**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.** | : | |
| | : | |

---

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

Philip D. Moran (MA 353920)
265 Essex Street, Suite 202
Salem, Massachusetts 01970
T: 978-745-6085
F: 978-741-2572
philipmoranesq@aol.com

Mathew D. Staver†
Horatio G. Mihet†
Roger K. Gannam†
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854-0774
T: 407-875-1776
F: 407-875-0770
court@lc.org
hmihet@lc.org
rgannam@lc.org

†Admitted *pro hac vice*
Attorneys for Defendant

# TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases** **Page**

**STATUTES**

## INTRODUCTION

The Opposition (dkt. 292, "Opp.") filed by Plaintiff Sexual Minorities Uganda ("SMUG") to Defendant Scott Lively's ("Lively") Motion for Summary Judgment demonstrates that, despite its vehement and repeated protestations to the contrary, SMUG is, in fact, attempting to put Lively's religious and political ideas and beliefs on trial, and to punish Lively for expressing those ideas and beliefs in Uganda and elsewhere. To survive the strict scrutiny of the First Amendment, SMUG continues to mask its claims under the cloak of "conspiracy," "joint criminal enterprise," "crimes against humanity," and other such grave accusations. But, since it lacks any facts whatsoever to meet its high burden of proving those claims, SMUG adopts a tried-and-true approach: throw up **everything** against the wall, and hope that something sticks. Surely there must be some genuine issue of material fact in a mountain of paper, SMUG protests. Yet nothing in SMUG's 1,000+ page submission, not even the astounding liberties SMUG takes with the truth, serves to cure any of the numerous deficiencies in SMUG's claims, each of which is fatal, and each of which independently warrants summary judgment.

First, Section I demonstrates that SMUG is stuck with the record it has created, including the post-discovery admissions of each of its officers and directors who were deposed, as well as its Rule 30(b)(6) designee. They all testified, in unison, that SMUG has no knowledge – personal, corporate or otherwise – of just about any of the critical facts on which its fanciful claims depend. SMUG's admitted lack of knowledge revokes its lawyers' creative license to advance new positions and interpretations that SMUG was unwilling to disclose in discovery. On the record created by SMUG's own witnesses, there is nothing left for a jury to decide.

Section II demonstrates that SMUG has not come even close to displacing the extraterritorial presumption with sufficient and relevant domestic conduct that would confer jurisdiction under the Alien Tort Statute ("ATS"). SMUG's witnesses – all of them – have

disclaimed all knowledge of **any** relevant domestic conduct by Lively. In two years of discovery, SMUG did not ask a single deposition question or written discovery question to determine whether Lively was located in the United States during any of the communications or events at issue in this suit. Left with nothing but speculation, and an astounding record of "I don't knows," SMUG now cobbles together **eight** pages (out of 40,000 generated in discovery) to attempt to prove the requisite tortious domestic conduct necessary for ATS jurisdiction. SMUG's effort is deceptive and falls far short of the target.

Section III demonstrates that there is good reason why SMUG relegates and buries the First Circuit's seminal and binding decision in *Spock* to a short footnote. SMUG cannot come even close to satisfying *Spock*'s strict standard of showing with substantial evidence that Lively had the specific intent to personally employ the illegal means of criminal persecution rising to the level of a crime against humanity. Even the mere suggestion of such, on this record, is absurd. Because SMUG knows it cannot meet the *Spock* standard, it belabors in vain to supplant it with the metastatic rules of general conspiracies, which is exactly what the First Circuit says cannot be done.

Section IV demonstrates that SMUG's entire theory of causation is based upon outright fraud. SMUG has egregiously withheld in discovery an out-of-print book that it commissioned and published, which surveys the Ugandan debate on homosexuality in the years before Lively ever stepped foot there in 2002. SMUG's book demonstrates that the exact same concepts it accuses Lively of "developing" "scripting" "programming" and thrusting upon a previously accepting society – "recruitment," "promotion" and criminalization – were actually ingrained in the Ugandan culture and public dialogue years before Lively's arrival. SMUG's theory of causation was

preposterous in the first place. Now that it has been laid bare by SMUG's own book, the theory is outright frivolous.

Section V demonstrates that SMUG is barred from recovering **any** damages, economic or non-economic, in this action for numerous reasons, not the least of which are a complete failure of proof and failure to disclose and substantiate damages in discovery. Because SMUG is asserting only tort claims in this lawsuit, and tort claims are, by their nature, dependent on SMUG showing and recovering some damages, SMUG's utter failure of proof on damages disposes of its entire lawsuit.

Section VI demonstrates that SMUG's claims are barred by the Act of State doctrine, even if SMUG is not seeking a judgment against the sovereign government of Uganda.

Section VII demonstrates that SMUG has adduced no evidence that Lively violated any universally accepted and clearly defined international legal norms, and, as such, SMUG's ATS claims fail for lack of jurisdiction. SMUG has also failed to adduce sufficient evidence to satisfy the elements of criminal persecution under the ATS.

Finally, Section VIII demonstrates that SMUG's state law claims are time-barred, because SMUG has admitted that it believed Lively was causing its claimed persecution injuries, and wanted to sue him, more than three years before it filed this lawsuit. SMUG has adduced no evidence whatsoever to meet its burden of showing that its claims were timely. And, even if they were not time-barred, SMUG's state law claims fail as a matter of law, for multiple reasons.

The Court has given SMUG an unprecedented opportunity to seek to substantiate its claims against Lively, through two years of discovery on three continents. In the end, SMUG's claims are as factually vacant now as they were when it started. Lively's Motion for Summary Judgment should be granted.

## LAW AND ARGUMENT

Two initial matters need to be briefly addressed.

First, SMUG's document (dkt. 270) comprising Plaintiff's Response to Defendant's Local Civil Rule 56.1 Statement of Facts [D-MF] and Plaintiff's Concise Statement of Material Facts of Record Omitted by Defendant [PSOF], fails to comply with Local Rule 56.1, which provides, in pertinent part, "A party opposing the motion shall include a concise statement of the material facts of record as to which it is contended that there exists a genuine issue to be tried." L.R. 56.1. SMUG's statement of "omitted" facts (PSOF) is not permitted by the rule, as the PSOF does not inform the court as to which "facts" in the PSOF, if any, SMUG contends there exists a genuine issue to be tried. Rather, SMUG's PSOF is a thinly veiled attempt to simply retell the story SMUG wants the Court to hear, rather than dealing with Lively's statement of undisputed facts.

Regarding local summary judgment rules like Local Rule 56.1, the First Circuit has stated:

> Such rules were inaugurated in response to this court's abiding concern that, without them, summary judgment practice could too easily become a game of cat-and-mouse. Such rules are designed to function as a means of focusing a district court's attention on what is—and what is not—genuinely controverted. When complied with, they serve to dispel the smokescreen behind which litigants with marginal or unwinnable cases often seek to hide [and] greatly reduce the possibility that the district court will fall victim to an ambush.
>
> Given the vital purpose that such rules serve, litigants ignore them at their peril. In the event that a party opposing summary judgment fails to act in accordance with the rigors that such a rule imposes, a district court is free, in the exercise of its sound discretion, to accept the moving party's facts as stated.
>
> We can hardly add to this admonishment but, at the risk of being redundant, we say again that parties are required to straightforwardly comply with the dictates of local rules such as Local Rule 56, and to state clearly and concisely the facts claimed to be undisputed or disputed, or qualified, and the record evidence

> supporting those claims.... Local Rule 56 is intended to prevent parties from shifting to the district court the burden of sifting through the inevitable mountain of information generated by discovery in search of relevant material ... [and prevent] the district court [from] grop[ing] unaided for factual needles in a documentary haystack.

*Rios-Jimenez v. Principi*, 520 F.3d 31, 38-39 (1st Cir. 2008) (internal citations and quotation marks omitted).

SMUG has done precisely what the First Circuit admonished against, which is to shift to the Court "the burden of sifting through the inevitable mountain of information generated by discovery in search of relevant material . . . ." *Id.* at 38. SMUG seeks to impose on Lively a new burden, never contemplated by Rule 56.1, to now respond to each of SMUG's 211 statements in its PSOF, and accompanying 212 exhibits. Although Lively does not take the bait to attempt such a response (and is not required to), Lively is prejudiced by SMUG's failure to focus the Court "on what is—and what is not—genuinely controverted." *Id.*

The proper remedy for failure to comply with Local Rule 56.1 is to disregard or strike SMUG's PSOF, s*ee Rand v. M/A-Com, Inc.*, 824 F. Supp. 242, 266 (D. Mass. 1992), or to deem Lively's statement of facts as true, *see Aulisio v. Baystate Health Sys., Inc.*, No. CIV.A. 11-30027-KPN, 2012 WL 3957985, at *1 (D. Mass. Sept. 7, 2012).

Second, throughout its brief, SMUG refers *ad nauseam* to this Court's Order denying Lively's Motion to Dismiss as being the established "law of the case." This is plain wrong. "To be sure, the district court has authority to reconsider its rulings." *United States v. Carrasco*, 540 F.3d 43, 52 (1st Cir. 2008). "Interlocutory orders, **including denials of motions to dismiss**, remain open to trial court reconsideration, and do not constitute the law of the case." *Perez-Ruiz v. Crespo-Guillen*, 25 F.3d 40, 42 (1st Cir. 1994) (emphasis added). "A ruling denying a motion to dismiss

is not the law of the case, and is not final even in the district court." *Commerce Oil Ref. Corp. v. Miner*, 303 F.2d 125, 128 (1st Cir. 1962).

## I. "I DON'T KNOW" MEANS "I DON'T KNOW": SMUG IS STUCK WITH THE RECORD IT HAS CREATED AND CANNOT ADVANCE NEW POSITIONS ON WHICH IT HAS DISCLAIMED ALL KNOWLEDGE MERELY TO DEFEAT SUMMARY JUDGMENT.

As demonstrated by Lively, SMUG – both corporately and through each one of its officers and directors who was deposed – unequivocally and repeatedly proclaimed complete lack of knowledge on most of the essential elements of SMUG's claims, through hundreds of "I don't know" responses at their depositions, including at SMUG's Rule 30(b)(6) deposition. As but a few examples:

- SMUG admitted that it has no knowledge of anything unlawful Lively said in Uganda in 2002. (MF ¶¶ 15-18).
- SMUG admitted that it has no knowledge of anything unlawful Lively did or said in or toward Uganda between 2002 and 2009. (MF ¶ 21).
- SMUG admitted that it has no knowledge of any connection between Lively and the persistent and widespread discussion of "promotion," "recruitment," "criminalizing advocacy," and "stopping the homosexual agenda," in Ugandan society in the years before Lively's 2009 visit. (MF ¶¶ 25, 29, 31, 33-39).
- SMUG admitted that it has no knowledge of any assistance or involvement of Lively in the 2007 "backlash" to SMUG's "Let Us Live In Peace" media campaign, nor of any communication or connection between Lively and Minister Buturo, who is alleged to have engineered and carried out the backlash. (MF ¶¶ 42-44).
- SMUG admitted that it has no knowledge of anything unlawful that Lively said to Members of Parliament in 2009. (MF ¶¶ 54-55).
- SMUG admitted that it has no knowledge of "any assistance at all" provided by Lively towards any of the 14 alleged instances of persecution, and no knowledge of any agreement or communication between Lively and anyone in Uganda regarding those incidents (MF ¶¶ 103-117).
- SMUG admitted that it has no knowledge of any participation by Lively in the alleged "campaign to systematically persecute LGBTI individuals" in Uganda, including in any of the four specific activities of that "campaign" identified by SMUG. (MF ¶¶ 120-127).

- SMUG admitted that it has no knowledge of any action taken by Lively in the United States to assist in the carrying out of any of the alleged acts of persecution, nor of any action taken by Lively in the United States to deprive any Ugandan person of fundamental rights. (MF ¶¶ 132-148).

- SMUG admitted that it has no knowledge that David Kato was killed because of his advocacy or activism, despite admittedly making that claim numerous times. (MF ¶¶ 165-166).

- Lastly, SMUG admitted that it has no knowledge of any damages caused by Lively, and its 30(b)(6) designee on damages could not answer a single question regarding SMUG's claimed damages. (MF ¶¶ 177, 191).

SMUG's feeble and fleeting attempt to escape the fatal consequences of these admissions consists of only two points, in two-paragraphs, on two-pages of its thousand-plus-page submission: (A) SMUG claims that it cannot be faulted for not having "**pre-discovery** knowledge of all relevant conduct by Defendant" (Opp. at 66) (emphasis added); and (B) SMUG claims that the "lack of **personal** knowledge on the part of **certain** deponents" is "irrelevant" and does not foreclose its claims. (*Id*. at 65) (emphasis added). Neither contention has any factual or legal support, and both fail as a matter of law.

### A. SMUG's Admitted Total Lack of Individual and Corporate Knowledge Was Not Only "Pre-Discovery" But Also Post-Discovery And All Points Between.

SMUG's fanciful attempt to dismiss the admitted total lack of knowledge (both of itself and of its individual officers and directors) as mere "pre-discovery" ignorance is not grounded in reality or the undisputed record in this case. As a threshold matter, that SMUG admittedly had no "pre-discovery" knowledge of "any assistance at all" or any involvement by Lively in any of the persecutory acts it alleges demonstrates that SMUG had no good faith basis for the outrageous claims against Lively in its Complaint, nor for the promises SMUG made to this Court regarding what discovery will uncover in order to survive dismissal. *See, e.g.,* Fed. R. Civ. P. 11(b)(3) (requiring that factual contentions either have evidentiary support, or that they "specifically" identify the lack of current evidentiary support and the likelihood of future evidentiary support).

More importantly, however, SMUG's claim that its complete lack of corporate knowledge was merely "pre-discovery" oblivion somehow cured by subsequent discovery revelations is demonstrably not true. Fact discovery in this case began shortly after the Court denied Lively's motion to dismiss on August 14, 2013 (dkt. 59), and concluded generally on June 30, 2015.[1] (Dkt. 136). In the intervening two years, SMUG's many lawyers conducted all the discovery they wanted, on three continents including both coasts of the United States. Lively voluntarily provided thousands of pages of documents on June 12, 2014, **including all of his communications with Uganda and Ugandans**. (Declaration of Roger K. Gannam in Support of Defendant Scott Lively's Motion for Summary Judgment ("Gannam Declaration") Ex. 1.). SMUG's lawyers also subpoenaed and obtained numerous documents from multiple third parties (including churches, ministries, pastors and individuals). They deposed Lively over the course of two days, and they also deposed the other two American presenters at the 2009 conference in Uganda.

The depositions of SMUG and its officers and directors – where SMUG repeatedly admitted that it has no knowledge of any assistance or involvement by Lively in the alleged persecutory acts, and no knowledge of any damages caused by Lively – took place **at the very end of the fact discovery period**, and, in the case of SMUG's 30(b)(6) deposition, over four months **after** the close of fact discovery.[2] By the time SMUG's officers testified at their depositions in late June 2015, they had already had Lively's documents for **over one year**. By the

[1] As previously shown, the Court subsequently partially extended fact discovery until the week of November 9, 2015, but only "for limited and stated purposes," including the taking of SMUG's Rule 30(b)(6) deposition, because of SMUG's failure to produce documents in a timely manner and to accommodate the travel schedule of SMUG's witness. (*See* Lively MSJ Memo., dkt. 257, p. 138, n.31).

[2] *See e.g.*, Mugisha Tr., dkt. 250-3, p. 1, deposition taken on June 22, 2015; Lusimbo Tr., dkt. 250-2, p. 1, deposition taken on June 25, 2015; Mukasa Tr., dkt. 250-4, p. 1, deposition taken on August 13, 2015; Ganafa Tr., dkt. 250-1, deposition taken October 27, 2015; and Onziema Tr., dkt. 250-6, p. 1, SMUG 30(b)(6) deposition taken on November 10, 2015.

time SMUG's Rule 30(b)(6) designee testified as to SMUG's corporate knowledge and SMUG's position on the issues in suit, SMUG had been in possession of Lively's documents, including all of Lively's writings and all of his communications with Uganda and Ugandans, **for 17 months or more**.

Armed with all of this information, and **at the very end of fact discovery in this case**, SMUG and its officers unambiguously disclaimed any knowledge – personal or corporate – of "any assistance at all" provided by Lively to the alleged persecutory acts (MF ¶¶ 103-117), and of any participation by Lively in the alleged "campaign to systematically persecute LGBTI individuals" (MF ¶¶ 120-127), and of any action taken by Lively in the United States to assist in any persecution (MF ¶¶ 132-148), and of any damages purportedly caused by Lively. (MF ¶¶ 177, 191). That SMUG knew no more of Lively's involvement in its wild conspiracy theories post-discovery than it did pre-discovery is not surprising at all, because, as SMUG has now implicitly acknowledged, nothing that SMUG obtained in discovery shows "any assistance at all" provided by Lively to the alleged persecutory acts. The only connection here is manufactured by SMUG's lawyers based on their impressive ability to cut-and-paste clearly protected writings and speech and transform them into a nefarious "conspiracy." But, as shown in the next section, as a matter of law SMUG's unambiguous disclaimer of any corporate knowledge on the central issues in suit has permanently and completely revoked its lawyers' creative license to transform "I don't know," into "I **do** know."[3]

[3] Lively does not relish, and hesitates to focus a portion of the discussion herein on SMUG's lawyers, rather than SMUG, but it is impossible to avoid since SMUG has disclaimed lack of knowledge across the board, and it is only its lawyers that supposedly know SMUG's position. As shown herein, the case law is replete with similar attempts by similarly creative lawyers, and Lively has no choice but to point out these matters.

The only way SMUG can survive summary judgment on this record, is to grossly distort it, but SMUG's bald claim of "pre-discovery" ignorance cannot withstanding any scrutiny.

### B. SMUG's Admitted Total Lack of Corporate Knowledge Is Binding On SMUG And Revokes Its Lawyers' Creative License.

SMUG's second argument to avoid its fatal disclaimers of knowledge – that "lack of **personal** knowledge on the part of **certain** deponents" is "irrelevant" (Opp. at 65) – is equally unavailing and founders on the same shoals of reality. As the undisputed record plainly reflects, it is not only SMUG's individual officers that admitted total lack of "personal" knowledge of wrongdoing by Lively – though every last one of them certainly did just that – but, most critically, SMUG itself disclaimed lack of any **corporate** knowledge, via its chosen Rule 30(b)(6) designee. Having testified under oath that SMUG's official position at the close of discovery was that SMUG had no idea what unlawful acts Lively might have done in the United States or Uganda, and that SMUG could not answer a single question about its purported damages, SMUG is now stuck with the record it has created and cannot pretend otherwise.

#### 1. The Testimony of SMUG's Directors, Officers and Managing Agents Disclaiming Any Knowledge Of Critical Facts Is The Testimony of SMUG, And Is Binding On SMUG.

As an initial matter, SMUG is again being highly disingenuous when it claims that it cannot be faulted for the lack of "personal knowledge" of "certain deponents," (Opp. at 65), as if we're talking about janitors, gardeners, or other low-level employees who reasonably cannot be expected to know even the most basic facts undergirding SMUG's claims in this suit. When SMUG says "certain deponents," what it actually means is **every single one of its directors and officers** who testified in this action, from Samuel Ganafa (SMUG's Chairman of the Board), to Frank Mugisha (SMUG's Executive Director), to Pepe Onziema (SMUG's Programs Director), to Richard Lusimbo (SMUG's Research and Documentation Manager), to Victor Mukasa (SMUG's co-

founder). These are not assembly-line workers. They are the leaders of SMUG and of the entire movement headed by SMUG in Uganda – they are the "backbones of the movement" (Ganafa 62:2-63:4), who were in charge of investigating and responding to the very same alleged acts of persecution at issue in this suit (Lusimbo 12:17-18:13). They are the very individuals who decided that SMUG should sue Lively. (Mugisha 84:4-85:14). And each one testified that neither he, nor anyone else at SMUG, knows of any involvement by Lively in any "agreement" or "conspiracy." (*See e.g.*, MF ¶¶ 15-18, 21, 25, 29, 31, 33-39, 42-44, 54-55, 103-117, 120-127, 132-148, 165-166, 177, 191).

Thus, for example, when SMUG's Executive Director, Frank Mugisha, says that he is not aware of any unlawful agreement between Lively and others – thereby giving away one of the most fundamental lynchpins of SMUG's case – that admission is critical, given that its source is the public face of SMUG and the very same person who decided that Lively should be sued:

> Q: … are you aware of an unlawful agreement that Lively entered into with other people to deprive people of rights based on sexual orientation or gender identity?
>
> A: No, I am not.

(Mugisha 145:13-20). And when SMUG's Executive Director – who is in charge of SMUG's daily operation and knows SMUG better than anyone else – follows up that admission with an even more astounding revelation that **no one else at SMUG knows of such agreement either**, any reader must wonder how SMUG could possibly have had the requisite good faith to sue Lively claiming that such an agreement does, in fact, exist:

> Q: Is there **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?
>
> A: No.

(Mugisha 145:21-146:4) (emphasis added).[4]

Similarly, when SMUG's Chairman of the Board, the "backbone of the movement" admits that he has no knowledge of any unlawful agreement involving Lively, that admission carries enormous weight, given its source:

> Q: Paragraph 44 [of SMUG's Amended Complaint] says: "Defendant Lively entered into an unlawful agreement with others to intentionally and severely deprive persons of fundamental rights on the basis of their sexual orientation and gender identity." Are you aware of any agreement that Scott Lively entered into to deprive people of rights?
>
> A: No.

(Ganafa 200:20-201:4).[5] And when Mr. Ganafa, who is tasked with approving SMUG's budgets, admits that he is not aware of any damages suffered by SMUG, and is not able to identify even one way that Lively has damaged SMUG monetarily, it becomes evident that SMUG has no damages. (Ganafa 185:2-12).

Finally, when SMUG's Research and Documentation Manager, Richard Lusimbo, who is in charge of investigating incidents of alleged persecution, including the ones at issue in this suit, testifies repeatedly that he knows of no involvement whatsoever – "directly or indirectly" – between Lively and the incidents at issue, those admissions are fatal to SMUG:

> Q: Do you know whether Scott Lively had any involvement in the arrests of three activists in June of 2008?
>
> A: No, I don't know.
>
> Q: And when I say any involvement, I mean **directly or indirectly**.

[4] SMUG's counsel objected to each of these two questions "to the extent it calls for a legal conclusion." (Mugisha 145:17-19; 146:3). Neither question sought any legal opinion or conclusion – just Mugisha's and SMUG's factual knowledge of the existence of the "unlawful agreement" at the basis of SMUG's claims.

[5] SMUG's counsel did not lodge a "legal conclusion" objection here, as it had done with Mugisha. (*Id.*)

A: No, I don't.

(Lusimbo 100:9-15) (emphasis added). Lusimbo repeatedly disclaimed any knowledge of "any involvement" "in any way" by Lively in the persecutory acts at issue, which were under his purview to investigate. (*E.g.*, Lusimbo 101:22-102:2; 103:14-17; 104:19-23; 105:23-106:4; 109:3-6; 109:11-15; 116:9-13; 121:3-17; 122:11-14; 123:2-4; 123:9-13; 123:21-124:7; 124:14-125:2). If SMUG's chief investigator has not uncovered any connection between Lively and the alleged persecutory acts, how could anyone else? In fact, as one of SMUG's officers and/or managing agents, Lusimbo himself put to rest this question, by testifying that **no one else at SMUG knows of any involvement by Lively either**:

Q: Does anyone else[,] or do you know whether anyone else has knowledge of involvement by Scott Lively in the June 2008 arrest of three activists?

A: No.

(Lusimbo 100:22-25). Indeed, Lusimbo repeatedly testified that no one else at SMUG (or outside of SMUG, for that matter) knows about any involvement by Lively in the alleged persecutory acts. (*E.g.*, Lusimbo 102:3-6; 103:18-21; 114:21-24; 116:14-21; 121:18-21; 122:15-18; 123:5-8; 123:14-17; 124:8-11; 125:3-6).

SMUG may try to sweep the critical admissions of these "certain deponents" under the rug, but it is stuck with and bound by them. As a matter of black letter law, the testimony of SMUG's officers, directors and managing agents **is the testimony of SMUG**, and is binding on SMUG. *See, e.g.*, *GTE Prod. Corp. v. Gee*, 115 F.R.D. 67, 68 (D. Mass. 1987) ("the testimony [of an officer, director or managing agent] **is of the corporation** and if the corporation is a party, the testimony may be used at trial by an adverse party for any purpose") (emphasis added); Fed. R. Civ. P. 32(a)(3) ("An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director [or] managing agent …").

### 2. The Testimony of SMUG's Rule 30(b)(6) Witness Disclaiming Any Knowledge Of Critical Facts States SMUG's Position And Is Binding On SMUG.

Even more significantly, SMUG's contention that the "lack of personal knowledge on the part of certain deponents" is not fatal to its claims also falters because it overlooks, no doubt intentionally, one critical fact: it is not **just** SMUG's officers and directors who disclaimed "personal" knowledge virtually across the board, but SMUG's Rule 30(b)(6) witness also testified, unambiguously, that, as of the close of fact discovery in this case, **SMUG as an organization has no corporate knowledge on most of the key elements of SMUG's own claims**. These admissions are indeed dispositive of SMUG's claims, because they state SMUG's position on the key aspects of SMUG's claims – a position that SMUG's lawyers cannot now change.

#### a. Through Its 30(b)(6) Designee, SMUG Disclaimed Knowledge Of Any Unlawful Conduct Or Involvement By Lively.

Lively served SMUG with a deposition notice pursuant to Rule 30(b)(6), requesting testimony on, among other topics:

> **SMUG's claims in this lawsuit and evidence** regarding: (i) persecution in Uganda, including without limitation **the specific persecutory acts** alleged by SMUG in its Amended Complaint (Dkt. No. 27) and discovery responses; (ii) **wrongful conduct by Lively, including without limitation acts or omissions undertaken by Lively in Uganda, in the United States, or elsewhere**; (iii) wrongful conduct by any of the alleged co-conspirators of Lively; (iv) **the specifics of any alleged conspiracy in which Lively participated**; and (v) **specific damages incurred or claimed by SMUG**.

(Gannam Decl. Ex. 2) (emphasis added). SMUG designated its Programs Director, Pepe Onziema, to testify on its behalf on all topics requested, and presented Onziema for deposition on November 10 and 11, 2015, in New York. (Onziema 1, 6:13-25). SMUG does not argue that there were any defects in the notice, and, in any event, SMUG never sought a protective order and therefore waived any objection. *See, e.g.*, *Mitsui & Co. (U.S.A.) v. Puerto Rico Water Res. Auth.*, 93 F.R.D. 62, 67 (D.P.R. 1981) ("The [protective] order [to a Rule 30(b)(6) deposition notice] must be

obtained before the date set for the discovery, and failure to move at that time will be held to preclude objection later.")

Having designated Onziema to testify on its behalf on the requested topics, and irrespective of Onziema's "personal knowledge" on those topics, SMUG's fundamental, textbook duties under Rule 30(b)(6) were to prepare Onziema to "testify on [SMUG's] behalf as to all matters known or reasonably available to [SMUG]." *Calzaturficio S.C.A.R.P.A. s.p.a. v. Fabiano Shoe Co.*, 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), *aff'd* 166 F.R.D. 367 (M.D.N.C., 1996)). Under the Rule, SMUG "must prepare [Onziema] by having [Onziema] review prior fact witness deposition testimony as well as **documents and deposition exhibits**," including the documents that SMUG now seeks to use to advance its farfetched theories. *Calzaturficio*, 201 F.R.D. at 37 (emphasis added). *See also, QBE Ins. Corp. v. Jorda Enterprises, Inc.*, 277 F.R.D. 676, 689 (S.D. Fla. 2012) ("the litigation commandments" require corporate designee to review "available materials, such as fact witness deposition testimony, exhibits to depositions [and] **documents produced in discovery**") (emphasis added). This is because SMUG was required to "not only testify about facts within [SMUG's] knowledge, but also **its subjective beliefs and opinions** [and] **its interpretation of documents and events**." *Id*. (emphasis added).

These authorities easily demolish SMUG's unsupported claim that it had no obligation to meaningfully answer Lively's deposition questions because, its argument goes, Lively himself already has "personal knowledge" of his evil conspiracy, since his own writings reflect it. (Opp. at 65-66). Lively legitimately sought, and was legally entitled to obtain in discovery (not at summary judgment), SMUG's position and SMUG's "subjective beliefs and opinions [and] its interpretation of documents and events." *QBE Ins.*, 277 F.R.D. at 689. As but oneexample, Lively

(and everyone else) has no reason to think that his request to be put in touch with Ugandan lawyers for the purpose of suing SMUG for defaming his name with scurrilous accusations (PSOF ¶173) evidences any involvement at all in any "crime against humanity." If SMUG holds that ridiculous position, Lively was entitled to discover it more than a year ago in discovery, not when SMUG filed its opposition to his summary judgment motion. *See, e.g., Ierardi v. Lorillard, Inc.*, No. CIV. A. 90-7049, 1991 WL 158911, at *2-3 (E.D. Pa. Aug. 13, 1991) ("… documents can always be interpreted in various ways. This Court finds that plaintiffs are entitled to discover the interpretation [defendant] intends to assert at trial.") (holding that party whose 30(b)(6) designee claims ignorance at deposition cannot attempt to change that position at trial). Lively's knowledge that he had these communications does nothing to apprise him of SMUG's bizarre position, and does not allow him to probe and cross-examine SMUG's (non-existent) evidence to support that position. That is why we have discovery in U.S. courts, and SMUG has made a mockery of it.

Moreover, "a witness appearing pursuant to a Rule 30(b)(6) deposition has a much greater responsibility to prepare and to educate himself to answer questions that go beyond what he knows." *Infinity Fluids, Corp. v. Gen. Dynamics Land Sys., Inc.*, No. CV 14-40089-TSH, 2015 WL 4498069, at *2 (D. Mass. July 23, 2015). "Even if the documents are voluminous and the review of those documents would be burdensome, [Onziema was] still required to review them in order to prepare [] to be deposed." *Calzaturficio*, 201 F.R.D. at 37.[6] "This interpretation is

[6] *See also, Spicer v. Universal Forest Products, E. Div., Inc.*, No. 7:07CV462, 2008 WL 4455854, *4 (W.D. Va. Oct. 1, 2008) ("The fact that preparation for a 30(b)(6) deposition requires many hours of work and review of voluminous documents does not relieve the corporation of its responsibility to adequately prepare."); *QBE Ins.*, 277 F.R.D. at 689 ("Preparing a Rule 30(b)(6) designee may be an onerous and burdensome task, but this consequence is merely an obligation that flows from the privilege of using the corporate form to do business."); *Taylor*, 166 F.R.D. at 362 ("The Court understands that preparing for a Rule 30(b)(6) deposition can be burdensome. However, this is merely the result of the concomitant obligation from the privilege of being able to use the corporate form in order to conduct business.").

necessary 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 but a thorough and vigorous one before the trial [which] would totally defeat the purpose of the discovery process." *Id*. at 36. "Truth would suffer." *Taylor*, 166 F.R.D. 361.

Onziema understood these obligations, and understood that he was present to testify as to **SMUG's** knowledge and position on the requested topics. He confirmed **twice** (once at the start of each day), that whenever he indicated a lack of knowledge he was testifying that SMUG, as an organization, has no knowledge on a given subject:

> Q: … any question that I ask you, I want you to assume that I'm asking you both in your individual capacity, based on your own knowledge, **but also based on the knowledge of SMUG as an organization**. Is that okay?
>
> A: Yes.
>
> …
>
> Q: If I ask you any question that you don't know the answer to and you say I don't know, I will assume that means you personally don't know and that **SMUG as an organization does not have that knowledge**. Is that okay?
>
> A: Yes.

