffs failed to establish any "*domestic* injury." *RJR Nabisco, Inc. v. European Community*, No. 15-138, 2016 WL 3369423, at *15-19 (U.S. June 20, 2016) (emphasis in original). This conclusion would provide little fanfare in the case at bar if the Court's "**domestic** injury" requirement was tied to express language in the RICO statute—but it is clearly not so tied. Instead, the Court recognized a "domestic injury" requirement after citing the same foreign policy concerns discussed in *Kiobel*, and leaning heavily on *Kiobel*'s logic and reasoning. Thus, under *Kiobel* and *RJR Nabisco*, an actionable ATS-based claim must involve both domestic conduct and domestic injury.

In *RJR Nabisco*, the Court unanimously held the underlying substantive provisions of the RICO statute could be applied extraterritorially. *RJR Nabisco*, 2016 WL 3369423, at *9-11. But the Justices split 4-3 (one Justice did not participate) on the issue of whether RICO's private cause of action provision, 18 U.S.C. § 1964(c), overcame the presumption against extraterritoriality. Section 1964(c) of the RICO statute allows "[a]ny person injured in his business or property by

reason of a violation of section 1962" to sue for damages, costs, and attorney's fees. *Id.* at *15. Applying the "logic" of *Kiobel*, the Court concluded that Section 1964(c) "does not overcome the presumption against extraterritoriality," and held that a private RICO plaintiff "must allege and prove a *domestic* injury to its business or property." *Id.* (emphasis in original). According to the Court in *RJR Nabisco*, the logic of *Kiobel* "requires that we separately apply the presumption against extraterritoriality to RICO's cause of action despite our conclusion that the presumption has been overcome with respect to RICO's substantive prohibitions." *Id.* The *RJR Nabisco* court noted that, in *Kiobel*, the High Court held that the presumption against extraterritoriality "constrain[s] courts considering causes of action" under the ATS even though it was a "'strictly jurisdictional statute' that 'does not directly regulate conduct or afford relief'" and "even though the underlying substantive law consisted of well-established norms of international law, which by definition apply beyond this country's borders." *Id.* (citing *Kiobel*, 133 S.Ct. at 1664).

Like the Court in *Kiobel*, the Court in *RJR Nabisco* emphasized the significant foreign policy implications of providing a cause of action for foreign injury: "[A]s we have observed in other contexts, providing a private civil remedy for foreign conduct creates a potential for international friction beyond that presented by merely applying U.S. substantive law to that foreign conduct." *Id.*; *see also id.* at *16 ("This is not to say that friction would necessarily result in every case, or that Congress would violate international law by permitting such suits. **It is to say only that there is a potential for international controversy that militates against recognizing foreign-injury claims without clear direction from Congress**.") (emphasis added). Thus, it was nothing unique about the particular statutory language in RICO that required only "domestic"

injuries—indeed, the statute does not include that limitation expressly.[3] Instead, the foreign policy concerns discussed at length in *Kiobel*, coupled with a robust view of the presumption against extraterritoriality, provide the underpinnings for the decision.

Also similar to the Court in *Kiobel*, the Court in *RJR Nabisco* found that "[n]othing in §1964(c) provides a clear indication that Congress intended to create a private right of action for injuries suffered outside of the United States." *Id.* at *17. "The word 'any' ordinarily connotes breadth, but it is insufficient to displace the presumption against extraterritoriality," and the statute's "reference to injury to 'business or property' also does not indicate extraterritorial application." *Id*. This conclusion echoes the *Kiobel* decision from three years earlier:

> **[N]othing in the text of the statute suggests that Congress intended cause of action recognized under it to have extraterritorial reach**. The ATS covers actions by aliens for violations of the law of nations, but that does not imply extraterritorial reach—such violations affecting aliens can occur either within or outside the United States. **Nor does the fact that the text reaches '*any* civil action' suggest application to torts committed abroad**; it is well established that generic terms like 'any' or 'every' do not rebut the presumption against extraterritoriality.

Kiobel, 133 S.Ct. at 1665 (italics in original; bold emphasis added). "It is not enough to say that a private right of action must reach abroad because the underlying law governs conduct in foreign countries. Something more is needed, and here it is absent." *RJR Nabisco*, 2016 WL 3369423, at *17. The question presented in *RJR Nabisco*, as in *Kiobel*, is not "whether a federal court has

[3] Three justices dissented from the Court's conclusion that a "domestic" injury was required. *RJR Nabisco*, 2016 WL3369423, at *23 (Ginsburg, J., concurring in part, dissenting in part, and dissenting from the judgment). According to the **dissenters**, "this case has the United States written all over it" since "[a]ll defendants are U.S. corporations, headquartered in the United States, charged with a pattern of racketeering activity directed and managed from the United States, involving conduct occurring in the United States," and thus posed no concerns about international friction. *Id.* But neither the defendant's U.S. citizenship nor its U.S.-based conduct was enough to overcome application of the extraterritorial bar where all injuries occurred abroad.

jurisdiction to entertain a cause of action provided by foreign or international law," but instead "'whether the court has authority to recognize a cause of action *under U.S. law*' **for injury suffered overseas**." *Id.* (quoting *Kiobel*, 133 S.Ct. at 1666) (italics in original; bold emphasis added). The answer, based upon the application of the presumption against extraterritoriality, is no. Because the only injury allegedly suffered by the European Community and 26-member nations who filed the suit was "injury suffered abroad" (the plaintiffs had previously waived their damages claims for domestic injuries), the complaint had to be dismissed. *Id.* at *19.

Finally, in *Kiobel*, the Court further stated that "there is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms." *Kiobel*, 133 S.Ct. at 1668. "The United States was, however, embarrassed by its potential inability to provide judicial relief to foreign officials **injured in the United States**. Such offenses against ambassadors violated the law of nations, 'and if not adequately redressed could rise to an issue of war.' The ATS ensured that the United States could provide a forum for adjudicating such incidents." *Kiobel*, 133 S.Ct. at 1668 (internal citations omitted) (emphasis added). Therefore, the same "domestic injury" requirement recognized by a plurality of the Court in *RJR Nabisco* in the context of a civil RICO claim must also be applied in ATS cases such as the case at bar.

Applying the *Kiobel – RJR Nabisco* reasoning to SMUG's claims under the ATS requires entry of summary judgment, since SMUG has failed to establish any injury at all (*see* Sections VI-VII, *infra*), let alone injury suffered in the United States. Importantly, SMUG only alleges foreign injuries, if any. (MF ¶¶ 178-179). Headquartered in Uganda and situated exclusively in Uganda, the only purported harms allegedly suffered by SMUG took place in Uganda and never here in the United States. (MF ¶¶ 104-117, 178-179, 193). There is "nothing in the text of the ATS" that "evinces the requisite clear indication of extraterritoriality," and, therefore, any cognizable "tort"

recognized under the ATS—in addition to requiring actionable domestic conduct—must also be a tort causing domestic injury. *See Kiobel*, 133 S.Ct. at 1666, 1669 ("The reference to 'tort' does not demonstrate that the First Congress 'necessarily meant' for those causes of action to reach conduct in the territory of a foreign sovereign."); *RJR Nabisco*, 2016 WL 3369423, at *19 (invoking the presumption against extraterritoriality to require a civil RICO plaintiff "to allege and prove a **domestic injury** to business or property" since the statute "does not allow recovery for foreign injuries") (emphasis added).

Thus, the ATS statute does not indicate extraterritorial application or reach so the presumption must apply, even as to SMUG's alleged (but unproven) injuries. Summary judgment should be granted.

C. SMUG'S State Law Claims Also Are Barred On Extraterritorial Grounds.

The presumption against extraterritorial application of the ATS that bars SMUG's federal claims applies with equal (if not greater) force to SMUG's state law claims. *See Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 263 (2010) ("we apply the presumption **in all cases**") (emphasis added).

There is "no indication" that any Massachusetts law (whether based in statute or the common law) was passed (or made) so that Massachusetts would be "a uniquely hospitable forum for the enforcement of international norms." *Kiobel*, 122 S.Ct. at 1668. As Justice Story stated nearly 200 years ago, "No nation has ever yet pretended to be the *custos morum* of the whole world . . ." *U.S. v. The La Jeune Eugenie*, 26 F. Cas. 832, 847 (1822). The principle no less applies to a single U.S. state, or a single U.S. court. *See Morrison*, 561 U.S. at 261 (explaining that the "wisdom" of the extraterritorial bar is demonstrated by the inconsistent and unpredictable "results of judicial-speculation-made law"); *Kiobel*, 133 S.Ct. at 1664 ("the danger of unwarranted judicial

interference in the conduct of foreign policy is magnified in the context of the ATS, because the question is not what Congress has done but instead what courts may do").

It would be a complete rejection of the Supreme Court in *Kiobel* and other Supreme Court precedent to conclude that the state common law of Massachusetts (or any one of the fifty states that has no constitutional prerogative in foreign relations) does, in fact, apply abroad. In *Kiobel*, the presumption against extraterritoriality applied even though the very substance of the law at issue was directed at well-established international law norms that necessarily apply abroad. 122 S.Ct. at 1664-66. The presumption against extraterritorial application of laws has also been applied to employment practices of U.S. employers employing U.S. citizens in another country. *See EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 246-48, 259 (1991). No principle prohibits a similar application of *Kiobel* to the state law claims at issue here. *Kiobel* was clearly intended to curb ATS litigation in American courts, not simply to punt it into different fora (state court rather than federal court) or under a different jurisdictional guise (diversity jurisdiction rather than ATS jurisdiction).[4]

Confirming the above principles, numerous Massachusetts courts have applied the same presumption against extraterritoriality found in *Kiobel*, *Morrison* and elsewhere to preclude application of Massachusetts state laws to events occurring outside the United States. *See e.g.*, *Doricent v. American Airlines, Inc.*, No. 91-12084, 1993 WL 437670, at *8 (D. Mass. Oct. 19, 1993) (holding that Massachusetts civil rights laws did not apply to events occurring in Haiti);

[4] *Kiobel* cannot be interpreted to open a back door for these same lawsuits through the federal diversity statute instead. The ATS, like the federal diversity statute (28 U.S.C. § 1332), is a "strictly jurisdictional" statute that "does not directly regulate conduct or afford relief." *Kiobel*, 133 S.Ct. at 1664. Even so, the *Kiobel* Court held that the presumption against extraterritoriality "constrain[s] courts considering causes of action" under the ATS. *Id.*; *see also RJR Nabisco*, 2016 WL 3369423, at *15 (applying presumption to private right of action provision in RICO statute). This same analysis should be applied by a federal court sitting in diversity based upon state common law claims involving events that occurred abroad.

Hadfield v. A.W. Chesterton Co., No. 20084382, 2009 WL 3085921, at *1-2 (Mass. Super. Sept. 15, 2009) (applying presumption against extraterritorial application of state law to dismiss wage claim brought by an Australian resident who worked in sub-Saharan Africa, **even though defendant company was headquartered in Massachusetts** and plaintiff had made numerous trips to its Massachusetts headquarters); *Taylor v. Eastern Connection Operating, Inc.*, 988 N.E.2d 408, 413 n.9 (Mass. 2013) (assuming without deciding that "there is a presumption against the application of Massachusetts statutes outside the United States"); *Howarth v. Lombard*, 56 N.E. 888, 889 (Mass. 1900) ("It is familiar law that statutes do not extend, *ex proprio vigore*, beyond the boundaries of the state in which they are enacted.").

Beyond Massachusetts, it is a well-recognized principle in federal and state courts across the country that the presumption against extraterritoriality applies to state law claims. *See, e.g.*, *Hirst v. Skywest, Inc.*, No. 15-2036, 2016 WL 2986978, at *8 (N.D. Ill. May 24, 2016) ("State laws . . . presumptively lack extraterritorial reach."); *Abel v. Planning & Zoning Comm'n*, 998 A.2d 1149, 1157 (Conn. 2010) ("Many state courts have applied this principle [of the presumption against extraterritoriality] to state statutes.") (collecting cases); *Judkins v. Saint Joseph's College of Maine*, 483 F. Supp. 2d 60, 65 (D. Me. 2007); *Mitchell v. Abercrombie & Fitch*, No. 04-306, 2005 WL 1159412, at *2 (S.D. Ohio May 17, 2005); *Rathje v. Scotia Prince Cruises, Ltd.*, No. 01-123, 2001 WL 1636961, at *9 (D. Me. Dec. 20, 2001) ("[S]tate statutes are presumed not to have extraterritorial reach."); *Union Underwear Co. v. Barnhart*, 50 S.W.3d 188, 190 (Ky. 2001); *Sandberg v. McDonald*, 248 U.S. 185, 195 (1918) ("Legislation is presumptively territorial and confined to limits over which the law-making power has jurisdiction."); 73 Am. Jur. 2d Statutes § 243 (2d ed.) (noting general rule that a state law does not operate beyond the territorial limits of

the state unless "clearly expressed or indicated by its language, purpose, subject matter, or history").

Importantly, specifically within the ATS context, numerous courts have applied the presumption against extraterritoriality to bar **state law** claims brought in conjunction with ATS claims, whether statutory or common law. *See, e.g.*, *In re: Chiquita Brands Int'l, Inc. Alien Tort Statute & Shareholder Derivative Litig.*, 792 F. Supp. 2d 1301, 1355 (S.D. Fla. 2011) (holding in ATS litigation that the "civil tort laws" of Florida, Ohio, New Jersey and the District of Columbia do not apply to extraterritorial conduct and dismissing various state common law claims); *see also Roe I v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 1024 (S.D. Ind. 2007) (dismissing state law claims in ATS litigation where "[p]laintiffs have not yet articulated a viable basis for applying California law or Indiana law to the management of a Plantation in Liberia"); *Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1318 (11th Cir. 2008) (affirming the district court's grant of summary judgment on state law claims in ATS litigation because the "tort claims" under Alabama law did not apply to injuries that occurred outside the state); *In re: Chiquita Brands Int'l, Inc. Alien Tort Statute & Shareholder Derivative Litig.*, --- F. Supp. 3d ---, 2016 WL 3247913, at *8 (S.D. Fla. June 1, 2016) (finding that state law claims against individual defendants were "similarly barred on extraterritoriality grounds" as claims against a corporate defendant and dismissing such claims for lack of subject matter jurisdiction).

The same outcome should obtain here. As shown above, SMUG has no evidence of any "relevant conduct" by Lively in the United States (including Massachusetts). (MF ¶¶ 130-148.) And SMUG has no evidence of **any** injury (*see* Sections VI-VII, *infra*), let alone the **domestic** injury (in Massachusetts) required under *RJR Nabisco*. Accordingly, this Court lacks subject-

matter jurisdiction over SMUG's state law claims (*i.e.*, Count IV for civil conspiracy, and Count V for negligence). Summary judgment should be granted.

III. SMUG'S CLAIMS ARE BARRED BY THE ACT OF STATE DOCTRINE.

The act of state doctrine "precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964). In one of its earliest formulations, the High Court stated that "**[e]very sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory**." *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) (emphasis added). Notably, "[n]one of this Court's subsequent cases in which the act of state doctrine was directly or peripherally involved manifest any retreat from *Underhill*." *Sabbatino*, 376 U.S. at 416.

The act of state doctrine requires that "when it is made to appear that the foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned." *Ricaud v. Am. Metal Co.*, 246 U.S. 304, 307 (1918). Put another way, "[t]he act of state doctrine is not some vague doctrine of abstention but a *principle of decision* binding on federal and state courts alike." *W.S. Kirkpatrick & Co., Inc. v. Envt'l Tectonics Corp., Int'l*, 493 U.S. 400, 406 (1990) (emphasis original). As Justice Scalia put it,

> The short of the matter is this: Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them. The act of state doctrine does not establish an exception for such cases and controversies that may embarrass foreign governments, but merely **requires** that, in the process of deciding, **the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid.**

Id. at 409 (emphasis added).

In *W.S. Kirkpatrick*, the Court ultimately found that the act of state doctrine did not apply, but for reasons much different than what SMUG seeks here. Indeed, there, the Court noted that "[a]ct of state issues only arise when a court *must decide* – that is, when the outcome of the case turns upon – the effect of official action by a foreign sovereign. When that question is not in the case, neither is the act of state doctrine." *Id.* at 406 (emphasis original). Unlike SMUG's claims, the Court determined that the "doctrine has no application to the present case **because the validity of no foreign sovereign act is at issue**." *Id.* at 409-10 (emphasis added).

Where, as here, the validity and legality of a foreign government's action is squarely at issue and indeed fundamental to the plaintiff's entire claim, the act of state doctrine has clear and unambiguous application. *See Ricaud*, 246 U.S. at 310 (noting that it is a "rule of law that **the act within its own boundaries of one sovereign state cannot become the subject of re-examination and modification in the courts of another**") (emphasis added); *Sabbatino*, 376 U.S. at 439 ("Since the act of state doctrine proscribes a challenge to the validity of the Cuban [government's] decree in this case, any counterclaim based on asserted invalidity **must fail**.) (emphasis added).

The Supreme Court likewise invoked the act of state doctrine in *Oetjen v. Cen. Leather Co.*, 246 U.S. 297 (1918). There, the actions of the Mexican government were at issue, and the courts dismissed the action stating that redress for alleged injuries – if any – must be obtained in the courts of the government who allegedly caused the injuries. *Id.* at 304. The Court stated:

> The principle that the conduct of one independent government cannot be successfully questioned in the courts of another is applicable to a case involving . . . claims for damages [which] are based upon acts done in a foreign country, for it rests at last upon the highest considerations of international comity and expediency. **To permit the validity of the acts of one sovereign to be reexamined and perhaps condemned by the courts of another would certainly imperil the amicable relations between governments and vex the peace of nations**.

Id. at 303-04 (emphasis added).

The act of state doctrine bars this Court from inquiring into the validity of the AHA, and also precludes this Court from reexamining and questioning the facts or result of the alleged official acts of Ugandan government officials. Here, SMUG's claims of "persecution" hinge entirely upon its claim that the introduction, consideration, passage and enactment of the AHB/AHA by the sovereign government of Uganda constituted a "crime against humanity of persecution," in which Lively was somehow complicit as a "conspirator" or "aider and abettor." Alternatively, SMUG wants this Court to declare that official acts of Ugandan government officials, such as Minister Lokodo's alleged "raids" of LGBTI workshops or Minister Buturo's promises to criminalize "promotion of homosexuality," constitute "crimes against humanity of persecution," in which Lively was somehow complicit. If this Court were to find that the actions of Uganda's Parliament and government officials in considering, passing and implementing the AHA were valid and not "criminal" or "persecutory," SMUG's claims against Lively, such as they are, would evaporate, for one cannot "conspire" to do something lawful. As such, there is no way for SMUG to prevail in this case without this Court inquiring into the validity of the official acts of Uganda's sovereign government, and without this Court's indictment of those official acts as criminal or persecutory.

If SMUG's claims are not barred by the act of state doctrine here, then the doctrine is meaningless. Indeed, one of the most fundamental applications of the act of state doctrine arises when plaintiffs ask a court to determine the legality of a foreign statute or policy. *Soc'y of Lloyd's v. Siemon-Netto*, 457 F.3d 94, 102-03 (D.C. Cir. 2006) (holding that "the act of state doctrine bars [courts] **from even asking**" whether a foreign statute is lawful) (emphasis added); *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019 (W.D. Wash. 2005) (holding that act of state doctrine barred the court's consideration of claims concerning a foreign government's official policies);

see also Doe v. Exxon Mobile Corp., 69 F. Supp. 2d 75, 87 (D.D.C 2014) (noting that an "illustrative list of acts" to which the act of state doctrine applies includes *inter alia* "**passing a law**") (emphasis added).

Not only is this Court's inquiry concerning the legality of the AHA prohibited by the act of state doctrine, but so, too, is any inquiry regarding the alleged acts of persecution undertaken by Ugandan officials in the course of implementing official Ugandan policy and law. Yet, SMUG's claims under the ATS require not only the prohibited inquiry into, but also a direct indictment of, such official acts as criminal. Indeed, the fourteen specific acts of alleged persecution identified by SMUG were primarily engaged in, if at all, by officials of the sovereign Ugandan government. (MF ¶ 104) (Ugandan police); (¶ 105) (Ugandan Minister Lokodo and Ugandan police); (¶ 106) (Ugandan police); (¶ 107) (Ugandan Minister Lokodo); (¶ 108) (Ugandan Deputy Attorney General, Ugandan Minister Buturo, and Uganda Broadcast Council); (¶ 109) (Ugandan authorities); (¶ 112) (Ugandan police); (¶ 113) (Ugandan Parliament); (¶ 114) (Ugandan government); (¶ 115) (Ugandan police); (¶ 116) (Ugandan officials); (¶ 117) (Ugandan police). Accordingly, the gravamen of SMUG's entire lawsuit is predicated on this Court reviewing the actions of a sovereign government and its officials, concluding that they were criminal, and then finding that Lively somehow "conspired" in or "assisted" those acts (despite SMUG's complete evidentiary failure on Lively's involvement). The act of state doctrine precludes this Court from undertaking the inquiry requested by SMUG.

Following the Supreme Court's admonitions in *Sabbatino, Underhill, Ricaud*, and *Oetjen*, numerous cases have dismissed claims that sought precisely what SMUG seeks here – namely, the prohibited inquiry into the validity of the actions of sovereign governments and government officials. *See, e.g.*, *Konowaloff v. Metro. Museum of Art*, 702 F.3d 140 (2d Cir. 2012) (dismissing

plaintiff's complaint based on the act of state doctrine and holding that "the validity of the foreign state's act may not be examined '**even if the complaint alleges that the [act] violates customary international law**'") (emphasis added) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964)); *Glen v. Club Mediterranee, S.A.*, 450 F.3d 1251, 1257 (11th Cir. 2006) (dismissing a tort claim "[b]ecause the act of state doctrine requires that the courts deem valid the Cuban [action] at issue in this case, [and] the Glens cannot maintain their claims"); *Braka v. Bancomer, S.N.C.*, 762 F.2d 222, 225-26 (2d Cir. 1986) ("The act of state doctrine bars consideration of plaintiffs' complaint because the situs of defendant's obligations was in Mexico and the acts in question were taken by the Mexican government in its capacity as a sovereign."); *Empresa Cuban Exportadora De Azucar y Sus Derivados v. Lamborn & Co., Inc.*, 652 F.2d 231 (2d Cir. 1981) (dismissing a claim based on the act of state doctrine); *Occidental Petro. Corp. v. Buttes Gas & Oil Co.*, 461 F.2d 1261 (9th Cir. 1972) (affirming a district court's dismissal of a complaint based on the act of state doctrine despite plaintiffs' assertion that the actions of the government official at issue in the case were motivated by his own personal interests).

It should be noted, too, that the act of state doctrine bars judicial inquiry regardless of how offensive or abhorrent a foreign state's action or statutory enactment may be to SMUG, this nation, this Court, or Massachusetts. *Sabbatino*, 376 U.S. at 436-37 ("However offensive to the public policy of this country and its constituent states [a government's action] of this kind may be, we conclude both that the national interest and progress toward the goal of establishing the rule of law among nations are best served by maintaining intact the act of state doctrine.").

Since this court cannot even inquire into the legality of Uganda's AHB/AHA or the acts of Ugandan government officials, the Court should grant summary judgment on all of SMUG's claims.

IV. THE COURT LACKS SUBJECT-MATTER JURISDICTION OVER SMUG'S INTERNATIONAL LAW CLAIMS UNDER THE ALIEN TORT STATUTE BECAUSE SMUG HAS NO EVIDENCE THAT LIVELY HAS VIOLATED ANY UNIVERSALLY ACCEPTED AND CLEARY DEFINED INTERNATIONAL LEGAL NORMS.

A. The Record Evidence Shows Lively's Actual Conduct Did Not Violate Any Specific, Universal And Obligatory Customary International Law Norm.

In the MTD Order, this Court accepted SMUG's **allegations** that Lively committed the crime against humanity of persecution against LGBTI people in Uganda. (MTD Order at 30-31.) The Court also recognized, however, that "all these allegations will need to be proved . . . and they may not be." (MTD Order at 35.) "[T]hey may not be," is an understatement. The allegations on which SMUG's Amended Complaint survived dismissal have been conclusively disproved, by SMUG's own witnesses. And just as SMUG's sensational allegations are now supplanted by record evidence, whatever norm of international law ostensibly criminalized Lively's conduct according to SMUG's allegations, must be supplanted by a specific, universal, and obligatory norm that covers Lively's actual conduct according to the record.

Under the ATS, federal courts have jurisdiction only to adjudicate the very narrow subset of international law norms that are "'specific, universal and obligatory.'" *Sosa*, 542 U.S. at 732; *Kiobel*, 133 S. Ct. at 1665. Lower courts must engage in "vigilant doorkeeping" to maintain only a "narrow class" of actionable torts, *Sosa*, 542 U.S. at 729, limited to "'a handful of heinous actions—each of which violates definable, universal and obligatory norms.'" *Id.* at 732 (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring)).

"[T]he requirement of universality goes not only to recognition of the norm in the abstract sense, **but to agreement upon its content as well**." *Xuncax v. Gramajo*, 886 F. Supp. 162, 187 (D. Mass. 1995) (emphasis added). "[T]he offense must be based on present day, **very widely accepted** interpretations of international law: **the specific things the defendant is alleged to have**

done must violate what the law already clearly is." *Mamani v. Berzain*, 654 F.3d 1148, 1152 (11th Cir. 2011) (emphasis added). This court in *Xuncax* dismissed ATS claims for "cruel, inhuman, or degrading treatment" because, although proscribed generally by "major international agreements on human rights," there was no universal agreement as to what specific acts constitute the tort. 886 F. Supp. at 187. In *Mamani*, the Eleventh Circuit dismissed an ATS claim for crimes against humanity because, although some crimes against humanity are recognized, there is no universal consensus that the specific conduct alleged constituted such crimes. 654 F.3d at 1152. *See also Forti v. Suarez-Mason*, 694 F. Supp. 707, 712 (N.D. Cal. 1988) ("To be actionable under the [ATS] the proposed tort must be characterized by universal consensus in the international community as to its binding status *and its content*. In short, it must be a universal, *definable*, and obligatory international norm.") (emphasis in original) (dismissing ATS claim because of "definitional gloss" and lack of universal agreement over the elements of the asserted norm); *In re Terrorist Attacks on September 11, 2001*, 714 F.3d 118, 125 (2d Cir. 2013) (affirming dismissal of ATS claim because "there continues to be strenuous disagreement among States about what actions do or do not constitute terrorism . . . .").

In *Sosa*, the ATS plaintiff sought damages for "a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment." 542 U.S. at 738. As the basis for his ATS claim, the plaintiff asserted an international norm against "arbitrary" detention, ostensibly prohibiting any officially sanctioned, illegal detention, no matter the circumstances. *Id.* at 736. As support for this norm, the plaintiff pointed to a "survey of national constitutions," *id.* at 736 n.27, showing, "[t]he right to be free from arbitrary arrest and detention is protected in at least 119 national constitutions." M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent*

Protections in National Constitutions, 3 Duke J. Comp. & Int'l L. 235, 261 (1993). The Supreme Court observed, however, "that consensus is at a high level of generality." *Sosa*, 542 U.S. at 736 n.27. "Any credible invocation of a principle against arbitrary detention that the civilized world accepts as binding customary international law requires a factual basis beyond relatively brief detention in excess of positive authority." *Id.* at 737. The Court concluded that the plaintiff's asserted norm, criminalizing **any** officially sanctioned illegal detention "regardless of the circumstances," was "far from full realization," and "expresses an aspiration that exceeds any binding customary rule having the specificity we require." *Id.* at 738, n.29. Thus, while there was a discernable norm against arbitrary detention, **generally**, the Court did not discover any specific, universal, and obligatory norm as to the meaning of "arbitrary" that criminalized the specific detention at issue.

