NO. 17-1593

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

SEXUAL MINORITIES UGANDA

Plaintiff-Appellee,

v.

SCOTT LIVELY, individually and as President of Abiding Truth Ministries,

Defendant-Appellant.

Appeal from the United States District Court for the District of Massachusetts
Lower Court Case No. 3:12-cv-30051-MAP

BRIEF OF DEFENDANT-APPELLANT SCOTT LIVELY

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GLOSSARY OF ABBREVIATED TERMS

Throughout this brief, the following abbreviated terms refer to:

"Am. Compl." – First Amended Complaint for Crime Against Humanity of Persecution, July 13, 2012, dkt. 27, Appendix 42-102.

"Judgment" – Judgment in a Civil Case, June 5, 2017, dkt. 351, Addendum 148.

"Lively" – Defendant-Appellant, Scott Lively.

"MTD Order" – Memorandum and Order Regarding Defendant's Motions to Dismiss, August 14, 2013, dkt. 59, Addendum 1-79.

"S.J. Order" – Memorandum and Order Regarding Defendant's Motion for Summary Judgment, June 5, 2017, dkt. 350, Addendum 123-147.

"SMUG" – Plaintiff-Appellee, Sexual Minorities Uganda.

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34(a), Lively requests that oral argument be permitted because it would assist the Court in understanding and deciding the weighty jurisdictional, constitutional and procedural issues in this appeal, which arises from a complex, transnational litigation spanning over five years.

JURISDICTIONAL STATEMENT

The district court correctly concluded that it lacked subject-matter jurisdiction over SMUG's federal law claims, and dismissed them. (S.J. Order, Addendum 143-44, 147; Judgment, Addendum 148).

The district court had original, diversity jurisdiction under 28 U.S.C. §1332 over SMUG's state law claims, because SMUG and Lively are citizens and residents of different countries and SMUG claimed damages in excess of $75,000. (Am. Compl. ¶15, Appendix 48). The court also had supplemental jurisdiction pursuant to 28 U.S.C. §1367. (*Id.*)

This Court has appellate jurisdiction under 28 U.S.C. §1291 to review the final S.J. Order and Judgment of the district court. Under the merger rule, this Court also has jurisdiction to review the MTD Order (dkt. 59, Addendum 1-79). *Brandt v. Wand Partners*, 242 F.3d 6, 14 (1st Cir.2001).

This Court has authority to reform, modify or vacate the district court's orders, including the S.J. Order and the MTD Order, pursuant to 28 U.S.C. §2106.

The S.J. Order and Judgment were entered on June 5, 2017, and disposed of all parties' claims. This appeal was timely filed on June 8, 2017. (Notice of Appeal, Appendix 40).

STATEMENT OF THE ISSUES

1) Did the district court err by adjudicating SMUG's "crimes against humanity" claims, and by purporting to find that Lively's core political speech and advocacy aided and abetted crimes against humanity and "constitute violations of international law," after the court correctly concluded that it lacked subject-matter jurisdiction to entertain those claims?

2) Did the district court err by failing to grant Lively's Motion to Dismiss SMUG's Amended Complaint for lack of subject-matter jurisdiction, where SMUG could not in good faith allege any unlawful domestic conduct by Lively?

3) Did the district court err by failing to exercise its original, mandatory, diversity jurisdiction, or its discretionary supplemental jurisdiction, over SMUG's state law claims?

4) Did the district court err by dismissing SMUG's state law claims without prejudice, instead of with prejudice, when the record evidence demonstrated that those claims are time-barred and foreclosed as a matter of law?

STATEMENT OF THE CASE

INTRODUCTION

Present before this Court is a breathtaking, first-of-its-kind pronouncement of a United States district court, that the nonviolent core political speech, writings, opinions and advocacy of a United States citizen, expressed peaceably and openly in a foreign country with an independent judiciary and a democratically-elected sovereign legislature, are not protected by the First Amendment and violate "international law," because they aid-and-abet the crime against humanity of persecution – one of the most heinous crimes known to mankind.

As somber and unprecedented as this proposition is, it does not come to this Court in the context of a reasoned opinion, carefully linking the law to the massive factual record developed over the five-year span of this litigation. Nor is it issued in an actual case or controversy as required by Article III of the United States Constitution. Instead, these purported findings are made in conclusory fashion, in a curt opinion which: (1) does not even identify which "international law" was violated and how; and (2) devotes only **a footnote** to casting aside as "satellite arguments" and "peripheral contentions" the bedrock protections of the First Amendment. Even though the district court had previously forecasted that First Amendment issues "will almost certainly be front and center at the summary judgment stage," and even though the parties had filed dozens of pages briefing

monumental First Amendment issues, the court's opinion finding that "international law" can be – and indeed had been – violated through core political speech and advocacy does not even mention the First Amendment **once**.

Most troubling, however, is that the district court's pronouncements and adjudication are included in an opinion which finds – correctly and indisputably – that the court is actually without subject-matter jurisdiction to even entertain, much less adjudicate, the "crimes against humanity" claims at issue in this case. Thus, after essentially declaring Lively as the enemy of mankind for aiding-and-abetting heinous crimes against humanity, the court purported to insulate and immunize its findings against appellate review by granting Lively summary judgment for lack of jurisdiction over the just-adjudicated claims. And, while greatly exceeding the scope of its jurisdiction in deciding SMUG's federal claims, the court also erred in relinquishing original, mandatory diversity jurisdiction over SMUG's state law claims, dismissing them without prejudice so that they can be refiled in spite of being patently without merit.

Ultimately, this appeal is not about Lively's speech, writings, opinions and advocacy, although SMUG will certainly attempt to outrage this Court with cherry-picked statements devoid of any context, as SMUG did below. No one disputes that Lively's speech – no matter how offensive it may be to some – has never come even close to inciting imminent lawless action. Instead, this appeal tests whether a district

court which finds that speech and advocacy "detestable," "despicable," "pathetic," "ludicrous," "abhorrent," and "bizarre" – to name a few of the adjectives it employed – can allow that moral outrage to displace the requirements of Article III, and thereby purport to decide factual claims and issues of law for which jurisdiction is indisputably absent.

This Court should hold that the Constitution demands more.

FACTUAL AND PROCEDURAL BACKGROUND

A) Defendant-Appellant Scott Lively.

Scott Lively is an American Christian pastor and activist. (Declaration of Scott Lively, dkt. 257-1, ¶4, p. 2). Lively believes that the purpose of life is to be conformed to the character of Jesus Christ, through a life-long series of challenges uniquely designed for each person by God Himself. (*Id*. at ¶6(a), p. 2). He believes that same-sex attraction is a challenge faced by many, and is no more or less immoral than the temptation to steal or to commit adultery. (*Id*. at ¶6(b), pp. 2-3). In Lively's Christian worldview, what distinguishes homosexuality (the indulgence of same-sex attraction) from other sins is that some of those who practice it have created a social and political movement or agenda to normalize and legitimize it. (*Id*.)

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

gay movement and those persons who struggle with same-sex attraction and homosexual conduct. (*Id.*). Lively believes it is his Christian duty to love as individuals all persons who identify as homosexual or commit the sin of homosexuality. (*Id.*) Lively does not believe that homosexuals should be singled out for condemnation, and certainly never for threats or violence. (*Id.* at ¶6(d), p. 3).

Lively is firmly opposed to any violence against, or ridicule, ostracism or vilification of, any person, including any person who identifies as homosexual. (*Id.* at ¶6(i), p. 5). Lively abhors the idea of forcibly "outing" persons who want to keep their consensual, adult sexual activities private and discrete. (*Id.* at ¶6(j)).

Lively believes the law should allow consenting adults to make wrong choices in their private sexual conduct. (*Id.* at ¶6(g), p. 4). To encourage traditional man-woman marriage, which he believes to be the best and most optimal societal arrangement for the raising of children, Lively would favor misdemeanor criminalization of any sexual act outside of marriage, including adultery, fornication, and homosexual conduct. (*Id.*) Lively, however, would urge for very modest penalties for such conduct in the letter of the law, and even more relaxed and minimal application of such laws to preserve the ability of all individuals to live their lives privately and discretely. (*Id.*)

During two trips to Uganda in 2002, and one trip in 2009, Lively shared his opinions and views on human sexuality, including pornography, abstinence,

homosexuality and the homosexual movement, with various citizen groups including teachers, students, pastors and politicians. (*Id*. at ¶¶7-16, 19-27).

B) SMUG's Lawsuit to Punish and Prohibit Lively's Core Political Speech and Advocacy in Uganda.

SMUG, a Ugandan advocacy group for homosexual rights, brought this "crimes against humanity" lawsuit against Lively, to punish and enjoin his non-violent, core political speech and advocacy in Uganda. (Am. Compl., dkt. 27, Appendix 42-102). Specifically, SMUG's Rule 30(b)(6) designee on the scope of the injunctive relief sought by SMUG revealed under oath that SMUG was asking the district court to enjoin Lively from "persecuting" SMUG, by: (1) prohibiting Lively from selling or giving away his books in Uganda; (2) prohibiting Lively from preaching Christian sermons on homosexuality in Uganda; (3) prohibiting Lively from speaking to high schoolers in Uganda about the health hazards of certain sexual conduct; (4) prohibiting Lively from training Ugandan lawyers to use the law to oppose legalization of same-sex marriage; and (5) prohibiting Lively from lobbying the Ugandan Parliament not to legalize same-sex marriage. (SMUG/Onziema Dep., dkt. 250-7, 433:18-438:10, Addendum 105-106).

To entreat the district court into awarding this sweeping relief, SMUG alleged that, over the course of a decade, Ugandan citizens whom Lively has never met or spoken with committed **14 distinct criminal acts of persecution** against homosexual persons in Uganda. (Am. Compl., ¶¶165-228, Appendix 83-95). Among

the 14 alleged persecutory acts were "raids" of Ugandan homosexual advocacy organizations by Ugandan police (in Uganda); arrests of homosexual rights activists in Uganda by Ugandan government officials; "threats" by Ugandan government officials and agencies "to criminalize and shut down health services" for homosexual persons in Uganda; and involuntary "outings" of Ugandan homosexual persons by Ugandan tabloids, which SMUG claimed to lead to the heinous murder of David Kato, a prominent homosexual rights advocate in Uganda and one of the founders of SMUG. (*Id.*) A full listing of all 14 persecutory acts alleged by SMUG in its Amended Complaint and in subsequent discovery, together with a discussion of the lack of any evidence connecting those alleged acts to Lively, can be found in Lively's Statement of Material Facts, ¶¶102-117, dkt. 257, Addendum 109-118.

Even though Lively has consistently condemned acts of violence, SMUG claimed that Lively was responsible for these acts of "persecution" – not because Lively orchestrated, coordinated, financed or encouraged these acts, nor because he even knew of them – but because Lively visited Uganda on three occasions, and his non-violent speech, writings and advocacy advancing a Christian view of human sexuality allegedly created a "virulently hostile environment." (Am. Compl., ¶258, Appendix 100).

In addition to enjoining Lively's speech, writings and advocacy in Uganda, SMUG also sought a declaration from the court that "Defendant's conduct was in

violation of the law of nations." (Am. Compl., "Prayer for Relief" paragraph (d), Appendix 101). SMUG's principal federal claim against Lively was that his speech, writings and advocacy aided-and-abetted the crime against humanity of persecution. (*Id*. at ¶¶237-238, 241-244, Appendix 97-98). Invoking the district court's original, diversity jurisdiction, as well as supplemental jurisdiction, SMUG also brought two state law claims – negligence and civil conspiracy. (*Id*. at ¶¶15, 251-262, Appendix 48, 58-59).

The court denied Lively's motion to dismiss. (MTD Order, Addendum 1-79). This opened the door to multi-year, transcontinental discovery, during which the parties exchanged 40,000 pages of documents, took 100 hours of depositions on both coasts and several states in between, and filed 5,000 pages of summary judgment papers. (Docket Sheet, Appendix 1-39). Over the 5 and ½ year span of this litigation, the court considered 74 motions, held 6 hearings, and issued 90 orders (*id*.), including a 79-page decision denying Lively's motion to dismiss (Addendum 1-79), and the 25-page decision granting Lively summary judgment. (Addendum 123-147).

C) At the Conclusion of Discovery, SMUG Admitted that it Never Had Any Knowledge of "Any Assistance At All" Provided by Lively to Any of the Alleged Persecutory Acts.

At the conclusion of the sweeping discovery in this case, with all of the evidence in, **for each of the 14 alleged persecutory acts** SMUG's Rule 30(b)(6) designee confirmed *seriatim* that **SMUG still had no knowledge of "any assistance at all" provided by Lively to any of the alleged perpetrators**. (SMUG/Onziema Dep., dkt. 250-7, 294:2-295:11; 304:25-305:6; 306:18-22; 309:5-9; 313:5-9; 315:17-22; 320:15-20; 323:3-7; 324:17-21; 328:16-21; 334:17-22; 337:24-338:6; 341:2-6; 342:12-16; 343:3-7; 348:10-14; 350:22-351:3; 352:6-10; 353:22-354:5; 357:19-24; 408:10-409:15; Addendum 88-104). Reviewing each of these numerous unequivocal disclaimers of knowledge can be daunting, but the following three examples are representative of SMUG's response as to **all** incidents of "persecution:"

> Q: Do you have any knowledge of any assistance at all provided by Scott Lively to the police in raiding and arresting persons at the 2012 pride gathering?
>
> SMUG: No, I do not.

(SMUG/Onziema Dep., 341:2-6).

> Q: Do you have any knowledge of any assistance provided by Scott Lively to either the Ugandan police or any local council authorities or even any private citizens in connection with the arrest, eviction and beating of Mukisa or the arrest of Mukasa?
>
> SMUG: I do not know.

(*Id*. at 353:22-354:5).

Q: Do you have any knowledge of any assistance at all provided by Scott Lively to private actors to carry out discrimination against LGBTI persons in Uganda in the areas of housing, employment, health or education?

SMUG: I do not know.

(*Id*. at 337:24-338:6).

In addition to SMUG's Rule 30(b)(6) designee on the specific subject of Lively's alleged involvement in the claimed "persecution," numerous of SMUG's high-level officers – including Executive Director Frank Mugisha, Chairman Sam Ganafa, co-founder Victor Mukasa, and Research and Documentation Manager Richard Lusimbo – also confirmed their, and by extension SMUG's, complete lack of knowledge as to any assistance or involvement by Lively in any of the claimed persecutory acts. The voluminous record references to their unison chorus of "I do not know" can be found in Lively's Statement of Material Facts, ¶¶102-117, dkt. 257, Addendum 109-118.[1]

Emblematic of SMUG's complete lack of evidence of any connection between Lively and any of the 14 alleged persecutory acts is the heinous murder of David Kato. SMUG alleged in its Amended Complaint that Kato was killed because

[1] Each of the Material Facts paragraphs contains extensive citations to the record, including to the Mugisha Deposition (filed at dkt. 250-3), the Ganafa Deposition (filed at dkt. 250-1), the Mukasa Deposition (filed at dkts. 250-4 and 250-5), the Lusimbo Deposition (filed at dkt. 250-2), and the deposition of SMUG's Rule 30(b)(6) designee, Pepe Onziema (filed at dkts. 250-6 and 250-7).

his homosexual status and advocacy were revealed in a Ugandan tabloid. (Am. Compl. ¶¶10, 221-222, Appendix 46, 94; SMUG/Onziema Dep., 170:8-171:9, Addendum 85). But, at the close of discovery SMUG admitted that it lacked any knowledge of "any assistance that Scott Lively has provided in connection with [the Tabloid Outings]." (SMUG/Onziema Dep., 334:17-22, Addendum 96). Moreover, when confronted with the fact that Kato was not actually killed by a homophobe as a result of any tabloid outing but by a homosexual acquaintance over a sexual dispute, SMUG admitted that it was aware of this fact since 2011, before filing this lawsuit. (*Id*. at 161:4-162:9; 203:23-204:6, Addendum 82-83, 86). SMUG further admitted that "SMUG has no evidence that David Kato was killed as a result of his LGBT activism." (*Id*. at 163:15-18, Addendum 83). SMUG then agreed that "it would be wrong for SMUG to suggest that [Kato] was killed as a result of his advocacy," as SMUG had done in its Amended Complaint. (*Id*. at 169:8-12, Addendum 84).

D) At the Conclusion of Discovery, SMUG Admitted that it Never Had Any Knowledge of Any Participation by Lively in Any "Conspiracy" to "Persecute."

Even though it never had any knowledge of Lively's participation or involvement in any of the alleged persecutory acts, SMUG alleged in its Amended Complaint that Lively was involved in a widespread "conspiracy to persecute LGBTI persons in Uganda," (Am. Compl. ¶5, Appendix 43-44), which SMUG

defined as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of identity of the group or collectivity." (*Id*. at ¶3).

In discovery, however, SMUG's Executive Director admitted that neither he **nor anyone at SMUG** had knowledge of Lively's participation in any conspiracy:

> Q: [T]he Amended Complaint says that: "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." Now…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?
>
> MUGISHA: No, I am not.
>
> 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**?
>
> MUGISHA: **No**.

(Mugisha Dep., dkt. 250-3, 145:7-146:4) (emphasis added).

SMUG's Chairman similarly admitted a total lack of knowledge as to any conspiracy involving Lively:

> 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?
>
> GANAFA: No.

(Ganafa Dep., dkt. 250-1, 200:20-201:4).

Then, at the conclusion of discovery, **with all of the evidence gathered**, SMUG's 30(b)(6) designee on the topic of Lively's alleged participation in any "conspiracy" admitted that, other than Lively's commenting on a draft law that was never enforced against anyone, SMUG was unaware of Lively's participation in any conspiracy:

Q: Apart from the drafting of the AHB, do you have any knowledge of any agreement between Scott Lively and another person to deprive persons of fundamental rights on the basis of their sexual orientation and gender identity?

SMUG: I don't know.

(SMUG/Onziema Dep., 365:23-366:5, Addendum 102).

E) At the Conclusion of Discovery, SMUG Admitted that it Never Had Any Knowledge of Any Relevant Domestic Conduct by Lively.

After discovery was concluded and SMUG finished its years-long discovery into Lively's speech, writings and advocacy, SMUG's Rule 30(b)(6) designee on the topic of Lively's domestic conduct admitted that SMUG never had any knowledge of anything Lively did **in or from the United States** to assist any of the 14 alleged persecutory acts in Uganda. (SMUG/Onziema Dep., 300:7-12; 304:20-24; 306:13-17; 308:23-309:4; 312:24-313:4; 315:11-16; 320:9-14; 322:21-323:2; 324:11-16; 328:9-15; 334:23-335:5; 337:18-23; 340:20-25; 342:7-11; 342:22-343:2; 343:8-16; 348:4-9; 350:16-21; 351:24-352:5; 354:6-13; 357:13-18; 366:6-10; Addendum 89-

102). SMUG's disclaimer of knowledge as to two of the 14 incidents are representative of the rest:

Q: Did Scott Lively do anything in the United States directed to helping [Minister of Ethics and Integrity] Simon Lakodo or the Ugandan police carry out the raid described in paragraph 179 [of the Amended Complaint]?

SMUG: I don't know.

(SMUG/Onziema Dep., 304:20-24).

Q: Do you have any knowledge of any action taken by Scott Lively in the United States directed towards assisting [Deputy Attorney General] Ruhindi to take action against SMUG?

SMUG: I don't know.

(*Id*. at 312:24-313:4).

After disclaiming all knowledge as to anything that Scott Lively might have done in or from the United States to incite, encourage, coordinate or assist any of the 14 alleged acts of "persecution," SMUG revealed that – **with all of the evidence gathered** – it **still** lacked any knowledge of anything Lively did in the United States to encourage, assist or carry out any general "persecution" (as defined by SMUG) 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**?

SMUG: **I do not know**.

(*Id*. at 366:11-16) (emphasis added).

F) The District Court's Summary Judgment.

Constrained by SMUG's evidentiary failures, but not without a long string of epithets denigrating Lively as a "crackpot bigot" and worse, the district court granted Lively's motion for summary judgment, concluding that it lacked subject-matter jurisdiction to adjudicate SMUG's federal claims for "persecution" brought under the Alien Tort Statute. (S.J. Order, Addendum 123-147). Specifically, the court concluded that Lively "supplied no financial backing to the detestable campaign in Uganda, he directed no physical violence, he hired no employees, and he provided no supplies or other material support." (*Id*. at 21, Addendum 143). Accordingly, Lively's conduct in the United States was not sufficient to displace the presumption against extraterritorial application of the Alien Tort Statute and to confer jurisdiction upon the court. (*Id*. at 21-22, Addendum 143-44).

Although it concluded that it lacked jurisdiction to adjudicate SMUG's federal claims, instead of merely dismissing them the court proceeded to adjudicate them, declaring – without any evidentiary or legal support – that Lively's speech and advocacy most certainly "constitute violations of international law." (*Id*. at 3, Addendum 125). The court also purported to find, even as it was dismissing SMUG's aiding-and-abetting claims for lack of jurisdiction, that Lively's political speeches, writings and advocacy did, in fact, aid-and-abet crimes against humanity. (*Id*. at 1, 3, 24, Addendum 123, 125, 146).

As for SMUG's state law claims, the court relinquished jurisdiction – both original, **mandatory** diversity jurisdiction and discretionary supplemental jurisdiction – and dismissed them **without prejudice**, specifically inviting SMUG to re-file them in state court. (*Id*. at 23, 25, Addendum 145-47).

Lively filed this appeal. SMUG has not appealed or cross-appealed the dismissal of its claims.

SUMMARY OF THE ARGUMENT

Because it was admittedly without subject-matter jurisdiction to entertain or decide SMUG's federal claims for "crimes against humanity," the district court had no authority to pass on the merits of SMUG's principal claims, and to decide that Lively's speech, writings, opinions and advocacy "violate international law," or that they aided-and-abetted crimes against humanity. Instead, the court was constitutionally constrained only to announce the lack of jurisdiction and dismiss SMUG's claims. This Court enjoys jurisdiction and plenary authority to modify, vacate and otherwise reform the district court's summary judgment order so as to bring it within the requirements of the Constitution and the law.

Because at the close of discovery SMUG admitted under oath that it never had any corporate knowledge of anything that Lively might have done in the United States to assist, carry out, incite or orchestrate either specific acts of "persecution" or "persecution" in general in Uganda, SMUG did not allege, and could not have

alleged in good faith, sufficient domestic conduct to overcome the presumption against extraterritorial application of the Alien Tort Statute. Accordingly, the district court never had subject-matter jurisdiction over SMUG's federal claims. The court's order denying Lively's motion to dismiss for lack of subject-matter jurisdiction should be vacated, so that the numerous and complex issues of constitutional and international law purportedly decided therein can be decided by a court with proper jurisdiction in an actual case or controversy.

Finally, the district court erred in relinquishing its original, mandatory diversity jurisdiction, as well as its discretionary supplemental jurisdiction, over SMUG's state law claims. Had the court adjudicated those claims as it was required, it would have had no choice but to dismiss them with prejudice, because they are time-barred and foreclosed by the First Amendment, among other deficiencies. This Court should reverse the district court's error and dismiss SMUG's state law claims with prejudice.

ARGUMENT

I. THIS COURT SHOULD REFORM THE DISTRICT COURT'S EXTRA-JURISDICTIONAL AND PREJUDICIAL SUMMARY JUDGMENT ORDER ADJUDICATING SMUG'S CLAIMS.

A. Even Though it Lacked Jurisdiction, the District Court Purported to Adjudicate SMUG's Aiding-and-Abetting and Declaratory Relief Claims.

"[T]he existence *vel non* of subject matter jurisdiction is a question of law reviewable *de novo*." *Shea v. Rev-Lyn Contracting Co.*, 868 F.2d 515, 517 (1st Cir. 1989).

It is not possible to read the district court's summary judgment order and not have the firm conviction that it contains **an actual determination of legal issues and legal claims brought by SMUG**, which the court was admittedly without jurisdiction to even entertain, much less decide. This is because the district court made sure that there would be "no mistake" as to its adjudication:

> **Anyone reading this memorandum should make no mistake**. The question before the court is not whether **Defendant's actions in aiding and abetting [persecution]...constitute violations of international law**. **<u>They do</u>**.

(S.J. Order at 3, Addendum 125) (emphasis added).

The principal thrust of SMUG's lawsuit was the specious claim that Lively's speech, writings and advocacy aided-and-abetted Ugandan actors (whom he has never met or spoken to) in the commission of 14 alleged acts of "persecution" in Uganda. (Am. Compl., ¶¶237-238, 241-244, Appendix 97-98). SMUG emphasized

that aiding-and-abetting was its principal claim. (*See, e.g.*, Mem. Opp. S.J., dkt. 292 p. 65 ("Plaintiff asserts that…Defendant aided and abetted the crime against humanity of persecution.") (*See also id*. at pp. 2, 5, 9, 77, 123). SMUG also sought a declaration that "Lively's conduct was in violation of the law of nations," (Am. Compl., "Prayer for Relief" paragraph (d), Appendix 101), and **this is precisely what SMUG received**.

Though not at all necessary to the court's determination that it lacked subject-matter jurisdiction, instead of simply dismissing SMUG's lawsuit as was required, the court purported to engage in legal and factual findings which unquestionably adjudicated SMUG's aiding-and-abetting and declaratory relief claims:

> Lively...**has aided and abetted** a vicious and frightening campaign of repression against LGBTI persons in Uganda.

(S.J. Order at 1, Addendum 123) (emphasis added).

> Anyone reading this memorandum should make no mistake. The question before the court is not whether **Defendant's actions in aiding and abetting [persecution]...constitute violations of international law**. **They do**."

(*Id.* at 3, Addendum 125) (emphasis added).

> Discovery confirmed the nature of Defendant's, on the one hand, vicious and, on the other hand, ludicrously extreme animus against LGBTI people and his determination **to assist in persecuting them** wherever they are, including Uganda.

(*Id.* at 24, Addendum 146) (emphasis added).

> **The evidence of record demonstrates that Defendant aided and abetted [persecution in Uganda]**.

(*Id*.) (emphasis added).

Without doubt, and without jurisdiction, the district court purported to issue the precise legal declaration sought by SMUG, that Lively's speech, writings and advocacy in Uganda "constitute violations of international law." Equally indisputable is that the court purported to determine that SMUG proved its principal claim that Lively aided-and-abetted the crime against humanity of persecution.

B. SMUG Agrees that the District Court Adjudicated its Federal Claims in its Favor, and Promises to Use that Adjudication Against Lively.

SMUG acknowledges and relishes in the fact that the court purported to adjudicate SMUG's declaratory relief and aiding-and-abetting claims in SMUG's favor. SMUG claims that the court's conclusions of law are "a win for SMUG because we were able to hold Scott Lively accountable," and because the S.J. Order "**shows that Scott Lively in fact aided and abetted the persecution of Uganda's LGBTI community**." (*See Sexual Minorities Uganda Press Release*, June 7, 2017, Exhibit A to Declaration of Horatio Mihet in Support of Lively's Response to SMUG's Motion to Dismiss Appeal, EID 6108185, DOCID 00117181086, pp. 5-6) (emphasis added). SMUG has further boasted that "[b]y having a court recognize that persecution of LGBTI people amounts to a crime against humanity, we have already been able to hold Lively to account and reduce his dangerous influence in Uganda." (*See This Anti-LGBT Activist Violated International Law–But He Can't*

Be Sued In the US, BuzzFeedNews, June 6, 2017, attached as Exhibit B to Mihet Declaration, EID 6108185, DOCID 00117181086, pp. 7-9).

SMUG's counsel similarly claims that the court's adjudication is a "win for SMUG" because it "**affirm[ed] that…Lively aided and abetted the crime against humanity**." (*See Center for Constitutional Rights Press Release*, June 6, 2017, attached as Exhibit C to Mihet Declaration, EID 6108185, DOCID 00117181086, pp. 10-13) (emphasis added). Indeed, SMUG stated that "**[t]he judge agrees with us in every claim we made**." (*See Scott Lively Celebrates After Judge Condemns His 'Crackpot Bigotry,'* attached as Exhibit D to Mihet Declaration, EID 6108185, DOCID 00117181086, pp. 14-21).

SMUG has promised that it will avail itself of "all the options, including…bringing the state law claims in Massachusetts State Court." (Mihet Decl., Exh. D, EID 6108185, DOCID 00117181086, p. 18). SMUG boasts that the court's order will "**go a long way in helping advocates in other countries build support for these kinds of claims**" against Lively and others. (*Id*. at 19) (emphasis added). SMUG also reveals that it intends to use the legal and factual findings in the court's order to subject Lively to "**prosecution in other countries where laws to prosecute him already exist[]**." (*Id.*) (emphasis added). This is why SMUG celebrates that the court "has left the way open for us to...make another case in another court." (*Id*. at 17-18).