(Onziema 7:4-8:2) (emphasis added). At the start of the second deposition day, Onziema re-confirmed his understanding that his "I don't know" responses indicated not only his, but also SMUG's, lack of knowledge on a given subject:

> Q: And I also wanted to just remind you for the record that because you are appearing in both capacities, any question I ask you that you answer, we will assume that **your answer is on behalf of both yourself and SMUG**. Is that okay?
>
> A: Yes.
>
> Q: And if you -- **if your answer is "I don't know" to any question, we will assume that means both that you don't know personally and that SMUG doesn't know**. Is that okay?
>
> A: Yes.

(Onziema 256:6-19) (emphasis added).

Understanding that he was speaking for SMUG, and having been designated by SMUG to provide SMUG's "position" on its claims and SMUG's "interpretation of documents and events," *Calzaturficio*, 201 F.R.D. at 37, with the benefit of all fact discovery complete and having been in possession of Lively's documents for over 17 months, SMUG's designee then revealed that SMUG, at the organizational level, as the one and only Plaintiff in this case, has no knowledge whatsoever on even the most critical aspects of the claims it is advancing against Lively. (*See, e.g.*, MF ¶¶ 15-18, 21, 25, 29, 31, 33-39, 42-44, 54-55, 103-117, 120-127, 132-148, 165-166, 177, 191).

For example, "echoing" and "parroting" (to use two of SMUG's favorite terms) the complete knowledge disclaimers of SMUG's directors and officers, Onziema confirmed that SMUG itself has no knowledge of "any assistance at all" provided by Lively towards any of the alleged persecutory events or acts. (*See* Onziema Deposition References in MF ¶¶ 103-117). Because they are so numerous, it is not possible to exhaustively list or even to summarize SMUG's disclaimers of knowledge without copying hundreds of deposition pages. One example is instructive and typical of the rest.

With respect to the alleged July 20, 2005 Raid – one of the persecutory acts for which SMUG seeks to hold Lively liable in this suit – Onziema confirmed that SMUG has no knowledge of any "communications" or "agreements" between Lively and any of the alleged co-conspirators in this suit, or between Lively and any of the alleged perpetrators of that act, and that SMUG has no knowledge of "any assistance at all" provided by Lively to them:

> Q: Are you familiar with the events [of the July 20, 2005 Raid]?
>
> A: Yes.
>
> Q: Do you have any knowledge of any **communication** between Scott Lively and the Ugandan authorities regarding the events [of the July 20, 2005 Raid]?

(Pause.)

A: I don't know.

Q: Do you have any knowledge of any **communication between Scott Lively and Martin Ssempa, Steven Langa, Nsaba Buturo, Simon Lakodo or George Oundo** in connection with the Ugandan authorities forcing their way into the home of Victor Mukasa and arresting Yvonne Oyo?

A: I do not know.

Q: Do you have any knowledge of any **agreement** between Scott Lively and the Ugandan authorities … regarding the events [of the July 20, 2005 Raid]?

A: I do not know.

Q: Do you have any knowledge of any action taken by Scott Lively in the United States directed towards helping the Ugandan authorities enter the home of Victor Mukasa and arresting Yvonne Oyo …?

A: I do not know.

Q: Do you have any knowledge of **any assistance at all provided by Scott Lively to the Ugandan authorities to carry out the events [of the July 20, 2005 Raid]**?

A: I do not know.

(Onziema 327:8-328:21) (emphasis added). Onziema went on to confirm the same complete lack of knowledge on behalf of SMUG – with respect to communications, agreements and "any assistance at all" **for each of the other persecutory acts alleged by SMUG in this lawsuit**. (*See* Onziema Deposition References in MF ¶¶ 103-117).

Critically, with respect to the so-called persecutory "campaign" supposedly undertaken by Stephen Langa, Martin Ssempa and other so-called "co-conspirators" of Lively in Uganda, Onziema presented SMUG's position that this "campaign" consisted of four general activities or overt acts: (a) delivering petitions to Parliament; (b) holding sermons and rallies to turn Ugandans against homosexuality; (c) taunting and humiliating LGBT persons in public spaces, and (d) using media to continue to call public attention to homosexuality. (Onziema 385:14-24, 387:5-19).

Onziema testified, however, that SMUG has no knowledge of any participation by Lively in any of these alleged activities. (Onziema 401:15-403:7).

And with respect to Lively's U.S. conduct – a critical topic to SMUG's foolhardy attempts to overcome the extraterritorial bar – SMUG's designee admitted that (a) SMUG has no knowledge of anything Lively did or said in the U.S. between 2002 and March 2009, including anything directed at Uganda (MF ¶132); (b) SMUG has no knowledge of anything Lively did in the U.S. directed to helping Simon Lokodo, the Ugandan police, or any other actors carry out any of the alleged persecutory acts (MF ¶¶ 133-141); and (c) SMUG has no knowledge of any action taken by Lively in the U.S. to persecute anyone in Uganda. (MF ¶ 148). As but one example of SMUG's total lack of knowledge on but one of at least a dozen questions on Lively's U.S. conduct – a topic specifically identified in Lively's 30(b)(6) deposition notice – SMUG's designee offered this case-ending testimony:

> Q: Do you have any 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?
>
> A: I do not know.

(Onziema 366:11-16). No objections. No confusion. No equivocation. SMUG knows nothing. As shown below, its lawyers cannot now argue that SMUG does, after all, know something.

**b. SMUG Is Stuck With The Record It Has Created, And Its Lawyers Cannot Manufacture SMUG's Contentions On Questions And Topics To Which SMUG Has Disclaimed Knowledge.**

SMUG's lawyers now pretend that SMUG's complete lack of knowledge of any connection between Lively and the alleged persecution provides them with carte blanche to manufacture SMUG's contentions based on their chopped reading of Lively's documents and writings. This is not how the law works:

> Of course, just like in the instance of an individual deponent, [SMUG] may plead lack of memory. However, if it wishes to assert a position based on testimony from [Lively], **or [his] documents**, [SMUG's] designee still must present an opinion as to why the corporation believes the facts should be so construed. **The attorney for the corporation is not at liberty to manufacture the corporation's contentions**. Rather, the corporation may designate a person to speak on its behalf and **it is this position which the attorney must advocate**.

*Taylor*, 166 F.R.D. at 361–62 (emphasis added). *See also*, *Corus Eng'g Steels Ltd. v. M/V ATLANTIC FORREST*, No. CIV.A. 01-2076, 2002 WL 31308335, *1–2 (E.D. La. Oct. 11, 2002) (quoting and agreeing with *Taylor* on same point).

> Moreover,
>
> [SMUG] claims a right to deny knowledge or position [at its 30(b)(6) deposition], but then at trial to rely on the documents and testimony of others [*i.e.*, Lively] or to at least present argument that the evidence presented by [Lively] does not reflect the state of facts as contended by [Lively].
>
> **This suggested procedure assumes that the attorneys can directly represent [SMUG]'s interest on their own as opposed to merely being a conduit of [SMUG]. This, of course, is not true. If a corporation has knowledge or a position as to a set of alleged facts or an area of inquiry, it is its officers, employees, agents or others who must present the position, give reasons for the position, and, more importantly, stand subject to cross-examination.** A party's trial attorney normally does not fit that bill.

*Taylor*, 166 F.R.D. at 362–63 (emphasis added) (internal citations omitted).

> Furthermore,
>
> [D]ocuments can always be interpreted in various ways. … [Lively was] entitled to discover the interpretation [SMUG] intends to assert at trial. …
>
> [SMUG]'s suggested interpretation would permit [SMUG] to profess ignorance of information [Lively] request[ed] during a 30(b)(6) deposition, but then allow [SMUG] to present evidence on the same subject at trial. [SMUG]'s interpretation, however, subverts the purpose of Rule 30(b)(6). Under Rule 30(b)(6), [SMUG] ha[d] an obligation to prepare its designee to be able to give binding answers on behalf of [SMUG]. **If the designee testifies that [SMUG] does not know the answer to [Lively's] questions, [SMUG] will not be allowed effectively to change its answer by introducing evidence during trial. The very purpose of discovery is to avoid trial by ambush**.

*Ierardi v. Lorillard, Inc.*, No. CIV. A. 90-7049, 1991 WL 158911, at *2-3 (E.D. Pa. Aug. 13, 1991) (internal quotes omitted) (emphasis added).

Also,

> [I]f [SMUG] chooses to designate witnesses who, because of failing memory or lack of knowledge say that "[SMUG] does not know the answer" to a given question, **that is itself an answer and [SMUG] will be bound by that answer**.

*Ierardi v. Lorillard, Inc.*, No. CIV. A. 90-7049, 1991 WL 66799, at *2 (E.D. Pa. Apr. 15, 1991) (emphasis added).

Finally,

> Regardless of whether [SMUG] failed to prepare its witnesses, or whether there was a genuine lack of knowledge, [SMUG] will not be able to take a position at trial on those issues where one of its Rule 30(b)(6) designees did not provide testimony. Finally, [SMUG] will be prohibited from calling other witnesses on these topics. In other words, **[SMUG] is stuck with the record it has created**.

*Aldridge v. Lake Cty. Sheriff's Office*, No. 11 C 3041, 2012 WL 3023340, *5 (N.D. Ill. July 24, 2012) (emphasis added).

Consistent with these fundamental principles, numerous courts have precluded creative attorneys from "manufacturing" or arguing their corporate clients' contentions and positions from other evidence when corporate designees claim lack of knowledge. *See, e.g., Taylor*, 166 F.R.D. at 361–63 ("if a party states it has no knowledge or position as to a set of alleged facts or area of inquiry at a Rule 30(b)(6) deposition, it cannot argue for a contrary position at trial"); *Ierardi*, 1991 WL 158911; *Aldridge*, 2012 WL 3023340; *QBE Ins.*, 277 F.R.D. at 690 ("When a corporation's designee legitimately lacks the ability to answer relevant questions on listed topics … the 'we-don't-know' response can be binding [and] the lack of knowledge answer is itself an answer which will bind the corporation at trial."); *id*. at 698 ("QBE will not be able to take a position at trial on those issues for which [its 30(b)(6) witness] did not provide testimony"); *Strategic Decisions, LLC v. Martin Luther King, Jr. Ctr. for Nonviolent Soc. Change, Inc.*, No. 1:13-CV-2510-WSD, 2015

WL 2091714, *7 (N.D. Ga. May 5, 2015) ("When the 30(b)(6) representative claims ignorance of a subject during the deposition, courts have precluded the corporation from later introducing evidence on that subject.") (collecting cases); *id*. at *8-9 (following multiple "I don't know" responses of 30(b)(6) deposition designee, "Defendant is precluded from introducing evidence at trial … that contradicts, alters, supplements, amends or explains" the previous lack of knowledge); *Remediation Products, Inc. v. Adventus Americas Inc.*, No. CIV. 307CV153RJCDCK, 2009 WL 4612290, *4 (W.D.N.C. Dec. 1, 2009) (plaintiff whose 30(b)(6) designee did not know answer to "What has [defendant] done that is unfair and deceptive?" could not introduce testimony to escape summary judgment "indicating [it] now has knowledge of the facts underlying [its] claim for unfair and deceptive trade practices"); *Chapman v. Ourisman Chevrolet Co.*, No. CIV.A. AW-08-2545, 2011 WL 2651867, *4–5 (D. Md. July 1, 2011) (party whose 30(b)(6) designee testified "I do not know" was "bound to the answers that [designee] gave during his deposition" and was barred from subsequently claiming that it did know the information at issue); *Super Future Equities, Inc. v. Wells Fargo Bank Minnesota, N.A.*, No. CIV A 306-CV-0271-B, 2007 WL 4410370, *8 (N.D. Tex. Dec. 14, 2007) (granting summary judgment after precluding party whose 30(b)(6) witness could not answer deposition questions on damages from presenting evidence on damages to oppose summary judgment); *Spicer v. Universal Forest Products, E. Div., Inc.*, No. 7:07CV462, 2008 WL 4455854, *8 (W.D. Va. Oct. 1, 2008) ("Universal's defense that Spicer was terminated for financial reasons related to the Pearisburg facility is stricken as the corporation's 30(b)(6) witness had no information on this topic."); *First Data Merch. Servs. Corp. v. SecurityMetrics, Inc.*, No. CIV.A RDB-12-2568, 2014 WL 6871581, *13–14 (D. Md. Dec. 3, 2014) (party whose 30(b)(6) witness testified "I don't know" on several questions regarding damages "will be bound by its Rule 30(b)(6) testimony" and could not seek to supplement it).

The reason for these outcomes is basic and simple. "The testimony provided by the corporate representative at a Rule 30(b)(6) deposition binds the corporation." *Trustees of Boston Univ. v. Everlight Elecs. Co.*, No. 12-CV-11935-PBS, 2014 WL 5786492, *3 (D. Mass. Sept. 24, 2014). This is because "a rule 30(b)(6) designee does not give his personal opinions, but presents **the corporation's position** on the topic." *Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416, 433 (5th Cir. 2006) (emphasis added).[7] Here, SMUG's designee stated SMUG's position that, even at the close of discovery, SMUG does not know the facts necessary to maintain its claims. **This** is SMUG's position, not the adorned rhetoric of its lawyers, "and it is **this** position which [SMUG's] attorney[s] must advocate." *Taylor*, 166 F.R.D. at 361–62 (emphasis added).

Underscoring the binding nature of the numerous "I don't know" responses given by SMUG's designee is the fact that Rule 32(a)(3) allows Lively to use those responses at trial "for any purpose," including to establish SMUG's position that it has no knowledge of wrongdoing by Lively or of damages allegedly caused thereby. *Id*. This is so "notwithstanding the availability of the Rule 30(b)(6) witness to testify live." *Estate of Thompson v. Kawasaki Heavy Indus., Ltd.*, 291 F.R.D. 297, 305–06 (N.D. Iowa 2013) (collecting numerous cases allowing use of 30(b)(6) transcript even when party is available to testify in person) (also citing 8A Wright et al., *Federal Practice and Procedure* § 2145 (2d ed. 2008) (courts "*may not refuse to allow the deposition to be used merely because the party is available to testify in person*") (italics in original). Thus, even if this case were to go to a jury, what the jury would hear is that SMUG "doesn't know" of any

[7] *See also, Taylor*, 166 F.R.D. at 361 ("The Rule 30(b)(6) designee … presents the corporation's 'position' on the topic.") (quoting *U.S. v. Massachusetts Indus. Finance Agency*, 162 F.R.D. 410, 412 (D. Mass. 1995)); *QBE Ins.*, 277 F.R.D. at 689 ("the designee must also testify about the corporation's position, beliefs and opinions."); *Aldridge*, 2012 WL 3023340, at *3 ("the purpose of a Rule 30(b)(6) witness is to present the organization's position on the listed topic and that person, then, provides binding answers on behalf of the organization").

connection between Lively and the alleged persecutory acts, or of any damages allegedly caused by Lively. There is nothing left for a jury to decide, given SMUG's lack of knowledge.

Critically, if SMUG's lawyers were unhappy with SMUG's across-the-board disclaimer of knowledge, the time to do something about it was during or immediately after SMUG's deposition. *See, e.g.*, *QBE Ins.*, 277 F.R.D. at 690 ("If it becomes apparent during the deposition that the designee is unable to adequately respond to relevant questions on listed subjects, then the responding corporation has a duty to timely designate additional, supplemental witnesses as substitute deponents."); *Spicer*, 2008 WL 4455854, at *4 (same). SMUG's duty to provide a substitute witness was not in any way dependent on a corrective request from Lively. *See Strategic Decisions*, 2015 WL 2091714, at *9 fn. 6 (N.D. Ga. May 5, 2015) (rejecting defendant's excuse that plaintiff never requested another, more knowledgeable witness, because "[i]t was Defendant's responsibility to substitute an appropriate deponent after Bernice failed to adequately prepare for the deposition, and failed to respond to the relevant areas of inquiry."). Because SMUG did not provide a different, more knowledgeable witness on its own, at a time when discovery was still ongoing, SMUG and its lawyers cannot now, more than a year after close of discovery, "review previous deposition testimony and documents previously produced in discovery after the deposition has concluded to then determine [SMUG's] corporate position." *Taylor*, 166 F.R.D. at 363. Indeed, after discovery is complete and dispositive motions are briefed, there is no longer the option of taking the deposition of a corporate deponent whose 30(b)(6) witness lacked knowledge on critical matters. *See Aldridge* 2012 WL 3023340, at *5 ("Because the discovery cutoff, set by the district court, expired on April 2, 2012, the more commonly invoked sanction requiring defendant to produce yet another 30(b)(6) deposition witness is not available.").

At bottom, "SMUG is stuck with the record it has created." *Id*. The post-discovery "I don't know" responses uniformly provided by its individual directors, officers and managing agents, and by its chosen 30(b)(6) designee, really do mean "I don't know" for purposes of this summary judgment motion. That is SMUG's position, and SMUG must stick to it.

### C. SMUG's Failure To Provide Meaningful Responses To Critical Interrogatories Also Revokes SMUG's Ability to Present New Theories and Positions.

To make matters worse, SMUG not only failed to disclose its newfound knowledge, positions and theories at depositions, but also in response to critical interrogatories propounded by Lively. For example, Lively Interrogatory 11 required SMUG to identify "each Communication that you contend Lively undertook in furtherance of any conspiracy or any Persecution," and to disclose the dates, participants, and substance of such communications, as well as Lively's location during such communications, and all of the evidence supporting SMUG's position and theories regarding such communications. (SMUG's Supp. Resp. to Lively Interrogatories, Gannam Decl. Ex. 3 at 29). SMUG's sole response was merely to refer Lively to some paragraphs in SMUG's Amended Complaint, which provide none of the required details. (*Id*.) SMUG never supplemented its response – not even 17 months after receiving all of Lively's communications with Uganda and Ugandans. As a result, Lively did not have SMUG's current position and interpretation of Lively's writings and communications at any point during discovery. SMUG shielded its theories until it filed its opposition to Lively's dispositive motion.

In response to several other critical interrogatories, SMUG did exactly the same thing – referred Lively to non-descript and non-specific paragraphs in SMUG's Amended Complaint, as SMUG's only response, even at the close of discovery. Interrogatory 16 required SMUG to identify the specifics of its alleged conspiracy, including start and end dates, all participating parties, and the "specific responsibilities, actions or omissions" of each party, including Lively, in

furtherance of the conspiracy. (Gannam Decl. Ex. 3 at 32-33). SMUG's sole response was to "refer[] Defendant to paragraphs 43-226 of the Amended Complaint." (*Id.*) In the same vein, Interrogatory 5 required SMUG to identify each specific act it claims Lively committed towards the alleged persecution, to also identify the date and location of each act, and to explain how each acts "contributed to, or assisted in" the persecution. (Gannam Decl. Ex. 3 at 24-25). SMUG again referred Lively paragraphs in its "Amended Complaint (Dkt. No. 27), which describe Defendant's conduct… ." (*Id.*)

Interrogatory 9 required SMUG to identify the exact terms of the injunction it seeks against Lively. (Gannam Decl. Ex. 3 at 27-28). SMUG merely referred Lively to its Amended Complaint, and claimed it could not provide a more specific response "before designated discovery is complete and the full extent of Defendant's role in the widespread and/or systematic persecution of Uganda's LGBTI community has been established." (*Id.*) Discovery has been closed for over a year, and SMUG has had Lively's documents for over two years, yet SMUG has never supplemented its response. The only specifics are those provided by SMUG's 30(b)(6) designee, who testified that SMUG's position is that this Court should enjoin Lively from, among other things, selling any of his books in Uganda, preaching at Ugandan churches, or lobbying or advocating against same-sex marriage in Uganda. (MF ¶¶ 170-176).

Lastly, in connection with SMUG's attempt to displace the presumption against extraterritoriality, Interrogatory 8 required SMUG to identify, among other things, "each specific act that took place in the United States," "the Date on which it occurred," "the Location where it occurred," and "the Person who committed the act." (Gannam Decl. Ex. 3 at 27). SMUG objected on the grounds that it could not give a "legal conclusion" and that the information sought was already known by Lively. (*Id.*)

The gross deficiency of SMUG's interrogatory responses in revealing SMUG's subjective beliefs, theories and interpretation of Lively's documents and writings, is self-evident. "[I]nterrogatory answers must be complete in and of themselves; other documents or pleadings may not be incorporated into an answer by reference." *Mahoney v. Kempton*, 142 F.R.D. 32, 33 (D. Mass. 1992). *See also, Ferrara v. Ballisteri & DiMaio, Inc.*, 105 F.R.D. 147, 150 (D. Mass. 1985) ("An answer to an interrogatory must be complete in itself and should not refer to pleadings, or to depositions, or other documents, or to other interrogatories…") (quoting 4A Moore's *Federal Practice,* ¶ 33.25, pp. 33-129-30 (2d ed., 1948)). SMUG's rote incorporation of its Amended Complaint, and its refusal to provide any additional detail on these critical aspects of its claims, is, therefore, utterly deficient, because "[i]t is not the office of an answer to an interrogatory to merely restate virtually in *haec verba* the allegations of the complaint." *United States v. W. Va. Pulp & Paper Co.*, 36 F.R.D. 250, 251 (S.D.N.Y. 1964) (holding that the broad and liberal function of the discovery rules "is certainly not performed by a mere restatement of the general terms of the allegations of the complaint"). *See also, King v. E.F. Hutton & Co., Inc.*, 117 F.R.D. 2, 6 (D.D.C. 1987) (holding that references to complaint in interrogatory responses were improper because complaint lacked the detail sought in the interrogatories, but "even if the information in the complaint was adequate in its detail it could not fulfill the role of answers to interrogatories").

Also deficient was SMUG's refusal to provide the required substance and detail about its claims, positions and theories on the ground that Lively already had that information. *See, e.g.*, *King*, 117 F.R.D. at 6 (plaintiffs had responsibility to give complete answers to each interrogatory because their positions and opinions on certain matters were "highly relevant to the central issues in the case"); *Walt Disney Co. v. DeFabiis*, 168 F.R.D. 281, 284 (C.D. Cal. 1996) (holding that it is not a sufficient response to claim that defendant already knew the information requested);

*Hitachi, Ltd. V. AmTRAN Tech. Co. Ltd.*, No. C 05-2301 CRB, 2006 WL 2038248 (N.D. Cal. 2006) ("a refusal to respond to interrogatories on the belief that the requesting party already possesses the documents is insufficient").

While Lively theoretically might have sought to compel SMUG to provide the substance and detail it was required to provide, Lively was entitled to believe that SMUG had no substance and detail, and was also entitled to rely upon the supplementation requirements in the discovery rules to obtain all of the responsive information available to SMUG. It never came – not even a year-and-a-half after SMUG obtained Lively's communications with Uganda. In any event, having made proper discovery requests, it is not Lively's duty to move to compel production of the information, theories and positions SMUG wishes to advance in this lawsuit, but it is SMUG's unavoidable duty to voluntarily provide them, or else they are to be excluded. "A party who breaches the duty . . . to supplement an interrogatory answer may not use any undisclosed material as evidence unless it proves that its failure to disclose was harmless or substantially justified." *AVX Corp. v. Cabot Corp.*, 252 F.R.D. 70, 78 (D. Mass. 2008). *See also,* Fed R. Civ. P. 37(c)(1); *Klonoski v. Mahlab*, 156 F.3d 255, 269 (1st Cir. 1998) ("[T]he new rule [37(c)(1)] clearly contemplates stricter adherence to discovery requirements, and harsher sanctions for breaches of this rule, and the required sanction in the ordinary case is mandatory preclusion.").

At the end of the day, fundamental discovery rules and basic fairness prohibit SMUG from withholding its facts, theories, positions and interpretation of Lively's documents throughout the entire process and period of discovery, only to provide them for the first time in opposition to Lively's dispositive motion. Reduced to only the information it was willing to provide in discovery – that is, the unverified allegations in its complaint, and the hundreds of "I don't know" deposition

responses – SMUG's claims are wholly unsupported and fail as a matter of law. Summary judgment is warranted.

## II. SMUG CANNOT DEMONSTRATE SUFFICIENT TORTIOUS DOMESTIC CONDUCT TO OVERCOME THE PRESUMPTION AGAINST EXTRATERRITORIALITY.

### A. Even After Discovery, SMUG Has No Knowledge of Any Relevant Domestic Conduct By Lively Sufficient To Overcome the Extraterritorial Presumption.

As shown above (section I.B.2.a., *supra*), Lively's Rule 30(b)(6) deposition notice to SMUG specifically requested testimony on "wrongful conduct by Lively … **in the United States** …." (Gannam Decl. Ex. 2) (emphasis added). As also discussed, SMUG's 30(b)(6) designee on domestic conduct testified unequivocally that, as of four months after the close of discovery and 17 months after receiving Lively's documents, SMUG as a corporate entity has absolutely no knowledge of anything done by Lively in the United States to persecute anyone in Uganda:

> Q: Do you have any 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?
>
> A: I do not know.

(Onziema 366:11-16). SMUG's designee on domestic conduct also admitted that SMUG has no knowledge of anything Lively did or said in the U.S. between 2002 and March 2009, including anything directed at Uganda (MF ¶132), and that SMUG has no knowledge of anything Lively did in the U.S. directed to helping Simon Lokodo, the Ugandan police, or any other actors carry out any of the alleged persecutory acts (MF ¶¶ 133-141). Moreover, SMUG did not disclose any of its knowledge or position on Lively's alleged U.S. conduct in its response to Lively's Interrogatory 8, which required SMUG to identify, among other things, "each specific act that took place in the United States," "the Date on which it occurred," "the Location where it occurred," and "the Person who committed the act." (Gannam Decl. Ex. 3 at 27).

Having shielded and withheld SMUG's position and knowledge on Lively's alleged domestic conduct throughout discovery, SMUG's lawyers now, for the first time, want to drastically change SMUG's sworn testimony. For example, SMUG now wants to claim that Lively was involved in "the drafting of the AHB" and provided input and "strategic advice" "from the United States." (Opp. at 87). This, however, is directly contradicted by SMUG's sworn deposition testimony, where it unequivocally testified that it had no corporate knowledge whatsoever to back up any of these allegations:

Q: Do you have any knowledge of any action taken by Scott Lively **in the United States** in connection with the drafting of the 2009 AHB?

A: I do not know.

(Onziema 366:6-10) (emphasis added).

Q: Do you have any knowledge of any action taken by Scott Lively **in the United States** directed towards aiding the Parliament in passage of the AHA in 2013?

A: I do not know.

Q: Do you have any knowledge of any assistance at all provided by Scott Lively to the Ugandan Parliament in 2013 to pass the AHA?

A: I do not know.

Q: Any knowledge of any communication between Scott Lively and the president of Uganda in connection with his signing of the law in February 2014?

A: I do not know.

Q: Do you have any knowledge of any action taken by Scott Lively **in the United States** directed towards helping the president sign the AHA into law in 2014?

A: I do not know.

Q: Do you have any knowledge of any assistance at all provided by Scott Lively to the Ugandan president in 2014 in connection with signing the AHA into law?

A: I do not know.

Q: **Do you have any knowledge of any action ever taken by Scott Lively <u>in the United States</u> directed towards getting the AHA enacted in Uganda**?

A: Please repeat the question.

MR. GANNAM: Can you read that back?

(Record read.)

A: I do not know.

(Onziema 342:7-343:16) (emphasis added).

Critically, SMUG spent two deposition days with Lively, one year after SMUG received Lively's document production. Yet SMUG did not ask Lively a single question about where he was when he wrote any email or engaged in any communication. Similarly, SMUG propounded dozens of written discovery requests to Lively, but not a single one of them sought to determine whether Lively engaged in any particular conduct in the United States. Thus, four months after Lively's deposition (and after the close of fact discovery), when SMUG's chosen designee on domestic conduct stated SMUG's post-discovery position that SMUG has no knowledge whatsoever of any relevant conduct by Lively in the United States, that disclaimer of knowledge was not merely the result of lack of preparation, or failure to read deposition transcripts, or failure to review discovery documents, all of which the designee had an obligation to do. (*See* section I.B.2.a, *supra*). Instead, it was the result of SMUG's abject failure to adduce in discovery any evidence that Lively engaged in any relevant conduct in the United States.

For all of the reasons and authorities discussed in section I.B, *supra*,, **this** is SMUG's post-discovery position, and it is **this** position from which its counsel must now argue that the extraterritorial presumption has been displaced. SMUG is stuck with the record it has created, and, on such record, no court has ever found a sufficient connection between foreign injury and domestic conduct to overcome *Kiobel*'s extraterritorial bar.

Stripped from the adorned rhetoric of counsel, and reduced only to the facts, positions and interpretations SMUG was willing to provide in discovery on the issue of domestic conduct, the

only connection between Lively and the United States properly adduced by SMUG is Lively's U.S. citizenship and Massachusetts residency. But, "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[,] … and it would reach too far to say that mere corporate [or, by extension, individual] presence suffices." *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013) (citing *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010)). Indeed, no case – including no case cited by SMUG – has ever concluded that the U.S. citizenship or residency of the defendant alone is sufficient to displace *Kiobel*'s presumption against extraterritoriality. *See, e.g.*, *Mastafa v. Chevron Corp.*, 770 F.3d 170, 188 (2d Cir. 2014) ("neither the U.S. citizenship of defendants, nor their presence in the United States, is of relevance for jurisdictional purposes"); *Doe v. Drummond Co.*, 782 F.3d 576, 596 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 1168 (2016) ("although the U.S. citizenship of Defendants is relevant to our inquiry, this factor is insufficient to permit jurisdiction on its own") (affirming summary judgment for lack of ATS jurisdiction).

Because SMUG cannot meet its burden of establishing this Court's jurisdiction under the Alien Tort Statute with mere "I don't know" disclaimers, its ATS claims fail as matter of law.

### B. SMUG's Undisclosed Theories, Interpretations and Positions Are Not Sufficient to Displace The Extraterritorial Presumption.

Even if the Court would allow SMUG to flout its clear discovery obligations and to depart radically from its discovery "I don't know" position, SMUG's current theory and "evidence" on domestic conduct fares no better, and is insufficient as a matter of law to establish ATS jurisdiction.

#### 1. SMUG Did Not Solicit Or Obtain In Discovery Any Facts To Establish The Location Of Lively's Speech Or Conduct, And, Therefore, Its Claims Regarding Domestic Conduct Are Based Only On Inadmissible Speculation.

As discussed in the preceding section, SMUG made absolutely no effort in discovery to establish that Lively did anything – sent any emails, communicated with anybody, entered into

any agreement, coordinated any conduct – **from the United States**. (*See* section II.A, *supra*). SMUG asked no deposition questions, and propounded no written discovery – no interrogatories, requests for production or requests for admission – seeking to establish Lively's location during any of the communications or events on which it now seeks to rely. (*Id*.) Thus, when SMUG repeatedly asserts throughout its brief that Lively did something "from the United States," or "in the United States" (*e.g.,* Opp. at 86-87), SMUG has absolutely no evidence to substantiate those assertions. (*Id*.) On the contrary, SMUG notes Lively's extensive travels outside of the United States, "in more than 30 countries" (PSOF ¶ 5), including "a nearly **year-long** speaking tour in Central and Eastern Europe." (PSOF ¶ 16) (emphasis added). Indeed, as discussed in section II.B.2, *infra*, the only two letters put forth by SMUG to exemplify Lively's solicitation of funds "in the United States" were indisputably written "from Uganda" and "from Klaipeda," Lithuania. (*Id*.)