Accordingly, for SMUG to recover under the ATS for "persecution" as a crime against humanity, it is not enough for SMUG to point to a binding international law norm against "persecution," or even a norm against persecution based generally on sexual orientation or gender identity. Rather, SMUG must point to a specific, universal, and obligatory norm criminalizing Lively's specific conduct. And while SMUG's ATS claims survived dismissal based on unproven allegations of Lively's conduct, to survive summary judgment SMUG must show that the world has criminalized what Lively **actually did**, according to the **record evidence**. SMUG will fail.

No conceivable international law norm is violated by what Lively actually did according to the record evidence:[5]

[5] SMUG neither has produced, nor can produce, evidence to refute any of these facts. As set forth in the Statement of Material Facts above, SMUG's witnesses consistently disclaimed knowledge of any contrary facts.

- Lively visited Uganda twice in 2002 for several speaking engagements regarding his orthodox Christian viewpoint on sexual ethics and the natural family; homosexuality was but one topic among many he discussed. (MF ¶¶ 10-20.)
- Lively returned to Uganda nearly seven years later in March 2009, to speak at a conference on the subject of homosexuality (MF ¶ 47.)
- At the March 2009 conference and a few speaking engagements around the conference, Lively presented a broad range of his research, conclusions, and views regarding homosexuality, which included urging tolerance, compassion, dignity, and respect for people who identify as homosexual or are engaged in homosexual conduct, as fellow human beings made in the image of God; urging the maintenance of a distinction between homosexual **people**, whom are to be loved, and the homosexual political and social **agenda**, which is to be opposed; identifying ways that young people are introduced to homosexuality based on his own personal experience and the accounts given to him **by Ugandans**; and advocating for the liberalization of Ugandan laws against homosexual conduct. (MF ¶¶ 2-9, 53-61, 64-72.)
- Following the March 2009 conference, Lively campaigned—for nearly five years—for the liberalization, and ultimately abandonment, of a proposed new law against homosexual conduct which he did not write, request, have prior knowledge of, or even suggest at any time, and which was stricken by a court shortly after enactment, before it was ever enforced. (MF ¶¶ 79-81, 85, 94.)
- During the nearly seven years between Lively's second 2002 Uganda visit and his return in March 2009, he had no substantive contact with any person in Uganda, apart from a sporadic exchange of e-mails with Stephen Langa beginning in March 2007 to

plan for the conference in March 2009, and a single exchange with a representative of pastor Martin Ssempa, in 2008, wherein the representative sought permission to make copies of a previously published book by Lively, and Lively invited Ssempa to join in planning the logistics for the March 2009 conference.[6] (MF ¶¶ 21-24.)

- Lively provided no support, assistance, or participation, directly or indirectly, for any of the alleged instances of "persecution" for which SMUG seeks recovery in this case. (MF ¶¶ 102-117.)
- Lively had no knowledge of, or intent to effect, incite, or facilitate, alone or in concert with anyone else, any of the alleged instances of "persecution" for which SMUG seeks recovery in this case, or any expansion of Uganda's laws against homosexuality, or any violence, hatred, ridicule, ostracism, or vilification of any LGBTI Ugandan. (MF ¶¶ 103, 118, 129.)

Neither political incorrectness nor opposition to a popular cause is a crime against humanity. Lively is not an enemy of the human race for opposing the viewpoints or social and political agenda of a Ugandan LGBTI organization, representing no more than one tenth of one percent of the LGBTI people in Uganda (MF ¶ 193), even as he publicly (and privately) urged liberalization of laws against the conduct of the organization's constituents. Whatever "persecution" means, it cannot mean Lively's pure speech and public advocacy—no matter how disagreeable—are now criminal endeavors. Whatever norm against persecution found by this Court in the MTD Order to be specific enough to reach the untested "facts" of SMUG's tall tale in the Amended Complaint, it is obvious now, in the light of a record, that a still more novel and as yet unannounced norm

[6] Langa also paid a brief social visit to Lively and his wife in the United States in 2005 or 2006, and they visited a museum together. (MF ¶ 22.)

must be discovered to criminalize what Lively actually did (or, rather, said) in Uganda. To be sure, only an "any circumstances" norm akin to the one asserted by the *Sosa* plaintiff, criminalizing as persecution **any** opposition to SMUG's viewpoint, would suffice. Clearly no such norm exists, and Lively is entitled to summary judgment on SMUG's ATS claims as a matter of law.

B. There Is No Universally Accepted And Clearly Defined International Law Norm Against "Persecution" On The Basis Of Sexual Orientation And Gender Identity.

As shown by Lively in support of his motion to dismiss, there is no universally accepted and clearly defined international law norm against persecution, **generally** on the basis of sexual orientation and gender identity, sufficient to confer this Court jurisdiction over SMUG's ATS claims, which depend on those categories. (Mem. Law Supp. Lively Mot. Dismiss Pls. Am. Compl. ("Lively MTD Mem."), dkt. 33, § III.B; Mem. Law Supp. Lively Mot. Amend and Certify Non-Final Order Interl. Appeal, dkt. 65, § II; Mem. Law Supp. Lively Mot. Recon. Order Den. Certification Interl. Appeal , dkt. 73, at 8-9.) Although Lively will not rehearse all the points of these arguments here, Lively reasserts them and incorporates them herein by this reference. There is more to be said, however, at this summary judgment stage of these proceedings.

The Court's MTD Order rejected Lively's arguments and accepted an international law norm the Court deemed sufficiently universal to cover SMUG's claims, but it did so based only on the **allegations** of the Amended Complaint, which were superficially astounding. (MTD Order at 30-31.) Now that the **record** has revealed the allegations to be fiction, however, a new specific, universal, and obligatory norm criminalizing Lively's actual conduct must be discovered to save SMUG's claims from summary judgment. (*See* Section IV.A, *supra*.) New considerations are warranted.

First, the absence of any international law consensus on the inclusion of sexual orientation as a basis category for persecution at the level of crime against humanity has been observed at

least twice—in 2010 and 2014—by a leading (perhaps *the* leading) publicist on international criminal law.[7] Professor M. Cherif Bassiouni,[8] cited by the Supreme Court in *Sosa*, argued the need for an international law convention on crimes against humanity ("CAH") to unify to consensus **twelve** disparate formulations of CAH scattered throughout international law,[9] and to expand CAH into new areas. M. Cherif Bassiouni, *Crimes Against Humanity: The Case for A Specialized Convention*, 9 Wash. U. Global Stud. L. Rev. 575, 582-83, 585-86, 590 (2010). In cataloguing his aspirations for expansion of CAH coverage beyond where it was in 2010 (after Lively's last visit to Uganda), Bassiouni argued, "[t]here are also other extensions of the present listing of human protections, such as . . . **persecution based on sexual orientation**." *Id.* at 590 (emphasis added). Then in 2014, in his "comprehensive treatment of all legal and historical aspects pertaining to CAH in a single definitive volume," Bassiouni repeated the aspiration: "The list of human protections could also extend to . . . persecution based on sexual orientation." M. Cherif

[7] The Supreme Court in *Sosa* recited its **cautious** reliance on "jurists and commentators, who by years of labor, research an experience, have made themselves peculiarly well acquainted with the subjects of which they treat." 542 U.S. at 733-34. *See also* Statute of the International Court of Justice, June 26, 1945, art. 38(3), 59 Stat. 1031, 33 U.N.T.S. 993 (relying on "judicial decisions and the teachings of the most highly qualified publicists of the various nations, as **subsidiary means** for the determination of rules of law" (emphasis added)).

[8] Bassiouni is also designated by SMUG as one of its expert witnesses in this case, but as a legal expert, and not on any issue of fact. Lively objects to any consideration by the Court of any expert report on purely legal issues, or expert "testimony" on legal issues, and will move to strike any such "evidence" introduced by SMUG. Confined to their scholarly writings, however, as opposed to works commissioned by advocates, commentators such as Bassiouni remain one appropriate resource for defining norms of customary international law. *See supra*, note 7.

[9] The disparity among the twelve various formulations of CAH "evidences a weakness in customary international law" and "raises questions about whether they can be deemed sufficient to identify the specific contents of CAH in customary international law . . . ." Bassiouni, *Specialized Convention, supra*, at 583. Such uncertainty in the ability of existing international instruments to accurately identify the existing international law norms of CAH counsels against any expansion of CAH claims cognizable under the ATS in reliance on such instruments.

Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application*, at i, 53 n.12 (2014).

Thus, Bassiouni confirmed in both 2010 and 2014 what Lively argued in support of his motion to dismiss: The inclusion of sexual orientation as a basis category of persecution at the level of CAH "expresses an aspiration that exceeds any binding customary rule . . . ." *Sosa*, 542 U.S. at 738. Since "[t]he ATS is no license for judicial innovation," *Mamani*, 654 F.3d at 1152, such an aspirational norm cannot be declared by this Court as a matter of jurisdictional law.

Second, courts should be wary of the arguments of "human rights advocates" who cross from arguing what the law is to arguing what they desire it to be. As cautioned by Bassiouni:

> A binding legal norm may take one of three forms: a given convention or treaty; a general or particular international custom (as evidenced by consistent practice and opino juris); and a general principle of law (as evidenced by other perfected and unperfected sources of international law or by principles derived from the major legal systems of the world).
>
> **All too frequently, human rights advocates overlook these important legal distinctions** and attempt the de jure condendo extrapolation of legal rights or binding obligations from international instruments which do not have legally binding effects. In fact, human rights advocates frequently cross into the realm of lex [desiderata[10]] with the argument that the moral and ethical merits of a given proposition are sufficient to overcome technical legal arguments.

Bassiouni, *National Constitutions*, *supra*, at 242. As shown previously by Lively, SMUG's ATS claims rely almost exclusively on "extrapolation of legal rights or binding obligations from international instruments which do not have legally binding effects." (*See, e.g.*, Lively MTD

[10] The original is "lex *desirata*," an obvious typographical error. "Lex *desiderata*" means "the law as desired," as opposed to "lex lata," meaning as "the law as it exists."

Mem., dkt. 33, § III.A; Pls. Mem. Law Opp'n Def. Mot. Dismiss Am. Compl. ("SMUG Opp. MTD"), dkt. 38, § II.C.3.) Bassiouni knows this game well and warns against it.

Third and finally, to the extent Bassiouni is wrong, and there is a universally binding international norm prohibiting persecution generally on the basis of sexual orientation, the articulation of such a norm at this "high level of generality," without more, would be useless for ATS purposes. *See Sosa*, 542 U.S. at 736 n.27. (*See* Section IV.A, *supra*.) Rather, articulation of a sufficiently "specific, universal, and obligatory" norm to apply to the specific Lively conduct shown in the record would require answering questions not yet codified in any convention, taken up by any international tribunal, or otherwise answered to consensus in any universally recognized and clearly defined norm. For example, when is advocacy of an opposing viewpoint on homosexual conduct criminal? When is petitioning the government with objectionable motives criminal? Can there be a "universal" norm against petitioning foreign governments to enact laws restricting homosexual rights, when such petitioning activity would be absolutely protected under the First Amendment (and its *Noerr-Pennington* offspring) in the United States? (*See* Section V.E *infra*.) When is the domestic criminalization of homosexual conduct *criminal in and of itself* at customary international law, as opposed to legitimate state policymaking?[11] There is no specific,

[11] Lively's argument in support of dismissal, that the continued criminalization of homosexual conduct by approximately 80 of 200 countries demonstrates no "full realization" of any norm prohibiting such laws as "persecution," drew the Court's sharp rebuke. (*See* Lively MTD Mem., dkt. 33, § III.B; MTD Order at 28-29.) Lively respectfully submits that the Court misapprehended his point. Lively does not assert, as perhaps apprehended by the Court, that the existence of deprivations of rights is justification for the continued deprivation of rights. Rather, Lively invoked the reasoning of the Supreme Court in *Sosa*:

> It is not that violations of a rule logically foreclose the existence of that rule as international law. Nevertheless, **that a rule as stated is as far from full realization as the one Alvarez urges is evidence against its status as binding law; and an even clearer point against the creation by judges of a private cause of action to enforce the aspiration behind the rule.**

universal, and obligatory international norm that these acts are ever criminal, let alone providing knowable boundaries. And this Court's binding responsibility of "vigilant doorkeeping" to maintain a "narrow class" of actionable torts, limited to "'a handful of heinous actions—each of which violates definable, universal and obligatory norms,'" *Sosa*, 542 U.S. at 729, 732, prohibits the Court from undertaking to be the first to declare such norms.[12]

C. There Is No Universally Accepted And Clearly Defined International Law Norm Of Conspiracy Liability.

Lively is entitled to summary judgment on SMUG's "Third Claim for Relief," for the "Crime Against Humanity of Persecution: Conspiracy" (Am. Compl., dkt. 27, ¶¶ 246-250), because this Court lacks subject matter jurisdiction over the claim. There is no universally accepted and clearly defined international norm of conspiracy liability which could give this Court jurisdiction under the ATS.

Since the ATS is strictly "a jurisdictional statute creating no new causes of action," *Sosa*, 542 U.S. at 724, courts must look to international law to determine not only the **existence** of

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542 U.S. at 738 n.29 (emphasis added) (internal citation omitted). In other words, the persistence of a large number of states (approx. 40%) criminalizing homosexual conduct is evidence that there is no "full[y] realiz[ed]" international law consensus that such laws constitute "deprivation of fundamental rights" "by reason of the identity of the group" to the level of a crime against humanity. The absence of such a consensus counsels against invoking (or creating) an aspirational rule that any such law, **and even the advocacy thereof**, is *per se* persecutory, and the ATS prohibits a federal court from undertaking to define the contours of any norm against such state policymaking in a case of first impression.

[12] To accomplish "persecution" requires the intent to discriminate on prohibited grounds in conjunction with other acts, which are also usually criminal. Consequently, there has always been a historical difficulty in identifying and defining persecution as a stand-alone crime without connecting it to other specific criminal acts. This is why **there has never been a case involving the charge of "persecution" that has not involved other specific criminal acts.**

Bassiouni, *Contemporary Application, supra*, at 405 (emphasis added).

liability for the challenged conduct, *id*. at 733 ("[defendant's] detention claim must be gauged against the current state of international law"), but also the **scope** of that liability, *id*. at 732 n.20 ("A related consideration is whether **international law** extends the **scope** of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual") (emphasis added). "**To find ATS jurisdiction over an alleged secondary tort, there must be a sufficient and sufficiently definite international consensus supporting not only the underlying tort but also the form of secondary liability for that tort**." *Abecassis v. Wyatt*, 704 F. Supp. 2d 623, 654 (S.D. Tex. 2010) (applying *Sosa*) (emphasis added).

Fortunately, the Supreme Court has made this Court's task of divining the contours of international law on conspiratorial liability relatively easy. In *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), the Supreme Court reviewed various sources of international law, and held,

> the only 'conspiracy' crimes that have been recognized by international war crimes tribunals (**whose jurisdiction often extends beyond war crimes proper to crimes against humanity** and crimes against the peace) are **conspiracy to commit genocide and common plan to wage aggressive war** . . . .

548 U.S. at 610 (emphasis added). The Supreme Court quoted with approval other international jurists who "made a persuasive argument that **conspiracy in the truest sense is not known to international law**." *Id*. at 611 (emphasis added) (internal quotes omitted). Finally, the Supreme Court quoted various United Nations War Crimes Commissions, which "observ[ed] that, although a few individuals were charged with conspiracy under European domestic criminal codes following World War II, the United States Military Tribunals established at that time **did not recognise as a separate offence conspiracy to commit** war crimes or **crimes against humanity**." *Id*. at 611 n.40 (emphasis added) (internal quotations and alterations omitted).

As with all Supreme Court precedent, "this Court must . . . apply the Supreme Court's assessment of the law of nations." *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 263

(S.D.N.Y. 2009). Thus, even though *Hamdan* was not decided under the Alien Tort Statute, the Supreme Court's determination that international law forecloses conspiratorial liability for all but two offenses, neither of which is claimed here, is binding. *Id*. Applying *Hamdan* specifically to conspiracy claims brought under the Alien Tort Statute, the court in *South African Apartheid* held:

> **Jurists from the civil law tradition have long resisted the application of conspiracy to crimes under the law of nations**, as conspiracy is an Anglo–American legal concept. Importantly, the Supreme Court recently stated in *Hamdan v. Rumsfeld* that the law of war provides liability only for 'conspiracy to commit genocide and common plan to wage aggressive war.' While *Hamdan* did not address the [Alien Tort Statute], this Court must nevertheless apply the Supreme Court's assessment of the law of nations. ***Sosa* requires that this Court recognize only forms of liability that have been universally accepted by the community of developed nations. Conspiracy does not meet this standard. Therefore, this Court declines to recognize conspiracy as a distinct tort to be applied pursuant to [ATS] jurisdiction**.

Id. at 263 (emphasis added).

The *South African Apartheid* court is by no means unique in its application of the *Hamdan*-*Sosa* principle to reject conspiratorial liability for alleged human rights abuses under the Alien Tort Statute. *See e.g., Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 664-65 (S.D.N.Y. 2006) ("As of today, therefore, liability under the ATS for participation in a conspiracy may **only attach where the goal of the conspiracy was either to commit genocide or to commit aggressive war**. . . . As described above, [plaintiffs] contend that [defendant] joined **a conspiracy to commit a crime against humanity**. . . . As a result, the defendants' motion for summary judgment on the conspiracy claim is granted") (emphasis added) (applying *Hamdan*), *aff'd*, 582 F.3d 244, 260 (2d Cir. 2009) ("[P]laintiffs have not established that international law universally recognizes a doctrine of conspiratorial liability . . . .") (internal quotations and alterations omitted); *cf. United States v. Ali*, 718 F.3d 929, 935, 942 (D.C. Cir. 2013) (observing "piracy . . . the oldest and most widely acknowledged" of "universal crimes,"

but affirming dismissal of charge for conspiracy to commit piracy on grounds that "[i]nternational law does not permit [it]").

Because it knows that international law does not recognize conspiracy claims, SMUG may entreat this Court to look to United States federal common law, which is much more hospitable to such claims.[13] However, numerous federal courts applying *Sosa* have properly rejected similar requests and looked only to international law, as *Sosa* requires. *See e.g.*, *South African Apartheid,* 617 F. Supp. 2d at 263 (looking "to customary international law as the source of relevant authority" to determine whether conspiratorial liability may be asserted under ATS); *Presbyterian Church of Sudan,* 453 F. Supp. 2d at 665 n.64 ("[T]his Court continues to believe that international law must supply the substantive law for plaintiffs' [conspiracy] claims . . . .") (rejecting application of *Pinkerton*), *aff'd,* 582 F.3d 244, 260 (2d Cir. 2009) ("As a matter of first principles, we look to international law to derive the elements for any such cause of action [for conspiracy]."); *Abecassis,* 704 F. Supp. 2d at 654 ("International law, according to [*Sosa*], also defines who may be sued for violating that norm. There is no reason to believe that international law determines whether private – as well as state – actors can be sued but not whether secondary – as well as primary – actors can be sued."). Fidelity to Supreme Court precedent necessitates that this Court likewise look exclusively to international law to determine whether SMUG can assert a claim of conspiracy to persecute under the Alien Tort Statute.

[13] Under federal common law, "a defendant who does not directly commit a substantive offense may nevertheless be liable if the commission of the offense by a co-conspirator in furtherance of the conspiracy was reasonably foreseeable to the defendant as a consequence of their criminal agreement." *United States v. Bruno,* 383 F.3d 65, 89 (2d Cir. 2004) (citing *Pinkerton v. United States,* 328 U.S. 640, 646-48 (1946)).

Here, SMUG seeks to assert a claim of conspiracy not for the two torts allowed under *Hamdan*, but for a "crime against humanity," which was specifically dismissed in *South African Apartheid* and *Presbyterian Church of Sudan*. SMUG's claim should meet the same fate.[14]

D. There Is No Universally Accepted And Clearly Defined International Law Norm Of Joint Criminal Enterprise Liability.

Lively is also entitled to summary judgment on SMUG's "Second Claim for Relief," for the "Crime Against Humanity of Persecution: Joint Criminal Enterprise." (Am. Compl., dkt. 27, ¶¶ 240-245), because this Court lacks subject matter jurisdiction over the claim. There is no universally accepted and clearly defined international norm of joint criminal enterprise liability which could give this Court jurisdiction under the ATS.

The Supreme Court has observed that **one** court, "[t]he International Criminal Tribunal for the former Yugoslavia (ICTY), drawing on the Nuremberg precedents, has adopted a 'joint criminal enterprise' theory of liability, but that is **a species of liability for the substantive offense** (akin to aiding and abetting), **not a crime on its own**." *Hamdan v. Rumsfeld*, 548 U.S. 557, 611, n.40 (2006) (emphasis added) (citing *Prosecutor v. Tadíc*, Judgment, Case No. IT–94–1–A (ICTY App. Chamber, July 15, 1999)). Because it lacks "universal recognition" in international courts, the theory of joint criminal enterprise has been dismissed, along with conspiracy claims, in ATS

[14] SMUG will undoubtedly point to *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005), where the Eleventh Circuit recognized conspiracy liability under the Alien Tort Statute for a number of violations of international law including crimes against humanity. 402 F.3d at 1159. However, *Cabello* was decided before *Hamdan*. Moreover, the Eleventh Circuit ran afoul of the Supreme Court's instruction in *Sosa*, and looked to domestic rather than international law to determine whether conspiracy liability exists. *Id*. For these reasons, the Second Circuit expressly rejected *Cabello*, agreeing instead with the lower court in *Presbyterian Church of Sudan*, "that *Sosa* required applying international law." *Presbyterian Church of Sudan*, 582 F.3d at 260 n.11 (affirming *Presbyterian Church*, 453 F. Supp. 2d at 665 n.64 ("[T]he Eleventh Circuit erred . . . by drawing on domestic law, and not international law.")). This court should likewise reject *Cabello*, and follow the Supreme Court's clear teaching in *Hamdan* and *Sosa*.

cases. *See e.g.*, *Presbyterian Church*, 582 F.3d at 260 (affirming dismissal of joint criminal enterprise theory along with conspiracy claims because plaintiff failed to establish universal recognition, and, in any event, had failed to establish the requisite *mens rea*); *South African Apartheid*, 617 F. Supp. 2d at 263 (noting "the ICTY recognized Joint Criminal Enterprise as a crime derived from customary international law and comparable to conspiracy, [h]owever, the ICC has repeatedly declined to apply a broad notion of conspiratorial liability under customary international law"). Because it lacks universal recognition and is not clearly defined, this Court should enter summary judgment, for lack of subject matter jurisdiction, on SMUG's "claim" for joint criminal enterprise liability.

E. The United States Constitution Prohibits This Court From Entertaining Any ATS Claim Against Lively Based On A Crime Which Has Not Been Punished By Another Nation Or International Tribunal As An Offense Against The Law Of Nations.

In clarifying the limits on ATS jurisdiction to claims based on specific, universal, and obligatory norms of international law, the *Sosa* Court began with the premise that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the original ATS] was enacted." 542 U.S. at 731-32. The Court cited for context an early-nineteenth century Supreme Court case, *United States v. Smith*, 18 U.S. 153 (1820), which considered the constitutionality of an early ATS counterpart statute punishing "the crime of piracy, **as defined by the law of nations**." 18 U.S. at 157 (emphasis added).

The constitutional authority for the piracy statute at issue in *Smith* came from Article 1, Section 8, clause 10 (hereinafter, the "Offenses Clause"), providing, "[The Congress shall have Power To] define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." *See Smith*, 18 U.S. at 158. The issue in dispute was whether, under

the Offenses Clause, the piracy statute was a constitutional delegation by Congress of its power to define piracy, by merely referring to "the law of nations" rather than defining the crime itself, essentially leaving the definition to judicial interpretation. *Id.* at 156-58.

The *Smith* Court held that reference to "the law of nations" was constitutionally sufficient, reasoning that "[w]hat the law of nations on this subject is, may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognising and enforcing that law," thus defining this "crime of a settled and determinate nature" with "reasonable certainty." *Id.* at 160-162. "So that, whether we advert to writers on the common law, or the maritime law, or the law of nations, we shall find that they universally treat of piracy as an offence against the law of nations, and that its true definition by that law is robbery upon the sea." *Id.* at 162.

It appears no accident that the *Sosa* Court cited to *Smith*, in that the ATS derives its constitutional authority from the same Offenses Clause as the 1819 statute at issue in *Smith*. *See* Eugene Kontorovich, *Discretion, Delegation, and Defining in the Constitution's Law of Nations Clause*, 106 Nw. U.L. Rev. 1675, 1747-48 (2012).

> In effect, *Sosa* stated that courts cannot define their own offenses under the ATS in the absence of congressional definitions. They can only take those offenses that are predefined in international law. It is thus instructive that in calling for definite norms, *Sosa* specifically cites *Smith*--a case about the constitutional limits of the define power--to illustrate the specificity with which ATS causes of action must be defined in international law. After all, *Smith* said that piracy was uniquely so self-defined that it alone could be punished by the courts without any further definition by Congress. The status and definition of piracy was not just something some scholars and legal sources indicated, but one on which there was universal agreement. Had there been less than that, Congress's delegation of defining authority to the courts may well have been inadequate.
>
> . . . . *Sosa's* standard is independent of presumed legislative intent: it is mandated by the Offenses Clause and nondelegation concepts. **The constitutional underpinnings of *Sosa's* rule mean that**

> **refusing to recognize fuzzy, emerging, or not universally accepted offenses is more than an implementation of congressional intent or a prudent policy. Rather, *Sosa's* caution may be the kind of caution courts must exercise when there is a danger of construing a statute in a way that would raise constitutional concerns.**

Id. (emphasis added).

Though the Offenses Clause is not expressly discussed in *Sosa*, the *Sosa* prohibition against courts' defining their own offenses under the ATS is not only dictated by the text and history of the ATS itself, but in the first instance by the Offenses Clause. *Id.* at 1748. Thus, the rule announced in *Sosa* "was necessary to avoid serious constitutional difficulties." *Id.* The constitutional implications for ATS cases are significant:

> These suits have invoked an increasingly broad set of international norms of increasing nonobviousness and indefiniteness. **When the suitability of a cause of action under the *Sosa* standard is questionable, doubts must be resolved in favor of caution.** This is because the question of definiteness implicates not just the Court's recent interpretation of the ATS, but also the limits on federal legislative authority and the separation of powers.
>
> . . . . [T]he Court has given a template for analyzing these issues, most recently in *Hamdan*. To satisfy the Offenses Clause, an offense defined solely by the courts would have to meet the same kind of searching scrutiny given the conspiracy charge in *Hamdan*. **It would have to be shown, to begin with, that the same conduct has in fact been punished by other nations or international tribunals as an offense against the law of nations.**

Id. at 1749 (emphasis added).

No nation or international tribunal has punished, as an offense against the law of nations, the same purely speech conduct, with no factual, temporal, or causal connection to any cognizable harm, as is attributable to Lively on the record before the Court. Thus, any new international law norm defined by the Court to criminalize Lively's conduct would not only violate the jurisdictional

grant of the ATS, but would also violate the Offenses Clause of the Constitution. Accordingly, Lively is entitled to judgment as a matter of law on SMUG's ATS claims.

V. SMUG HAS NO EVIDENCE THAT LIVELY ENGAGED IN ANY UNPROTECTED SPEECH OR CONDUCT, AND SMUG'S CLAIMS ARE FORECLOSED BY THE FIRST AMENDMENT.

SMUG's lawsuit is (and always has been) a brazen and direct assault on Lively's First Amendment rights. SMUG's goal has been to punish Lively for his speech and remove his voice from the public sphere, because it abhors Lively's religiously-motivated views on marriage, family, and homosexuality. To avoid its obvious head-on collision with the First Amendment, SMUG manufactured allegations of a hate-crime ring and far-reaching "conspiracy" to persecute LGBTI persons in Uganda, which was allegedly orchestrated and directed by Lively. But, at this stage, SMUG can no longer transmogrify Lively's protected speech into unprotected "conduct" through vacant and hollow unverified allegations of a purported criminal mastermind allegedly manipulating the sovereign Parliament and will of an entire nation to persecute LGBTI Ugandans.