C. In the Absence of Jurisdiction (and Evidence), the District Court's Adjudication is Unlawful and Ultra Vires.

As detailed in Sections C, D and E of the Statement of the Case, pp. 10-15, *supra*, at the conclusion of discovery, after years of intrusively inquiring into all of Lively's speeches, writings and advocacy, and with all of the evidence in, SMUG's Rule 30(b)(6) designee on the specific topic of Lively's alleged participation in any "conspiracy," as well as SMUG's top-level officers and directors, all admitted that SMUG still had no knowledge of "any assistance at all" provided by Lively to any of the 14 alleged persecutory acts, and that no one at SMUG had any knowledge of any participation by Lively in any "conspiracy" to "persecute." Thus, if the district court were inclined and permitted to exceed its subject-matter jurisdiction and determine whether SMUG had proven its fanciful claims, it could only conclude – from SMUG's binding testimony – the exact opposite.

But the district court's summary judgment is unlawful and should be reformed for yet another, even more obvious reason. The fatal problem with the court's legal conclusions, declarations and adjudication of SMUG's claims is that the court correctly held that it had no jurisdiction to entertain SMUG's declaratory relief, aiding-and-abetting, or other crimes against humanity claims, because SMUG could not adduce sufficient domestic conduct by Lively to displace the extraterritorial presumption. (S.J. Order, Addendum 145-47). The court thus correctly dismissed SMUG's federal claims brought under the Alien Tort Statute for lack of jurisdiction.

(*Id.*) Because it had no evidence whatsoever that Lively did anything illegal in the United States or elsewhere, **SMUG chose not to appeal the dismissal**. Remarkably, even after Lively appealed, SMUG still chose not to cross-appeal the dismissal. The court's holding that it lacked jurisdiction is therefore final and unassailable.

"For a court to pronounce upon the [merits of a dispute] when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101–02 (1998). "The requirement that jurisdiction be established **as a threshold matter** 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'" *Id.* at 94–95 (alteration in original) (emphasis added) (quoting *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)). The jurisdictional inquiry is therefore always antecedent to any merits inquiry, *Steel*, 523 U.S. at 101, and:

> Without jurisdiction the court cannot proceed **at all** in any cause. Jurisdiction is the power to declare the law, and when it ceases to exist, **the only function remaining to the court is that of announcing the fact and dismissing the cause**.

Ex Parte McCardle, 74 U.S. 506, 514 (1868) (emphasis added).

As demonstrated above (*supra* pp. 19-20), the district court here did a lot more than what was permitted – that is, "announcing the fact [of lack of jurisdiction] and dismissing the case." *Ex Parte McCardle*, 74 U.S. at 514. Instead, the court improperly purported to find that SMUG had proven its claims, that Lively did, in

fact, aid and abet "crimes against humanity" with his political speech, writings and advocacy, and that Lively violated some unidentified dictates of "international law" and is now the enemy of mankind. (S.J. Order, Addendum 123, 125, 146). Without jurisdiction to make any of these purported legal or factual findings, the court's conclusions and adjudication of SMUG's declaratory relief and aiding-and-abetting claims "flout the dictates of Article III." *Envt'l Prot. Info. Ctr., Inc. v. Pacific Lumber Co.*, 257 F.3d 1071, 1077 (9th Cir. 2001). As the Supreme Court held in *Steel*, the court's extra-jurisdictional decision to "pronounce" upon the merits of SMUG's federal claims and to adjudge Lively guilty of violating international law is "by very definition" an ultra vires act. 523 U.S. at 101-02.

D. This Court Has Jurisdiction and Authority to Reform the District Court's Prejudicial Ultra Vires Order.

This Court has plenary authority to reform and vacate the district court's ultra vires pronouncements:

> The Supreme Court or any other court of appellate jurisdiction may affirm, **modify**, **vacate**, set aside or reverse any judgment, decree, **or order** of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. § 2106 (1948) (emphasis added). "Our supervisory power over the judgments of the lower federal courts is a broad one." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950).

The Supreme Court has long recognized that a prevailing party is entitled to appeal a favorable decision where "the decree itself purports to adjudge the validity of [a claim], and though the adjudication was immaterial to the disposition of the cause, **it stands as an adjudication of one of the issues litigated**." *Elec. Fittings Corp. v. Thomas & Betts Corp.*, 307 U.S. 241, 242 (1939) (emphasis added). Where, as here, the court entered findings on claims immaterial to the disposition of the matter, Lively is "entitled to have this portion of the decree eliminated," and "the Court of Appeals [has] jurisdiction…to entertain the appeal, not for purposes of passing on the merits, **but to direct reformation of the decree**." *Id.* (emphasis added).

Critically, ultra vires statements, pronouncements or determinations made by district courts in the absence of subject matter jurisdiction impose a special category of harm on prevailing parties, and can be appealed – and corrected or reformed – even where: (1) they are found in an **order**, as opposed to a judgment or decree; (2) the prevailing party cannot show cognizable future economic loss; and (3) the extra-jurisdictional statements have no preclusive or estoppel effect. *See, e.g.*, *Pacific Lumber*, 257 F.3d at 1075-77 (allowing prevailing party appeal and ordering reformation of order dismissing action for lack of subject-matter jurisdiction, to purge extra-jurisdictional, "ultra vires statements" addressing the merits of the case); *New Jersey v. Heldor Indus., Inc.*, 989 F.2d 702, 705-08 & n.10 (3d Cir. 1993)

(permitting prevailing party to appeal favorable final judgment to challenge interlocutory conclusions of law in an order issued without jurisdiction, and vacating same); *Unalachtigo Band of Nanticoke Lenni Lenape Nation v. Corzine*, 606 F.3d 126, 130 (3d Cir. 2010) (allowing appeal by prevailing party to seek vacatur of district court order issued without subject-matter jurisdiction, and vacating same); *Black Rock City, LLC v. Pershing Cty. Bd. of Comm'rs*, 637 F. App'x 488, 489 (9th Cir. 2016) (allowing appeal by settling party even after settlement to challenge summary judgment order issued by district court without subject-matter jurisdiction, because "[w]here district courts have issued wrongful orders, this court has exercised the power to vacate them.").

In *Pacific Lumber*, the district court granted Pacific Lumber's motion to dismiss for lack of subject-matter jurisdiction, but also included in the dismissal order several statements going to the merits of the case, including some purported reaffirmations for the court's previous grant of injunctive relief against Pacific Lumber. 257 F.3d at 1074. The Ninth Circuit allowed Pacific Lumber to appeal the dismissal order, even though "the final judgment was entirely in Pacific Lumber's favor." *Id*. at 1074-75. First examining "the three established prudential routes … by which a winning party may be deemed 'aggrieved' by a favorable judgment," the Ninth Circuit concluded that none of them applied to Pacific Lumber, because (1) the offending extra-jurisdictional statements were in an order, not the decree or

judgment; (2) Pacific Lumber had not alleged future economic loss arising from the ultra vires statements; and (3) the extra-jurisdictional statements would not have preclusive effect in future litigation. *Id*. at 1075-76.

Nevertheless, the Ninth Circuit held that the district court's ultra vires statements, made knowingly after the court concluded it lacked jurisdiction, could not go unchallenged. *Id*. at 1076-77. Quoting the Supreme Court's teaching in *Steel* and *Ex Parte McCardle* that "without jurisdiction the court cannot proceed at all in any cause," and that once jurisdiction is determined to be absent "the only function remaining to the court is that of announcing the fact and dismissing the cause," the Ninth Circuit held that "the district court's decision to flout the dictates of Article III and render an opinion in spite of knowing [that subject-matter jurisdiction was absent] did render Pacific Lumber an 'aggrieved party'" sufficient to maintain an appeal for reformation of the ultra vires order. *Id*. This is because:

> While it is true that all dicta 'have no preclusive effect,' *Abbs v. Sullivan,* 963 F.2d 918, 924 (7th Cir. 1992), **dicta entered after a court has lost jurisdiction over a party inflicts a wrong on that party of a different order than that which exists in the usual case of extraneous judicial pronouncement**.

Id. at 1077 (emphasis added). Accordingly, employing its plenary authority to reform orders under 28 U.S.C. §2106, the Ninth Circuit "order[ed] the district court

to … reform the [dismissal] order" to purge the extra-jurisdictional statements and simply dismiss the case for lack of jurisdiction. *Id*.[2]

A similar outcome obtained in *Heldor*, where the district court issued an opinion overruling an objection by the New Jersey Department of Environmental Protection ("DEP") to a proposed bankruptcy settlement, even after the DEP had informed the court that it withdrew its objection and wanted the settlement to proceed. *Heldor Indus., Inc.*, 989 F.2d at 706-09. Even though the DEP ultimately "received all [it] sought," the Third Circuit permitted it to appeal for the sole purpose of vacating the district court's opinion entered without subject-matter jurisdiction. *Id*. at 709 & n.10. The Third Circuit held that while some (including a dissenting panel judge) might argue that the district court's extra-jurisdictional pronouncements are mere "dictum" and "precedent for nothing," "**it does not follow that we are disabled from vacating what we believe was demonstrably a**

[2] Oddly, SMUG relies heavily on its incomplete reading of *Pacific Lumber* to argue that the district's court's ultra vires statements are immune from this Court's review. (SMUG Reply in Support of Motion to Dismiss Appeal, EID 6109692, DOCID 00117183807, p. 8). However, while SMUG cites repeatedly to the Ninth Circuit's threshold determination that Pacific Lumber did not have standing to appeal its favorable judgment under "the three established prudential routes," SMUG completely ignores the second part of the decision which finds that jurisdiction **does** exist to reform ultra vires, extra-jurisdictional statements included in an otherwise favorable order. (*Id*.). Had SMUG read the entire *Pacific Lumber* decision, it would have realized that it completely guts, rather than support, SMUG's attempt to immunize the district court's jurisdictional overreach.

constitutional nullity, and not merely judicial bad manners." *Id*. (emphasis added).

And, in *Unalachtigo*, the district court "[i]n a single order" dismissed plaintiff's complaint *sua sponte* for lack of standing, and also denied an intervenor's Rule 19 motion to dismiss that same complaint, holding that the intervenor did not have a cognizable interest in the subject property. 606 F.3d at 127-28. Even though the intervenor obtained all the relief it had requested – dismissal of the complaint – the Third Circuit, citing *Pacific Lumber* and *Heldor*, allowed the intervenor to appeal for the sole purpose of vacating that portion of the court's order denying its Rule 19 motion to dismiss on the merits. *Id*. at 129-30. The Third Circuit found that, once the court dismissed the complaint for lack of standing, it lacked subject matter jurisdiction to do anything else, and could no longer entertain or rule upon the intervenor's Rule 19 motion. *Id*. Irrespective of prejudice or preclusive effect, the court's ultra vires statements in the dismissal order were *ipso facto* sufficiently injurious to permit the prevailing party's appeal and the reformation of the order:

> Thus, as in *Heldor* and *Pacific Lumber,* the District Court issued an opinion on Stockbridge's Rule 19 motion when it lacked jurisdiction. This 'advisory' opinion ignores the dictates of Article III and renders Stockbridge an 'aggrieved party' such that it is entitled to appellate relief.…For the foregoing reasons, we will vacate the portion of the District Court's order and opinion denying Stockbridge's Rule 19 motion.

Id. at 130.

Finally, in *Black Rock City*, the district court purported to enter an order granting a motion for summary judgment after the parties had deprived it of subject-matter jurisdiction by stipulating to a voluntary dismissal. 637 F. App'x at 488. Even though the parties had settled, the Ninth Circuit allowed one of the litigants to appeal for the sole purpose of vacating the ultra vires opinion. *Id.* The Court concluded that, notwithstanding settlement, it retained both jurisdiction and authority under 28 U.S.C. § 2106 to correct the district court's ultra vires action: "Where district courts have issued wrongful orders, this court has exercised the power to vacate them." *Id*. at 488 n.1 (citing 28 U.S.C. § 2106 and *Pacific Lumber*, 257 F.3d at 1073).

The foregoing discussion demonstrates that SMUG's preoccupation with estoppel and prejudice is misplaced where, as here, the challenged statements in a court order are not merely **extraneous** (as they were in the authorities adduced by SMUG), but also **extra-jurisdictional**, or ultra vires, as they were in *Pacific Lumber*, *Heldor*, *Unalachtigo*, and *Black Rock City*. This Court enjoys plenary authority under 28 U.S.C. § 2106 to order reformation of the district court's summary judgment order, to purge from it the numerous purported findings that go beyond announcing the lack of jurisdiction and dismissal of SMUG's federal claims.

However, even if Lively were required to show legally cognizable prejudice beyond the district court's ultra vires pronouncements themselves, he can certainly do so here. As detailed above, the court did not merely cast aspersions upon Lively

for his "crackpot bigotry" and for his speech, writings and advocacy, which the court considered detestable. (*See* pp. 19-20, *supra*). Instead, the court purported to find that SMUG had proven its federal claims of aiding-and-abetting the crime against humanity of persecution – the very claims which the court lacked jurisdiction to entertain. (*Id.*) The court thus declared Lively *hostis humani generis*, concluding that Lively's speech, writings and advocacy "constitute violations of international law," without specifying **which** law (or laws) Lively purportedly violated, and **how** he purportedly violated it (or them). (*Id.*) The court also dismissed Lively's bedrock First Amendment liberties as "satellite arguments" and "peripheral contentions," (S.J. Order, p. 4, n.4, Addendum 126), without any consideration of the mountain of precedent which holds that, notwithstanding anything contrary in "international law," Lively has a constitutional right to **peacefully express** political views no matter how offensive or detestable they might be to SMUG, the district court or others. (*See* First Amendment discussion, Section III(C)(2), pp. 49-55, *infra*).

Beyond the significant reputational harm attendant to being labeled by a federal court, summarily and without proof, an aider-and-abettor of "crimes against humanity" – the worst crimes known to mankind – Lively now faces the certain prospect of further litigation in international courts, as SMUG promises to "make another case in another court," and to use the district court's purported factual and legal findings to subject Lively to "prosecution in other countries." (*See* pp. 21-22,

supra). There is no reason to hope that foreign tribunals would even be familiar with the concept and limitations of subject-matter jurisdiction in United States courts, much less that they would give no credence to the district's court's ultra vires statements which SMUG promises to employ, in the same way that SMUG apparently argues a United States court might ignore them. *See Heldor*, 989 F.2d at 709, n.10 (vacating ultra vires statements of district court because they had already been cited by some U.S. courts "apparently not noticing that [they were] 'precedent for nothing.'").

This Court has both authority and jurisdiction to order the reformation of the district court's extra-jurisdictional statements. The Court should reform the summary judgment order so that it only announces the lack of jurisdiction over SMUG's federal claims and dismisses them. *Ex Parte McCardle*, 74 U.S. at 514.

II. THIS COURT SHOULD VACATE THE DISTRICT COURT'S ORDER ERRONEOUSLY DENYING LIVELY'S MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION.

As discussed in the preceding section, this Court reviews the existence or lack of subject-matter jurisdiction *de novo*. *Shea*, 868 F.2d at 517.

In its summary judgment order, more than five years into this litigation, the district court ultimately arrived at the proper conclusion that it lacked subject-matter jurisdiction to entertain SMUG's federal "persecution" claims under the Alien Tort Statute ("ATS"). (S.J. Order, Addendum 145-147). The district court correctly

concluded that SMUG could not adduce sufficient domestic conduct by Lively to displace the extraterritorial presumption announced and enforced by the Supreme Court in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013). (*Id.*) Specifically, the court properly concluded that Lively "supplied no financial backing to the detestable campaign in Uganda, he directed no physical violence, he hired no employees, and he provided no supplies or other material support" from the United States. (*Id*. at 21, Addendum 143). Finally, the court correctly found that **Lively's "status as an American citizen and his physical presence in the United States is clearly not enough under controlling authority to support ATS extraterritorial jurisdiction**." (*Id*. at 24-25 Addendum 146-47) (emphasis added).

The district court should have reached this conclusion **four years earlier**, in 2013, when it considered Lively's motion to dismiss (dkts. 30, 33) SMUG's Amended Complaint (dkt. 27). In that motion, Lively demonstrated that the court "lacks subject-matter jurisdiction over SMUG's persecution claims because the Alien Tort Statute does not reach extraterritorial conduct." (Dkt. 33, pp. 96-109 of 109). Specifically, Lively showed the court that SMUG's Amended Complaint did not allege any actionable domestic conduct by Lively, and that SMUG's sole basis for establishing extraterritorial jurisdiction was Lively's citizenship and residence in the United States, which was insufficient as a matter of settled law. (Dkt. 33, pp. 108-09 of 109).

Although Lively's motion to dismiss was filed in 2012, before the Supreme Court decided *Kiobel*, the motion was still pending when *Kiobel* was decided, and Lively brought it to the attention of the court. (Dkt. 54). Despite the clear holding in *Kiobel* that federal courts lack subject matter jurisdiction over ATS claims where all relevant conduct is alleged to take place outside the United States, the court denied Lively's motion to dismiss, concluding that Lively's citizenship and residence in the United States, coupled with SMUG's supposed allegations that he maintained "kind of 'Homophobia Central' in Springfield, Massachusetts," were sufficient to overcome *Kiobel*'s extraterritorial presumption. (MTD Order, dkt. 59 at 4-5, Addendum 4-5).

The court's conclusion that it had subject-matter jurisdiction over SMUG's ATS claims was erroneous for two reasons. First, the court was ultimately correct in its 2017 S.J. Order when it held that Lively's citizenship and residence in the United States were insufficient as a matter of law to confer extraterritorial jurisdiction, which means that the court's contrary holding in the 2013 MTD Order was erroneous. *See, e.g.*, *Mastafa v. Chevron Corp.*, 770 F.3d 170, 188 (2d Cir. 2014) ("in identifying the conduct which must form the basis of the violation *and* the jurisdictional analysis under the ATS, precedents make clear that **neither the U.S. citizenship of defendants, nor their presence in the United States, is of relevance**

for jurisdictional purposes") (bold emphasis added; italics original) (collecting cases).

Second, and more importantly, the court erred because SMUG did not allege (and could not have alleged) in its Amended Complaint that Lively did anything in the United States to carry out or assist any of the 14 specific persecutory acts alleged by SMUG, or any "persecution" in general. (Am. Compl., dkt. 27). We know this not only from a plain reading of SMUG's Amended Complaint, but also (and especially) from SMUG's admission, **at the completion of discovery**, that SMUG had no knowledge of any such domestic conduct by Lively. (*See* pp. 14-15, *supra*). After five years of delving into Lively's speech, writings and advocacy, with all of the evidence in, SMUG's Rule 30(b)(6) designee on the subject of Lively's alleged domestic conduct readily admitted that SMUG **still** lacked any corporate knowledge of anything Lively did in the United States to encourage, assist or carry out any "persecution" (as defined by SMUG) 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?**
>
> SMUG: **I do not know**.

(SMUG/Onziema 366:11-16, Addendum 102) (emphasis added).

If SMUG had no knowledge of any relevant domestic conduct by Lively in 2017 – after five years of discovery – then logic dictates that SMUG could not have

possibly had such knowledge in 2012 when it filed its Amended Complaint, prior to any discovery. Accordingly, SMUG could not have alleged in good faith sufficient domestic conduct by Lively to overcome the presumption against extraterritoriality and confer subject matter jurisdiction upon the district court. The court's decision to the contrary in the MTD Order was erroneous. The court was without jurisdiction *ab initio*.

Notably, after his Motion to Dismiss was denied, Lively asked the court to certify its MTD Order for immediate appeal to this Court (dkts. 64, 65), but the district court summarily denied the request, stating without explanation that "[n]o substantial question of law exists justifying an interlocutory appeal." (Dkt. 71). Lively then asked the court to reconsider its decision denying appeal certification (dkts. 72, 73), which the court also denied, summarily. (Dkt. 75).

Besides condemning Lively to several years' worth of discovery on multiple continents, the district court's MTD Order also purported to resolve numerous weighty and complex questions of international and constitutional law, many of which were novel and never before answered by a United States court, such as:

(1) whether the "crime against humanity of persecution" is sufficiently clearly defined and universally accepted in the body of international law to be actionable in a United States court under the Alien Tort Statute, pursuant to the

Supreme Court's narrow reading of that statute in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), (MTD Order at 3-4, 19-31, Addendum 3-4, 19-31);

(2) whether there exists in international law instruments or customs a clearly defined and universally accepted prohibition against persecution based on sexual orientation or gender identity, as would be required for jurisdiction under the Alien Tort Statute, when almost half of the world's nations criminalize homosexual conduct, (MTD Order at 28-29, Addendum 28-19); and

(3) whether the Petition Clause of the First Amendment immunizes from tort liability U.S. citizens who petition or lobby foreign governments, (MTD Order at 62-63, Addendum 62-63).

Because the district court was without jurisdiction to entertain SMUG's federal claims under the Alien Tort Statute, the court's pronouncements on these and numerous other issues are ultra vires and void. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-02 (1998) ("For a court to pronounce upon the [merits of a dispute] when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires."). This Court, like "every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review.'" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 73 (1997) (citing *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934)). In exercising its constitutional duty to ensure that jurisdiction is and was "extant at all stages of

review," *id.* at 67, as well as its broad authority under 28 U.S.C. §2106, this Court should vacate the MTD Order so that the weighty, novel and complex questions purportedly decided by the district court can be decided in a future litigation that involves an actual case or controversy. *Arizonans for Official English*, 520 U.S. at 73; *Munsingwear, Inc.*, 340 U.S. at 40 (vacatur "is commonly utilized in precisely this situation to prevent a judgment [when jurisdiction is absent], from spawning any legal consequences.")

III. THIS COURT SHOULD CORRECT THE DISTRICT COURT'S FAILURE TO DISMISS SMUG'S STATE LAW CLAIMS WITH PREJUDICE.

After 5 and ½ years of litigation, which included discovery on two continents and yielded 40,000 pages of documents, the court refused to dismiss with prejudice SMUG's state law claims – for negligence and civil conspiracy – condemning Lively to yet more litigation in state court. (S.J. Order at 23, Addendum 145). This Court has jurisdiction to, and should, correct the district court's failure to dismiss SMUG's state law claims with prejudice. *See, e.g.*, *In re TJX Companies Retail Sec. Breach Litig.*, 564 F.3d 489, 493 (1st Cir. 2009); *Corujo v. Eurobank*, 299 F. App'x 1, 1 (1st Cir. 2008). *See also*, 15A Fed. Prac. & Proc. Juris. § 3914.6 (2d ed. 2002) ("Even more obviously, a defendant must be allowed to appeal a dismissal without prejudice in order to argue that the dismissal should have been with prejudice.")

A. The District Court Erred in Relinquishing Original, Mandatory Jurisdiction Over SMUG's State Law Claims.

Whether the court erred in matters of subject-matter jurisdiction is a legal question reviewed by this Court *de novo*. *Shea*, 868 F.2d at 517.

SMUG repeatedly invoked the district court's **original, diversity** jurisdiction over its state law claims. (*See, e.g.*, Am. Compl., dkt. 27, ¶ 15, Appendix 48) ("This Court also has jurisdiction...under 28 U.S.C. §1332 (diversity jurisdiction) because there is complete diversity among the parties…and the amount in controversy exceeds $75,000."); SMUG Mem. Opp. MSJ, dkt. 292, p. 104 ("There can be no dispute that Plaintiff has made a good-faith claim to damages in excess of $75,000...this Court has diversity jurisdiction.")).

The court was fully cognizant that SMUG had invoked its original jurisdiction. (*See, e.g.*, Tr. MTD Hrg. Jan. 7, 2013, dkt. 357, p. 55 ("I recognize that you have not just federal question jurisdiction **but you also allege diversity jurisdiction**") (emphasis added); MTD Order, dkt. 59, Addendum 16-17 ("The five-count Amended Complaint asserts...diversity jurisdiction")). Nevertheless, following dismissal of SMUG's federal claims for lack of subject-matter jurisdiction, the court relinquished its original, diversity jurisdiction over SMUG's state claims, dismissing them without prejudice, without any explanation or authority for so doing. (S.J. Order at 23, Addendum 145). **The court never concluded – expressly or impliedly – that it lacked diversity jurisdiction.**

Disingenuously, SMUG now points out that Lively argued below that diversity jurisdiction was absent, and posits that the district court did not "relinquish" its original jurisdiction but merely, and *sub silentio*, agreed with Lively that diversity jurisdiction was absent, and "effectively granted the relief Lively sought." (SMUG Reply in Support of Motion to Dismiss Appeal, EID 6109692, DOCID 00117183807, pp. 3-4 & n.3). This is a factual and legal impossibility.

"For the purpose of establishing diversity jurisdiction…it has long been the rule that a court decides the amount in controversy from the face of the complaint, 'unless it appears or is in some way shown that the amount stated in the complaint is not claimed 'in good faith.''" *Coventry Sewage Assocs. v. Dworkin Realty Co.*, 71 F.3d 1, 4 (1st Cir. 1995) (quoting *Horton v. Liberty Mutual Ins. Co.,* 367 U.S. 348, 353 (1961)). Thus, the only way for the district court to conclude that it lacked diversity jurisdiction over SMUG's state law claims would have been to agree with Lively and find that SMUG brought those claims **in bad faith**. *Id*. However, there is nothing in the summary judgment order that even hints that the court suspected, much less found, such malfeasance on the part of SMUG. Quite the contrary, the court's extra-jurisdictional purported findings that Lively's speech, writings and advocacy aided-and-abetted serious crimes against humanity, and that "these efforts to intimidate and injure the LGBTI community in Uganda were, unfortunately, to some extent successful," combined with the court's invitation for SMUG to refile its

state law claims in state court, leave only the firm conviction that the court believed SMUG to have filed this suit, including the state law claims, in good faith. (S.J. Order at 23, Addendum 145). And, having expressly assured the court that "[t]here can be no dispute that [SMUG] has made **a good-faith** claim to damages in excess of $75,000," (SMUG Mem. Opp. MSJ, dkt. 292, p. 104) (emphasis added), SMUG is on precarious ground to now contend otherwise, particularly given the implications of Fed. R. Civ. P. 11.

Far from agreeing with Lively that SMUG had brought its state law claims in bad faith, the court merely ignored its obligation to entertain those claims under its original, diversity jurisdiction, perhaps because entertaining those claims would have required their dismissal with prejudice, as demonstrated below. The court elected instead to relinquish its original jurisdiction and invited SMUG to refile those claims in state court. This is reversible error.

Diversity jurisdiction is both original and mandatory. *See* 28 U.S.C. §1332(a) ("The district courts **shall** have **original jurisdiction** of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between...citizens of a State and citizens or subjects of a foreign state") (emphasis added). "[F]ederal courts must abide by their virtually unflagging obligation to exercise their lawful jurisdiction…." *Nazario-Lugo v. Caribevision Holdings, Inc.*, 670 F.3d 109, 114 (1st Cir. 2012) (reversing refusal to exercise

diversity jurisdiction). "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Marshall v. Marshall*, 547 U.S. 293, 298 (2006).

Unlike supplemental jurisdiction, federal courts sitting in diversity have **no discretion** to relinquish jurisdiction over state claims following dismissal of federal claims:

> **The court had diversity jurisdiction over the case, which is not discretionary**. Thus, the District Court could not properly have eliminated the case from its docket....In contrast, when a…case involves pendent state-law claims, a district court has undoubted discretion to decline to hear the case.

Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 356 (1988) (emphasis added). The Ninth Circuit has similarly explained this firmly-entrenched principle:

> Dismissal of the federal claim would thus, ordinarily, have authorized the district court to remand the pendent state law claims. But...the amended complaint presented **an independent jurisdictional basis for the state law claims, namely diversity**…[W]here the district court is presented with a case within its original jurisdiction…**[it has] no discretion to remand these claims to state court.**

Williams v. Costco Wholesale Corp., 471 F.3d 975, 977 (9th Cir. 2006) (emphasis added) (internal quotes and citations omitted). *See also*, *K.M.B. Warehouse Distributors, Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 130 (2d Cir. 1995) ("if jurisdiction over the [state law] claims had been based upon diversity of citizenship, the district court would have erred in dismissing them" following dismissal of federal claims); *Custom Auto Body, Inc. v. Aetna Cas. & Sur. Co.*, No. 78-0301,

1983 WL 1873, *20 (D.R.I. Aug. 3, 1983) (court "lacks any discretion to dismiss" diversity state claims following dismissal of federal claims.); *Melendez Garcia v. Sanchez*, No. CIV. 02-1646 ADC, 2007 WL 7610724, *20-21 (D.P.R. Aug. 23, 2007) (same).