Devoid of any evidence, SMUG is thus relying only on its rank speculation that Lively must have done the alleged things "from" or "in" the United States, because Lively is a United States citizen and resident. (*Id*.) But, SMUG bears the burden of proof to establish this Court's jurisdiction under the ATS. *See O'Toole v. Arlington Trust Co.*, 681 F.2d 94, 98 (1st Cir. 1982) ("the burden of proof is on the plaintiff to support allegations of jurisdiction with competent proof when the allegations are challenged by the defendant"); *Tiangang Sun v. China Petroleum & Chem. Corp. Ltd.*, No. CV 13-05355 BRO (EX), 2014 WL 11279466, *6 (C.D. Cal. Apr. 15, 2014) ("plaintiff bears the burden of proving subject-matter jurisdiction" under ATS). Accordingly, SMUG must adduce admissible **evidence** to meet that burden, and cannot rely on inadmissible speculation about where Lively might or must have been at any particular point in time. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) ("the plain language of Rule 56(c) mandates the 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 that party's case, and on which that party will bear the burden of proof at trial.") Critically, Lively does not bear the burden of negating elements of SMUG's claims as to which SMUG has the burden of proof. *Id*. at 331. Instead, as the nonmoving party bearing the burden of proof at trial, SMUG could only defeat Lively's motion asserting no evidence of domestic conduct "by calling the Court's attention to supporting **evidence** already in the record." *Id.* at 332 (emphasis added). SMUG has not pointed to any such evidence demonstrating that Lively did something unlawful (or anything, for that matter) in the United States.

Other ATS plaintiffs who have tried the same speculative approach to establishing the requisite domestic conduct of U.S. citizens or residents have properly failed. In *Mujica v. AirScan Inc.*, 771 F.3d 580, 592 (9th Cir. 2014), *cert. denied sub nom. Mujica v. Occidental Petroleum Corp.*, 136 S. Ct. 690 (2015), a case relied upon by SMUG (Opp. at 88), plaintiffs argued, as SMUG does here, that defendants' alleged "material and logistical support" to perpetrators of human rights abuses in Columbia must have been provided, at least in part, from the United States, since defendants were U.S. corporations, headquartered in the United States. *Id*. at 592. The Ninth Circuit, however, rejected this argument and required dismissal of the ATS claims because "[s]uch speculation is not an adequate basis on which to allow Plaintiffs' claims to go forward." *Id*. If such speculation is not sufficient even at the pleading stage, where well-pleaded factual allegations are deemed true, *id*., they certainly cannot be sufficient here, on summary judgment, where SMUG bears the burden of presenting record evidence to substantiate its jurisdictional claims.

Similarly, in *Mastafa*, plaintiffs attempted to overcome the *Kiobel* presumption by arguing, as SMUG does here, that "many decisions related to the alleged violations … were necessarily made … in the United States," since defendant company was headquartered in the United States.

*Mastafa*, 770 F.3d at 189. The Second Circuit rejected this argument and affirmed the jurisdictional dismissal of ATS claims, because "Plaintiffs' assertion that, because Chevron was headquartered in the United States, much of the decisionmaking to participate in the [illegal] scheme was necessarily made in the United States, is just such a conclusory assumption." *Id*. at 190. The same outcome should obtain here.

**2. The Eight Pages Identified By SMUG Do Not Establish That Lively "Manage[d] Actual Crimes" From "Homophobia Central in Springfield Massachusetts."**

The "evidence" that SMUG does attempt to adduce does not even begin to satisfy its burden of meeting *Kiobel*'s high jurisdictional threshold by showing "relevant conduct" in the United States. In denying Lively's motion to dismiss, the Court accepted SMUG's promises that it would adduce in discovery evidence of Lively's "management of actual crimes" from "Homophobia Central in Springfield, Massachusetts." (MTD Order, dkt. 59, pp. 5, 62). In the Material Facts recitation of his dispositive motion, Lively set out his evidence that he engaged in no conduct in the United States (or elsewhere), in connection with any campaign, agreement, conspiracy, enterprise, or other effort to effect, incite or facilitate any persecution in Uganda, including the specific persecution alleged by SMUG. (MF ¶¶ 130-131). Pursuant to Local Rule 56.1, SMUG was required to specifically identify all record evidence on which it relies to dispute Lively's assertion, knowing that all material facts set out by Lively which SMUG does not contradict with reference to specific evidence "will be deemed for purposes of the motion to be admitted." L.R. 56.1.

SMUG indeed set out all of its rebuttal evidence at D-MFR 130-131, dkt. 270, p. 34. There, SMUG identified precisely eight, and **only eight**, pages out of the roughly 40,000 pages of documents generated in discovery. Even a cursory review of these documents reveals that SMUG

has not come even close (or within the same universe) of delivering on its promise to uncover and demonstrate Lively's "management of actual crimes" from "Homophobia Central":

- SMUG identifies **only two pages** (LIVELY 3275 and LIVELY 3537) for its grand assertion that "Lively engaged in communications with his co-conspirators and others between 2002 – 2014 to design and carry out their plan for persecuting Uganda's LGBTI community while in the United States." (Dtk. 270, p. 34). Before even examining the two pages, the immediate question that arises is, what kind of elaborate "plan" of persecution can be managed over the course of twelve years with just two pages (that is **pages**, not documents)? Be that as it may, examining the two pages reveals just how preposterous SMUG's claim really is:

    - LIVELY 3275 (filed at dkt. 293-55, p. 2) is a short email written by Stephen Langa to Scott Lively on March 11, 2009, thanking him for visiting Uganda. Lively's response consists of exactly 15 words:

        > "I am home and feeling pleased about all that transpired in Uganda.
        >
        > Many Blessings,
        >
        > Scott"

If this is what SMUG means by "communications … to design and carry out their plan for persecuting Uganda's LGBTI community while in the United States," then clearly words mean nothing to SMUG. How can the Court trust anything else that SMUG says?

- The second page, LIVELY 3537 (filed at dkt. 257-1, p. 83), is no more revealing of actual crime management than the first. This is an October 28, 2009 email from Lively to Stephen Langa and Martin Ssempa, consisting of only three sentences:

    > "Brothers,

> Can you send me a copy of the bill? The news is hitting here in the US and from the reports it sounds excessively harsh and is likely to create a lot of problems for Uganda internationally. Is there a treatment/recovery component to the bill?
>
> In Jesus,
>
> Scott"

Once again, what kind of crime manager is Scott Lively, if he is hearing about the "crimes" he is supposedly managing from the "news" like everyone else? And he certainly is not doing a great job encouraging the "criminals" he is "managing," because all that he does is criticize the proposal as "excessively harsh" and tells them that it will cause Uganda a lot of problems.

The notion that these two pages somehow show a grand "design" to carry out a "plan of persecution," and Lively's management of that plan over the course of one decade plus two years, is not only without merit, but outright frivolous.

- The next **four pages** (LIVELY 1663, LIVELY 1664, LIVELY 2708, and Lively Resp. to Interrogatory 18) are identified by SMUG to support its claim that "Lively also solicited funds from supporters in the United States to help support his travel to and efforts in Uganda." (Dkt. 270, p. 34). SMUG's reliance on these documents is even more outrageous than the first two.
    - LIVELY 1663 and LIVELY 1664 (filed at dkt. 293-41, pp. 2-3) are two pages of the same document. The first page (LIVELY 1664) does not contain any solicitation of funds, but does contain these words, left out by SMUG because they are devastating to its domestic conduct argument:

      > Report **from Uganda** [title]
      >
      > I'm writing **from Kampala, Uganda** …

    - The second page (LIVELY 1664) requests funds from Lively's readers for the specific purpose of sending 100 copies of Lively's book, "Seven Steps"

to Uganda. The appeal notes specifically that "I didn't raise any money towards this in my last appeal," so Lively was unable to send the books.

- The only other fund solicitation document identified by SMUG is LIVELY 2708 (filed at dkt. 293-88, p.3). It contains a one-sentence request for donations in the "PS" line at the end, and there is no indication whatsoever that the funds are being requested to fund any trip or effort in Uganda. More importantly, as the previous page in the same document reflects (LIVELY 2707, filed at dkt. 293-88, p. 2), this letter was also written from outside the United States (another fatal fact SMUG fails to mention):

> Report **from Klaipeda** [title]
>
> … Anne and I are on a bus today **from Klaipeda, Lithuania to Riga, Latvia**.

So, to prove that Lively "solicited funds" "in the United States" to fund "his travel to and efforts in Uganda," (dkt. 270, p. 34), SMUG cites two letters, both of which were indisputably written from **outside** of the United States, and only one of which specifically requests funds for Uganda (to send 100 copies of a book). Two letters in twelve years. How many people received the requests? Where were those people located? Did they actually donate any funds? If so, how much? What were those funds used for? SMUG does not have answers to any of these questions.

Moreover, is requesting money for the purpose of sending copies of a book to Uganda a "crime against humanity"? Is it even tortious or unlawful? Is this one of the activities SMUG wants the Court to enjoin in this action? How can SMUG point to this as evidence of Lively's management of actual crimes, even as SMUG vehemently protests that it is not suing Lively for his speeches and writings?

- The seventh page in SMUG's eight-page compendium of proof on domestic conduct is LIVELY 3248 (filed at dkt. 293-59, p. 2). SMUG advances this document as proof that Lively "strategized with allies in the United States in countering some of the media reporting surrounding his participation in the seminar in Uganda." (Dkt. 270, p. 34). In reality, the document consists of an email sent by a third party to several recipients, including Lively, forwarding the reporting of a blogger on the 2009 Ugandan conference, which the writer believed was inaccurate. (*Id*.) There is no indication, or proof, where the email was written, and where the writer and recipients were located during this exchange. SMUG never asked Lively or anyone else. More importantly, a third party's disagreeing with a media or blogger's report of an event, deeming that report "outrageous" for lying about Lively's positions and speeches, and indicating that "I'm going to call" the college where the blog report originated to complain, are neither tortious, nor unlawful, and certainly do not aid or abet "crimes against humanity." This is how free speech and free press work. This document in no way shows Lively's "management of actual crimes," and certainly not his doing so from Homophobia Central.

- The last page of proof on domestic conduct submitted by SMUG is LIVELY 3277 (filed at dkt 293-36, p. 2). SMUG claims that this document shows that "Lively strategized with allies in the United States to expand the reach of his persecutory efforts." (Dkt. 270, p. 34). In reality, the document reflects an email discussion between Lively and a third party, with no indication whatsoever where either one was located during the exchange. (Once again, SMUG never asked.) More importantly, Lively writes only two things in the email, both of which relate the suggestions and ideas of others, not his own:

A) Lively relayed that "[t]he key leaders [in Uganda] want to coordinate something with WCF [World Congress of Families] to unify African nations and align them with

counterparts throughout the world." (*Id.*) SMUG has adduced no evidence that WCF ever became involved in Uganda or Africa, nor that any joint efforts between Lively and WCF actually took place, ever. In other words, SMUG has provided no evidence that Lively ever did anything (in the United States or elsewhere) to assist the "key leaders" in "coordinat[ing] something with WCF," much less that the "something" ever took place, or that the "something" was illegal. This is also a far cry from "management of actual crimes."

B) Lively also relayed that "they [*i.e.*, the Ugandan leaders] have also suggested that we hold a global contest to design a non-religious pro-family symbol/flag we could all use." (*Id.*) SMUG has adduced no evidence that such contest ever took place, or that the symbol/flag was ever designed, much less that Lively coordinated such efforts or did so from the United States. And even if he had coordinated such efforts (which he did not), is designing a flag now "evidence" of tortious or illegal conduct? Is it proof of Lively's "management of actual crimes" from Springfield, Massachusetts? Even the suggestion of this is too ridiculous to maintain.

At bottom, having examined each of the eight pages identified by SMUG as its only proof to rebut Lively's sworn assertion that he engaged in no relevant domestic conduct to persecute anyone, it becomes clear why SMUG's chosen 30(b)(6) designee readily admitted that SMUG has absolutely no knowledge of such domestic conduct. SMUG indeed has no such knowledge. The transparent efforts of counsel to cobble together portions of eight out of 40,000 pages into proof

that Lively managed actual crimes from the United States is both meritless and frivolous. SMUG's jurisdictional theory, just like its conspiracy theory, crumbles under the slightest scrutiny.[8]

### 3. The Authorities Cited By SMUG Do Not Establish This Court's ATS Jurisdiction, But Conclusively Defeat It.

Finally, the cases relied upon by SMUG do not help to revive its case because in none of them did the plaintiffs, seeking to establish subject matter jurisdiction under the Alien Tort Statute for foreign injuries, disclaim any knowledge of any domestic wrongdoing by the defendants. On the contrary, SMUG's cited authorities involved substantially more evidence of actual domestic conduct than here, which was properly brought before the respective courts (presumably after

[8] In its Opposition brief, SMUG references in passing a handful of other items regarding allegedly domestic conduct, which are not included in SMUG's response to Lively's statement of Material Facts, and are therefore waived. L.R. 56.1. In any event, these additional items, even if considered by the Court, are also of no help whatsoever to SMUG's claim that Lively managed actual crimes from Springfield, Massachusetts.

For example, SMUG claims that Lively wrote and published books and other writings in the United States, setting forth "his persecutory strategies." (Opp. 86). Not only does SMUG not provide any evidence of where Lively was when he wrote the "persecutory strategies" (SMUG never asked), but SMUG vehemently protests, repeatedly, that it is **not** suing Lively for anything that he wrote or published. (*E.g.*, Amd. Compl., dkt. 27, ¶ 11) (claiming that "[t]his case … is not, therefore, premised on [Lively's] anti-gay speech or writings.")

SMUG also claims that "some of Defendant's meetings with his Ugandan associates also took place in the United States." (Opp. at 87) (citing PSOF ¶ 197). By "some," SMUG means exactly **one**, because the cited record refers only to one meeting in 2014, and says **only** that "Langa visited the United States and met with Lively and his church at length." (PSOF ¶ 197, dkt. 270, p. 111). What did Lively and Langa discuss? SMUG doesn't say. Is meeting with "Lively and his church at length" tortious, or, worse, a "crime against humanity"? SMUG appears to think so.

Lastly, SMUG claims that Lively provided suggestions for the drafting of the AHB "from the United States." (Opp. at 87). SMUG adduces no evidence whatsoever of Lively's location during the cited communications – because SMUG never asked Lively or anyone else about that. (*Id.*) More importantly, as discussed in section III.B.3, *infra*, Lively's constant urging of Ugandans to moderate the provisions of their proposed law does not go outside the bounds of protected speech. And, further, as discussed in section IV.E, *infra*, Lively's limited input on a draft bill provided to him by others was ignored by Ugandan lawmakers and did not cause any of the persecution alleged by SMUG.

sufficient disclosure in discovery), and yet that evidence was still found insufficient for ATS jurisdiction in all but one case. For example, SMUG tries to turn a pair of Second Circuit cases – *Mastafa* and *Balintulo v. Ford Motor Co.*, 796 F.3d 160 (2d Cir. 2015) – on their head, by claiming that they would support jurisdiction here. (Opp. at 89-90). In fact, both cases considered domestic conduct far in excess of SMUG's "I don't know" and speculative "evidence," and concluded that, although substantial and although it "appear[ed]" to "touch and concern the United States," the conduct was clearly **not** sufficient to confer ATS jurisdiction under *Kiobel* because it was not in violation of the law of nations. *See Mastafa*, 770 F.3d at 191-94 ("multiple domestic purchases and financing transactions" not sufficient to displace extraterritorial presumption because the conduct did not intentionally aid and abet violations of the law of nations); *Balintulo*, 796 F.3d at 169 (developing hardware and software in the United States used to implement apartheid in South Africa was not sufficient to confer ATS jurisdiction) ("because plaintiffs fail plausibly to plead that any U.S.-based conduct on the part of either Ford or IBM aided and abetted South Africa's asserted violations of the law of nations, their claims cannot form the basis of our jurisdiction under the ATS"). These holdings are fully consistent with the Supreme Court's teaching in *Kiobel* that the focus should be on the "relevant conduct," and 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." *Kiobel*, 133 S. Ct. at 1669 (emphasis added).

SMUG attempts to put the Second Circuit out on a limb and suggests that it has adopted the "minority view" by requiring that domestic conduct be tortious in order to displace the extraterritorial presumption. (Opp. at 89). In fact, the Eleventh Circuit has also adopted the same view, in *Doe*, 782 F.3d at 592, another case curiously cited by SMUG in support of its position. (Opp. at 88). There, the Eleventh Circuit specifically cited the Second Circuit's holding in *Mastafa*,

and held that "our jurisdictional inquiry requires us to consider the domestic or extraterritorial location where the defendant is alleged to engage in **conduct that directly or secondarily results in violations of international law** within the meaning of the ATS." *Doe*, 782 F.3d at 592 (citing *Mastafa,* 770 F.3d at 185, 195). SMUG's contention that *Doe* helps its case is truly odd given the Eleventh Circuit's holding that not even the domestic decision to engage and directly fund the direct perpetrators of atrocities in Columbia (*i.e.*, the AUC paramilitaries) was sufficient to confer ATS jurisdiction. *Doe*, 782 F.3d at 598. Under *Doe*'s interpretation of *Kiobel*, Lively theoretically could have engaged Ugandan security forces from the United States, **and paid them**, and ATS jurisdiction would still be lacking for any human rights violations committed by those forces in Uganda. *See id*. This Court, of course, need not go nearly that far, because Lively did no such thing and SMUG cannot come even close to adducing **that kind** of evidence.

What is, in fact, the "minority position" is the Fourth Circuit's holding in *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516 (4th Cir. 2014), the only case cited by SMUG where ATS jurisdiction survived, on very different facts. The plaintiffs in *Al Shimari* did not disclaim all knowledge of any domestic conduct by the defendant, as SMUG has done here, nor did they try to predicate jurisdiction on eight pages of documents, some clearly written from overseas, and the rest containing only protected First Amendment speech. *Id*. Instead, in *Al Shimari*, credible evidence from the U.S. Defense Department's investigation (presumably properly disclosed in discovery) indicated that the employees of a U.S. corporation **personally "directed or participated in some of the abuses"** of Iraqi prisoners in Iraq. 758 F.3d at 521 (emphasis added). The American employees in Iraq personally "repeatedly beat[], shot in the leg, repeatedly shot in the head with a taser gun, subjected to mock execution, … kept in a cage, beat[] on the genitals with a stick, forcibly subjected to sexual acts, and forced [the prisoners] to watch the rape of a

female detainee." *Id*. (internal quotes omitted). The company involved had a $19 million security contract with the U.S. government, executed in the United States. *Id*. at 522. The American wrongdoers in Iraq were in "daily contact" with company leaders in the United States, and company leaders were made aware of these criminal acts. *Id*. On these, vastly different facts, the Fourth Circuit concluded that the ATS provides jurisdiction over "acts of torture committed by United States citizens who were employed by an American corporation." *Id*. at 528, 530-31.

Perhaps if, instead of its constant "I don't know" responses, SMUG had identified any evidence of Lively's participation in any of the persecutory acts (such as in the alleged arrests, or beatings, or tabloid outings), or, at the very least, evidence of Lively's actual management of such alleged acts from the United States, SMUG's reliance on *Al Shimari* would be more apposite. Of course, SMUG was not able to adduce such evidence after two years of intense discovery, and would not be able to adduce it after one hundred more years of discovery. The eight pages of documents on which SMUG now attempts to rely do not belong even in the same universe as the acts alleged in *Al Shimari*.

Also unavailing for SMUG is its reference to three courts that have cited this Court's *Kiobel* analysis in the denial of Lively's motion to dismiss. (Opp. at 88-89). Those courts noted this Court's reliance on SMUG's promise that it will adduce evidence in discovery that "'the **tortious acts** committed by [Lively] took place to a substantial degree within the United States,' including '**planning and managing a campaign of repression** in Uganda from the United States.'" *Mastafa*, 770 F.3d at 188 n.14 (emphasis added) (quoting *Sexual Minorities Uganda v. Lively*, 960 F.Supp.2d 304, 321-22 (D. Mass. 2013)); *see also, Mujica v. AirScan Inc.*, 771 F.3d 580, 595 (9th Cir. 2014), *cert. denied sub nom. Mujica v. Occidental Petroleum Corp.*, 136 S. Ct. 690 (2015) (noting this Court's conclusion that SMUG's claims "were not barred where alleged **torts** occurred

**to a substantial degree** within the United States… .") (emphasis added). SMUG, of course, delivered on its promise only with "I don't know," and was not able to identify in discovery (at depositions or in interrogatory responses) a single one of those "tortious acts" or "alleged torts" supposedly occurring in the United States. No court has held or would hold that such complete lack of corporate knowledge of domestic conduct by the one and only plaintiff in suit would suffice to meet *Kiobel*'s demanding standard.

Ultimately, for all of its lip service to the supposed "law of the case" throughout its Opposition, SMUG is now trying to convince the Court to abandon its holding that only tortious domestic conduct providing "substantial practical assistance … to the commission of the crime against humanity" is relevant to the ATS jurisdictional inquiry. (MTD Order, dkt. 59 at 44). Such a departure would not be consistent with the teaching of the Supreme Court in *Kiobel*, nor with the interpretation of that ruling by other courts. As SMUG has no evidence that Lively did anything in or from the United States, much less that he managed a crime syndicate bent on persecuting homosexuals, SMUG's jurisdictional arguments fail, and summary judgment is warranted.

## III. SMUG HAS ADDUCED NO EVIDENCE THAT LIVELY PERSONALLY AGREED TO EMPLOY THE ILLEGAL MEANS CONTEMPLATED BY ANY CONSPIRACY, AND, THEREFORE, BINDING PRECEDENT REQUIRES SUMMARY JUDGMENT ON FIRST AMENDMENT GROUNDS.

### A. The First Amendment Imposes A High Bar For SMUG's Claims Under The Binding First Circuit Precedent Of *United States V. Spock*.

As shown in Lively's MSJ Brief, all of SMUG's claims are subject to the U.S. Constitution, and must overcome the First Amendment.[9] (MSJ. Br. at 84-87.) SMUG's Opposition, however, attempts to avoid the transcendent First Amendment problems with its claims by sheer volume of

[9] SMUG's ATS claims also must specifically satisfy the requirements of the Constitution's Offenses Clause, Article 1, Section 8, clause 10. (MSJ Br. at 80-83.)

hype and over-rehearsed legal principles, while smugly suggesting Lively devoted too many pages to his own arguments. (Opp. at 122.) SMUG's dismissive approach to the First Amendment is surprising, given that both this Court and the First Circuit have recognized the obvious and paramount First Amendment implications of SMUG's claims. (MTD Order, dkt. 59 at 57; dkt. 129.) More surprisingly, SMUG relegates to a mere footnote its entire discussion of the binding First Circuit precedent in *United States v. Spock*, 416 F.2d 165 (1st Cir. 1969), requiring the application of *strictissimi juris*[10] to conspiracy and aiding and abetting-type claims which are "in the shadow of the First Amendment." 416 F.2d at 172-73. But SMUG has nowhere to hide from *Spock*. And now that SMUG's Opposition reveals, for the first time, how SMUG proposes to prove its conspiracy theory, *Spock* is all the more applicable, and requires summary judgment on all of SMUG's claims.

In *Spock*, the First Circuit reversed the conviction of celebrity pediatrician and anti-Vietnam War activist Dr. Benjamin Spock, who had been convicted by a jury of conspiracy to counsel, aid and abet others to commit the crime of draft evasion under the Selective Service Act. 416 F.2d at 168. The First Circuit held that the case against Dr. Spock never should have gone to the jury, and that Dr. Spock was entitled to acquittal as a matter of law. *Id.* at 178-79. The court reached its decision applying the principle of *strictissimi juris*, a heightened, specific intent standard to be applied in conspiracy cases involving both legal and illegal purposes, which are "in the shadow of the First Amendment." *Id.* at 172-73, 178-79. The numerous analogues between *Spock* and the instant case merit the extended discussion below, which shows that the same principle precludes a jury question on any of SMUG's claims against Lively.

[10] "[Latin] Of the strictest right or law; to be interpreted in the strictest manner." BLACK'S LAW DICTIONARY (10th ed. 2014).

### 1. The *Spock* "Conspiracy" Involved Speech In The Shadow Of The First Amendment.

Dr. Spock and defendant "co-conspirators" drafted and widely circulated "'A Call to Resist Illegitimate Authority' (hereinafter the Call)," a manifesto that urged resistance to and defeat of the draft, in no uncertain terms. *Id.* at 168, 173-74. The Call drafters declared the American war in Vietnam to be outrageous, unconstitutional, and illegal; and equated United States troops to criminal soldiers engaged in "crimes against humanity" against the Geneva Accords, such as—

> the burning and bulldozing of entire villages consisting exclusively of civilian structures; the interning of civilian non-combatants in concentration camps; the summary executions of civilians in captured villages who could not produce satisfactory evidence of their loyalties or did not wish to be removed to concentration camps; the slaughter of peasants who dared to stand up in their fields and shake their fists at American helicopters;

"for which individuals were to be held personally responsible even when acting under the orders of their governments and for which Germans were sentenced at Nuremberg to long prison terms and death." *Id.* at 192. On these grounds the Call charged "every free man" with the "moral duty" to "choose the course of resistance dictated by his conscience and circumstances," such as refusing to obey orders, absenting himself without official leave, refusing to be inducted into the armed services, "resisting openly and paying a heavy penalty," and "organizing more resistance." *Id.* at 192-93.

The Call authors praised all such resistance as "courageous and justified," and promised to "continue to lend our support to those who undertake resistance to this war" and "raise funds to organize draft resistance unions, to supply legal defense and bail, to support families and otherwise aid resistance to the war in whatever ways may seem appropriate." *Id.* at 193. The Call drafters acknowledged that "we might all be liable to prosecution and severe punishment," but nonetheless concluded, "Now is the time to resist." *Id.*

The cover letter accompanying the Call, signed specifically by Dr. Spock and others,[11] included more strident calls to action, describing the Call as "a first step toward the more vigorous response to the war which the time requires of us." *Id.* at 193. The letter continues,

> Those who have signed, including ourselves, have pledged themselves to extend material and moral support to young men who are directly resisting the war. Many of us are further committed to joining those young men in acts of civil disobedience.
>
> . . . .
>
> . . . . We ask you to join us by signing 'A Call to Resist Illegitimate Authority.' More than that, we ask you to commit yourself to the fullest possible extent to the tasks of resisting the war and bringing it to a halt.

*Id.*

Dr. Spock and the other defendants signed the Call, and were eventually joined by hundreds more. *Id.* at 168. Dr. Spock and some co-defendants spoke at a New York City press conference launching the Call, where one co-defendant announced a "nationwide collection of draft cards and a ceremonial surrender thereof to the Attorney General." *Id.* Then some of Dr. Spock's "co-conspirators" went out and actually collected others' draft cards (a criminal act[12]), and burned some. Days later, all defendants attended a demonstration in Washington, during which an attempt was made to present the collected draft cards to the Attorney General. *Id.* Dr. Spock himself, however, did not participate in the card collecting and burning activities or their planning, or in the planning of the Washington demonstration he attended, or in the attempted turnover of draft cards to the Attorney General. *Id.* at 168, 179. Nevertheless, he was indicted for conspiracy to

[11] Another prominent signer of the cover letter accompanying the Call was Noam Chomsky. *Id.* at 194. He was not named as a defendant or "co-conspirator" in the *Spock* opinion.

[12] "Willful nonpossession of a draft card is criminal." *Id.* at 178 n.30. Thus, assisting in the collection of others' draft cards "could well have been found to be aiding and abetting non-possession." *Id.* at 178.

"counsel, aid and abet" others' criminal conduct, and convicted along with the other "co-conspirators." *Id.* at 168. Dr. Spock and the other defendants challenged their convictions on constitutional and evidentiary grounds. *Id.* at 168-69.

### 2. The *Spock* Analysis Applies First Amendment Protections To Alleged Conspiracies Involving Speech.

Dealing first with the constitutional issue, the *Spock* court observed:

> Inseparable from the question of the sufficiency of the evidence to convict are the rights of the defendants, and others, under the First Amendment. We approach the constitutional problem on the assumption, which we will later support, that the ultimate objective of defendants' alleged agreement, viz., the expression of opposition to the war and the draft, was legal, but that the means or intermediate objectives encompassed both legal and illegal activity without any clear indication, initially, as to who intended what. **This intertwining of legal and illegal aspects, 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**.

*Id.* at 169 (emphasis added) (footnote omitted). The First Amendment also compelled the court to assume "that the defendants were not to be prevented from vigorous criticism of the government's program merely because **the natural consequences might . . . lead to unlawful action**." *Id.* at 170.[13]

Turning to whether there was sufficient evidence to take Dr. Spock to the jury, the First Circuit recited the general elements of an illegal conspiracy: "First, whether there was evidence of an agreement; second, whether the agreement contemplated or included illegal activity; third, whether the defendants individually adhered to that illegality." *Id.* at 174.

[13] "Throughout our decisions there has recurred a distinction between the statement of an idea which may prompt its hearers to take unlawful action, and advocacy that such action be taken. **Every idea is an incitement**." *Id.* at 170 n.11 (emphasis added) (citations and internal quotations marks omitted).

In determining first whether there was evidence of an agreement, the court looked to the Call, the cover letter, and the press conference launching the Call. *Id.* at 174-75. Although the Call was not "an integrated document, limited to the four corners of the instrument," the court held that "there are several instances of concerted activity from which the jury could infer an agreement." *Id.* at 175-76.

In determining second whether there was evidence of an illegal purpose, the court concluded a jury could find the types of resistance urged by the Call to include illegal means, observing, "the Call on its face indicated that some signers considered the illegal to be the appropriate." *Id.* at 176. The court also observed, however, that the Call also contained "many lawful criticisms of the war, lawful adjurations and expressions of sympathy and support for persons who acted illegally," and "contemplated conduct of an entirely lawful character." *Id.* at 176. "The Call had 'a double aspect: in part it was a denunciation of a governmental policy and, in part, it involved a public call to resist the duties imposed by the Act.'" *Id.*

The court having found sufficient evidence of an agreement, and evidence of both lawful and unlawful purposes, "[t]here remains the question whether it could have been found . . . **that the individual defendants personally agreed to employ the illegal means contemplated by the agreement** including counselling unlawful refusal to be drafted or other violations of the Selective Service Act." *Id.* 176–77. "Even if the Call included illegal objectives, there is a wide gap between signing a document such as the Call and demonstrating one's personal attachment to illegality." *Id.* at 173. Pointing to the requirement for specific intent, as opposed to mere knowledge, the court explained, "expressing one's views in broad areas is not foreclosed by knowledge of the consequences," and "**one may belong to a group, knowing of its illegal aspects, and still not be found to adhere thereto**." *Id.* at 179 (emphasis added).

Under these First Amendment and other foundational principles, "the defendants were entitled . . . to certain protections before they could be convicted of conspiracy in what we might call a bifarious undertaking, involving both legal and illegal conduct." *Id.* at 172. Effecting the distinction between persons liable and not liable in an association "having both legal and illegal aims," the court reasoned, "is the substantive purpose of **all conspiracy law, which is directed only at those who have intentionally agreed to further the illegal object.**" *Id.* at 172 (emphasis added). In this setting, "[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 for his adherence to lawful and constitutionally protected purposes . . . ." *Id.* at 172-73 (emphasis added) (quoting *Noto v. United States*, 367 U.S. 290, 299-300 (1961)) (internal quotations marks omitted).

In the context of "bifarious" group action implicating the First Amendment, and in accordance with the principle of *strictissimi juris*, the *Spock* court announced the evidentiary burden which must be met in order to prove the third, specific intent element of individual conspiracy liability:[14]

> When the alleged agreement is both bifarious and political within the shadow of the First Amendment, we hold that an individual's specific intent to adhere to the illegal portions may be shown in one of three ways: [1] by the individual defendant's prior or subsequent unambiguous statements; [2] by the individual defendant's

[14] The *Spock* opinion is organized such that the court's reasoning for invoking *strictissimi juris* and the resulting evidentiary burden for "bifarious" agreements "in the shadow of the First Amendment" appears in section I of the opinion, *id.* at 168-174, and the court's analysis of the evidentiary sufficiency on the three conspiracy elements (agreement, illegal purpose, and specific intent) for each defendant, and its application of *strictissimi juris* specifically to Dr. Spock, appears in section II, *id.* at 174-79. For the convenience of the Court and clarity of *Spock*'s analogues to Lively's case, the discussion of *Spock* herein presents the reasoning of the court's *strictissimi juris* invocation and resulting evidentiary burden from section I of its opinion together with the court's specific application of the *strictissimi juris* burden to the evidence of Dr. Spock's intent from section II of its opinion.