In the MTD Order, this Court envisioned that "this issue [of whether Lively's expression is protected by the First Amendment] will almost certainly be front and center at the summary judgment stage of this case." (MTD Order at 57); *see also id.* at 64 (explaining that courts have regularly "tackle[d] a First Amendment defense with a more complete evidentiary record at the summary judgment stage"). Now center stage, SMUG's claims must rest upon evidence of unprotected speech or conduct by Lively—yet discovery has confirmed that SMUG's claims against Lively are simply unvarnished criticism of his protected speech, and nothing more. Therefore, SMUG cannot avoid summary judgment on First Amendment grounds because it has no facts showing that Lively ever engaged in any unprotected speech or conduct, let alone the alleged "advocacy of imminent criminal conduct" and "management of actual crimes," for which this Court denied Lively's motion to dismiss. (MTD Order at 62.) SMUG has not a shred of

evidence that Lively engaged in any unprotected speech or conduct, and, therefore, its claims against Lively are foreclosed by the First Amendment.

A. A U.S. Citizen's Fundamental First Amendment Right To Free Speech Applies Anywhere In The World And Trumps "International Law."

As a U.S. citizen, Lively has a fundamental right to engage in core political speech, not only in the United States but throughout the entire world. His First Amendment rights protected by the U.S. Constitution trump SMUG's makeshift contortions of purported "international" or foreign "law." Well over one century ago, the Supreme Court held that "[t]he guaranties [the Constitution] affords . . . apply only to citizens and others within the United States, **or who are brought there for trial for alleged offenses committed elsewhere**." *Ross v. McIntyre*, 140 U.S. 453, 464 (1891) (emphasis added) (citing *Cook v. U. S.*, 138 U. S. 157, 181 (1891)). Subsequently, in *Reid v. Covert*, 354 U.S. 1 (1957), the Supreme Court reaffirmed this principle in the strongest possible terms, holding that the Bill of Rights applies to protect U.S. citizens even in a foreign jurisdiction:

> [W]e reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. **When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land**. This is not a novel concept. To the contrary, **it is as old as government**. It was recognized long before Paul successfully invoked his right as a Roman citizen to be tried in strict accordance with Roman law.

Id. at 5-6 (emphasis added); *see also Haig v. Agee*, 453 U.S. 280, 308 (1981) ("[a]ssuming, *arguendo* that First Amendment protections reach beyond our national boundaries . . ."); *Drummond Co., Inc. v. Collingsworth*, Nos. 13-80169, 13-80171, 2013 WL 6074157, at *14 (N.D. Cal. Nov. 18, 2013) (finding that U.S. citizen defendant "enjoyed First Amendment rights

abroad"); *Bullfrog Films, Inc. v. Wick*, 646 F. Supp. 492, 502 (C.D. Cal. 1986) ("[T]here can be no question that, in the absence of some overriding governmental interest such as national security, **the First Amendment protects communications with foreign audiences to the same extent as communications within our borders**."), *aff'd*, 847 F.2d 502 (9th Cir. 1988) (emphasis added).[15].

This bedrock principle is fully recognized by the Restatement (Third) of Foreign Relations Law § 721 (1987), which states that, "[t]he Constitution governs the exercise of authority by the United States government over United States citizens outside United States territory, for example on the high seas, and even on foreign soil." *Id*. at cmt. b (emphasis added). More specifically, the Restatement recognizes that:

> The **freedoms of speech**, press, religion, and assembly, and the right not to be subject to an establishment of religion, **are protected against infringement in the exercise of foreign relations power** as in domestic affairs.

Id. at cmt. d (emphasis added). Accordingly, it is beyond cavil that Lively did not check his First Amendment rights at the airport before departing for Uganda, either when he visited in March and June of 2002, or again seven years later, in March 2009. Since this Court could not punish Lively for his core political speech if (and to the extent) it had occurred (or did occur) in the United States, the Court cannot punish that same speech and expressive activity because it took place in Uganda.[16]

An equally firm and non-negotiable principle is that Lively's First Amendment rights trump anything contrary in the amorphous and shifting world of "international law," especially as defined by SMUG rather than the actual governing legal standards established by the Supreme

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[15] SMUG conceded the cross-border application of the First Amendment. (*See* SMUG Opp. MTD, dkt. 38, at 39 ("It is true that the First Amendment generally traveled with Lively to Uganda…")).

[16] In fact, the extraterritorial nature of Lively's speech in Uganda presents a separate and insurmountable obstacle, because it deprives this Court of subject-matter jurisdiction, warranting summary judgment in Lively's favor. *See* Section II, *supra*.

Court. "**No agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution**." *Reid*, 354 U.S. at 16 (emphasis added) (emphasis added).

> It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights--let alone **alien to our entire constitutional history and tradition--to … permit[] the United States to exercise power under an international agreement without observing constitutional prohibitions**.

Id. at 17 (emphasis added) ("This Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty"). The Restatement also recognizes this principle:

> A rule of **international law** or a provision of an international agreement of the United States **will not be given effect as law in the United States if it is inconsistent with the United States Constitution**.

Restatement (Third) of Foreign Relations Law § 115(3) (1987) (emphasis added). Thus, whatever the First Congress intended when it enacted the Alien Tort Statute in 1789, it could not have meant to render the First Amendment subservient to the dictates of "international law," because any "**law repugnant to the constitution is void**." *Marbury v. Madison*, 5 U.S. 137, 180 (1803) (emphasis added). "**[T]he [Alien Tort Statute] is not a blanket delegation of lawmaking to the democratically unaccountable international community of custom creators**," *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1016 (7th Cir. 2011) (emphasis added).

Support for this conclusion can also be found in the unwillingness of U.S. Courts to give effect to foreign judgments which implicate fundamental constitutional rights, including First Amendment free speech rights, or which invite a U.S. Court to apply foreign law contrary to the U.S. Constitution. *See, e.g.*, *Matusevitch v. Telnikoff*, 877 F. Supp. 1, 3-4 (D.D.C. 1995) (refusing to recognize and enforce a foreign judgment because the underlying cause of action is repugnant to U.S. public policy since it would "would deprive the plaintiff of his constitutional rights" under

the First Amendment); *Abdullah v. Sheridan Square Press, Inc.*, No. 93-2515, 1994 WL 419847, at *1 (S.D.N.Y. May 4, 1994) (dismissing British libel claim, holding that "establishment of a claim under the British law of defamation would be antithetical to the First Amendment protection accorded the defendants"); *Bachchan v. India Abroad Publ'ns, Inc.*, 585 N.Y.S.2d 661, 665 (Sup. Ct. 1992) (stating that the First Amendment "would be seriously jeopardized by entry of [a] foreign libel judgment granted pursuant to standards deemed appropriate in England but considered antithetical to the protections afforded [to] the press by the U.S. Constitution"). "Speech similar to the plaintiff's statements have received protection under the First Amendment to the Constitution and are thereby **unactionable in U.S. courts**." *Matusevitch*, 877 F. Supp. at 4 (emphasis added).[17]

Accordingly, the supremacy of the U.S. Constitution, coupled with its portability for U.S. citizens in foreign jurisdictions, mean that SMUG cannot hold Lively liable in this Court for any speech in Uganda which allegedly violated "international law" or Massachusetts state law, if that speech is constitutionally protected in the United States. Because Lively's core political speech is fully protected in the United States, SMUG's claims based upon his speech or expressive activity are entirely foreclosed by the First Amendment and require summary judgment in favor of Lively on all of SMUG's claims.

[17] These concerns have also been statutorily embodied in the Securing the Protection of our Enduring and Established Constitutional Heritage Act (SPEECH Act), enacted in 2010, in which Congress detailed "First Amendment considerations" that require domestic courts not to recognize and enforce certain foreign defamation judgments. *See* 28 U.S.C. § 4102; *see also Trout Point Lodge, Ltd. v. Handshoe*, 729 F.3d 481, 496 (5th Cir. 2013) (holding under SPEECH Act that Nova Scotian judgment was "unrecognizable and unenforceable" since Canadian law failed to offer "as much free speech protection as the United States Constitution").

B. Lively's Alleged Conduct Is Core Political Speech Protected By The First Amendment.

At bottom, SMUG's complaint – and Lively's alleged "crime" against humanity – is that Lively **spoke** and **wrote** about homosexuality in a way SMUG finds deeply offensive. In no small measure, SMUG seeks to turn First Amendment jurisprudence entirely on its head and arm United States District Courts through the ATS with the power to censor, restrain, suppress, and silence speech that offends SMUG's sensibilities. On the undisputed evidentiary record in this case, the First Amendment – if it means anything – requires dismissal of SMUG's claims.

The Supreme Court has repeatedly held that "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder v. Phelps*, 131 S.Ct. 1207, 1215 (2011) (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)). The Court has also indicated that in public debate "citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." *Boos v. Barry*, 485 U.S. 312, 322 (1988) (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988)) (internal quotes omitted). As the Court stated in *FCC v. Pacifica Found.*, 438 U.S. 726 (1978):

> [T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, **if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection**. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.

Id. at 745-46 (emphasis added); *see also Hustler Magazine*, 485 U.S. at 56 ("It is firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.") (quoting *Street v. New York*, 394 U.S. 576, 592 (1969)).

"The First Amendment reflects 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Snyder*, 131 S.Ct. at 1215 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). "That is because 'speech concerning public affairs is more than self-expression; it is the essence of self-government.'" *Id*. at 1215 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964)); *see also Hustler Magazine*, 485 U.S. at 50-51 ("[T]he freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole.") (quoting *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503-04 (1984)). The Supreme Court has explained that protecting speech is not a case-by-case cost-benefit analysis:

> The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relevant social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. **Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it**.

U.S. v. Stevens, 559 U.S. 460, 470 (2010) (emphasis added). "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 579 (1995).

Even "threats of vilification or social ostracism," are "constitutionally protected and beyond the reach of a damages award." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 926 (1982). "**Speech is powerful**. **It can stir people to action** … and—as it did here—inflict great pain. [But] we cannot react to that pain **by punishing the speaker**." *Snyder*, 131 S.Ct. at 1220 (emphasis added); *see also Hustler Magazine*, 485 U.S. at 55 (acknowledging the Court's

"longstanding refusal to [punish speech] because the speech in question may have an adverse emotional impact on the audience"); *Bible Believers v. Wayne County, Mich.*, 805 F.3d 228, 243 (6th Cir. 2015) (en banc), *cert denied*, 136 S.Ct. 2013 (2016) ("In fact, it is the minority view, including expressive behavior that is deemed distasteful and highly offensive to the vast majority of people, that most often needs protection under the First Amendment."). Nor may speech be regulated based upon "listeners' reaction" to it. *Forysth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 134 (1992). Thus, the strength of the First Amendment is in how wide its net is cast. Any other speech rule "would effectively empower a majority to silence dissidents simply as a matter of personal predilections," and open the door for government to "regulate" offensive speech as "a convenient guise for banning the expression of unpopular views." *Cohen v. California*, 403 U.S. 15, 21, 26 (1971).

In *Snyder*, the Supreme Court afforded immunity from private suit to a religious group that opposed homosexuality in the military, and that held highly offensive signs and chanted equally offensive slurs outside a military funeral, including: "Fag Troops," "Semper Fi Fags," "God Hates Fags," "Fags Doom Nations," "Not Blessed Just Cursed," "You're Going to Hell," and "God Hates You." 131 S.Ct. at 1216-17. The Supreme Court agreed that this message was "particularly hurtful" and caused "incalculable grief." *Id*. at 1217-18. Nevertheless, the Court concluded that the speech was protected by the First Amendment and not actionable by the aggrieved parties in a United States court, because it was public discourse on a matter of public concern. *Id*. at 1219. "**If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable**." *Id*. (quoting *Texas v. Johnson,* 491 U.S. 397, 414 (1989)) (emphasis added). "Indeed, '**the point of all speech protection** . . . is to shield just those choices of content that in

someone's eyes are misguided, or even hurtful.'" *Id*. (emphasis added) (quoting *Hurley*, 515 U.S. at 574).

Clearly, SMUG is deeply offended by Lively's speech and opinions, and it wants to quash his allegedly "anti-gay" speech about marriage, family, and homosexuality (or, for that matter, anyone who shares Lively's views on these matters). This, however, does not give SMUG a cause of action for tort liability against a U.S. citizen in a U.S. court. "As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate." *Snyder*, 131 S.Ct. at 1220. "**That choice requires that we shield [Lively] from tort liability**." *Id*. (emphasis added).

In its Amended Complaint, SMUG alleged that Lively committed "crimes against humanity" in violation of "international law," because he: (1) shared his purported **opinion** that all who engage in homosexual conduct are "evil," "rapists and murders," "child abusers," have a "predilection for child sexual violence," and possess the "genocidal tendencies of the Nazis and Rwandan conspirators"; and (2) advocated, lobbied and otherwise tried to influence members of the Ugandan government (and other private citizens) that they should propose and pursue laws that "criminalize advocacy undertaken by [homosexual] rights advocates." (*See* Am. Compl., dkt. 27, ¶¶ 65-93). In the MTD Order, this Court found that SMUG's Amended Complaint alleged that Lively "vilified the targeted community to inflame public hatred against it" and "advised" citizens how to pursue, and members of the Ugandan government how to enact, legislation restricting homosexual rights. (MTD Order at 34.) The undisputed evidentiary record demonstrates that SMUG has no evidence to support these allegations. In the first instance, the record shows that SMUG's claims about what Lively said are highly distorted, or at the very least, are not supported

by any actual evidence. Moreover, all of Lively's speech that is contained in the actual record in this case constitutes protected First Amendment expression that would **not** be unlawful in the U.S.

As noted above, the undisputed record shows that Lively's actual beliefs and speech about marriage, family, and homosexuality do not comport with the manufactured and unfounded allegations in SMUG's Amended Complaint. Lively's views and beliefs are summarized without any dispute in his affidavit. (MF ¶¶ 2-9). Among other things, Lively believes traditional man-woman marriage is the "best and most optimal societal arrangement for the raising of children" and he encourages the continuation of the Judeo-Christian, marriage-based civilization as God designed and intended it benefits, while opposing agendas that threaten it. (MF ¶¶ 5-6). Lively believes that homosexuality is a sin, but, in and of itself, no greater sin than any other sin, including his own. (MF ¶¶ 2, 5). He believes he is compelled by Jesus Christ to love as individuals all persons who identify as homosexual or commit the sin of homosexuality. (MF ¶¶ 2, 5). As such, Lively has always been, and remains, firmly opposed to any violence against, or ridicule, ostracism or vilification of any person, including any person who identifies as homosexual, and he does not hate anyone. (MF ¶¶ 6, 67-68). He abhors the idea of forcibly "outing" persons who want to keep their consensual, adult sexual activities private and discrete. (MF ¶ 5). Lively has always been, and remains, firmly opposed to any attempt to criminalize or punish any form of "status" or sexual "identity" or "orientation," separate and apart from sexual conduct. (MF ¶¶ 8, 118, 129). While Lively is in favor or prohibiting promotion of homosexual conduct to children and he opposes the so-called "gay agenda," he would not prohibit homosexual persons or organizations supporting them from using legal means and the democratic process to advocate for changes to laws they oppose, and he firmly believes that the people involved in homosexual conduct are to be treated with dignity and respect. (MF ¶¶ 9, 72). SMUG has no evidence to refute these undisputed and

religiously-motivated beliefs, and no amount of scorn for them removes them from First Amendment protection, not only when they are deeply held, but especially when they are shared in the marketplace of ideas.

As for Lively's trips to Uganda in March and June 2002, SMUG has no knowledge of what Lively actually said during those visits. (MF ¶¶ 15-19). In fact, Lively spoke to different groups and media outlets about pornography, Christian leadership, abstinence, God's design for marriage and family, and holiness and Christian living. (MF ¶¶ 11-13). In a few of those appearances, homosexuality was but one topic discussed among many within the broader context of preserving a Judeo-Christian marriage- and family-based culture, but Lively never discussed or advocated about the concepts of "promotion of homosexuality" or "recruitment" of youth into homosexuality, changing Ugandan laws about homosexual conduct, or strategies on the criminalization of promotion of homosexuality. (MF ¶¶ 14, 20). Following his second visit to Uganda in 2002, Lively did not return to Uganda until March 2009, and SMUG has no evidence of anything Lively did or said in Uganda until he returned to the country in March 2009. (MF ¶ 21).

Lively returned to Uganda to participate in a March 2009 conference. (MF ¶ 47). The undisputed purpose for this conference when he agreed to attend was to provide correct and truthful information on homosexuality. (MF ¶¶ 48-49). Before arriving in Uganda, there was no mention of enacting or amending Ugandan laws regarding homosexuality or discussing governmental strategies or policies regarding homosexuality. (MF ¶¶ 49-51, 57). When Lively arrived, he was informed that some members of the Ugandan Parliament were considering enacting a new law regarding homosexuality and he attended and spoke at a meeting where less than ten out of Uganda's 385 members of the Parliament were in attendance. (MF ¶¶ 51, 53, 56-57). In this meeting, and elsewhere, Lively repeatedly shared his views that any criminalization of homosexual

conduct should focus on rehabilitation and not punishment, and he urged Ugandans, including members of the Parliament, to liberalize Ugandan law to allow voluntary counseling instead of incarceration for those convicted of homosexual conduct. (MF ¶¶ 58-60, 81, 85). When speaking to the gathering at Parliament, Lively did not advocate for tougher criminal punishments for homosexual conduct, and he did not advocate for the death penalty or life imprisonment for any form of homosexual conduct. (MF ¶¶ 61-62). Otherwise, Lively provided a series of three lectures at a conference where about thirty to forty people were in attendance, **including persons who disagreed with Lively's views about marriage, family, and homosexuality, who were allowed to state their opposing viewpoints and who thanked Lively for the exchange of ideas**. (MF ¶¶ 64-71). Lively's lectures in March 2009, as well as other speaking engagements he had with several church, university, and school assemblies, comported with his religiously-motivated views set forth above. (MF ¶¶ 2-9, 67, 72).

Lively's speech about marriage, family, and homosexuality is afforded the highest protection under the First Amendment, because it is core political speech on public issues and matters of public significance. Furthermore, SMUG has no evidence of any speech amounting to incitement, or integral to or aiding and abetting any criminal conduct, or constituting a conspiratorial agreement to persecute. (*See* Sections V.C & V.D, *infra*.) Thus, Lively's speech cannot be the basis for SMUG's claims, no matter how much it offends SMUG. The First Amendment has withstood far more (and far worse), because it must.

Finally, a refusal to protect Lively's expression under the First Amendment based upon the undisputed record in this case would carry the astounding implication that Americans engaged in the public debate over sexual rights – for example by "conspiring" to pass constitutional amendments denying marriage rights to homosexual couples, by "plotting" to defeat local

ordinances requiring cross-gender bathroom use, by "scheming" to defeat the passage of the Employer Non-Discrimination Act, or by vigorously arguing these issues in the courts – are somehow perpetrating or "aiding and abetting" "widespread and systematic attacks against a civilian population" and therefore potentially guilty of the "crime against humanity of persecution," because they have engaged in the "intentional and severe deprivation of fundamental rights contrary to international law." To question the wisdom of such advocates, and to oppose them in the political process is one thing, but to open the door for declaring them *hostis humanis generis*, is quite another. Countless Americans involved in intense advocacy over homosexual rights are not enemies of the state or of mankind with no First Amendment rights—and certainly no less First Amendment rights than the KKK, *see Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); Neo Nazis, *see Nat'l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43, 43-44 (1977); Westboro Baptists, *see Snyder*, 131 S.Ct. at 1220; lewd magazine publishers, *see Hustler Magazine*, 485 U.S. at 50-51, 56; "dial-a-porn" pleasure seekers, *see Sable Comm'cns of Cal., Inc. v. v. FCC*, 492 U.S. 115, 126, 130 (1989); or animal crush video enthusiasts, *Stevens*, 559 U.S. at 469-72.

While speech which is an "integral part" of a crime may not be protected under the First Amendment, there is no question that "vilifying a targeted group" and engaging the legal and political process over rights afforded that group is neither a "crime" nor criminally "aiding and abetting" a crime. Such conduct, even if considered utterly reprobate and vile by some (if not "doubtless gross and repugnant in the eyes of most," *Hustler Magazine*, 485 U.S. at 50), is not unlawful in the United States and thus cannot provide a cause of action under the ATS or any state law. Thus, allowing SMUG to pursue tort liability against Lively based upon his speech will violate not only his own First Amendment rights and protections but also substantially erode this cherished

freedom for all U.S. citizens.[18] Accordingly, Lively's speech is core political speech, and SMUG's claims based upon Lively's protected speech and expressive activity must fail.

C. Neither The Criminal Conduct Nor Incitement Exceptions To The First Amendment Apply To Lively's Speech.

To avoid dismissal of its claims on First Amendment grounds at the pleading stage, SMUG claimed that it sought "to challenge [Lively's] **conduct** through his involvement in a conspiracy to severely deprive people of their fundamental rights," and "not … his anti-gay speech or writings." (Am. Compl., dkt. 27, ¶ 11 (emphasis added)). However, as discovery has shown, SMUG has no evidence of any conspiratorial "conduct," and is left to complain only about Lively's **speech**. "Just as putting a 'Horse' sign around a cow's neck does not make a bovine equine," *Donovan ex rel. Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211, 224 (3d Cir. 2003), so labeling speech as "conduct" or "conspiracy" does not render that speech actionable on this undisputed evidentiary record. *See NAACP v. Button*, 371 U.S. 415, 429 (1963) ("a State cannot foreclose the exercise of constitutional rights by mere labels").[19] Instead, SMUG must show how Lively's speech falls outside the First Amendment's protection. As detailed below, SMUG cannot make this showing to defeat summary judgment.

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[18] SMUG has admitted that it is indeed attempting to criminalize Lively's expressive activity, even if, and to the extent, it occurred in the United States. (*See, e.g.*, Pls.' Opp. To Lively's Mot. to Amend MTD Order, dkt. 69 at 21, n.12). SMUG has no limiting principle to resist this conclusion if Lively's speech rights are not protected here. Rather than ask this Court to "punish the speaker," SMUG should sue actual criminals who commit or incite imminent violence against its members in Ugandan courts, **just as it has successfully done on repeated occasions to date**. (MF ¶¶ 159-161).

[19] Even if Lively's writings, books, speeches, presentations, and other verbal or written statements are treated as "conduct"—a conclusion that ignores their nature and substance and outright defies logic—his activities and communications nonetheless represent protected expression under the First Amendment. *See Bartnicki v. Vopper*, 200 F.3d 109, 120 (3d Cir. 1999) ("[A]lthough it may be possible to find some kernel of conduct in almost every act of expression, such conduct does not take the defendants' speech activities outside the protection of the First Amendment."), *aff'd*, 532 U.S. 514 (2001).

For speech to fall outside the First Amendment's protection, it must satisfy one of the few "historic and traditional categories [of expression] long familiar to the bar," including: "advocacy intended, and likely, to incite imminent lawless action"; obscenity; defamation; "speech integral to criminal conduct"; "fighting words"; child pornography; fraud; true threats; and "speech presenting some grave and imminent threat the government has the power to prevent." *U.S. v. Alvarez,* 132 S.Ct. 2537, 2544 (2012) (internal citations and quotations omitted); *see also Stevens,* 559 U.S. at 468.

In this matter, the Court permitted this case to proceed beyond the pleadings because it found SMUG's allegations might take Lively's speech outside the protection of the First Amendment as incitement or "speech integral to criminal conduct." (MTD Order at 59-62.) Pointing to SMUG's Amended Complaint, this Court found "sufficient allegations to support a claim for activity outside the protection of the First Amendment" based upon "sufficient allegations" of "conduct" that "has gone far beyond mere expression into the realm" of "advocacy of imminent criminal conduct" (or "advocacy of a crime against humanity") and "management of actual crimes—repression of free expression through intimidation, false arrests, assaults, and criminalization of peaceful activity and even the status of being gay or lesbian." (MTD Order at 61-62.)[20]

[20] In an earlier part of the MTD Order, this Court described SMUG's allegations of Lively's role as follows: "Essentially, Defendant's role is alleged to be analogous to that of an upper-level manager or leader of a criminal enterprise. He participated in formulating the enterprise's policies and strategies. He advised other participants on what actions might be most effective in achieving the enterprise's goals, such as criminalizing any expressions of support of the LGBTI community and intimidating its members through threats and violence. He generated and distributed propaganda that falsely vilified the targeted community to inflame public hatred against it. In particular, Plaintiff has set out plausibly that Defendant worked with associates within Uganda to coordinate, implement, and legitimate 'strategies to dehumanize, demonize, silence, and further criminalize the [Ugandan] LGBTI community.' In both 2002 and 2009, as part of this alleged campaign, Defendant met with Ugandan governmental leaders. Defendant's intentional activities,

SMUG cannot defeat summary judgment on its claims because it has no evidence to support these wild allegations. As detailed below, the undisputed record in this case shows that neither the "criminal conduct" nor the "incitement" exceptions apply. Lively never authorized, directed, ratified, managed or even assisted any tortious or criminal activity against LGBTI Ugandans. He also never gave specific instructions to threaten, intimidate, or commit violent acts against them, or incite any other form of imminent lawless action against LGBTI Ugandans. He simply made three visits to Uganda (spaced out by nearly 7 years), gave speeches and presentations based upon his writings, conducted some interviews, and, upon his return to the United States, later urged Ugandans to moderate their legislative proposals and existing law—views which were deemed too liberal by Ugandans and outright rejected by the Ugandan government.

1. Lively's Speech Is Not Integral To Any Criminal Conduct.

The undisputed evidentiary record in this case demonstrates that Lively's speech and expressive activity – both in Uganda and in the United States – was neither integral to any criminal conduct, nor aiding and abetting any such conduct. In *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949), the Supreme Court recognized an exception to the First Amendment for speech that is integral to criminal conduct. In *Giboney*, members of a union were enjoined by a state antitrade restraint statute from picketing outside a company for the purpose of persuading the company to discontinue its sales to non-union buyers. 336 U.S. at 492-94. The Court found that the union's picketing was not protected by the First Amendment because it was "doing more than

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according to the Amended Complaint, succeeded in intimidating, oppressing, and victimizing the LGBTI community. Indeed, as noted, according to the Amended Complaint Defendant acknowledged that his efforts made him instrumental in detonating 'a nuclear bomb against the 'gay' agenda in Uganda. **Of course, all these allegations will need to be proved** at trial to entitle Plaintiff to a verdict, **and they may not be**." (MTD Order at 34-35 (internal citations omitted; emphasis added).)

exercising a right of free speech or press." 336 U.S. at 503. In language specifically cited by this Court in its MTD Order, the Supreme Court rejected the union workers' free speech claim, noting that it "rarely has been suggested that the constitutional freedom for speech and press extends to immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute" and concluding that "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney*, 336 U.S. at 408, 502 (citations omitted). Ever since, "speech integral to criminal conduct" has been recognized as a well-established category of unprotected speech, *see Stevens*, 559 U.S. at 468, but the scope, breadth and meaning of this exception has also been the subject of much controversy and confusion. *See, e.g.*, Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Unchartered Zones*, 90 Cornell L. Rev. 1277, 1314-22 (2005) (identifying at least eight different interpretations of *Giboney*'s "course of conduct" language).

Importantly, whatever the outer bounds of this exception could be while still preserving the bedrock First Amendment principles discussed at length above, the *Giboney* exception requires at least three key elements, none of which has been (nor can be) shown here. First, *Giboney* involved a "**valid criminal statute**" that was violated by the speaker. *Giboney*, 336 U.S. at 495-98 (emphasis added). This case does not involve the violation of any lawfully enacted criminal statute, at the state or federal level. In this international context, a corollary statute would be a federal criminal statute enacted by Congress pursuant to its constitutional legislative power to "define and punish . . . Offenses against the Law of Nations." U.S. Const., art. I, § 8, Cl. 10. No such statute is at issue here. Moreover, no Court has ever held that the *Giboney* exception applies

to judge-made federal common law under the ATS on what constitutes a violation of the law of nations. Any such holding would represent not only an expansion of the ATS – which the Supreme Court has soundly rejected in *Sosa* and *Kiobel* – but one that puts it on a collision course with the First Amendment.