B. The District Court Erred in Relinquishing Supplemental Jurisdiction Over SMUG's State Law Claims.

Alternatively, even if SMUG had not invoked the court's original jurisdiction, the court erred in relinquishing supplemental jurisdiction over SMUG's state law claims. "[T]he termination of the foundational federal claim does not divest the district court of power to exercise supplemental jurisdiction, but, rather, sets the stage for an exercise of the court's informed discretion." *Senra v. Town of Smithfield*, 715 F.3d 34, 41 (1st Cir. 2013). "In deciding whether to exercise supplemental jurisdiction in such a circumstance, a judge must take into account concerns of comity, judicial economy, convenience, fairness, and the like." *Id.* (affirming retention of state claims, and dismissal of same with prejudice following dismissal of federal claims, because "parties had been litigating the matter for more than a year, and a seven-month window for discovery had closed"). "While dismissal may sometimes be appropriate if the federal-question claim is eliminated **early in the proceedings**, each case must be gauged on its own facts." *Roche v. John Hancock Mut. Life Ins. Co.*, 81 F.3d 249, 257 (1st Cir. 1996) (emphasis added) (affirming retention of state law claims, and dismissal of same with prejudice following

dismissal of federal claims, because "[t]he litigation had matured well beyond its nascent stages, discovery had closed, the summary judgment record was complete, the federal and state claims were interconnected, and powerful interests in both judicial economy and fairness tugged in favor of retaining jurisdiction."). *See also*, *Delgado v. Pawtucket Police Dep't*, 668 F.3d 42, 48 (1st Cir. 2012) (affirming retention of state law claims following summary judgment on federal claims because "the case had passed through every phase of litigation but trial.").

This Court "review[s] a district court's decision not to exercise supplemental jurisdiction for abuse of discretion." *Gonzalez-De-Blasini v. Family Dep't.*, 377 F.3d 81, 89 (1st Cir. 2004). A court that fails to consider judicial economy, or that relinquishes supplemental jurisdiction over fully and extensively litigated state law claims, abuses its discretion. *See Redondo Const. Corp. v. Izquierdo*, 662 F.3d 42, 49 (1st Cir. 2011) (court abused discretion in relinquishing supplemental jurisdiction over state claims because "action had been pending in federal court for more than six years, the summary judgment record had been complete for nearly a year," extensive discovery was relevant to federal and state claims, and state claims "rested on virtually the same factual basis as did [the federal] claim."). *See also*, *Miller Aviation v. Milwaukee Cnty. Bd. of Supervisors*, 273 F.3d 722, 732 (7th Cir. 2001) (district court abused its discretion in relinquishing supplemental jurisdiction over state claims, after "court spent more than five years overseeing this multifaceted

litigation, [and] considered 22 motions, held 9 hearings, and issued 19 orders, including the 71–page decision presently before us on appeal.”).

Here, as in *Senra*, *Roche*, *Delgado*, *Redondo*, and *Miller Aviation*, everything but trial was complete for both the state and federal claims, which arose out of the same facts. The court spent more than five years overseeing this multifaceted and multi-continent litigation, with the parties’ having exchanged 40,000 pages of documents, taken 100 hours of depositions on both coasts and several states in between, and filed 5,000 pages of summary judgment papers, and the court’s having considered 74 motions, held 6 hearings, and issued 90 orders, including the 79-page decision denying Lively’s motion to dismiss, and the 25-page decision granting Lively summary judgment. Under these circumstances, the court erred in relinquishing supplemental jurisdiction, **without any consideration of judicial economy**. This Court should reverse.

C. This Court Should Order Dismissal With Prejudice of SMUG’s State Law Claims.

There is more than sufficient evidence in the record for this Court to do what the district court refused – order the dismissal of SMUG’s state law claims with prejudice. SMUG’s negligence and civil conspiracy claims should be dismissed with prejudice because (1) they are clearly time-barred; (2) they are barred by the First Amendment; and (3) SMUG failed to adduce any evidence of damages.

1) SMUG's State Law Claims are Time-Barred.

Under Massachusetts law, the limitations period for both negligence and civil conspiracy is three years. *See* Mass. Gen. Laws Ann. ch. 260, § 2A (West); *see also Pagliuca v. City of Boston*, 35 Mass. App. Ct. 820, 823 (1994). A negligence cause of action accrues when a plaintiff has "(1) knowledge or sufficient notice that she was harmed and (2) knowledge or sufficient notice of what the cause of harm was." *Bowen v. Eli Lilly & Co.*, 408 Mass. 204, 208, 557 N.E.2d 739, 742 (1990).

"A civil conspiracy claim accrues on the date of the first allegedly wrongful act, and another wrongful act in that same conspiracy does not reset the time period during which a plaintiff may file suit." *Lamoureux v. Smith*, No. 07953B, 2007 WL 4633272, at *2 (Mass. Super. Nov. 5, 2007). *See also*, *Nieves v. McSweeney*, No. 9905457J, 2001 WL 1470497, at *3 (Mass. Super. Oct. 3, 2001), *aff'd,* 60 Mass. App. Ct. 1107, 800 N.E.2d 346 (2003) ("Under Massachusetts law, the injury and the damage alleged in the tort of civil conspiracy flow from the first overt act, not from the mere continuation of the conspiracy.").

SMUG filed this lawsuit on March 14, 2012. (Complaint, dkt. 1; Docket Sheet, Appendix 4). But SMUG alleges that the "conspiracy" involving Lively began in 2002 at the latest, and that Lively committed numerous overt acts when he first visited Uganda in 2002. (Am. Compl., dkt. 27, ¶¶26, 46-56, Appendix 10, 56-58). SMUG admitted that it was aware of Lively's 2002 visits to Uganda, and his

activities there, **since 2002**. (SMUG/Onziema Dep., dkt. 250-7, 367:5-17, Addendum 102). SMUG's negligence and civil conspiracy claims were not filed until 10 years later, or 7 years too late. They are time barred.

At the very least, SMUG admitted that it had five representatives present at Lively's speeches during the March 5-7, 2009 conference – Lively's last visit to Uganda. (SMUG/Onziema Dep., 372:15-19, Addendum 103). As such, SMUG knew everything that Lively said at the March 2009 conference at the moment he said it. (*Id*. at 372:20-373:2, Addendum 103). Upon hearing Lively's speeches during the March 2009 conference, **SMUG believed that it was being persecuted and harmed by Lively**. (*Id*. at 373:3-14, Addendum 103). SMUG was considering suing Lively "since he came here [to Uganda] in March 2009," so as of March 7, 2009 at the latest. (*Id*. at 151:10-18, Addendum 81). Since SMUG knew as of at least March 7, 2009 both that it was allegedly being harmed and that Lively was the supposed cause of that harm, there is no scenario under which SMUG's causes of action could not have accrued by March 7, 2009 at the very latest (if not years earlier). *Bowen*, 408 Mass. at 208. Because SMUG waited more than three years after that date to file this lawsuit, its state law claims are time-barred.

Importantly,

> [w]hen 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).

> 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**.'

Id. (emphasis added) (quoting *Vega v. Kodak Caribbean, Ltd.,* 3 F.3d 476, 479 (1st Cir. 1993)).

Here, SMUG adduced no competent evidence from which a fact finder could conclude that SMUG did not know in 2002, let alone by March 7, 2009, that Lively was the alleged source of its claimed "persecution." On this evidentiary failure alone, summary judgment on SMUG's state law claims was warranted, and the claims should be dismissed with prejudice.

2) SMUG's State Law Claims are Barred by the First Amendment.

a. The First Amendment is Paramount in This Case.

In the MTD Order, the court acknowledged that Lively's First Amendment defenses to SMUG's claims "will almost certainly be front and center at the summary judgment stage." (Dkt. 59 at 57, Addendum 57). In their summary judgment briefing, the parties dedicated **seventy-three pages** to First Amendment issues. (Dkt. 257 pp. 105-141 of 198; Dkt. 292 pp. 141-151 of 152; Dkt. 305 pp. 59-86 of 150). And, the court designated only two questions for oral argument on

summary judgment, one of which was, "what specific speech or conduct by Defendant – however odious, in Plaintiff's view – fell outside the protection of the First Amendment?" (Order Regarding Oral Argument, dkt. 321).

However, in the S.J. Order the court relieved itself of having to engage the dispositive First Amendment obstacles to its otherwise ultra vires findings and conclusions on SMUG's ATS claims, reclassifying the "front and center" First Amendment issues as mere "satellite arguments" and "peripheral contentions." (Dkt. 350 at 4 n.4, Addendum 126.) The court's brush-off notwithstanding, the First Amendment bars not only SMUG's federal "persecution claims," but, for present purposes, SMUG's state law negligence and civil conspiracy claims as well. SMUG has no evidence of conduct by Lively which is not protected speech. (MSJ Br., dkt. 257 at 83-119; MSJ Reply, dkt. 305 at 46-73.)

b. Lively's Core Political Speech on Public Issues Merits the Highest First Amendment Protection.

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

quotation marks omitted). "**If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable**." *Snyder*, 131 S. Ct. at 1219 (quoting *Texas v. Johnson,* 491 U.S. 397, 414 (1989)) (emphasis added). Even "threats of vilification or social ostracism," are "constitutionally protected and beyond the reach of a damages award." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 926 (1982). "**Speech is powerful**. **It can stir people to action**…and—as it did here—inflict great pain. [But] we cannot react to that pain **by punishing the speaker**." *Snyder*, 131 S. Ct. at 1220 (emphasis added). Nor may speech be regulated based upon "listeners' reaction" to it. *Forysth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 134 (1992).

Thus, Lively's peaceful expression of his Christian views on marriage, family, and homosexuality merit the highest First Amendment protection, regardless of how offensive his views may be to some or even many, and regardless of the reaction of listeners. To be sure, there is no such thing in Massachusetts (or any other state) as a duty of care not to cause a "virulently hostile environment" (Am. Compl. ¶ 258), and certainly not when the alleged "hostile environment" (*i.e.*, "listeners' reaction") was created through the civil, peaceful expression of core political speech on a

matter of public concern, entitled to the highest First Amendment protection.[3] Thus, the First Amendment bars SMUG's negligence and civil conspiracy claims, which are based on nothing more than Lively's protected speech and advocacy.

Importantly, it is beyond cavil that the First Amendment guarantees Lively's right to engage in core political speech not only in the United States, but throughout the entire world. *See Reid v. Covert*, 354 U.S. 1, 5-6 (1957); *Ross v. McIntyre*, 140 U.S. 453, 464 (1891).

c. The Exceptions to First Amendment Protection Previously Entertained by the District Court Are Foreclosed by the Record.

For speech to fall outside the First Amendment's protection, it must satisfy one of the few "historic and traditional categories of expression long familiar to the bar." *U.S. v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (internal quotation marks and citation omitted). The recognized exceptions to First Amendment protection for "incitement" and "speech integral to criminal conduct," though entertained by the court at the dismissal stage (MTD Order at 59-62), are now foreclosed by the record.

The undisputed evidentiary record in this case demonstrates that Lively's speech and expressive activity do not constitute incitement. Only "advocacy [which]

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[3] The district court previously recognized that SMUG's "state law negligence claim appears to be substantively the most fragile," because Lively's argument that there is no legally cognizable duty to avoid creating a "virulently hostile environment" "certainly has force." (MTD Order, dkt. 59, at 78.)

is directed to inciting or producing **imminent** lawless action **and is likely** to incite or produce such action" is unprotected. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982) (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)) (emphasis added). But "the mere abstract teaching. . .of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." *Brandenburg*, 395 U.S. at 448 (quoting *Noto v. United States*, 367 U.S. 290, 297–298 (1961)). There is no exception for "threats of vilification or social ostracism," because they are "constitutionally protected and beyond the reach of a damages award." *Claiborne*, 458 U.S. at 926 (emphasis added). In the case at bar, the undisputed record shows that SMUG cannot establish that Lively advocated any violence or other illegal activity, much less incited "**imminent**" violence or illegality against Ugandans. Put within the framework of SMUG's made-up tort, speech likely to cause **imminent violence** may be actionable; speech likely to cause a "virulently hostile environment" cannot be.

The record likewise forecloses resort to the limited First Amendment exception for "speech integral to criminal conduct," for the simple and dispositive reason that SMUG's state law claims are civil, not criminal. Invocation of this exception, recognized by the Supreme Court in *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949), requires at least three elements, none of which can be

established on this record: (1) the speaker's violation of a "**valid criminal statute**;" (2) the speaker's "**sole immediate object**" and "**sole immediate purpose**" was to facilitate the ongoing commission of a criminal offense; and (3) the speaker's "single and integrated course of conduct" pursuant to a "plan" and "agreements" with others "designed" to violate the law. 336 U.S. at 495-98, 501, 502. Neither SMUG's (civil) negligence nor its civil conspiracy claim can be saved by the *Giboney* exception.

d. SMUG Has No Sufficient Evidence to Meet the *Strictissimi Juris* Specific Intent Standard for Its Civil Conspiracy Claim.

Under this Court's seminal case, alleged conspiracies combining protected speech with both legal and illegal conduct must be proved *strictissimi juris*,[4] which is a heightened, specific intent standard to be applied in "bifarious" conspiracy cases "in the shadow of the First Amendment." *United States v. Spock*, 416 F.2d 165, 172-73, 178-79 (1st Cir. 1969). Under this standard, there can be no individual conspiracy liability for wrongs committed by others unless there is substantial evidence that the individual defendant "**personally agreed to employ the illegal means**" contemplated by the alleged conspiracy. *Id.* at 176-77.

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

There is no record evidence in this case, of either speech or conduct by Lively, showing that Lively personally agreed to engage in any illegality. To be sure, Lively disputes all aspects of SMUG's alleged conspiracy, including that there is any record evidence of an unlawful agreement involving Lively, or that Lively was ever involved in any agreement with illegal purposes. But it is beyond dispute that the record shows numerous legal purposes and objectives for all the Ugandan group activity in which Lively was involved, making it, at worst, "bifarious" and "within the shadow of the First Amendment" under *Spock*. Accordingly, the question of Lively's intent must be determined *strictissimi juris*, which requires evidence that Lively personally agreed to employ the illegal means of persecution of which SMUG complains. Given the complete lack of evidence of any intent by Lively to effect any of the 14 alleged acts of persecution (*see* pp. 10-15, *supra*), SMUG's civil conspiracy claim is barred.

4) SMUG Failed to Adduce any Evidence of Damages.

Throughout the entire period of discovery in this case, SMUG refused to provide its damages calculation to Lively, maintaining instead that its damages would be calculated by an expert and disclosed with its expert reports after the close of fact discovery. (Lively's Statement of Material Facts, ¶¶180(a)-(d), dkt. 257, pp. 65-66 of 198, Addendum 119-120). SMUG continually maintained that an expert was required to calculate its damages, however, SMUG never disclosed an expert

witness nor provided an expert report on damages. (*Id*. at ¶¶181-182, Addendum 120). SMUG ultimately provided a lay witness as its Rule 30(b)(6) designee on the subject of damages, but this witness was not able to answer a single question about how SMUG's purported damages were calculated. (*Id*. at ¶191, Addendum 122).

The failure to show damages is grounds for granting summary judgment on tort claims, because damages are an element of the claim. *See Young v. Wells Fargo Bank, N.A.*, 109 F. Supp. 3d 387, 393-96 (D. Mass. 2015); *Cash Energy, Inc. v. Weiner*, 81 F.3d 147, 1996 WL 141787, at *2 (1st Cir. Mar. 29, 1996) (affirming court's granting of summary judgment where plaintiff was unable to prove damages); *Boston Prop. Exchange Transfer Co. v. Iantosca*, 720 F.3d 1, 10 (1st Cir. 2013) ("As for the tort claims, we affirm summary judgment for the defendants on all of them because [plaintiff] failed to provide any evidence to meet an essential element of each: that the defendants caused it to suffer damages.").

SMUG's abject failure to adduce any admissible evidence as to any alleged damages required the court to dismiss its state law claims with prejudice. The district court's failure to dismiss with prejudice was erroneous and should be corrected by this Court.

CONCLUSION

For these reasons, this Court should (1) vacate for lack of subject matter jurisdiction the district court's MTD Order; (2) reform the district court's S.J. Order to purge the extra-jurisdictional and ultra vires pronouncements by the court, leaving only the announcement of lack of jurisdiction over SMUG's federal claims and their dismissal; (3) reverse the portion of the S.J. order dismissing SMUG's state law claims without prejudice, and remand same to the district court with instructions to dismiss them with prejudice; and (4) issue such other and further relief as this Court deems just and proper.

Respectfully submitted,

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/s/ Horatio G. Mihet__________

Attorney for Defendant Appellant Scott Lively

Dated: October 2, 2017

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I hereby certify that on this 2nd day of October, 2017, I caused the foregoing to be electronically filed with this Court. Service will be effectuated on all counsel of record via this Court's ECF/electronic notification system.

/s/ Horatio G. Mihet
Horatio G. Mihet
Attorney for Defendant-Appellant

NO. 17-1593

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

SEXUAL MINORITIES UGANDA

Plaintiff-Appellee,

v.

SCOTT LIVELY, individually and as President of Abiding Truth Ministries,

Defendant-Appellant.

Appeal from the United States District Court for the District of Massachusetts
Lower Court Case No. 3:12-cv-30051-MAP

ADDENDUM
TO BRIEF OF DEFENDANT-APPELLANT SCOTT LIVELY

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Judgment in a Civil Case (Dkt. 351)..Addendum 148

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

SEXUAL MINORITIES UGANDA,)
Plaintiff)
)
v.) C.A. No. 12-cv-30051-MAP
)
SCOTT LIVELY,)
Defendant)

MEMORANDUM AND ORDER REGARDING
DEFENDANT'S MOTIONS TO DISMISS
(Dkt. Nos. 21 & 30)

August 14, 2013

PONSOR, U.S.D.J.

I. INTRODUCTION

Plaintiff Sexual Minorities Uganda is an umbrella organization located in Kampala, Uganda, comprising member organizations that advocate for the fair and equal treatment of lesbian, gay, bisexual, transgender, and intersex (LGBTI) people in that east African country. Defendant Scott Lively is an American citizen residing in Springfield, Massachusetts who, according to the complaint, holds himself out to be an expert on what he terms the "gay movement." (Dkt. No. 27, Am. Compl. ¶ 1.) Lively is also alleged to be

an attorney, author, and evangelical minister.

Plaintiff alleges that in concert with others Defendant -- through actions taken both within the United States and in Uganda -- has attempted to foment, and to a substantial degree has succeeding in fomenting, an atmosphere of harsh and frightening repression against LGBTI people in Uganda. The complaint asserts five counts, three invoking the jurisdiction of the federal Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), and two under state law. Plaintiff seeks compensatory, punitive, and exemplary damages; declaratory relief holding that Defendant's conduct has been in violation of the law of nations; and injunctive relief enjoining Defendant from undertaking further actions, and from plotting and conspiring with others, to persecute Plaintiff and the LGBTI community in Uganda.

Defendant has filed two motions to dismiss, offering in essence five arguments.[1] First, the court lacks

[1] Defendant filed his first motion to dismiss (Dkt. No. 21) based on Plaintiff's original complaint (Dkt. No. 1). Subsequently, Plaintiff filed a First Amended Complaint. (Dkt. No. 27.) Defendant has now moved to dismiss the Amended Complaint. (Dkt. No. 30.) Because the Amended Complaint is now the operative pleading, the court will focus on the arguments raised in Defendant's second motion to dismiss.

jurisdiction because international norms do not bar persecution based on sexual orientation or gender identity with sufficient clarity and historical lineage to make it one of the narrow set of claims for which the ATS furnishes jurisdiction. Second, the court cannot recognize a claim under the ATS for actions taken outside the United States, as the Supreme Court has recently held in Kiobel v. Royal Dutch Petroleum, 133 S. Ct. 1659 (2013). Third, Plaintiff lacks standing to bring this case either on behalf of itself as an organization or on behalf of members of the LGBTI community in Uganda. Fourth, the right of free speech described in the First Amendment to the United States Constitution prohibits any attempt by Plaintiff to restrict expression, however distasteful, through court action. Finally, the two claims asserted under Massachusetts state law lack any adequate legal foundation.

For the reasons set forth at length below, none of these arguments is persuasive. As to the first argument, many authorities implicitly support the principle that widespread, systematic persecution of individuals based on their sexual orientation and gender identity constitutes a

crime against humanity that violates international norms. It is a somewhat closer question whether this crime constitutes what Justice Souter has termed one of the "relatively modest set of actions alleging violations of the law of nations" for which the ATS furnishes jurisdiction. Sosa v. Alvarez-Machain, 542 U.S. 692, 720 (2004). However, aiding and abetting a crime against humanity is a well-established offense under customary international law, and actions for redress of this crime have frequently been recognized by American courts as part of the subclass of lawsuits for which the ATS furnishes jurisdiction. Given this, the allegations set forth in the Amended Complaint are more than adequate at this stage to require denial of Defendant's motion to dismiss. Moreover, given the elasticity of the legal standard for ATS jurisdiction, it is fairer and more prudent to address the Sosa issue on a fully developed record, following discovery.

Second, the restrictions established in Kiobel on extraterritorial application of the ATS do not apply to the facts as alleged in this case, where Defendant is a citizen of the United States and where his offensive conduct is

alleged to have occurred, in substantial part, within this country. Indeed, Defendant, according to the Amended Complaint, is alleged to have maintained what amounts to a kind of "Homophobia Central" in Springfield, Massachusetts. He has allegedly supported and actively participated in worldwide initiatives, with a substantial focus on Uganda, aimed at repressing free expression by LGBTI groups, destroying the organizations that support them, intimidating LGBTI individuals, and even criminalizing the very status of being lesbian or gay.[2] Kiobel makes clear that its restrictions on extraterritorial application of American law do not apply where a defendant and his or her conduct are based in this country.

Third, clear authority supports Plaintiff's standing here. Fourth, the argument that Defendant's actions have constituted mere expression protected under the First Amendment is, again, premature. Accepting the allegations of the complaint, as the court must at this stage,

[2] It is important to emphasize that the court at this stage is drawing its summary of facts from the allegations of the Amended Complaint, some of which describe despicable opinions and conduct by Defendant. Defendant denies a number of these claims; Plaintiff will bear the burden of proving them at trial.

sufficient facts are alleged, with specific names, dates, and actions, to support the claim that Defendant's behavior crossed well over any protective boundary established by the First Amendment. Fifth, and finally, the arguments attacking the claims under Massachusetts state law have not been convincingly developed. Having denied the motions to dismiss the federal claims, the court will retain the state law claims pending discovery and, if appropriate, reconsider them on a fuller record in connection with a motion for summary judgment.

II. FACTS[3]

The essence of the claims before the court, expatiated in the Amended Complaint's detailed recitation of allegations, is that Defendant Scott Lively along with others in Uganda devised and carried out a program of persecution aimed at Plaintiff's organization and its

[3] The factual background is drawn from the allegations contained in Plaintiff's Amended Complaint (Dkt. No. 27). Because this is a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the court "accept[s] as true all well-pleaded facts, analyz[es] those facts in the light most hospitable to the plaintiff's theory, and draw[s] all reasonable inferences for the plaintiff." See United States ex rel. Hutcheson v. Blackstone Med., Inc., 647 F.3d 377, 383 (1st Cir. 2011), cert. denied 132 S. Ct. 815 (2011).

members based on their sexual orientation and gender identity. The Amended Complaint describes a campaign of harassment and intimidation, and a resulting atmosphere of fear, that Defendant is alleged, in active concert with others, to have directed at the LGBTI community in Uganda. According to Plaintiff, Defendant helped coordinate, implement, and justify "strategies to dehumanize, demonize, silence, and further criminalize the LGBTI community" in Uganda. (Dkt. No. 27, Am. Compl. ¶ 7.)

The Amended Complaint identifies a group of Ugandans with whom Defendant is alleged to have worked closely to carry out his "decade-long persecutory campaign." (Dkt. No. 27, Am. Compl. ¶ 25.) These individuals allegedly include:

- Stephen Langa, the Executive Director of the Family Life Network and the Director of the Ugandan branch of the Arizona-based Disciple Nations Alliance;
- Martin Ssempa, Ugandan pastor, involved in implementing Uganda's HIV/AIDS policy from as early as 2003;
- James Buturo, Ugandan Minister of Information and Broadcasting for the President (2001-2006) and Minister of Ethics and Integrity in the Office of the Vice-

President (2006-2011);

- David Bahati, member of Parliament and sponsor of legislation entitled the Anti-Homosexuality Bill; and
- Simon Lokodo, current Minister of Ethics and Integrity.

According to the Amended Complaint, Defendant came to Uganda in 2002 when he participated in the country's first anti-LGBTI conference. In March 2002, Defendant spoke at a gathering organized by Langa about the supposed links between pornography and homosexuality. Several months later in June 2002, Defendant returned to Uganda to participate in additional speaking events and media appearances organized by Langa. These appearances were designed, again, to headline the purported link between pornography and homosexuality.

During this trip, Defendant and Langa also held an all-day invitation-only pastors' conference. Defendant later wrote that the pastors in attendance "were very grateful for the insights I was able to give them about the way in which America was brought low by homosexual activism." (Dkt. No. 27, Am. Compl. ¶ 50.) Defendant also addressed students at several universities and high schools where he blamed the

so-called "gay movement" for the dangerous effects of a "porn culture." (Dkt. No. 27, Am. Compl. ¶ 51.) Defendant also met with the Kampala City Council.

Defendant has stated, according to the Amended Complaint, that these appearances and meetings in 2002 made him instrumental in the efforts by Langa and Ssempa, not only to create a rhetorical platform for Uganda's anti-LGBTI campaign of persecution, but to craft specific initiatives designed to repress and intimidate LGBTI people and organizations advocating on their behalf. (Dkt. No. 27, Am. Compl. ¶ 56.)

Plaintiff alleges that between 2002 and 2009 Defendant continued to work from the United States with Langa and Ssempa to assist, encourage, and consult with them to design and then carry out specific actions to deny fundamental rights to the LGBTI community in Uganda. During this time, Ssempa was involved in formulating the Ugandan HIV/AIDS policy. In this role, he took action to exclude LGBTI persons from the program's assistance. Ssempa also publicly posted the names of LGBTI rights advocates -- labeled as "homosexual promoters" -- as well as pictures of them with

their contact information, as part of a campaign of intimidation.

For his part, Defendant began developing and disseminating strategies to be used to discriminate against and persecute LGBTI communities in Uganda and elsewhere. In pursuit of this, he published two books, Defend the Family: Activist Handbook and Redeeming the Rainbow. The books presented a comprehensive plan of action designed to repress the so-called "gay movement," which he described as "the most dangerous social and political movement of our time." (Dkt. No. 27, Am. Compl. ¶¶ 57-60.) The two primary tactics advocated by Defendant were criminalizing advocacy -- that is, subjecting any public expressions of support for the LGBTI community to criminal prosecution -- and attributing to LGBTI individuals a compulsion to sexually abuse children.

In July 2005, the police unlawfully raided the home of Victor Mukasa, a transgender LGBTI advocate and founder of Plaintiff Sexual Minorities Uganda, seized a number of documents as well as hard-copy and electronic files, and arrested Mukasa's guest, Yvonne Oyo. Oyo was taken to the

police station where she was forced to remove her clothing in front of male officials to "prove her sex." (Dkt. No. 27, Am. Compl. ¶ 30.) Police then sexually assaulted Oyo by touching and fondling her breasts.

Over three years following the raid, in December 2008, the High Court of Uganda issued a well-publicized ruling arising out of the raid of Mukasa's home and the arrest and abuse of Oyo. The High Court held that gays and lesbians, like anyone else, could challenge the unlawful conduct of authorities. The High Court also awarded damages to Oyo for the violation of her right to protection from torture and cruel, inhuman, and degrading treatment under Article 24 of the Ugandan Constitution. The High Court also awarded damages to Mukasa for the violation of his right to privacy of person, home, and property guaranteed by Article 27 of the Ugandan Constitution.

Plaintiff alleges that this High Court decision had the effect of spurring Defendant, in coordination with his co-conspirators in Uganda, to intensify the campaign of persecution against members of the LGBTI community. Less than three months after the High Court decision, in March

2009, Langa hosted an anti-gay conference entitled, "Seminar on Exposing the Homosexual Agenda." The conference was attended by a number of Ugandan religious and government leaders, parliamentarians, police officers, and teachers. Defendant traveled to Uganda to speak as one of the headliners at this conference. During this visit, Defendant met with parliamentarians and government officials including Buturo, made media appearances, and spoke at seminars at schools and churches.