> subsequent commission of the very illegal act contemplated by the agreement; or [3] by the individual defendant's subsequent legal act if that act is clearly undertaken for the specific purpose of rendering effective the later illegal activity which is advocated.

*Id.* at 173 (internal quotation marks omitted). Whatever category of evidence offered to establish specific intent, the court clarified, "there must be **substantial evidence . . . and not a mere scintilla**." *Id.* at 179 (emphasis added).

The *Spock* court also clarified that the specific intent of one defendant under such a "bifarious" agreement cannot be proved by introducing the statements of alleged "co-conspirators," holding, "This was improper. The specific intent of one defendant in a case such as this is not ascertained by reference to the conduct or statements of another even though he has knowledge thereof. The metastatic rules of ordinary conspiracy are at direct variance with the principle of *strictissimi juris*." *Id.* at 173.[15]

Although Dr. Spock drafted and promoted the Call with others, signed the cover letter with others, and took part in a press conference and demonstration with others, all of which the court found evidenced an agreement with both legal and illegal purposes, *id.* at 174-76, the court nonetheless held Dr. Spock entitled to acquittal as a matter of law due to the lack of evidence of unambiguous statements of specific intent:

> 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**

[15] Statements of an alleged co-conspirator are admissible against a defendant under Fed. R. Evid. 801(d)(2)(E), although not to prove "the existence of the conspiracy or participation in it," for "extrinsic proof of the declarant's involvement in the conspiracy" beyond the statements themselves is a condition to admissibility. *See United States v. Sepulveda*, 15 F.3d 1161, 1182 (1st Cir. 1993). But the **admissibility** of a co-conspirator's statements is a separate question from the **ability** of such statements to prove intent under the *strictissimi juris* burden. *See, e.g., United States v. Stone*, No. 10-20123, 2011 WL 17613, at *5 (E.D. Mich. Jan. 4, 2011).

> **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).

The court similarly found that Dr. Spock's conduct associated with his speech did not sufficiently evidence specific intent for a jury question:

> Similarly, Spock's actions lacked the clear character necessary to imply specific intent under the First Amendment standard. He was not at the [draft card collection and burning] meeting; in fact he knew nothing of it until afterwards. Although he was at the Washington demonstration he had, unlike [alleged "co-conspirators"] Goodman and Coffin, no part in its planning. **He contributed nothing, even by his presence, to the turning in of cards.** Nor, finally, did his statements in the course of the Washington demonstration extend at all beyond the general anti-war, anti-draft remarks he had made before. **His attendance is as consistent with a desire to repeat this speech as it is to aid a violation of the act.**

*Id.* at 179 (emphasis added).

The rule announced in *Spock* balances the interests of free speech and association under the First Amendment with the interest of deterring and punishing crimes committed through concerted action. *Id.* at 170-71. The First Amendment is of such importance that where the alleged group activity is centered around speech, and involves any legal purposes and means, a member of the group must not stand trial for the criminal purposes and acts of other members without clear evidence of specific intent to **personally** engage in illegality. *Id.* at 172-73. To be sure, the First Amendment interests are so important that even "vigorous" speech is protected where "the natural consequences might . . . lead to unlawful action," *id.* at 170, and a defendant's knowledge of other group members' illegal purposes is not enough to remove the protection. *Id.* at 178-79. Thus, in the absence of substantial evidence of either unambiguous statements or clear conduct showing

the specific intent to **personally** participate in illegality, there can be no jury question on liability of the defendant for the illegal acts of other members of the group. *Id.* at 173, 179.[16]

### B. *Spock* Requires Summary Judgment Against SMUG's Persecution Claims.

#### 1. The *Strictissimi Juris* Burden of *Spock* Applies to SMUG's Claims.

For First Amendment purposes, the instant case is on all fours with *Spock*. Although Lively disputes that there is any record evidence of an unlawful agreement involving Lively, or that Lively was ever involved in an agreement with any illegal purposes, it is beyond dispute that the record shows numerous legal purposes and objectives for all the Ugandan group activity in which Lively was involved. (MF ¶¶ 10-20, 47-72 (showing numerous public speaking engagements, including with other speakers not considered "co-conspirators," involving expression of religious viewpoints on marriage, family, pornography, and homosexuality).) To be sure, SMUG concedes that Lively's expression of his religious beliefs and viewpoints regarding homosexuality are legally protected. (Opp. at 125). Thus, to the extent there could be any genuine issue of material fact as to an agreement or association with illegal purposes (which there is not), the record evidence forecloses dispute as to the concomitant legal purposes of such an association, making it, at worst, "bifarious"

[16] Other circuits have also acknowledged the high bar of the *strictissimi juris* rule announced in *Spock*. *See, e.g., United States v. Montour*, 944 F.2d 1019, 1024 (2d Cir. 1991) ("Under *strictissimi juris*, a court must satisfy itself that there is sufficient direct or circumstantial evidence of the defendant's own advocacy of and participation in the illegal goals of the conspiracy and may not impute the illegal intent of alleged co-conspirators to the actions of the defendant."); *United States v. Wieschenberg*, 604 F.2d 326, 332 (5th Cir. 1979) ("**It is not enough for it merely to establish a climate of activity that reeks of something foul.** The law requires proof that the members of the conspiracy knowingly and intentionally sought to advance an illegal objective. Involvement by individuals in a clandestine agreement that appears suspicious may be ill advised or even morally reprehensible, but, without proof of an illegal aim, it is not criminal." (emphasis added)); *United States v. Dellinger*, 472 F.2d 340, 392-93 (7th Cir. 1972) ("Specially meticulous inquiry into the sufficiency of proof is justified and required because of the real possibility in considering group activity, characteristic of political or social movements, of an unfair imputation of the intent or acts of some participants to all others. . . .").

and "within the shadow of the First Amendment" under *Spock*. Accordingly, any alleged criminal intent of Lively must be determined *strictissimi juris*, which requires evidence that Lively personally agreed to employ the criminal means of persecution of which SMUG complains.

SMUG would no doubt prefer a different standard be applied to test the sufficiency of the evidence of its conspiracy theories. Indeed, to support its complete and devastating lack of knowledge of just how Lively pulled off the amazing feat of conscripting a sovereign foreign government to persecute SMUG, SMUG seeks refuge in *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970) (Opp. at 65), in which the Supreme Court reversed the grant of summary judgment to a conspiracy defendant because the defendant failed to negate the plaintiff's conspiracy allegations. 398 U.S. at 157. SMUG quotes not the *Adickes* Court's holding, however, but the Court's recitation of the *conspiracy plaintiff's argument*, claiming the *Adickes* court agreed with it: "*See Adickes* . . . (agreeing that although plaintiff had no knowledge of an agreement between the alleged conspirators, 'the sequence of events created a substantial enough possibility of a conspiracy to allow her to proceed to trial, especially given the fact that the noncircumstantial evidence of the conspiracy could only come from adverse witnesses.'" (Opp. at 65 (quoting *Adickes*, 398 U.S. at 157).) But any agreement by the *Adickes* Court with the plaintiff's argument was necessarily tied to the Court's holding, which did not directly concern the sufficiency of the plaintiff's evidence to get to a jury. 398 U.S. at 157. Rather, the Court's holding was that the defendant below should not have received summary judgment because the defendant "did not carry its burden . . . to foreclose the possibility [of the facts of the alleged conspiracy]." *Id.* Thus, if the *Adickes* Court agreed with the plaintiff's argument, that she only had to present a "sequence of events creat[ing] a substantial enough possibility of a conspiracy to allow her to proceed to trial," it was only on the way to its holding that the **defendant** seeking summary judgment had the burden

of foreclosing the possibility of the plaintiff's theory. *Id.* But the reason SMUG cites the plaintiff's argument from *Adickes*, rather than the Court's holding, is obvious: the *Adickes* holding regarding a defendant's burden on summary judgment was **superseded** by the Supreme Court in *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1985) ("In our view, the plain language of Rule 56(c) mandates the entry of summary judgment . . . 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."); *see also Edwards v. Princess Cruise Lines, LTD*, 471 F. Supp. 2d 1027, 1029-1030 (N.D. Cal. 2007) ("To the extent plaintiff relies on *Adickes* . . . for the proposition that a movant must 'disprove' an essential element of the non-movant's case, that case has been superseded in pertinent part by *Celotex* . . . .").

Thus, no standard concerning summary judgment from *Adickes* has any utility in the instant case, least of all a litigant's position which, if important to the *Adickes* Court's holding, has been superseded along with the holding. Even more critically, *Adickes* is also inapposite because the conspiracy at issue there had no First Amendment implications like SMUG's alleged conspiracy, and therefore would necessarily have been concerned with "[t]he metastatic rules of ordinary conspiracy [which] are at direct variance with the principle of *strictissimi juris*." Spock, 416 F.2d at 173.

### 2. SMUG's Claims Require Proof That Lively Personally Agreed To Employ The Means Of Criminal Persecution.

In this case, SMUG seeks to hold Lively civilly liable under the ATS for the international "crime against humanity" of "persecution." In reaching a definition of criminal persecution for ATS purposes, this Court differentiated among the three separate concepts of "discrimination," "persecution," and persecution "crimes against humanity." (MTD Order, dkt. 59 at 21.) The Court defined these concepts in terms of "the increasing severity of the discriminatory activity." (*Id.*)

Thus, persecution "is a harsher subset of discrimination," but, "It is doubtful whether the ATS would furnish jurisdiction for a claim of persecution alone; this claim under the common law would appear to lack the 'definite content and acceptance among civilized nations' within the 'historical paradigms familiar when § 1350 was enacted.'" (*Id.* at 22-23 (quoting *Sosa*, 542 U.S. at 732).) "Persecution can be a crime against humanity, but it may not always rise to that level." (*Id.* at 22.) Accordingly, the Court held actionable under the ATS only "persecution that rises to the level of a crime against humanity." (*Id.* at 23.)

In accordance with *Spock* and this Court's definitions above, to survive summary judgment on its conspiracy claim, SMUG must adduce substantial evidence that Scott Lively personally agreed to employ the means of *criminal* persecution—not mere discrimination, and not "mere" persecution, but **persecution at the level of an international crime against humanity**.

### 3. SMUG Has Failed To Meet The *Spock* Burden Of Adducing Substantial Evidence That Lively Personally Agreed To Employ Any Illegal Means Of Criminal Persecution.

In its Opposition, SMUG informs the Court that Lively was "one of the chief strategists" of the persecutory conspiracy, but that the persecution was "executed by his co-conspirators." (Opp. at 49.) SMUG later clarifies that it was specifically "the Ministry of Ethics and Integrity, through Buturo, and later, Lokodo, that carried out the violations of Plaintiff's rights . . . ." (Opp. at 77.) But throughout SMUG's description of the fourteen acts of "persecution" for which it seeks to hold Lively responsible, SMUG consistently relies on the statements of Lively's purported "co-conspirators" to establish intent (*see, e.g.*, Opp. at 51, 53), or (non-conspirator) "police officers" (Opp. at 55), or (non-conspirator) media publications. (Opp. at 56.) While such statements of alleged co-conspirators may be considered to show a defendant's intent under regular conspiracy rules, it is improper to consider them under the *strictissimi juris* rule of *Spock*. 416 F.2d at 173.

Therefore, only Lively's unambiguous statements, or clear conduct showing his personal agreement with the illegal persecutory means. *Id.*

Whether any of the fourteen acts constituted criminal persecution in whole or in part, which Lively does not concede, there is no evidence that Lively personally agreed to any criminally persecutory means involved. (Lively Decl. (dkt. 257-1), ¶¶ 34-37.) The only one of the acts that Lively even had knowledge of was the AHB, which he did not draft and did not agree with, and which he tried constantly and consistently to moderate, after he became aware of it. (*Id.*, ¶¶ 28-32.) Apart from criticizing and attempting to diminish or displace the AHB, there is no evidence that Lively personally participated in any of the fourteen acts, either by directing an act, suggesting an act, approving of an act, or even knowing about an act. (*Id.*, ¶¶ 28-32, 34-37.) And even considering all evidence of Lively's contact with the AHB, including SMUG's "evidence," there is no unambiguous statement or clear conduct by Lively evidencing Lively's personal agreement to engage in any of the fourteen acts or other criminal persecution, whether under color of the AHB or otherwise. This complete absence of evidence of specific criminal intent is fatal to SMUG's claims.

**a. SMUG's Manufactured "Evidence" Of "Intent" Falls Far Short Of *Strictissimi Juris.***

SMUG repeatedly reassures that it does not seek to impose liability on Lively for his speaking and writing regarding his religious and political views, but that all of his speech is relevant merely to show "intent." (Opp. at 125.) But SMUG makes it clear early in its Statement of Facts ("PSOF") that Lively's religious and political views are exactly what SMUG wants to put on trial, labelling all of Lively's speaking and writing outside Uganda, "Lively's Persecutory Efforts Internationally." (PSOF at 46, ¶¶ 4-20.) SMUG's D-MFR, PSOF, and its Opposition sections relying on these "facts," compose a catalogue of exaggerations and outright

misrepresentations of Lively's actual speaking and writing—too many to recite here. Some typical examples, however, illustrate the deception, and cast doubt on every statement of "fact" SMUG adduces to show "intent."

- **The Lively Persecution "Strategy" to End All LGBT Association, Assembly, and Expression.** Taking cherry-picked quotes, divorced from context, and liberally adding innuendo and pure rhetorical gloss, SMUG weaves a fantastical narrative to hide the factual deficiencies of its persecution claims. Indeed, SMUG cuts from whole cloth the Lively "strategy" that drives the narrative from start to finish: "Foremost among his strategies is **broad-based systematic discrimination** against people **on the basis of sexual orientation and gender identity**." (PSOF ¶ 19.) To support this exaggeration, SMUG selectively quotes Lively's 2009 book, *Redeeming the Rainbow*: "Lively recommends criminal laws that prevent LGBT people from 'us[ing] the organs of government to advance their philosophy as normal and healthy.'" (*Id.*) The cited source, however, shows the dishonesty of both SMUG's conjured "strategy" and cherry-picked quote:

> To reverse the current trend toward sexual anarchy, society will need to establish new **public policies that actively discourage sex outside of marriage**, including homosexuality. Such policies should be strong enough **to prevent government** from facilitating, endorsing or condoning sexual activity outside of marriage, **but only as restrictive on personal liberties as necessary to maintain a family-centered culture.** One model for such policy might be current laws in some states that criminalize marijuana usage but provide **minimal sanctions for violations**. People in these states **may indulge themselves privately in this harmful conduct but cannot openly recruit others into their lifestyle or use the organs of government to advance their philosophy as normal and healthy.**

(Sullivan Decl. Ex. 20 (dkt. 293-20) at SMUG000259 (emphasis added).) Far from "broad-based systematic discrimination against people on the basis of sexual orientation and gender identity," as pretended by SMUG, Lively's writing advocates, on its face, specific and constrained policies, unequivocally focused on *conduct* ("sexual activity outside of marriage") and not "orientation" or

"identity." Moreover, the advocacy that Lively proposes to restrict is likewise specific and constrained, only preventing advocacy of extramarital sexual conduct, and the use of government to promote such conduct as good. Furthermore, Lively only supports "minimal sanctions for violations," that are "only as restrictive on personal liberties as necessary." (*Id.*) SMUG's entire narrative, which depends on Lively's "intent" to criminally persecute LGBT persons with "broad-based systematic discrimination" essentially unravels here.

But SMUG still insists that Lively's principal strategy is "to bring about the widespread and systematic persecution of the LGBTI community by depriving LGBTI Ugandans of their rights to association, assembly, and expression, including the right to advocate their human rights." (Opp. at 70.) The persecution "evidence" SMUG is perhaps proudest of is from a Lively radio appearance in April, 2012, after SMUG filed this lawsuit. (PSOF ¶ 149.) According to SMUG's Opposition:

> In response to questions about his efforts in Uganda, Defendant stated outright:
>
> > Well, you know, *I am against advocacy.* And actually I take the position that *homosexuality should be criminalized* […] so that you have a public policy basis to prevent the advocacy that I think should be prohibited – and that is gay pride parades and public school advocacy and promotion of homosexuality to school children. That kind of thing…. As an attorney, also, the problem is, if you have, at least in the US, Canada's got a little different legal context, but in the US you can't have unequal treatment of like groups. You couldn't do that in the United States for example…
> >
> > PSOF ¶ 149. (emphasis added).

(Opp. at 76.) But in the above quote, directly from SMUG's Opposition, SMUG deceptively combined Lively's answers to two different questions, and then deleted from the misquoted material the critical, constraining context of Lively's position on criminalization and advocacy. Following is a transcript of the actual questions and answers:

> MS. SIMPSON: My thinking and knowing what you talk about, you haven't worked to eradicate any trace of LGBT, Q plus, plus,

> advocacy, quite the contrary. You are saying Hey, there's hope, there's healing, there's a different way of doing things and that's the greatest form of advocacy I can think of.
>
> MR. LIVELY: Well, you know, I am against the advocacy. Actually I take the position that homosexuality should be criminalized. I'm actually -- I take that position even here in the United States, **but that it should be criminalized like marijuana or speeding on the highway is criminalized**, so that you have a public policy basis to prevent, or **the advocacy that I think should be prohibited and that is gay pride parades, public school advocacy, promotion of homosexuality to school children, that kind of thing. That's what I mean by advocacy. I am against those --**
>
> MS. SIMPSON: I have a simpler solution. Just cut the public money to all these various organizations and activities, and you solve three quarters of the problem.
>
> . . . .
>
> MR. LIVELY: As an attorney also, the problem is, if you have, at least in U.S., Canada has a different legal context, but in the U.S., you can't have unequal treatment of like groups. So you couldn't do that in the United States, for example, **unless there was a public policy reason. You know, people, the pro-marijuana advocates here in the U.S., they can't go to Congress and get money to go into the schools and teach that marijuana smoking is a good thing. They can't do that. Why? Because it's illegal. Right? It doesn't mean people won't do it. It doesn't mean that we turn a blind eye to most of it. But because it's illegal you have the ability to prohibit the promotion of it, the public dollars, and to access to things like the public schools.**

(Gannam Decl. Ex. 4 at 391:5-392:6.) In context, and on its face, the exchange shows Lively believes in nominal criminalization of homosexual conduct (along with other sexual acts outside of marriage), as has been done with speeding and individual marijuana use, not as a means to criminally punish homosexual conduct, but to provide a public policy basis to prevent the specific and limited categories of expression comprising gay pride *parades*, and promotion of homosexual conduct to schoolchildren. (*Id.*) This limited and specific opposition to "advocacy" is not in the same universe as the allegation that Lively "'actively and intensively worked to eradicate any trace

of LGBT advocacy and identity,'" which is the SMUG allegation being discussed (PSOF ¶ 149), or that Lively "worked . . . to bring about the widespread and systematic persecution of the LGBTI community by depriving LGBTI Ugandans of their rights to association, assembly, and expression, including the right to advocate their human rights" (Opp. at 70).

Indeed, Lively's unequivocal and unrefuted statements in both his writings outside Uganda and his Declaration in support of Summary Judgment show that Lively has no interest in the kind of comprehensive silencing and isolation SMUG so desperately wants to hang around his neck. (Lively Decl. ¶¶ 6.g. ("I would favor misdemeanor criminalization of any sexual act outside of marriage, including adultery, fornication, and homosexual conduct. While I would be in favor of very modest penalties for such conduct in the letter of the law, I would urge even more relaxed and minimal application of such laws . . . ."), 6.l ("While I would be in favor of prohibiting promotion of homosexual conduct or lifestyle to children and youth, I would not prohibit homosexual persons or organizations from using legal means and the democratic process to advocate for changes to laws they oppose."); Sullivan Decl. Ex. 20 (dkt. 293-20) at SMUG000360 ("[W]e should extend reasonably high tolerance for people who choose to publicly disclose their homosexual 'orientation,' because the social benefit we all enjoy from freedom of speech outweighs the harm of their disclosure.").

- **Opposing Nondiscrimination Laws.** To further show persecutory "intent," SMUG falsely characterizes Lively's opposition to nondiscrimination laws in Moldova based on "sexual orientation" and "gender identity" as working "*to ensure that LGBT Moldovans could be subject to discrimination*," and that "Lively also 'taught the Moldovans' *that discrimination is necessary*." (PSOF ¶ 20 (emphasis added).) What Lively actually "taught" the Moldovans, however, is that the point of opposing such laws is to preserve the freedom to dissent:

> What I know now, and have taught the Moldovans, is that the anti-discrimination law is the seed that contains the entire tree of the homosexual agenda, with all of its poisonous fruit. It is the cornerstone of their legal and political strategy, **putting the power of the government behind the legal premise that the practice of homosexuality deserves public approval and that opposition to homosexuality, including that which is rooted in the Biblical world view, must be discouraged.** From that premise the conclusion is logically inevitable.

(Sullivan Decl. Ex. 13 (dkt. 293-13) at LIVELY 2410 (emphasis added).) Lively had previously explained his view towards such laws in his book, *Redeeming the Rainbow*:

> Government and corporate policy makers include sexual orientation in anti-discrimination policies in order to protect freedom of thought and speech on the basis of the claim that sexual orientation is nothing more than a state of mind. Americans rightfully cherish the First Amendment right to think and speak freely. **The practical effect of such policies, however, is to legitimize and protect any sexual conduct associated with an orientation, and, ironically, to *suppress* the thought and speech of those who object to the promotion of homosexuality. . . .**

(Gannam Dec. Ex. 5 at SMUG000347-49.)

- **Enactment of the AHB.** SMUG devotes substantial space to inflating and distorting Lively's involvement with the AHB. **First**, SMUG intentionally confuses the issue of what Lively knew about plans for a new homosexuality law in Uganda before he arrived in 2009. Lively did not know of any plan by Ugandans to enact new law regarding homosexuality until he arrived in Uganda in March 2009, and even then he had no knowledge of any contemplated content of such a law. (Lively Decl. ¶¶ 19, 20.) SMUG attempts to change what Lively knew before he arrived in Uganda in 2009, by attributing to Lively what only others knew. For example, during the same April, 2012 radio appearance in which Lively stated his position on LGBT advocacy (which SMUG misrepresented), Lively summarized his understanding of how the AHB actually related to his 2009 visit, and his rejection of it from the beginning:

> So when in 2009 **they** had not been able to stop George Soros and these others from, you know, creating a sexual revolution there, **they knew** they needed to strengthen their laws. And in anticipation of that **they held** this conference that **I went** and spoke at.
>
> Well, that conference was to sort of educate the leaders of the society so that when the law came out that **they have** an easier time, you know, being able to implement it.
>
> Well, **I spoke to the Ugandan parliament, at least members of it, in their assembly hall, urging them to focus on rehabilitation and not punishment.** But, when the law came out and it quoted a capital punishment provision for a category called aggravated homosexuality, which is mostly focused on pedophilia, but could have been construed to include repeat offenders of simple homosexuality. And the homosexuals and the leftists around the globe just went crazy on this story, and then pointed at me and accused me of being the mastermind of what they began calling the kill the gays bill, which is a blatant lie.
>
> . . . .
>
> MR. GRAY: **You spoke against both the death penalty and imprisonment when you spoke in Uganda, didn't you, in 2009?**
>
> MR. LIVELY: **Yes, yes, I did.** However, I actually did write some suggested modifications. They sent me a draft of the bill before they actually brought it forward. And I sent my comments back. **What I did is I -- wherever they had quoted prison, I slashed it to, you know, knowing that they weren't going to eliminate it completely, I slashed it down. I took the death penalty out in my suggested revision, and I added two categories based on rehabilitation and promotion of pro-family values in the national school system. And so I got that in the document to show what I actually said. And I'm on record of that from the beginning.**

(Gannam Decl. Ex. 4 at 386:13-388:21 (emphasis added).) But Lively explained at his deposition that he did not know of any effort to change Ugandan law regarding homosexuality until after he arrived in Uganda:

> **Q. Was the purpose of you going to Uganda to help Ugandans strengthen their laws against homosexuality?**

> **A. My purpose was to educate the Ugandans about the homosexual movement and agenda.**
>
> Q. If you stated on the Roadkill – in the Roadkill Radio show that you produced to us in this litigation that the purpose of your going to Uganda was to help Ugandans strengthen their laws against homosexuality, would that have been a false statement?
>
> . . . .
>
> A. I think **it would have been a reference in retrospect as to conversations that I had in Uganda at the time**.

(Gannam Decl. Ex. 4 at 119:25-120:16 (emphasis added).)

> Q. Was part of your purpose in going to Uganda to assist Ugandans in strengthening their laws against homosexuality?
>
> MR. MIHET: Objection. Asked and answered multiple times.
>
> **A. I learned about the intention to strengthen the law during the conference. . . .**
>
> Q. Okay. But how about before you went to the conference?
>
> **A. No, my purpose in going was to educate the Ugandans about the homosexual movement and agenda.**

(Gannam Decl. Ex. 4 at 300:14-301:4 (emphasis added).)

Lively's deposition testimony clarified that Lively had no knowledge of any intention by Ugandans to enact new law on homosexuality prior to his arriving in Uganda. But, by the time of Lively's 2012 radio appearance, he had surmised that some Ugandans (unknown to him) had such a law in mind when he was invited to speak in 2009, and intended to use the 2009 conference in that regard. (Lively Decl. ¶ 33.) However, to date, Lively has never discovered whether this is true. (*Id.*)

SMUG has not adduced evidence to refute the fact that Lively did not know of any plan to change Ugandan law regarding homosexuality prior to his arrival in 2009. However, even if there were a genuine question as to whether Lively knew of such plans prior to travelling to Uganda in

2009, there is no evidence that Lively knew what such a law might contain, or that any draft of such a law was in existence prior to his arrival. Thus, there is no evidence of any intention by Lively to aid in the enactment of any law that would violate international law, or aid in the enactment of any law that would necessarily or even likely lead to criminal persecution.

**Second**, SMUG attempts to turn Lively's consistent disapproval of the AHB into unqualified support by selectively quoting from Lively's numerous communications criticizing and recommending abandonment of the proposed law (Lively Decl. ¶¶ 28-33.) For example, from an e-mail chain discussing a future conference in Uganda, and the lies of activists intent on blaming Lively for murder (who had posted photographs falsely depicting Ugandans killing LGBT persons), SMUG quotes only this portion, ostensibly deeming it material:

> You may think the battle is over because you have passed the anti-homosexuality law (in your minds a powerful defensive bulwark), but for them this is only the beginning of the next phase of their war to conquer you.

(PSOF ¶ 196 (quoting Sullivan Decl. Ex. 166 (dkt. 293-178) at LIVELY 3499).) What SMUG omitted, however, is Lively's very next sentence, unequivocally criticizing the AHA and the Ugandan government that enacted it:

> And (with all due respect for your duly elected government) because you didn't focus on therapy and prevention rather than punishment, you have handed them a club to beat you with and put fear instead of hope in the hearts of homosexual strugglers.

(Sullivan Decl. Ex. 166 (dkt. 293-178) at LIVELY 3499.) Earlier in the string, Lively had suggested an All-Africa conference in Uganda to promote "Christianity and Biblical values regarding sexuality," and he made clear his continued intent to change the AHA:

> It would revisit the problems of pornography, abortion, fornication and homosexuality and explore how the African model of reconciliation and restoration can overcome these problems. **I am especially keen to address the restorative model regarding homosexuality to help shift the African focus away from**

> **punishment toward healing the underlying disorder, with mercy toward the strugglers.**

(*Id.* at LIVELY 3497) (emphasis added).

In another example, SMUG quotes a fraction of an e-mail from Lively to show Lively gave his "support" for the AHB. (PSOF ¶ 167 (quoting Sullivan Decl. Ex. 156 (dkt. 293-168) at LIVELY 3733).) But that one word of "support" was preceded by seven paragraphs of qualification:

> Now that Uganda's so-called "kill the gays" bill has been revised to **drop the death penalty and reportedly add provisions for prevention and therapy of homosexuality** I think there **may be room for tentative support** in the Christian community in the west, even though it retains jail terms for offenders. . . .
>
> . . . .
>
> . . . . [I]n all the media-driven hysteria about the Ugandan Anti-Homosexuality Bill, one glaring fact has been consistently omitted (despite my having pointed it out to nearly every "journalist" who has interviewed me). The fact is that Ugandan law is typical of most African law in that it tends to be very harsh in the letter, but very lenient in the application. I doubt very much that anyone arrested under the new law (**if it passes**) will receive anything close to the jail terms allowed for in the bill.
>
> . . . .
>
> **In my opinion, the Ugandan Anti-Homosexuality Bill is still too harsh in the letter. I would prefer something closer to the approach several American states have taken toward marijuana: criminalize it but minimize the penalty and turn a blind eye toward discrete violations. Indeed, this would be my prescription for dealing with homosexuality (and all sex outside of marriage) in the United States. This would preserve basic freedom of choice for people who choose to inhabit various sub-cultures out of the mainstream, yet provide the larger marriage-based society with the legal power to prevent sex activists from advocating their lifestyles to children in the public schools or to flaunt their sins in "pride" parades through the city streets.**
>
> However, **since I didn't write the Ugandan bill and have no power to redraft it on my own terms**, and since the alternative to

> passing this bill is to allow the continuing, rapid, foreigner-driven homosexualization of Ugandan culture, **I am giving the revised Anti-Homosexuality Bill my support.**

(Sullivan Ex. 156 (dkt. 293-168) at LIVELY 3732-33.)

Far from showing Lively's "support" for the AHB, this communication from Lively, on its face, is a continued effort to revise the AHB towards something the AHB was not yet, which Lively *could* support. First, Lively opens by suggesting only "tentative support" based on changes only "reportedly" made to the bill (which he obviously did not have personal knowledge of). Second, even though the bill "reportedly" retained incarceration, Lively explained his understanding that such laws in Uganda were leniently applied, and his expectation that such leniency would be applied in enforcement of the bill "(if it passes)." Finally, Lively explained his unwavering disapproval of the punishment aspect of the bill, preferring it to be modeled on "something closer to the approach several American states have taken toward marijuana: criminalize it but minimize the penalty and turn a blind eye toward discrete violations." Such an approach would, he continued, provide the public policy basis to limit specific forms of advocacy of homosexual conduct, namely public school advocacy and gay pride parades. As shown above, this is entirely consistent with Lively's prior speaking, writing, and testimony in favor of nominal criminalization of homosexual conduct with minimal penalty, primarily to provide a policy basis for prohibiting limited and specific categories of advocacy—none of which amounts to criminal persecution.

None of the additional "facts" regarding the AHB adduced by SMUG in its D-MFR, PSOF, or Opposition show Lively's personal agreement with the AHB as drafted, or the AHA as enacted. Nor do any of SMUG's "facts" show Lively's personal agreement to aid any acts of criminal persecution under color of the AHB or AHA. And, to the extent any of Lively's statements could be deemed subject to interpretation as to his personal agreement with the AHB or AHA, which

Lively does not concede, such ambiguous statements cannot satisfy the *Spock strictissimi juris* burden as a matter of law.

- **Summary.** In all of the above examples, SMUG selectively quoted, or outright misrepresented, what Lively actually spoke and wrote, in order to advance SMUG's false narrative that Lively intended to orchestrate the government-enforced oppression and isolation of LGBT Ugandans. However, neither in the above examples, nor in any "facts" offered by SMUG in its D-MFR, PSOF, or Opposition, does SMUG adduce any unambiguous spoken or written statement, or clear conduct from Lively advocating or agreeing with the alleged acts of criminal persecution which SMUG complains it has suffered at the hands of the Ugandan government, and on which SMUG's claims against Lively are exclusively based.

#### 4. SMUG's Attempt To Brush-Off *Spock* Lacks Credibility And Demonstrates That SMUG Is Not Even Trying To Satisfy *Spock's* Strict Standard.