Second, the speech at issue in *Giboney* lost First Amendment protection because its "**sole immediate object**" and "**sole immediate purpose**" was to facilitate the ongoing commission of a criminal offense—in that case, the felony violation of an antitrade restraint statute by forcing a company to enter into an unlawful business arrangement. *Giboney*, 336 U.S. at 498, 501 (emphasis added). In stark contrast, there is no evidence that Lively had any criminal purpose for his speech, let alone one that could be described as his "sole immediate object." Although this heightened intent showing under *Giboney* requires something comparable to specific intent, SMUG has no evidence to establish even a lesser intent requirement, such as knowledge or foreseeability. Certainly, there is no evidence in the record that Lively's **only** purpose—or "sole immediate object"—was to facilitate, manage, direct, and orchestrate the commission of a crime against humanity. Instead, all of the evidence in this case demonstrates that Lively only intended to share his views on marriage, family, and homosexuality. (MF ¶¶ 2-9, 48-52, 67). He shared those views openly and publicly, and **he respectfully engaged with others that disagreed with him, who ultimately thanked him for sharing his views**. (MF ¶¶ 64-71). When Lively travelled to Uganda in March and June 2002 and in March 2009, and at all times before, during, in between, and after such travels, Lively never had any intention to effect, incite, or facilitate: the persecution of any LGBTI or other person in Uganda; the criminalization or punishment of any form of sexual "identity" or "orientation" or "status" or existence of any LGBTI or other person in Uganda; or violence against, or hatred, ridicule, ostracism, or vilification of, any LGBTI person in Uganda.

(MF ¶¶ 103, 118, 129). Moreover, Lively specifically objected to Ugandan attempts to enact laws that were, in Lively's views, abhorrently harsh. (MF ¶¶ 58-61, 81-85). Therefore, nothing in the record provides any evidence that Lively's "sole" and "immediate" objective was violence to or abuse of LGBTI Ugandans.

Third, the union and its members who picketed in *Giboney* had "**adopted a plan**" and made "**agreements**" that were "designed" to violate the antitrade restraint law with "all" of their activities constituting a "single and integrated course of conduct." *Giboney,* 336 U.S. at 492, 502. In that way, the speech implemented the agreed-upon criminal purpose. In contrast, SMUG has absolutely no evidence that Lively entered into any agreement for any purpose, let alone an unlawful one, with a person responsible for committing any one of the single acts of persecution. In fact, Lively never "offer[ed] to engage in [any] illegal transactions," *see U.S. v. Williams,* 553 U.S. 285, 297 (2008), nor enter into any "agreements and conspiracies deemed injurious to society." *See Giboney*, 336 U.S. at 502. The record is indisputably clear: Lively neither "designed" nor "adopted" a plan to commit or aid the commission of a crime against humanity. Thus, SMUG cannot establish any of these three key elements present in *Giboney* to remove the speech at issue in that case from First Amendment protection.

Whether under *Giboney* or any other case relying upon it, SMUG cannot establish that Lively's speech is unprotected because it is "integral to criminal conduct." SMUG has utterly failed to put forward any proof supporting its allegations that Lively engaged in "management of actual crimes" (MTD Order at 62), or that Lively is the leader or member of a "conspiracy to deprive persons of their fundamental rights on the basis of their sexual orientation and gender

identity". (SMUG Opp. MTD, dkt. 38 at 20; *see id.* at 21 (referring to "his conspiracy")).[21] SMUG has no evidence showing that Lively's alleged speech and conduct is somehow "criminal activity" or conduct not protected by the First Amendment. Critically, SMUG has no evidence that Lively contributed any actual conduct to the alleged persecutory acts. (MF ¶¶ 102-117, 130-148). SMUG also has no evidence that Lively engaged in his expression with any criminal purpose or design. (MF ¶¶ 2-14, 47-52, 67-68, 103, 118, 129). SMUG also has no evidence that Lively entered into any agreement with anyone to commit any crimes against humanity. (MF ¶ 118, 130-131).

For any and all of the alleged persecutory acts, SMUG's witnesses testified repeatedly and unambiguously that they and SMUG "don't know" of "**any** connection" whatever between Lively and the fourteen persecutory incidents and their alleged perpetrators. (MF ¶¶ 102, 104-117). SMUG's witnesses consistently admitted that SMUG has absolutely no knowledge of any "communications," let alone "agreements," between Lively and the alleged perpetrators (or even Ugandan leaders for that matter); that SMUG has absolutely no knowledge of "**any assistance at all**" provided by Lively to the alleged perpetrators; and that SMUG has absolutely no knowledge of "any facts that would show that Scott Lively was responsible" for any of the fourteen incidents of alleged persecution at issue in this case. (MF ¶¶ 102, 104-117). Lively meanwhile expressly

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[21] The "conspiracy" alleged by SMUG in its Amended Complaint is that (1) Lively saturated the public discourse on homosexuality in Uganda with his opinions about homosexuality and homosexuals in a manner that offended SMUG, and (2) Lively then worked with private Ugandan citizens to lobby and influence two members of the Ugandan government to introduce legislation which allegedly "would render [SMUG's] work and mere existence illegal." (Am. Compl., dkt. 27, ¶¶ 65-93). Aside from the undisputed facts that (i) the legislation in question was only enacted nearly five years after Lively's last visit, and was promptly invalidated by Ugandan courts before anyone was punished under it (MF ¶¶ 88, 94-95); (ii) Lively had no role in preparing its initial draft (MF ¶¶ 75-76, 79-80); (iii) Lively stridently and consistently opposed the draconian criminal measures of the bill (MF ¶¶ 81, 85); and (iv) the Ugandans specifically rejected Lively's objections and concerns (MF ¶¶ 82-84, 86-93), Lively has a protected right to petition government to enact legislation, regardless of whether SMUG likes his proposals or even his motives. *See* Section V.E, *infra*.

disclaims any knowledge of, provision of support, assistance for, or other participation whatsoever in, whether directly or indirectly, any of the alleged persecutory acts other than the downward revision of the AHB, which is addressed below.[22] Accordingly, there is no direct or indirect connection between Lively and any of the alleged acts of persecution.

SMUG further claimed in its Amended Complaint that Lively worked with his Ugandan co-conspirators "on a campaign to systematically persecute LGBTI individuals and deny them fundamental human rights." (Am. Compl., dkt. 27, ¶ 94). But the only activities of this alleged "campaign" that SMUG could identify in discovery are First Amendment-protected activities: (i) writing and delivering petitions to the Ugandan Parliament; (ii) holding rallies and delivering sermons riling Ugandans against homosexuality; (iii) taunting and humiliating LGBTI individuals in public spaces; and (iv) using the media to continue to call the public's attention to the promotion of homosexuality. (MF ¶¶ 119-120). Not only that, but, critically, SMUG has no knowledge of any participation by Lively in any of these four activities. (MF ¶¶ 121-124).

Furthermore, SMUG's Executive Director and Board Chairman testified that they have no knowledge of any unlawful agreement that Lively entered into with anyone to deprive persons of fundamental rights on the basis of their sexual orientation and gender identity, and that no one at SMUG has that knowledge. (MF ¶¶ 125-126). Moreover, SMUG has no knowledge of any action taken by Lively in the United States to deprive any Ugandan person of fundamental rights based on sexual orientation or gender identity. (MF ¶ 148). Lively has also expressly testified that at no time when he travelled to Uganda in March and June 2002 and in March 2009, and at all times

[22] As discussed herein, Lively provided comments to a draft of the AHB—comments which specifically objected to the most draconian measures of the proposed law, and which were rejected by the Ugandan Parliament as too lenient. (MF ¶¶ 79-93). Thus, it would be unimaginable to hold Lively liable for a law he indisputably opposed.

before, during, in between, and after such travels, did he ever enter into any campaign, agreement, conspiracy or enterprise with Langa, Ssempa, Buturo, or Bahati, or any other person to effect, incite, or facilitate the persecution of any LGBTI or other person in Uganda. (MF ¶¶ 118, 130-131).

SMUG also testified that it has no knowledge of any agreement between Lively and another person to deprive persons of fundamental rights on the basis of their sexual orientation, apart from its baseless and unsubstantiated accusation of Lively's alleged drafting of the 2009 AHB, which SMUG claims to have seen in unverified "media reports" from unidentified sources. (MF ¶¶ 97, 127). However, in fact, SMUG admits that it does not know who wrote the first draft of the 2009 AHB and does not know of any "specific contribution" that Lively made to the AHB. (MF ¶¶ 98-99, 113, 142). Moreover, there is no evidence in the record of any meeting between Lively and David Bahati, the actual drafter of the AHB, ever, and others with actual knowledge of the AHB deny any involvement from Lively in the drafting of it. (MF ¶¶ 73-76, 79-80, 96). Furthermore, when Lively provided comments to a draft of the AHB, his views were deemed too liberal by Ugandans and rejected in their entirety, because Lively was asking them to relax the proposed criminal penalties to levels that were even lower than existing law. (MF ¶¶ 62-63, 82-84, 86-93). Lively did not advocate for tougher laws against homosexual conduct, and certainly did not advocate for the death penalty, or even life imprisonment for any sexual offense. (MF ¶¶ 58-61, 81). In fact, Lively specifically objected to the death penalty and life imprisonment provisions in the AHB, which he found to be "appall[ing]," and he continued to make these same objections (and others) in subsequent years until a later version of the bill, the AHA, was enacted in 2014. (MF ¶¶ 81, 85).

Thus, on this undisputed evidentiary record, SMUG has no evidence of any criminal conduct by Lively to direct, authorize, manage, or aid and abet the commission of any crime against humanity. Nothing. Not one act—whether direct persecution, aiding and abetting persecution, or conspiracy to persecute. Therefore, SMUG has no evidence of Lively doing anything remotely criminal, as part of anything that could be described as a criminal enterprise, let alone an act that would constitute a specific and universally accepted crime against humanity. This total absence of evidence is fatal to SMUG's claims. The utter lack of proof requires summary judgment on SMUG's claims because all of Lively's alleged "conduct" is, at the end of the day, exclusively and only speech, writings and expressive activity protected under the First Amendment. Accordingly, the *Giboney* exception does not apply and Lively's expression is protected by the First Amendment.

2. Lively's Speech Does Not Constitute Incitement.

The undisputed evidentiary record in this case also demonstrates that Lively's speech and expressive activity – both in Uganda and in the United States – does not constitute incitement. Much like its lack of proof of any criminal conduct, SMUG has no evidence showing any incitement to **any** violence, let alone **imminent** violence, by Lively that would suffice to pierce his First Amendment privilege. Indeed, SMUG has utterly failed to put forward any proof supporting its allegations that Lively engaged in "advocacy of imminent criminal conduct"—in this case advocacy of an imminent crime against humanity. (MTD Order at 62.)

"[M]ere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982) (italics in original) (citing *Brandenburg v. Ohio*, 395 U.S. 444 (1969)); *see also Williams*, 553 U.S. at 298-99 (noting the "important distinction" between a "proposal to engage in illegal

activity" and the "abstract advocacy of illegality"). Neither do "threats of vilification or social ostracism," which are likewise "constitutionally protected and beyond the reach of a damages award." *Claiborne*, 458 U.S. at 926 (emphasis added). Only "advocacy [which] is directed to inciting or producing **imminent** lawless action **and is likely** to incite or produce such action" is unprotected. *Id.* at 928 (citing *Brandenburg*, 395 U.S. at 447). But "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." *Brandenburg*, 395 U.S. at 448 (quoting *Noto v. United States*, 367 U.S. 290, 297–298 (1961)). Speech that "amount[s] to nothing more than advocacy of illegal action **at some indefinite future time**," cannot be punished. *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (state could not punish speaker who exclaimed to police that "we'll take the f----- street **later**," because lawless action being advocated for "later" was not imminent) (emphasis added). In *Claiborne*, the Supreme Court held that "strong language" and "emotionally charged rhetoric" that arguably advocated racial violence was nonetheless protected, even though violence ultimately resulted, because "the acts of violence … occurred **weeks or months** after the … speech," and thus it was not imminent. 458 U.S. at 928 (emphasis added).

In the case at bar, the undisputed record shows that SMUG cannot establish that Lively advocated any violence, much less incitement of "**imminent**" lawless violence against LGBTI Ugandans. As an initial matter, SMUG has no evidence to support its allegations that Lively ever advocated any violence in the abstract or specifically against any person or group, let alone incited anyone to produce or commit imminent violence. (MF ¶¶ 5, 8, 67-68, 72, 102-118, 130-148). Under *Brandenburg*, *Claiborne* and *Hess*, incitement cannot be found if violence is merely advocated, let alone if no violence is even advocated and mere opinions on social and moral issues are disseminated through speech and writings. Moreover, SMUG has no evidence that Lively ever

sought the commission of "imminent" crimes against LGBTI Ugandans, whether in the form of intimidation, false arrests, assaults, or criminalization of status. (MF ¶¶ 104-118, 129-148). In fact, the undisputed evidentiary record demonstrates that Lively never sought to effect, incite, or produce any such actions. (MF ¶¶ 8, 129).

SMUG has no evidence to show that Lively's speech and advocacy "invited, induced and encouraged" people whom Lively never even met to commit violent acts which Lively never advocated, such as "severe repression, arrest and certainly even violence," (Am. Compl., dkt. 27, ¶ 93), and then not "imminently," but rather many months and even years removed from Lively's visits to Uganda. For instance, SMUG has no evidence that Lively provided locations for Ugandan police to "raid" or names of people for Ugandan police to arrest (MF ¶¶ 104-105, 109, 112, 115); nor that he provided names of homosexuals for Ugandan tabloids to "out" (MF ¶¶ 5, 108, 110-111, 137, 139). Critically, SMUG has no evidence that Lively advocated for, let alone incited anyone to commit any of the specific persecutory acts. (MF ¶¶ 102-117, 130-148).

Thus, SMUG has no evidence whatsoever linking Lively to the alleged persecutory acts, or the incitement of them. SMUG has no knowledge of "any connection" between Lively and the fourteen persecutory incidents and their alleged perpetrators, and it has no knowledge of any "communications" or "agreements" between Lively and the alleged perpetrators. (MF ¶¶ 118, 130-131). SMUG also has absolutely no knowledge of "any assistance at all" provided by Lively to the alleged perpetrators and no knowledge of "any facts that would show that Scott Lively was responsible" for any of these fourteen incidents. (MF ¶¶ 102-117, 132-146). The allegations of sinister and nefarious "conduct," "strategy," "scheming" and "plotting" that SMUG attributes to Lively in its Amended Complaint has been shown to be a bag of air. All that Lively did was speak his views, offensive as they may be to SMUG.

On this undisputed record, SMUG also cannot possibly meet the imminence requirement of *Brandenburg*. Each of the fourteen alleged acts of persecution took place several **years** before (?) or after the alleged speech that caused it. If "later today" was not sufficiently imminent in *Hess*, "later this decade" is certainly not imminent. So, even if "discrimination" against homosexual conduct were illegal under international law, and it is not, Lively cannot be liable for advocating such discrimination because he did not advocate **imminent** lawless conduct. Accordingly, the *Brandenburg* exception does not apply and Lively's expression is protected by the First Amendment.

D. The First Amendment Bars Guilt By Association.

Both the Supreme Court and the First Circuit have recognized particular concerns raised by conspiracy claims in the context of First Amendment activity that apply to, and doom, SMUG's claims against Lively. The Supreme Court has held that parties cannot be liable for conspiracy or similar claims based upon mere association alone. *See Claiborne*, 458 U.S. 918-19 ("The First Amendment similarly restricts the ability of the State to impose liability on an individual solely because of his association with another."); *see also Healy v. James*, 408 U.S. 169, 186 (1972) ("[I]t has been established that 'guilt by association alone, without [establishing] that an individual's association poses the threat feared by the Government,' is an impermissible basis upon which to deny First Amendment rights.") (citation omitted); *Scales v. United States*, 367 U.S. 203, 229 (1961) (noting, in view of First Amendment concerns, that a "blanket prohibition of association with a group having both legal and illegal aims" would present "a real danger that legitimate political expression or association would be impaired," and suggesting that punishment requires "clear proof that a defendant 'specifically intend[s] to accomplish [the aims of the organization] by resort to violence'") (citing *Nolo*, 367 U.S. at 299); *De Jonge v. Oregon*, 299 U.S. 353, 364-65

(1937) (holding that a person could not be prosecuted merely for "assist[ing] in the conduct of [peaceable] meetings" held by the Communist Party).

Therefore, Lively's simple and limited association with certain private Ugandan citizens who opposed the expansion of homosexual rights cannot be "criminal activity," even if those alleged co-conspirators had subsequently committed crimes. *Claiborne*, 458 U.S. at 920 ("Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence."); *see also In re: Asbestos Litig.*, 46 F.3d 1284, 1286, 1290 (3d Cir. 1994) (reversing denial of summary judgment on conspiracy claims under the "strict standard set out in Claiborne" because mere association with another "cannot possibly show that [defendant] specifically intended to further" wrongful conduct by another).

But, in this case, the undisputed evidentiary record shows that the four individuals with whom Lively allegedly associated in Uganda **are not even the same as those who allegedly committed the acts of persecution**. (MF ¶¶ 104-117). Thus, SMUG not only has no evidence of any direct or indirect involvement by Lively in the acts of persecution, (MF ¶¶ 102-118, 125-126, 129-148), SMUG also has no evidence showing a connection between the four alleged co-conspirators and the alleged acts of persecution. SMUG has no evidence that any of the four alleged co-conspirators committed any of the acts of persecution, let alone at the insistence or direction of Lively. (MF ¶¶ 102-118, 130-148). Instead, the alleged perpetrators of the acts are entirely different persons and not one of them is alleged to be a co-conspirator of Lively. (MF ¶¶ 104-118). Still further attenuated, SMUG also has no evidence that any of the four co-conspirators instructed or otherwise conspired with the alleged perpetrators in the commission of the persecutory acts, let alone that they did so at the behest of Lively. (MF ¶¶ 102-118, 129-148). Accordingly, on the undisputed record, there is no cognizable connection whatsoever between

Lively and the alleged persecutory acts. Speech – even speech that is offensive or hostile or inflammatory – is not enough. Nor is mere association with others.

SMUG's conspiracy claims also face an even higher hurdle in the First Circuit based upon the court's seminal decision in *United States v. Spock*, 416 F.2d 165 (1st Cir. 1969), addressing heightened requirements for proving conspiratorial liability when the First Amendment is involved. In *Spock*, the First Circuit held that "[t]he metastatic rules of ordinary conspiracy are at direct variance with the principle of *strictissimi juris*." *Spock*, 416 F.2d at 173. When analyzing an alleged conspiracy involving political speech "within the shadow of the First Amendment," as involved here, "'[c]riminal intent must be judged *strictissimi juris*, for otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, **but not specifically intending to accomplish them by resort to violence**, might be punished …'" *Id.* at 172 (quoting *Noto*, 367 U.S. at 299-300). "[The] intertwining of legal and illegal aspects [of an alleged conspiracy involving political advocacy], the public setting of the agreement and its political purposes, and the loose confederation of possibly innocent and possibly guilty participants raise the most serious First Amendment problems." *Spock*, 416 F.2d at 169.

In *Spock*, the First Circuit reversed the conviction of Dr. Spock, who was convicted for conspiring with others to aid the hindrance of the Vietnam War draft. *Id.* at 168. Dr. Spock and other "co-conspirators" drafted and widely circulated The Call, a manifesto that urged resistance to and defeat of the draft, in no uncertain terms. *Id.* at 168, 173-74. Dr. Spock even offered financial assistance and a defense to those who would resist the draft. *Id.* at 176. Some of Dr. Spock's "co-conspirators" then went out and actually collected and burned draft cards, a criminal act. Dr. Spock himself, however, did not participate in this activity. *Id.* at 168, 179. Nevertheless, he was charged with "conspiracy," and convicted along with the others. *Id.* at 168.

Because this purported conspiracy also involved protected political speech, the First Circuit applied the doctrine of *strictissimi juris,* and went on to analyze whether Dr. Spock actually had the specific intent to undertake the unlawful acts, or employ the unlawful means, that the other co-conspirators employed: "There remains the question whether it could have been found, within the strict test laid down by the cases supra, that the individual defendants **personally agreed to employ the illegal means contemplated by the agreement**." *Id.* at 176-77 (emphasis added). Intent to accomplish the general **objectives** of the conspiracy was not sufficient under the First Amendment, because it would operate as an impermissible chill on protected speech. Fidelity to the First Amendment required instead specific intent to carry out the unlawful **acts** themselves. The Court found that Dr. Spock had no such specific intent, even though he made plenty of "generalized" statements calling for resistance to the draft, and **even though he was actually present** at (though not personally involved in) a draft card burning demonstration:

> The principle of strictissimi juris requires the acquittal of Spock. It is true that he was one of the drafters of the Call, but this does not evidence the necessary intent to adhere to its illegal aspects. Nor does his admission to a government agent that he was willing to do 'anything' asked to further opposition to the war. **Specific intent is not established by such a generalization**. …The jury could not find proscribed advocacy from the mere fact, which he freely admitted, that he hoped the frequent stating of his views might give young men 'courage to take active steps in draft resistance.' **This is a natural consequence of vigorous speech**.

Id. at 178-79 (emphasis added). "Similarly, Spock's actions lacked the clear character necessary to imply specific intent under the First Amendment standard. … Although he was at the Washington demonstration he had, unlike Goodman and Coffin, … **contributed nothing, even by his presence, to the turning in of [draft] cards**." *Id.* at 179 (emphasis added).

The same outcome should obtain here. This Court is required to apply *strictissimi juris* to SMUG's claims because they indisputably involve speech "within the shadow of the First

Amendment." *See id.* at 416 F.2d at 179. Under this doctrine, Lively could not be liable for the alleged acts of persecution unless he "**personally agreed to employ the illegal means contemplated**." *See id*. at 176 (emphasis added). If Dr. Spock could not be liable for the crime of draft card burning committed by others, even though he explicitly advocated that crime and was physically present during its commission, *id*. at 176-79, Lively cannot be liable for the alleged persecution here, which occurred an ocean away from Lively, because SMUG has no evidence whatsoever that Lively "personally agreed to employ" the alleged persecutory acts. (MF ¶¶ 102-118, 125-126, 129-148). Moreover, just as Dr. Spock did not have specific intent for the unlawful acts committed at the very event which he attended, the undisputed record shows that Lively had no specific intent for the allegedly unlawful acts committed while he was half-a-world away, and years after his visits to Uganda. (MF ¶¶ 103, 118, 129).

In sum, there is no way that SMUG's phantom claim of "conspiracy" can survive this Court's application of the binding precedent in *Spock*, and the Supreme Court precedent rejecting guilt by association. The First Amendment prohibits this Court from holding Lively liable for any conspiracy based upon his mere association with private Ugandan citizens (none of whom themselves committed any crimes), particularly since Lively did not personally agree to employ, let alone associate with any persons who perpetrated, the fourteen incidents of alleged persecution.

E. Lively Is Immune From Tort Liability Under The *Noerr-Pennington* Doctrine.

Lively is also immune from tort liability under the "*Noerr-Pennington*" doctrine. Under this doctrine, which takes its name from two Supreme Court cases, "all persons, **regardless of motive**, are guaranteed by the First Amendment the right to seek to influence the government or its officials to adopt a new policy, and they cannot be required to compensate another for loss occasioned by a change in policy should they be successful." *Sierra Club v. Butz*, 349 F. Supp. 934, 938 (N.D. Cal. 1972) (emphasis added); *see also Eastern R.R. Conference v. Noerr Motor*

Freight, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). The First Circuit has made it clear that "**there is no remedy against private persons who urge the enactment of laws, regardless of their motives**." *Tomaiolo v. Mallinoff*, 281 F.3d 1, 11 (1st Cir. 2002) (emphasis added) (internal alterations omitted) (quoting *Munoz Vargas v. Romero Barcelo*, 532 F.2d 765, 766 (1st Cir. 1976), in turn citing *Noerr*, 365 U.S. 127, and Pennington, 381 U.S. at 669-70) (affirming dismissal of Section 1983 action). This case is no different. Lively cannot be liable for any "conspiracy" with members of the Ugandan government, not only because his downward revisions of the proposed criminal penalties were never adopted, but because he was exercising a protected First Amendment right.

Originally adopted in the context of antitrust claims, the *Noerr-Pennington* doctrine is no longer limited to antitrust claims under the Sherman Act or any particular language in that federal statute, notwithstanding this Court's prior suggestion to the contrary. (MTD Order at 63 n.11.) The cases applying the *Noerr-Pennington* doctrine to shield petitioning activity outside the antitrust field are literally legion.[23]

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[23] *See, e.g., In re: Innovatio IP Ventures, LLC Patent Litig.*, 921 F. Supp. 2d 903, 911 (N.D. Ill. 2013) ("[B]ecause the doctrine derives from a constitutional source, other regional circuit courts have held that it must also extend to state law statutory and common law claims.") (collecting cases); *New West, L.P. v. City of Joliet*, 491 F.3d 717, 722 (7th Cir. 2007) ("*Noerr-Pennington* has been extended beyond the antitrust laws, where it originated, and is today understood as an application of the First Amendment's speech and petitioning clauses."); *Sosa v. DirecTV, Inc.*, 437 F.3d 923, 934-36 (9th Cir. 2006) (affirming dismissal of civil RICO claim based upon *Noerr-Pennington* immunity); *Anderson Development Co., L.C. v. Tobias*, 116 P.3d 323, 332-33 (Ut. 2005) (holding that lower courts had erred in failing to grant defendant's motions for summary judgment based on *Noerr-Pennington* in a claim for intentional interference with prospective economic relations and existing contractual relations); *IGEN Int'l, Inc. v. Roche Diagnostics GmbH*, 335 F.3d 303, 310 (4th Cir. 2003) ("[A]lthough originally developed in the antitrust context, the doctrine has now universally been applied to business torts."); *Harrah's Vicksburg Corp. v. Pennebaker*, 812 So.2d 163, 171-74 (Miss. 2002) (applying the *Noerr-Pennington* doctrine to reject state tort claims of restraint of trade, tortious interference, and civil conspiracy); *Titan America, LLC v. Riverton Investment Corp.*, 569 S.E.2d 57, 61-62 (Va. 2002) (applying the *Noerr-Pennington* doctrine in an action for tortious interference with business expectancy and conspiracy); *Manistee Town Ctr. v. City of Glendale*, 227 F.3d 1090, 1092 (9th

Instead, courts overwhelmingly agree that the doctrine is grounded in the First Amendment. *See, e.g.*, *Vibo Corp. v. Conway*, 669 F.3d 675, 683-84 (6th Cir. 2012) (explaining that the *Noerr-Pennington* doctrine protects First Amendment rights); *Mercatus Group, LLC v. Lake Forest Hosp.*, 641 F.3d 834, 846 (7th Cir. 2011) ("*Noerr-Pennington* was crafted to protect the freedom to petition guaranteed under the First Amendment."); *Suburban Restoration Co., Inc. v. ACMAT Corp.*, 700 F.2d 98, 101 (2d Cir. 1983) (referring to *Noerr-Pennington* doctrine as "an application of the [F]irst [A]mendment"); *see also California Motor Transport. Co. v. Trucking*

Cir. 2000) ("The immunity is no longer limited to the antitrust context; we have held that *Noerr-Pennington* immunity applies to claims under 42 U.S.C. § 1983 that are based on the petitioning of public authorities."); *Tarpley v. Keistler*, 188 F.3d 788, 794-96 (7th Cir. 1999) (Noerr-Pennington doctrine applied to protect defendant from a Section 1983 claim); *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119, 128 (3d Cir. 1999) ("We are persuaded that the same First Amendment principles on which *Noerr–Pennington* immunity is based apply to the New Jersey tort claims."); *Pound Hill Corp., Inc. v. Perl*, 668 A.2d 1260, 1263 (R.I. 1996) (applying *Noerr-Pennington* doctrine to common-law tort claims); *Gunderson v. University of Alaska*, 902 P.2d 323, 326-30 (Alaska 1995) (affirming the grant of defendants' motion for summary judgment on the basis of *Noerr-Pennington* in a suit alleging numerous tort claims); *Azar v. Primebank, FSB*, 499 N.W.2d 793, 794-95 (Mich. 1993) ("[T]he *Noerr–Pennington* doctrine is a principle of constitutional law that bars litigation arising from injuries received as a consequence of First Amendment petitioning activity, regardless of the underlying cause of action asserted by the plaintiffs."); *Eaton v. Newport Bd. of Educ.*, 975 F.2d 292, 298-99 (6th Cir. 1992) (applying *Noerr-Pennington* immunity in Section 1983 action); *Lampley v. Bridgestone Firestone, Inc.*, No. 90-907, 1992 WL 12666661, at *2 (M.D. Ala. Mar. 31, 1992) ("While the *Noerr-Pennington* doctrine evolved in the antitrust area, the First Amendment rights it protects apply equally to other claims.") (civil conspiracy claim); *Video Int'l Production, Inc. v. Warner-Amex Cable Commc'ns, Inc.*, 858 F.2d 1075, 1084 (5th Cir. 1988) ("Although the *Noerr–Pennington* doctrine initially arose in the antitrust field, other circuits have expanded it to protect first amendment petitioning of the government from claims brought under federal and state laws, including section 1983 and common-law tortious interference with contractual relations."); *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155, 159-60 (3d Cir. 1988) ("In numerous cases, the courts have rejected claims seeking damages for injuries allegedly caused by the defendants' actions directed to influencing government action." (affirming granting of summary judgment) (collecting cases); *Evers v. County of Custer*, 745 F.2d 1196, 1204 (9th Cir. 1984) (finding *Noerr-Pennington* immunity under the First Amendment against a conspiracy claim); *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 614 (8th Cir. 1980) ("Lower federal courts have adopted this deference to the right to petition not only in antitrust cases but in other cases involving civil liability. In various contexts, these courts have held individual defendants constitutionally immune from liability for exercising their right to petition.") (Section 1983 claim).