According to the Amended Complaint, Defendant continued his attacks on gay and lesbian people, some of them bordering on ludicrous. Defendant charged, for example, that homosexuals were behind the rise of Nazism and the genocide in Rwanda. (Dkt. No. 27, Am. Compl. ¶¶ 8, 24, 54, 82, 93.)[4] Other accusations were aimed at playing on parents' fears, such as the bogus claims that gay and

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[4] In his book The Pink Swastika: Homosexuality in the Nazi Party, Defendant argued that the rise of Nazism, with its resultant horrors, was engineered and driven by a violent and fascistic gay movement in Germany. In other works, he has blamed homosexuals for other historical atrocities including the Spanish Inquisition, the French Reign of Terror, South African apartheid, American slavery, and the Rwandan genocide. (Dkt. No. 27, Am. Compl. ¶ 24.)

lesbian people had a compulsion to sexually abuse children and that they were engaged in a campaign to "recruit" Ugandan children as homosexuals. (Dkt. No. 27, Am. Compl. ¶¶ 36-39, 65, 72-74, 81, 82, 93.)

Defendant also allegedly formulated and promoted specific strategies to further deprive the LGBTI community of its basic human rights, including freedom of expression and protection of life, liberty, and property. Defendant, according to Plaintiff, has acknowledged that his 2009 efforts in Uganda were based on his book <u>Redeeming the Rainbow</u>, which advocates criminalizing advocacy on behalf of LGBTI people and attributing acts of sexual violence against children to LGBTI individuals' purported obsession with pedophilia. Nor were Defendant's efforts without effect. Defendant boasted that an associate was told "that our campaign was like a nuclear bomb against the 'gay' agenda in Uganda." (Dkt. No. 27, Am. Compl. ¶ 88.)

According to the Amended Complaint, partly as a result of Defendant's efforts to incite fear and hatred against LGBTI people, on April 29, 2009, an Anti-Homosexuality Bill was introduced in the Ugandan Parliament. The bill proposed

the death penalty for crimes of "aggravated homosexuality," including execution for "repeat offenders" of "homosexuality." (Dkt. No. 27, Am. Compl. ¶ 37.) The bill also proposed to criminalize any advocacy on behalf of the LGBTI community as the "promotion of homosexuality." This type of repression of any public support for equal treatment of gays and lesbians was precisely what Defendant advocated in his speeches and writings and the strategy he was helping his co-conspirators in Uganda to promulgate.

The bill was revised and expanded in October 2009 by co-conspirator and member of Parliament, David Bahati. The revised bill left the death penalty provisions and expanded the criminalization of association with or advocacy for LGBTI individuals. The adoption of this legislation would have turned Uganda into a virtual anti-gay police state, making it a crime punishable by imprisonment, for example, for a Ugandan to fail to report to the police any person whom he or she suspects is a "homosexual" or involved in advocacy related to homosexuality. (Dkt. No. 27, Am. Compl. ¶ 9.)

The Amended Complaint alleges that Defendant has

acknowledged that he reviewed and commented on a draft of the Anti-Homosexuality Bill before it was introduced, communicating with the leadership in the Ugandan Parliament through Ssempa. Defendant returned to Uganda in 2009 to help efforts to strengthen the law and embolden leaders "so that when the law came out they'd have an easier time" implementing it. (Dkt. No. 27, Am. Compl. ¶ 85.)

The Amended Complaint notes that, while the Anti-Homosexuality Bill did not pass, the level of LGBTI persecution from governmental and media sources increased. With Defendant's active assistance Langa, Ssempa, Buturo, and Bahati continued to sensationalize in lurid terms the threat LGBTI individuals purportedly posed to children. Media outings of LGBTI individuals became more frequent and were accompanied with continued incendiary claims that LGBTI people posed a danger to children. In one case, a tabloid accompanied the photos of gay and lesbian people with the headline "Hang Them."

The Ugandan High Court issued a permanent injunction in January 2011 to prevent newspapers from identifying LGBTI individuals and requiring the tabloid to pay damages to

persons whose photos were depicted. Nevertheless, in the wake of public disclosures and police harassment, a number of activists, including Plaintiff's current Executive Director, were forced to leave Uganda or go into hiding.

Despite the High Court rulings, Ugandan police and government officials have more recently continued efforts to repress any advocacy on behalf of LGBTI people, as Defendant's writings urge. In 2012, at least two gatherings of LGBTI advocates were raided and disbanded. Both raids were ordered by Simon Lokodo, the current Minister of Ethics and Integrity. Lokodo has threatened advocates with arrest for "promotion of homosexuality." After the February 2012 raid, Lokodo referred to the advocates as "terrorists." Lokodo has stated that the raids and arrests were ordered so that "everybody else will know that at least in Uganda we have no room here for homosexuals and lesbians." (Dkt. No. 27, Am. Compl. ¶ 41, 165-85.) Subsequently, Plaintiff has not been permitted to register as a non-governmental organization.

The five-count Amended Complaint asserts jurisdiction under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), as

well as federal question jurisdiction (§ 1331), diversity jurisdiction (§ 1332), and supplemental jurisdiction (§ 1367). The five counts allege: (I) crimes against humanity of persecution, based on individual responsibility under the ATS; (II) crimes against humanity of persecution, based on a joint criminal enterprise under the ATS; (III) crimes against humanity of persecution, based on conspiracy under the ATS; (IV) civil conspiracy under Massachusetts state law; and (V) negligence under Massachusetts state law. Plaintiff seeks compensatory, punitive, and exemplary damages; declaratory relief holding that Defendant's conduct was in violation of the law of nations; and injunctive relief enjoining Defendant from undertaking further actions, and from plotting and conspiring with others, to persecute Plaintiff and the LGBTI community in Uganda.

III. DISCUSSION

As noted, Plaintiff has invoked jurisdiction for this lawsuit, in part, under the Alien Tort Statute. This statute, passed as part of the Judiciary Act of 1789, is terse, stating simply: "The district courts shall have original jurisdiction of any civil action by an alien for a

tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. Defendant has raised two independent challenges to the court's ability to recognize a cause of action under the ATS in his motion to dismiss.

First, Defendant points out that the ATS furnishes jurisdiction only where the international law norm is sufficiently definite and historically rooted to support the asserted cause of action. Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004). In other words, even where a colorable claim for a violation of current international norms is adequately set forth, a further question must be confronted: is this cause of action among "the modest number of international law violations with a potential for personal liability" for which jurisdiction adheres under the ATS? Sosa, 542 U.S. at 724. Defendant argues, in essence, that the Amended Complaint sets out no adequate claim for a violation of any international norm, and, even if it does, the alleged violation does not fall within the small group of claims for which the ATS furnishes jurisdiction.

Second, Defendant cites Kiobel v. Royal Dutch

Petroleum, 133 S. Ct. 1659 (2013), as support for the argument that Plaintiff has no claim under the ATS in any event, given the presumption against extraterritoriality described by Chief Justice Roberts in his majority opinion.

In addition to the two arguments specifically directed at the court's ability to recognize a claim under the ATS, Defendant contends that Plaintiff lacks standing to bring this suit. He further takes the position that all of the allegations set forth in the Amended Complaint target speech protected by the First Amendment and therefore cannot form the basis of any lawsuit against him. Finally, Defendant challenges the application of Massachusetts state law, based on the statute of limitations and the sufficiency of the pleadings. The discussion below will begin by addressing the ATS-related arguments, then move to Defendant's other contentions.

A. "Persecution" Under the Alien Tort Statute.

Plaintiff alleges that Defendant aided and abetted in the persecution of the LGBTI community in Uganda and that this persecution amounted to a crime against humanity. The Supreme Court has held that a federal court can only

recognize a claim under the ATS if the claim seeks to enforce an underlying norm of international law that is as clearly defined and accepted as the international law norms familiar to Congress in 1789 when the ATS was enacted. Sosa, 542 U.S. at 732. The analysis, therefore, must proceed in two steps: first, was there a violation of an international norm -- in this case, as Plaintiff alleges, a recognized crime against humanity committed by Defendant? Second, if so, is the crime against humanity within the limited group of claims for which the ATS furnishes jurisdiction?

The answer to the first question is straightforward and clear. Widespread, systematic persecution of LGBTI people constitutes a crime against humanity that unquestionably violates international norms. A review of applicable authorities makes the answer to the second question easily discernible as well. Aiding and abetting in the commission of a crime against humanity is one of the limited group of international law violations for which the ATS furnishes jurisdiction.

A variety of sources can be used to determine the

content of international law: treaties, judicial decisions of the "courts of justice of appropriate jurisdictions," and controlling legislative or executive decisions. The Paquete Habana, 175 U.S. 677, 700 (1900); see also Sosa, 542 U.S. at 734. In the absence of these controlling authorities, the Supreme Court has counseled that the existence and content of international law may be derived by reference to:

> **the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.**

Sosa, 542 U.S. at 734 (citing The Paquete Habana, 175 U.S. at 700).

In analyzing the existence of the international legal norm proffered by Plaintiff in this case, it is helpful to begin by differentiating among three terms: discrimination, persecution, and crimes against humanity. These three concepts measure the increasing severity of the discriminatory activity against a targeted group.

The Human Rights Committee of the United Nations has

defined discrimination as:

> [A]ny distinction, exclusion, restriction, or preference based on certain motives . . . that seeks to annul or diminish the acknowledgment, enjoyment, or exercise, in conditions of equality, of the human rights and fundamental freedoms to which every person is entitled.

UN Human Rights Comm., CCPR Gen. Comment 18, Non-Discrimination (1989), available at http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/3888b0541f8501c9c12563ed004b8d0e?Opendocument.

Persecution is a harsher subset of discrimination, comprising "intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity." Rome Statute on the International Criminal Court art. 7(2)(g), July 1, 2002, 2187 U.N.T.S. 38544. Persecution can be a crime against humanity, but it may not always rise to that level.

For persecution to amount to a crime against humanity, it must be "part of a widespread or systematic attack directed against any civilian population." Rome Statute art. 7(1)(h).

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." See Sosa, 542 U.S. at 732 (citation omitted). On the other hand, persecution that rises to the level of a crime against humanity has repeatedly been held to be actionable under the ATS. See Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 256 (2d Cir. 2009); Cabello v. Fernandez-Larios, 402 F.3d 1148, 1154 (11th Cir. 2005) (noting that crimes against humanity have been recognized as actionable under United States and international law since long before the 1970's); Flores v. Southern Peru Copper Corp., 414 F.3d 233, 244 n.18 (2d Cir. 2003) (noting that "customary international law rules proscribing crimes against humanity . . . have been enforceable against individuals since World War II"); Kadić v. Karadžić, 70 F.3d 232, 236 (2d Cir. 1995); In re Chiquita Brands Int'l, Inc., 792 F. Supp. 2d 1301, 1344 (S.D. Fla. 2011); Doe v. Saravia, 348 F. Supp. 2d 1112, 1156-57 (E.D. Cal. 2004) (holding that persecution that constitutes a crime against humanity is actionable under the ATS); Mehinovic v. Vuckovic, 198 F.

Supp. 2d 1322, 1352 (N.D. Ga. 2002) ("Crimes against humanity have been recognized as a violation of customary international law since the Nuremberg trials and therefore are actionable under the ATCA."), abrogated in part Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1247 (11th Cir. 2005).

For persecution to reach the level of a crime against humanity, it typically must involve more than the "intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity." Rome Statute art. 7(2)(g). It must be demonstrated, in addition, that the persecution has been "part of a widespread or systematic attack" to qualify as a crime against humanity. Saravia, 348 F. Supp. 2d at 1156; see also Rome Statute art. 7(1)(h).

To properly plead persecution as a crime against humanity, Plaintiff must allege both the proper actus reus -- denial of fundamental rights -- and mens rea -- the intentional targeting of an identifiable group. The allegations set forth in the Amended Complaint offer evidence of both aspects of criminal intent. It has been

noted that "the crime of persecution encompasses a variety of acts, including, inter alia, those of a physical, economic or judicial nature, that violate an individual's right to the equal enjoyment of his basic rights." Prosecutor v. Tadić, Trial Judgment, IT-94-1-T ¶ 710 (May 7, 1997). In determining what constitutes a basic right, international courts have looked to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Id. at 703; Prosecutor v. Kupreškić, Judgment, IT-95-16-T, ¶ 621 (Jan. 14, 2000).

Persecution on the level of a crime against humanity must be based on the identity of a specific targeted group. Defendant argues that persecution based on sexual orientation or gender identity has not been sufficiently recognized under international law to be actionable under the ATS. It is true that many of the international treaties and instruments that provide jurisdiction over crimes against humanity list particular protected groups without specifying LGBTI people. See, e.g., Nuremberg Charter art. 6(c) (encompassing "persecutions on political, racial or religious grounds"); Rome Statute art. 7(1)(h) (defining an

actionable crime against humanity as "persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law"); Updated Statute of the Int'l Criminal Tribunal for the Former Yugoslavia art. 5(h), Sept. 2009 (providing jurisdiction over "persecutions on political, racial and religious grounds"); Statute of the Int'l Tribunal for Rwanda art. 3(h), Jan. 1, 2007 (providing jurisdiction over "persecutions on political, racial and religious grounds").

It is noteworthy, however, that virtually all of these instruments provide savings clauses. See Rome Statute art. 7(1)(h) (including "other grounds that are universally recognized as impermissible under international law" in the definition). Even when they do not, international courts have interpreted the identity of the group requirement broadly to encompass persecution of a discrete identity. See Prosecutor v. Naletilić and Martinović, Judgment, IT-98-34-T, ¶ 636 (Mar. 31, 2003) (instructing that the jurisdictional limit to prosecute persecution based on race,

politics, and religion must be "interpreted broadly"); Prosecutor v. Nahimana, Trial Judgment, ICTR-99-52-T ¶ 1071 (Dec. 3, 2003).

Significantly, the boundaries of persecution are almost always defined by those carrying out the persecution against a particular group. In other words, the perpetrator "defines the victim group while the targeted victims have no influence of the definition of their status." Naletilić and Martinović Judgment ¶ 636. This fact strongly argues in favor of a generous interpretation of what groups enjoy protection under international norms.

Customary international law does not in general limit the type of group that may be targeted for persecution. As the International Criminal Tribunal for the Former Yugoslavia (ICTY) has observed, "There are no definitive grounds in customary international law on which persecution must be based and a variety of different grounds have been listed in international instruments." Tadić Trial Judgment ¶ 711.

In light of the savings clauses in the international instruments and the expansive boundaries of customary law,

the argument that international norms do not bar systematic persecution of LGBTI people, because -- in contrast to racial, ethnic or religious minorities -- they are not explicitly mentioned is unpersuasive. It is enough that Plaintiff alleges that the denial of fundamental rights it suffered was based on an "unjustifiable discriminatory criterion." Id. at ¶ 697.

One argument offered by Defendant in this regard may be dismissed out of hand. Defendant appears to contend that because LGBTI people suffer discrimination in many countries, acts of persecution committed by him against this community cannot be viewed as violating international norms. (Dkt. No. 33, Def.'s Mem. 31-34.) This argument is utterly specious. First, Defendant concedes that the highest court in Uganda has itself recognized the entitlement of gay and lesbian people to fair and equal treatment under the law, including protection of their basic rights to free expression, life, liberty, and property. More importantly, even a glance at the history of treatment of gays and lesbians makes it clear that the discrimination suffered by them is on a par with the treatment meted out to other

groups, defined by religion, race, or some other accepted characteristic.

The history and current existence of discrimination against LGBTI people is precisely what qualifies them as a distinct targeted group eligible for protection under international law. The fact that a group continues to be vulnerable to widespread, systematic persecution in some parts of the world simply cannot shield one who commits a crime against humanity from liability.

As noted, the critical feature that elevates a campaign of persecution to a crime against humanity is its expression as a widespread, systematic attack on the targeted community. In determining whether actions are part of a systematic attack, the former President of the International Criminal Tribunal for the former Yugoslavia, Antonio Cassesse set out the following test:

> [O]ne ought to look at these atrocities or acts in their context and verify whether they may be regarded as part of an overall policy or a consistent pattern of inhumanity, or whether they instead constitute isolated or sporadic acts of cruelty or wickedness.

Saravia, 348 F. Supp. 2d at 1156. To be widespread and systematic, acts do not have to "involve military forces or

armed hostilities, or any violent force at all." Rodney Dixon, "Crimes Against Humanity: Analysis and Interpretation of Elements," in Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article 124-25 (Otto Triffterer ed. 1999). The International Criminal Tribunal for Rwanda (ICTR) has observed:

> An attack may also be non violent in nature, like imposing a system of apartheid . . . or exerting pressure on the population to act in a particular manner, may come under the purview of attack, if orchestrated on a massive scale or in a systematic manner.

Prosecutor v. Akayesu, Opinion and Judgment, Case No. ICTR-96-4-T, ¶ 581 (Sept. 2, 1998).

Plaintiff has stated a claim for persecution that amounts to a crime against humanity, based on a systematic and widespread campaign of persecution against LGBTI people in Uganda. The allegations feature Defendant's active involvement in well orchestrated initiatives by legislative and executive branch officials and powerful private parties in Uganda, including elements of the media, to intimidate LGBTI people and to deprive them of their fundamental human rights to freedom of expression, life, liberty, and

property.

Plaintiff rests its claim of individual liability in large part on Defendant's accessory role in aiding and abetting the persecutory campaign amounting to a crime against humanity. (Dkt. No. 27, Am. Compl. ¶¶ 237-38; Dkt. No. 38, Pl.'s Mem. 44.) Aiding and abetting is a well-established basis for liability in international customary law. Numerous authorities confirm that a cause of action exists under international law for aiding and abetting a crime against humanity. Indeed, aiding and abetting liability was accepted as part of the customary international law that was applied by the war tribunals after World War II. Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 270-75 (2d Cir. 2007) (Katzmann, J. concurring), adopted in Presbyterian Church of Sudan, 582 F.3d at 258.

Aiding and abetting has been subsequently recognized as an established basis for liability in international law instruments including the Rome Statute and the statutes creating the ICTY and the ICTR. Id.

Beyond current customary international law, the United

States Congress itself in 1789 appeared to recognize a cause of action for aiding and abetting violations of international law. Doe v. Exxon Mobil Corp., 654 F.3d 11, 29 (D.C. Cir. 2011). The year after the passage of the Judiciary Act, Congress passed a piracy law providing for aiding and abetting liability. Crimes Act of 1790, ch. 9, § 10, 1 Stat. 112, 114 (1790) (deeming "an accessary [sic] to ... piracies" anyone who shall "knowingly and willingly aid and assist, procure, command, counsel, advise" any person to commit piracy). An early federal circuit court case acknowledged that U.S. citizens could be liable for aiding and abetting a violation of U.S. treaties or the law of nations. Henfield's Case, 11 F. Cas. 1099 (C.C. Pa. 1793) (No. 6360) (noting that "they who commit, aid, or abet hostilities against these powers, or either of them, offend against the laws of the United States, and ought to be punished; and consequently, that it is your duty, gentlemen, to inquire into and present all such of these offences, as you shall find to have been committed within this district"); see also Talbot v. Jensen, 3 U.S. 133, 167-68 (1795).

Aiding and abetting liability under the ATS has been accepted by every circuit court that has considered the issue. Exxon Mobil Corp., 654 F.3d at 29-30; Presbyterian Church of Sudan, 582 F.3d at 259; Khulumani, 504 F.3d at 260 (per curiam); Cabello, 402 F.3d at 1157-58.

To obtain a verdict based on a theory of aiding and abetting, a plaintiff must prove that a defendant provided "practical assistance to the principal which has a substantial effect on the perpetration of the crime." Exxon Mobil Corp., 654 F.3d at 39; Presbyterian Church of Sudan, 582 F.3d at 259. The circuits are currently divided as to whether a plaintiff must show that a defendant acted only with knowledge of the criminal enterprise or that his explicit purpose was to facilitate the criminal activity. Compare Exxon Mobil Corp., 654 F.3d at 39 (requiring that plaintiff commit the act with knowledge of the criminal purpose); Presbyterian Church of Sudan, 582 F.3d at 259 (requiring that plaintiff show that defendant committed the act with "the purpose of facilitating the commission of the crime"); Cabello, 402 F.3d at 1157-58 (adopting the federal common law standard of knowledge). Because Plaintiff has

pleaded the more stringent "purpose" standard, it is unnecessary for the court to resolve the "knowledge/purpose" controversy.

The Amended Complaint sets forth detailed factual allegations supporting Count One's claim that Defendant bears individual liability for aiding and abetting the commission of a crime against humanity. Essentially, Defendant's role is alleged to be analogous to that of an upper-level manager or leader of a criminal enterprise. He participated in formulating the enterprise's policies and strategies. He advised other participants on what actions might be most effective in achieving the enterprise's goals, such as criminalizing any expressions of support for the LGBTI community and intimidating its members through threats and violence. He generated and distributed propaganda that falsely vilified the targeted community to inflame public hatred against it.

In particular, Plaintiff has set out plausibly that Defendant worked with associates within Uganda to coordinate, implement, and legitimate "strategies to dehumanize, demonize, silence, and further criminalize the

[Ugandan] LGBTI community." (Dkt. No. 27, Am. Compl. ¶ 27.) In both 2002 and 2009, as part of this alleged campaign, Defendant met with Ugandan governmental leaders. (Dkt. No. 27, Am. Compl. ¶¶ 36, 52, 77, 78.) Defendant's intentional activities, according to the Amended Complaint, succeeded in intimidating, oppressing, and victimizing the LGBTI community. Indeed, as noted, according to the Amended Complaint Defendant acknowledged that his efforts made him instrumental in detonating "a nuclear bomb against the 'gay' agenda in Uganda." (Dkt. No. 27, Am. Compl. ¶¶ 56 & 88.)

Of course, all these allegations will need to be proved at trial to entitle Plaintiff to a verdict, and they may not be. But, as this lengthy discussion demonstrates, they are sufficient, as allegations, to state a claim for the commission of a crime against humanity against Defendant.

Similarly, the overwhelming weight of authority establishes that this crime against humanity is one of the relatively few violations of international norms for which the ATS furnishes jurisdiction.[5] It is true, as Sosa makes

[5] Defendant argues that he cannot be liable for persecution because he is not a state actor. However, there is no requirement that aiding and abetting be done by a state

clear, that not all violations of international norms, even if properly alleged, can be pursued under the ATS. The further question is whether, as Justice Souter put it, Plaintiff's claim rests "on a norm of international character accepted by the civilized world and defined with specificity comparable to the features of the 18th-century paradigms [the Court has] recognized." 542 U.S. at 725 (emphasis added).

Put more concretely, is aiding and abetting a crime against humanity tantamount to piracy, or one of the other narrowly defined crimes for which the ATS provided jurisdiction in 1789?

Again, the weight of authority confirms that it is. As noted, both crimes against humanity and aiding and abetting liability are well-established and accepted in customary international law. Moreover, an ATS cause of action for this type of international law violation has been widely recognized in the lower courts. As Sosa noted, "the door is still ajar," to federal common law claims for some violations of customary law, if only because "[i]t would

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actor.

take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals." Id. at 728, 732.

In sum, then, for the reasons stated Plaintiff has adequately pled both that a crime against humanity has been committed by Defendant and that this crime rests among the relatively small group of violations of international norms for which the ATS provides jurisdiction.[6]

B. Claims Related to Extraterritorial Conduct Under the Alien Tort Statute.

Defendant argues that this court cannot recognize Plaintiff's ATS claims because Plaintiff cannot overcome the presumption that causes of action recognized under the ATS do not extend to extraterritorial conduct. Subsequent to oral argument, the Supreme Court clarified an aspect of this issue in Kiobel v. Royal Dutch Petroleum, 133 S. Ct. 1659

[6] It is important to note that, in addition to Count I, Counts II and III of the Amended Complaint have, apparently in the alternative, charged Defendant as a participant in a joint criminal enterprise and as a co-conspirator respectively. Because Plaintiff has clearly set forth its claim in Count I against Defendant based on his individual responsibility, it is unnecessary, at least at this stage, to address the sufficiency of the legal and factual support for these two counts.

(2013). The Court's decision addressed whether a federal court could recognize a cause of action for claims by Nigerian citizens living in the United States against Dutch and British corporations. Neither corporation had more than a negligible presence in the United States, and all the tortious conduct alleged to have been committed by them occurred outside the United States, in Nigeria. The Supreme Court held that in this context, the plaintiffs did not have a cause of action, based on the presumption against extraterritorial application. 133 S. Ct. at 1669.

Two facts alleged in this case distinguish it from Kiobel. First, unlike the British and Dutch corporations, Defendant is an American citizen residing within the venue of this court in Springfield, Massachusetts. Second, read fairly, the Amended Complaint alleges that the tortious acts committed by Defendant took place to a substantial degree within the United States, over many years, with only infrequent actual visits to Uganda.

The fact that the impact of Defendant's conduct was felt in Uganda cannot deprive Plaintiff of a claim. Defendant's alleged actions in planning and managing a

campaign of repression in Uganda from the United States are analogous to a terrorist designing and manufacturing a bomb in this country, which he then mails to Uganda with the intent that it explode there. The Supreme Court has made clear that the presumption against the extraterritorial application of a statute comes into play only where a defendant's conduct lacks sufficient connection to the United States. See Morrison v. Nat'l Australia Bank Ltd., 130 S. Ct. 2869, 2884 (2010); Pasquantino v. United States, 544 U.S. 349 (2005).

Kiobel elaborated on this theme. As Chief Justice Roberts stated in his opinion, the issue in that case was "whether a claim may reach conduct occurring in the territory of a foreign sovereign." Kiobel, 133 S. Ct. at 1664. In the final paragraph of his decision, he emphasized that the Court's holding applied to a factual scenario where "all the relevant conduct took place outside the United States." Id. at 1669. Where conduct occurred solely abroad, "mere corporate presence," he concluded, did not touch and concern the United States "with sufficient force to displace the presumption against extraterritorial application." Id.

The separate concurrence of Justice Kennedy made the limited reach of Kiobel manifest. "Other cases," he noted, "may arise with allegations of serious violations of international law principles protecting persons . . . ; and in those disputes the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation." 133 S. Ct. at 1669.

Even the narrowest construction of the Kiobel holding, set forth in the separate concurrence of Justice Alito on behalf of himself and Justice Thomas, made clear that an ATS cause of action will lie where the "domestic conduct is sufficient to violate an international law norm that satisfies Sosa's requirements of definiteness and acceptance among civilized nations." Kiobel, 133 S. Ct. at 1670 (emphasis added).

This is not a case where a foreign national is being hailed into an unfamiliar court to defend himself. Defendant is an American citizen located in the same city as this court. The presumption against extraterritoriality is based, in large part, on foreign policy concerns that tend

to arise when domestic statutes are applied to foreign nationals engaging in conduct in foreign countries. Kiobel, 133 S. Ct. at 1664-65; Morrison, 130 S. Ct. at 2885-86 (noting the obvious "probability of incompatibility with the applicable laws of other countries" and concluding that the defendants' connection to the United States was insufficient); EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991) (noting that presumption "serves to protect against unintended clashes between our laws and those of other nations which could result").[7]

An exercise of jurisdiction under the ATS over claims against an American citizen who has allegedly violated the law of nations in large part through actions committed within this country fits comfortably within the limits described in Kiobel.

Indeed, the failure of the United States to make its courts available for claims against its citizens for actions taken within this country that injure persons abroad would

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[7] In extreme cases, piracy for example, Kiobel noted that the ATS would provide jurisdiction over claims against foreign nationals for tortious conduct committed wholly in a foreign country, on the ground that it carried "less direct foreign policy consequences." Id. at 1667.

itself create the potential for just the sort of foreign policy complications that the limitations on federal common law claims recognized under the ATS are aimed at avoiding. Under the law of nations, states are obliged to make civil courts of justice accessible for claims of foreign subjects against individuals within the state's territory. "If the court's decision constitutes a denial of justice, or if it appears to condone the original wrongful act, under the law of nations the United States would become responsible for the failure of its courts and be answerable not to the injured alien but to his home state." Tel Oren v. Libyan Arab Republic, 726 F.2d 774, 783 (D.C. Cir. 1984) (Edwards, J. concurring), cert. denied, 470 U.S. 1003 (1985).

One such episode, occurring shortly after the passage of the ATS, underlines the role of United States courts in precisely this situation. In 1794, several U.S. citizens joined a French privateer fleet to aid the French in the war on Great Britain despite the official American policy of neutrality. These Americans formed part of a force that attacked and plundered the British colony of Sierra Leone. When the British Ambassador protested and demanded that the

Americans be punished, then Attorney General William Bradford responded that it was unlikely that the Americans could be criminally prosecuted for actions abroad or on the high seas. But, he noted, "[t]here can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a civil suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States." Kiobel, 133 S. Ct. at 1668 (quoting Breach of Neutrality, 1 Op. Atty. Gen. 57 (1795)).