SMUG's footnoted brush-off of *Spock* is wrong on both grounds given. (Opp. at 130 n.50.) First, the *Spock* court itself rejected out of hand the argument pretended by SMUG that "*Spock* is essentially an incitement case." (*Id.*) The defendants in *Spock* sought to avoid liability for "**conspir[ing] to 'counsel, aid and abet**'" the crime of draft evasion by claiming they did not commit "'incitement.'" *Spock*, 416 F.2d at 171. But the court responded that the "government's interest" in its long established "ability to deter and punish those who increase the likelihood of crime by concerted action" was not "diminished in this case by the defendants' claim that their conduct did not involve 'incitement' . . . ." *Id.*

*Spock*'s significance as a **conspiracy** case, not an incitement case, was confirmed by the Seventh Circuit in *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972). The *Dellinger* court explained that *Spock* expanded the principle of *strictissimi juris* from "penalties based on membership as such" (*i.e.*, guilt by association), "to an instance where defendants were charged

with a **conspiracy**." 472 F.2d at 392-93 (emphasis added). The *Dellinger* court, though "no[t] concerned with the **charge** of conspiracy," held that the principle of *strictissimi juris* applied equally to the case before it which involved acts that "occurred in the context of a group undertaking with legal . . . and allegedly illegal (violent) branches." *Id.* at 393. Thus, not only does *Spock* apply to cases involving the specific charge of conspiracy, but also to any conspiracy-like case involving bifarious group activity.

SMUG's second reason to disregard *Spock*, that SMUG has presented substantial evidence "that all of the conspirators' goals included depriving LGBTI individuals of their fundamental rights" (Opp. at 130 n.50), begs the question that *Spock* requires to be answered *strictissimi juris*: whether there is specific evidence that Lively "personally agreed to employ the illegal means contemplated," either through Lively's own "unambiguous statements," or through conduct "clearly undertaken for the specific purpose of rendering effective the . . . illegal activity," but excluding the statements of the alleged "co-conspirators." If SMUG believed it could satisfy the *Spock* standard, it stands to reason SMUG would have tried to, rather than strain credibility by claiming "*Spock* adds nothing to this discussion." (*Id.*) In any event, SMUG has not presented evidence nearly sufficient to satisfy the strictures of *Spock*.

### C. *Spock* Requires Summary Judgment Against SMUG's Joint Criminal Enterprise and Aiding and Abetting Persecution Claims.

Although *Spock* and much of its progeny have dealt specifically with charges of conspiracy, the First Amendment interests protected by the rule in *Spock* are no less present when other "bifarious" group activity, "in the shadow of the First Amendment," leads to claims which are not labeled conspiracy. Thus, in *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972), the Seventh Circuit applied the *Spock* protections in examining the sufficiency of evidence to uphold the convictions of a group of anti-war activists under the federal Anti-Riot Act, even though all

the defendants had been acquitted of conspiracy charges under the Act. 472 F.2d at 348-49. Given the heavy First Amendment implications of the convictions, the *Dellinger* court invoked the *strictissimi juris* evidentiary burden of *Spock*:

> Specially meticulous inquiry into the sufficiency of proof is justified and required because of the real possibility **in considering group activity, characteristic of political or social movements**, of an unfair imputation of the intent or acts of some participants to all others.
>
> . . . . We adopt the concept for application in this case because, **although we are no longer concerned with the charge of conspiracy, the acts charged against individual defendants occurred in the context of a group undertaking** with legal (protest of the war and expression, generally, of dissent) and allegedly illegal (violent) branches. It is our belief that this duality would usually exist in an undertaking involving activity of a group and out of which a riot arises.
>
> In the context of our case, the doctrine of *strictissimi juris* surely precludes (if other general principles do not) a finding that any defendant had an unlawful intent if the finding be based solely on the fact that he participated in planning and organizing the [group] activity out of which riots arose, or on the mere imputation to him of the plan of any associate that such riots be produced.

*Id.* at 392–93 (emphasis added).

As demonstrated by *Dellinger*, the specific intent rationale of *Spock* applies not only to conspiracy, but to any claim arising out of bifarious group activity, "in the shadow of the First Amendment," such group activity being "characteristic of political or social movements." *Id.* Despite semantic variations in their elements, SMUG's joint criminal enterprise and aiding and abetting claims against Lively clearly arise out of group activity which is "characteristic of political or social movements," and which abides in the shadow of the First Amendment. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 260 (2d Cir. 2009) (recognizing joint criminal enterprise is "[t]he analog to a conspiracy . . . in international law.") ("[A]n essential element of a joint criminal enterprise is 'a criminal intention to participate in a common criminal

design.' . . [P]laintiffs' conspiracy claims would require the same proof of *mens rea* as their claims for aiding and abetting."). Thus, these claims must likewise satisfy *strictissimi juris,* and likewise fail on the same absence of record evidence of criminal intent. Under *Spock,* summary judgment is required on SMUG's aiding and abetting, conspiracy, and joint criminal enterprise claims.

## IV. SMUG HAS ADDUCED NO EVIDENCE THAT ANY UNPROTECTED SPEECH OR CONDUCT OF LIVELY PROXIMATELY CAUSED ANY OF THE ALLEGED PERSECUTORY ACTS.

The lynchpin of SMUG's causation theory in this case is the supposed two-step, grand "strategy" that Lively single-handedly "developed" "for the systematic persecution of LGBTI persons" in Uganda, which, we are told, consists of (1) introducing the previously unknown concepts of homosexual "recruitment" and "sound[ing] alarms about supposed dangers to children posed by gays and the gay movement"; and (2) using the resulting furor as justification for criminalizing the "promotion" of homosexuality, which SMUG equates with criminalizing "public advocacy," and the commission of heinous acts against homosexuals. (Amd. Compl., dkt. 27, ¶¶ 65-74, 93; Opp. at 70). As shown herein, SMUG's theory is not only without merit, but outright frivolous. SMUG's own book, egregiously withheld from Lively in discovery and only recently obtained by Lively, lays waste to SMUG's causation theory, and exposes it for the fraud that it is, by cataloging the now-undeniable proof that, long before Lively ever stepped foot in Uganda, Ugandan society was persistently preoccupied with the very two things that Lively supposedly "developed" and thrust upon an unsuspecting nation: (1) the perceived danger posed by homosexuality to children, and (2) efforts to stop the promotion of homosexuality. SMUG does not have a shred of evidence to support its fraudulent causation theory. The Court should enter summary judgment and sanction SMUG for its continued discovery failures and abuses.

### A. SMUG's Own Book, Egregiously Withheld From Lively In Discovery, Exposes And Dismantles SMUG's Fraudulent Causation Theory.

#### 1. SMUG Literally Wrote The Book Documenting Uganda's Preoccupation With "Recruitment," and "Promotion" Years Before Lively Arrived in 2002.

When it comes to the content and causality of SMUG's conspiracy theory, SMUG cannot marshal the facts to fit. Thus, SMUG's opposition attempts to prop up the mere allegations of the Complaint and the "I don't knows" of SMUG's officers and directors with adjectives and epithets disguised as facts. Though perhaps suitable for a fundraising pitch, SMUG's feint does not meet the standard for a genuine jury question, on any material issue. SMUG's diversion, however, is not only away from the facts SMUG does not have, but also away from problematic (indeed fatal) facts SMUG does have—SMUG's little black box (see below)—which annihilates SMUG's conspiracy theory.

But first, a little more on SMUG's theory, for context: SMUG caricatures Lively and grossly exaggerates his speech to conjure a super-villainous leader of a crime syndicate, whom SMUG can then charge for every wrong SMUG claims to have suffered since 2002. SMUG uses varying but similarly sensational language to describe Lively's conspiratorial means and ends, such as the following:[17]

> Underlying their efforts are Defendant's strategies to dehumanize LGBTI people by equating them with pedophiles and attributing mass atrocities to the LGBTI community, criminalize their status, and criminalize any association or expression in support of equal treatment of LGBTI people.

(Opp. at 57 (citations omitted).) And,

> Following the script Defendant set out in writings and presentations during his meetings in Uganda in 2002 and 2009, the co-

[17] SMUG stretches the concept of persecution to now include even opposition to laws not yet enacted (*see, e.g.,* Opp at 58).

> conspirators justified their persecutory efforts by framing advocacy for LGBTI rights as "promotion of homosexuality" and "propaganda." The co-conspirators claimed that LGBTI advocacy groups were involved in "recruitment," namely of children, into homosexuality, essentially equating the LGBTI community with perpetrators of sexual assault of children.

(Opp. at 73 (citations omitted).)

The upshot of SMUG's conspiracy theory is this: Beginning in 2002, Lively bewitched the nation of Uganda by implanting in the Ugandan psyche the previously unknown concepts of homosexual "recruitment of children," criminalizing the "promotion of homosexuality," and equating homosexuality with pedophilic rape. So powerful were Lively's incantations, the story goes—even "***compelling***" the persecution of LGBTI Ugandans—that "his reliant co-conspirators" dutifully carried out his "script" and "program" of persecution through the fourteen persecutory acts allegedly perpetrated by the office of the Ministry of Ethics and Integrity. (Opp. at 57, 70-71 ("The conspiracy in Uganda began in 2002, when Defendant brought his program there . . . ."), 73, 77 ("In the Ugandan persecutory conspiracy, it was the Ministry of Ethics and Integrity . . . that carried out the violations of Plaintiff's rights and those of its member organizations and other in Uganda's LGBTI community."), 123.)

SMUG's conspiracy theory, such as it is, was fraudulent *ab initio*. SMUG's Opposition dogmatically doubles down on SMUG's supposition that every Ugandan who utters the concepts of "recruitment" or "promotion of homosexuality" in Uganda since 2002 is necessarily "parroting" Lively and proving Lively's "significant impact and 'success'" in "the persecution of the LGBTI community." (Opp. at 73 n.30.) This is so, SMUG claims, even though every single one of its witnesses, including its 30(b)(6) designee could not name one connection between Lively and numerous alleged injustices and persecution happening in Uganda between 2002 and 2007. (MF

¶¶ 25-46). Be that as it may, SMUG has been sitting on a little black box, containing a historical record which lays waste to the Lively origin story.

In 2007, SMUG published its own book on the homosexuality debate in Uganda, titled *Homosexuality: Perspectives from Uganda* (Gannam Decl. Ex. 6 (hereinafter, "*Perspectives*")). The editor of *Perspectives* was SMUG's co-founder, advisor and summary judgment declarant, Dr. Sylvia Tamale, a Professor of Law and former dean of Makerere University School of Law in Kampala, Uganda. (Onziema, 222:5-17; Tamale Decl., dkt. 289, ¶¶ 1-2). Tamale described *Perspectives* as "**a historical record of the debate**" regarding homosexuality in Uganda for the period 1997 to 2007, from the "two biggest English dailies." (*Perspectives* at ix-x.) (emphasis added). In addition to the full text articles curated by Tamale for the book,[18] *Perspectives* includes a "compendium of **all newspaper titles printed on this subject** over the said period," and promises to "give readers **a fair sense and flavour of the contemporary debate**." (*Id.* at x, back cover.) (emphasis added).

*Perspectives* proves an inconvenient truth for SMUG: the magic formula SMUG claims Lively used to bewitch the nation ***beginning in 2002*** was documented—by SMUG—to be already pervasive in the natural language of the Ugandan homosexuality debate ***years before Lively ever arrived***. *Perspectives* chronicles the pre-Lively and purely Ugandan homosexuality debate over the course of ten years, starting in late 1997 with the debate in full swing. To be sure, the harshness of the native Ugandan expression of these ideas stands in stark contrast to the specific and constrained positions Lively would later share in 2009. In any event, among the full text articles

[18] According to *Perspectives*, "the articles are reproduced verbatim with minimal editing for clarity. The coverage is obviously not exclusive, but it does focus most prominent features of the debate on the issue." (*Perspectives* at ix-x.) Tamale's team spent "tireless hours" on "hundreds of newspaper articles . . . researching and verifying . . . ." (*Id.* at x.)

and compendium of headlines in *Perspectives* are numerous pre-2002 articles which are directly relevant, and calamitous, to SMUG's Lively-in-2002 conspiracy theory:[19]

**Pre-2002 Articles Connecting Homosexuality to Rape and Pedophilia (and Child Sacrifice)**

- ***Kabaka Slams Homos*, The New Vision, Sept. 25, 1999.**
  Appearing to a crowd of hundreds, the Kabaka (King) of the Baganda people in Uganda[20] **strongly condemned as "barbaric acts" the homosexuality, child rape, and child sacrifice being reported in local papers.** Referring to incestuous child rape and "the increasing numbers of homosexual cases," and specifically to a government report "that several teachers in [Uganda] continue to defile their pupils and students," the Kabaka implored that "such violent actions must be stopped forth with."

(Gannam Decl. Ex. 7; *Perspectives* at 186.)

- ***Other Pre-2002 Headlines Connecting Homosexuality to Rape and Pedophilia***
  - ***Homo nabbed with 15 years boy***, The Monitor, Nov. 11, 1998
  - ***Child sex scandal, Briton was in Uganda***, The East African, Aug. 1, 1999
  - ***Baby defiler was a homo – report***, The Monitor, Oct. 8, 1999
  - *Gay tutors rapped*, The Monitor, Oct. 13, 1999
  - *Pupil pin homo tutor*, The Monitor, Dec. 27 1999
  - ***Gay teacher assaulted 5***, The Monitor, Jan. 3, 2000
  - ***Teacher faces sodomy charges***, Sunday Vision, Jan. 16, 2000

(*Perspectives* at 185-193 (emphasis added).)

**Pre-2002 Articles on Recruitment of Children and Promotion of Homosexuality**

- ***Why Homosexuality Should be Shunned*, Sunday Monitor, May 27, 2001.**
  Daily Monitor columnist Julius Mucunguzi makes a comprehensive *Ugandan* argument against homosexuality. First, regarding "**recruitment of children**":

[19] The articles and headlines recited here comprise **only 58 out of 254 headlines** in the *Perspectives* compendium of "all" articles on the homosexuality debate in Uganda for the period October 1997 to February 2002. During this 52-month period preceding Lively's first visit to Uganda, the readers of Uganda's leading papers were seeing almost five stories per month regarding the Ugandan homosexuality debate.

[20] "The Baganda . . . are an ethnic group native to Buganda, a subnational kingdom within Uganda. . . . [T]he Baganda are currently the largest ethnic group in Uganda." *Baganda People*, BUGANDA TOURISM, http://www.bugandatourism.com/buganda/baganda-people.html (last visited August 19, 2016).

> Homosexual behaviour is learned, and occurs among those who are vulnerable to the environmental factors that tend to produce homosexual behaviour . . . .
>
> . . . .
>
> . . . . Media reports indicate that homosexual experimentation among high schools students has increased considerably in recent years as **schools have presented homosexual activity as normal, desirable and even "cool**."
>
> **Sexually vulnerable young people are being steered onto a behavioural path** that they and their families will sorely regret and which will even cost some of them their lives at an early age.

Regarding banning the "**promotion of homosexuality**":

> But to see our own people beginning to advocate for such weird lifestyles like homosexuality is absurd to say the least. I know that these **gay rights movements** in the US have a lot of money, but we can't afford to sacrifice our morals in exchange for it.
>
> So, I don't agree with those who say that the government should not get involved in the debates about homosexuality**. It is the duty of government to protect its citizens from harmful behavior.**
>
> . . . .
>
> Given the **well-documented, socially and medically destructive effects of homosexual behaviour on individuals, families and communities**, compassion and prudence should lead us to **discourage any cultural promotion of homosexuality as a moral and normal activity**.
>
> . . . .
>
> Homosexual behaviour, like other destructive vices, can be learned - and unlearned. **Under no circumstances should it be promoted**, particularly through misrepresentation of scientific studies.

(*Perspectives* at 65-69 (internal quotations omitted) (emphasis added).)

- ***Other Pre-2002 Headlines on Recruitment of Children and Promotion of Homosexuality***
  - ***Homosexuality is a time bomb in schools***, The New Vision, Apr. 29, 1998
  - ***Sugar daddies, not gays are the issue***, The Monitor, July 5, 1998
  - *Youth warned on sodomy*, Sunday Vision, Jan. 17, 1999
  - *School owners rap gays*, The New Vision, Oct. 2, 1999

- *School expels boy for being gay*, The Monitor, Oct. 6, 1999
- ***Homosexuality: Ban single sex schools?***, The Monitor, Oct. 8, 1999
- ***Is it gay pride or homo harassment at boys' school?***, Sunday Monitor, Oct. 24, 1999
- ***Abnormal family relationships can sometimes cause homosexuality***, Sunday Vision, Nov. 14, 1999
- ***Prisons, schools breed most homosexuals***, The New Vision, Nov. 29, 1999
- *Avoid gay sex, Janet tells youth*, The New Vision, Jan. 12, 2000

(*Perspectives* at 183-193 (emphasis added).)

**Pre-2002 Articles Discussing Societal Opposition to, and Incarceration of, Homosexuals**

- ***Museveni Opens War on Gay Men*, The Monitor, Sept. 28, 1999; *Arrest Homos, Says Museveni*, The New Vision, Sept. 28, 1999.**
  Days after the Kabaka's charge to stop the "barbaric acts" of homosexuality and child rape and sacrifice, Ugandan President Yoweri Museveni announced to a workshop of parliamentarians from Uganda and eighteen other African countries that **"I have told the [police] to look for homosexuals lock them up and charge them."** The President's address was "often interrupted by deafening applause."

(*Perspectives* at 25-28 (emphasis added).)

- ***Homos in West are Beasts – Minister*, The Monitor, Nov. 12, 1999.**
  Addressing a Muslim Youths Congress Convention, the Ugandan Minister of State for Security, Muruli Mukasa, "**referred to homosexuality as a 'bad crime' and described gays in the West as beasts**." "The minister warned that security will promptly arrest homosexuals wherever they come across them." He "questioned the mental state of homosexuals" and said homosexuality "**can lead to the downfall of great civilisations**."

(*Perspectives* at 29-30 (emphasis added).)

- ***Other Pre-2002 Headlines on Societal Opposition to, and Incarceration of, Homosexuals***
  - ***Museveni warns off homosexuals***, The Monitor, July 22, 1998
  - *Gay debate shows strength of African Church*, The East African, Aug. 9, 1998
  - ***Minister warns of homosexuals***, The Crusader, Aug. 18, 1998
  - *Man arrested posing as a woman*, The New Vision, Oct. 29, 1998
  - *Brazilian homosexual suspect held*, The New Vision, Nov. 12, 1998
  - *Ex-president gets 10 years for homo-sex*, Sunday Vision, Jan. 19, 1999
  - ***Sodomy: Banana jailed***, The Monitor, Jan. 19, 1999
  - ***Homosexuality rears its ugly head** and children pack alcohol for break*, The East African, Aug. 1, 1999
  - *Police quiz suspected homosexuals*, The New Vision, Sept. 4, 1999
  - ***Museveni opens war on gay men***, The Monitor, Sept. 28, 1999
  - ***Arrest homos, says Museveni***, The New Vision, Sept. 28, 1999
  - *Homo report out Sunday*, The New Vision, Oct. 1, 1999
  - *Museveni, gets real on homosexuals*, The New Vision, Oct. 6, 1999

- ***MP warns on homosexuality***, The Monitor, Oct. 14, 1999
- *Homos rampant in Jinja*, The New Vision, Oct. 14, 1999
- *Weak men should fear homos*, Sunday Monitor, Oct. 17, 1999
- *Follow God's manual on gays*, The Monitor, Oct. 18, 1999
- *Museveni's anti-homo talk angers Swedish parliament*, The Monitor, Oct. 20, 1999
- ***Uganda should notify visiting homos about impending arrest***, Sunday Vision, Oct. 24 1999
- ***Museveni attack on homos worries US***, The Monitor, Oct. 27 1999
- *Nabudere raps West for putting homosexuality above democracy*, The Monitor, Oct. 28, 1999
- ***In the 60' homosexuality moved from the alleys of immorality to the front doorsteps of activists***, The New Vision, Oct. 28, 1999
- *Museveni's position on gays is politically right*, The New Vision, Nov. 3, 1999
- ***Yes, homosexuals deserve no living here***, The New Vision, Nov. 4, 1999
- ***Ugandans must reject homosexuality***, Sunday Vision, Nov. 7, 1999
- *Nkoyooyo supports Museveni on gays*, The New Vision , Nov. 13, 1999
- *Despite Moi and Museveni, US gays plan safaris*, The East African, Nov. 15, 1999
- ***Homo held***, The Monitor, Nov. 18, 1999
- ***Museveni still tough on homos***, The Monitor, Nov. 24, 1999
- *Kako expels 4 homo students*, The Monitor, Nov. 26, 1999
- ***Gay war must go on,*** The Monitor, Nov. 29, 1999
- *Museveni backed on gays*, The New Vision, Nov. 30, 1999
- *Integrity-Uganda: Prophets or profit?*, The New Vision, May 9, 2001
- *Homosexuality is no pleasant walk*, Sunday Vision, May 13, 2001
- ***Homosexuality remains a crime in this country***, The New Vision, May 17, 2001
- ***If you are gay in Uganda, the law will catch up with you***, The New Vision, May 17, 2001
- *MUK, Mukono students condemn homosexuality*, The New Vision, May 21, 2001
- ***Can the state legislate against gays****?*, The Monitor, May 30, 2001

(*Perspectives* at 184-195 (emphasis added).)

The King of Buganda. The President of Uganda. Ugandan columnists and citizens galore. They debated homosexuality openly and often, including specifically the concepts deemed off limits by SMUG, years before Lively's first trip to Uganda. And the context shows not only that the concepts of "recruitment of children," "promotion of homosexuality," and connecting homosexuality with pedophilic rape were not new, but also that they were immensely popular. SMUG has not produced or adduced any evidence showing that Lively himself mentioned the unmentionables in 2002, or how these supposedly actionable ideas and concepts that spellbound

Uganda can be otherwise attributed to Lively in 2002, when they were *passim* in Uganda five years prior to his arrival.

Furthermore, even if Lively did use self-aggrandizing language to describe his 2002 impact in Uganda (*see* Opp. at 80) (which he did not), he obviously did not move the needle by SMUG's standard—he was not mentioned anywhere in SMUG's "historical record" and "fair" representation of the "contemporary debate" on homosexuality in Uganda from 1997 to 2007.[21] If Lively overstated his 2002 reception, it may be evidence of a crime against *humility*, but not against humanity.

The media record in *Perspectives* does not even show a bump in the rhetoric following Lively's 2002 visits, let alone the surge of hostility on which SMUG's narrative depends. In fact, following Lively's first, February 2002 visit to Uganda, there were only eight more articles on the subject of homosexuality for the remainder of the year. (*Perspectives* at 196.) In early 2003, however, tracking public comments by Tamale urging expansion of LGBTI rights in Uganda, there was indeed a surge in the public LGBT debate. (*Id.* at 99-101, 196-203.) But the 130 homosexuality-related headlines that followed Tamale's comments in 2003 primarily concern cultural and religious arguments about homosexuality, and barely suggest the concepts condemned by SMUG (recruitment, promotion, pedophilia, etc.). (*Id.*) Then, following the 2003 Tamale surge, articles covering the Ugandan homosexuality debate decreased steadily and significantly in 2004 (79), 2005 (29), and 2006 (33). (*Id.* at 203-211).

Through mid-August 2007 there were only 25 headlines, but then SMUG staged its "Let Us Live in Peace" media initiative, which propelled another 87 headlines in just 2 1/2 months,

[21] At this time SMUG's David Kato was looking for *someone* to sue, but not Lively, even though SMUG knew who he was. (Onziema at 155:15-157:11.) SMUG apparently had a conspiracy theory then, but no conspirator.

through the end of the *Perspectives* coverage period (October 2007). (*Id.* at 211-217; Onziema at 155:15-23, 197:13-202:10). The media fires between 2002 and 2007 were ignited by Tamale and SMUG, not Lively. This explains why, when asked about the connection between Scott Lively and any of the media fires and alleged incidents of persecution between 2002 and 2009 – including the backlash to SMUG's 2007 "Let Us Live In Peace" initiative – each and every one of SMUG's own witnesses, including SMUG's chosen 30(b)(6) designee responded with a chorus of "I don't knows." (MF ¶¶ 25-46).

Thus, according to SMUG's own "fair" publication of the "historical record," Ugandan society was already debating the topics of homosexual recruitment of youth, banning promotion of homosexuality, adult-child homosexual rape, and the jailing of homosexuals, well before Lively first stepped foot in Uganda, as reported and featured by Uganda's leading daily papers. These facts, though published in a book by SMUG, are omitted from SMUG's narrative that Lively planted the ideas in the Ugandan consciousness beginning in 2002. The reason, of course, is obvious: The foundation of SMUG's conspiracy theory crumbles under the weight of the truth.

**2. SMUG Should Be Severely Sanctioned, Up To And Including Dismissal, For Willfully Withholding Critical Evidence From Lively.**

Because it is so devastating to its causation theory, SMUG withheld its out-of-print *Perspectives* book from Lively in discovery, hoping that Lively would not find it. SMUG was obviously aware of the book, since it was edited by its co-founder and published by SMUG itself. (*Perspectives* at inside cover and ii). SMUG's 30(b)(6) designee confirmed at SMUG's deposition that he had a copy of the book within his custody possession and control. (Onziema 221:10-20). SMUG's counsel confirmed that the book had not been produced, and proffered the untenable excuse that the book was not in SMUG's custody, possession or control, even though it was admittedly in the custody, possession or control of one of SMUG's chief officers and 30(b)(6)

designee. (Onziema 258:7-19). This kind of discovery gamesmanship finds no support in the law, and has been repeatedly rejected in this district.[22] Even after SMUG's deposition, SMUG never produced its book, to this day, notwithstanding SMUG's clear duty to supplement its discovery responses and document production under Rule 26(e)(1)(A).

That SMUG's improper and deliberate withholding of this critical piece of evidence prejudiced Lively is self-evident. Lively was unable to question any of SMUG's witnesses about the book and its findings that so completely dismantle SMUG's theory. Lively was also unable to seek authenticated copies of the hundreds of referenced articles. Nor was Lively apprised of the importance of deposing Tamale, SMUG's co-founder, and thus Lively did not seek to depose her. Finally, Lively did not have SMUG's book available to him when drafting his dispositive motion. He was only able to obtain a copy recently, after the damage calculated by SMUG had been done.

The Court should not countenance SMUG's discovery games. SMUG's deliberate withholding of this critical evidence deserves severe sanctions, up to and including dismissal. *See, e.g., Valley Eng'rs Inc. v. Electric Eng'rg Co.*, 158 F.3d 1051, 1058 (9th Cir. 1998) (dismissing case because plaintiff withheld a "smoking gun" document during discovery and noting that

[22] *See, e.g., Calzaturficio S.C.A.R.P.A. s.p.a. v. Fabiano Shoe Co.*, 201 F.R.D. 33, 39 (D. Mass. 2001) (holding that documents within the possession of corporation's officers were deemed to be within the control of corporation for purposes of discovery under Rule 34) ("Under Rule 34, 'control' does not require that the party have legal ownership or actual physical possession of the documents at issue; rather, documents are considered to be under a party's control when that party has the right, authority, or practical ability, to obtain the documents from a non-party to the action. … those documents, even if they were in the possession of [the corporation's] accountant, were still in [the corporation's] control because [the corporation] had the legal right and the practical ability to obtain the documents from the accountant."); *Haseotes v. Abacab Int'l Computers, Inc.*, 120 F.R.D. 12, 14 (D. Mass. 1988) (holding that officers and directors of corporation could not use corporate veil to refuse production of relevant documents, and that documents in the custody, possession and control of the corporation were deemed to be in the custody, possession and control of individual officers and directors) ("a party has 'control' over a document if that party has a legal right to obtain those documents").

"**[t]here is no point to a lawsuit if it merely applies law to lies**.") (emphasis added); *Freddie v. Martin Transport, Ltd.*, 428 F. App'x 801, 804 (10th Cir. 2011) (affirming dismissal when critical document was not produced and noting that the withholding of evidence "substantially prejudices an opposing party by casting doubt on the veracity of all of the culpable party's submissions throughout litigation").

### B. SMUG Has Adduced No Competent Evidence To Rebut The Accurate Picture Of Pre-2002 Uganda In Its Own Book, And SMUG's Bald Assertions To The Contrary Are Demonstrably Deceptive And False.

Not aware that Lively has been able to obtain SMUG's out-of-print book, and perhaps gambling that the book would not make it into evidence, SMUG tries to paint a deceptively calm picture of pre-2002 Uganda, to support its narrative that Lively's 2002 visit turned the country upside down in previously unknown anti-gay furor. SMUG tells the Court:

> ***Prior to 2002*** [emphasis in original]
>
> …
>
> Apart from ***a*** statement by the Ugandan President in 1999 that LGBTI people should be sent to prison, (Sullivan Decl. Ex. 28 at p. 226:2-18), LGBTI Ugandans primarily suffered discrimination during **private interactions** such as with family members, colleagues, and health care professionals when seeking medical assistance tailored to their needs as sexual minorities. (Onziema Decl. ¶ 6; Sullivan Decl. Ex. 34 at pp. 18:19-23:9) **LGBTI Ugandans gathered together without intrusion by public institutions**, such as government agencies, the police, and **the media**. (Sullivan Decl. Ex. 28 at pp. 40:8-41:3, 51:6-21; Sullivan Decl. Ex. 34 at pp. 24:20-22; 28:9-18).

(PSOF ¶ 22, dkt. 270, pp. 53-54) (emphasis added). Since Lively had already identified President Museveni's 1999 statement (MF ¶ 25), SMUG attempts to cast it aside as a one-off happenstance ("apart from ***a*** statement …") in an otherwise calm atmosphere, where homosexuals might have encountered occasional "discrimination during private interactions," but certainly not the "intrusion" and constant bombardment by the "police" and "public institutions" and the "media" that became prevalent after Lively's visit. (*Id*.) But the headlines in SMUG's own book reveal

SMUG's deception, because President Museveni had not made "**a** statement" against homosexuals, but rather numerous statements over multiple years (pre-2002), each more incendiary than the next. (*E.g.*, Museveni charges police "to look for homosexuals, lock them up and charge them"; "Museveni warns off homosexuals"; "Museveni opens war on gay men"; "Arrest homos, says Museveni"; "Museveni gets real on homosexuals"; "Museveni's anti-homo talk angers Swedish parliament"; "Museveni attack on homos worries US"; "Museveni still tough on homos") (*See* pp. 77-80, *supra*).

SMUG's book is also replete with headline after headline showing that, **prior to 2002**, "public institutions," "police" and "the media" – all of the entities which SMUG now claims left homosexuals alone – in fact routinely called for the investigation, arrest, prosecution and punishment of homosexuals, and acted on those calls with actual arrests and criminal penalties. (*E.g.*, Museveni told parliamentarians, to deafening applause, that he instructed police to "look for homosexuals [and] lock them up"; the Ugandan Minister of State for Security likened gays to "beasts" and "warned that security will promptly arrest homosexuals"; "Minister warns of homosexuals"; "Man arrested posing as a woman"; "Brazilian homosexual suspect held"; "Ex-president gets 10 years for homo-sex"; "Police quiz suspected homosexuals"; "MP [Member of Parliament] warns on homosexuality"; "Uganda should notify visiting homos about impending arrest"; "Yes, homosexuals deserve no living here"; "Homo held"; "Gay war must go on"; and "If you are gay in Uganda, the law will catch up with you"). (*See* pp. 77-80, *supra*).

None of this is new or unknown to SMUG, because SMUG literally wrote the book on it, and SMUG's counsel are aware of that book. In light of this, SMUG's deceptive portrayal of pre-2002 Uganda casts a long shadow of doubt over everything else SMUG says to support its claims.