Unlimited, 404 U.S. 508, 510-12 (1972) (discussing the First Amendment underpinnings of the *Noerr-Pennington* doctrine); *BE&K Constr. Co. v. N.L.R.B.*, 536 U.S. 516, 524-25 (2002). "**There is simply no reason that a common-law tort doctrine can any more permissibly abridge or chill the constitutional right of petition than can a statutory claim such as antitrust**." *Video Int'l Production*, 858 F.2d at 1084 (emphasis added); *see also First Nat'l Bank of Omaha v. Marquette Nat'l Bank of Minneapolis*, 482 F. Supp. 514, 525 (D. Minn. 1979) (granting immunity against tortious interference claims for "to hold otherwise would effectively chill the defendants' First Amendment rights").

Even cases cited by this Court in the MTD Order (dkt. 59, p. 63 n.11) do not suggest this limitation but instead state just the opposite conclusion.[24] Importantly, these cases evidence that the First Amendment sets a floor for constitutional protection. Therefore, just as individuals and entities cannot be liable under the Sherman Act for petitioning activities, neither can they be held liable for torts in violation of international law over against the First Amendment.

Moreover, *Noerr-Pennington* immunity is also not limited to petitioning the United States government. Neither the First Circuit (nor any other Circuit, for that matter) has limited petitioning immunity to one's own government. The unquestionable legality of Lively's alleged conduct, had it occurred in the United States, raises serious due process and free speech questions about whether a U.S. court can punish it:

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[24] *See, e.g., Carpet Group Int'l v. Oriental Rug Importers Ass'n, Inc.*, 256 F. Supp. 2d 249, 261 (D.N.J. 2003) ("The *Noerr-Pennington* doctrine thus protects citizens from being penalized for exercising their [F]irst [A]mendment right to petition the government."); *Luxpro Corp. v. Apple, Inc.*, No. 10-3058, 2011 WL 1086027, at *3 (N.D. Cal. Mar. 24, 2001) ("Under the *Noerr-Pennington* doctrine, those who petition the government for redress are generally immune from antitrust, statutory, or tort liability **as part of the First Amendment right to petition the government**.") (emphasis added).

> **We see no reasons why acts that are legal and protected if done in the United States should in a United States court become evidence of illegal conduct because performed abroad**. We also reject the idea that the availability of petitioning immunity turns on the political "persuasion" of the government involved. The political character of the government to which the petition is addressed should not taint the right to enlist its aid.

Coastal States Mktg., Inc. v. Hunt, 694 F.2d 1358, 1366-67 (5th Cir. 1983) (emphasis added); *see also Coca-Cola Co. v. Omni Pac. Co.*, 1998 U.S. Dist. LEXIS 23277, *28-30 (N.D. Cal. Dec. 9, 1998) (agreeing with *Coastal States*, and declining to impose liability for conduct directed at foreign government that was legal in the United States); *Carpet Group*, 256 F. Supp. 2d at 266 (agreeing that the "lobbying of foreign governments, whether performed at home or abroad, is protected" from civil liability under the *Noerr-Pennington* doctrine); *Luxpro*, 2011 WL 1086027, at *5 (agreeing with Fifth Circuit that "[A] party should not be held liable for conduct that would be legal and protected if it was performed in the United States, but is now illegal because it was performed abroad" and holding that the "*Noerr-Pennington* doctrine also protects parties' efforts to petition foreign governments"); *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707 (1962) (distinguishing *Noerr* only on its facts rather than finding it inapplicable to foreign petitioning); *Friends of Rockland Shelter Animals, Inc. v. Mullen*, 313 F. Supp. 2d 339, 344 (S.D.N.Y. 2004) (concluding that the inapplicability of the *Noerr-Pennington* doctrine to foreign petitioning represents the "minority view").[25]

[25] In the MTD Order, this Court limited *Noerr-Pennington* Immunity to domestic petitioning. However, one of the two district court cases relied upon by this Court (MTD Order at 62) to establish this limitation, *Australia/E. U.S. A. Shipping Conference v. United States*, 537 F. Supp. 807 (D.D.C. 1982), **was vacated**, 1986 WL 1165605 (D.C. Cir. Aug. 27, 2086), and has not been used to confine First Amendment protections to the United States. The other district court case (MTD Order at 62), *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971), has been repeatedly rejected as "the minority view." *See, e.g.*, *Mullen*, 313 F. Supp. 2d at 344 (rejecting *Occidental Petroleum*-based argument that "the First Amendment right to petition

As discussed above, the First Amendment does not stop at the U.S. border. Accordingly, the *Noerr-Pennington* doctrine should equally apply to foreign petitioning or lobbying efforts as it does here in the United States, especially when Plaintiffs are seeking to impose tort liability in an American court based upon that expressive activity. Otherwise, a U.S. court could become a vehicle for punishing or enjoining a U.S. citizen for speech and expressive activity that is lawful here. "The right to speak freely and to promote diversity of ideas . . . is . . . one of the chief distinctions that sets us apart from totalitarian regimes." *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). If a U.S. citizen can lobby or petition his own government without fear of prosecution or tort liability, the same protections and immunity should apply to any foreign petitioning activity. The First Amendment protections should not hinge on where the speech is directed to, or where the speech is made from—if that same speech directed to persons or officials in the U.S. would be lawful, as is the case here.

In this matter, there is no evidence that Lively "petitioned" or "lobbied" the Ugandan government to do anything other than to liberalize the already criminal punishments for homosexual conduct and focus on counseling and education rather than incarceration. (MF ¶¶ 58-61, 75-76, 79-81, 85, 98-100, 113, 142). Lively provided comments drastically toning down the punitive aspects of the AHB, and pleaded with the Ugandans to moderate the proposal. (MF ¶¶ 81, 85). Despite his efforts to lessen the criminal sanctions and soften the statute, all of his proposals were rejected by the Ugandan government. (MF ¶¶ 62-63, 82-84, 86-93). Moreover, discussing issues of marriage, family, and homosexuality, or writing a government official asking them to change already-drafted proposed legislation about homosexuality represent core protected speech

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the Government for a redress of grievances only applies to petitions to one's own government"); *Coastal States*, 694 F.2d at 1366; *Coca-Cola Co.*, 1998 U.S. Dist. LEXIS 23277, at *29-30.

about matters of public concern under the First Amendment. Thus, to the extent Lively discussed issues of marriage, family, and homosexuality with members of the Ugandan government, or engaged in limited correspondence regarding proposed legislation, these activities should be similarly protected.

There are further grounds for applying the *Noerr-Pennington* doctrine to shield foreign advocacy from ATS liability in particular. First, applying *Noerr-Pennington* to ATS claims furthers the Supreme Court's instruction in *Sosa* that federal courts should exercise restraint and "great caution" in recognizing judge-made causes of action for violations of "norms of international law," especially since a lack of "judicial caution" could potentially impinge foreign relations and affairs. *See Sosa*, 542 U.S. at 725-28; *see also Kiobel*, 133 S.Ct. at 1664. Thus, where foreign advocacy, foreign law, and foreign interests are at stake, a federal court should heed the Supreme Court's directive on restraint in ATS cases. One way to practice that restraint and avoid undue international friction through U.S. court litigation is through the application of the *Noerr-Pennington* immunity.

Second, applying the *Noerr-Pennington* doctrine to foreign advocacy will prevent an impermissible chilling of First Amendment activity, at home and abroad. *See U.S. Football League v. Nat'l Football League*, 634 F. Supp. 1155, 1181 (S.D.N.Y. 1986), *aff'd*, 842 F.2d 1335 (2d Cir. 1988) (noting that *Noerr-Pennington* evidence "by its very nature chills the exercise of First Amendment rights"). Indeed, such immunity protection is also necessary "to assure to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974) (citation omitted); *see also Hustler Magazine*, 485 U.S. at 51 (recognizing that the Court has been "particularly vigilant to ensure that individual expressions of ideas remain free" from punishment or sanction).

In the age of cross-border transactions and multinational corporations, where American citizens are dealing with foreign governments each and every day on a myriad issues, it makes no sense from a policy standpoint to require them to check their petitioning safeguards at the border, even if the First Amendment allowed it, which it does not. U.S. citizens frequently comment on and propose foreign legislation, whether from a computer at their home or office situated in the United States or an in-person visit to the foreign jurisdiction. This expression of core political views should not be curbed by ATS litigation that can punish a U.S. citizen for speech directed abroad that would be legal if directed at their own government.

The Supreme Court has struck down on First Amendment grounds laws prohibiting incoming international communications. *See Lamont v. Postmaster General of the U.S.*, 381 U.S. 301, 305-07 (1965). U.S. courts should similarly resist any attempt to impose liability for outgoing international communications. Courts are creatures of the Constitution, so they cannot punish United States citizens for conduct that would be protected in the United States, simply because that conduct took place in another country. Thus, if this Court cannot punish Lively for advocating so called "discrimination" of homosexual conduct in the United States; for criticizing or condemning homosexual conduct in the United States; or for lobbying government officials to defeat legislative efforts to protect homosexual conduct in the United States, then the Court cannot punish him for allegedly doing **these very same things** in Uganda. Accordingly, this Court should also grant summary judgment in Lively's favor on SMUG's claims under the *Noerr-Pennington* doctrine.

VI. THE COURT LACKS SUBJECT MATTER JURISDICTION OVER SMUG'S CLAIMS BECAUSE SMUG LACKS STANDING.

A. SMUG Lacks Standing To Bring Its Own Claims.

Article III of the United States Constitution limits the judicial power to actual cases and controversies. *See* U.S. Const. art. III, § 2. "Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The Supreme Court has established an "irreducible constitutional minimum" that a Plaintiff must establish before being given the keys to the federal courthouse. *Id.* "First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical." *Id.* (internal citations and quotations omitted). "Second, there must be a causal connection between the injury and the conduct complained of—the injury must be fairly traceable to the challenged action of the defendant, and **not the result of the independent action of some third party not before the court**." *Id.* (emphasis added). "Third, it must be likely, as opposed to merely speculative that the injury will be redressed by a favorable decision." *Id.* at 561 (internal citations and quotations omitted).

"The requirements of Art. III are not satisfied merely because a party requests a court of the United States to declare its legal rights, and has couched that request for forms of relief historically associated with courts of law." *Valley Forge Christian College v. American United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan*, 504 U.S. at 561. Indeed, "[s]ince they are not mere pleading requirements but rather **an indispensable part of the plaintiff's case**, each element must be supported in the same way as any other matter on which

the plaintiff bears the burden of proof." *Id.* (emphasis added). The indispensable and irreducible constitutional minimum of standing is "not merely a troublesome hurdle to overcome if possible so as to reach the merits of a lawsuit which a party desires to have adjudicated, it is a part of the basic charter promulgated by the Framers of the Constitution at Philadelphia in 1787." *Valley Forge*, 454 U.S. at 476. "**Those who do not possess Art. III standing may not litigate as suitors in the courts of the United States**." *Id.* at 475-76 (emphasis added). SMUG fails this test. It seeks "little more than . . . to employ a federal court as a forum to air generalized grievances about the conduct of" unrelated actors in its country, to which it cannot in any away connect Lively. *Id.* at 483.

SMUG has utterly failed to come forward with sufficient evidence to establish that it meets the three irreducible constitutional minimums of standing to bring its claims in this court. SMUG cannot and has not established with the requisite evidence that it has an injury or that Lively is the cause of its injuries, and therefore whatever injuries SMUG may have allegedly suffered are not traceable to Lively. Moreover, the remedy SMUG seeks from this Court will not redress its injuries. SMUG lacks standing to litigate as a suitor in federal court, and summary judgment should be granted.

1. SMUG Cannot Demonstrate An Actual And Concrete Injury.

"The first of [the Article III] prerequisites deals with harm. The plaintiff must adequately allege [and at the summary judgment stage, demonstrate with evidence] that [it] has suffered or is threatened by an injury in fact to a cognizable interest." *Pagan v. Calderon*, 448 F.3d 16, 27 (1st Cir. 2006). "An injury in fact is one that is concrete and particularized, on the one hand, and actual or imminent (as opposed to conjectural or hypothetical), on the other hand." *Id.* (citing *Lujan,* 504 U.S. at 560. Put another way, "[t]here must be a personal stake in the outcome such as to assure

that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). "**Abstract injury is not enough**." *Id.* (emphasis added).

SMUG has utterly and completely failed to bring forth any evidence of harm to its organization. While this Court noted that SMUG's alleged injuries "obviously costs money" (MTD Order at 47), SMUG has not put forward any admissible evidence of such costs and therefore has failed to adequately demonstrate harm. *See* Section VII, *infra* (demonstrating SMUG's failure to provide the admittedly required expert evidence on damages, and SMUG's failure to provide damages documentation and deposition testimony on damages during fact discovery). SMUG's evidentiary failure on damages is neither accidental nor surprising. Not only was SMUG's designee on damages not able to answer a single question on SMUG's damages calculations (MF ¶ 191), but SMUG's own Chairman of the Board, who is "supposed to approve the budgets," and who is described as the "backbone of the LGBT movement in Uganda," was not able to identify even one way that Lively has damaged SMUG monetarily. (MF ¶ 177). Simply put, while at the motion to dismiss stage this Court felt compelled to credit SMUG's vacant assertion that the alleged "injuries to Plaintiff are quantifiable" (MTD Order at 49), when it came time for proof SMUG completely failed to quantify them. Thus, all SMUG can put forward is the axiomatically insufficient abstract injury. Such will not suffice to satisfy the rigorous demands of Article III.

2. SMUG Has Not And Cannot Demonstrate Any Causal Connection Between Its Alleged Injuries And The Alleged Conduct Of Lively.

Even if SMUG could demonstrate sufficient and quantifiable injuries, which it cannot, SMUG would still lack Article III standing because it cannot demonstrate that those non-existent injuries are fairly traceable to Lively. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice . . . In response to a summary judgment motion,

however, [SMUG] can no longer rest on such 'mere allegations' but must 'set forth' by affidavit and other evidence 'specific facts'" showing that Lively's alleged conduct is the cause of its purported injuries. *Lujan,* 504 U.S. at 561. Under the second irreducible constitutional requirement of standing, SMUG is mandated "to show a sufficiently direct causal connection between the challenged action and the identified harm." *Katz v. Pershing, LLC*, 672 F.3d 64, 71 (1st Cir. 2012). This direct causal connection "cannot be overly attenuated." *Donahue v. City of Boston*, 304 F.3d 110, 115 (1st Cir. 2002); *Pagan*, 448 F.3d at 27 ("This causal connection must be demonstrable; in other words, it cannot be overly attenuated.").

Additionally, "causation is absent if the injury stems from the independent action of a third party." Katz, 672 F.3d at 71. *See also Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 42 (1976) (holding that causation requires that the "injury [not] result from the independent action of some third party not before the court."). As the Supreme Court has recognized, SMUG's burden is to demonstrate with sufficient evidence that its alleged injuries are the direct result of Lively's alleged conduct and **not** "**the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume to either control or to predict**." *Lujan*, 504 U.S. at 562 (emphasis added).

Here, SMUG has no evidence of any demonstrable and direct connection between Lively and its alleged injuries. SMUG claims that it was injured by fourteen specific acts of persecution within the fourteen years since Lively first visited Uganda in 2002. (MF ¶¶ 102-117). However, for each and every one of those acts, SMUG and its witnesses repeatedly and unambiguously testified that they know of no connection whatsoever between Lively and those incidents and their alleged perpetrators. *Id*. SMUG has no knowledge of any communications, let alone agreements, between Lively and the alleged perpetrators. *Id*. SMUG has no knowledge of "**any assistance at**

all" provided by Lively to the alleged perpetrators. *Id*. And SMUG readily and candidly admits that it is not "aware of any facts that would show that Scott Lively was responsible" for any of these alleged incidents. *Id*. Rarely does the testimony of a litigant so unequivocally establish that the litigant has no standing, and no claim.[26]

Since SMUG has no evidence of any "communication," "agreement," "involvement," "assistance" or "responsibility" as to Lively with respect to any of the fourteen incidents which allegedly injured SMUG, it necessarily follows that SMUG cannot in any way prove that the alleged perpetrators of those incidents did not act independently of Lively. This is fatal to SMUG's standing under *Katz*. 672 F.3d at 71.

3. SMUG's Alleged Injuries Are Not Redressable.

a. SMUG's Alleged Injuries Cannot Be Redressed Through Monetary Damages.

Even if SMUG could articulate cognizable injuries that are fairly traceable to Lively, which it cannot, SMUG would still lack Article III standing because its non-existent injuries are not redressable by this Court. SMUG must demonstrate with sufficient evidence that it is "likely, **as opposed to merely speculative**, that [its alleged] injuries will be redressed by a favorable decision from this Court." *Lujan*, 504 U.S. at 561 (emphasis added). For its alleged injuries to be redressable by this Court, SMUG must also demonstrate that there is a "**substantial likelihood** that the requested relief will remedy the alleged injury in fact." *Bonas v. Town of N. Smithfield*, 265 F.3d 69, 73 n.4 (1st Cir. 2001) (quoting *Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 771 (2000)) (emphasis added).

[26] SMUG's failure to prove any causation in the matter is also discussed more fully in Section VIII, *infra*.

At the motion to dismiss stage, this Court accepted as true the notion that SMUG's alleged organizational injuries "were quantifiable and may be remedied by an award of monetary damages." (MTD Order at 49.) At this stage of the proceedings, however, taking SMUG at its word is no longer permissible to satisfy the Constitutional standing requirements. *See, e.g.*, *Lujan*, 504 U.S. at 561 (holding that at the summary judgment stage, a plaintiff can no longer rest on its allegations, but must put forward direct evidence to satisfy its burden). Here, SMUG has fallen fatally short of the mark concerning its burden to demonstrate that its alleged injuries can be redressed. *See* Section VII, *infra* (demonstrating that SMUG cannot establish damages). Redressing SMUG's injuries through a monetary award is no longer even theoretically possible because SMUG has failed to bring forth evidence of such damages. *Id*.

b. SMUG's Alleged Injuries Cannot Be Redressed Through Equitable Relief.

i. This Court Cannot Affect The Conduct Of Independent, Sovereign Actors On Another Continent.

Nor can SMUG's unsubstantiated injuries be redressed through any injunctive relief. Importantly, Article III's redressability requirement applies "with undiminished force" to claims for equitable relief. *Igartua-De La Rosa v. United States*, 417 F3d. 145, 153 (1st Cir. 2005) (Lipez, J., concurring). Fatally for SMUG's claims of equitable relief, when the requested relief cannot reach independent third parties who are also responsible for the harm alleged, the equitable relief claim is not redressable and plaintiff has no standing to assert it. *Lujan*, 504 U.S. at 561 (holding that the plaintiff failed to establish redressability on its injunctive relief claims because the remedy for its alleged injury required action from parties not before the court and over whom the court had no power); *see also Simon*, 426 U.S. at 43 (same). Even more problematic for SMUG's claims is that the independent actors here are outside the jurisdiction and reach of any injunctive relief from this Court. *See Iguarta-De La Rosa*, 417 F.3d at 155 (Lipez, J., concurring) ("If a legislative body

would be within its rights to ignore the court's decision, and the plaintiff cannot convince the court that it is 'likely as opposed to merely speculative,' that the legislature will react in the way that he hopes, **the redressability requirement has not be met**.") (quoting *Lujan*, 504 U.S. 561) (emphasis added).

This Court, too, has recognized the problem of injunctive relief in this matter: "It is quite true that this court does not have either the jurisdiction or power to stop all possible harm against Plaintiffs in Uganda." (MTD Order at 56.) The Court found Lively's redressability argument to have "force," but nonetheless found it "unpersuasive" **at the motion to dismiss stage**, because the Court was required to accept as true SMUG's now-defunct allegations that the perpetrators of the alleged persecution were not independent actors but merely Lively's puppets. (*Id*.) However, now that SMUG has repeatedly admitted that it has no evidence of "any connection" between Lively and the actual perpetrators of the fourteen alleged acts of persecution (MF ¶¶ 102-118, 130-148), and that it has no facts whatsoever that "would show that Scott Lively was responsible" for the alleged acts of those independent parties, (*id*.), the Court can no longer accept SMUG's vacant allegations. If SMUG has no proof that Lively was in any way connected to the fourteen acts of persecution, then it necessarily must follow that SMUG has no proof that an injunction against Lively would have any effect on the conduct of non-parties on a different continent. While redressability might be "a matter of degree" (MTD Order at 56), the injunctive relief sought must still alleviate the injuries that SMUG claims require injunctive relief. *See, e.g.*, *Katz*, 672 F.3d at 72. Here, SMUG has no evidence that any injunctive relief against Lively would have any meaningful impact on alleged perpetrators of persecution whom Lively has never even met, and with whom SMUG can establish no connection.

ii. SMUG Has No Evidence Of Irreparable Future Harm Likely To Be Caused By Lively.

Additionally, to obtain an injunction against Lively, SMUG must also show that there is a likelihood that its alleged persecution in the past **is likely to be caused by Lively in the future**.[27] "In seeking prospective relief like an injunction, a plaintiff must show that he can reasonably expect to encounter the same injury again in the future—**otherwise there is no remedial benefit that he can derive from such judicial decree**." *MacIssac v. Town of Pughkeepsie*, 770 F. Supp. 2d 587, 593 (S.D.N.Y. 2011) (citing *City of L.A. v. Lyons*, 461 U.S. 95, 102-05 (1983)) (emphasis added). An injunction cannot issue for speculative future conduct that may not ever occur, against Lively – who SMUG has no knowledge of ever participating or assisting in alleged acts of past persecution. *See Lyons*, 461 U.S. at 105-06 (holding that speculative future injuries based solely on suppositions and the independent actions of third parties cannot justify the extraordinary remedy of injunctive relief). If such an injunction could issue, then the Supreme Court's requirement of immediate and irreparable injury has absolutely no meaning. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (requiring plaintiffs to demonstrate immediate and irreparable injury before the extraordinary and disfavored remedy of an injunction can be granted).

SMUG can point to no evidence to demonstrate that Lively poses any credible and demonstrable threat of **future** irreparable injury. That this is true can hardly be gainsaid because Lively never participated in any of the previous acts of alleged persecution in Uganda. (MF ¶¶ 102-118, 132-146; Lively Decl. ¶ 34). Moreover, Lively has never engaged in "any conduct

[27] In fact, what SMUG appears to be seeking is an improper remedy to punish Lively for alleged conduct in the past. *Weinberfer v. Romero-Barcelo*, 456 U.S. 305 (1982) (noting that injunctive relief is intended to deter future violations, **not to punish past ones**); *Maine Human Rights Comm'n v. Sunbury Primary Care, P.A.*, 770 F. Supp. 2d 370, 398 (D. Me. 2011) ("A party seeking injunctive relief must show a threat of irreparable future harm . . . The requirement exists because an injunction is intended to forestall future violations, not to punish past ones).

whatsoever in the United States (or anywhere else in the world) in connection with any campaign, agreement, conspiracy, enterprise, or other effort" to engage in any form of persecution or discrimination. (MF ¶¶ 130-131).

Most problematic for SMUG, however, is the fact that Lively indisputably has "no intention to return to Uganda at any time in the future, to speak regarding homosexuality or for any other reason." (Lively Decl. ¶ 38). With no evidence of past involvement in any alleged acts of persecution, and no evidence that Lively intends to return to Uganda at all, the injunctive relief sought by SMUG would not redress anything and "would be pointless." *Dudley v. Hannaford Bros. Co.*, 333 F.3d 299, 304 (1st Cir. 2003) (injunctive relief is only available for credible and proven threats of **future** irreparable injury, not to punish past acts; absent proof of irreparable future action "an injunction would be pointless").

iii. This Court Cannot Redress SMUG's Non-Existent Injuries Through An Unconstitutional Injunction.

Finally, even if SMUG's unsubstantiated injuries could be redressed through equitable relief, which they cannot, the Court could not redress them through an unconstitutional remedy. As discussed in Section V, *infra*, what SMUG really seeks in this lawsuit is to enjoin pure political speech and protected activity that lies at the core of the First Amendment. Since this Court cannot enter the equitable relief sought by SMUG, the Court cannot redress SMUG's alleged injuries. SMUG lacks standing and summary judgment should be entered on all of its claims.

B. SMUG Lacks Associational Standing To Bring Claims On Behalf Of Its Members.

Because of the same three defects discussed in the preceding section, SMUG not only lacks standing to bring its own claims, but also lacks associational standing to bring the claims of its members. An association may only bring suit on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are

germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individuals members in the lawsuit." *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

SMUG attempts to get around its inability to prove monetary damages (*see* Section VII, *infra*), and its inability to seek money damages in a representative capacity[28], by committing to only seek injunctive relief on behalf of its members. (MF ¶¶ 171-176; MTD Order at 50). But, while claims for injunctive relief have **sometimes** been allowed to be brought by an association, "[t]his does not mean, however, that an association automatically satisfies the third prong of the *Hunt* test simply by requesting equitable relief rather than damages." *Bano v. Union Carbide Corp.*, 361 F.3d 696, 714 (2d Cir. 2004). As this Court has also noted, "[a]dmittedly, all requests for injunctive relief do not automatically grant a plaintiff associational standing." (MTD Order at 53.)

SMUG does not have associational standing because, for one thing, its associational claims *require* SMUG to allege and prove damages. As shown in Section VII, *infra*, all of SMUG's claims sound in tort, and damages are an essential element of all tort claims, including SMUG's. SMUG's members are barred from showing injury in this case for the same reasons as SMUG. *See* Section VI.A, *infra*. Moreover, for the same reasons that the injunctive relief sought by SMUG could not redress SMUG's alleged injuries (*see* Section VI.A.3.b, *supra*), that relief also could not redress any alleged but unsubstantiated injuries of any SMUG members. Accordingly, SMUG has no associational standing to bring the claims of its members. Summary judgment should be granted.

[28] *United Union of Roofers, Waterproofers, & Allied Trades No. 40 v. Ins. Corp. of Am.*, 919 F.2d 1398, 1400 (9th Cir. 1990) ("no federal court has allowed an association standing to seek monetary relief on behalf of its members").