It is true, as Defendant points out, that the Amended Complaint, which was filed prior to Kiobel, highlights actions taken by Defendant in Uganda. Defendant's contention that all his alleged misconduct took place in Uganda, however, offers a distorted picture of the pleading. As noted, Plaintiff alleges that Defendant's tortious behavior unfolded over at least a decade, during which time he was actually present in Uganda only a few times. The actual claim of individual responsibility against Defendant is rooted in a contention that Defendant aided and abetted

the tortious conduct. The relevant question therefore is whether Plaintiff has alleged that substantial "practical assistance" was afforded to the commission of the crime against humanity from the United States.

The Amended Complaint adequately sets out actionable conduct undertaken by Defendant in the United States to provide assistance in the campaign of persecution in Uganda. To review these allegations, and at the risk of repetition, the Amended Complaint alleges that Defendant resides and operates out of Springfield, Massachusetts. (Dkt. No. 27, Am. Compl. ¶ 8.) It describes how, after Defendant traveled to Uganda in 2002, he continued to assist, manage, and advise associates in Uganda on methods to deprive the Ugandan LGBTI community of its basic rights. (Id. at ¶¶ 47, 55-56.) Defendant's Ugandan co-conspirators then contacted him in the United States in 2009 to craft tactics to counter the Ugandan High Court ruling confirming that LGBTI persons enjoyed basic protections of the law. (Id. at ¶ 36.) After going to Uganda in 2009, Defendant continued to communicate from the United States through Martin Ssempa to members of the Ugandan Parliament about the legislation proposing the

death penalty for homosexuality. From his home in the United States, he reviewed a draft of the legislation and provided advice on its content. (Id. at ¶¶ 140, 161.) Given that Defendant is a United States citizen living in this country and that the claims against him "touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritoriality," a cause of action is appropriate under the ATS. Kiobel, 133 S. Ct. at 1669.[8]

C. Standing.

[8] This conclusion is in line with most of the cases that have considered the presumption against extraterritoriality post-Kiobel. See Muntslag v. Dieteren, S.A., 2013 WL 2150686, at *2 (S.D.N.Y. May 17, 2013) (holding that jurisdiction did not exist over foreign defendants when allegedly tortious acts all occurred abroad); Mohammadi v. Islamic Republic of Iran, -- F. Supp. 2d ----, 2013 WL 2370594, at *15 (D.D.C. May 31, 2013) (holding that there was an insufficient nexus to the territory or interests of the United States when the defendants were leaders of Iran and activities occurred in the sovereign territory of Iran); Mwani v. bin Laden, -- F. Supp. 2d ----, 2013 WL 2325166, at *4 (D.D.C. May 29, 2013) (holding that presumption against extraterritoriality displaced when a foreign defendant bombed an American embassy abroad and overt acts in furtherance of the conspiracy took place in the United States). In one case, a district court has dismissed a claim against an American corporation based on alleged torture and war crimes occurring in Iraq. al Shimari v. CACI Int'l, Inc., -- F. Supp. 2d ----, 2013 WL 3228720, at *7-10 (E.D. Va. June 25, 2013). Arguably, a different rationale may apply to a natural U.S. citizen than an American corporation. If not, this court finds the reasoning in al Shimari unpersuasive.

Defendant argues that Plaintiff, as an umbrella organization, lacks standing to bring this suit either in its own right or as a representative of its members. The argument will not withstand scrutiny. Plaintiff has standing to seek monetary and equitable relief for Defendant's actions that have caused direct damage to it. Moreover, it also has associational standing to bring claims on behalf of its members and the LGBTI community for injunctive relief to prevent Plaintiff from continued actions "to strip away and/or deprive Plaintiff and LGBTI community in Uganda of their fundamental rights." (Dkt. No. 27, Am. Compl. ¶ 13.)

1. Organizational Standing.

It is well-established that an organization can sue to obtain compensation for injuries it sustains. Warth v. Seldin, 422 U.S. 490, 511 (1975); Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 n.19 (1982); Mass. Delivery Ass'n v. Coakley, 671 F.3d 33, 44-45 (1st Cir. 2012). Article III standing exists where three criteria are satisfied: (1) an injury in fact, which is (2) fairly traceable to the defendant's misconduct, and which can be (3) redressed

through a favorable decision of the court. Lujan v. Defenders of Wildlife, 560 U.S. 555, 560-61 (1992).

Defendant does not argue that Plaintiff has failed to meet the first prong -- injury in fact. The Amended Complaint sets forth two distinct harms to Plaintiff's organization. First, Plaintiff's operations, conferences, and staff have allegedly been targeted as part of the persecutory campaign. Plaintiff alleges that, as a result, it has had to retain the services of security personnel, take additional security measures for its premises, and relocate its offices and operations. All this has obviously cost money. Second, Plaintiff has had to expend considerable resources and efforts to counteract Defendant's campaign of repression; the need for these efforts has impaired Plaintiff's ability to carry out its own organizational objectives. Defendant correctly concedes that the allegations of injury in fact are sufficient.

Defendant does challenge the sufficiency of the evidence to satisfy the second element, the connections between the injury and Defendant's conduct. For the court to find that Plaintiff has standing, "there must be a causal

connection between the injury and conduct complained of -- the injury has to be 'fairly trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Lujan, 504 U.S. at 560 (quoting Simon v. Eastern Ky. Welfare Rights Org., 526 U.S. 26, 41-42 (1976)).

In addressing this factor, it is important to bear in mind that Defendant's actions need not be "the very last step in the chain of causation for the injury. It suffices if the plaintiff can show injury produced by determinative or coercive effect upon the action of someone else." Weaver's Cove Energy, LLC v. R.I. Coastal Res. Mgmt. Council, 589 F.3d 458, 467 (1st Cir. 2009) (internal quotation and citation omitted).[9]

At this stage, Plaintiff has adequately pled that Defendant was one of the "principal strategists and actors behind this decade-long persecutory campaign." (Dkt. No.

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[9] Defendant contends that the "fairly traceable" element is only met if Plaintiff can show that his speech was directed at producing or inciting imminent lawless action and is likely to produce or incite such action. However, this is a substantive test for whether speech is protected by the First Amendment and not a test for standing. See NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982).

27, Am. Compl. ¶ 25.) While some of the actions that Plaintiff describes in the Amended Complaint may not be directly traceable to Defendant, Defendant may nevertheless be held liable, as the previous discussion notes, for his conduct as an aider and abettor. According to the Amended Complaint, Defendant himself has acknowledged that he has been instrumental in launching the anti-LGBTI movement in Uganda and developing strategies for its ongoing operation -- the "nuclear bomb" previously noted. Given all this, the allegations of the complaint sufficiently support a finding that Plaintiff's injury is directly traceable to Defendant's conduct.

Finally, Plaintiff has met its burden to plead plausibly that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Lujan, 504 U.S. at 561. To a substantial extent the injuries to Plaintiff as an organization are quantifiable and may be remedied by an award of monetary damages.

2. Associational Standing.

While Plaintiff may seek monetary damages for the

injuries it has suffered to itself as an organization, Defendant argues that Plaintiff cannot seek monetary damages for its members, based on its associational standing. Defendant contends that proof of these claims, and particularly the determination of monetary damages, will require participation by individuals whose interests the organization does not have standing to assert. 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.

Associational standing allows an organization to bring suit "solely as the representative of its members" "[e]ven in the absence of injury to itself." Warth, 422 U.S. at 511. To assert associational standing, a plaintiff must show: (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977).

Defendant does not directly argue that Plaintiff fails to meet the first two requirements. Plaintiff is "an umbrella organization that was founded in 2004 by a coalition of Ugandan organizations advocating on behalf of lesbian, gay, bisexual, transgender, and intersex ('LGBTI') communities, to unify and support sexual minority groups in Uganda." (Dkt. No. 27, Am. Compl. ¶ 18.) Plaintiff asserts that "individual members of its constituent organizations" have suffered persecution and associated harms as a result of Defendant's actions. (Dkt. No. 27, Am. Compl. ¶ 21.) Plaintiff also asserts that the interests it seeks to protect in this case -- preventing persecution of the LGBTI community in Uganda -- are germane to its agenda to advocate, unify, and support this community.

While not contesting either of these points directly, Defendant does argue that Sexual Minorities Uganda has not adequately alleged associational authority. To support the need to show associational authority, Defendant cites an ATS case where a defendant, Unocal, Inc., argued that "an organization only has associational standing when it has a clear mandate from its membership to take the position

asserted in the litigation." Nat'l Coal. Gov't Union Burma v. Unocal, Inc., 176 F.R.D. 329, 344 n.16 (C.D. Cal. 1997). Here, Defendant argues, no such clear mandate has been alleged.

Defendant has misread the Unocal decision. In that case, the district court denied the Federated Trade Unions of Burma standing based on the fact that all of the tort claims were based on harm to individual plaintiffs, and none to the organization itself. The court's holding on the standing issue was not anchored on whether the organization had a clear mandate from its membership. Authority from the District of Massachusetts makes clear that an organization represents a "defined and discrete constituency" even if that constituency is different from the formal members of the organization. NAACP v. Harris, 567 F. Supp. 637, 640 (D. Mass. 1983).

It is true that authorities generally reject associational standing where an organization seeks monetary relief on behalf of its members, on the ground that these claims require individualized proof of claims. See Bano v. Union Carbide Corp., 361 F.3d 696, 714 (2d Cir. 2004).

However, Plaintiff here seeks to assert associational standing solely to obtain injunctive relief on behalf of its members. Because Plaintiff is not requesting monetary damages for its members, there is normally "no need . . . for the members to participate as parties." Pharm. Care Mgmt. Ass'n v. Rowe, 429 F.3d 294, 307 (1st Cir. 2005).

Admittedly, all requests for injunctive relief do not automatically grant a plaintiff associational standing. Courts have rejected claims for injunctive relief that seek, in effect, remedies applicable only to specific individuals. Bano, 361 F.3d at 716 (rejecting associational standing where the group sought an injunction ordering remediation of individual private properties).

Here, however, Plaintiff is not requesting injunctive relief that is particular to any individual in Uganda. Instead, the injunctive relief in this case only requests that the Defendant cease certain general activities. This equitable relief will not require participation of Plaintiff's members. "[The] relief, if granted, would inure to the benefit of all the affected [members] equally, regardless of their individual circumstances." Coll.

Dental Surgeons P.R. v. Conn. Gen. Life Ins. Co., 585 F.3d 33, 41 (1st Cir. 2009).

Defendant points to two district court opinions purportedly supporting the proposition that associational representation is not suitable for civil tort claims because those claims "can only be adjudicated by considering the testimony and other evidence of the people allegedly [injured]." Nat'l Coal. Gov't Union Burma, 176 F.R.D. at 344; see also Presbyterian Church of Sudan v. Talisman Energy, Inc., 2005 WL 1060353 (S.D.N.Y. May 6, 2005). These decisions are, of course, not binding on this court. More importantly, the language of these decisions describing the limits of associational standing for tort claims appears to be overbroad.

The fact that a claim requires individual proof does not necessarily defeat associational standing. See Playboy Entm't v. Public Service Comm'n Puerto Rico, 906 F.2d 25, 35 (1st Cir. 1990) (holding that the need for individual proof does not necessitate that members be parties); Coll. Dental Surgeons P.R., 585 F.3d at 41 (noting that even though some fraudulent practice claims may require evidence from

individual members those claims are not a "fact-intensive-individual inquiry"). "Even though [a claim] is intensely fact specific and [plaintiff] will be required to introduce proof of specific [member] practices and effects [] on specific [members], we see no reason that [plaintiff's members] would be required to participate as parties." Pharm. Care Mgmt. Ass'n, 429 F.3d at 306. Because the claim here -- persecution -- is a group-based claim, it is well-suited to be brought by a representative association like Plaintiff, even though some of the evidence will come from individual testimony. Plaintiff has associational standing to bring its claims for injunctive relief.

Plaintiff also meets the Article III requirements for standing as a representative of its members. The analysis for injury and causation in this context is virtually the same as the analysis applicable to determine an organization's entitlement to bring a suit in its own right. Defendant contends, however, that even if Plaintiff has adequately pled injury and causation, the allegations of the Amended Complaint fail to satisfy the third requirement -- redressability -- when the only relief it seeks for its

members is an injunction. No injunctive or declaratory relief that this court could issue, Defendant says, could possibly provide Plaintiff's members any remedy, since the initiatives against the LGBTI community in Uganda have an independent momentum beyond any control by Defendant.

This argument has force but, at least at this stage, is unpersuasive. It is well-established that, while Plaintiff must show that a favorable resolution would likely redress the injury, "[r]edressability is a matter of degree" and Plaintiff need not show that the potential remedies within the court's power would completely alleviate its members' injuries. Katz v. Pershing, LLC, 672 F.3d 64, 72 (1st Cir. 2012).

Certainly there is no doubt that Defendant is only one of several actors allegedly persecuting the LGBTI community in Uganda. As Defendant notes, enjoining Defendant does not guarantee that his co-conspirators will cease their repression against Plaintiff and its members. It is quite true that this court does not have either the jurisdiction or power to stop all possible harm against Plaintiff in Uganda. Nevertheless, Plaintiff has sufficiently alleged

that Defendant played a crucial role in developing strategies to deny basic rights to Plaintiff's members over the last decade. With the failure (so far) of the Anti-Homosexuality Bill, Plaintiff has a justified fear that Defendant will be called upon to help devise new strategies to deny the rights of Plaintiff's members. Plaintiff has shown that "a favorable ruling could potentially lessen its injury; it need not definitively demonstrate that a victory would completely remedy the harm." Antilles Cement Corp. v. Fortuño, 670 F.3d 310, 318 (1st Cir. 2012).

For all the foregoing reasons, the Amended Complaint contains sufficient allegations to support both organizational and associational standing.

D. First Amendment Concerns.

Defendant has vigorously argued that all his actions are protected by the First Amendment to the United States Constitution. Discovery may, or may not, reveal that the argument is correct, and this issue will almost certainly be front and center at the summary judgment stage of this case. What is quite clear now, however, is that the Amended Complaint adequately alleges that Defendant's actions have

fallen well outside the protections of the First Amendment.

Defendant is correct that the First Amendment places limits on the imposition of tort liability linked to offensive speech, and that the protection of free expression, including the protection of "thought we hate," is a centerpiece of our democracy.[10] Snyder v. Phelps, 131 S. Ct. 1207, 1215 (2011); Hustler Magazine v. Falwell, 485 U.S. 46, 50-51 (1988).

For example, intentional infliction of emotional distress claims -- which ask a jury to consider whether speech was "outrageous" -- are too subjective to meet the requirements of the First Amendment when applied to public figures or topics of public concern. Snyder, 131 S. Ct. at 1219; Hustler, 485 U.S. at 55. "[H]urtful speech" is protected when it "address[es] matters of public import on public property, in a peaceful manner, in full compliance with the guidance of local officials." Snyder, 131 S. Ct. at 1220.

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[10] An ardent exposition of all the reasons why protection of "thought we hate" is so central to the genius of our Constitution is contained in the late Anthony Lewis's superb book, Freedom for the Thought We Hate: A Biography of the First Amendment (2010).

In the criminal context, even if speech advocates for the use of force or for violations of law, it receives First Amendment protection "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969).

On the other hand, when noxious words become part of a criminal enterprise, the First Amendment provides limited protection. As Justice Black, an unsurpassed supporter of the First Amendment, wrote:

> It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now. . . .
> . . . [I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed. Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society.

Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498, 502 (1949) (internal citations omitted).

It is well-established that speech that constitutes criminal aiding and abetting is not protected by the First Amendment. See, e.g., United States v. Bell, 414 F.3d 474, 483-84 (3d Cir. 2005); Nat'l Org. for Women v. Operation Rescue, 37 F.3d 646, 656 (D.C. Cir. 1994); United States v. Freeman, 761 F.2d 549, 552 (9th Cir. 1985) (Kennedy, J.) (noting that "[c]ounseling is but a variant of the crime of solicitation, and the First Amendment is quite irrelevant if the intent of the actor and the objective meaning of the words used are so close in time and purpose to a substantive evil as to become part of the ultimate crime itself"); United States v. Kelley, 769 F.2d 215, 217 (4th Cir. 1985); United States v. Barnett, 667 F.2d 835, 842-43 (9th Cir. 1982) ("The first amendment does not provide a defense to a criminal charge simply because the actor uses words to carry out his illegal purpose. Crimes including that of aiding and abetting, frequently involve the use of speech as part of the criminal transaction."); cf. Giboney, 336 U.S. at 498 (holding that speech integral to criminal conduct is not protected). It is equally well supported that the same logic extends to civil actions for aiding and abetting.

Rice v. Palladin Enterprises, Inc., 128 F.3d 233, 242-43 (4th Cir. 1997).

In determining whether speech that is related to political advocacy receives First Amendment protection, the Supreme Court has distinguished between "theoretical advocacy," Scales v. United States, 367 U.S. 203, 235 (1961), meaning advocacy of "principles divorced from action," Yates v. United States, 354 U.S. 298, 320 (1957), and speech that is meant to induce or precipitate illegal activity. See also United States v. Williams, 553 U.S. 285, 298-99 (2008). As the court in Brandenburg recognized, "[T]he mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." 395 U.S. at 448 (quoting Noto v. United States, 367 U.S. 290, 297-98 (1961)). Merely advocating for reform is quite different constitutionally from preparing for criminal activity.

Based on these authorities it is clear that the Amended Complaint sets forth sufficient allegations to support a claim for activity outside the protection of the First

Amendment. Plaintiff contends that Defendant's conduct has gone far beyond mere expression into the realm not only of advocacy of imminent criminal conduct, in this case advocacy of a crime against humanity, but management of actual crimes -- repression of free expression through intimidation, false arrests, assaults, and criminalization of peaceful activity and even the status of being gay or lesbian -- that no jury could find to enjoy the protection of the First Amendment.

Apart from his right to free expression, Defendant also contends that his actions are protected by the Petition Clause of the First Amendment. Generally, Defendant points out, "there is no remedy against private persons who urge the enactment of laws, regardless of their motives." <u>Tomaiolo v. Mallinoff</u>, 281 F.3d 1, 11 (1st Cir. 2002). It is well-established, however, that the Petition Clause does not immunize a defendant's interactions with foreign governments. <u>Australia/Eastern U.S.A. v. United States</u>, 557 F. Supp. 807, 812 (D.D.C. 1982); <u>Occidental Petroleum Corp. v. Buttes Gas & Oil Co.</u>, 331 F. Supp. 92 (C.D. Cal. 1971),

aff'd 461 F.2d 1261 (9th Cir. 1972).[11] In other words, the Petition Clause protects the right of Americans to seek legislation by the United States government, not by governments of foreign countries.

Even if the Petition Clause applied, the court could not dismiss the action as a matter of law, given that the petition clause cannot protect activities taken for unlawful purposes or toward unlawful ends. Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 514 (1972) (quoting Giboney, 336 U.S. at 502) (recognizing that activity that is an integral part of illegal conduct does not receive petitioning clause protection). Here, the Amended Complaint makes precisely that allegation.

Speech can undoubtedly sometimes fall within grey areas. When this occurs, and where a jury needs to resolve contested factual issues to determine whether speech or

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[11] Defendant cites cases which grant companies Noerr-Pennington immunity from prosecution for their petitioning activity even if they are aimed at foreign governments. However, those cases rest their conclusions on the scope of the Sherman Act itself and not on the First Amendment petition clause. Coastal States Mktg., Inc. v. Hunt, 694 F.2d 1358 (5th Cir. 1983); Carpet Group Int'l v. Oriental Rug Importers Ass'n, Inc., 256 F. Supp. 2d 249 (D.N.J. 2003); Luxpro Corp. v. Apple Inc., 2011 WL 1086027 (N.D. Cal. Mar. 24, 2001).

conduct is constitutionally protected, the court is well equipped to provided the jury appropriate instructions to handle this task. Freeman, 761 F.2d at 551, 552-53; United States v. White, 610 F.3d 956, 962 (7th Cir. 2010) ("Based on the full factual record, the court may decide to instruct the jury on the distinction between solicitation and advocacy, and the legal requirements imposed by the First Amendment."). Courts have regularly found it preferable to tackle a First Amendment defense with a more complete evidentiary record at the summary judgment stage or at trial, rather than at the motion to dismiss stage. Curley v. North Am. Man Boy Love Ass'n, 2001 WL 1822730, at *2 (D. Mass. Sept. 27, 2001); cf. White, 610 F.3d at 962 ("Based on the full factual record, the court may decide to instruct the jury on the distinction between solicitation and advocacy, and the legal requirements imposed by the First Amendment."). At this stage, it is far from clear that the First Amendment will foreclose liability on any set of facts that Plaintiff might show.

In making this decision, the court is mindful of the chilling effect that can occur when potential tort liability

is extended to unpopular opinions that are expressed as part of a public debate on policy. However, at this stage, the Amended Complaint sets out plausible claims to hold Defendant liable for his role in systematic persecution, rather than merely for opinions that Plaintiff finds abhorrent. The complexion of the case at this stage entitles Plaintiff to discovery and requires the court to deny Defendant's motion to dismiss.

E. <u>State Law Claims</u>.

Counts IV and V of the Amended Complaint assert Massachusetts common law claims for civil conspiracy and negligence. Defendant seeks dismissal of these counts on several grounds. First, he contends that under a proper choice of law analysis, Massachusetts law simply does not apply to the facts alleged. Ugandan law, if any, should govern. Second, he argues that both the civil conspiracy and negligence claims are barred by the three-year statute of limitations. Finally, he takes the position that the facts as set forth in the Amended Complaint are insufficient to make out claims under either theory. The court will deny the motion to dismiss because (1) Massachusetts law governs

this litigation and (2) the arguments asserting violation of the statute of limitations and failure to state a claim require development through discovery and may be re-assessed at the summary judgment stage on a fuller record.

1. Choice of Laws.

It is well-settled that district courts hearing state law claims apply the substantive law of the state in which the court sits, including that state's choice-of-law rules. Servicios Comerciales Andinos, S.A. v. General Elec. Del Caribe, Inc., 145 F.3d 463, 478 (1st Cir. 1998); Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78 (1938). Massachusetts employs a functional choice of laws approach that is guided by the Restatement (Second) of Conflict of Laws (1971). Clarendon Nat'l Ins. Co. v. Arbella Mut. Ins. Co., 803 N.E.2d 750, 752 (Mass. App. Ct. 2004).

The Restatement instructs courts to apply the law of the state with the "most significant relationship to the occurrence and the parties under the principles stated in § 6." Restatement (Second) of Conflict of Laws § 145 (1971). Section 6 of the Restatement cites the following factors as relevant to choice of law decisions:

> (a) the needs of the interstate and international systems,
> (b) the relevant policies of the forum,
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
> (d) the protection of justified expectations,
> (e) the basic policies underlying the particular field of law,
> (f) certainty, predictability and uniformity of result, and
> (g) ease in the determination and application of the law to be applied.

Id. at § 6.

In the tort context, the Restatement also sets out four factors to help determine which jurisdiction has the most significant relationship:

> (a) the place where the injury occurred,
> (b) the place where the conduct causing the injury occurred,
> (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
> (d) the place where the relationship, if any, between the parties is centered.

Id. at § 145.

Defendant is correct to note that the jurisdiction where the injury occurred normally has a significant interest in having its law apply because "persons who cause injury in a state should not ordinarily escape liabilities

imposed by the local law of that state on account of the injury." Restatement (Second) of Conflict of Laws § 145(2), cmt. 2. However, even when the injury (and, indeed, even the conduct that caused the injury) occurs in a foreign location, Massachusetts choice-of-laws doctrine does not automatically apply foreign law. See, e.g., Robidoux v. Muholland, 642 F.3d 20, 28 (1st Cir. 2011); Lou v. Otis Elevator Co., 933 N.E.2d 140, 150-51 (Mass. App. Ct. 2010). The court must weigh all the Restatement factors to determine the proper law to apply.

Several factors other than the place of injury tip the balance in favor of Massachusetts law. First, Defendant is a Massachusetts resident and an American citizen. Plaintiff is not asking the court to apply a law that is foreign to Defendant, but rather the rules prevailing in his home country and Commonwealth. Second, as noted previously, Plaintiff alleges that much of the actionable conduct occurred in Massachusetts.

On the civil conspiracy claim particularly, a powerful, independent consideration supports application of Massachusetts law. Plaintiff, as Defendant concedes, would

have no forum for this claim in Uganda. Ugandan law apparently does not recognize a cause of action for civil conspiracy. (Dkt. No. 33, Def.'s Mem. 69.) In the absence of any remedy for Plaintiff in Uganda, the interest of the Commonwealth of Massachusetts in adjudicating Plaintiff's civil conspiracy claim, recognized under its law, becomes more prominent. As the Supreme Judicial Court has recognized, the state has an interest in maintaining a cause of action for this type of civil conspiracy which ensures that "influence and power" are not combined to interfere with individual rights. See Willett v. Herrick, 136 N.E. 366, 370 (Mass. 1922). This is particularly true when a substantial part of the conduct supporting the conspiracy is alleged to have occurred within the Commonwealth.

Problems in applying Ugandan law also plague the adjudication of the negligence claim, not because no Ugandan law is applicable, as with the civil conspiracy claims, but because the Ugandan law is unclear. One of the factors the court can consider in determining the proper choice of law is the "ease in the determination and application of the law to be applied." Restatement (Second) of Conflict of Laws §

6. For this reason, the party seeking to apply foreign law, here Defendant, must outline the substance of that law with reasonable certainty. See In re Avantel, S.A., 343 F.3d 311, 321-22 (5th Cir. 2003); cf. Carey v. Bahama Cruise Lines, 864 F.2d 201, 205 (1st Cir. 1988) (holding that parties who fail to give the court requisite notice of foreign law have waived their right to have foreign law applied).

Defendant has done little to meet that burden here. In the one paragraph in his memorandum describing Ugandan negligence law, Defendant notes only that "Uganda law may recognize traditional negligence as a cause of action" but that there is no indication that any "novel duty of care principles apply." (Dkt. No. 33, Def.'s Mem. 70.) Because Defendant has not described the substance of Ugandan negligence law in any detail, the court cannot take the first step in any choice of laws analysis; it cannot determine whether any actual conflict exists between the laws. See Cohen v. McDonnell Douglas Corp., 450 N.E.2d 581, 584 n.7 (Mass. 1983).

In sum, although arguments exist on both sides, the

functional choice of law approach counsels applying Massachusetts law to Counts IV and V. This conclusion leaves Defendant's arguments regarding statute of limitations and failure to state a claim. The discussion below will address these contentions as they apply, first, to civil conspiracy and then to negligence.

2. Civil Conspiracy.

a. Statute of Limitations.

Massachusetts applies a three-year statute of limitations to civil conspiracy claims. Mass. Gen. Laws ch. 260, § 2A; Pagliuca v. City of Boston, 626 N.E.2d 625, 627-28 (Mass. App. Ct. 1994). Defendant argues that the limitations period begins to run with the first overt act. However, this accrual rule only applies to federal and state statutory civil rights claims, which are not asserted here. Pagliuca, 626 N.E.2d at 627-28 (distinguishing between the time-of-first-wrongful-act standard applicable to federal and state civil rights statutes and time-of-injury standard applicable to common law civil conspiracy).

For a common law civil conspiracy claim, the cause of action accrues at the time the plaintiff is injured, or when

he discovers or reasonably should have discovered the cause of the injury. Genereux, 577 F.3d at 359-63; Pagliuca, 626 N.E.2d at 627-28. Plaintiff filed its complaint on March 14, 2012. To obtain dismissal of a complaint based on the statute of limitations, an affirmative defense, Defendant must point to sufficient facts offered in the complaint, or in other allowable sources of information, to show with certitude that Plaintiff knew or could have reasonably discovered the source of its injury before March 14, 2009. Cf. Gray v. Evercore Restructuring L.L.C., 544 F.3d 320, 324 (1st Cir. 2008); see also LaChapelle v. Berkshire Life Ins. Co., 142 F.3d 507, 509 (1st Cir. 1998) (noting that "a motion to dismiss based on a limitations defense is entirely appropriate when the pleader's allegations leave no doubt that an asserted claim is time-barred").

To prevail on his statute of limitations affirmative defense, Defendant must show that Plaintiff had "(1) knowledge or sufficient notice that she was harmed and (2) knowledge or sufficient notice of what the cause of the harm was." Bowen v. Eli Lilly & Co., 557 N.E.2d 739, 742 (Mass. 1990). While Plaintiff was undoubtedly aware that some

injuries occurred prior to 2009, Defendant has not adequately shown that Plaintiff had adequate notice before March 14, 2009, that Defendant contributed to these harms. As Plaintiff has noted in the Amended Complaint, Defendant did not publicly acknowledge his pivotal role in the anti-LGBTI efforts in Uganda until after the March 2009 conference.