But the deception does not end there, unfortunately. SMUG needs record facts to support its exceptionally rosy picture (compared to reality) of Uganda "Prior to 2002," and, lacking such facts altogether, SMUG resorts to creating them out of whole cloth. **Not a single one of the deposition citations in SMUG's PSOF ¶ 22 (block quoted on the previous page) actually refers to pre-2002 Uganda, even though SMUG expressly advances them as descriptive of Uganda "Prior to 2002."** For example:

- "Sullivan Decl. Ex. 34 at pp. 18:19-23:9" – refers to the deposition of Samuel Ganafa, SMUG's Chairman of the Board. SMUG did not actually include the cited pages in its Sullivan Exhibit 34, for reasons that will become obvious shortly. The Court can find them, however, at dkt. 250-1 (filed by Lively). In the cited pages, Ganafa is talking about the situation in Uganda **between 2002 and 2004**, not "Prior to 2002," as SMUG misrepresents.

- "Sullivan Decl. Ex. 28 at pp. 40:8-41:3" – refers to the deposition of Frank Mugisha, SMUG's Executive Director. In the cited portion, Mugisha's description of Uganda appears to match SMUG's "Prior to 2002" picture. (*E.g.*, Mugisha relates that homosexuals attending Ice Breakers group meetings were **not** reporting being persecuted or harassed, and were mostly concerned with "rejection" by friends and family) (Mugisha 40:8-41:3). So far so good. However, the preceding page, in a portion not cited by SMUG, plainly reveals that **Mugisha is describing Uganda in 2005** (three years after Lively supposedly turned it upside down against homosexuals), and not "Prior to 2002," as SMUG grossly misrepresents:

  > Q: **We're still in 2005**, you're at Ice Breakers. …

  (Mugisha, 39:9-10) (emphasis added). Thus, Mugisha's account directly contradicts SMUG's pre-2002 vs. post-2002 narrative, and stands for the exact opposite of what SMUG purports.

- "Sullivan Decl. Ex. 28 at pp. 51:6-21" – this is another Mugisha deposition excerpt advanced by SMUG to prove its assertion that homosexuals were largely left alone in Uganda "Prior to 2002." In the cited testimony, Mugisha indeed says that, when he joined SMUG, it was not being prevented at all from accomplishing its mission and objectives. (Mugisha, 51:6-21). The problem for SMUG, again, is that Mugisha is talking about **2006**, four years after Lively supposedly bewitched Ugandans:

  > Q: And **at the time that you joined SMUG in 2006**, was SMUG ever prevented from doing any of the advocacy that it wanted to do?
  >
  > A: No.

(*Id*.) (emphasis added). SMUG's reliance on testimony about 2006 Uganda to prove its false narrative about pre-2002 Uganda eviscerates that narrative and impugns SMUG's credibility.

- "Sullivan Decl. Ex. 34 at pp. 24:20-22; 28:9-18" – the last of SMUG's citations is also from the Ganafa deposition, and also refers to a portion of that deposition which SMUG does not actually include in Sullivan Exhibit 34, for equally obvious reasons. Examining the cited testimony in the full transcript filed by Lively (dkt. 250-1), reveals that SMUG saved its biggest whopper for last. Ganafa does indeed testify that "we're able to run smoothly without interference until these outings started coming." (Ganafa 24:20-22). The problem is, however, that Ganafa is once again talking about **Uganda between 2002 to 2004**, after Lively's visit, and not "Prior to 2002" as SMUG misrepresents. The Court can easily determine this by looking at the previous and subsequent questions asked of Ganafa, which refer to 2002 and 2004, respectively. (Ganafa 23:21-24; 24:23). Ganafa also says in the very same response (of which SMUG cites only two lines), that the reason his advocacy group was "run[ning] smoothly without interference" was because it was purposefully concealing its work with homosexuals, and not because pre-Lively Uganda was leaving gays alone, as SMUG claims. (Ganafa 24:10-22).

Perhaps one or two flatly false citations could be written off as sloppiness, and could be forgiven in a gigantic brief. But when every single citation for a critical proposition is false, and actually demonstrates exactly the opposite of what SMUG claims, the Court can have no confidence in anything SMUG says. Will SMUG at least withdraw its PSOF ¶ 22, and the entire fraudulent theory it has built upon it, now that its deception has been laid bare?

Lastly, without any support in the record for its "Prior to 2002" narrative of Uganda, SMUG resorts to the rank hearsay of Onziema, who says, in a self-serving declaration, that, based on his "conversations with LGBTI community members" he believes that the pre-2002 "discrimination suffered by LGBTI Ugandans was largely limited to private interactions, such as among family members and colleagues." (Onziema Decl., dkt. 291, ¶ 6) (cited at PSOF ¶ 22). Rank hearsay aside, this is the same witness who admitted that he has SMUG's *Perspectives* book in his possession. (Onziema 221:10-20). Perhaps he has never read it. Perhaps he has. Either way, his inadmissible hearsay statement does nothing to contradict the overwhelming evidence collected by SMUG in its own book, and cannot resuscitate SMUG's fraudulent causation theory.

### C. SMUG Has Adduced No Competent Evidence To Rebut The Binding And Sworn Testimony Of Its Own Witnesses Disclaiming Any Knowledge Of Any Connection Between Lively And The Allegedly Hostile Climate In Uganda Between 2002 And 2009.

As already demonstrated, at the close of discovery SMUG's 30(b)(6) designee, along with every SMUG officer and director who was deposed, testified in unison that SMUG lacks any knowledge of any connection whatsoever between Lively and the numerous alleged incidents of hostility in Uganda between 2002 and 2009. (MF ¶¶ 25-46). This is not surprising, given the findings detailed in SMUG's own book, which purports to present a "fair" picture of the homosexuality debate in Uganda during that time, yet does not mention Lively even once.

Even if SMUG could be allowed to now depart from its sworn testimony and position in discovery, which it cannot (section I, *supra*), SMUG has adduced no evidence from which any trier of fact could possibly conclude that the 2002 – 2009 hostilities were caused by Lively. SMUG's response to Lively's MF ¶¶ 25-46 occasionally quibbles with Lively on minor and non-material points, but offers no evidence to rectify its previously sworn lack of knowledge of any facts linking Lively to anything that happened in Uganda prior to 2009. (SMUG D-MFR, dkt. 270, pp. 16-18).

Having previously admitted that it has no knowledge of anything of substance that Lively discussed in Uganda in 2002 (MF ¶¶ 15-18), SMUG now presents a fleeting, **twenty-second** reference to "recruitment" by Martin Ssempa during a 2002 interview of Lively on Ssempa's television show, **as the one and only instance where "recruitment" was discussed by Lively in Uganda prior to 2009**. (Sullivan Exhibit 175, p. 10, lines 1-9). SMUG deceptively makes it seem as if that is what the show was about, when, in fact, the cited reference was made by Ssempa (not Lively) in passing, previewing an intended discussion of Lively's "Seven Steps" book later in the show, **which never actually came because Ssempa and Lively ran out of time discussing other**

**things**. (*Id*.) SMUG has presented no evidence on whether or when the show actually aired, how many people watched it, and whether anyone actually saw the twenty second book reference by Ssempa and did anything with that information. SMUG also has presented no evidence whatsoever that Lively discussed the concepts of "promotion" or "pedophilia" in 2002.

Thus, SMUG wants the Court (and jury) to believe that the furor over "recruitment" in Uganda between 2002 and 2009, and, indeed, a host of alleged hostile events during that same period, were caused by a twenty-second reference previewing one of Lively's books in 2002, even though SMUG's own book demonstrates that this concept was already engrained in Ugandan culture, and in the Ugandan discussion of homosexuality, years before Lively stepped foot in Uganda. If this is "proximate cause," then that term mean nothing.

### D. SMUG Has Adduced No Competent Evidence To Rebut The Binding And Sworn Testimony Of Its Own Witnesses Disclaiming Any Knowledge Of Any Connection Between Lively And Thirteen Out Of the Fourteen Alleged Persecutory Acts.

As already demonstrated, at the close of discovery SMUG's 30(b)(6) designee, and each of SMUG's officers and directors who was deposed, testified in unison that SMUG has no knowledge – personal, corporate or otherwise – about any involvement or any connection between Lively and thirteen of the fourteen alleged persecutory acts. (MF ¶¶ 103-117). Indeed, SMUG's chosen designee testified, repeatedly, that SMUG has no knowledge of "any assistance at all" provided by Lively towards any of those events. (*Id*.; *see also*, section I, *supra*, p.6).

In its response to Lively's Statement of Material Facts, SMUG does not bring forth any evidence regarding any connection between Lively and any of the fourteen alleged persecutory acts, except for Lively's alleged involvement in the drafting of the AHB (discussed separately below). (SMUG D-MFR ¶¶ 103-117, dkt. 270, pp. 32-33). Accordingly, it is undisputed that SMUG has no knowledge, even now, of anything that Lively did to assist in the perpetration of

thirteen out of the fourteen alleged acts of persecution. L.R. 56.1. SMUG's theory that Lively has proximately caused its alleged persecution has thus fallen apart, and cannot be submitted to a jury.

**E. SMUG Has Adduced No Competent Evidence To Show That Lively's Comments On The AHB Drafted By Ugandans Contributed To Any Alleged Persecution.**

The only alleged act of persecution as to which SMUG attempts to present any evidence of involvement or assistance by Lively is the drafting of the AHB. (SMUG D-MFR ¶ 103, dkt. 270, p. 32). As discussed in section III.B.3.a, *supra*, SMUG grossly distorts and misrepresents Lively's actual involvement in the AHB. But even with all of that distortion, at the end of the day (and SMUG's 1,000+ page submission), SMUG has no competent proof to dispute Lively's showing as to any of the following critical facts:

- Almost one year prior to the March 2009 conference, some Ugandan Members of Parliament perceived the need for the AHB, and began the process of drafting it, without any input from Lively. (*Compare* MF ¶ 75 *with* SMUG D-MFR ¶ 75 ("Neither admitted nor denied")).

- SMUG has no knowledge whatsoever of what Lively told the small gathering of Members of Parliament when he met them in 2009. (*Compare* MF ¶¶ 53-56 *with* SMUG D-MFR ¶ 53-56 (quibbling with the size of the gathering, but offering no evidence about anything Lively said)).

- SMUG has no evidence to rebut the eyewitness accounts of Lively, Tuhaise and Langa that Lively urged Members of Parliament to moderate existing criminal punishment of homosexual acts, to focus on counseling and education, and to show tolerance, restraint and respect. (*Compare* MF ¶¶ 58-61 *with* SMUG D-MFR ¶¶ 58-61 (speculating, **without any proof**, that Lively must have said something else, because of his previous writings and speeches on homosexuality; and arguing that Lively's suggestion of counseling and therapy as alternatives to jail sentences was not an attempt to moderate Ugandan law, because counseling and education are harmful, **without any proof that anyone in Uganda has ever been subjected to involuntary therapy**)).

- SMUG has no evidence to dispute, and does not even respond to, Lively's showing that Lively had no involvement whatsoever in the initial draft of the AHB, and that, by the time Lively first saw the AHB draft in April 2009, it already contained most of its provisions, including the death penalty for aggravated offenses, the prohibition on the promotion of homosexuality, and the reporting requirements for

those in authority. (*Compare* MF ¶ 79 *with* **no response** from SMUG). *See* L.R. 56.1 (material facts not rebutted by nonmoving party are deemed admitted).

- SMUG has no evidence to dispute Lively's proof that his sole contribution to the proposed law drafted by Ugandan legislators was to urge drastic reductions in the proposed penalties across the board, to make them even more lenient than existing Ugandan law, and to urge counseling and education instead of jail sentences. Instead, SMUG advances the ridiculous theory that, by urging a drastic reduction in the proposed punishment for a provision drafted by Ugandan legislators, Lively was somehow responsible for the provision itself. SMUG also faults Lively, again, for recommending counseling and education instead of jail sentences across the board, without any proof that Lively's suggestions were ever adopted (they weren't), and without any proof that any Ugandan has ever been subjected to involuntary therapy, let alone at Lively's behest. (*Compare* MF ¶ 81 *with* SMUG D-MFR ¶ 81).

- To rebut Lively's showing that, between 2009 and 2013 he continually urged Ugandans to moderate the AHB but the Ugandans disagreed with Lively, SMUG argues that:

    - Lively is responsible for the **drastic reduction** of the punishment for "promotion of homosexuality," from the 20 years initially proposed by Ugandan legislators (without input from Lively) to 5-7 years;

    - Lively is responsible for the AHB's **abandonment of the death penalty** initially proposed by Ugandan legislators for certain aggravated offenses (without input from Lively); and

    - Lively is responsible for the AHB's **removal of the reporting requirement** initially proposed by Ugandan legislators.

(*Compare* MF ¶¶ 85-88 *with* SMUG D-MFR ¶¶ 82-88).

Clearly, then, SMUG wants to declare Lively *hostis humani generis*, because he succeeded in persuading the sovereign legislature of Uganda to substantially moderate a legislative proposal whose drafting began one year before his 2009 visit to Uganda. SMUG has offered no evidence whatsoever to rebut Lively's showing that the AHB would have been introduced even if he had never stepped foot in Uganda, because its drafters began drafting it one year prior to 2009. And, SMUG has offered no evidence to show what the AHB would have looked like if Lively had not

continuously pleaded for its moderation. SMUG's theory is devoid of facts and too fanciful to maintain.

Ultimately, the AHB was in effect for a few short months, and SMUG was successful in invalidating it, using the independent Ugandan judiciary. Even if a citizen could be held legally responsible for the enactment of a law vigorously debated by a sovereign legislature (a ridiculous and foreign concept to American law), SMUG's universe of fourteen alleged acts of "persecution" shrinks to **one**. No reasonable jury could find that Lively's commenting on the AHB constitutes the "crime against humanity of persecution," the worst and most heinous of crimes.

Finally, SMUG admits that Uganda's judiciary is independent of the political forces advocating against SMUG. (*Compare* MF ¶ 159 *with* **no response** from SMUG (dkt. 270, p. 37)). That same independent judiciary that sided with SMUG in invalidating the AHB, and in five of the six legal challenges brought by SMUG, delivers the final blow to SMUG's causation theory, and it is fatal. In the one case SMUG has lost, Uganda's independent judiciary rejected SMUG's legal challenge to Minister Lokodo's "raid" of a homosexual rights workshop in 2012. (Onziema Decl., dkt. 291, ¶ 43 and Ex. D). The basis for the court's holding was that "promotion" of homosexuality was illegal under Ugandan law – **not under the AHA, which was not effective in 2012, but under Uganda's colonial-era penal law that criminalized homosexuality**. (*Id*.) Because Uganda's penal code criminalized homosexuality, the court held, it also criminalized the "promotion of homosexuality." (*Id*.) The court discussed in great detail the concept that "promotion of homosexuality" has always been, and remains, illegal in Uganda. (*Id*.)

Accordingly, "promotion of homosexuality" was illegal in Uganda decades before Lively first visited in 2002, and decades before the AHB was debated and briefly enacted into law. (*Id*.) "Promotion of homosexuality" remains illegal in Uganda even now that the AHB has been

invalidated. This helps to explain why every SMUG witness, including its 30(b)(6) designee, disclaimed any knowledge of any connection between Lively and any of the "raids" "crackdowns" and arrests allegedly carried in Uganda to curb "promotion of homosexuality." SMUG does not even suggest, much less prove with evidence, that Lively is in any way responsible for Uganda's colonial era law criminalizing homosexuality and prohibiting its "promotion." SMUG has no competent evidence to support its causation theory, and, therefore, summary judgment is warranted.

## V. SMUG HAS NOT PRESENTED COMPETENT EVIDENCE ON EITHER ECONOMIC OR NON-ECONOMIC DAMAGES, AND, THEREFORE, SUMMARY JUDGMENT SHOULD BE ENTERED ON SMUG'S CLAIMS FOR DAMAGES, AND, CONCOMITANTLY ON ALL OF SMUG'S TORT CLAIMS.

SMUG makes no excuse for its now admitted discovery failures, and only a feeble attempt to salvage its defunct claims for "economic damages." SMUG then hangs its entire case on an artificially constructed distinction between its "economic" and "non-economic" damages. But SMUG's claims for "non-economic" damages are equally defunct, and SMUG is precluded from recovering any damages – economic or non-economic – as a matter of law. Summary judgment is therefore appropriate not only on SMUG's claims for damages, but on SMUG's claims altogether.

### A. Summary Judgment Should Be Entered on SMUG's Claims for Economic Damages.

SMUG all but concedes that its claims for "economic damages" are ripe for summary judgment as a result of SMUG's abject failure to substantiate them in discovery. (Opp. at 94-95). SMUG has **no response** at all – let alone a valid excuse – to Lively's now unrebutted showing that:

1) SMUG has continually maintained, several times under oath, that "an expert witness is required to prepare SMUG's damages calculations," and that no one at SMUG has "that exact expertise";

2) Throughout the entire two-year fact discovery period, SMUG purposefully withheld its damages calculations and documentation on the ground that they "will be calculated by an expert witness and reflected in an expert report";

3) SMUG utterly failed to disclose any expert witness on damages, and thus failed to produce the expert evidence which it agreed was required, and which it had promised to produce;

4) SMUG's two-page damages calculation (a) was first produced more than four months after the close of fact discovery; and (b) was admittedly compiled by a secret financial expert retained by SMUG, whose identity and required report have not been disclosed to this day; and

5) SMUG's Rule 30(b)(6) designee on damages could not answer a single question on SMUG's belated damages calculation or on any specific damages claimed by SMUG.

(*Compare* Lively's Statement of Materials Facts, MF ¶¶ 180-191, *with* SMUG's Response to Lively's Statement of Material Facts, dkt. 270, pp. 40-43, ¶¶ 180-191) (*See also*, Opp. at 94-95). SMUG has now admitted these facts. *See* L.R. 56.1 ("Material facts of record set forth in [Lively's Statement of Material Facts] will be deemed for purposes of the [summary judgment] motion to be admitted by [SMUG] unless controverted."). SMUG also does not address, and completely ignores, the substantial body of law adduced by Lively which precludes litigants who shun their discovery obligations from presenting to a jury damages claims that have not been probed and tested in discovery. (*Compare* Lively MSJ Memo at 130-140 *with* Opp. at 94-95). On this undisputed record alone, summary judgment on SMUG's claims for economic damages is required.[23] Any other result would allow litigants to mock their discovery obligations, as SMUG did here.

SMUG does make a half-hearted attempt to salvage its claims for economic damages, by claiming that it supplemented its initial, four-month-late damages calculation (referred to herein

[23] As previously discussed, summary judgment can be entered no just on entire claims, but also on elements of claims as well as remedies. (*See* Lively MSJ Memo at 130, n.29).

as the "Initial Worksheet") with another, seven-month-late "more detailed itemized accounting" (referred to herein as the "Supplemental Worksheet"). (Opp. at 95). There are at least three separate and independent reasons why the Supplemental Worksheet is no more useful to SMUG's salvage efforts than its Initial Worksheet, and why the Court should strike and disregard both.

First, as SMUG acknowledged, it produced its Supplemental Worksheet on February 19, 2016, more than **seven months** after the close of fact discovery. (Opp. at 95). SMUG already admitted through its 30(b)(6) damages designee that the financial figures on which its damages calculations are purportedly based were available to SMUG many **years** prior to the belated disclosure, and that "there is no reason" why SMUG could not have provided those figures sooner. (MF ¶¶ 187-189). SMUG does not even attempt to provide an excuse now, in its Opposition. (Opp. at 95). Accordingly, SMUG's decision to deprive Lively of any opportunity to investigate and probe SMUG's claimed damages, through depositions or otherwise, is inexcusable and bars any evidence from SMUG on damages:

> The late disclosure after the close of discovery leaves [Lively] without the means to explore and challenge the basis of the recent calculations. Both fact and expert discovery are closed thereby leaving [Lively] in a prejudicial position of having to defend against calculations without opportunity to explore and challenge the basis for the calculation.

*AVX Corp. v. Cabot Corp.*, 251 F.R.D. 70, 78 (D. Mass. 2008) (on strikingly similar facts, excluding evidence of damages because it was not disclosed until after close of discovery). The First Circuit has made clear that "Rule 37(c)(1) … **requires** the **near automatic exclusion** of Rule 26 information that is not timely disclosed," such as SMUG's damages calculation, which was due with SMUG's Rule 26(a)(1) initial disclosures at the start of discovery. *Wilson v. Bradlees of New England, Inc.*, 250 F.3d 10, 20 (1st Cir. 2001) (emphasis added). *See also*, *Pena-Crespo v. Puerto Rico*, 408 F.3d 10, 13 (1st Cir. 2005) ("exclusion of evidence is a standard sanction for a violation of the duty of disclosure under Rule 26(a)"). The First Circuit has also imposed a high burden on

"the party facing sanctions for belated disclosure to show that its failure to comply with the Rule was either justified or harmless and therefore deserving of some lesser sanction." *Wilson*, 250 F.3d at 21. As discussed above, in light of the admissions of its Rule 30(b)(6) designee, SMUG cannot even begin to explain its complete discovery failure on damages, and has not even attempted to proffer an explanation to this Court. (Opp. at 95).

Second, SMUG has already admitted that the damages calculations in its Initial Worksheet were performed by an undisclosed financial expert retained by SMUG, because SMUG could not perform the calculations itself. (MF ¶¶ 181, 186). Even a cursory comparison of SMUG's Initial Worksheet (dkt. 263-1, pp. 12-13) and Supplemental Worksheet (filed under seal as Exhibit 199 to the Sullivan Declaration, dkt. 293-214) reveals that the damages figures in the Supplemental Worksheet are the same as those in the Initial Worksheet. Reason dictates then, that the calculations in the Supplemental Worksheet were at least derived from, if not also entirely performed by, the same undisclosed, secret expert retained by SMUG to perform the calculations in SMUG's Initial Worksheet. Reason also dictates that, if SMUG did not have the ability or "exact expertise" to perform the calculations in its Initial Worksheet, then the same was true for the "more detailed itemized accounting" contained in the Supplemental Worksheet, so the latter required expert calculations just like the former. Yet SMUG has never disclosed the identity, let alone report, of any expert on damages, as it was required to do by Rule 26(a)(2) and by this Court's discovery orders. The "near automatic exclusion" is the "standard sanction" and, indeed, the only viable sanction now that fact discovery has been closed for well over a year and Lively's dispositive motion has been briefed. *See Pena-Crespo*, 408 F.3d at 13-14 (affirming exclusion of expert witness for failure to submit the required expert report).

Third and last, another cursory look at SMUG's Supplemental Worksheet (dkt. 293-214) reveals that it is inherently flawed and underscores the extreme prejudice visited by SMUG on Lively in denying him any opportunity to probe or investigate its content during depositions or other discovery. The Supplemental Worksheet is cryptic and might as well have been written in a foreign language. The little that can be deciphered indicates that what SMUG has apparently done is simply to take every single Ugandan shilling it ever **budgeted** (not actually spent) from 2007 to 2014 – on such things as (a) SMUG's entire rent for each year; (b) all SMUG staff salaries and allowances for every staff member, including SMUG's janitor and gardener[24]; (c) "furniture"; (d) "electricity and water bills"; (e) internet access; (f) routine medical bills for staff and volunteers; (g) "general welfare"; (h) "feeding"; and (i) a non-descript "miscellaneous" – and laid them at Lively's feet, without even a feigned attempt to explain why or how Lively is responsible for SMUG's flower beds, office furniture, coffee maker, or the cost of its staff members' flu shots or Big Macs. Taking just one year as an illustrative example, the Court will note at the bottom of page 4 on the Supplemental Worksheet that SMUG's total claimed damages for 2007 are 33,554,900 Ugandan shillings.[25] That number just happens to coincide with SMUG's total expenditures for 2007 in all of the above-referenced categories, plus many others.[26] In other words,

[24] This is not a joke. SMUG does actually employ a gardener on its staff (Mugisha 72:16-19), and apparently thinks Lively should pay his salary.

[25] This figure is also included in SMUG's Initial Worksheet, for which SMUG has abandoned confidentiality, and which is publicly filed at dkt. 263 and 263-1. Therefore, this figure is not confidential. (*See* dkt. 263, p. 1 n.1).

[26] SMUG's Supplemental Worksheet, at the top entry on the chart of pages 3 and 4, indicates that SMUG pulled its 2007 damages numbers from SMUG014621, a document SMUG produced in discovery. (Gannam Decl. Ex. 8.) SMUG did not include the document with its Opposition, for obvious reasons. The document is not one specifically prepared for SMUG's damages calculations. Instead, it is SMUG's general Financial Report for 2007, and it indicates that SMUG either budgeted or spent the same amount in 2007 as it is claiming for damages against Lively.

what SMUG wants to tell a jury is that not a single one of SMUG's actual or planned expenditures in 2007 – not even for toilet paper, aspirin or light bulbs – was made for any reason other than to defend itself from Scott Lively – whose last visit to Uganda had been five years prior.

The Court will also note that many of the entries on the Supplemental Worksheet purport to come from "budgets," without any explanation as to whether or not the budgeted amounts were ever spent, and without any documentary proof (such as receipts) that any of the amounts budgeted by SMUG were, in fact, actually spent.

That no expert, including the one who actually came up with these worksheets, was willing to sign a report or stake her credibility and reputation on the damages "calculations" advanced by SMUG is not surprising. What is both surprising and troubling is that SMUG's lawyers did not have the same reservations. SMUG's damages "calculations" do not even survive application of Rule 11, much less Rule 56. The Court should enter summary judgment on SMUG's claims for damages.

### B. Summary Judgment Should Be Entered on SMUG's Claims for Non-Economic Damages.

Realizing that its claims for damages cannot survive summary judgment, and that their dismissal means the end of SMUG's damages-dependent tort claims, SMUG has now constructed a purely artificial distinction between its claims for economic and non-economic damages, claiming that the latter are exclusively in the province of the jury and that they are sufficient to save SMUG's tort claims. (Opp. at 91-93). SMUG's efforts fail because SMUG is also precluded, as a matter of law, from recovering non-economic damages, for any one of **seven** separate and independent reasons.

### 1. SMUG Has Already Abandoned Non-Economic Damages For Individual Persons, And Cannot Now Change Its Mind.

In its section heading on non-economic damages, SMUG contends in conclusory fashion that it has "demonstrate[d] a range of non-economic damages," (Opp. at 91), but then moves into a discussion of legal authorities and ends the section without identifying or discussing **a single item** of non-economic damages within the so-called "range." (Opp. at 91-93). SMUG does cite to a few paragraphs in its own "Statement of Facts," (*id.* at 94), perhaps hoping that the Court will not actually take the time to read the cited paragraphs. This is because the paragraphs cited by SMUG refer only to damages allegedly suffered by **individuals**, from such alleged things as "demeaning tabloid outings" of individuals (*e.g.*, PSOF ¶¶ 100, 127, 170, 185, 187); harsh treatment of and statements about individuals, such as "equating workshop participants to terrorists" (*e.g.*, PSOF ¶ 142); and arrest and detention of individuals by the police (*e.g.*, PSOF ¶¶ 152, 161). The last paragraph cited by SMUG to show it has demonstrated a "range" of non-economic damages is most illustrative in showing that SMUG is attempting to base its non-economic damages on harms allegedly suffered by individual persons:

> The approximately twenty **attendees** arrested were taken to the local police station, where they were verbally accosted, threatened, and mocked by officers and inmates. Police proceeded to take photographs of the **individuals**. Several **people** were brutally beaten by both police officers and inmates, including Onziema, who sustained multiple injuries. **Individuals** were forced to strip and bathe, and some were separated for physical inspection by police officers during which they would touch the **individual's** genitals and verbally confirm their sex. … The raid, arrests, and abuse caused severe **humiliation, trauma, and physical injury**.

(PSOF ¶ 211) (emphasis added) (cited at Opp. p. 94) (internal citations omitted).

The problem with SMUG relying on non-economic damages allegedly suffered by individuals to save SMUG's claims is obvious. To survive dismissal on the question of whether or not this lawsuit required individual participation and individualized proof, SMUG represented to Lively and the Court that "SMUG seeks only declaratory and injunctive relief on behalf of its

members," and that "it is not making a claim for monetary damages on behalf of its members." (SMUG Opp. to Mot. to Dismiss Amd. Compl., dkt. 36, pp. 79-80). The Court accepted SMUG's representation:

> The simple answer to this is that Plaintiff seeks monetary damages only for injury to itself as an organization, **not for its individual members, as to whom only equitable relief is requested**.

(Order Denying Mot. to Dismiss, dkt. 59, p. 50) (emphasis added). "Because Plaintiff is not requesting monetary damages for its members, there is … no need … for the members to participate as parties." (*Id*. at 53). Thereafter, throughout discovery in this case SMUG continually and repeatedly asserted that it was not seeking any damages for individuals, but only for alleged losses that it sustained itself as an entity: "**SMUG only seeks damages for harm it suffered as an organization**." (SMUG Resp. to Lively Interrogatory 4, dkt. 249-5, pp. 2).

Having represented to Lively and the Court that it is not claiming any damages for anyone other than its corporate self, and having denied Lively the opportunity to investigate and probe any claimed damages on behalf of individuals, SMUG cannot now use untested and unproven allegations of damages (economic or non-economic) allegedly suffered by individuals in order to escape summary judgment on its own claims for damages.

**2. As A Corporate Entity, SMUG Cannot Suffer Non-Economic Damages.**

The fact that SMUG is precluded from seeking (and has abandoned) non-economic damages on behalf of individual persons spells the end of any non-economic damages claim for SMUG itself, because SMUG is a corporate entity, not a person. Corporate entities do not have feelings, do not consort, do not suffer emotional harm or "trauma," and do not feel pain and suffering. For this reason, the law is clear that corporate entities cannot recover the "range of non-economic damages" SMUG is now attempting to allege. *See, e.g., Dynamic Image Techs., Inc. v. United States*, 221 F.3d 34, 37 (1st Cir. 2000) ("Because corporations, unlike natural persons, have

no emotions, they cannot press claims for intentional infliction of emotional distress.") (affirming dismissal of non-economic injury claim by corporate plaintiff) (citing *FDIC v. Hulsey,* 22 F.3d 1472, 1489 (10th Cir. 1994)); *Mikolinski v. Burt Reynolds Prod. Co.*, 10 Mass. App. Ct. 895, 895, 409 N.E.2d 1324, 1325 (1980) ("It also seems obvious that a corporation cannot lay claim for emotional distress"); *Reidy v. Travelers Ins. Co.*, 928 F. Supp. 98, 110 (D. Mass. 1996), *aff'd,* 107 F.3d 1 (1st Cir. 1997) ("under Massachusetts law, a loss of consortium claim can only be brought [by] a claimant's spouse [who] has a valid tort claim").

**3. SMUG Is Barred From Recovering Goodwill or Reputational Damages Because It Has Failed To Provide The Required Computation In Discovery.**

Besides emotional harm, pain and suffering, humiliation and similar kinds of non-economic damages that a corporation cannot suffer or recover as a matter of law, the only other type of **arguably** non-economic damages SMUG hints at are so-called "goodwill" or "reputational" damages, which are essentially the same thing.[27] SMUG claims that, "[a]s a repeated target of persecution, SMUG has faced significant harm to its reputation." (PSOF ¶ 209).

As an initial matter, the distinction that SMUG tries to create between its alleged goodwill or reputational damages and the economic damages it is barred from recovering is an artificial one that should be rejected:

> From a purely analytical standpoint, the distinction between economic and reputational damages remains unsettled and is often difficult to ascertain. For instance, one of the obvious ways in which a defamatory remark can harm someone, particularly a business, is by causing economic losses. Such damages are not

[27] "[H]arm to reputation and loss of goodwill [are] essentially the same thing." *Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd*, 762 F.3d 829, 847 (9th Cir. 2014) (affirming grant of new trial because jury had returned separate damage awards for injuries to reputation and goodwill); *see also, Little v. City of N. Miami*, 805 F.2d 962, 969 (11th Cir. 1986) (using "goodwill" and "business reputation" interchangeably in damages context).

> distinguishable from the damages caused by the harm to reputation but rather flow directly from the loss in reputation.