VII. SMUG'S CLAIMS FAIL AS A MATTER OF LAW BECAUSE SMUG HAS NO ADMISSIBLE AND COMPETENT EVIDENCE OF DAMAGES.

Summary judgment on SMUG's claims is also appropriate because SMUG has no admissible and competent evidence to support its claims for money damages.[29] This lack of proof is fatal to SMUG's claims at this stage because damages is an essential element it must prove for each of its claims. Throughout the entire period of fact discovery, SMUG withheld its damages computation from Lively, maintaining repeatedly under oath that its computation required expert testimony and would be disclosed along with expert reports after fact discovery is closed. SMUG then failed to provide an expert report or any expert testimony on its damages. Instead, after fact discovery closed, SMUG attempted to provide a calculation through its lay witness, even though that witness admitted under oath that the calculation was performed by a hired (yet undisclosed) expert because no one at SMUG had the expertise to perform it. Not surprisingly, SMUG's damages designee was not able to answer a single question about SMUG's damages that had been calculated by SMUG's secret expert. On this record, SMUG cannot establish any damages for its tort claims. Summary judgment is warranted.

A. All Of SMUG's Damages Sound In Tort And Require Proof Of Damages As An Essential Element.

As a general matter, the failure to show damages is grounds for granting summary judgment where damages are an element of the claim. *See Young v. Wells Fargo Bank, N.A.*, 109

[29] Rule 56 allows a party to move for summary judgment on "part of each claim or defense," Fed. R. Civ. P. 56(a), which was intended "to make clear . . . that summary judgment may be requested not only as to an entire case but also as to a claim, defense, or part of a claim or defense," Fed. R. Civ. P. 56 advisory committee notes (2010). Accordingly, summary judgment can be granted on elements of claims, as well as remedies. *See Gaither v. Stop & Shop Supermarket Co. LLC*, 84 F. Supp. 3d 113, 122 n.8 (D. Conn. 2015); *Hamblin v. British Airways PLC*, 717 F. Supp. 2d 303, 306 (E.D.N.Y. 2010); *Stellar J. Corp. v. Smith & Loveless, Inc.*, No. 09-353, 2010 WL 4791740, at *2 (D. Or. Nov. 18, 2010).

F. Supp. 3d 387, 393-96 (D. Mass. 2015); *Amorim Holding Financeria, S.G.P.S., S.A. v. C.P. Baker & Co., Ltd.*, 53 F. Supp. 3d 279, 308-09, 312 (D. Mass. 2014); *AVX Corp. v. Cabot Corp.*, 600 F. Supp. 2d 286, 295 (D. Mass. 2009); *see also Cash Energy, Inc. v. Weiner*, 81 F.3d 147, 1996 WL 141787, at *2 (1st Cir. Mar. 29, 1996) (affirming district court's granting of summary judgment where plaintiff was unable to prove damages); *Draft-Line Corp. v. Hon Co.*, 983 F.2d 1046, 1993 WL 984, at *2 (1st Cir. Jan. 6, 1993) (finding no error in district court's granting of summary judgment for defendant where plaintiff made "no showing" that there was "genuine issue of fact relating to damages"); *Boston Prop. Exchange Transfer Co. v. Iantosca*, 720 F.3d 1, 10 (1st Cir. 2013) ("As for the tort claims, we affirm summary judgment for the defendants on all of them because [plaintiff] failed to provide any evidence to meet an essential element of each: that the defendants caused it to suffer damages.").

Counts I, II and III of SMUG's Complaint all rest upon the jurisdictional Alien **Tort** Statute. A valid ATS claim requires proof of three elements: "plaintiffs must (i) be 'aliens,' (ii) claiming **damages** for a **'tort only,'** (iii) resulting from a violation 'of the law of nations' or of 'a treaty of the United States.'" *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 242 (2d Cir. 2003) (quoting 28 U.S.C. § 1350) (emphasis added)*; see also Presbyterian*, 582 F.3d at 255; *Shan v. China Constr. Bank Corp.*, No. 09-8566, 2010 WL 2595095, at *3 (S.D.N.Y. June 28, 2010).

Therefore "[t]he AT[S] requires the commission of a tort in order to impose liability." *Bieregu v. Ashcroft*, 259 F. Supp. 2d 342, 353 (D.N.J. 2003) (citing *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir.1995), *cert. denied*, 518 U.S. 1005 (1996); *Iwanowa v. Ford Motor Co.*, 67 F.Supp.2d 424, 439 (D.N.J.1999); *Jogi v. Piland*, 131 F.Supp.2d 1024, 1026–27 (C.D.Ill. 2001)). "Implicit in any wrong labeled a tort is an element of damages." *Jogi v. Piland*, 131 F. Supp. 2d 1024, 1027 (C.D. Ill. 2001), *rev'd on other grounds and remanded sub nom. Jogi v. Voges*, 480

F.3d 822 (7th Cir. 2007). ATS plaintiffs "cannot state [an ATS] tort claim in the absence of a showing of 'causation' and 'damages,' necessary elements of any tort claim." *Bieregu,* 259 F. Supp. 2d at 353-54. Without damages, any tort claims brought under the ATS must fail. *Bieregu,* 259 F. Supp. 2d at 353-54 (dismissing ATS claim because the damages alleged were speculative); *Jogi*, 131 F. Supp.2d at 1027 (dismissing ATS claim because "the court can discern no element of damages from the plaintiff's speculation).

Moreover, "when questions endemic to tort litigation or civil liability arise in ATS litigation—such as damages computation …—these issues must be governed by domestic law." *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1022 (9th Cir. 2014), *cert. denied sub nom. Nestle U.S.A., Inc. v. John Doe I,* 136 S. Ct. 798, 193 L. Ed. 2d 711 (2016). It cannot be reasonably disputed that domestic law requires damages for any tort claim. *Ankiewicz v. Kinder*, 563 N.E.2d 684, 686 (Mass. 1990) ("**All torts share the elements** of duty, breach of that duty, and **damages arising from that breach**.") (emphasis added).

For the same reason, SMUG's state law claims for civil conspiracy (Count IV) and negligence (Count V), which also sound in tort, also require SMUG to prove damages as an essential element. A civil conspiracy claim under Massachusetts law requires proof of damages. *See Advanced Micro Devices, Inc. v. Feldstein*, 951 F. Supp. 2d 212, 221 (D. Mass. 2013) (noting that a civil conspiracy under Massachusetts law requires proof of "an overt act that results **in damages**") (internal quotations omitted; emphasis added); *see also Therrien v. Hamilton*, 849 F. Supp. 110, 115 (D. Mass. 1994) (same) (Ponsor, J.); *Clermont v. Fallon Clinic, Inc.*, No. 2001-1512 B, 2003 WL 21321190, at *15 (Mass. Super. May 15, 2003) ("To establish a claim for civil conspiracy, a [plaintiff] must prove . . . damage."); *Shawsheen River Estates Assocs. Ltd. P'ship*, No. 95-1557, 1995 WL 809834, at *4 (Mass. Super. Apr. 11, 1995). Likewise, damages is a

required element of any negligence claim under Massachusetts law. *Geshke v. Crocs, Inc.*, 740 F.3d 74, 77 (1st Cir. 2014) ("To recover on a claim for negligence under Massachusetts law, a plaintiff must carry the burden of proving the elements of duty, breach, causation, and **damages**.") (citing *Leavitt v. Brockton Hosp., Inc.*, 907 N.E.2d 213, 215 (Mass. 2009)) (emphasis added); *see also Donovan v. Philip Morris USA, Inc.*, 914 N.E.2d 891, 898-99 (Mass. 2009).

Because damages is an essential element of each of SMUG's tort claims, and because, as shown below, SMUG has not adduced and cannot adduce evidence of any damages, summary judgment is warranted on each of SMUG's claims. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) ("In our view, the plain language of Rule 56 mandates that entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial"); *Sanchez v. Triple S. Mgmt, Corp*., 492 F.3d 1, 9 (1st Cir. 2007).

B. SMUG Has Consistently Maintained, Under Oath, That Its Alleged Damages Require Expert Computation, But SMUG Failed To Adduce Any Expert Testimony On Damages.

In its Complaint filed more than four years ago, SMUG sought (as it was required to do) an award of money damages for each of its claims. *See* Am. Compl., ¶¶ 13, 239, 245, 250, 255-256, 262; *see also id.* "Prayer for Relief," § a-b. Rule 26 required SMUG to provide Lively "a computation of each category of damages claimed" as well as "the documents or other evidentiary material . . . on which each computation is based, including materials bearing on the nature and extent of injuries suffered." Fed. R. Civ. P. 26(a)(1)(A)(iii). Lively also sought SMUG's damages, and, particular, SMUG's calculations for its alleged damages, through an interrogatory. (Lively Interrogatory 4).

However, throughout the entire period of fact discovery in this case, SMUG continually refused to provide its damages calculations to Lively, maintaining instead that its damages would be calculated by an expert and disclosed with its expert reports after the close of fact discovery. SMUG repeatedly made these representations in its initial disclosures and its sworn interrogatory responses. (MF ¶ 180) (*e.g.*, "Plaintiff will provide its computation of damages as soon as expert reports are delivered and damages are computed.").

In addition to its sworn discovery responses, SMUG also clearly and unambiguously admitted at its Rule 30(b)(6) deposition that the work of a financial expert was required to calculate its damages; that SMUG did not have the expertise to calculate its own damages, and that SMUG indeed retained an undisclosed expert to perform its damages calculation. (MF ¶¶ 181, 186) (SMUG Rule 30(b)(6) damages designee unambiguously reaffirming under oath that "**an expert witness is required to prepare SMUG's damages calculations for this case**" and that there is no one at SMUG that could have made the actual calculations without consulting with a financial expert because "**SMUG does not have that exact expertise to do the calculations**") (emphasis added) (MF ¶ 183) (SMUG damages designee admitting that SMUG hired financial expert for its damages calculation).

In spite of all of these admissions about the requirement for expert testimony on the issue of its alleged damages, SMUG inexplicably failed to identify any expert witness or provide an expert report on damages prior to its expert disclosure deadline, which had already been extended by over three months at SMUG's request. (MF ¶ 182; *see also* Order (6/24/15), dkt. 190 (granting dkt. 178, Pls.' Mot. for Ext. of Time to Submit Expert Disclosures); Order (8/14/15), dkt. 207). SMUG stated under oath that it had no reason for its critical failure. (MF ¶¶ 182, 187-189).

Realizing the fatal import of SMUG's admissions and evidentiary failures on expert testimony, on the evening after the first day of SMUG's Rule 30(b)(6) deposition SMUG's lawyers discussed this specific issue with SMUG's damages designee, knowing full well that the witness was still under cross-examination and required to return for a second day of testimony. (MF ¶ 184). On the second day of testimony, after admittedly receiving instruction from SMUG's counsel, SMUG's damages designee sought to change SMUG's sworn testimony from the previous day, and sought to change SMUG's multiple sworn discovery responses, by suddenly claiming that now there **was** someone within SMUG who could (but did not) perform the damages calculations—SMUG's in-house accountant. (*Id.*) SMUG's designee did not speak with SMUG's in-house accountant to confirm that the accountant could indeed perform the calculations, but nonetheless testified – based only upon what SMUG's attorneys had told the designee the night before – that the accountant could do the task. (*Id.*)

In any event, SMUG indisputably did not designate its in-house accountant either as an expert witness on damages (with an attendant report), or to testify on SMUG's behalf as a lay witness on the subject of damages. (MF ¶ 190). Instead, the only witness SMUG did designate on damages could provide no testimony on damages. (MF ¶ 191). Specifically, SMUG's damages designee was not able to answer **a single question** about how SMUG's purported damages were calculated. (*Id.*) For example, SMUG's designee could not explain how the financial figures from its 2007 documents were used to come up with any of its calculated damages for 2007, nor for any other year between 2007 and 2014. (*Id.*) This is not surprising at all, since SMUG's calculations were admittedly performed by an undisclosed expert, after SMUG concluded that it lacked the expertise to perform its own calculations. (MF ¶¶ 183, 186). "**That's why we engaged an [outside] accountant to help with the calculation**." (MF ¶ 191) (emphasis added).

The Court should not and cannot allow SMUG, at the behest of counsel, to so easily cast aside its repeated sworn disclosure and testimony. Instead, the Court must credit SMUG's unrefuted, unambiguous and unrehearsed sworn discovery disclosures and sworn testimony that its damages require calculation by a financial expert, and the Court should enter summary judgment for SMUG's total failure to produce a damages expert.[30] *See, e.g.*, *Antioch Co. Litig. Trust v. Morgan*, No. 10-156, 2014 WL 1365949, at *5-6 (S.D. Ohio Apr. 7, 2014) (granting summary judgment on claims requiring proof of damages after precluding "Plaintiff's new attempt to claim that its damages can be proven without an expert," where factual record closed with plaintiff providing "no information about its claimed damages" and plaintiff's Rule 30(b)(6) witness having testified that "an expert was required"); *Cole v. Homier Distrib. Co.*, No. 07-1493, 2009 WL 775627, at *5 (E.D. Mo. Mar. 20, 2009) (granting defendant summary judgment on plaintiffs' breach of contract claims since defendant was not able to perform discovery "on **Plaintiffs' new assertion that they can provide a reasonable basis for their damages, absent any expert testimony**," where plaintiffs had stated under oath until fact discovery closed that they would rely upon an expert to calculate damages) (emphasis added).

In *Antioch*, the plaintiff's Rule 30(b)(6) witness, like SMUG's Rule 30(b)(6) witness, originally testified that damages and damages calculations were the "province of expert testimony," but once fact discovery closed, plaintiff claimed that "it does not need an expert because it relies on simple math using numbers that were available at the time of the [Rule 30(b)(6)] deposition." *Antioch*, 2014 WL 1365949, at *6. But, "**[i]f calculating damages were as**

[30] Separate and apart from SMUG's sworn testimony that its damages require expert calculation, the law clearly agrees with SMUG as well. *See e.g.*, *Nat'l Fire Protection Ass'n, Inc. v. Int'l Code Council, Inc.*, No. Civ. A 03-10848 DPW, 2006 WL 839501 *25 (D. Mass. Mar. 29, 2006) ("when loss of goodwill is not adequately proven by expert testimony, the trial court should not allow the jury to speculate as to what damages would be").

easy as simple arithmetic, and is based on the facts in the record, then Plaintiff's 30(b)(6) witness should have answered questions about damages." *Antioch*, 2014 WL 1365949, at *6 (emphasis added). Like the damages designee in *Antioch*, SMUG's damages designee could do nothing of the sort. (MF ¶ 191).

Summary judgment on each of SMUG's claims is therefore warranted for SMUG's failure to provide the indisputably required expert testimony. Lacking any expert testimony on damages, let alone evidence attributing such damages to Lively, SMUG has no evidence to establish its alleged damages under any of its claims. Thus, since SMUG "is **unable to demonstrate that it has in fact suffered quantifiable damages as the result of any conduct attributable to**" Lively, Lively's motion for summary judgment should be granted. *See AVX Corp.*, 600 F. Supp. 2d at 295; *see also Cash Energy*, 81 F.3d 147, 1996 WL 141787, at *2 ("It is axiomatic that the defendants are not liable for damages they did not cause.").

C. Even If SMUG's Damages Could be Determined Without Expert Testimony, And Even If The Court Could Allow SMUG To Change Its Sworn Testimony At The Behest Of Counsel, SMUG Is Still Barred From Proving Damages By Its Failure To Timely Provide Its Damages Documentation And Calculation.

Finally, even if SMUG's damages could be determined without expert testimony, after SMUG repeatedly claimed that they could not, and even if the Court could allow SMUG to completely change its unambiguous sworn testimony at the behest of counsel – none of which is possible – SMUG would still be precluded from proving any damages through lay witnesses because it failed to provide its damages documentation and calculation in discovery.

By the time of SMUG's Rule 30(b)(6) deposition in November 2015, fact discovery in this case had already been closed for **more than four months**, and SMUG's expert disclosure deadline

had also expired.[31] After it repeatedly claimed that its damages required expert calculation and would be provided with expert reports, SMUG attempted to provide **for the very first time** a nonsensical "calculation" of its damages just two business days prior to its Rule 30(b)(6) deposition, four days after its expert disclosure deadline, and four months after the close of fact discovery. (MF ¶¶ 180, 182, 185). This woefully belated disclosure was provided via a purported two-age worksheet, in a "supplement" to SMUG's prior interrogatory responses – the same interrogatory responses in which SMUG had consistently claimed, under oath, that its damages would be calculated by financial experts. (MF ¶¶ 180, 183).

SMUG's worksheet and interrogatory "supplement" was neither sworn nor verified, but it was purportedly coming from a lay witness. (MF ¶ 185). This was the first inkling – and it was a vague one – that SMUG would attempt to walk away from the "wait for expert reports" mantra it had repeated while discovery was still open. (MF ¶ 180). But, at its Rule 30(b)(6) deposition, SMUG's damages designee conceded that the calculations on the worksheet **were, in fact, performed by the expert financial firm that SMUG had retained, because no one at SMUG**

[31] Lively was forced to take SMUG's Rule 30(b)(6) deposition after the close of all fact discovery, and after the expiration of SMUG's expert report deadline, because of SMUG's failure to produce documents in a timely manner, and to accommodate the travel schedule of SMUG's witness. (*See* Orders, dkts. 191, 207, 227, 231). The deadline for general fact discovery closed on June 30, 2015. (*See* Order (2/24/15), dkt. 136 (granting dkt. 135, Joint Mot. to Extend Time to Complete Discovery). In an order dated June 24, 2015, the Court extended the deadline for completing fact discovery only "for limited and stated purposes," including the taking of SMUG's Rule 30(b)(6) deposition. (*See* Order (6/24/15), dkt. 191). On August 14, 2015, the Court further extended the deadline for taking non-expert depositions that had already been noticed (including SMUG's Rule 30(b)(6) deposition) until October 2, 2015. (*See* Order (8/14/15), dkt. 207). On September 23, 2015, without extending the deadline for general fact discovery, the Court again extended the deadline for taking previously noticed fact depositions, including SMUG's Rule 30(b)(6) deposition, until the week of October 26, 2015. (*See* Order (9/23/15), dkt. 227). Finally, on October 13, 2015, without extending the deadline for general fact discovery, the Court again extended the time for taking SMUG's Rule 30(b)(6) deposition until the week of November 9, 2015. (*See* Order (10/13/15), dkt. 231).

had the expertise to perform the calculations themselves. (MF ¶ 186). Additionally, as noted above, SMUG's damages designee – a law witness – was unsurprisingly unable to answer a single question about the "calculations" on the worksheet. (MF ¶ 191).

Importantly, on its second deposition day, after SMUG's witness changed SMUG's tune from "expert required" to "no need for expert," SMUG's damages designee admitted that SMUG had no good reason for failing to provide its supposedly easily calculable damages during fact discovery, when Lively could have still investigated and rebutted them. (MF ¶¶ 184, 187-189). SMUG's damages designee testified that SMUG could have performed its damages calculations **several years prior**, but SMUG was too busy to do so. (MF ¶ 188). SMUG's designee also testified that there was no reason why SMUG could not have performed its damages calculations for the years 2007 to 2013 by at least July of 2014. (MF ¶ 189).

The upshot of SMUG's failure to timely calculate and disclose its damages to Lively until November 2015, after fact discovery had already closed, coupled with SMUG's failure to provide a damages designee that could answer basic questions about SMUG's belated "calculation" at SMUG's deposition, is that SMUG has completely denied Lively any ability to probe, investigate and rebut SMUG's claimed damages, such as they are. SMUG's trial by ambush should not be countenanced, and must result in the preclusion of any damages showing by SMUG at this stage. *See, e.g., Cash Energy, Inc. v. Weiner*, 81 F.3d 147 (1st Cir. 1996) (affirming grant of summary judgment against a plaintiff for failing to provide sufficient evidence of damages during the discovery period); *AVX Corp. v. Cabot Corp.*, 251 F.R.D. 70, 78 (D. Mass. 2008) (refusing to permit plaintiff to use damages calculation because of failure to produce supporting evidence for such calculation and stating that "[t]he late disclosure after the close of discovery leaves Cabot without the means to explore and challenge the basis of the recent calculations. Both fact and

expert discovery are closed thereby leaving Cabot in a prejudicial position of having to defend against calculations without opportunity to explore and challenge the basis for the calculation."); *Nat'l Fire Protection Ass'n, Inc. v. Int'l Code Council, Inc.*, No. Civ. A 03-10848 DPW, 2006 WL 839501 *25 (D. Mass. Mar. 29, 2006) (denying a plaintiff's motion for summary judgment for failing to provide any proof of damages, other than a self-serving affidavit, and failing to provide promised expert testimony concerning the damages calculation).

SMUG is therefore stuck with the hollow and vacant damages testimony provided by its damages designee. Rule 30(b)(6) requires a company to have persons testify "on its behalf as to all matters known or reasonably available to it" and "requires persons to review all matters known or reasonably available to it in preparation for the 30(b)(6) deposition" in order to "make the deposition a meaningful one and to prevent the 'sandbagging' of an opponent by conducting a half-hearted inquiry before the deposition," which would "totally defeat the purpose of the discovery process." *Calzaturficio S.C.A.R.PA. s.p.a. v. Fabiano Shoe Co., Inc.*, 201 F.R.D. 33, 36 (D. Mass. 2001) (quoting *United States v. Taylor*, 166 F.R.D. 356, 362 (M.D.N.C. 1996); *see also Int'l Ass'n of Machinists & Aerospace Workers v. Werner-Masuda*, 390 F. Supp. 2d 479, 487-88 (D. Md. 2005) (addressing the deficiencies of a "woefully unprepared" Rule 30(b)(6) witness who was not "properly educated as to the noticed deposition topics," as best illustrated by a series of fourteen "I don't know[s]"); *Black Horse Lane Assocs., L.P. v. Dow Chem. Corp.*, 228 F.3d 275, 304 (3d Cir. 2000) ("In reality if **a Rule 30(b)(6) witness is unable to give useful information he is no more present for the deposition than would be a deponent who physically appears for the deposition but sleeps through it**.") (emphasis added); *Rainey v. Am. Forest & Paper Ass'n, Inc.*, 26 F. Supp. 2d 82, 95 (D.D.C. 1998) ("Rule 30(b)(6) does not require a corporate party to facilitate preparation of its opponent's legal case; but it binds the corporate party to the positions

taken by its 30(b)(6) witnesses so that opponents are, by and large, insulated from trial by ambush.").

In sum, SMUG cannot prove damages for either of two independently sufficient reasons: (1) SMUG failed to produce a damages expert after repeatedly claiming and admitting under oath that expert testimony was required; or, (2) SMUG failed timely to provide damages calculations and documentation during fact discovery, and failed to provide a fact witness at its deposition with any knowledge about its damages calculations. In either case, SMUG has failed to produce evidence of damages, which is an essential part of each of SMUG's tort claims in this action. Accordingly, summary judgment should be granted.

VIII. SMUG'S CLAIMS FAIL AS A MATTER OF LAW BECAUSE SMUG HAS NO COMPETENT OR ADMISSIBLE EVIDENCE AS TO CAUSATION.

Summary judgment on SMUG's claims is also appropriate because SMUG has no admissible and competent evidence of causation to support its claims against Lively. This lack of proof is fatal to SMUG's claims at this stage because causation is an essential element it must prove for each of its tort claims against Lively.

A. All Of SMUG's Claims Sound In Tort And Require Proof Of Causation As An Essential Element.

As a general matter, the failure to show causation is grounds for granting summary judgment where causation is an element of the claim. *See Schubert v. Nissan Motor Corp. in U.S.A.*, 148 F.3d 25, 29 (1st Cir. 1998) (affirming grant of summary judgment based on plaintiffs' failure "to carry their burden on 'the issue of causation'" in negligence-based products liability action); *Champagne v. Servistar Corp.*, 138 F.3d 7, 13 (1st Cir. 1998) (affirming grant of summary judgment where plaintiff "failed to produce evidence of causation sufficient to survive summary judgment" on discrimination claims); *Rodriguez-Cirilo v. Garcia*, 115 F.3d 50, 53 (1st Cir. 1997) (affirming grant of summary judgment on Section 1983 claim "based on plaintiffs' failure to

demonstrate causation under well-established tort principles"); *Moody v. Maine Central Railroad Co.*, 823 F.2d 693, 694 (1st Cir. 1987) (resisting plaintiff's invitation to "make this a pioneer cases exploring the frontier" and affirming the district court's grant of summary judgment where plaintiff "failed to make a sufficient showing of causation"). "**If there are 'fatal gaps" in the evidence introduced to prove the plaintiff's causal chain, summary judgment is appropriate**." *In re: Nexium (Esomeprazole) Antitrust Litig.*, 42 F. Supp. 3d 231, 269 (D. Mass. 2014) (citing *Kearney v. Philip Morris, Inc.*, 916 F. Supp. 61, 66 (D. Mass. 1996)) (emphasis added).

As noted above, Counts I, II, and III of SMUG's Amended Complaint all rest upon the jurisdictional ATS, which requires the commission of a tort for liability to imposed. ATS plaintiffs "cannot state [an ATS] tort claim in the absence of a showing of 'causation,'" which is a necessary element of any tort claim. *Bieregu*, 259 F. Supp. 2d at 353-54; *see also De Los Santo Mora v. Brady*, No. 06-46, 2007 WL 981605, at *4 (D. Del. Mar. 30, 2007) (listing "causation" as a "necessary" element of an ATS claim); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, No. 01-9882, 2005 WL 1060353, at *1-2 (S.D.N.Y. May 6, 2005) (noting that "proof of proximate causation" was necessary to establish alien association's ATS claims). Without causation, any tort claim brought under the ATS must fail. *Bieregu*, 259 F. Supp. 2d at 353-54 (dismissing ATS claim based on lack of causation); *De Los Santo Mora*, 2007 WL 981605, at *4 (dismissing ATS claims based on lack of causation); *see also Liu Bo Shan v. China Constr. Bank Corp.*, 421 Fed. Appx. 89, 94-95 (2d Cir. 2011 (dismissing ATS claim for aiding and abetting based on "thin allegations of assistance" because actionable "assistance must be **both** 'practical' **and** have 'a substantial effect on the perpetration of the crime,' which is not this case") (citing *Presbyterian Church*, 582 F.3d at 258) (emphasis added).

Moreover, "when questions endemic to tort litigation or civil liability arise in ATS litigation—such as . . . proximate causation—these issues must be governed by domestic law." *Nestle*, 766 F.3d at 1022. It cannot be reasonably disputed that domestic law requires causation for any tort claim. *Swift v. U.S.*, 866 F.2d 507, 508-09 (1st Cir. 1989) (identifying "causation (actual and proximate)" as one of the "essential elements of a common law tort action" under Massachusetts law); *Glidden v. Maglio*, 722 N.E.2d 971, 973-74 (Mass. 2000) ("[c]ausation" is an "essential element" of any negligence claim); *Feldstein*, 951 F. Supp. 2d at 221 (civil conspiracy under Massachusetts law requires proof of an "overt act that **results in** damages") (internal quotations omitted; emphasis added); *Fahey v. R.J. Reynolds Tobacco Co.*, No. 927221, 1995 WL 809837, at *8 (Mass. Super. June 12, 1995) (explaining that claim for civil conspiracy under Massachusetts law requires plaintiff to show that "defendant's actions proximately caused [plaintiff's] damages").

"Under Massachusetts tort law, proof of causation must be such as to make the defendant's causality 'appear more likely or probable in the sense that actual belief in its truth exists in the mind or minds of the tribunal notwithstanding any doubts that still linger there.'" *Schubert*, 148 F.3d at 32 (quoting *Lynch v. Merrell-Nat'l Lab.*, 830 F.2d 1190, 1197 (1st Cir. 1987), in turn citing, *Smith v. Rapid Transpit, Inc.*, 58 N.E.2d 754, 755 (Mass. 1945)). "The defendant wins if the plaintiffs fail to show 'that there was a greater likelihood or probability that the harm complained of was due to causes for which the defendant was responsible than from any other cause.'" *Lynch*, 830 F.2d at 1197 (citing *Corsetti v. Stone Co.*, 483 N.E.2d 793, 805 (Mass. 1985), and *Beaver v. Costin*, 227 N.E.2d 344, 346 (Mass. 1967)). "The concept of proximate causation restricts tort liability to those whose conduct, beyond falling within the infinite causal web leading to an injury,

was a legally significant cause. The passage of time can certainly reduce the legal significance of a particular contributing act." *Rodriguez-Cirilo*, 115 F.3d at 52.