Plaintiff has also alleged several harmful incidents that occurred within the last three years. The most recent incidents, including the deliberately intimidating, mass disclosures of the identities of LGBTI peoples, as well as the arrests and raids targeted at Plaintiff and its activities, all occurred after March 2009. Given these allegations, any assessment of the statute of limitations defense must await full discovery and possibly trial.

b. Failure to State a Claim.

Massachusetts recognizes two types of civil conspiracy. The more typical kind is akin to a theory of joint liability in tort. Aetna Cas. Sur. Co. v. P & B Autobody, 43 F.3d 1546, 1564 (1st Cir. 1994). However, Plaintiff argues that the second, more exceptional, type of civil conspiracy

applies to Defendant. With the second type, a plaintiff need not allege an underlying tort, because the mere force of numbers acting in unison to injure a plaintiff constitutes a wrong. Weiner v. Lowenstein, 51 N.E.2d 241, 243 (Mass. 1943). However, a plaintiff must show "that there was some peculiar power of coercion" used by a combination of individuals on the plaintiff "which any individual [alone,] standing in a like relation to the plaintiff would not have had." DesLauries v. Shea, 13 N.E.2d 932, 935 (Mass. 1938) (internal quotation omitted).

In other words, the injury to a plaintiff must be the result of the combination of the defendants and not just the product of actions taken by more than one individual. In one of the few successful civil conspiracy actions of this sort, the Massachusetts Supreme Judicial Court held that the plaintiffs had properly pled the claim when they alleged that the defendants had worked together to manipulate the plaintiffs' business holdings to acquire certain obligations for themselves. Willett, 136 N.E. at 368-70. None of the defendants could have accomplished the injurious result by themselves. Additionally, even if each of the individual

actions were benign, the defendants were able to use their combined power and influence to destroy the plaintiffs' credit and holdings. Id.

In successful claims offered under this theory, the plaintiff has shown that defendants had a "peculiar commanding influence" either through some type of unique power or fiduciary relationship or even "mere numbers acting simultaneously" that injured a plaintiff and lacked "an excuse or justification." Johnson v. East Boston Savings Bank, 195 N.E. 727, 729-30 (Mass. 1930). In Johnson, for example, it was not enough to allege that several board members had worked together to defame the plaintiff after his termination. The court held that the reputational import of termination was the same whether it was done by a board with many members or by one person. Johnson, 195 N.E. at 730. The court must determine here if Plaintiff has alleged that there was "added force due to combination"; that is, that the injury is greater specifically because of the combined force. Johnson, 195 N.E. at 730.

One decision has pointed out that the most common form of this kind of conspiracy "is to be found in the combined

action of groups of employers or employees, where through the power of combination pressure is created and results brought about different in kind from anything that could have been accomplished by separate individuals." Fleming v. Dane, 22 N.E.2d 609, 611 (Mass. 1939).

Defendant argues that this sort of civil conspiracy is limited to the kind of direct economic coercion described in Fleming. It is true that some sort of economic coercion is typically the goal of this type of civil conspiracy. See Mass. Laborers' Health & Welfare Fund v. Philip Morris, Inc., 62 F. Supp. 2d 236, 244 (D. Mass. 1999). At the same time, nothing in the case law suggests that a plaintiff is limited to pleading purely economic coercion. Participation in the kind of widespread, systematic campaign alleged in the Amended Complaint appears to fall within the possible boundaries of this cause of action.

Alternatively, Defendant argues that Plaintiff has not adequately alleged that the coercive force exhibited by the conspiracy was "peculiarly focused against" Plaintiff. See Mass. Laborers', 62 F. Supp. 2d at 245. This contention flies in the face of the allegations of the Amended

Complaint, which charges that Defendant and his co-conspirators took actions that deliberately singled out Plaintiff and its members for persecution. If the Amended Complaint is accepted, the public in general was never the target; Plaintiff and the LGBTI community in Uganda were. This conspiracy-based coercion obviously had far more power than anything any one individual could have wielded, particularly in light of coordinated governmental and media initiatives associated with the conspiracy. At this motion to dismiss phase, Plaintiff's Amended Complaint has sufficiently alleged that Defendant and his co-conspirators were exploiting a "peculiar coercive power" with the goal of injuring Plaintiff and its members.

3. Negligence.

a. Statute of Limitations.

Massachusetts also applies a three-year statute of limitations to negligence claims. Mass. Gen. Laws ch. 260, § 2A; Genereux v. Am. Beryllia Corp., 577 F.3d 350, 359 (1st Cir. 2009) (citing Olsen v. Bell Tel. Labs, Inc., 445 N.E.2d 609 (Mass. 1983)). Like the civil conspiracy claim, this cause of action accrues at the time the plaintiff is

injured, or reasonably discovers the cause of an injury. Genereux, 577 F.3d at 359-63; John Beaudette, Inc. v. Sentry Ins. A Mut. Co., 94 F. Supp. 2d 77, 108 (D. Mass. 1999). As discussed in the civil conspiracy section, the Amended Complaint sets out that Plaintiff has been injured in the last three years and may not have had sufficient notice of Defendant's involvement in the earlier alleged injurious actions until three years before the filing of the complaint. The facts of record are insufficient to permit the court to allow the motion to dismiss based on this affirmative defense at this stage.

b. Failure to State a Claim.

Defendant argues that there is no duty of care to avoid creating a "virulently hostile environment." (Dkt. No. 33, Def.'s Mem. 70 (quoting Dkt. No. 27, Am. Compl. ¶ 258).) This argument certainly has force, and the state law negligence claim appears to be substantively the most fragile of Plaintiff's asserted causes of action. It will be difficult for Plaintiff to assemble facts during discovery to justify a finding of liability based on the negligent creation of a "dangerous situation." (Dkt. No.

27, Am. Compl.¶ 259.) Nevertheless, for now, the Amended Complaint has offered the standard articulation of a negligence claim, alleging that Defendant failed to act with reasonable care, with resulting harm to Plaintiff. Onofrio v. Dep't of Mental Health, 562 N.E.2d 1341, 1344-45 (Mass. 1990). The protection of free speech set forth in the First Amendment may make this count particularly difficult to defend at the summary judgment stage. That, however, is a decision for another day.

IV. CONCLUSION

For the foregoing reasons, Defendant's motions to dismiss (Dkt. Nos. 21 and 30) are hereby DENIED. The case is hereby referred to Magistrate Judge Kenneth P. Neiman for a pretrial scheduling conference pursuant to Fed. R. Civ. P. 16.

It is So Ordered.

/s/ Michael A. Ponsor
MICHAEL A. PONSOR
U. S. District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
SPRINGFIELD DIVISION

------------------------------x
SEXUAL MINORITIES UGANDA,

Plaintiff,

vs. Civil Action No.
3:12-CV-30051(MAP)

SCOTT LIVELY, INDIVIDUALLY AND
AS PRESIDENT OF ABIDING TRUTH
MINISTRIES,

Defendant.
------------------------------x

DATE: Tuesday, November 10, 2015

TIME: 9:40 a.m.

Videotape deposition of PEPE ONZIEMA, taken by Defendants, pursuant to notice, held at the offices of DORSEY & WHITNEY, LLP, 51 West 52nd Street, New York, New York 10019, before Elizabeth Willeski, RPR, of Capital Reporting Company, a Notary Public in and of the State of New York.

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1 P. Onziema
2 of progress, Mugisha said. Pointing to the white
3 tarpaulin under which his group assembled after
4 Monday's hour-long march. We are no longer afraid
5 of anything. We even have a banner." Were you
6 present with Frank Mugisha when he said that?
7 A No.
8 Q Do you agree with him?
9 A Agree with what?
10 Q Was he speaking for SMUG when he said
11 "we are no longer afraid of anything"?
12 A Please ask the question again.
13 MR. GANNAM: Can you read it back.
14 (The question was read back by the court
15 reporter.)
16 A Yes.
17 Q On the next page about six paragraphs
18 down there is a quote attributed to you. It says:
19 "It's been a long journey, said Pepe Julian
20 Onziema, a gay activist who works with Mugisha.
21 The suit against Lively is something we had been
22 brainstorming about since he came here in March
23 2009. We felt, how can someone come from
24 someplace and tell our people that we homosexuals
25 are lesser citizens. We felt really insulted."

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1 P. Onziema
2 Do you recall giving this quote to the writer?
3 A Yes.
4 Q And you testified earlier that it was in
5 2010 that the conversation with Frank and David
6 began regarding suing Scott Lively. Seeing this
7 quote, does that refresh your recollection that it
8 was at a different time?
9 A Yes, it does.
10 Q So having seen this quote now, what is
11 your memory of when the discussions to sue Scott
12 Lively began?
13 A 2009.
14 Q And when it says: "We have been
15 brainstorming about since he came here in March
16 2009." Who's "we"?
17 A David, myself, Frank, and other
18 activists.
19 Q What other activists?
20 A They are not affiliated with our
21 organization.
22 Q So who are they?
23 A I don't remember them by name.
24 Q I'm sorry, you don't remember...
25 A Them by name.

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1 P. Onziema
2 Q Was Kapya Kaoma someone involved in
3 those discussions in 2009?
4 A Not that I recall.
5 Q Do you know who Kapya Kaoma is?
6 A I know.
7 Q Are you aware that Kapya Kaoma and his
8 organization, Political Resource Associates, has
9 publically stated that it broke the story about
10 Scott Lively's involvement with the 2009
11 Anti-Homosexuality Bill in Uganda?
12 A Please help me understand the question.
13 Q Are you aware that Kapya Kaoma and his
14 organization, Political Resource Associates, take
15 credit for revealing the connection between Scott
16 Lively and the Anti-Homosexuality Bill in 2009?
17 A I'm not aware of that.
18 Q Do you disagree with that statement?
19 A That they broke the news?
20 Q That they not only broke the news but
21 identified a connection between Scott Lively and
22 the 2009 Anti-Homosexuality Bill?
23 A I don't agree.
24 Q Why don't you agree?
25 A Because we were already doing our own

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1 P. Onziema
2 groundwork in Uganda.
3 Q Referring back to this quote in the
4 article. You said: "How can someone come from
5 someplace and tell our people that we homosexuals
6 are lesser citizens." Is that something that
7 Scott Lively said?
8 A I wasn't quoting him. That was my
9 quote.
10 Q I know. But you said how can someone
11 come from someplace and tell our people that we
12 homosexuals are lesser citizens. Was that someone
13 Scott Lively coming from someplace, the United
14 States, and saying that?
15 A Again, that's my quote, not Scott
16 Lively's quote. I wasn't quoting Scott Lively.
17 Q So who were you referring to when you
18 said someone coming from someplace and telling our
19 people that?
20 A The someone in this quote was Scott
21 Lively.
22 Q So do you believe that Scott Lively said
23 that homosexuals are lesser citizens?
24 A He alluded to that, yes.
25 Q Did you ever hear him say that?

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1 P. Onziema
2 e-mails strung together. Beginning at the top
3 says: "Frank, here is the draft for Huff Post
4 blog. See you for breakfast tomorrow. KK." Do
5 you understand KK to be Kapya Kaoma?
6 A Yes.
7 Q The e-mail below that says from Alex
8 DiBranco to Kapya Kaoma, and subject is draft for
9 Frank. It says: "Hi, Kapya. The attachment
10 below is the draft for Frank to you to post in
11 Huff Post. Please share with him." This appears
12 to me to be an e-mail, someone writing a post for
13 the Huffington Post for Frank to post under his
14 name. Do you have any knowledge of this?
15 A I don't understand the question.
16 Q Well, do you know what this document is
17 talking about, this person Alex DiBranco writing
18 to Kapya Kaoma about a draft for Frank?
19 MR. SULLIVAN: Objection to form.
20 A I don't.
21 Q Are you aware of any practice of Frank
22 Mugisha to have other people write things for him
23 that he then posts on digital media under his own
24 name?
25 A No, I don't.

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1 P. Onziema
2 Q Were you aware of this particular
3 Huffington Post piece or at least a piece intended
4 for Huffington Post in 2012?
5 A Not that I recall.
6 MR. GANNAM: Let's take a break.
7 VIDEOGRAPHER: The time right now is
8 3:01 p m. and we're off the record.
9 (A brief recess was taken.)
10 VIDEOGRAPHER: This marks the beginning
11 of Tape Number 4. The time is 3:16 p m.
12 and we are back on the record.
13 EXAMINATION BY MR. GANNAM:
14 Q I have a document that was previously
15 marked as Defendant's Exhibit JJJ. This is an
16 article from the Sunday Monitor published November
17 10, 2011. The headline reads: Gay Activist
18 Murderer Sentenced to 30 Years. This is an
19 article about the person who confessed to killing
20 David Kato. Have you ever seen this article
21 before?
22 A Yes.
23 Q The article recites certain facts about
24 the killing of Mr. Kato. And in prior
25 depositions, Frank Mugisha, the executive director

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1 P. Onziema
2 of SMUG, Richard Lusimbo, the head researcher for
3 SMUG, Kapya Kaoma, the professional researcher for
4 Political Research Associates, Sam Ganafa, the
5 chairman of the board for SMUG, all were shown
6 this article and none of them had knowledge of any
7 facts in disagreement with the facts reported in
8 this article; those facts essentially being that
9 an acquaintance of Mr. Kato who was staying in
10 Mr. Kato's home killed him and confessed to it and
11 is now in prison under a 30-year sentence. Do you
12 have knowledge of any facts that would disagree
13 with what's reported in this article about the
14 killing of David Kato and who did it?
15 A Facts to me? I just want to understand
16 the question.
17 Q Well, do you know what a fact is?
18 A I do.
19 Q Do you have knowledge of any facts
20 regarding the circumstances of David Kato's death
21 that would disagree with the facts reported in
22 this article?
23 A I disagree with the facts in this
24 article.
25 Q What facts do you disagree with?

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1 P. Onziema
2 A I'm having a hard time understanding
3 what you mean by facts in this case.
4 Q I will ask you some specific questions
5 then. Do you have knowledge of any facts contrary
6 to the fact that the person who killed David Kato
7 is Sidney Nsubuga Enoch?
8 A I don't know, but that's the person who
9 was identified.
10 Q Do you have knowledge of any facts in
11 disagreement with the statement in the article
12 that Mr. Enoch confessed to murdering David Kato?
13 A It was on the news that he confessed.
14 Q Do you have knowledge to any facts to
15 the contrary?
16 A I don't.
17 Q And just so I'm clear, do you have any
18 knowledge to the contrary that Enoch is the person
19 who killed David Kato?
20 A I don't.
21 Q Do you have knowledge of any facts
22 contrary to the reported fact that Enoch was an
23 acquaintance of Mr. Kato?
24 A No.
25 Q Do you have any knowledge of any fact

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1 P. Onziema
2 contrary to the reported fact that David Kato
3 wanted to have sex with Mr. Enoch?
4 A No.
5 Q And do you have knowledge of any fact
6 contrary to the reported fact that Enoch killed
7 David Kato because he did not want to have sex
8 with him?
9 A No.
10 Q Do you have any knowledge of any fact
11 suggesting that David Kato was killed as a result
12 of his LGBT advocacy in Uganda?
13 A Please repeat the question.
14 MR. GANNAM: Can you read it back.
15 (The question was read back by the
16 court.)
17 A Yes.
18 Q And what facts do you have knowledge of?
19 A That he received threats through phone
20 calls and on his way home.
21 Q On his way home when?
22 A From the city to Nkona (phonetic) and
23 that he was attacked very many times when we were
24 at court during the hearings of the Rolling Stone
25 case that we had filed.

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1 P. Onziema
2 Q Are there other persons who are LGBT
3 activists in Uganda who have received death
4 threats?
5 A Yes.
6 Q Who are not dead today?
7 A Yes.
8 Q So do you know whether any of the
9 persons who threatened David Kato perpetrated his
10 murder?
11 A Please repeat the question.
12 (The question was read back by the court
13 reporter.)
14 A No, I don't.
15 Q So would you agree that as you sit here
16 today SMUG has no evidence that David Kato was
17 killed as a result of his LGBT activism?
18 A Right.
19 Q Since that is true, is it also true that
20 SMUG did not have any such evidence in 2012 in
21 March when it filed the lawsuit in this case?
22 A I beg your pardon?
23 MR. GANNAM: Can you read it back.
24 (The question was read back by the court
25 reporter.)

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1 P. Onziema
2 A Correct.
3 Q And isn't it also true then that when
4 SMUG filed its Amended Complaint in this case,
5 SMUG also did not have any such evidence?
6 A Correct.
7 Q I'm going to show you an exhibit that
8 was previously marked Exhibit 4H. This is a
9 somewhat redacted document, but the parts we can
10 see show that it's an e-mail string, the latest of
11 which is dated June 26, 2014. The subject is
12 partially redacted, but in part is SMUG fundraiser
13 in NYC June 27/28. The sender and primary
14 recipient are redacted. The cc recipients are
15 frankmugisha@gmail.com, onziema@gmail.com. And it
16 references several attachments. The body of the
17 e-mail says: Hi, redacted name. I've attached a
18 write-up of SMUG's work, fact sheet about the
19 fund, and a PDF of a New Yorker article profiling
20 Frank and SMUG from December 2012. The next
21 paragraph reads: By coincidence, Pepe Onziema
22 SMUG's director of programs will be in New York
23 this weekend. He is being interviewed by John
24 Oliver. Do you remember receiving this e-mail?
25 A No, I don't.

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1 P. Onziema
2 Q Onziema@gmail.com is your e-mail
3 address, correct?
4 A Yes.
5 Q Is it true that on June 26 of 2014 you
6 were preparing or even headed for New York to be
7 on an HBO show?
8 A Yes.
9 Q So that much is true, correct?
10 A Yes.
11 Q The attachment that is here which begins
12 on page numbered SMUG 020360 is a write-up of SMUG
13 showing SMUG's logo at the lower left-hand corner
14 and the logo for the [redacted]
15 right, are you familiar with that organization?
16 A Yes, I am.
17 Q At the very bottom, it says: "All
18 proceeds from this event will go to SMUG via the
19 [redacted] It appears to be a
20 fundraising piece for an event involving SMUG.
21 Are you familiar with the event?
22 A Yes.
23 Q On this fundraising piece for SMUG about
24 halfway down the page, a little further than that,
25 it says: "Despite the personal risk involved,

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1 P. Onziema
2 SMUG's staff and volunteers have remained resolute
3 courageous attitude even in the wake of threats
4 and tragedy following the brutal 2011 murder of
5 SMUG's advocacy director, David Kato. SMUG
6 publicly declared its refusal to be intimidated,
7 eventually filing and winning an injunction
8 against a Ugandan tabloid that had previously
9 published David's name and photo under the banner
10 hang them." Now, isn't it true this paragraph is
11 suggesting that David Kato's death was a result of
12 his activities on behalf of SMUG?
13 MR. SULLIVAN: Objection to form. The
14 document speaks for itself.
15 Q You can answer.
16 A Maybe.
17 Q Where it says that SMUG publicly
18 declared its refusal to be intimidated, can you
19 think of a reason why SMUG would be intimidated by
20 the murder of David Kato if it didn't have
21 anything to do with his advocacy?
22 MR. SULLIVAN: Objection to form.
23 A This is a colleague of mine, someone
24 that we worked with day-to-day. Obviously these
25 matters will scare us. It will worry us. And the

167

1 P. Onziema
2 choice to move from that would still have to be
3 ours and our choice was not to be intimidated even
4 if, you know, he was not part of the team anymore.
5 Q If David Kato had died in a car
6 accident, would SMUG have been intimidated about
7 continuing its advocacy work?
8 MR. SULLIVAN: Objection to form.
9 A When death removes someone from you,
10 obviously there are ways you react to that.
11 Q Such as?
12 A You have given an example of an
13 accident. Obviously the rest of us would, you
14 know, worry about how we will die.
15 Q So reactions to someone you know dying
16 would be grief, sadness. That would seem natural,
17 correct?
18 A Yes.
19 Q Why would you be intimidated by
20 someone's death unless you believe that you were
21 under the threat of experiencing the same death?
22 A David was murdered, his brains spilled
23 on the floor. That was brutal. That would scare
24 anybody who is close to him.
25 Q It would scare anyone as to experiencing

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1 P. Onziema
2 the same type of death?
3 A I don't understand the question.
4 Q I could understand being scared of the
5 person who perpetrated him, but that person is
6 doing a 30-year prison sentence, so what would
7 there be to intimidate SMUG?
8 A We receive threats on a day-to-day
9 basis, some of them being death threats, some of
10 them people actually going to the length of
11 physically attacking you after those threats. So
12 obviously, you know, for you to keep your head
13 above all that goes on is to refuse to be
14 intimidated by people like that or things like
15 that.
16 Q So let me ask you this, given that you
17 said SMUG has no evidence that David Kato was
18 killed because of his LGBT advocacy, do you think
19 it would be wrong to suggest that he was killed
20 due to his advocacy in order to raise funds for
21 SMUG?
22 MR. SULLIVAN: Objection to form.
23 A I don't understand what you're asking
24 me.
25 Q What didn't you understand?

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1 P. Onziema
2 A The whole question the way that you
3 asked it.
4 Q You have testified that SMUG has no
5 evidence that David Kato was killed for his LGBT
6 activism, correct?
7 A Correct.
8 Q So knowing that, do you think it would
9 be wrong for SMUG to suggest that he was killed as
10 a result of his advocacy in order to raise money?
11 MR. SULLIVAN: Objection to form.
12 A It's wrong to suggest that.
13 Q I'm going to read to you a statement.
14 "In 2010, a tabloid newspaper, parroting
15 characterizations of the gays and lesbians
16 repeatedly made to Ugandan officials by Lively
17 published an article outing Sexual Minorities
18 Uganda's advocacy officer David Kato and others
19 under the headline hang them. Some of the
20 advocates featured in that article received
21 heightened death threats and one of them, Mr.
22 Kato, is now dead." Hearing that statement read,
23 does that statement suggest to you that Mr. Kato
24 was killed because of his advocacy?
25 MR. SULLIVAN: Objection to form.

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1 P. Onziema
2 A May I ask whose statement that is?
3 Q You may ask but I'm not going to answer
4 that question.
5 A Please ask the question again.
6 Q You want me to read the statement again?
7 A Yes.
8 Q "In 2010, a tabloid newspaper parroting
9 characterizations of gays and lesbians, repeatedly
10 made to Ugandan officials by Lively published an
11 article outing Sexual Minorities Uganda advocacy
12 officer David Kato and others under the headline
13 hang them. Some of the advocates featured in that
14 article received heightened death threats and one
15 of them, Mr. Kato, is now dead." Does that
16 statement suggest to you that Mr. Kato is dead
17 because a tabloid published his picture under the
18 headline hang them?
19 MR. SULLIVAN: Objection to form. The
20 statement states what it states.
21 A Yes, it does.
22 Q "And in January 2011 the high court
23 issued a permanent injunction preventing the
24 newspaper from identifying LGBTI persons and
25 ordering the tabloid to pay damages to the

171

1 P. Onziema
2 plaintiffs, Kato, Onziema, and Nabagesera
3 continued to receive death threats. Kato was
4 killed in his home just over one year ago on
5 January 26, 2011." Does that statement suggest
6 that Kato was killed as a result of the newspaper
7 identifying LGBTI persons?
8 MR. SULLIVAN: Same objection.
9 A Yes, it suggests.
10 Q I'm going to show you an article
11 previously marked as Defendant's Exhibit C. This
12 is an article from BBC News dated Monday, October
13 27, 2003 entitled My Life As a Gay Ugandan
14 Christian. It describes a person named
15 Christopher Senteza. First of all, do you know
16 who that person is?
17 A No.
18 Q The article claims that he is a gay
19 Ugandan and that he has worked for Integrity
20 Uganda. Are you familiar with Integrity Uganda?
21 A Yes.
22 Q Towards the bottom of the page it says:
23 "A part of his work for Integrity Uganda, a
24 Christian group which offers support for gays and
25 lesbians, he recalls a visit with a friend to a

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1 P. Onziema
2 gay teenager's mother he was trying to help. We
3 went and visited the son and his mother decided to
4 chase us from the house. She accused us of trying
5 to preach homosexuality to him, which of course we
6 were not trying to do." Now, you don't have any
7 knowledge of that particular incident he
8 described, do you?
9 A No, I don't.
10 Q Do you have any reason to doubt that
11 this article with that quote from Mr. Senteza was
12 published by BBC News in 2003?
13 A Please ask the question again.
14 Q Do you have any reason to doubt that
15 this article, including that quote from Mr.
16 Senteza, was published by the BBC News in October
17 of 2003?
18 A No.
19 Q Do you have any reason to doubt that in
20 the press, in the media, accusations of a gay
21 Ugandan trying to preach homosexuality appear in
22 print?
23 A Please repeat the question.
24 MR. GANNAM: Can you read it back.
25 (The question was read back by the court

173

1 P. Onziema
2 reporter.)
3 A No.
4 Q On the next page about a third of the
5 way down it says: "In 1999, the President
6 launched a fierce attack on homosexuality and said
7 gays should be sent to jail, referring to
8 President Museveni of Uganda." Are you aware of a
9 1999 verbal attack or other attack by President
10 Museveni to the effect that gays should be sent to
11 jail?
12 A Yes, I'm aware.
13 Q I'm going to show you an article marked
14 Exhibit D. This is an article appearing on
15 PlanetOut Network, October 4, 2004. The headline
16 is Uganda Fines Radio Station For Gay Show. It
17 says: "A radio station in Uganda was fined over
18 $1,000 after broadcasting a talk show that
19 featured openly gay guests who said homosexuality
20 is an acceptable way of life." Are you familiar
21 with this incident in 2004?
22 A Yes, I am.
23 Q And towards the bottom it says:
24 "Homosexuality is Illegal in Uganda." Do you
25 agree in 2004 with that statement?

202

1 P. Onziema
2 recited in that article are also examples of the
3 backlash that Mr. Mugisha was talking about,
4 correct?
5 A Correct.
6 Q And do you have any knowledge of any
7 facts that would show that Scott Lively was
8 involved in any backlash against SMUG or the LGBTI
9 community following the 2007 campaign?
10 A No.
11 MR. SULLIVAN: If we are going on to
12 another exhibit, why don't we take a break. We've
13 been going about an hour and a half.
14 MR. GANNAM: Okay.
15 VIDEOGRAPHER: The time is 4:43 p.m. and
16 we're off the record.
17 (A brief recess was taken.)
18 VIDEOGRAPHER: This marks the beginning
19 of Tape Number 5 the time right now is
20 5:02 p m. and we are back on the record.
21 EXAMINATION BY MR. GANNAM:
22 Q Since you have been in the United States
23 for your deposition, have you met with Victor
24 Mukasa?
25 A No.

203

1 P. Onziema
2 Q Have you had any contact with Victor
3 Mukasa?
4 A No.
5 Q When is the last time you did have
6 contact with Victor Mukasa?
7 A By contact you mean?
8 Q Either telephone, e-mail, in person?
9 A I don't remember exactly, sometime in
10 2014.
11 Q Was that in the United States or in
12 Uganda?
13 A In United States.
14 Q What were the circumstances of that
15 meeting?
16 A It wasn't a meeting. It was a phone
17 call and I wanted to see him.
18 Q And did you end up meeting?
19 A No, we did not.
20 Q Schedule problems or did Victor Mukasa
21 not want to?
22 A Schedule problems.
23 Q I previously showed you Exhibit JJJ. It
24 was the article about David Kato's killer. That
25 article was published November 10, 2011. So the

204

1 P. Onziema
2 confession and sentencing had already occurred at
3 that point in time. Were you also aware of the
4 sentencing of the confessed killer at the end of
5 2011?
6 A Yes.
7 Q You testified earlier that you were
8 aware that Scott Lively had visited Uganda in
9 2002?
10 A Yes.
11 Q What were the circumstances of that
12 visit?
13 A I don't know, but how I'm aware of his
14 visit was through a television talk show.
15 Q A television talk show that you saw on
16 TV?
17 A Yes.
18 Q When?
19 A In 2002.
20 Q What was the name of the show?
21 A I think Youth Focus or Youth something.
22 Q What channel does that come on?
23 A It was UBC, the national Ugandan
24 television station.
25 Q And did you know who Scott Lively was

205

1 P. Onziema
2 before you saw him on TV?
3 A No, I didn't.
4 Q How long was he on that show?
5 A The show I think runs for 45 minutes and
6 he was the guest that evening.
7 Q And what did Scott Lively say on the
8 show, Youth Focus?
9 A I don't remember his exact words, but
10 the theme of the talk show was around
11 homosexuality.
12 Q Any videotape or recordings of that show
13 exist?
14 A I don't know.
15 Q What else do you know about Scott
16 Lively's visit to Uganda in 2002?
17 A I know that he was hosting on the show
18 by Pastor Ssempa.
19 Q Was it Martin Ssempa's show?
20 A He was the host of the show.
21 Q He was the host. Is that a regular
22 hosting engagement that Martin Ssempa had?
23 A The show no longer exists but at that
24 time.
25 Q He was the regular host of the show?