*Smithfield Foods, Inc. v. United Food & Commercial Workers Int'l Union*, 585 F. Supp. 2d 815, 822 (E.D. Va. 2008) (internal quotes and citations omitted). *See also, Roundhouse v. Owens-Illinois, Inc.*, 604 F.2d 990, 995 (6th Cir. 1979) ("Goodwill and loss of business reputation might be deemed consequential damages."); *Gentek Bldg. Prod., Inc. v. Sherwin-Williams Co.,* No. 1:02CV00013, 2005 WL 6778678, at *15 (N.D. Ohio Feb. 22, 2005) ("Gentek II takes the position that diminution of goodwill and business reputation are not economic damages …. This argument lacks merit. … Gentek II's alleged damage is **typical economic loss**.) (emphasis added).

Here, as demonstrated above, SMUG cannot show or recover any economic losses, which necessarily includes any losses it alleges to have suffered as a result of harm to its reputation. In other words, SMUG's claim for goodwill or reputational damages is for "typical economic loss," *Gentek*, 2005 WL 6778678, at *15, and fails with and for the same reasons as SMUG's other claims for economic damages.

More importantly, whether SMUG's claim for goodwill or reputational damages is economic or non-economic is ultimately irrelevant, because in either case SMUG had a clear duty to provide its computation of such damages to Lively, which SMUG utterly has failed to do **even to this day**. At the outset of discovery, SMUG was required by Rule 26(a)(1)(A)(iii) to provide Lively with "a **computation of each category** of damages claimed." *Id*. (emphasis added). Lively also requested in his Interrogatory 4 to SMUG "the nature **and amount**" of "**any other damages**" it sought in this lawsuit, together with "the method, or means or formulas that you employed to calculate those damages." (MSJ Ex. E, dkt. 249-5, p. 2) (emphasis added).

Having never provided the computation and information it was legally required to provide, SMUG now disputes the disclosure requirement because the task of "estimating" non-economic damages belongs to the jury. (Opp. at 92). This is contrary to the plain language of the Rule:

> Without citation to any authority, Plaintiff blithely asserts that non-economic damages "are peculiarly with [sic] the province of the jury." That may be true, yet Plaintiff does not explain what relevance that truism has with regard to his obligations under Rule 26(a)(1)[A(iii)]. Plaintiff does not explain why that rule does not state, "except, of course, non-economic damages." Plaintiff does not explain the incongruity of the assertion that a jury can and must calculate such non-economic damages, yet the person claiming them is excused from doing so.

*McKinney v. Reassure Am. Life Ins. Co.*, No. 06-CIV-271-RAW, 2006 WL 3228791, *1 (E.D. Okl. Nov. 2, 2006). "Due process requires a plaintiff to specify *how much* they are requesting in damages. It is simply unfair for any defendant to remain in forced ignorance regarding this number until the rebuttal portion of a plaintiff's closing argument." *Id*. at *2 (italics in original) (requiring plaintiff to disclose computation of non-economic damages while discovery was still pending, under pain of "foreclosure of Plaintiff's claim for non-economic damages"). *See also, Dixon v. Bankhead*, No. 4:00CV344-WS, 2000 WL 33175440, at *1 (N.D. Fla. Dec. 20, 2000) ("Fed.R.Civ.P. 26(a)(1)(A)-(C) is clear and can be followed by every claimant with reasonable effort. All the claimant needs to do is sit down and calculate the damages that are claimed. … If Plaintiff is to be permitted to testify to his intangible emotional harm, as he should be, he surely can place a dollar value on that from his own perspective. He is in a better position to do this than the jury.").

Not one of the three cases cited by SMUG stands for the proposition that reputational damages (or any economic or non-economic damages for that matter) need not be timely calculated and disclosed in discovery. (Opp. at 92-93) (citing *Davignon v. Celmmey*, 322 F.3d 1, 11 (1st Cir. 2003); *Trull v. Volskwagen of America, Inc*. 320 F.3d 1, 9 (1st Cir. 2002); and *Hilao v. Estate of Marcos*, 103 F.3d 789, 791, 793, 795 (9th Cir. 1996)). Instead, these cases stand only for the

unremarkable proposition that **all** damages are within the province of the jury, and that, where supported by sufficient evidence at trial, a jury's ultimate determination on damages will not be overturned. *See, e.g.*, *Davignon*, 322 F.3d at 11-12; *Trull*, 320 F.3d at 9-10; *Hilao*, 103 F.3d at 792-93. Not one of these courts dealt with pre-trial disclosure obligations on damages, and, therefore, not one held that plaintiffs were relieved from disclosing their damages computations and documents because their claimed damages were in the province of the jury. *Id*. If anything, the cases underscore the need for sufficient evidence to support both economic and non-economic damages. For example, in affirming a large award for non-economic damages, the First Circuit in *Trull* discussed at length the evidentiary support for those damages submitted to the jury, which included no fewer than **five experts**, including a "medical economist," a "neuropsychologist," and a "clinical psychologist." *Trull*, 320 F.3d at 10. The issue of pre-trial damages disclosures was not discussed in *Trull*, and surely SMUG cannot contend that the First Circuit somehow relieved plaintiff there of the need to disclose damages experts and their reports prior to trial, simply by stating the truism quoted by SMUG, that "translating legal damage into money damages is a matter peculiarly within the jury's ken." (Opp. at 92-93) (quoting *Trull*, 320 F.3d at 9).

In sum, because SMUG failed to provide its computation and documents for any alleged goodwill or reputational harm, SMUG is precluded from recovering any such damages, irrespective of whether they are deemed economic or non-economic. *See Wilson*, 250 F.3d at 20 (First Circuit holds that "Rule 37(c)(1) … requires the near automatic exclusion of Rule 26 information that is not timely disclosed"); *Pena-Crespo,* 408 F.3d at 13 (First Circuit holds that "exclusion of evidence is a standard sanction for a violation of the duty of disclosure under Rule 26(a)").

**4. SMUG Is Barred From Recovering Goodwill or Reputational Damages Because It Has Failed to Provide The Required Expert Report To Substantiate Them, Even After It Agreed, Under Oath, That An Expert Witness Was Required.**

A further ground upon which SMUG is barred from recovering goodwill or reputational damages is that it failed to substantiate such damages with an expert report, as SMUG agreed under oath it was required to do, and as SMUG promised to do. "Where loss of goodwill is not adequately proven by expert testimony, the trial court should not allow the jury to speculate as to what those damages would be and should direct a verdict against any damages for goodwill." *Kinetico, Inc. v. Indep. Ohio Nail Co.*, 19 Ohio App. 3d 26, 31–32, 482 N.E.2d 1345, 1351 (1984) ("trial court erred in submitting the issue of goodwill damages to the jury"). *See also, S. Port Marine, LLC v. Gulf Oil Ltd. P'ship*, 234 F.3d 58, 67 (1st Cir. 2000) (affirming vacatur of goodwill damages, even where supported by expert witness, because expert provided insufficient evidence of reputational loss to justify verdict); *Roundhouse v. Owens-Illinois, Inc.*, 604 F.2d 990, 995 (6th Cir. 1979) (affirming directed verdict on "goodwill and loss of business reputation" claims because plaintiffs did not "offer any expert testimony valuing goodwill"); *Gentek Bldg. Prod., Inc. v. Sherwin-Williams Co.*, No. 1:02CV00013, 2005 WL 6778678, at *18 (N.D. Ohio Feb. 22, 2005) (granting summary judgment on goodwill damages "because Gentek II has not designated an expert to testify regarding goodwill damages, and has not provided other competent evidence that any diminution of goodwill was proximately caused by Sherwin–Williams' alleged misconduct").

Here, from the very beginning of discovery until four months after the close of discovery, and throughout all times in between, SMUG consistently maintained, often under oath, that its alleged goodwill and reputational damages (along with its other damages) would be calculated by an expert witness and disclosed with its expert reports. In its first Initial Disclosures, served on December 10, 2013, SMUG asserted that all of its damages (without excepting reputational losses)

would be provided "as soon as expert reports are delivered and damages are computed." (MSJ Ex. F, dkt. 249-6, p. 5). In its First Supplemental Initial Disclosures, served December 20, 2013, SMUG specifically identified the alleged damages "to its standing and reputation in the community" as being among the "computation of damages" that SMUG would deliver "as soon as expert reports are delivered and damages are computed." (MSJ Ex. G, dkt. 249-7, pp. 2-3). Then, in its verified interrogatory responses, SMUG repeated unambiguously and under oath its position that its alleged "standing and reputation in the community" losses would have to be calculated by an expert witness and disclosed with its expert reports:

> SMUG seeks damages for … the **harm SMUG has suffered to its standing and reputation in the community. While the specific amount of damages will by [*sic*] calculated by an expert witness and reflected in an expert report**, the method for measuring the damages consists of identifying from SMUG's records those expenditures that relate to the above-mentioned categories.

(SMUG Second Supp. Resp. to Lively Interrogatory 4, MSJ Ex. E, dkt. 249-5, p. 3) (emphasis added).

Thus, SMUG's current position that it need not make any computation or disclosure (expert or otherwise) regarding its alleged reputational losses is a new one, that did not surface until four months after the close of fact discovery, and 5 days after SMUG's expert disclosure deadline, when SMUG utterly failed to disclose any expert on damages, including on reputational damages, as it had sworn it would do. (*See* SMUG Third Supplemental Response to Lively Interrogatory 4, served November 6, 2015, MSJ Ex. E, dkt. 249-5, pp. 7, 9) (stating for the first time that "standing and reputation" losses would be "determined at trial"). SMUG did not explain then, and does not explain now how its position could change so drastically, when the law and the facts have not changed.

SMUG's discovery ambush should not be countenanced. SMUG's current claim that it should be allowed to present goodwill or reputational damages to a jury without any expert testimony (and, as shown below, without any evidence) should be rejected.

**5. SMUG Is Barred From Recovering Goodwill or Reputational Damages Because It Has Presented No Evidence Of Such Losses, And The Undisputed Evidence From SMUG's Own Witnesses Demonstrates That It Has None.**

SMUG's complete failure to provide the required computation for its alleged goodwill or reputational losses, and to provide the required (and promised) expert report to substantiate them, is not accidental oversight. SMUG has no evidence whatsoever of any reputational losses, and, instead, the testimony of its own witnesses refutes SMUG's conclusory and self-serving allegations of goodwill harm.

Whereas a for-profit entity's reputational losses are measured in terms of lost profits, a non-profit's goodwill damages are measured in lost members, lost donors or lost donations. *See Am. Gold Star Mothers v. Nat'l Gold Star Mothers*, 191 F.2d 488, 489 (D.C. Cir. 1951) ("reputation and good will" of charitable institutions are legally protected against "anything which tends to divert membership or gifts from them"). Here, the undisputed testimony from SMUG's Executive Director is that SMUG's budgets and receipts exploded exponentially – **by several thousand percent** – from 2007 to 2015, with enormous increases year-over-year. (Mugisha 61:20-64:24; 66:17-67:11).[28] SMUG's Executive Director testified that the more SMUG was in the news, the more its leaders were able to travel internationally, the more they were able to fundraise, and the more they were able to attract donors and donations. (Mugisha 67:15-69:14). SMUG's 30(b)(6)

[28] The previously filed transcript of the Mugisha deposition contains redacted financial figures, because SMUG has designated them as confidential. The relevant pages cited here are attached to the Gannam Declaration as Exhibit 9, and filed under seal, without redactions.

designee also testified that SMUG's membership has almost **doubled** between 2004 and 2015, going from 10 to 18 organizational members. (Onziema 28:20-25; 69:21:25; 111:14-19). And, SMUG's designee also testified that "**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**." (MF ¶ 164) (emphasis added).[29]

In the face of this sworn testimony, SMUG now baldly claims that it "has faced significant harm to its reputation." (PSOF ¶ 209). The only "evidence" of this "harm" that SMUG brings forth, is the conclusory and self-serving declaration of Onziema – the same witness whom SMUG designated to testify at its 30(b)(6) deposition. (*Id*.) But Onziema's declaration, hand-crafted for purposes of summary judgment, is devoid of any facts to support the bald assertion that SMUG's goodwill or reputation has been harmed. (*Id*.) SMUG does not identify a single donor or donation lost on account of its allegedly harmed reputation. (*Id*.) Nor does SMUG identify a single lost member on account of its reputation. (*Id*.) SMUG does not identify a single lost opportunity on account of its reputation. (*Id*.) Nor does SMUG establish what its reputation was before Lively, what its reputation is now, and the extent to which it was allegedly diminished. (*Id*.) Nor does SMUG try to quantify this alleged loss in any way, with expert testimony or otherwise. (*Id*.) In other words, SMUG does not provide one shred of evidence based upon which a jury could

[29] SMUG's designee now submits an after-the-fact declaration, drafted by the same lawyers present at his deposition, in which he claims he did not really mean what he said. (Onziema Decl., dkt. 291, ¶ 63). "[I]t is well settled … that as a general proposition, a party may not submit an affidavit or declaration at the summary judgment stage contradicting its earlier deposition testimony." *Caraustar Indus., Inc. v. N. Georgia Converting, Inc.*, No. CIV 304CV187-H, 2006 WL 3751453, *6 (W.D.N.C. Dec. 19, 2006) (citing *Rohrbourgh v. Wyeth Labs., Inc.*, 916 F.2d 970, 975 (4th Cir. 1990) (party may not create material issue of fact by submitting affidavit inconsistent with prior deposition testimony)).

evaluate its bare allegation that its reputation was harmed, or upon which a jury could even begin to quantify that supposed harm. (*Id*.)

On this record, the Court cannot allow SMUG's claim for reputational damages to go to a jury. "[B]are allegations that [SMUG] was harmed in the … community are insufficient." *Agric. Servs. Ass'n, Inc. v. Ferry-Morse Seed Co.*, 551 F.2d 1057, 1072 (6th Cir. 1977) (reversing award of goodwill damages because "[t]estimony was lacking on which financial institutions" refused to deal with plaintiff on account of allegedly tarnished reputation). "[A]n award for damage to goodwill or business reputation must be supported by **specific evidence**." *Dresser Indus., Inc., Waukesha Engine Div. v. Gradall Co.*, 965 F.2d 1442, 1448 (7th Cir. 1992) (emphasis added). "Mere self-serving testimony is not enough to prove damage to a plaintiff's goodwill." *Id*. (holding that evidence was insufficient to support a reputational damage award, where, as here, plaintiff merely claimed that its corporate goodwill was harmed, but "did not even venture to put a dollar figure on [the reputational] loss, much less support [the] testimony with **concrete** evidence") (emphasis added). "It would [be] sheer speculation on the jury's part to try to establish a figure for lost goodwill," based only on self-serving statements "that plaintiff's customer [or, here, donor or member] base fell drastically as a result" of alleged reputational harm. *Roundhouse v. Owens-Illinois, Inc.*, 604 F.2d 990, 995 (6th Cir. 1979) (affirming directed verdict on reputational damage claim).

### 6. SMUG Is Constitutionally Barred From Recovering Goodwill or Reputational Damages Because It Cannot Meet the Exacting First Amendment Standard of *New York Times v. Sullivan*.

Yet another independent ground for SMUG's inability to prove or recover goodwill or reputational damages is SMUG's inability to meet the exacting constitutional defamation standard set by the Supreme Court in *New York Times v. Sullivan*, 376 U.S. 254 (1964). Irrespective of whether they bring a claim for defamation or some other non-defamation tort, public figures may

not recover defamation-type damages, such as reputational injury, arising from speech or expressive activities "without showing in addition that the publication contains **a false statement of fact** which was made with 'actual malice,' *i.e.*, **with knowledge that the statement was false** or with reckless disregard as to whether or not it was true." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (emphasis added) (applying "the New York Times standard" to non-libel claim of "intentional infliction of emotional distress").

The First Circuit has held that reputational damages (along with emotional distress) are subjected to the *New York Times* standard even if they are not brought within a defamation claim:

> the **type of damages sought** bears on the necessity of constitutional safeguards. In *Hustler*, the plaintiff sought emotional distress damages, which (**along with reputational damages**) are properly compensable in defamation actions, and **are thus subject to the same "constitutional libel standards."**

*Veilleux v. Nat'l Broad. Co.*, 206 F.3d 92, 127–28 (1st Cir. 2000) (emphasis added) (quoting *Cohen v. Cowles Media Co.*, 501 U.S. 663, 671 (1991)). This is because "[p]laintiffs should not be permitted to 'end-run' around the First Amendment by seeking emotional distress [or reputational] damages under the lower state law standards of proof." *Veilleux*, 206 F.3d at 126. In *Veilleux*, the First Circuit agreed with the Fourth Circuit that, irrespective of how a claim is labeled, "attempt[ing] to recover 'defamation-type' damages without satisfying the stricter First Amendment standards of a defamation claim was barred by *Hustler." Veilleux*, 206 F.3d at 128 (quoting *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999)). And in *Food Lion*, the Fourth Circuit invalidated reputational damages in a non-defamation tort claim, because "*Hustler* confirms that **when a public figure plaintiff uses a law to seek damages resulting from speech covered by the First Amendment, the plaintiff must satisfy the proof standard of *New York Times***." *Food Lion*, 194 F.3d at 523 (emphasis added).

That SMUG is a public figure is not debatable. *See, e.g., Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 592-93 (1st Cir. 1980) (holding that a corporation can be a public figure required to satisfy the *New York Times* actual malice standard if it is involved in a public controversy and "when the power, prominence, or involvement of the company in respect to the controversy — or its public efforts to influence the results of such controversy — were such as to merit public figure treatment"); *Bose Corp. v. Consumers Union of U.S., Inc.*, 692 F.2d 189, 194-95 (1st Cir. 1982) *aff'd,* 466 U.S. 485 (1984) (recognizing that a corporation can be a public figure for purpose of the *New York Times* standard). Accordingly, even if SMUG had sufficiently disclosed in discovery and substantiated its alleged reputational damages to send them to a jury (which it did not), SMUG would still have to satisfy the exacting *New York Times* standard, which it categorically cannot do. This is so even though SMUG is not bringing a defamation claim, because of the type of remedy SMUG seeks.

And, critically, this is so notwithstanding SMUG's profoundly wrong protestation that Lively's speech is not protected by the First Amendment. "[I]t is clear that speech may altogether lack constitutional protection, yet still be subjected to the constitutional defamation standards of *New York Times." Smithfield Foods, Inc. v. United Food & Commercial Workers Int'l Union*, 585 F. Supp. 2d 815, 821 (E.D. Va. 2008) (citing *Linn v. United Plant Guard Workers of Am., Local 114*, 383 U.S. 53, 63 (1966)). "[T]he salient constitutional inquiry pertains to the type of damage sought, and **does not hinge on the protected or unprotected nature of the Defendant's conduct**." *Smithfield Foods*, 585 F. Supp. 2d at 821 (emphasis added) (citing *Veilleux*, 206 F.3d at 127). In *Food Lion*, the Fourth Circuit expressly rejected the argument that unlawful speech and conduct need not pass *New York Times* muster, and invalidated reputational damages on *New York Times* grounds, even though the underlying conduct connected with the speech was decidedly

unlawful (*i.e.*, trespass). *Food Lion*, 194 F.3d at 524. And, in *Smithfield Foods*, the court likewise subjected reputational damages to the *New York Times* standard (also in a non-defamation context), notwithstanding the claim that the underlying speech was unlawful (*i.e.*, extortion), and even assuming for purposes of argument that it was extortionate. *Smithfield Foods*, 585 F. Supp. 2d at 821-22. Accordingly, the Court need not even decide that Lively's speech and conduct is ultimately protected by the First Amendment in order to subject SMUG's reputational damage claims to the *New York Times* standard, and dispose of them.

Application of the *New York Times* standard to SMUG's reputational "damages" spells their doom. "A plaintiff required to prove actual malice under the *New York Times v. Sullivan* standard must do so with "convincing clarity," [that is, with] "clear and convincing proof." *Bose Corp.*, 692 F.2d at 195 (First Circuit employs the clear and convincing standard from *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974)). The First Circuit has noted "the almost decisive amplitude of breathing space surrounding defamatory falsehood, once a plaintiff is obliged to meet the *New York Times* standard," which, "in practical effect [means] a near-immunity from defamation judgments." *Bose*, 692 F.2d at 195 (internal alterations and quotes omitted).

First, SMUG has no "clear and convincing proof" that Lively made any actionable statements of **fact** leading to SMUG's (non-existent) reputational damages. "Only statements of fact are actionable under the tort for defamation. Statements of pure opinion are protected under the First Amendment to the United States Constitution." *Yong Li v. Reade*, 746 F. Supp. 2d 245, 252–53 (D. Mass. 2010). "[A] derogatory statement of opinion rather than a statement of fact [] cannot constitute defamation." *Paren v. Craigie*, No. CIV.A. 04-30127-KPN, 2006 WL 1766483, at *13 (D. Mass. June 15, 2006). Here, for all of the writings, speeches and statements of Lively that SMUG contorts and takes out of context, SMUG does not and cannot identify any statements

of fact that Lively made about SMUG which are causally connected to SMUG's claimed goodwill damages. SMUG cannot recover defamation-type damages against Lively based on differences of opinion, no matter how strong.

Second, SMUG also lacks "clear and convincing proof" that Lively has made any actionable false statements of fact **specifically about SMUG**. "Defamation of a large group gives rise to no civil action on the part of an individual member of the group… ." *Arcand v. Evening Call Pub. Co.*, 567 F.2d 1163, 1164 (1st Cir. 1977). "[A]n individual member of the defamed class cannot recover for defamation unless 'the group or class is so small that the matter can reasonably be understood to refer to the member, or ... the circumstances of publication reasonably give rise to the conclusion that there is particular reference to the member.'" *Operation Rescue Nat. v. United States*, 975 F. Supp. 92, 100 (D. Mass. 1997), *aff'd*, 147 F.3d 68 (1st Cir. 1998) (quoting *Eyal v. Helen Broadcasting Corp.*, 411 Mass. 426, 430 n. 6, 583 N.E.2d 228 (1991)).

Here, SMUG's own testimony is unrebutted that there are more than 415,000 LGBTI persons in Uganda, of whom only about 500 (one-tenth of one percent) belong to SMUG's organizational members. (MF ¶ 193). SMUG also testified that it does not represent the LGBTI community at large in Uganda. (MF ¶ 194). To be sure, SMUG takes issue with many things it claims Lively has said about homosexuals in general, perhaps even homosexuals in Uganda, but SMUG does not and cannot identify any false statements of fact that Lively made **about SMUG**. Indeed, the undisputed evidence here is that Lively had no idea what or who SMUG was until SMUG sued him in 2012. (Lively 302:23 – 303:6). If Lively indisputably did not know about SMUG when he visited Uganda in 2002 and 2009, then he could not have made any statements specifically about SMUG that would have caused SMUG's alleged reputational injuries.

Third and last, SMUG also lacks "clear and convincing proof" that Lively has caused any of its claimed reputational injuries by making false statements of fact about SMUG **with actual malice**. "The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law" because "judges, as expositors of the Constitution, have a duty to independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of actual malice." *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 685–86 (1989) (internal alterations and quotes omitted). "The standard is a **subjective** one-there must be sufficient evidence to permit the conclusion that **the defendant actually had a high degree of awareness of probable falsity**." *Id.* at 688 (emphasis added) (internal alterations and quotes omitted). "As a result, failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard." *Id*. The burden of proving actual malice on the part of the defendant, which is undoubtedly a very difficult and demanding burden, must be shouldered entirely by the plaintiff. *Grzelak v. Calumet Pub. Co.*, 543 F.2d 579, 582 (7th Cir. 1975).

SMUG has adduced no clear and convincing proof of any statement by Lively about SMUG, as to which Lively subjectively held a "high degree of awareness of probable falsity." *Harte-Hanks*, 491 U.S. at 685-86. SMUG spent two days taking Lively's deposition, and received thousands of documents from Lively, but has not adduced a single statement that comes even close to meeting its demanding burden.

For all these reasons, SMUG's reputational damages fail as a matter of law.

**7. SMUG Is Barred From Recovering Non-Economic Damages, Including Exemplary or Punitive Damages, Because SMUG Cannot Recover Economic Damages.**

Finally, the Due Process Clause of the Fourteenth Amendment to the United States Constitution forecloses SMUG's claims for non-economic damages, including any claims for punitive or exemplary damages, because it requires all such damages to be proportional to **provable** and **recovered** economic damages:

> Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. In [*Pacific Mut. Life Ins. Co. v.*] *Haslip,* [499 U.S. 1 (1991),] in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. … [C]ourts must ensure that the measure of punishment is both reasonable and **proportionate** to the amount of harm to the plaintiff **and to the general damages recovered**.

*State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 425-26 (2003). *See also, BMW of N.A., Inc. v. Gore*, 517 U.S. 559, 580 (1996) ("The principle that exemplary damages must bear a 'reasonable relationship' to compensatory damages has a long pedigree.")

Here, as already demonstrated, SMUG is precluded from recovering any economic damages. Whether the ratio between "the general damages [that can be] recovered" by SMUG (*i.e.*, zero) and any exemplary or punitive damages is 1:1, or 9:1, or even a constitutionally impermissible 9,000:1, the end result is the same, because any factor of zero is still zero. SMUG is precluded from recovering punitive, exemplary or other non-economic damages.

**C. Because All Of SMUG's Claims Sound In Tort, SMUG's Failure to Substantiate Damages Forecloses Its Claims As A Matter Of Law.**

As is clear by now, there are numerous separate and independent bars to SMUG's recovery of any damages, irrespective of whether SMUG designates them as "economic" or "non-economic." Because SMUG cannot prove or recover any damages, all of its claims in this action

must necessarily fail, because they all sound in tort and they all require damages as an essential element. (*See* Lively MSJ Memo, dkt. 257 at 130-133).

SMUG does not dispute that each of its claims requires proof of damages as an essential element. (Opp. at 91-93). Not one of SMUG's cited cases holds that tort claims under the Alien Tort Statute, or under Massachusetts negligence and conspiracy common law, can survive without any evidence of any damages. (*Id*.) SMUG's entire argument, then, is built on its irrelevant contention that its tort claims do not require "**economic** damages." (*Id*.) That argument falls as easily as the strawman which holds it together, because SMUG cannot prove economic or non-economic damages. Summary judgment is therefore appropriate not only on SMUG's damages claims, but on SMUG's entire claims.

## VI. SMUG'S CLAIMS ARE BARRED BY THE ACT OF STATE DOCTRINE EVEN THOUGH SMUG IS NOT SEEKING A JUDGMENT AGAINST UGANDA.

### A. SMUG's Claims Necessarily Require Consideration Of The Legality Of Ugandan Law And Official Acts.

"Every 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); *W.S. Kirkpatrick & Co., Inc. v. Envt'l Tectonics Corp., Int'l*, 493 U.S. 400, 406 (1990) ("the acts of foreign sovereigns taken within their own jurisdiction shall be deemed valid"). SMUG attempts to circumvent the import of the act of state doctrine by asserting that it is not questioning the validity of any foreign government acts, only seeking damages from a private individual who procured their injuries through foreign government actors. (SMUG Opposition at 118-19). However, "[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." *Kirkpatrick*, 493 U.S. at 406 (bold emphasis added; italics in original). The outcome of SMUG's claims are entirely dependent upon

a finding by this Court that the **effect** of Ugandan law (*e.g.*, the AHA), and of the acts of Ugandan government agencies (*e.g.*, the Ministry of Ethics and Integrity), and of the acts of Ugandan government officials (*e.g.*, Member of Parliament David Bahati, Minister Nsaba Buturo, and Minister Stephen Lokodo), was "persecution" in violation of international law. SMUG makes no bones about its claim in this lawsuit that the sovereign government of Uganda is chiefly responsible for the alleged persecution:

> In the Ugandan persecutory conspiracy, **it was the Ministry of Ethics and Integrity, through Buturo, and later, Lokodo, that carried out the violations of Plaintiff's rights** and those of its member organizations and others in Uganda's LGBTI community.

(Opp. at 77) (emphasis added).

SMUG cannot prevail in this lawsuit, unless this Court finds that the sovereign government of Uganda has, in fact, persecuted SMUG in violation of international law. This is because SMUG's theory of liability against Lively is premised and dependent on its claim that Lively conspired with, and aided and abetted, **the sovereign government of Uganda** (and its official agencies and their government leaders) to persecute SMUG. It is axiomatic that secondary liability is premised on the liability of the principal actors. *See e.g.*, *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1158 (11th Cir. 2005) (holding that secondary liability for, among other things, crimes against humanity requires showing that the principal committed the crime); *Doe v. Drummond Co.*, No. 7:09-CV-01041-RDP, 2009 WL 9056091, at *8 (N.D. Ala. Nov. 9, 2009) (secondary liability under the ATS requires showing that "the principal violated international law").

Indeed, the ATS requires a finding that there has been a tort "committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. If the AHA does not represent a violation of international law, then any advocacy undertaken in support of its passage necessarily cannot be in violation of international law. And if the Ugandan Ministry of Ethics and Integrity

has not persecuted SMUG, then Lively could not possibly be liable for non-existent persecutory acts. Thus, this Court **must** necessarily undertake consideration of whether Ugandan law and official Ugandan government acts are lawful or in violation of international law. Any such **consideration** (irrespective of ultimate finding) places SMUG's claims squarely within the act of state doctrine. *See, e.g.*, *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).

SMUG's claims rise and fall on whether the alleged actions of the Ugandan government and its officials were unlawful, and this Court must so find in order for SMUG to have any claims whatsoever against Lively. This Court would not be merely "impugning" the acts of a sovereign government, its officials and its law, as SMUG claims (Opp. at 118-19), it would be passing on the validity and legality of those acts and law. In *Kirkpatrick*, the Supreme Court held the act of state doctrine inapplicable because "what the court's factual findings may suggest as to the legality of the Nigerian contract, **its legality is simply not a question to be decided in the present suit**." *Kirkpatrick*, 490 U.S. at 406 (emphasis added). But, here, the legality of the acts of Uganda and its officials are squarely in question. This Court must declare those alleged acts to have been acts of persecution in order for SMUG to have sustained any damages from Lively's alleged "procurement" of those alleged acts. The act of state doctrine bars any such consideration.

SMUG's contention that the act of state doctrine is inapplicable because SMUG is not seeking a **judgment** against any Ugandan law or official is without merit. Indeed, even in litigation involving only private parties and no government officials, the act of state doctrine still precludes this Court's consideration of any claims requiring an inquiry into the "practical effect" of a foreign government's law to the plaintiff's alleged injuries. *See Soc'y of Lloyds*, 457 F.3d at 102-03

(holding that considering legality of a private entity's bylaws under a foreign government's statutory requirements was prohibited by the act of state doctrine).

The scenario here is akin to that at issue in *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019 (W.D. Wash. 2005), *aff'd*, 503 F.3d 974 (9th Cir. 2007), where the identical argument that SMUG makes here was soundly rejected. In *Corrie*, private plaintiffs brought ATS claims against Caterpillar, a private entity, alleging that its sale of bulldozers and equipment to the government of Israel assisted that government in carrying out crimes against humanity against Palestinians in Gaza. *Id.* at 1023-24. Plaintiffs only sued Caterpillar, and did not seek any judgment or relief against the government of Israel or its officials. *Id.* They argued, as SMUG does here, that the act of state doctrine did not apply because they were not directly challenging the conduct of a foreign government or seeking to enjoin it. *Id*. at 1032. The court, however, disagreed and dismissed the lawsuit on act of state grounds, because, as SMUG does here, "Plaintiffs claim that Israel's official policy violates international law," and "[t]his lawsuit challenges the official acts of an existing government … ." *Id*. Said the *Corrie* court:

> The Act of State Doctrine, which **precludes United States courts from judging the validity of a foreign sovereign's official acts**, also bars adjudication of Plaintiffs' claims.