Because causation is an essential element of each of SMUG's tort claims, and because, as shown below, SMUG has not adduced and cannot adduce evidence supporting any causal link between Lively's speech and expressive activities and SMUG's alleged injuries, summary judgment is warranted on each of SMUG's claims. *See Celotex*, 477 U.S. at 322 (summary judgment appropriate against a party who fails to sufficiently establish an element on which it bears the burden of proof).

B. SMUG Cannot Link Together Any Causal Chain Between Lively's Speech And Expressive Activities And Its Alleged Injuries.

The undisputed factual record in this case demonstrates that SMUG cannot establish causation on any of its claims against Lively. "The very mission of the summary judgment procedure is to pierce the pleading and to *assess the proof* in order to see whether there is a genuine need for trial." *Schubert*, 148 F.3d at 32 (quoting *DeNovellis v. Shalala*, 124 F.3d 298, 305-06 (1st Cir. 1997)) (internal citation omitted; emphasis in original). Thus, SMUG can no longer rest upon unfounded allegations that Lively "was one of the 'principal strategists and actors behind this decade-long persecutory campaign,'" for which this Court found causation sufficiently pleaded in SMUG's Amended Complaint. (MTD Order at 48-49 (internal citation omitted).) Instead, SMUG must come forward with "proof" that this Court can "assess." As shown below, SMUG has absolutely no proof that warrants a triable issue on causation. Instead, the causal chain for its claims is full of "fatal gaps," necessitating summary judgment. *See Nexium*, 42 F. Supp. 3d at 269.

Critically, SMUG has no evidence of any involvement or assistance provided by Lively in any of the fourteen specific instances of persecution alleged by SMUG. At their depositions, SMUG's witnesses testified repeatedly and unambiguously that they and SMUG "don't know" of

"**any** connection" whatsoever between Lively and the fourteen persecutory incidents and their alleged perpetrators. (MF ¶¶ 102-117). SMUG's witnesses further admitted that SMUG has absolutely no knowledge of any "communications," let alone "agreements," between Lively and the alleged perpetrators; that SMUG has absolutely no knowledge of "**any assistance at all**" provided by Lively to the alleged perpetrators; and that SMUG has absolutely no knowledge of "**any facts that would show that Scott Lively was responsible**" for any of these fourteen incidents. (MF ¶¶ 104-117).

In addition, the undisputed record shows that Lively has never entered into any campaign, agreement, conspiracy, or enterprise with Langa, Ssempa, Buturo, Bahati or any other person to effect, incite or facilitate: "persecution," in Uganda, including the specific incidents of persecution alleged by SMUG; nor the criminalization or punishment of any form of sexual "identity" or "orientation" or "status" or existence of any LGBTI or other person in Uganda. (MF ¶ 118). The sum total of this evidence could not be more clear at this stage: SMUG has absolutely no evidence of causation to support its allegations that Lively was a participant in, let alone "one of the 'principal strategists and actors behind [a] decade-long persecutory campaign.'" (*See* MTD Order at 48.) The complete absence of any causal link between Lively and the fourteen specific instances of persecution requires summary judgment in Lively's favor on all of SMUG's claims based upon those incidents.

Not only does SMUG lack any evidence connecting Lively to the fourteen persecutory acts or their perpetrators, but SMUG also lacks any evidence to support its novel and farfetched causation theory that Lively's speech and ideas laid the groundwork or fertilized the ground for persecution to mushroom. SMUG has no evidence that Lively did anything unlawful during his initial trips to Uganda in 2002. (MF ¶¶ 10-20). Specifically, the undisputed record shows that

during his 2002 visits to Uganda, Lively did not develop strategies for an ongoing anti-LGBTI movement in Uganda by discussing the concepts of "promotion of homosexuality" or "recruitment" of youth into homosexuality. (MF ¶ 14). Nor did he discuss or advocate strategies on the criminalization of "promotion of homosexuality." (MF ¶ 14). To the contrary, in March 2002 Lively spoke at a conference about pornography and obscenity and, in June 2002 he delivered remarks at several public speaking events focusing on pornography, obscenity, abstinence, God's design for marriage and family, and Christian living. (MF ¶¶ 10-13). SMUG has no evidence about what Lively said during his trips in 2002, other than a single TV interview in which Lively spoke about pornography's role in the sexual revolution. (MF ¶¶ 15-20). The undisputed record further shows that Lively had no substantive contact with Uganda or Ugandans between June 2002 and March 2009, and SMUG has no evidence that Lively did anything unlawful during this time period, let alone authorize, direct, manage, and oversee strategies for operating an anti-LGBTI movement in Uganda. (MF ¶¶ 21-24).

But while SMUG has absolutely no evidence of any actions taken by Lively in that timeframe, SMUG admits that between at least 1999 (**years before Lively ever visited Uganda**) and March 2009 (when Lively returned to Uganda to participate in another conference), "homophobia," "persecution," and attempts to criminalize "promotion of homosexuality" and "recruitment" of children into homosexuality were prevalent in Ugandan society and from Uganda government officials, **and SMUG further admitted that it has no evidence linking any of it to Lively**. (MF ¶¶ 25-40). These admissions are fatal to any genuine need for a trial on the issue of causality. For instance, SMUG is aware that in 1999 the President of Uganda "launched a fierce attack on homosexuality and said gays should be sent to jail." (MF ¶ 25). SMUG witnesses testified that they and SMUG were further aware that in 2002 homosexuals were experiencing denial of

health services and it was not possible to register a homosexual organization in Uganda. (MF ¶¶ 26-27). These same witnesses conceded that members of the Ugandan government and others in Ugandan society made public statements covered by media sources declaring, among other things, that "we are not going to give [homosexuals] the opportunity to recruit others," and that "homosexuality, lesbianism, and the like are a morally corrupting influence on the youth." (MF ¶¶ 30-31, 36). Other Uganda voices were publicly calling for arrests and prosecution. (MF ¶¶ 34-35). SMUG agrees that in 2006, "persecution of homosexuals was not new in Uganda" and Uganda was already engaged in "an active campaign of legislative overkill" against LGBTI rights "to silence an emerging community." (MF ¶¶ 32-33).

Moreover, in 2007, SMUG conducted a visible, 45-day "Let Us Live in Peace" media campaign, which triggered "angry response," "a lot of backlash," and calls for legislative action in Uganda and from Ugandan government officials. (MF ¶¶ 41-46). SMUG's witnesses testified that Uganda government officials and others in Ugandan society made public statements covered by media sources declaring, among other things, that the government "will not tolerate anyone who lures others into lesbianism and homosexuality" and should resist "indoctrinating our children to homosexuality." (MF ¶ 42). These same witnesses conceded that in 2007 the Ugandan government was already engaged in attempting to criminalize the "promotion of homosexual conduct," and that the backlash at the time was because "95 percent of Ugandans are against homosexuals and homosexuality." (MF ¶¶ 43, 45). SMUG has "no doubt" that in 2008 ideas such as the "promotion of homosexuality" or homosexual "recruitment" of children were prevalent in Ugandan media and society. (MF ¶ 39). The presence of these concepts into society, and the consideration of new legislation to toughen Ugandan's law against homosexual concept, are also matters confirmed by

the Principal Research Officer of Uganda's Parliament. (MF ¶¶ 74-76). SMUG has not a shred of evidence linking Lively to the foregoing statements and events. (MF ¶¶ 21, 25, 31, 33-37, 42-44).

Accordingly, this undisputed evidence demonstrates that the Ugandan society had its own ideas about homosexuality and the Ugandan government was already considering, independent of Lively, amendments to existing Ugandan law in order to ban the "promotion" of homosexuality to protect against the "recruitment" of children before Lively visited Uganda. Thus, to the extent SMUG tries to rest its tort claims against Lively on his purported introduction of the ideas of "promotion" and "recruitment" into Ugandan society, SMUG has no admissible or competent evidence to support that claim. The undisputed evidence demonstrates that these ideas were already present in Ugandan society, without Lively whatsoever and absent any direct or indirect connection to him.

Notably, several of the fourteen allegedly persecutory acts supposedly took place in this 2002 to 2009 frame, during which SMUG says it has no knowledge of anything Lively said or did in Uganda. (*E.g.*, MF ¶ 106 (2008 raid); MF ¶ 108 (2007 crackdown); MF ¶ 109 (2005 raid)). Even if SMUG had not already completely eviscerated causation by testifying that it knows of no assistance or involvement whatsoever by Lively in these incidents (*id.*), would SMUG really argue that Lively's brief visits to discuss pornography and obscenity in 2002, and his passing remarks on homosexuality in the context of the broader sexual revolution, somehow **caused** (to a legal certainty) government's arrest of homosexuals in 2005? Or in 2007? Or in 2008? Could such a preposterous argument escape sanctions, let alone dismissal? In any event, SMUG's own witnesses have removed SMUG's ability to continue to advance this argument, because they have already admitted, unequivocally, that SMUG has no knowledge of any facts connecting Lively to any of the allegedly adverse events between 2002 and 2007. (MF ¶¶ 25-46).

SMUG also has no evidence that Lively did anything unlawful during his March 2009 visit to Uganda. (MF ¶¶ 47-72). Lively committed no crime in delivering his lectures at the March 2009 conference on homosexuality or speaking to several church, university, and school assemblies. (MF ¶¶ 47, 65-72). Lively also committed no crime in giving an informal talk to a few Members of the Ugandan Parliament during that trip, a meeting about which SMUG admittedly knows nothing. (MF ¶¶ 53-63). In fact, less than ten (out of 385) Members of Parliament were present for Lively's talk, which lasted about an hour. (MF ¶¶ 53, 56). During the talk, Lively urged the handful of Parliament members present and the others in the audience that they should liberalize Uganda's criminal ban on homosexuality, and that they should focus on voluntary counseling and education instead of incarceration for those who violate the law. (MF ¶ 58). Lively also told his audience that those struggling with homosexuality do not deserve to be jailed, as under the existing law, but deserve the chance to overcome indulging in homosexual conduct through voluntary counseling and education. (MF ¶ 59). At the same meeting, Lively also urged tolerance, restraint and respect for persons struggling with homosexuality in any new law dealing with homosexual conduct. (MF ¶ 60). At the meeting at Parliament, Lively did not advocate for tougher criminal punishments for homosexual conduct; did not advocate for the death penalty for any form of homosexual conduct or sexual crimes; and did not advocate for the punishment of life imprisonment for any form of homosexual conduct of sexual crimes. (MF ¶ 61). Can SMUG really argue, without losing all credibility, that these undisputed statements, which it has no knowledge to controvert, somehow caused (to a legal certainty) any of the adverse persecutory actions that supposedly took place several years later?

Nor does SMUG have any evidence that Lively did anything unlawful upon his return to the United States after his March 2009 visit, with respect to the AHB and AHA or otherwise. As

discussed in detail above, Lively's only contribution to the AHB and the AHA was to repeatedly urge its moderation and the drastic reduction of criminal penalties, to make them even lower than existing law. (MF ¶¶ 81, 85). Lively did not draft these bills. (MF ¶¶ 78-80, 85, 98). Ultimately, all of Lively's proposals, ideas and pleas to soften the proposed Ugandan laws were outright rejected by the independent volition of the sovereign government of Uganda. (MF ¶¶ 82-84, 86-88). The AHA was passed after much debate in Uganda's Parliament, with Lively never once involved or present for a single debate, and without including any of Lively's proposed modifications to reduce the criminal punishment in the law. (MF ¶¶ 88-93). While SMUG got away with claiming that Lively was the mastermind and principal architect of the AHB at the motion to dismiss stage, when its frivolous allegations did not require proof, is SMUG going to maintain that argument now, on these facts, after admitting under oath that it has no knowledge of anything that can contradict them?

In sum, SMUG has no evidence of causation to link Lively with any of SMUG's purported injuries. The undisputed record shows that SMUG has no knowledge that Lively is the actual and proximate cause for the fourteen specific instances of alleged persecution, the introduction into Ugandan society of the concepts of "promotion of homosexuality" or "recruitment" of youth into homosexuality, or the consideration and enactment of harsher criminal laws affecting homosexuality. As such, SMUG cannot patch together any chain of causation for which Lively would be liable on SMUG's claims. Thus, SMUG cannot establish a trial-worthy issue on any aspect of causation (actual and proximate) for any of its tort claims. Summary judgment on all counts should be entered.

IX. SMUG'S CLAIMS FAIL AS A MATTER OF LAW BECAUSE SMUG HAS NO COMPETENT OR ADMISSIBLE EVIDENCE TO PROVE ANY OF THEIR OTHER ESSENTIAL ELEMENTS.

Even if SMUG overcomes the presumption against extraterritoriality, the bar of the act of state doctrine, shows the existence and violation of a universally accepted and clearly defined international norm, demonstrates that Lively is not protected by the First Amendment, and establishes standing to sue, SMUG's claims still fail because SMUG has no evidence to prove their essential elements. SMUG's failure of proof as to damages and causation, both essential elements to each of its claims, has already been discussed in Sections VII and VIII, respectively, *supra*. This section addresses the other essential elements of SMUG's claim as to which SMUG similarly lacks any competent and admissible evidence.

A. SMUG's Persecution Claim Fails for Lack of Evidence.

1. SMUG Has No Evidence To Support Direct Liability Of Lively For Persecution.

In its "First Claim for Relief" ("Persecution: Individual Responsibility"), SMUG attempts to assert both a direct liability claim against Lively for allegedly committing persecution himself (Am. Compl., dkt. 27, ¶ 237), as well as a secondary liability claim for "aiding and abetting" others to persecute (*id*. at ¶ 238). SMUG has no evidence to support either theory.

a. Lively Is Not A State Actor.

Lively cannot be directly liable on a claim of "persecution" because he is a private citizen, and not a state actor. The record is devoid of any evidence that Lively is an employee, agent, representative, or other operative for Uganda. (Am. Compl., dkt. 27, ¶¶ 22-23; MF ¶¶ 74-76, 79-93, 113, 142). In *Sosa*, the Supreme Court emphasized that "the determination [of] whether a norm is sufficiently definite to support a cause of action [under the Alien Tort Statute]" includes the "related consideration [of] whether international law extends the scope of liability for a violation

of a given norm to the perpetrator being sued, if the defendant is a **private** actor." 542 U.S. 692, 732 & n.20 (emphasis added). Pre- and post-*Sosa* courts have held that **crimes against humanity are not actionable against non-state actors**.

"The general rule is that international law only binds state actors." *Estate of Rodriquez v. Drummond Co., Inc.*, 256 F. Supp. 2d 1250, 1260-61 (N.D. Ala. 2003). However, the Restatement (Third) of Foreign Relations Law recognizes that, in certain limited circumstances, "[i]ndividuals may be held liable for offenses against international law, **such as piracy, war crimes, or genocide**." Restatement (Third) of Foreign Relations Law II, Introductory Note (1987) (emphasis added). As such, "there exists a 'handful of crimes to which the law of nations attributes individual responsibility.'" *Kadic v. Karadzic*, 70 F.3d 232, 240 (2d Cir. 1995) (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 795 (D.C. Cir. 1984) (Edwards, J. concurring)). "[B]ut **no court has found more in that 'handful' than war crimes, crimes committed in pursuit of genocide, slave trading, aircraft hijacking, and piracy**." *Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 120 (D.D.C. 2003) (emphasis added) (citing *Kadic*, 70 F.3d at 240).

Thus, "courts interpreting the [Alien Tort Statute] have found that certain forms of conduct – **piracy, the slave trade, slavery and forced labor, aircraft hijacking, genocide, and war crimes** – violate the law of nations 'whether undertaken by those acting under the auspices of a state or only as private individuals.'" *Estate of Rodriquez*, 256 F. Supp. 2d at 1260-61 (emphasis added) (allowing claims of extrajudicial killing to proceed against non-state actor under Alien Tort Statute only because killings were adequately alleged to be part of war crimes) (quoting *Kadic*, 70 F.3d at 239). In *Kadic*, the Second Circuit found that genocide and war crimes were within the "handful of crimes" actionable against non-state actors under the Alien Tort Statute, as were torture and summary execution **when committed in the course of genocide or war crimes**. 70 F.3d at

241-244. The Second Circuit permitted claims of torture and killing against a non-state actor, but only because they were adequately alleged to have been committed in the course of genocide or war crimes. *Id*. at 244.

Other courts have routinely dismissed claims against non-state actors under the Alien Tort Statute which do not fall within the limited "handful of [recognized] crimes," including, specifically, crimes against humanity. *See e.g., Islamic Salvation Front,* 257 F. Supp. 2d at 120 (granting summary judgment on claim for crimes against humanity under Alien Tort Statute, because only plaintiff's airplane hijacking claim "can be found on that short list" of international torts actionable against non-state actors); *South African Apartheid,* 617 F. Supp. 2d at 251-52 (dismissing direct liability claims under Alien Tort Statute, because "[a]lthough the establishment of state-sponsored apartheid and the commission of inhumane acts needed to sustain such a system is indisputably a tort under customary international law, the international legal system has not thus far definitively established liability for non-state actors") ("this Court declines to recognize a tort of apartheid by a non-state actor").

In *Beanal v. Freeport-McMoRan, Inc.,* the court dismissed an Alien Tort Statute claim for crimes against humanity brought against a private actor, concluding that "[c]ertain conduct … only violates the law of nations if committed by a state actor." 969 F. Supp. 362, 371 (E.D. La. 1997) *aff'd, Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999). "[Plaintiff] **must allege state action in order to state a claim under § 1350 for non-genocide related human rights violations abuses**." *Id*. at 373 (emphasis added). "**State action is required to state a claim for violation of the international law of human rights**." *Id*. at 380 (emphasis added).[32]

[32] In his "definitive volume" on crimes against humanity, Bassiouni states, aspirationally, "the need exists to include nonstate actors within the meaning of CAH." Bassiouni, *Contemporary Application, supra,* at XXXIV.

The same outcome must obtain here. SMUG attempts to bring a direct liability claim for the crime against humanity of persecution against Lively, whom SMUG concedes is a private citizen, not a state actor. (Am. Compl., dkt. 27, ¶ 22). Because neither crimes against humanity in general, nor persecution in particular, is on the "short list" of the "handful of crimes" actionable against non-state actors, Lively is entitled to judgment as a matter of law on this claim.[33]

b. SMUG Has No Evidence That Lively Persecuted Anyone.

SMUG's direct liability claim of persecution against Lively fails for still another, more basic reason: SMUG has no evidence Lively has committed any act of persecution **himself**. In *Liu*, the Second Circuit affirmed the dismissal of a direct liability claim of torture and inhuman treatment under the Alien Tort Statute. 421 Fed. App'x at at 92. Similarly to SMUG here, the plaintiff in *Liu* alleged that the police committed various acts of unlawful unrest, torture and inhuman treatment. *Id*. Also like SMUG, the plaintiff in *Liu* did not sue the police, but sued a private bank, and alleged that the bank provided the police with the false information leading to his unlawful arrest and eventual torture. *Id*. Also like SMUG, the plaintiff in *Liu* alleged inhuman treatment only by the police, not by the bank. *Id*. Said the Second Circuit: "Like the district court, we conclude that these allegations are insufficient to support a reasonable inference of direct liability by the Bank for conduct—torture, cruel treatment, and prolonged arbitrary detention—that the amended complaint repeatedly asserts was committed by the Chinese government police." *Id*.

[33] Even if SMUG is able to show that some nations or some courts have recognized direct liability claims for persecution against non-state actors, in light of the authorities above SMUG certainly cannot meet its burden of showing that such causes of action are "universally recognized" in the international community. As such, the Court would lack subject-matter jurisdiction over a claim on that theory. (*See* Section IV, *supra*.)

SMUG has sued Lively for "persecution," but has failed to produce a shred of evidence that he, himself, committed any of the fourteen instances of persecution alleged in its Amended Complaint and interrogatory answers. (MF ¶¶ 102-117, 132-146). Accordingly, Lively is entitled to judgment as a matter of law on SMUG's direct liability claim.

2. SMUG Has No Evidence That Lively Aided And Abetted Any Persecution.

Having failed to produce any evidence of direct persecution by Lively, SMUG will no doubt claim Lively still, somehow, aided and abetted someone else's. In the Amended Complaint, SMUG purports to assert a claim for purposefully "aid[ing], abet[ing], or otherwise assist[ing] in the commission or attempted commission of the crime [of persecution], including by providing the means for its commission." (Am. Compl., dkt. 27, ¶ 238). However, this claim fares no better than the direct liability claim, and Lively is entitled to judgment as a matter of law for two reasons: (a) SMUG has no evidence of any aiding and abetting conduct by Lively; and (b) SMUG has no evidence that Lively had the requisite intent to aid and abet.

a. SMUG Has No Evidence Of Any Aiding And Abetting Conduct By Lively.

The conduct (*actus reus*) element of aiding and abetting a crime requires proof of "**practical assistance** to the principal which has a **substantial effect** on the perpetration of the crime." *Presbyterian Church*, 582 F.3d at 259 (emphasis added); *see also Liu*, 421 Fed. App'x at 94 (allegations failed to show practical assistance or substantial effect on the perpetration of the crime). The absence of any "substantial effect" of Lively's conduct on any alleged instance of persecution is demonstrated in Section VIII, *supra*, showing a failure of evidence on causation as to each and every claim asserted by SMUG. There is likewise no evidence to support the "practical assistance" prong.

SMUG has expressly and conclusively disclaimed knowledge of any agreement, assistance, or coordination between or among Lively and the perpetrators of the fourteen instances of alleged persecution.[34] (MF ¶¶ 102-118, 125-126, 130-148). Nor has SMUG produced any evidence of how Lively aided, abetted, or assisted any of his alleged "co-conspirators" – Langa, Ssempa, Buturo, and Bahati— in the alleged persecutory acts that were carried out by others. (MF ¶¶ 102-118, 130-148). In short, there is no evidence whatsoever of practical assistance.

Furthermore, even if it were plausible on the record before the Court that the actual perpetrators of the alleged persecutory acts (or other anonymous aiders and abetters) were somehow encouraged or inspired by Lively's *speech*, such "encouragement" is an insufficient basis for liability as a matter of law. *See Liu*, 421 Fed. App'x at 94 (holding allegations of "encouragement and support" do not amount to practical assistance and substantial effect). Merely exercising one's First Amendment rights by expressing opinions to citizens and government officials cannot constitute aiding and abetting. *See Aziz v. Alcolac, Inc.*, 658 F.3d 388, 401 (4th Cir. 2011). It is likewise insufficient for aiding and abetting liability that Lively was friendly with people SMUG deems enemies of the human race. *See South African Apartheid*, 617 F. Supp. 2d at 257 ("It is (or should be) undisputed that simply doing business with a state or individual who violates the law of nations is insufficient to create liability under customary international law. International law does not impose liability for declining to boycott a pariah state or to shun a war criminal.").

[34] With respect to Uganda's enactment of the AHA, there is evidence of Lively's attempt to lodge his objections to the law with the Ugandan Parliament, which objections were disregarded. (MF ¶¶ 79-93).

b. SMUG Has No Evidence That Lively Had The Requisite Intent To Aid And Abet.

Not only has SMUG failed to produce evidence that Lively committed any specific act of aiding and abetting, but SMUG has also failed to produce any evidence that Lively acted with the **purpose** of aiding any perpetrator to persecute **specific victims**. Without meeting these basic requirements, the aiding and abetting claim fails on the *mens rea* ground alone.

Adhering to *Sosa*'s guiding principle, the *mens rea* standard for secondary liability, including aiding and abetting, requires a demonstration of purpose. *Presbyterian Church*, 582 F.3d at 255 ("The decisive issue in this case is whether accessorial liability can be imposed absent a showing of purpose," a question the court emphatically answered in the negative); *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 400-01 (4th Cir. 2011) (adopting the purpose *mens rea* standard and noting that, although not dispositive, the Supreme Court "chose not to disturb the Second Circuit's specific intent analysis [in *Presbyterian Church*] when it declined" to grant certiorari); *Abecassis v. Wyatt*, 704 F. Supp. 2d 623, 655 (S.D. Tex. 2010) (applying *Presbyterian Church*) ("[T]he [Alien Tort Statute] will only confer jurisdiction if there are allegations of purposefulness.").[35]

To prove secondary liability for crimes against humanity, a plaintiff must prove that the defendant actually **intended** for **specific** harm to occur to **specific** victims. *Chiquita*, 792 F. Supp. 2d at 1349 ("With respect to [defendant]'s secondary liability for the [perpetrator]'s crimes against humanity, Plaintiffs must allege that [defendant] not only intended for the [perpetrator] to torture and kill, but that [defendant] intended for the [perpetrator] to torture and kill civilians").

[35] Even if the Court were to apply the minority standard and assume that the *mens rea* element is satisfied on the basis of mere knowledge of the persecution, SMUG's allegations nevertheless fail as a matter of law, because they do not show that Lively knew that his speech (or alleged "conduct") would provide practical assistance to, or substantially affect, the perpetrators of the alleged persecution.

In *Liu*, the plaintiff brought claims under the Alien Tort Statute against the defendant bank for aiding and abetting (1) torture, (2) cruel, inhumane, and degrading treatment, and (3) prolonged arbitrary detention, by alleging that the bank had aided the police in committing these torts. 421 Fed. App'x at 90. Specifically, the plaintiff "allege[d] that the Bank falsified evidence and induced the police to arrest [the plaintiff] in retaliation for his release of [an] audit [of the Bank]." *Id.* at 94. The Second Circuit nevertheless upheld the dismissal of the complaint:

> Notwithstanding Liu's assertions that the Chinese government exercised a 'high degree of control' over the Bank and 'shared the goal of silencing Liu,' . . . the amended complaint fails plausibly to allege that the Bank acted with the **purpose** that Liu be subjected to torture, cruel treatment, or prolonged arbitrary detention by the police. . . . Although 'intent must often be demonstrated by the circumstances,' **Liu's allegations do not support a reasonable inference that the Bank acted with the purpose to advance violations of customary international law** . . . .

Id. (emphasis added) (internal citations omitted) (quoting *Presbyterian Church*, 582 F.3d at 264).

Much like the plaintiff in *Liu*, SMUG's allegations imply that Lively's pure speech somehow induced Ugandan perpetrators to persecute SMUG. (Am. Compl., dkt. 27, ¶¶ 92-93). However, even with the allegation of a "high degree of control" over the perpetrators, something SMUG has not proved, the *Liu* plaintiff failed to warrant a plausible inference that the defendant "acted with the purpose to advance violations of customary international law." *Liu*, 421 Fed. App'x at 94.

Critically, SMUG has expressly and unambiguously disclaimed any knowledge of any connection whatsoever between Lively and the fourteen alleged instances of persecution. (MF ¶¶ 104-117, 132-146). SMUG certainly cannot prove Lively intended the persecutory acts to occur, or exercised any control over the alleged perpetrators. (MF ¶¶ 103, 118, 129-131). Accordingly,

SMUG cannot show the requisite intent for aiding and abetting liability, and Lively is entitled to judgment as a matter of law.

3. SMUG Cannot Recover For Persecution In Its Own Right, Because It Is An Organization, Not An Individual.

In its "First Claim for Relief," SMUG attempts to assert a claim of persecution not only in a representative capacity, but also on its own behalf. (Am. Compl., dkt. 27, ¶¶ 236-239). Lack of standing aside, the "tort" of "persecution" can only be claimed by natural persons, not organizations. SMUG defines "[p]ersecution as a crime against **humanity**" (*id*. at ¶ 3) (emphasis added), and repeatedly and exclusively refers to it as such in the Amended Complaint. SMUG, however, is obviously not a human being, so it cannot claim to be the victim of a "crime against **humanity**."