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

SPRINGFIELD DIVISION

3:12-CV-30051-MAP

---------------------------------------x
SEXUAL MINORITIES UGANDA,

Plaintiff,

- against -

SCOTT LIVELY,

Defendant.
---------------------------------------x

Date: November 11, 2015
Time: 9:18 a.m.

Continued Videotaped Deposition of PEPE JULIAN ONZIEMA, taken by the Defendants, pursuant to Notice and Adjournment, held at the offices of Dorsey & Whitney, LLP, 51 West 52nd Street, New York, New York, before Tammy O'Berg, a Shorthand Reporter and Notary Public of the State of New York.

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1 PEPE JULIAN ONZIEMA
2 of SMUG's resources to protect SMUG from
3 persecution? Is that true?
4 A. Yes.
5 Q. And so I'm clear, SMUG is
6 seeking damages for persecution that SMUG
7 experienced as SMUG, the organization,
8 correct?
9 A. Yes.
10 Q. And SMUG is not seeking any
11 damages for persecution experienced by
12 individuals; is that correct?
13 A. That's correct.
14 Q. Is SMUG seeking damages for
15 any -- for persecution experienced by any
16 SMUG member organization?
17 (Witness perusing document.)
18 Q. I remind you that at the top of
19 the section it says, SMUG only seeks
20 damages for harm it suffered as an
21 organization.
22 And you said that was true,
23 correct?
24 A. Yes.
25 Q. So is it also true that SMUG

293

1 PEPE JULIAN ONZIEMA
2 does not seek damages for harm suffered by
3 any of its members?
4 A. SMUG is made up of member
5 organizations.
6 Q. I understand, but SMUG is
7 seeking damages in this case for harm that
8 SMUG suffered as an organization, correct?
9 A. Yes.
10 Q. It's not seeking damages
11 experienced by any of its individual
12 member organizations; is that correct?
13 (Pause.)
14 A. I'm not clear on what you're
15 asking me.
16 Q. Let me give you an example:
17 In this lawsuit, is SMUG seeking
18 to recover damages for persecution
19 experienced specifically by FARUG?
20 A. No.
21 Q. And would -- would your answer
22 be the same for any other SMUG member
23 organization?
24 A. Yes.
25 Q. All right.

294

1 PEPE JULIAN ONZIEMA
2 I want to refer you back to the
3 Amended Complaint which is Exhibit 4-I.
4 It's in front of you.
5 I'm going to begin on page 42,
6 numbered paragraph 165.
7 Paragraph 165 reads, On June 18,
8 2012, Ugandan police raided a
9 skills-building workshop for LGBTI rights
10 advocates from East Africa that was being
11 held at the as Esella Country Hotel
12 outside Kampala.
13 Are you familiar with this event
14 described in paragraph 165?
15 A. Yes.
16 Q. It alleges that Ugandan police
17 raided a workshop, correct?
18 A. Correct.
19 Q. Are you --
20 MR. GANNAM: Strike that.
21 Q. Do you have knowledge of any
22 assistance provided to the Ugandan police
23 by Scott Lively in connection with that
24 raid described in paragraph 165?
25 MR. SULLIVAN: Objection to

295

1 PEPE JULIAN ONZIEMA
2 form.
3 (Witness perusing document.)
4 A. I would like you to repeat the
5 question.
6 MR. GANNAM: Can you read it
7 back, please.
8 (Record read.)
9 (Pause.)
10 A. I have no knowledge of any
11 direct assistance by Scott Lively.
12 However, I know that this was
13 one of the acts that were being carried
14 out as -- as a result of his visit to
15 Kampala in 2009.
16 Q. Do you have knowledge of any
17 communication between Scott Lively and
18 anyone on the Ugandan police force
19 regarding this event in June of 2012?
20 A. No, I do not.
21 Q. Do you have knowledge of any
22 communication indirectly between Scott
23 Lively and the Ugandan police force
24 through another person or persons?
25 A. Could you repeat that, please?

300

1 PEPE JULIAN ONZIEMA
2 A. I wouldn't know.
3 Q. You're saying you wouldn't know.
4 My question is a little different.
5 My question is do you know?
6 A. I don't.
7 Q. Do you have any knowledge of
8 anything Scott Lively did in the United
9 States directed to helping the Ugandan
10 police carry out the raid described in
11 paragraph 165?
12 A. No.
13 Q. Can you turn the page to
14 paragraph -- I'm sorry, page 44?
15 A. Same document?
16 Q. Same document, yes. Numbered
17 paragraph 176.
18 Paragraph 176 begins, On
19 February 14, 2012, Sexual Minorities
20 Uganda and one of its member
21 organizations, Freedom and Roam Uganda,
22 were wrapping up a two-week conference on
23 LGBT issues that drew together
24 approximately 30 participants at the
25 Imperial Resort Hotel in Entebbe.

301

1 PEPE JULIAN ONZIEMA
2 Are you familiar with that
3 event?
4 A. Yes, I am.
5 Q. Were you present for that event?
6 A. Yes.
7 Q. Paragraph 179 says, Around noon
8 on February 14, 2012, during a session
9 that was being facilitated by Dr. Hilda
10 Tadria, cofounder of the African Women's
11 Development Fund, the Minister of Ethics
12 and Integrity, Simon Lakodo, accompanied
13 by the police, entered the conference room
14 and declared the meeting illegal.
15 Did you witness what's described
16 in paragraph 179?
17 A. Yes, I did.
18 Q. Are you aware of any
19 communication between Scott Lively and
20 Simon Lakodo regarding the event described
21 in paragraph 179?
22 A. No, I don't.
23 Q. What about communication between
24 Scott Lively and the Ugandan police
25 regarding the event described in paragraph

302

1 PEPE JULIAN ONZIEMA
2 179?
3 A. No.
4 Q. Are you aware of any
5 communication between any of -- Martin
6 Ssempa, Steven Langa, Nsaba Buturo and
7 Simon Lakodo regarding the event described
8 in paragraph 179?
9 A. Just -- ask the question again.
10 MR. GANNAM: Can you repeat the
11 question?
12 (Record read.)
13 (Pause.)
14 A. No, I'm not, but during that
15 raid, Simon Lakodo himself said he was
16 alerted about the meeting.
17 Q. Did he say who alerted him about
18 the meeting?
19 A. His colleagues, Ssempa and
20 Oundo.
21 Q. So Simon Lakodo said -- and you
22 heard him say that he was alerted to the
23 meeting described in paragraph 179 by
24 whom?
25 A. His colleagues, Ssempa and

303

1 PEPE JULIAN ONZIEMA
2 Oundo.
3 Q. What's Oundo's first name?
4 A. George.
5 Q. Did Simon Lakodo use those
6 words, "my colleagues"?
7 A. Yes.
8 Q. And you heard this yourself?
9 A. I did.
10 Q. Did he say he was alerted about
11 the meeting by Scott Lively?
12 A. No.
13 Q. Are you aware of any
14 communication between Scott Lively and
15 either Martin Ssempa or George Oundo
16 regarding the event described in paragraph
17 179?
18 A. No.
19 Q. Are you aware of any
20 communication between Scott Lively and
21 Steven Langa or Nsaba Buturo regarding the
22 event described in paragraph 179?
23 A. Please repeat the question.
24 Q. Are you aware of any
25 communication between Scott Lively and

304

1 PEPE JULIAN ONZIEMA
2 either Steven Langa or Nsaba Buturo
3 regarding the event described in paragraph
4 179?
5 A. No.
6 Q. Are you aware of any agreement
7 between Scott Lively and Simon Lakodo
8 concerning the event described in
9 paragraph 179?
10 MR. SULLIVAN: Objection to
11 form.
12 A. No.
13 Q. Are you aware of any agreement
14 between Scott Lively and the Ugandan
15 police regarding the event described in
16 paragraph 179?
17 MR. SULLIVAN: Objection to
18 form.
19 A. No.
20 Q. Did Scott Lively do anything in
21 the United States directed to helping
22 Simon Lakodo or the Ugandan police carry
23 out the raid described in paragraph 179?
24 A. I don't know.
25 Q. Do you have knowledge of any

305

1 PEPE JULIAN ONZIEMA
2 assistance provided by Scott Lively to
3 Simon Lakodo or the Ugandan police in
4 connection with the event described in
5 paragraph 179?
6 A. I don't know.
7 Q. The next page, 46, beginning in
8 paragraph 186 reads, On June 4, 2008,
9 three LGBTI rights activists were arrested
10 as they were attempting to peacefully
11 protest at the 2008 HIV/AIDS implementers
12 meeting in Kampala against the policy of
13 the Uganda AIDS Commission excluding LGBTI
14 persons from the commission's programs.
15 Are you familiar with that event
16 described in paragraph 186?
17 A. Yes.
18 Q. Were you in fact one of the
19 activists arrested?
20 A. Yes, I was.
21 Q. Were you aware of any
22 communication between Scott Lively and the
23 Ugandan police who carried out those
24 arrests in June of 2008?
25 A. No.

306

1 PEPE JULIAN ONZIEMA
2 Q. Are you aware of any
3 communication between Scott Lively and
4 either Martin Ssempa, Steven Langa, Nsaba
5 Buturo, Simon Lakodo or George Oundo
6 regarding the arrest in June of 2008?
7 A. No.
8 Q. Are you aware of any agreement
9 between Scott Lively and the Ugandan
10 police regarding those arrests in June of
11 2008?
12 A. No, I'm not aware.
13 Q. Are you aware of any action by
14 Scott Lively in the United States directed
15 towards assisting the Ugandan police with
16 the arrest in June of 2008?
17 A. I don't know.
18 Q. Are you aware of any assistance
19 at all provided by Scott Lively to the
20 Ugandan police in connection with the
21 arrest in June of 2008?
22 A. I do not know.
23 Q. Moving on to paragraph 194 on
24 the next page -- actually, 195.
25 It reads, In light of the

307

1 PEPE JULIAN ONZIEMA
2 ongoing discrimination and stigma, in May
3 2012, Sexual Minorities Uganda staff and a
4 member organization undertook efforts to
5 open a health clinic for LGBTI people in
6 Kampala to provide testing, counseling and
7 treatment for HIV/AIDS and other sexually
8 transmitted infections.
9 Are you familiar with that
10 clinic?
11 A. Yes, I am.
12 Q. Is that clinic open today?
13 (Pause.)
14 A. It's open but it's not operating
15 as it was set to operate before.
16 Q. Did it begin in May of 2012?
17 A. Yes.
18 Q. On the next page, paragraph 197,
19 it reads, On July 11, 2012, Minister of
20 Ethics and Integrity Lakodo told a news
21 agency that he intends to investigate the
22 clinic for promoting homosexuality.
23 Are you aware of such a
24 statement by Minister Lakodo?
25 A. Yes, I am.

308

1 PEPE JULIAN ONZIEMA
2 Q. Do you have any knowledge of any
3 communication between Scott Lively and
4 Minister Lakodo regarding the intent to
5 investigate the clinic described in
6 paragraph 197?
7 A. No, I don't.
8 Q. Do you have any knowledge of any
9 communication between Scott Lively and
10 either Martin Ssempa, Steven Langa, Nsaba
11 Buturo or George Oundo regarding Minister
12 Lakodo's intention to investigate the
13 clinic?
14 A. No, I don't.
15 Q. Do you have any knowledge of any
16 agreement between Scott Lively and
17 Minister Lakodo regarding the
18 investigation or an intent to investigate
19 the clinic?
20 A. No, I don't.
21 MR. SULLIVAN: Objection to
22 form.
23 Q. Do you have any knowledge of
24 anything Scott Lively did in the United
25 States directed towards assisting Minister

309

1 PEPE JULIAN ONZIEMA
2 Lakodo with an investigation of the
3 clinic?
4 A. I do not know.
5 Q. Do you have any knowledge of any
6 assistance at all provided by Scott Lively
7 to Minister Lakodo in connection with
8 investigating the clinic?
9 A. I do not know.
10 Q. Did Minister Lakodo or anyone
11 else in the Ugandan government ever carry
12 out such an investigation?
13 A. I beg your pardon.
14 Q. Did Minister Lakodo ever follow
15 through with his intention to investigate
16 described in paragraph 197?
17 A. The police came to the clinic a
18 couple of times. I don't know if that was
19 part of the investigation.
20 Q. Did the police shut down the
21 clinic or stop its operation?
22 A. No, they did not.
23 Q. What did they do?
24 A. They said they were going to get
25 a letter to make sure that the clinic was

310

1 PEPE JULIAN ONZIEMA
2 shut down.
3 Q. Did they succeed in doing that?
4 A. They never give us a letter.
5 Q. Was any adverse action taken
6 against the clinic by the police or any
7 other part of the Ugandan government?
8 A. No.
9 Q. Moving down page 48, beginning
10 in paragraph 199, it says, On August 16,
11 2007, Sexual Minorities Uganda and its
12 member organizations held a press
13 conference where they launched their Let
14 Us Live in Peace campaign.
15 You're familiar were this
16 campaign, correct?
17 A. Yes.
18 Q. And we discussed it yesterday,
19 correct?
20 A. Yes.
21 Q. We also discussed that there was
22 a backlash from Ugandan citizens and the
23 Ugandan government in connection with that
24 campaign, correct?
25 A. Correct.

311

1 PEPE JULIAN ONZIEMA
2 Q. Paragraph 200 says, Less than a
3 week later, Deputy Attorney General Fred
4 Ruhindi called upon the relevant agencies
5 to take appropriate action because
6 homosexuality is an offense under the laws
7 of Uganda.
8 Are you familiar with that
9 statement by Fred Ruhindi?
10 A. Yes.
11 Q. Do you know what laws Ruhindi
12 was referring to?
13 A. The penal code.
14 Q. Specifically the portion of the
15 penal code punishing homosexuality and
16 other unnatural offenses, as quoted here
17 in paragraph 200?
18 A. Yes.
19 Q. And that law, the penal code
20 section dealing with punishment of
21 unnatural offenses, has been on the books
22 for decades, correct?
23 A. Correct.
24 Q. And I believe you testified you
25 don't know of any involvement of Scott

312

1 PEPE JULIAN ONZIEMA
2 Lively with the passage of that penal code
3 section, are you?
4 A. No.
5 Q. Do you have any knowledge of any
6 communication between Scott Lively and
7 Deputy Attorney General Ruhindi regarding
8 his call for appropriate action to be
9 taken against SMUG?
10 A. No.
11 Q. Do you have any knowledge of any
12 communication between Martin Ssempa,
13 Steven Langa, Nsaba Buturo, Simon Lakodo
14 or George Oundo and Ruhindi regarding
15 Ruhundi's call for action to be taken
16 against SMUG?
17 A. No.
18 Q. Do you have any knowledge of any
19 agreement between Scott Lively and Ruhindi
20 regarding taking action against SMUG?
21 MR. SULLIVAN: Objection to
22 form.
23 A. No.
24 Q. Do you have any knowledge of any
25 action taken by Scott Lively in the United

313

1 PEPE JULIAN ONZIEMA
2 States directed towards assisting Ruhindi
3 to take action against SMUG?
4 A. I don't know.
5 Q. Do you have any knowledge of any
6 assistance provided by Scott Lively to
7 Ruhindi in connection with taking action
8 against SMUG?
9 A. I do not know.
10 Q. Paragraph 201 reads, Minister of
11 Ethics and Integrity Buturo also stated
12 that the government was considering
13 changing the laws so that promotion itself
14 becomes a crime and have catalogs of
15 people we think are involved in
16 perpetuating the vice of homosexuality.
17 Are you familiar with that
18 statement by Minister Buturo?
19 A. Yes, I am.
20 Q. Were you aware of it in 2007
21 when it was made?
22 A. Yes.
23 Q. Do you have any knowledge of any
24 communication between Scott Lively and
25 Minister Buturo regarding Buturo's

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1 PEPE JULIAN ONZIEMA
2 statement in 2007 about changing the laws
3 so that promotion itself becomes a crime?
4 A. No, I don't, but it has to be
5 noted that Scott Lively had already been
6 in Uganda and brought in these times of
7 promotion of homosexuality as early as
8 2002.
9 Q. Did Scott Lively meet with
10 Buturo when he came to Uganda in 2002?
11 A. I don't know.
12 Q. And I believe you testified
13 yesterday that when Scott Lively was in
14 Uganda in 2002, the only knowledge of
15 anything Scott Lively said at that time
16 was what you observed on a television show
17 featuring Scott Lively and Martin Ssempa,
18 correct?
19 A. Correct.
20 Q. And your testimony was that the
21 word "promotion" was stated by someone on
22 that show, correct?
23 A. Correct.
24 Q. But you could not remember
25 whether it was Scott Lively who used the

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1 PEPE JULIAN ONZIEMA
2 word "promotion" on that show, correct?
3 A. Correct.
4 Q. Are you aware of any agreement
5 between Scott Lively and Minister Buturo
6 regarding changing the laws so that
7 promotion itself becomes a crime in 2007?
8 MR. SULLIVAN: Objection to
9 form.
10 A. No.
11 Q. Do you have any knowledge of any
12 action taken by Scott Lively in the United
13 States directed towards assisting Buturo
14 in changing the laws so that promotion
15 itself becomes a crime in 2007?
16 A. I don't know.
17 Q. Do you have any knowledge of any
18 assistance at all provided by Scott Lively
19 to Minister Buturo in connection with
20 changing the laws to make promotion a
21 crime in 2007?
22 A. I don't know.
23 Q. Do you have any knowledge of any
24 communication between Scott Lively and
25 either Martin Ssempa, Steven Langa, Simon

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1 PEPE JULIAN ONZIEMA
2 Q. Do you have any knowledge of any
3 agreement between Scott Lively and Martin
4 Ssempa concerning the events described in
5 paragraphs 202 through 204?
6 MR. SULLIVAN: Objection to
7 form.
8 A. No, I don't.
9 Q. Do you have knowledge of any
10 action taken by Scott Lively in the United
11 States directed toward assisting Martin
12 Ssempa in any of the actions described in
13 paragraphs 202 through 204?
14 A. I do not.
15 Q. Do you have any knowledge of any
16 assistance at all provided by Scott Lively
17 to Martin Ssempa in connection with the
18 actions and events described in paragraphs
19 202 to 2004 -- excuse me, 202 through 204?
20 A. No, I don't.
21 Q. Do you have any knowledge of any
22 communication between Scott Lively and
23 Steven Langa, Nsaba Buturo Simon Lakodo
24 and George Oundo regarding the actions and
25 events described in paragraphs 202 through

321

1 PEPE JULIAN ONZIEMA
2 204?
3 A. I don't know.
4 Q. Paragraph 205 says, In August of
5 2007, the Ugandan Broadcasting Council
6 suspended Gaetano Kagwa, the manager of
7 Capital FM radio station, for interviewing
8 a lesbian activist on air.
9 Do you have knowledge of that
10 event?
11 A. Yes, I do.
12 Q. I believe we discussed it
13 yesterday, correct?
14 A. No.
15 Q. Okay.
16 Well, the event described here
17 in 2007, you said you do have knowledge of
18 the suspension of Gaetano Kagwa?
19 A. Yes.
20 Q. Do you have any knowledge of any
21 communication between Scott Lively and any
22 member of the Ugandan Broadcasting Council
23 regarding the suspension of Gaetano Kagwa?
24 A. No, I don't.
25 Q. Do you have any knowledge of any

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1 PEPE JULIAN ONZIEMA
2 communication between Scott Lively and
3 either Martin Ssempa, Steven Langa, Nsaba
4 Buturo, Simon Lakodo or George Oundo
5 regarding the suspension of Gaetano Kagwa
6 by the Ugandan Broadcasting Council?
7 A. No, I don't.
8 Q. Do you have any knowledge of any
9 agreement regarding the suspension of
10 Gaetano Kagwa?
11 A. No, I don't.
12 MR. SULLIVAN: Objection to
13 form.
14 Q. Do you have any knowledge of any
15 action taken by Scott Lively in the United
16 States directed towards assisting the
17 Ugandan Broadcasting Council in suspending
18 Gaetano Kagwa?
19 A. Please repeat the question.
20 MR. GANNAM: Read it back.
21 Q. Do you have any knowledge of any
22 action taken by Scott Lively in the United
23 States directed towards assisting the
24 Ugandan Broadcasting Council in suspending
25 Gaetano Kagwa?

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1 PEPE JULIAN ONZIEMA
2 A. I do not know.
3 Q. Do you have any knowledge of any
4 assistance at all provided by Scott Lively
5 to the Ugandan Broadcasting Council in
6 suspending Gaetano Kagwa?
7 A. I do not know.
8 Q. Paragraph 206 says that, On
9 September 9, 2007, the Red Pepper also
10 published names and photos of LGBTI
11 activists, with the headline on the cover
12 that stated "Homo Terror. We Name and
13 Shame the Top Gays in the City."
14 Are you familiar with that Red
15 Pepper publication in 2007?
16 A. Yes.
17 Q. Do you have any knowledge of any
18 communication between Scott Lively and any
19 person at the Red Pepper regarding this
20 publication on September 9, 2007?
21 A. I don't know.
22 Q. Do you have any knowledge of any
23 communication between Scott Lively and
24 Martin Ssempa, Steven Langa, Nsaba Buturo,
25 Simon Lakodo or George Oundo regarding the

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1 PEPE JULIAN ONZIEMA
2 September 9, 2007 Red Pepper publication?
3 A. I don't know.
4 Q. Do you have any knowledge of any
5 agreement between Scott Lively and the Red
6 Pepper regarding the September 9, 2007
7 publication?
8 MR. SULLIVAN: Objection to
9 form.
10 A. I do not know.
11 Q. Do you have any knowledge of any
12 action taken by Scott Lively in the United
13 States directed towards assisting the Red
14 Pepper in the September 9, 2007
15 publication?
16 A. I do not know.
17 Q. Do you have any knowledge of any
18 assistance at all provided by Scott Lively
19 to the Red Pepper in connection with the
20 September 9, 2007 publication?
21 A. I do not know.
22 Q. The publication described in
23 paragraph 206, is that what you would call
24 a media outing?
25 A. Yes.

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1 PEPE JULIAN ONZIEMA
2 Q. Do you have knowledge of any
3 agreement between Scott Lively and any
4 publication or any other media outlet in
5 Uganda --
6 MR. SULLIVAN: Objection to
7 form.
8 Q. -- regarding a media outing?
9 A. No, I don't.
10 Q. Do you have any knowledge of any
11 actions taken by Scott Lively in the
12 United States to assist any Ugandan
13 publication or media outlet in producing
14 an outing or publishing an outing of LGBTI
15 persons in Uganda?
16 A. No, I don't.
17 Q. Do you have any knowledge of any
18 assistance at all provided by Scott Lively
19 to any Ugandan publication or media outlet
20 in connection with an outing of LGBTI
21 persons in Uganda?
22 A. I do not know.
23 Q. Do you have any knowledge of any
24 communication between Scott Lively and
25 Martin Ssempa, Steven Langa, Nsaba Buturo,

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1 PEPE JULIAN ONZIEMA
2 Simon Lakodo or George Oundo in connection
3 with any media outing in Uganda?
4 A. I do not know.
5 Q. Paragraph 207 reads, In the wake
6 of the onslaught of outings, calls for
7 harsher tactics on the part of the
8 government and information that police
9 were actively looking for gay rights
10 activists, a number of activists,
11 including current Sexual Minorities Uganda
12 Executive Director Frank Mugisha, were
13 forced to leave the country or go into
14 hiding.
15 Are you familiar with the facts
16 alleged in paragraph 207?
17 A. Yes.
18 Q. Are you aware of anything that
19 Scott Lively did in the United States to
20 force Frank Mugisha to leave the country
21 in 2007?
22 A. I don't know.
23 Q. Paragraph 209 says, As described
24 above, on July 20, 2005, local Ugandan
25 authorities unlawfully forced their way

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1 PEPE JULIAN ONZIEMA
2 into the home of Victor Mukasa, a
3 transgender activist and founding member
4 of Sexual Minorities Uganda.
5 Paragraph 210 says that, Mukasa
6 was not present but the police arrested
7 his guest, Yvonne Oyo.
8 Are you familiar with the events
9 described in paragraph 209 and 210?
10 A. Yes.
11 Q. Do you have any knowledge of any
12 communication between Scott Lively and the
13 Ugandan authorities regarding the events
14 described in paragraphs 209 and 210?
15 (Pause.)
16 A. I don't know.
17 Q. Do you have any knowledge of any
18 communication between Scott Lively and
19 Martin Ssempa, Steven Langa, Nsaba Buturo,
20 Simon Lakodo or George Oundo in connection
21 with the Ugandan authorities forcing their
22 way into the home of Victor Mukasa and
23 arresting Yvonne Oyo?
24 A. I do not know.
25 Q. Do you have any knowledge of any

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1 PEPE JULIAN ONZIEMA
2 agreement between Scott Lively and the
3 Ugandan authorities described in paragraph
4 209 regarding the events in paragraph 209
5 and 210?
6 MR. SULLIVAN: Objection to
7 form.
8 A. I do not know.
9 Q. Do you have any knowledge of any
10 action taken by Scott Lively in the United
11 States directed towards helping the
12 Ugandan authorities enter the home of
13 Victor Mukasa and arresting Yvonne Oyo as
14 described in paragraphs 209 and 210?
15 A. I do not know.
16 Q. Do you have any knowledge of any
17 assistance at all provided by Scott Lively
18 to the Ugandan authorities to carry out
19 the events described in paragraphs 209 and
20 210?
21 A. I do not know.
22 Q. When Scott Lively was on
23 television in 2002 with Martin Ssempa, on
24 the show that you observed, did Scott
25 Lively say anything about a war on LGBTI

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1 PEPE JULIAN ONZIEMA
2 people during that TV show?
3 A. I don't remember.
4 Q. Did Martin Ssempa say anything
5 about that?
6 A. On the show, I don't remember.
7 Q. Paragraph 213 says, Plaintiff,
8 meaning SMUG, was directly harmed by the
9 blatant violation of the rights of Mukasa,
10 a founder and staff member of Sexual
11 Minorities Uganda, and Oyo.
12 It says, Plaintiff was
13 additionally harmed in that it was
14 diverted from its work and was forced to
15 assist in seeking redress and
16 accountability for the violations and find
17 ways of addressing the government
18 harassment in the meantime.
19 You've already testified that
20 you aren't aware of any communication
21 between Scott Lively and the authorities
22 responsible for arresting Oyo and raiding
23 Mukasa's home, correct?
24 A. Please repeat the question.
25 Q. You've already testified that

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1 PEPE JULIAN ONZIEMA
2 you aren't aware of any communication
3 between Scott Lively and the Ugandan
4 authorities who raided Victor Mukasa's
5 home and arrested Yvonne Oyo, correct?
6 A. Correct.
7 Q. And you already testified that
8 you don't have any knowledge of any
9 assistance provided by Scott Lively to the
10 Ugandan authorities in connection with
11 that entry into Victor Mukasa's home and
12 the arrest of Yvonne Oyo, correct?
13 A. Correct.
14 Q. So is it also true that you
15 don't have knowledge of any connection
16 between Scott Lively and the harm SMUG
17 claims it suffered as a result of the
18 entry into Mukasa's home and arrest of
19 Yvonne Oyo?
20 MR. SULLIVAN: Objection, form.
21 A. I believe there's a connection
22 because from 2002, seeing a difference in
23 the way we were being treated in the
24 Ugandan society, and this is one of the
25 persecutions that came to us at that time.