*Id*. (emphasis added). In affirming the district court on a different ground (*i.e.*, the political question doctrine), the Ninth Circuit observed that "Plaintiffs may purport to look no further than Caterpillar itself, but resolving their suit will necessarily require us to look beyond the lone defendant in this case and towards the policy interests and judgments of the United States government." *Corrie v Caterpillar, Inc.*, 503 F.3d 974, 984 (9th Cir. 2007). *See also, Sikhs for Justice v. Nath*, 893 F. Supp. 2d 598, 614 (S.D.N.Y. 2012) (denying motion for default because act of state defense asserted by private plaintiff was facially meritorious, and rejecting argument that the doctrine has no application in private party suits) ("Plaintiffs … argue that the INC, as a private entity, cannot

apply the act of state doctrine to the instant case. … Here, the Plaintiffs have alleged that the harms they suffered were caused by official public acts of the Indian government controlled by the INC and performed in India pursuant to official governmental orders. … Thus, the act of state doctrine may well be a facially meritorious defense to the Plaintiffs' claims and may require an analysis of India's alleged governmental actions.")[30]

Finally, SMUG's hyperbolic contention that application of the act of state doctrine here would represent a cataclysmic destruction of "the entire architecture of international refugee law" is without any merit. (Opp. at 121). The application of the act of state doctrine on strikingly similar facts eleven years ago in *Corrie* has not destroyed international refugee law. The doctrine has no application in asylum and non-refoulement cases because the relevant inquiry is entirely different. Refugee or non-refoulement protection is focused not on the actions of the government from which an individual seeks protection, but on a "well-founded fear of persecution"—*i.e.*, the subjective beliefs of the asylum seeker. 8 U.S.C. § 1101(a)(42)(A). In asylum and non-refoulement cases, the Supreme Court and the First Circuit have recognized that the relevant inquiry focuses on the beliefs of the asylum seeker. *See, e.g.*, *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 428-31 (1987)

[30] The district court opinion relied upon by SMUG, *Doe v. Exxon Mobil Corp.*, 69 F. Supp. 3d 75, 88 (D.D.C. 2014) (Opp. at 120) is distinguishable on the facts. There, "Plaintiffs [did] not allege that Exxon's security forces, while admittedly soldiers in the Indonesian military, injured them **pursuant to official policies of the GOI** [Government of Indonesia] or orders from military commanders." *Id*. at 88 (emphasis added). The court distinguished that situation from those involving official acts by high-ranking government officials pursuant to state policy. *Id*. And, the court specifically enumerated "[a]n illustrative list" of official acts that would be subject to the act of state doctrine, such as "**passing a law**, issuing an edict or decree, or **engaging in formal government action** … ." *Id*. at 87 (emphasis added). This is precisely the kind of official government conduct attacked by SMUG here, from the consideration and passing of the AHA, to the official acts of Ugandan's Ministry of Ethics and Integrity, and Uganda's highest government officials and Members of Parliament, which SMUG claims were acting pursuant to official state policy. (E.g., Opp. at 5) (SMUG claims that "the attacks are systematic because they are implemented broadly, **including through the execution of state policy**.") (emphasis added).

(discussing the asylum and refoulement obligations of the United States and holding that, under the Immigration and Naturalization Act, the focus is on the subjective beliefs and well-founded fear of the asylum seeker, not on the acts of the government from which the refugee fled); *Perez-Alvarez v. I.N.S.*, 857 F.2d 23 (1st Cir. 1988) ("Although objective factors are relevant, there is under the statute an obvious focus on the individual's subjective beliefs."). Even under the requirement that an asylum-seeker's beliefs be well-founded, the focus remains properly on the subjective beliefs of that refugee. *Cardoza-Fonseca*, 480 U.S. at 431 ("That the fear must be well-founded **does not alter that obvious focus on the individual's subjective beliefs**.") (emphasis added). Where, as here, the inquiry requires determinations concerning the validity and effect of the acts of the Ugandan government and its officials, *W.S. Kirkpatrick*, 493 U.S. at 406, the act of state doctrine precludes this Court consideration of SMUG's claims. Such application poses no threat to international refugee or non-refoulement law, and SMUG's contentions to the contrary find no support in the law.

**B. *Jus Cogens* Norms Do Not Preclude Application Of The Act Of State Doctrine.**

SMUG's argument that *jus cogens* norms preclude application of the act of state doctrine in this case (Opp. at 121-22) is without merit, for two reasons. First, acceptance of SMUG's argument would require the Court to elevate persecution on sexual orientation and gender identity grounds even further than the Court did in its Order denying Lively's motion to dismiss, to the "elite subset" of *jus cogens* norms that "enjoy the highest status within international law." *Siderman de Blake v. Republic of Argentina,* 965 F.2d 699, 715 (9th Cir. 1992). No other court has so held. While SMUG claims that some "crimes against humanity" have achieved *jus cogens* status, neither its expert's deposition, nor his scholarly writing, nor any of the cases SMUG relies

upon have ever concluded that persecution generally, and certainly not persecution on sexual orientation or gender identity grounds, rises to the level of *jus cogens*.

Thus, the cases upon which SMUG relies for the proposition that *jus cogens* crimes displace the act of state doctrine are inapposite, because they involve historically accepted and applied *jus cogens* norms. *See e.g., Warfaa v. Ali*, 33 F. Supp. 3d 653, 662 (E.D. Va. 2014), *aff'd*, 811 F.3d 653 (4th Cir. 2016) (cited at Opp., p. 122) (declining to apply the act of state doctrine in a case involving torture, because "the right to be free from torture 'is fundamental and universal, a right deserving of the highest status under international law, a norm of *jus cogens*.'"); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992) (cited at Opp., p. 122) (declining to apply the act of state doctrine to torture because "all states believe it is wrong, all that engage in torture deny it, and **no state claims a sovereign right to torture its own citizens**").

Second, SMUG's *jus cogens* argument falters because courts have still found that the immunity provided to sovereign governments and government officials is not automatically stripped when the alleged actions violate *jus cogens* norms. *See, e.g., Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1032 (W.D. Wash. 2005), *aff'd*, 503 F.3d 974 (9th Cir. 2007) (applying act of state doctrine and dismissing claims for extrajudicial killing, war crimes and cruel, inhuman, or degrading treatment); *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1173 (D.C. Cir. 1994) (rejecting argument that "a foreign state that violates [*jus cogens* norms] waives its right to be treated as sovereign"); *Konowaloff v. Metro. Museum of Art*, 702 F.3d 140, 145-46 (2d Cir. 2012) (act of state doctrine precludes review of "the validity of the foreign state's act … even if the complaint alleges that the taking violates customary international law").

In sum, this Court is precluded from considering the validity and effect of Ugandan law and the acts of Ugandan government agencies and high ranking officials. Accordingly, summary judgment is warranted.

## VII. SMUG'S EVIDENCE FAILS TO SUSTAIN ITS ATS CLAIMS.

### A. SMUG's Evidence Fails To Show A Violation Of Any Universally Accepted And Clearly Defined Norm By Lively.

Notwithstanding its attempt to construct a sufficiently clear and universal norm for a cognizable ATS claim, SMUG has failed to provide sufficient admissible evidence to permit this Court to maintain jurisdiction over the claim. As shown in Lively's MSJ Brief, it is not enough for SMUG to point to a binding international law norm against "persecution" or even persecution based on sexual orientation or gender identity. (MSJ Br. at 68.) Rather, SMUG must point to a specific, universal, and obligatory norm criminalizing Lively's specific conduct. (*Id.*)

> For a violation of international law to be actionable under the ATS, the 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.** High levels of generality will not do.
>
> To determine whether the applicable international law is sufficiently definite, **we look to the context of the case before us and ask whether established international law had already defined defendants' conduct as wrongful in that specific context.** Claims lacking sufficient specificity must fail.
>
> We do not look at these ATS cases from a moral perspective, but from a legal one. . . .

*Mamani v. Berzain*, 654 F.3d 1148, 1152 (11th Cir. 2011) (citations omitted).

Now that SMUG, for the first time, has undertaken to define exactly (sort of) what Lively did that makes him liable for criminal persecution, it is clear that there is no norm of "established international law [which has] already defined [Lively's] specific conduct as wrongful in that specific context." SMUG informs the Court that Lively's role in the alleged criminal persecution

was solely as one of the "chief strategists," while the actual "persecution" was "executed by his co-conspirators." (Opp. at 49.) Thus, SMUG no longer pretends any direct persecutory conduct by Lively. When the whole of Lively's actual conduct (MSJ Br. at 66-71) is viewed in the specific context of the record now before the Court, it is clear that Lively's conduct does not violate any international law norm cognizable under the ATS, even under an aiding and abetting theory.[31]

It is likewise clear that SMUG has failed to construct an international law norm recognizing conspiracy or joint criminal enterprise liability for ATS purposes, and certainly not in the specific context of this case. (*See* MSJ Br. at 75-80.) SMUG's Opposition simply failed to overcome the line of precedent foreclosing such secondary liability theories under the ATS, including *Hamdan v. Rumsfeld*, 548 U.S. 557, 610-611 (2006); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 260 (2d Cir. 2009); and *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 263 (S.D.N.Y. 2009). Accordingly, summary judgment is due on all of SMUG's ATS claims.

### B. SMUG's Evidence Fails To Satisfy The Elements Of Criminal Persecution As To Lively.

SMUG's "evidence" adduced in its D-MF and PSOF fails to satisfy the elements of the international crime against humanity of persecution. (*See* MSJ Br. at 151-165.) The elements of the criminal persecution, as articulated by this Court, are (1) the "'intentional and severe deprivation of fundamental rights contrary to international law, by reason of the identity of the group or collectivity,'" which is (2) "'part of a widespread or systematic attack directed against

[31] SMUG makes a straw man argument against the idea that "each single act in furtherance of the offense . . . had to separately and independently violate a norm of customary international law." (Opp. at 44 n.15.) This, of course, is an argument Lively never made. Lively recited all of his material conduct, and showed that it violated no international norm sufficiently "specific, universal, and obligatory." (MSJ. Br. at 68.) Even adding the "evidence" adduced by SMUG in its Opposition (as opposed to SMUG's exaggerated commentary thereon), Lively's conduct, as a whole, violates no cognizable international law norm.

any civilian population.'" (*Id.* (quoting Rome Statute art. 7(1)(h), 7(2)(g)).) Furthermore, for aiding and abetting liability for persecution, it must be proved that Lively "'acted with the "purpose" to advance the Government's human rights abuses.'" *Mastafa v. Chevron Corp.*, 770 F.3d 170, 193–94 (2d Cir. 2014) (quoting *Presbyterian Church*, 582 F.3d at 260); *see also Balintulo v. Ford Motor Co.*, 796 F.3d 160, 167 (2d Cir. 2015) ("Knowledge of or complicity in the perpetration of a crime—without evidence that a defendant purposefully facilitated the commission of that crime—is thus insufficient to establish a claim of aiding and abetting liability under the ATS.")

With respect to Lively, SMUG no longer asserts that Lively committed persecution himself, and SMUG has adduced no evidence that he personally intended or agreed to the execution of any of the fourteen acts of purported persecution on which SMUG's suit is based, thereby foreclosing aiding and abetting liability under the applicable "purpose" standard. (*See* section III, *supra*). Furthermore, SMUG has failed to supplant its "I don't knows" with actual evidence of causation by Lively. (*See* section IV, *supra*.) SMUG has otherwise failed to adduce evidence satisfying the other elements of its persecution claims, requiring summary judgment on its ATS claims.

## VIII. SMUG CANNOT RESCUE ITS STATE LAW CLAIMS FROM FAILING ON EITHER LIMITATIONS GROUNDS OR THE MERITS.

SMUG's state law claims cannot survive summary judgment. This Court is precluded from exercising jurisdiction over SMUG's state law claims because they are out of time. Even if such claims were brought within the limitations period – which they were not – SMUG's conspiracy and negligence claims fail as a matter of law. Summary judgment is therefore appropriate on SMUG's state law claims.

### A. SMUG's State Law Claims Are Out Of Time.

#### 1. SMUG Has Adduced No Evidence That Its Claims Did Not Accrue In 2002.

SMUG agrees that the statute of limitations on its state law claims is three years. (Opp. at 105). Lively maintains that the accrual date is 2002, either because of the application of the "first overt act" theory (MSJ Brief at 173-174), or, less controversially, because of SMUG's admission that its directors and officers were aware of Lively's 2002 visit to, and speeches and work in, Uganda **back in 2002** (*i.e.*, 14 years ago). (MF ¶ 195). SMUG does not respond to Lively's Material Fact ¶ 195 (dkt. 270, p. 43), and therefore admits it. L.R. 56.1. Even worse for SMUG, it brings forth no **evidence** whatsoever that it was not aware of both its alleged persecution injury and the source (supposedly Lively) in 2002, when its leaders saw and heard Lively in Uganda, or even in 2005 when the first of the fourteen allegedly persecutory acts occurred. As this Court has previously held, once Lively filed a summary judgment motion contending that SMUG's claims are time-barred, it was **SMUG's burden** to bring forth record **facts and evidence** to show that its lawsuit was timely, and it was not Lively's burden to further negate it:

> The burden upon a non-moving party where the summary judgment motion is based upon the statute of limitations is no different. …When a defendant files a motion contending that plaintiff's claims are time-barred (as here), the *plaintiff* bears the burden of pointing to facts of record that would justify a factfinder in concluding that the suit is timely.

*Church v. Gen. Elec. Co.*, No. CIV.A. 95-30139-MAP, 1997 WL 129381, *4 (D. Mass. Mar. 20, 1997) (PONSOR, J.) (italics emphasis in original). There is no sworn declaration, no deposition testimony and no other competent evidence adduced by SMUG from which a fact finder could conclude that SMUG did not know in 2002, 2005, 2007 or 2008 that Lively was the source of its claimed "persecution." All that exists are the vague insinuations of counsel to that effect, but this Court held in *Church* that those are not sufficient to escape summary judgment:

> That **evidence** [required from a plaintiff to escape summary judgment on limitations grounds] **must be "definite, competent evidence."** "Optimistic **conjecture, unbridled speculation, or hopeful surmise will not suffice**."

*Church*, 1997 WL 129381, at *4 (emphasis added) (quoting *Vega v. Kodak Caribbean, Ltd.*, 3 F.3d 476, 479 (1st Cir. 1993)). On this evidentiary failure alone, summary judgment on SMUG's state law claims is warranted. *Id*.

**2. SMUG Has Admitted That It Knew, Prior To March 14, 2009, That Lively Was The Source Of Its Claimed Persecution Injuries, And Has Failed To Adduce Any Evidence To Rebut Its Own Admissions.**

Even assuming that SMUG had adduced some evidence of justifiable ignorance until 2009, which would further evidence the futility of SMUG's attempts to causally connect Lively to everything that happened prior to 2009, the record evidence is now also undisputed that SMUG was both aware of Lively and believed Lively was persecuting SMUG, prior to the cutoff date of March 14, 2009 (*i.e.*, three years prior to the filing of this lawsuit).

The record evidence is replete with examples of why SMUG's claims are time-barred. Indeed, SMUG does not dispute that it was well aware, prior to March 14, 2009, of Lively's alleged "participation" in its purported "conspiracy." (MF ¶¶ 196-97) (admitting that SMUG 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); (*id.* ¶ 198) (admitting that **upon hearing Lively's speeches prior to March 7, 2009, SMUG believed it was being persecuted and harmed by Lively)**; (*id.* ¶ 199) (admitting that SMUG was even considering suing Lively while Lively was still present in Uganda, prior to March 7, 2009). SMUG does not and cannot contradict any of these admissions with record facts. (Dkt. 270, p. 43). It completely ignores MF ¶¶ 195, 196, 197, 199 and 200 (*id*.), and therefore admits them. L.R. 56.1.

SMUG also admits MF ¶ 198 (SMUG believed it was being persecuted and harmed by Lively as of the March 5-7, 2009 conference at the latest), the only paragraph on limitations to

which SMUG responds, because SMUG does not respond with any record **facts and evidence**, but only with the untenable legal position that "belief that one is harmed is different from knowledge of a legal injury." (Dkt. 270, p. 43). Setting aside the legal demerit of SMUG's "legal injury" and "legal claim" argument (Opp. at 105-06) for just another three sentences, the argument fails out of the starting gate on the facts, because SMUG has adduced no record facts whatsoever to demonstrate that it did not know of its "legal injury" or "legal claim" as of March 7, 2009. As the discussion above regarding this Court's holding in *Church* demonstrates, SMUG was required to do no less. Instead, all that SMUG did was to quibble philosophically with Lively that "belief that one is harmed is different from knowledge of a legal injury," without any citation to any record facts (self-serving declaration, deposition testimony or otherwise) from which a trier of fact could conclude that SMUG was oblivious of its "legal injury" or "legal claim" even after March 7, 2009. (Dkt. 270, p. 43).

The discussion of factual inadequacies in SMUG's "legal injury" and "legal claim" theory is, in any event, academic, because no such theory is recognized by the law, and, therefore, the theory cannot resurrect SMUG's state law claims from the limitations grave. SMUG posits an astounding proposition: until a plaintiff has knowledge of its alleged injuries, understands the full extent and scope of those alleged injuries, understands every possible cause of such injuries, and speaks with an attorney concerning all potential avenues and legal theories upon which it may base a "legal claim" for "legal injury," the limitations period cannot commence. (Opp. at 105) ("the fact that Plaintiff was aware of Defendant's anti-LGBTI speech at the March 2009 conference does not mean that it was aware of . . . **the requirements of a legal claim**." (emphasis added)). SMUG's theory finds no support whatsoever in the law. As the First Circuit has recognized, the "limitations period commences **at [the] time of initial injury**, not at a later date when plaintiff learned the full

extent of his injuries." *Price v. Shawmut Bank N.A.*, 39 F.3d 1166, *2 (1st Cir. 1994) (emphasis added); *see also Vander Salm v. Bailin & Assoc., Inc.*, No. 11-40180-TSH, 2014 WL 1117017, *6 (D. Mass. Mar. 18, 2014) ("[a] plaintiff **need not know the full extent of the harm for the limitations period to accrue**.") (emphasis added); *Micromuse, Inc. v. Micromuse, PLC*, 304 F. Supp. 2d 202, 210 (D. Mass. 2004) ("the limitations period begins to run **even if the plaintiff does not know the full extent of his injuries**") (emphasis added); *John Deaudette, Inc. v. Sentry Ins. A Mutual Co.*, 94 F. Supp. 2d 77, 106 (D. Mass. 1999) (same). SMUG's admitted awareness of its claimed persecution injury purportedly caused by Lively, and SMUG's contemplation of suing Lively, all prior to March 14, 2009, dooms its claims under the statute of limitations.

As this Court noted in *Church*, SMUG "cannot slip behind the protection of the discovery rule, however, by putting [its] head in the sand. In other words, a party cannot close its eyes to easily discernable facts." *Church*, 1997 WL 129381, at *5. Here, as in *Church*, "the facts of the record are fatal to any attempt to escape the statute of limitations." *Id.* Since SMUG was considering suing Lively prior to March 14, 2009, SMUG was unquestionably "on reasonable notice of the existence of an injury and its cause [and] **that reality alone is enough to end the discussion**. **That [SMUG] may not have known the full extent of [its] injury does not help**." *Id.* (emphasis added). Here, SMUG argues precisely what this Court rejected in *Church*:

> The question is whether sufficient evidence existed to inform [SMUG] that [Lively] **may have caused [it] injury**. After all, the deadline for filing does not fall upon notification. **Reasonable notice merely triggers a three-year period in which plaintiffs may investigate, during which they have a "duty to discover" the facts needed to bring the lawsuit**.

*Id.* at *6 (emphasis added) (quoting *Catrone v. Thoroughbred Racing Ass'n of N.A., Inc.*, 929 F.2d 881, 887 (1st Cir. 1991)). If knowledge of an injury, and belief that defendant was causing it to the point of wanting to sue that defendant, is not sufficient to "trigger a three-year period" for further

investigation, discovery and filing of the contemplated suit, what could ever suffice? Nothing. Summary judgment on limitations grounds is warranted.

**3. SMUG's Continuing Tort Theory Has Been Rejected By The First Circuit And This District.**

Left with no other alternative, SMUG retreats to a "continuing wrong" or "continuing tort" theory, whereby it claims, in one solitary paragraph devoid of any legal authority, that the alleged continuance of additional persecutory acts after 2009 serves to revive its moribund claims for negligence and civil conspiracy. (Opp. at 106). Massachusetts law firmly forecloses this argument and shuts this door. "In Massachusetts the 'continuing tort' theory has apparently been confined to instances of nuisance or trespass." *White's Farm Dairy, Inc. v. De Laval Separator Co.*, 433 F.2d 63, 67 (1st Cir. 1970) (rejecting application of continuing tort theory to negligence claim as being "far beyond the Massachusetts cases") (holding that dairy farmer's complaints about defective equipment in the week after it was installed triggered accrual of negligence claim, and the limitations period was not subsequently revived when the equipment started to injure individual cows). *See also, John Beaudette, Inc. v. Sentry Ins. A Mut. Co.*, 94 F. Supp. 2d 77, 107 (D. Mass. 1999) ("Massachusetts courts limit this [continuing tort] theory to actions in nuisance and trespass.") (collecting cases) (rejecting application of theory in negligence claim).

In *Vander Salm v. Bailin & Associates, Inc.*, No. CIV.A. 11-40180-TSH, 2014 WL 1117017, *6 (D. Mass. Mar. 18, 2014), this district held that "[a]ny tolling of actions in Massachusetts under the continuing tort doctrine is limited to claims of nuisance and trespass." *Id.* Declining to extend the continuing harm theory to negligence actions, this district held that plaintiffs' stated intent to sue a construction company immediately upon completion of a project was sufficient knowledge to trigger the limitations period for negligence, such that plaintiffs could

not sue the company more than three years later, even though they continued to suffer various different injuries, some of which were well within the limitations period. *Id*.

Finally, applying the same rule to a claim for civil conspiracy under Massachusetts common law (*i.e.*, the same type of civil conspiracy asserted by SMUG), a Massachusetts court in *Levesque v. Ojala*, No. 20034485, 2005 WL 3721859, *16 (Mass. Super. Dec. 8, 2005) rejected the exact same theory asserted here by SMUG, under the exact same claim:

> Injury and damage in a civil conspiracy action flow from the overt acts, **not from the mere continuance of a conspiracy**. **Under plaintiffs' theory a conspiracy action could not be maintained-since no cause of action would have accrued-until it could be told with certainty that the final overt act in furtherance of the conspiracy had been committed**.

*Levesque v. Ojala*, No. 20034485, 2005 WL 3721859, *16 (Mass. Super. Dec. 8, 2005) (internal quotes omitted) (rejecting continuing civil conspiracy theory) (citing *Kadar Corp. v. Milbury*, 549 F.2d 230, 234-35 (1st Cir. 1977)).

Here, SMUG has not sued Lively for trespass or nuisance, but for negligence and civil conspiracy. Accepting SMUG's theory of the statute of limitations would eviscerate the meaning of limitations periods. SMUG's state law claims are late, time barred and cannot be revived.

### B. SMUG's Conspiracy And Negligence Claims Are Unsupported By The Record And The Law.

#### 1. SMUG's Civil Conspiracy Claim Fails For Lack Of Evidence.

Under SMUG's own theory for its civil conspiracy claim, the record evidence is grossly inadequate to establish the elements of this cause of action. (Opp. at 96-98). As SMUG's own authorities indicate, the civil conspiracy claim it alleges requires that "the conspirators, acting in unison, exercise a peculiar power of coercion of the plaintiffs that they would not have had if they acted alone." (*Id.*) (quoting *Limone v. United States*, 497 F. Supp. 2d 143, 224 (D. Mass. 2007)). But, here, the record evidence does not provide any support for the notion that Lively coerced

SMUG (or anyone in Uganda) to do anything. Moreover, the record evidence demonstrates that Lively could not have directed his alleged activities towards SMUG, since it is undisputed that he was not even aware of its existence before SMUG sued him.

First, despite SMUG's citation to its Rule 30(b)(6) deponent's testimony that he "*believed*" Lively might have directed actions at SMUG (Opp. at 98), it has failed to proffer **evidence** that supports such a speculative belief. Such testimony amounts to little more than a self-serving subjective belief that provides no support for overcoming a summary judgment motion on SMUG's civil conspiracy claims. *See, e.g.*, *Caban-Rodriguez v. Jiminez-Perez*, 558 F. App'x 1, 6 (1st Cir. 2014) ("**subjective beliefs** simply **are not evidence** sufficient to counter Defendants' well-supported motion for summary judgment") (emphasis added); *Ameen v. Amphenol Printed Circuits, Inc.*, 777 F.3d 63, 72 (1st Cir. 2015) (subjective beliefs are not enough); *Arroyo-Audifred v. Verizon Wireless, Inc.*, 527 F.3d 215, 220 (1st Cir. 2008) ("subjective belief as to the 'real meaning' of a somewhat ephemeral comment is not a suitable proxy for admissible evidence"). Without record evidence demonstrating that the deponent's subjective belief had factual support, this self-serving statement cannot overcome Lively's summary judgment motion.

Second, the only record evidence that SMUG can produce involves alleged actions of other actors – primarily Ugandan government officials acting on their own. (Opp. at 98-99). Indeed, none of the evidence cited by SMUG even references Lively, much less demonstrates that he was participating in the alleged coercive actions. (*Id.*). In fact, SMUG even admits that the allegedly persecutory or coercive activities were **not carried out by Lively at all or directed by him**. (Opp. at 55) (noting that the police raids and other activities in Uganda "may not be directly attributable to [Lively]"); (*id.* at 56) ("The systematic nature of persecutory events described above have been driven, directed, facilitated, and encouraged by **powerful state actors**") (emphasis added). This is

consistent with SMUG's complete and total disclaimer of any knowledge that Lively provided "any assistance at all" or direction towards the execution of the alleged persecutory acts, which as discussed in section I, *supra*, is binding. The record does not demonstrate that Lively exercised any coercive influence over SMUG or anyone in Uganda, much less that he carried out particular coercion targeted specifically at SMUG.

Finally, contrary to SMUG's threadbare and conclusory assertions of Lively specifically targeting SMUG, the record evidence indicates that precisely the opposite is true. In fact, it would not have even been possible for Lively to direct his alleged activities specifically at SMUG, because he did not even know that SMUG existed prior to becoming the target of this fanciful suit:

> Q: So did you know of the existence of SMUG prior to being sued by SMUG?
>
> A: No. I had never heard of the name SMUG.
>
> Q: And you know that the acronym, but have you heard of an organization called Sexual Minorities Uganda?
>
> A: No.

(Gannam Decl. Ex. 4 at 302:23-303:6). Lively's testimony stands unrebutted. SMUG's claims that Lively targeted it specifically for coercion finds no support in the record. Moreover, in *Limone*, the court stated that the "salient factors in this [civil conspiracy] claim are the 'peculiar power of coercion' involved and relatedly, '**that the conspiracy achieved what individuals could not achieve**.'" *Limone*, 497 F. Supp. 2d at 223 (emphasis added) (quoting *Kurker v. Hill*, 44 Mass. App. Ct. 184, 188, 689 N.E.2d 833, (1998)); *see also Fleming v. Dane*, 304 Mass. 46, 50, 22 N.E.2d 609, 611 (Mass. 1939) ("[I]n order to prove an independent tort for conspiracy upon the basis of mere force of numbers acting in unison, it must be shown that there was some peculiar

power of coercion of the plaintiff possessed by the defendants in combination **which any individual standing in like relation to the plaintiff would not have had**." ) (emphasis added).

SMUG cannot possibly meet these requirements here, on the record its own witnesses created. As shown in section IV.A.1, *supra*, SMUG's own book conclusively debunks SMUG's claim that Lively introduced the supposedly criminal notions of "recruitment" and "promotion" in Ugandan society. SMUG has adduced no record evidence whatsoever showing that the Ugandan government and its officials would not have had the power to exercise any alleged coercion over SMUG absent Lively's alleged involvement. Any such claim would fly in the face of reason and the evidence.

Indeed, all of the alleged persecutory acts SMUG references as coercive were allegedly carried out by Ugandan government officials acting within the authority vested in them by the Ugandan government. (Opp. at 48) (discussing the coercive nature of the AHB, passed by a sovereign government with authority to enact such a measure independent of any alleged involvement of Lively); (*id.* at 50-51) (discussing the alleged raids of individuals in Uganda by Ugandan police and officials); (*id.* at 52-53) (discussing the alleged statements and actions of Ugandan officials relating to healthcare in Uganda and the actions of Ugandan police); (*id.* at 54-55) (discussing alleged actions of Uganda police). After two years of discovery, SMUG's 30(b)(6) designee as well as each of its officers and directors who were deposed testified as to SMUG's complete lack of knowledge that Lively had any involvement in these acts. All of the acts upon which SMUG relies could unquestionably have been carried out by these government officials independent of Lively, and, in fact, must have been (to the extent that they actually were), because SMUG lacks any knowledge, corporate, personal or otherwise, of "any assistance at all" provided by Lively. Moreover, the record is replete with many instances of Lively pleading and urging

Ugandans to adopt his recommendations on liberalizing existing and proposed Ugandan law on homosexuality, which the Ugandans consistently rejected, demonstrating that Ugandans are strong-willed and capable of forming their own opinions and responsible for their own actions. (*E.g.*, MF ¶¶ 58-63, 75-76, 81-83, 85-87). Here, as in *Fleming*, there is "nothing in the exercise of these powers by [the alleged conspirators] in association with each other and with the other defendants as alleged which gives to their acts in combination any greater or different tortious quality than would be ascribed to the same acts if performed by separate individuals only." *Fleming*, 22. N.E.2d at 611-12; *see also Limone*, 497 F. Supp. 2d at 224 n.184 (same).

SMUG's alleged coercion-based conspiracy tort is indeed a "rare tort" where "[f]or the most part, courts find that its elements are not met." *Limone*, 497 F. Supp. 2d at 225. This case is no different, and this Court should find the elements are unsatisfied.

**2. SMUG's Negligence Claim Fails As A Matter Of Law.**

SMUG's slapdash treatment of its negligence claim ignores the elements it is required to prove, and is utterly devoid of any factual support. (Opp. at 99-100). As SMUG concedes, it bears the burden of demonstrating the existence of a legal duty, a breach of that duty, causation, and damages flowing from the breach. (*Id.*) (citing *Onofrio v. Dep't of Mental Health*, 562 N.E.2d 1341, 1344-45 (Mass. 1990). Yet, SMUG does not even attempt to discuss any of those elements. SMUG completely fails to even address, let alone redress, the fatal problem of its entire negligence claim – the existence of a legal duty. (*Id.*). As demonstrated in Lively's brief (dkt. 257 at 170), there is no duty known to the law in Massachusetts or any other state arising out of a "virulently hostile environment" as SMUG claims. Because no such duty is known to the law, SMUG's negligence claim cannot even get out of the starting gate. If it did, it would immediately falter on

SMUG's failure to prove causation, section IV, *supra*, and, if not there, on SMUG's inability to show any damages, section V, *supra*.

Even if they were not time-barred, SMUG's civil conspiracy and negligence claims are deficient, factually vacant, and fail as a matter of law. Summary judgment is appropriate.

## CONCLUSION

For the foregoing reasons, and those in the initial memorandum in support, Defendant Scott Lively's Motion for Summary Judgment should be granted.

Respectfully submitted,

/s/ Roger K. Gannam

Philip D. Moran (MA 353920)
265 Essex Street, Suite 202
Salem, Massachusetts 01970
T: 978-745-6085
F: 978-741-2572
philipmoranesq@aol.com

Mathew D. Staver†
Horatio G. Mihet†
Roger K. Gannam†
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854-0774
T: 407-875-1776
F: 407-875-0770
court@lc.org
hmihet@lc.org
rgannam@lc.org

†Admitted *pro hac vice*
Attorneys for Defendant Scott Lively

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically with the Court on September 1, 2016. Service will be effectuated by the Court's electronic notification system upon all counsel or parties of record.

/s/ Roger K. Gannam
Roger K. Gannam
Attorney for Defendant Scott Lively