SMUG also defines persecution as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of [] identity" (*id*.), and claims that it was itself "deprived of these rights **on the basis of gender and/or sexual orientation and gender identity**." (*Id*. at ¶¶ 232, 237-238). However, because it is not a human being, SMUG can have neither a "gender" nor "gender identity." Equally obvious, because SMUG is not a human being, it can have neither sexual relations, nor "sexual orientation" nor "sexual identity." Even SMUG apparently recognizes these irrefutable facts, because, notwithstanding its claim that it has been persecuted, it ultimately admits in its Amended Complaint that "[t]he prohibition on persecution protects **individuals** on the basis of their identity." (*Id*. at ¶ 3) (emphasis added). Since SMUG also admits that it is an "umbrella **organization**," and not an individual (*id*. at ¶ 1) (emphasis added), there is no dispute that SMUG has no standing to claim persecution on its own behalf.

Beyond unassailable logic, SMUG's inability to claim persecution as an organization is confirmed by the dictates of international law:

> The contemporary international law of human rights has developed largely since the Second World War. **It is concerned with natural persons only**, and **it applies to all human beings**, not to aliens alone. It reflects general acceptance that every **individual** should have rights in his or her society which the state should recognize, respect, and ensure.

Restatement (Third) of Foreign Relations Law VII, Introductory Note (1987) (emphasis added).

The Restatement specifically defines "Human Rights" as the "freedoms, immunities, and benefits which, according to widely accepted contemporary values, every **human being** should enjoy in the society in which he or she lives." Restatement (Third) of Foreign Relations Law § 701 cmt. a (1987) (emphasis added). And, while subsections (1) and (2) of § 703 of the Restatement provide that **States** may pursue certain remedies, the last subsection, (3), provides: "An **individual** victim of a violation of a human rights agreement may pursue any remedy provided by that agreement or by other applicable international agreements." Restatement § 703 (emphasis added). SMUG is neither a "state," nor an "individual." Nowhere are corporations, organizations or associations granted a similar right or remedy. (*Id*.)

Even more on point, in *Chowdhury v. WorldTel Bangladesh Holding, Ltd.*, 588 F. Supp. 2d 375 (E.D.N.Y. 2008), two alien corporations sought to bring various tort claims against a United States citizen and others under the Alien Tort Statute. *Id*. at 378-79. The corporations alleged that one of their officers had been tortured and subjected to cruel, inhuman or degrading treatment. *Id*. at 378. The corporations pleaded the same claims as the individual officer, and sought to recover in their own right for damages they claimed to have incurred in connection with the ill treatment of their officer. *Id*. The court allowed some of the **individual** plaintiff's claims to proceed, but **dismissed with prejudice all of the claims brought by the corporation**:

> [T]here is no viable theory under the [Alien Tort Statute] upon which the corporate plaintiffs here can recover. **Corporations are not tortured; they are not subject to cruel, inhuman or degrading treatment**. . . . There is no domestic law norm that would recognize such a claim, let alone an international law norm.

Id. at 387 (emphasis added).

If an organization cannot be tortured or subjected to cruel, inhuman or degrading treatment, then it cannot be persecuted. Accordingly, SMUG failed to state a persecution claim for itself, and Lively is entitled to judgment as a matter of law on all persecution claims.

4. SMUG Has No Evidence That Any Crime Against Humanity of Persecution Has Occurred.

Finally, even if Lively and SMUG were proper parties to SMUG's persecution claims, SMUG still has not produced evidence of the crime against humanity of persecution. "[T]he [Alien Tort Statute] 'applies only to **shockingly egregious** violations of universally recognized principles of international law.'" *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 167 (5th Cir. 1999) (emphasis added) (quoting *Zapata v. Quinn*, 707 F.2d 691, 692 (2d Cir. 1983)). SMUG purports to charge Lively with the "crime against humanity of persecution," but "a crime against humanity … is reserved for **the most egregious violations of international law, such as genocide and slavery**." *Villeda Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285, 1300 (S.D. Fla. 2003) (emphasis added), *aff'd in part, vacated in part on other grounds, remanded sub nom. Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005). "Most [Alien Tort Statute] cases have determined liability for 'crimes against humanity' **only for the most heinous of crimes**, such as **murder and extermination, slavery, ethnic cleansing, and torture**, which are undertaken as part of a widespread or systematic attack against a civilian population." *Villeda Aldana*, 305 F. Supp. 2d at 1300 (emphasis added).

SMUG purports to plead persecution under the Rome Statute of the International Criminal Court ("ICC"). (Am. Compl., dkt. 27, ¶ 3). The relevant part of the Rome Statute provides:

> 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
>
> (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) **Persecution** against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, **in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court**; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Rome Statute, Art. 7(1) (emphasis added) (available at http://untreaty.un.org/cod/icc/statute/romefra.htm, last visited June 20, 2012). "Persecution" is defined as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity." *Id.*, at Art. 7(2)(g).

The ICC, responsible for enforcing the Rome Statute, has cautioned:

> Since article 7 pertains to international criminal law, its provisions, consistent with article 22, **must be strictly construed**, taking into account that crimes against humanity as defined in article 7 are among **the most serious crimes of concern to the international community** as a whole.[36]

[36] *Rome Statute: Elements of Crimes*, p. 5, Art. 7, Crimes Against Humanity, Introduction #1 (emphasis added) (published by the International Criminal Court and available at http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element_of_Crimes_English.pdf, last visited June 20, 2012).

By the plain terms of the Rome Statute, one cannot commit "persecution" in the abstract. Art. 7(1)(h). To be liable for "persecution," the persecutor must also commit "**any act referred to in this paragraph or any crime within the jurisdiction of the Court**." *Id*. (emphasis added). This is also made clear in the *Elements of Crimes* manual of the International Criminal Court, which provides six separate elements for the crime of "Persecution," the fourth of which is that "[t]he conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court." *Rome Statute: Elements of Crimes*, p. 11, Art. 7(1)(h), Crime Against Humanity of Persecution: Elements.

Bassiouni confirms that the additional crime requirement of the Rome Statute applies across all formulations of the crime against humanity of persecution:

> "Persecution" is more likely to take the form a [sic] motive, policy, or goal; **it is not an act in and of itself**. To accomplish "persecution" requires the intent to discriminate on prohibited grounds **in conjunction with other acts, which are also usually criminal.** Consequently, there has always been a historical difficulty in identifying and defining persecution as a stand-alone crime without connecting it to other specific criminal acts. This is why **there has never been a case involving the charge of "persecution" that has not involved other specific criminal acts.**

Bassiouni, *Contemporary Application, supra*, at 405 (emphasis added).

Thus, to prove the crime against humanity of "persecution," SMUG would have to prove that Lively severely and intentionally deprived a protected class of fundamental rights, **and also that he committed another international crime as an act of persecution, such as one of the other enumerated acts in Article 7(1), or one of the other three general crimes within the jurisdiction of the International Criminal Court (*i.e.*, genocide, war crimes or military aggression)**. *Rome Statute: Elements of Crimes*, p. 11, Art. 7(1)(h), Crime Against Humanity of Persecution: Elements. SMUG has no evidence of such a crime—that Lively committed genocide or war crimes, or that he tortured, murdered, enslaved, raped or imprisoned anyone.

Furthermore, SMUG has no evidence of a widespread or systematic attack against a population. SMUG's member organizations account for approximately one tenth of one percent of all LGBTI people in Uganda, and SMUG does not purport to represent or speak for any other members of Uganda's LGBTI population. (MF ¶ 193). SMUG claims fourteen instances of persecution since 2002. (MF ¶ 102). So, that's **fourteen instances in fourteen years, affecting some fraction of one tenth of one percent of the LGBTI people in Uganda**. If any "persecution" has occurred, it is clear it does not rise to the level of a crime against humanity under any formulation of its elements. Lively is entitled to judgment as a matter of law on SMUG's persecution claims.

B. SMUG's Joint Criminal Enterprise and Conspiracy Claims Fail for Lack of Evidence.

SMUG's second and third "claims" against Lively are for Lively's alleged participation in a "Joint Criminal Enterprise" and a "Conspiracy", respectively, to commit persecution. (Am. Compl., dkt. 27, ¶¶ 240-250.) As shown in Section IV, *supra*¸ this Court has no jurisdiction over these claims under the ATS because they lack "universal recognition" in international courts. The claims also fail, however, for lack of evidence.

1. SMUG Has No Evidence Of Conduct Which Could Be Deemed A Joint Criminal Enterprise Or Conspiracy.

The same lack of evidence of conduct supporting aiding and abetting liability is fatal to any theory of joint criminal enterprise or conspiracy to commit persecution. *See* section IX.A.2.a, *supra*.

2. SMUG Has No Evidence Of The Requisite Intent For Joint Criminal Enterprise Or Conspiracy Liability.

Both joint criminal enterprise and conspiracy liability require the same proof of mens rea as aiding and abetting. *See Presbyterian Church*, 582 F.3d at 260 (affirming dismissal of joint

criminal enterprise theory for failure to satisfy same *mens rea* requirement as aiding and abetting); *Liu*, 421 Fed. App'x at 93-94 & n.6 ("Assuming, without deciding, that [plaintiff] might assert a claim under the [Alien Tort Statute] for conspiracy," and affirming dismissal of such claim for failure to plead sufficient facts to infer requisite *mens rea*) (citing *Presbyterian Church*, 582 F.3d at 260). SMUG has failed to plead sufficient facts from which the requisite *mens rea* could be inferred, either for aiding or abetting, joint criminal enterprise, or conspiracy. *See* Section IX.A.2.b, *supra.* Accordingly, SMUG's claims for joint criminal enterprise and conspiracy must meet the same fate as its claim for aiding and abetting, and Lively is entitled to judgment as a matter of law.

C. SMUG's Civil Conspiracy Claims Fails For Lack Of Evidence.

SMUG's allegations concerning civil conspiracy (Count IV) involve the "more exceptional" and therefore more difficult to demonstrate type of civil conspiracy. (MTD Order at 73.) SMUG's claims involve the "coercive type" of conspiracy, *Aetna Cas. Sur. Co. v. P & B Autobody*, 43 F.3d 1546, 1563 (1st Cir. 1994), which is "sometimes called 'true conspiracy.'" *Massachusetts Laborers' Health & Welfare Fund v. Philip Morris, Inc.*, 62 F. Supp. 2d 236, 244 (D. Mass. 1999). This is a "rare and very limited cause of action in Massachusetts." *Id*. (quoting *Aetna*, 43 F.3d at 1563) (internal citations and quotes omitted). "The plaintiff must allege and prove that by mere force of numbers acting in unison the defendants exercised some peculiar power of coercion of the plaintiff which any individual standing in a like relation to the plaintiff would not have had." *Id*. (quoting *Fleming v. Dane*, 304 Mass. 46, 50 (1939)) (internal quotes omitted). "**The 'peculiar power' conspiracy is rarely proven**." *Wajda v. R.J. Reynolds Tobacco Co.*, 103 F. Supp. 2d 29, 37 (D. Mass. 2000) (emphasis added).

1. SMUG Admits That Lively Did Not Coerce It To Do Anything.

Massachusetts courts have applied the "rare and very limited" coercive conspiracy cause of action "**principally** to remedy **direct economic coercion**, as in the combined action of groups of employers or employees, where through the power of combination pressure is created and results brought about different in kind from anything that could have been accomplished by separate individuals or in other kinds of concerted refusals to deal." *Philip Morris*, 62 F. Supp. 2d at 244 (emphasis added).[37] In its Amended Complaint, SMUG does not specify exactly what Lively coerced it to do, which is by itself reason for dismissing the claim. *Wajda*, 103 F. Supp. 2d at 37 (dismissing complaint because "the pleadings fail to explain how this conspiracy had a 'coercive' effect upon plaintiff").

Having survived dismissal, however, it was incumbent upon SMUG to explain in discovery that which it failed to explain in its Amended Complaint. But at its Rule 30(b)(6) deposition, SMUG conceded that Lively has not coerced SMUG to do anything. (MF ¶ 128). In particular:

> Q: Has Scott Lively coerced SMUG to do anything?
> [SMUG Counsel]: Objection to form.
> A: No.

(Onziema 374:22-375:2). With fact discovery closed, SMUG has never identified anything that Lively coerced it to do, economically or otherwise, but instead has testified, under oath, that it hasn't been coerced by Lively to do anything. (*Id.*) As a matter of law, SMUG's civil conspiracy claim is foreclosed by its own testimony and evidentiary failure.

[37] While this Court asserted that direct economic activity may not necessarily be required (MTD Order at 76), it is certainly the principal reason for civil conspiracy claims. As such, a federal court "cannot in the context of a diversity case expand the tort law of Massachusetts beyond its present state." *Taylor v. Am. Chemistry Council*, 576 F.3d 16, 37 (1st Cir. 2009). In any event, as shown herein, SMUG was not able to identify any coercion, economic or otherwise.

2. SMUG Has No Evidence That Lively Peculiarly Focused Any Coercion Against SMUG Itself.

To be actionable, the alleged coercion **must be directed specifically at, and "peculiarly focused against" the plaintiff**. *Philip Morris*, 62 F. Supp. 2d at 245 (emphasis added). Where the alleged coercion is "directed at the public generally," or even to an entire segment of the population that engages in particular conduct (*e.g.*, "all smokers"), rather than specifically at the plaintiff itself, the coercion is not actionable even if many of the individuals in the targeted group are members of the plaintiff. *Id*. at 245 & fn.6. In *Philip Morris*, plaintiff was an employee benefit plan which claimed that defendant cigarette manufacturer conspired with others to coerce all smokers into smoking. *Id*. at 239. Plaintiff contended that the coercion was directed at it, because some smokers were members of its plan. *Id*. This District dismissed the coercive conspiracy claim, because it found that any coercion would have been directed at smokers in general, and was not "peculiarly focused" against the individual plaintiff. *Id*. at 246. "**There is no question that an allegation of a generally exerted and generally felt power of coercion is not sufficient to plead the independent tort of 'true conspiracy' as recognized in Massachusetts**." *Id*. at 245 (emphasis added).

Here, SMUG's admission that no coercion has taken place necessarily ends the inquiry, because non-existent coercion cannot be "peculiarly focused" against anyone. Nevertheless, if SMUG had identified some cognizable coercion, its civil conspiracy claim would still fail because SMUG has no evidence that Lively directed any efforts specifically at SMUG, as opposed to the LGBTI community at large, or even LGBTI advocacy groups in general. SMUG had an opportunity in over three years of discovery to seek such evidence, and it has none. Indeed, SMUG cannot even establish that Lively even knew what or who SMUG was when he visited Uganda in 2002 and 2009, or at any time before SMUG sued him, let alone that he "peculiarly focused" any

non-existent coercion against SMUG itself. How could Lively "peculiarly focus" anything against an entity that he did not even know existed until it sued him? SMUG can't say. Accordingly, summary judgment should be granted on SMUG's civil conspiracy claim.

3. SMUG Has No Evidence To Prove Any Combined Efforts Between Lively And The Alleged Perpetrators Of The Persecutory Acts.

As this Court recognized at the motion to dismiss stage, under SMUG's alleged civil conspiracy, "the injury to a plaintiff must be the result of the combination of the defendants and not just the product of actions taken by more than one individual. (MTD Order at 74 (emphasis in original).) SMUG has utterly failed to demonstrate any connection between Lively and the alleged perpetrators of the fourteen persecutory acts in suit. In fact, SMUG has not an inkling of evidence to support any of its wild accusations that Lively is the criminal mastermind of some grand conspiracy against SMUG.

This element requires, *inter alia*, that the injuries flowing to a plaintiff be something that "[n]one of the defendants could have accomplished the injurious result themselves." (MTD Order at 74.) SMUG was required to plead and demonstrate that neither Lively nor the Ugandan officials and individuals allegedly responsible for the alleged acts of persecution could have accomplished these acts absent the requisite **combined efforts**. (*Id.*) SMUG falls well short of this mark, and the evidence has not been and cannot be produced to prove this required element.

In fact, the undisputed evidence is that, between 1999 and 2009, there was already a "fierce attack" on homosexual conduct; there were already "homophobia" and "persecution" according to SMUG; there were already many calls to ban "promotion" of and "recruitment" into homosexuality, and there were already some "raids" and arrests being perpetrated by Ugandan police. (MF ¶¶ 25-26, 29, 31, 33-36, 42-44, 106, 108, 109). Critically, SMUG knows of no connection between any of these alleged hardships and Lively, (MF ¶¶ 21, 25, 29, 31, 33-36, 42-

44, 106, 108, 109, 132, 135, 137), and therefore SMUG cannot explain how the alleged perpetrators of the fourteen persecutory acts could not have accomplished without Lively after 2009, what was already allegedly being accomplished without him prior to 2009.

More importantly, SMUG admits even more directly that it has no knowledge of "any assistance at all" provided by Lively to, or any involvement by Lively in, or any connection by Lively with, any one of the fourteen persecutory acts in suit. (MF ¶¶ 102, 104-117, 132-146) It strains credulity for SMUG to insist that the alleged perpetrators of the persecutory acts could not have accomplished without Lively the things with which Lively admittedly had no connection or involvement. SMUG's civil conspiracy claim is foreclosed as a matter of law by SMUG's own testimony.

4. SMUG Has No Evidence That Lively Exercised Any "Peculiar Commanding Influence" Over Anyone.

As this Court has noted, "[i]n successful claims offered under [SMUG's] theory, the plaintiff has shown that defendants had a 'peculiar commanding influence' either through some type of unique power or fiduciary relationship or even 'mere numbers acting simultaneously' that injured a plaintiff and lack 'an excuse of justification.'" (MTD Order at 75 (quoting *Johnson v. E. Boston Savings Bank*, 195 N.E. 727, 729-30 (Mass. 1935).) For the same reasons discussed above, SMUG cannot prove that Lively exercised any "peculiar commanding influence" over SMUG, or anyone else in Uganda for that matter. Lively obviously has never had any fiduciary relationship with SMUG. And SMUG knows of no connection between Lively and the perpetrators of the fourteen persecutory acts in suit, such that SMUG could show that the "mere numbers" of Lively and those perpetrators, acting simultaneously, injured SMUG.

For anyone of the above four independent reasons (not to mention SMUG's failure to prove damages and causation – central to the tort of civil conspiracy), summary judgment should be granted.

D. SMUG's Negligence Claim Fails For Lack Of Evidence.

This Court previously recognized that SMUG's "state law negligence claim appears to be substantively the most fragile," because Lively's argument that there is no legally cognizable duty to avoid creating a "virulently hostile environment" "certainly has force." (MTD Order at 78.) The Court also noted that "it will be difficult for Plaintiff to assemble facts during discovery to justify a finding of liability," and that "the First Amendment may make this count particularly difficult to defend at the summary judgment stage." (*Id*. at 78-79). The Court was right.

Just how fragile SMUG's claim for negligence became readily apparent from its utter failure to demonstrate with evidence that it can satisfy any of the essential elements. SMUG's failure to establish damages and causation, as well as its irreconcilable conflict with the First Amendment are all detailed above.

In addition to those critical failures, SMUG still cannot establish the legal duty it is advancing. There is no such thing as a duty of care arising out of a "virulently hostile environment" (Amended Complaint ¶ 258), in Massachusetts (or any other State of the Union), and certainly not when the alleged "hostile environment" was created through the civil, peaceful expression of core political speech on a matter of public concern, entitled to the highest First Amendment protection. As demonstrated in Section V.C.2, *supra*, speech likely to cause **imminent violence** is actionable. Speech likely to cause a "virulently hostile environment" is not. As mentioned above, SMUG cannot ask this Court to so radically expand Massachusetts common law torts in a diversity jurisdiction case. *See Taylor v. Am. Chemistry Council*, 576 F.3d 16, 37 (1st Cir. 2009).

Finally, without a legally cognizable duty of care, there can be no breach. SMUG's negligence claim fails as a matter of law.

X. SMUG'S STATE LAW CLAIMS ALSO FAIL AS MATTER OF LAW BECAUSE THE COURT LACKS JURISDICTION AND THEY ARE TIME BARRED.

In addition to the jurisdictional extraterritorial bar (Section II, *supra*), the jurisdictional standing bar (Section VI, *supra*), and SMUG's failure of proof as to damages (Section VII, *supra*) causation (Section VIII, *supra*), and all of the other essential elements (Section IX, *supra*), SMUG's claims of civil conspiracy (Count IV) and negligence (Count V) under state law also fail because the Court lacks diversity jurisdiction, and because they are time barred.

A. The Court Lacks Diversity Jurisdiction And Should Not Exercise Supplemental Jurisdiction Over SMUG's State Law Claims.

"Where a party seeks to invoke diversity jurisdiction under section 1332, the parties must be of complete diversity and the amount in controversy must exceed $75,000." *Fagan v. Mass Mut. Life Investors' Servs., Inc.*, No. 15-30049, 2015 WL 3630277, at *6 (D. Mass. June 10, 2015) (Ponsor, J.). "The burden is on the federal plaintiff to establish that the minimum amount in controversy has been met." *CE Design Ltd. v. Am. Econ. Ins. Co.*, 755 F.3d 39, 43 (1st Cir. 2014).

Without proof of any damages (*see* Section VII, *supra*), SMUG cannot establish diversity jurisdiction over its state law claims. Although the jurisdictional inquiry of the amount in controversy typically focuses on the circumstances present at the time suit was filed, "if, from the proofs, the court is satisfied to a [legal] certainty that the plaintiff never was entitled to recover [the jurisdictional threshold] amount … the suit will be dismissed." *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938). Here, it is now readily apparent that SMUG never was entitled to recover the jurisdiction amount. Notwithstanding the writings of counsel in SMUG's Complaint, SMUG's own Chairman of the Board, who is "supposed to approve the budgets," and who is described as the "backbone of the LGBT movement in Uganda," was not able to identify

even one way that Lively has damaged SMUG monetarily. (MF ¶ 177). SMUG's failure to produce any calculation of damages during fact discovery, and its subsequent failure to provide any of the expert testimony it agreed was necessary and promised to provide, serve only to confirm that SMUG had no damages from the beginning (and certainly no damages caused by Lively). Therefore, SMUG's state law claims should be dismissed for lack of jurisdiction.

Moreover, "[i]f the court has 'dismissed all claims over which it has original jurisdiction,' the court may also 'decline to exercise supplemental jurisdiction' over the remaining claims." *South Commons Condominium Ass'n v. City of Springfield*, 967 F. Supp. 2d 457, 469 (D. Mass. 2013) (Ponsor, J.) (citing 28 U.S.C. § 1367(c)(3)); *see also Camelio v. Am. Federation*, 137 F.3d 666, 672 (1st Cir. 1998) (noting that a federal court granting summary judgment on federal claims "must reassess its jurisdiction, this time engaging in a pragmatic and case-specific evaluation of a variety of considerations that may bear on the issue"). "When federal claims are dismissed before trial, state claims are normally dismissed as well." *McInnis–Misenor v. Maine Med. Ctr.*, 319 F.3d 63, 74 (1st Cir. 2003). "[A] federal court should be especially cautious about exercising supplemental jurisdiction 'when the state law that undergirds the nonfederal claim is of dubious scope and application.'" *Partelow v. Massachusetts*, 442 F. Supp. 2d 41, 53 (D. Mass. 2006) (Ponsor, J.) (dismissing negligence-based claims) (citing *Rodriguez v. Doral Mortgage Corp.*, 57 F.3d 1168, 1177 (1st Cir. 1995)).

There is no good reason for this Court to retain supplemental jurisdiction over SMUG's defunct state law claims, particularly given troubling First Amendment implications and SMUG's total failure of proof as to causation, damages and other essential elements. The Court should enter summary judgment for lack of supplemental or diversity jurisdiction.

B. SMUG's State Law Claims Are Time Barred.

A federal court determining claims brought under 28 U.S.C. § 1332 "must apply the substantive law of the forum in which it sits, including that state's conflict-of-laws provision." *Dykes v. DePuy, Inc.*, 140 F.3d 31, 39 (1st Cir. 1998). Under Massachusetts conflict-of-laws rules, the statute of limitations under Massachusetts law is applied whenever it would bar the claims in suit. *Shamrock Realty Co., Inc. v. O'Brien*, 72 Mass. App. Ct. 251, 256 (2008) ("The forum will apply its own statute of limitations barring the claim.") (holding that shorter Massachusetts limitations period must be applied to bar claims brought in Massachusetts that were otherwise governed by Rhode Island law (quoting Restatement (2d) of Conflict of Laws § 142(1) (1988)).

Under Massachusetts law, the limitations period for civil conspiracy and negligence is three years. *See* Mass. Gen. Laws Ann. ch. 260, § 2A (West); *see also Pagliuca v. City of Boston*, 35 Mass. App. Ct. 820, 823 (1994). SMUG filed this lawsuit on March 14, 2009. (Compl., dkt. 1). This Court has held that SMUG's claims are time barred if SMUG "knew or could have reasonably discovered the source of its injury before March 14, 2009." (MTD Order at 72; *see also, id*. at 77-78.) This Court has further concluded that, if SMUG "had (1) knowledge or sufficient notice that [it] was harmed and (2) knowledge or sufficient notice of what the cause of the harm was" prior to March 14, 2009, its state law claims are barred. (*Id*. at 77).

Lively has previously asked the Court to adopt a different accrual standard, specifically, that of the "first overt act," and does so again here. (*See* Lively MTD Mem., dkt. 33 at 70-71) *see also Nieves v. McSweeney*, No. 9905457J, 2001 WL 147497, *3 (Mass. Super. Oct. 3, 2001), *aff'd*, 60 Mass. App. Ct. 1107 (2003) ("[t]he injury and the damage alleged in the tort of civil conspiracy **flow from the first overt act**.") (emphasis added); *Lamoureux v. Smith*, No. 07953B, 2007 WL 4633272, *2 (Mass. Super. Nov. 5, 2007) ("**a civil conspiracy claim accrues on the date of the**

first allegedly wrongful act.") (emphasis added). This Court disagreed, concluding instead that the "first overt act" theory of accrual applies only "to federal and state statutory civil rights claims." (MTD Order at 71.) But nothing in *Nieves* or *Lamoureux* limits the "first overt act" theory of accrual to federal and statutory civil rights claims. On the contrary, in *Lamoureux*, the Court specifically applied this theory to common law "civil conspiracy claim" which was brought in addition to section 1983 and was treated independently for the purposes of the court's discussion on accrual. 2007 WL 4633272 at *2. Under the "first overt act" theory of accrual, SMUG's state law claims were more than ten years late, because SMUG alleges that Lively committed overt acts in 2002, and SMUG admits that it knew of those acts back in 2002, when they occurred. (MF ¶¶ 15, 195).

But even under the accrual standard adopted by this Court, SMUG's claims are still clearly time barred. Critically, this Court has concluded, correctly, that SMUG "was undoubtedly aware that some injuries occurred prior to 2009," (*id*. at 72-73), but the Court was not satisfied, at the motion to dismiss stage, that SMUG "had adequate notice before March 14, 2009, that Defendant contributed to these harms." (*Id*. at 73). However, SMUG has since admitted under oath that it did, in fact, believe earlier than March 14, 2009 that it was injured **and that Lively was responsible for its injury**. Specifically, SMUG has admitted that it had five representatives at the March 5-7, 2009 conference attended by Lively, and thus SMUG knew everything that Lively said at the moment he said it. (MF ¶¶ 196-197). More importantly, SMUG has admitted that, **upon hearing Lively's speeches prior to March 7, 2009, SMUG believed that it was being persecuted and harmed by Lively**. (MF ¶ 198). And, SMUG was even considering suing Lively while Lively was still present in Uganda, prior to March 7, 2009. (MF ¶ 199).

Under these facts, there is no longer any doubt that, as of at least March 7, 2009, SMUG believed that Lively was persecuting and injuring it, and SMUG was considering suing Lively. However, SMUG did not file suit until March 14, 2012, more than three years later. Accordingly, SMUG's state law claims are time barred, and summary judgment should be granted.

CONCLUSION

For the foregoing reasons, Defendant Scott Lively's Motion for Summary Judgment should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically with the Court on July 5, 2016. Service will be effectuated by the Court's electronic notification system upon all counsel or parties of record.

/s/ Horatio G. Mihet
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