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1 PEPE JULIAN ONZIEMA
2 Q. But you don't have knowledge of
3 any connection between Scott Lively and
4 harm claimed by SMUG in paragraph 213,
5 apart from what you observed Scott Lively
6 say on television in 2002 to Martin
7 Ssempa, correct?
8 MR. SULLIVAN: Objection to
9 form.
10 A. Yes.
11 Q. Because you don't have knowledge
12 of anything other than what Scott Lively
13 said on television in 2002, isn't it also
14 true that you have no knowledge of
15 anything Scott Lively did in the United
16 States that's connected to the harm
17 claimed by SMUG in paragraph 213?
18 A. No, I don't.
19 Q. Paragraph 214 says, As the court
20 case set the stage for the intensification
21 of the war against the LGBTI community
22 previously declared by Ssempa, Langa,
23 Lively and Buturo -- Let me stop right
24 there.
25 "The court case," is that the

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1 PEPE JULIAN ONZIEMA
2 case brought by Victor Mukasa and Yvonne
3 Oyo in connection with the events in
4 paragraph 209 and 210?
5 A. I believe so, yes.
6 Q. You testified earlier that you
7 don't recall Scott Lively saying anything
8 about a war on LGBTI persons in his 2002
9 TV appearance with Martin Ssempa, correct?
10 A. I said I don't remember.
11 Q. You do not remember, correct.
12 So paragraph 214, where it
13 says -- or refers to the war against the
14 LGBTI community previously declared by
15 Ssempa, Langa, Lively and Buturo, you
16 don't have any knowledge of Scott Lively
17 actually saying he declared war on the
18 LGBTI community in Uganda, do you?
19 MR. SULLIVAN: Objection to
20 form.
21 A. I don't remember.
22 Q. That 2002 TV appearance was 13
23 years ago. Is it possible you're going to
24 remember some statement by Scott Lively
25 about declaring war on the LGBTI community

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1 PEPE JULIAN ONZIEMA
2 between now and the trial in this case?
3 MR. SULLIVAN: Objection, form.
4 A. Maybe.
5 Q. So your memory of what happened
6 13 years ago might improve between now and
7 the trial?
8 MR. SULLIVAN: Objection to
9 form.
10 A. I don't know. Maybe.
11 Q. You understand that one of the
12 reasons we're here today is to find out
13 what your testimony would be at the trial
14 of this case? Yes?
15 A. Yes.
16 Q. And so it is important that you
17 tell us everything you do remember about
18 any of these events that I ask you about,
19 and so -- you understand that, correct?
20 A. That's what I'm doing.
21 Q. And so, as you sit here today,
22 you don't know of any statement by Scott
23 Lively to the effect that he was declaring
24 war on the LGBTI community in Uganda?
25 A. I do not remember.

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1 PEPE JULIAN ONZIEMA
2 Q. Paragraph 217 over on page 52
3 describes five examples of publications of
4 names and identifying information about
5 LGBTI persons; is that correct?
6 A. Pardon?
7 Q. Paragraph 217 describes five
8 examples of Ugandan publications
9 publishing names and identifying
10 information about LGBTI persons in Uganda,
11 correct?
12 A. Correct.
13 Q. I believe you already testified
14 that you would consider events like these
15 a media outing, correct?
16 A. Correct.
17 Q. And you did already testify that
18 you don't have any knowledge of any
19 assistance that Scott Lively has provided
20 in connection with any media outings in
21 Uganda, correct?
22 A. Yes.
23 Q. Did you also testify that you
24 don't know of anything that Scott Lively
25 did in the United States directed towards

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1 PEPE JULIAN ONZIEMA
2 assisting with any media outing in Uganda?
3 MR. SULLIVAN: Asked and
4 answered.
5 A. I do not know.
6 MR. GANNAM: You can go ahead
7 and change the tape now.
8 THE VIDEOGRAPHER: This marks
9 the end of videotape number 1. The
10 time is 11:38 a m. Going off the
11 record.
12 (Brief recess taken.)
13 THE VIDEOGRAPHER: This is the
14 beginning of videotape number 2. The
15 time is 11:46 a m. Back on the
16 record.
17 Q. In discovery in this case, some
18 additional -- I'm sorry, going back to the
19 Amended Complaint, Exhibit 4-I, at
20 paragraph 226 it refers to -- at the
21 bottom of that paragraph -- a climate of
22 hostility and prejudice against LGBTI
23 persons in Uganda that contributes to and
24 reinforces discrimination by private
25 actors in housing, employment, health and

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1 PEPE JULIAN ONZIEMA
2 education.
3 Do you see that?
4 A. Yes.
5 Q. Are you aware of any
6 communication between Scott Lively and any
7 private actor regarding discriminating
8 against any LGBTI persons in housing,
9 employment, health or education?
10 A. No, I don't.
11 Q. Do you have any knowledge of any
12 communication between Scott Lively and
13 either Martin Ssempa, Steven Langa, Nsaba
14 Buturo, Simon Lakodo or George Oundo in
15 connection with discrimination by private
16 actors in housing, employment, health and
17 education?
18 A. Let me hear the statement again.
19 Q. Are you aware of any
20 communication between Scott Lively and
21 Martin Ssempa, Steven Langa, Nsaba Buturo,
22 Simon Lakodo or George Oundo regarding
23 discrimination by private actors in
24 housing, employment, health or education?
25 A. No, I don't. However, I want to

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1 PEPE JULIAN ONZIEMA
2 state again that Martin Ssempa, Steven
3 Langa, Nsaba Buturo are people who
4 continue to carry out antigay events and
5 statements, and these private actors or
6 owners of housing, employment, health and
7 education, these are people who are going
8 to those places and hear these allegations
9 against LGBT people.
10 And as I stated earlier, that I
11 know there's a connection between Ssempa
12 and Lively.
13 Q. But your answer to my question
14 about knowledge of any communication
15 between Scott Lively and any of those
16 persons I listed was no?
17 A. I do not know.
18 Q. Are you aware of any actions
19 taken by Scott Lively in the United States
20 to reinforce discrimination by private
21 actors in housing, employment, health or
22 education in Uganda?
23 A. I do not know.
24 Q. Do you have any knowledge of any
25 assistance at all provided by Scott Lively

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1 PEPE JULIAN ONZIEMA
2 to private actors to carry out
3 discrimination against LGBTI persons in
4 Uganda in the areas of housing,
5 employment, health or education?
6 A. I do not know.
7 Q. You testified earlier that SMUG
8 is not looking to recover damages for
9 discrimination suffered by individual
10 persons in connection with housing,
11 employment, health or education or
12 anything else, correct?
13 MR. SULLIVAN: Asked and
14 answered.
15 (Pause.)
16 A. Please repeat the question.
17 Q. You said earlier that SMUG was
18 seeking to recover damages in this case
19 for itself, correct?
20 A. Yes.
21 Q. And not for any individual
22 persons, correct?
23 A. Correct.
24 Q. And that would include damages
25 for individual persons who experienced

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1 PEPE JULIAN ONZIEMA
2 discrimination in the areas of housing,
3 employment, health or education, correct?
4 A. Correct.
5 Q. In discovery in this case, some
6 other incidents have been identified by
7 SMUG, particularly in interrogatory
8 responses to interrogatory number two, and
9 I'm specifically referring to Plaintiff's
10 Second Supplemental Responses to
11 Defendant's Second Supplemental Responses
12 to Defendant's Scott Lively's.
13 I'm going to describe some
14 events and you can tell me if you know
15 about them.
16 SMUG states that on August 4,
17 2012, Ugandan activists held their first
18 pride gathering at the botanical gardens
19 in Entebbe.
20 Are you familiar with that pride
21 gathering?
22 A. Yes.
23 Q. Were you there?
24 A. Yes.
25 Q. The discovery response says that

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1 PEPE JULIAN ONZIEMA
2 the police raided the gathering and
3 arrested several of the participants.
4 Did you witness that event?
5 A. Yes, I did.
6 Q. Do you have any knowledge of any
7 communication between Scott Lively and
8 police regarding the raiding and arresting
9 of people at the August 2012 pride
10 gathering?
11 A. I have no knowledge of any
12 communication.
13 Q. Do you have any knowledge of any
14 communication between Scott Lively and
15 Martin Ssempa, Steven Langa, Nsaba Buturo,
16 Simon Lakodo or George Oundo regarding the
17 police raid and arrest of persons at the
18 2012 pride gathering?
19 A. No, I do not.
20 Q. Do you have any knowledge of any
21 actions taken by Scott Lively directed
22 towards helping the police carry out that
23 raid and those arrests at the 2012 pride
24 gathering?
25 A. No, I do not.

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1 PEPE JULIAN ONZIEMA
2 Q. Do you have any knowledge of any
3 assistance at all provided by Scott Lively
4 to the police in raiding and arresting
5 persons at the 2012 pride gathering?
6 A. No, I do not.
7 Q. SMUG stated that an
8 anti-homosexuality bill was passed by
9 Parliament on December 20, 2013 and signed
10 into law on February 24, 2014. And it
11 describes that -- that bill as the
12 Anti-Homosexuality Act or AHA.
13 Are you familiar with the AHA?
14 A. Yes, I am.
15 Q. Are you familiar with that
16 timing of its passage by Parliament in
17 December 2013 and being signed into law in
18 February 2014 by the president?
19 A. Yes, I am.
20 Q. Do you have any knowledge of any
21 communication between Scott Lively and
22 members of Parliament in 2013 in
23 connection with the passage of the AHA?
24 A. I do not know.
25 Q. Do you have any knowledge of any

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1 PEPE JULIAN ONZIEMA
2 communication between Scott Lively and
3 Martin Ssempa, Steven Langa, Nsaba Buturo,
4 Simon Lakodo or George Oundo regarding the
5 passage of the AHA in 2013?
6 A. I do not know.
7 Q. Do you have any knowledge of any
8 action taken by Scott Lively in the United
9 States directed towards aiding the
10 Parliament in passage of the AHA in 2013?
11 A. I do not know.
12 Q. Do you have any knowledge of any
13 assistance at all provided by Scott Lively
14 to the Ugandan Parliament in 2013 to pass
15 the AHA?
16 A. I do not know.
17 Q. Any knowledge of any
18 communication between Scott Lively and the
19 president of Uganda in connection with his
20 signing of the law in February 2014?
21 A. I do not know.
22 Q. Do you have any knowledge of any
23 action taken by Scott Lively in the United
24 States directed towards helping the
25 president sign the AHA into law in 2014?

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1 PEPE JULIAN ONZIEMA
2 A. I do not know.
3 Q. Do you have any knowledge of any
4 assistance at all provided by Scott Lively
5 to the Ugandan president in 2014 in
6 connection with signing the AHA into law?
7 A. I do not know.
8 Q. Do you have any knowledge of any
9 action ever taken by Scott Lively in the
10 United States directed towards getting the
11 AHA enacted in Uganda?
12 A. Please repeat the question.
13 MR. GANNAM: Can you read that
14 back?
15 (Record read.)
16 A. I do not know.
17 Q. Do you have knowledge of any
18 person who was arrested under the AHA that
19 was signed into law on February 2014?
20 (Pause.)
21 A. Please repeat the question.
22 Q. Do you have any knowledge of
23 anyone who was charged with a violation of
24 the AHA signed into law in February of
25 2014?

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1 PEPE JULIAN ONZIEMA
2 government investigation of RLP?
3 A. No, I do not know.
4 Q. Do you have any knowledge of any
5 action taken by Scott Lively in the United
6 States directed towards helping the
7 government initiate an investigation into
8 RLP?
9 A. I don't know.
10 Q. Do you have any knowledge of any
11 assistance at all provided by Scott Lively
12 to the Uganda government in investigating
13 RLP?
14 A. I don't know.
15 Q. Are you familiar with the Walter
16 Reed Project at Makerere University?
17 A. Yes, I am.
18 Q. SMUG's discovery response
19 describes it as a U.S. funded medical
20 research facility in Kampala that
21 conducted HIV research and provided
22 services to LGBTI people.
23 Is that an accurate description
24 of the project?
25 A. Please repeat.

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1 PEPE JULIAN ONZIEMA
2 Q. The description is a U.S. funded
3 medical research facility in Kampala.
4 So far that's true?
5 A. Yes.
6 Q. That conducted HIV research and
7 provided services to LGBTI people.
8 Is that true?
9 A. That's true, but their services
10 are not limited to LGBT.
11 Q. Okay.
12 So it provides services to LGBTI
13 people and non-LGBTI people?
14 A. Yes.
15 Q. The discovery response says, On
16 April 3rd, 2014, Ugandan police raided the
17 clinic and arrested one of the facility's
18 employees, and that the operations of the
19 clinic were temporarily suspended.
20 And then it says, When the
21 clinic re-opened, it discontinued its
22 serves -- I think it meant "services" --
23 to men who have sex with men.
24 Is all of that accurate, to your
25 understanding?

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1 PEPE JULIAN ONZIEMA
2 A. Yes.
3 Q. Do you have any knowledge of any
4 communication between Scott Lively and the
5 Ugandan police regarding the raid of the
6 Walter Reed Clinic or the arrest of an
7 employee there?
8 A. I do not know.
9 Q. Do you have any knowledge of any
10 communication between Scott Lively and
11 Martin Ssempa, Steven Langa, Nsaba Buturo,
12 Simon Lakodo or George Oundo regarding the
13 raid at the Walter Reed Clinic or the
14 arrest of its employee?
15 A. I do not know.
16 Q. Do you have any knowledge of any
17 action taken by Scott Lively in the United
18 States directed towards assisting the
19 Ugandan police with the raid of the Walter
20 Reed Clinic or arrest of its employee?
21 A. I do not know.
22 Q. Do you have any knowledge of any
23 assistance at all provided by Scott Lively
24 to the Ugandan police in connection with
25 raiding the Walter Reed Clinic and

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1 PEPE JULIAN ONZIEMA
2 arresting its employee?
3 A. I do not know.
4 Q. The discovery response
5 continues, SMUG states that following the
6 enactment of the AHA, SMUG and a number of
7 SMUG member organizations have been
8 surveilled, exposed by the media,
9 threatened with closure and calls for
10 attack and/or evicted.
11 So following the enactment of
12 the AHA in 2014, do you have any knowledge
13 of any communication between Scott Lively
14 and anyone conducting surveillance of SMUG
15 or a SMUG member organization?
16 A. I do not know.
17 Q. Do you have any knowledge of any
18 communication between Scott Lively and
19 Martin Ssempa, Steven Langa, Nsaba Buturo,
20 Simon Lakodo or George Oundo regarding
21 conducting surveillance of SMUG or any of
22 its member organizations?
23 A. I do not know.
24 Q. Do you have any knowledge of any
25 action taken by Scott Lively in the United

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1 PEPE JULIAN ONZIEMA
2 States directed towards conducting
3 surveillance of SMUG or any of its member
4 organizations?
5 A. I do not know.
6 Q. Do you have any knowledge of any
7 assistance at all provided by Scott Lively
8 to any person conducting surveillance of
9 SMUG or any of its member organizations?
10 A. I do not know.
11 Q. The discovery response
12 continues, describing an arrest of Kim
13 Mukisa and Jackson Mukasa in late January
14 2014.
15 Do you have knowledge of that
16 arrest?
17 A. Yes, I do.
18 Q. The discovery response refers to
19 their arrest. It also refers to Kim
20 Mukisa being thrown out of his house on
21 January 27, 2014 and then beaten by local
22 council authorities and local residents.
23 Are you familiar with those
24 events?
25 A. Yes, I am.

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1 PEPE JULIAN ONZIEMA
2 Q. Do you have any knowledge of any
3 communication between Scott Lively and
4 either the Ugandan police or Ugandan local
5 council authorities or local residents
6 regarding the arrest or eviction or
7 beating of Kim Mukisa in 2014?
8 A. I don't know.
9 Q. Do you have any knowledge of any
10 communication between Scott Lively and
11 Ugandan police regarding the arrest of
12 Jackson Mukasa?
13 A. I do not know.
14 Q. Do you have any knowledge of any
15 communication between Scott Lively and
16 Martin Ssempa, Steven Langa, Nsaba Buturo,
17 Simon Lakodo or George Oundo regarding the
18 arrests and beatings and eviction of
19 Musika (phonetic) -- Mukisa, excuse me, or
20 the arrest of Mukasa?
21 A. I don't know.
22 Q. Do you have any knowledge of any
23 assistance provided by Scott Lively to
24 either the Ugandan police or any local
25 council authorities or even any private

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1 PEPE JULIAN ONZIEMA
2 citizens in connection with the arrest,
3 eviction and beating of Mukisa or the
4 arrest of Mukasa?
5 A. I do not know.
6 Q. Do you have any knowledge of any
7 action taken by Scott Lively in the United
8 States directed towards assisting the
9 Ugandan police or local council
10 authorities or Ugandan citizens in the
11 arrest, beating and eviction of Mukisa or
12 the arrest of Mukasa?
13 A. I don't know.
14 Q. This wasn't disclosed in
15 discovery, but we've since come to learn
16 of an arrest of SMUG's chairman of the
17 board, Sam Ganafa, in 2013.
18 Do you have any knowledge of
19 that?
20 A. Yes, I do.
21 Q. Do you have any knowledge of any
22 communication between Scott Lively and any
23 person responsible for the arrest of Sam
24 Ganafa in 2013?
25 A. I do not know.

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1 PEPE JULIAN ONZIEMA
2 Q. Do you have any knowledge of any
3 communication between Scott Lively and
4 Martin Ssempa, Steven Langa, Nsaba Buturo,
5 Simon Lakodo or George Oundo regarding the
6 arrest of Sam Ganafa in 2013?
7 A. I do not know.
8 Q. Do you have any knowledge of any
9 action taken by Scott Lively in the United
10 States directing -- directed towards
11 assisting in the arrest of Sam Ganafa in
12 2013?
13 A. I do not know.
14 Q. Do you have any knowledge of any
15 assistance at all provided by Scott Lively
16 to the Ugandan police or any other person
17 responsible for the arrest of Sam Ganafa
18 in 2013?
19 A. I do not know.
20 Q. Despite that arrest, Sam Ganafa
21 has never been convicted of any crime he
22 was charged with in 2013; is that correct?
23 A. That's correct.
24 Q. And Sam Ganafa is a free man as
25 we sit here today, correct?

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1 PEPE JULIAN ONZIEMA
2 A. Correct.
3 Q. Do you have any knowledge as to
4 why SMUG did not disclose the arrest of
5 Sam Ganafa in its discovery responses in
6 this case?
7 (Pause.)
8 A. I don't remember.
9 Q. The discovery responses do
10 disclose an arrest of Albert Cheptoyek and
11 Bernard Randall in October of 2013.
12 Are you familiar with those
13 arrests?
14 A. Yes, I am.
15 Q. It also -- the discovery
16 response also refers to there being -- or
17 Cheptoyek being beaten while in custody,
18 and both he and Randall being subjected to
19 invasive, humiliating and degrading anal
20 examinations by Uganda authorities.
21 You're familiar with those
22 claims?
23 A. Yes, I am.
24 Q. Do you have any knowledge of any
25 communication between Scott Lively and the

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1 PEPE JULIAN ONZIEMA
2 Ugandan police or anyone else responsible
3 for the arrest and treatment of Cheptoyek
4 and Randall in 2013?
5 A. I do not know.
6 Q. Do you have any knowledge of any
7 communication between Scott Lively and
8 Martin Ssempa, Steven Langa, Nsaba Buturo,
9 Simon Lakodo or George Oundo in connection
10 with the arrest and treatment of Cheptoyek
11 and Randall in 2013?
12 A. I do not know.
13 Q. Do you have any knowledge of any
14 action taken by Scott Lively in the United
15 States directed towards assisting with the
16 arrest and treatment of Cheptoyek and
17 Randall in 2013?
18 A. I do not know.
19 Q. Do you have any knowledge of any
20 assistance at all provided by Scott Lively
21 in connection with the arrest and rough
22 treatment of Cheptoyek and Randall in
23 2013?
24 A. I do not know.
25 Q. All right.

358

1 PEPE JULIAN ONZIEMA
2 Could I refer you to page 14 of
3 the Amended Complaint, Exhibit 4-I?
4 Actually, I want to look at
5 paragraph 44 on page 15.
6 In that paragraph SMUG alleges,
7 Defendant Lively entered into an unlawful
8 agreement with others to intentionally and
9 severely deprive persons of fundamental
10 rights on the basis of their orientation
11 and gender identity.
12 What is the unlawful agreement
13 described in paragraph 44?
14 MR. SULLIVAN: Objection to
15 form.
16 (Witness perusing document.)
17 A. I believe that from that visit
18 and the seminars and all the talks that
19 were given, that there -- it had to be
20 continuity to -- to the sermons that were
21 given, and who was present for this was
22 Steven Langa, Martin Ssempa and other
23 political leaders.
24 Q. So it's your testimony that you
25 believe there must be an agreement, but --

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1 PEPE JULIAN ONZIEMA
2 is that your testimony?
3 A. Yes.
4 Q. Do you believe that Scott Lively
5 and Steven Langa and Martin Ssempa sat
6 down together in a room and said, Let's
7 agree to deprive people of their rights?
8 A. Yes, I believe that.
9 Q. You believe that that meeting
10 occurred?
11 A. I don't know if that meeting
12 occurred, but they obviously were
13 somewhere.
14 Q. Well, let's start with -- with
15 whom did Scott Lively enter into an
16 agreement to deprive persons of
17 fundamental rights?
18 A. The antigay leaders mentioned in
19 here in our Complaint. There's Langa,
20 Ssempa, Buturo, Bahati.
21 Q. I just asked you a lot of
22 questions about the various acts of
23 persecution alleged in the Complaint and
24 described in discovery responses.
25 In connection with those

364

1 PEPE JULIAN ONZIEMA
2 Q. What specifically did the media
3 report -- this published report you're
4 referring to say about Scott Lively's
5 involvement with the AHB?
6 A. I don't remember it word for
7 word, but he was distancing himself from
8 the death penalty as included in the AHB
9 at that time.
10 Q. Have you heard any media reports
11 that Scott Lively was involved with
12 drafting the AHB that included the death
13 penalty?
14 A. I don't understand what you're
15 asking me.
16 Q. You said you recall a media
17 report that Scott Lively distanced himself
18 from the death penalty in the 2009 AHB; is
19 that correct?
20 A. Yes.
21 Q. You had said earlier that you
22 recall media reports that Scott Lively had
23 assisted in the drafting of the 2009 AHB;
24 is that also correct?
25 A. Yes.

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1 PEPE JULIAN ONZIEMA
2 Q. So what I'd like to know is if
3 you heard media reports that Scott Lively
4 assisted in drafting the 2009 AHB that
5 included the death penalty provision?
6 A. That was the media report before
7 he distanced himself from the death
8 penalty.
9 Q. And did the media report site a
10 source for this idea that Scott Lively
11 participated in drafting the 2009 AHB that
12 included the death penalty?
13 A. I don't remember.
14 Q. Is your only knowledge about
15 Scott Lively's participation in the
16 drafting of the AHB what you read or saw
17 in media reports?
18 A. I beg your pardon.
19 MR. GANNAM: Can you read that
20 back?
21 (Record read.)
22 A. Yes.
23 Q. Apart from the drafting of the
24 AHB, do you have any knowledge of any
25 agreement between Scott Lively and another

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1 PEPE JULIAN ONZIEMA
2 person to deprive persons of fundamental
3 rights on the basis of their sexual
4 orientation and gender identity?
5 A. I don't know.
6 Q. Do you have any knowledge of any
7 action taken by Scott Lively in the United
8 States in connection with the drafting of
9 the 2009 AHB?
10 A. I do not know.
11 Q. Do you have any knowledge of any
12 action taken by Scott Lively in the United
13 States to deprive any Ugandan person of
14 fundamental rights based on sexual
15 orientation or gender identity?
16 A. I do not know.
17 Q. Are you aware that in the
18 Amended Complaint, that SMUG alleges that
19 there was a conspiracy between Scott
20 Lively and other persons to deprive
21 Ugandans of fundamental rights based on
22 sexual orientation and gender identity?
23 A. Yes, I'm aware.
24 Q. Does SMUG also claim that Scott
25 Lively's visit to Uganda in 2002 was one

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1 PEPE JULIAN ONZIEMA
2 of the acts in furtherance of that
3 conspiracy?
4 A. Yes.
5 Q. Now, you became aware of Scott
6 Lively's visit to Uganda in 2002 in 2002,
7 when you saw him on TV, correct?
8 A. Correct.
9 Q. And when SMUG was founded in
10 2004, you still had knowledge of Scott
11 Lively having been in Uganda in 2002,
12 correct?
13 A. Yes.
14 Q. And at all times since 2002,
15 you've had knowledge that Scott Lively was
16 in Uganda in 2002, correct?
17 A. Yes.
18 Q. And I believe you testified
19 earlier that your only knowledge of what
20 Scott Lively said or did in Uganda in 2002
21 was based on the television-show
22 appearance that you observed yourself,
23 correct?
24 MR. SULLIVAN: Asked and
25 answered.

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1 PEPE JULIAN ONZIEMA
2 A. No, I don't.
3 Q. Have you now told me everything
4 you know about Scott Lively's visit to
5 Uganda in 2000; that he came twice, that
6 he had contact with Langa, that they
7 discussed creating an organization? Is
8 there anything else?
9 A. As much as I remember, that's
10 it.
11 Q. And to be clear, you're still
12 answering on behalf of both yourself and
13 SMUG, correct?
14 A. Correct.
15 Q. You testified yesterday that
16 SMUG sent five representatives to observe
17 Scott Lively's presentation in Uganda in
18 2009, correct?
19 A. Correct.
20 Q. So SMUG knew about everything
21 Scott Lively said at that conference at
22 the moment he said it, correct?
23 MR. SULLIVAN: Objection to
24 form.
25 (Pause.)

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1 PEPE JULIAN ONZIEMA
2 A. Yes.
3 Q. And upon hearing Scott Lively's
4 speech, SMUG believed that Scott Lively
5 was persecuting SMUG; is that correct?
6 (Pause.)
7 A. Yes.
8 Q. And upon hearing that speech,
9 SMUG believed that Scott Lively was
10 harming SMUG, correct?
11 (Pause.)
12 A. The content of what was being
13 said at that seminar was harming SMUG,
14 yes.
15 Q. One of the claims in this case
16 is --
17 MR. GANNAM: Strike that.
18 Q. Lively has not coerced or forced
19 SMUG to do anything, has he?
20 A. I beg your pardon.
21 Q. Lively hasn't forced or coerced
22 SMUG to take any particular action, has
23 he?
24 MR. SULLIVAN: Objection to
25 form.

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1 PEPE JULIAN ONZIEMA
2 A. I don't understand the question.
3 Q. Do you understand what it means
4 to coerce someone to do something?
5 (Pause.)
6 Q. Or to force someone to do
7 something they don't want to do?
8 A. Yes, I understand.
9 Q. So Scott Lively hasn't coerced
10 or forced SMUG to do anything, has he?
11 MR. SULLIVAN: Objection to
12 form.
13 (Pause.)
14 A. I feel the way you're asking the
15 question does not give me the opportunity
16 to answer it accurately.
17 Q. Well, is your answer yes or no?
18 Either Scott Lively did coerce SMUG to do
19 something or he didn't.
20 (Pause.)
21 A. Please repeat the question.
22 Q. Has Scott Lively coerced SMUG to
23 do anything?
24 MR. SULLIVAN: Objection to
25 form.

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1 PEPE JULIAN ONZIEMA
2 A. No.
3 Q. Are any of the things that Scott
4 Lively said or did in Uganda directed
5 towards SMUG specifically or towards the
6 LGBTI community in general?
7 MR. SULLIVAN: Objection to
8 form.
9 A. Yes.
10 Q. Yes, what? Scott Lively did
11 something directed to SMUG specifically?
12 A. That was not your question.
13 Q. Okay.
14 Did any of the things Scott
15 Lively said or did in Uganda --
16 MR. GANNAM: Strike that.
17 Q. Were any of the things Scott
18 Lively said or did in Uganda directed
19 towards SMUG specifically?
20 MR. SULLIVAN: Objection to
21 form.
22 (Pause.)
23 A. I believe so, yes.
24 Q. When Scott Lively was in Uganda
25 in 2002, SMUG did not exist, correct?

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1 PEPE JULIAN ONZIEMA
2 in 2007?
3 A. Please repeat that.
4 Q. Do you have any knowledge of any
5 assistance at all from Scott Lively to
6 Minister Buturo in connection with making
7 those statements in October of 2007?
8 (Pause.)
9 A. I don't know.
10 Q. Moving down to paragraph 152, it
11 says, In 2007, as Minister of Ethics and
12 Integrity, Buturo announced that there
13 would be work on a tough new law aimed at
14 criminalizing the promotion of
15 homosexuality and that the government was
16 interested in having catalogs of people we
17 think are involved in perpetuating the
18 vice of homosexuality.
19 Are you aware of any
20 communication between Lively and Buturo
21 regarding Buturo's statements in 2007
22 reflected in paragraph 152.
23 (Pause.)
24 A. No, I don't.
25 Q. Do you have any knowledge of any

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1 PEPE JULIAN ONZIEMA
2 actions taken by Scott Lively in the
3 United States directed at helping Buturo
4 to make such statements in 2007?
5 A. I don't know.
6 Q. Do you have any knowledge of any
7 assistance at all provided by Scott Lively
8 to Minister Buturo in connection with
9 making these statements in 2007?
10 A. Please repeat the question.
11 Q. Do you have any knowledge of any
12 assistance at all provided by Scott Lively
13 to Minister Buturo in connection with
14 making these statements in 2007?
15 A. I do not know.
16 Q. Have you ever heard Scott Lively
17 advocate for cataloging people by the
18 government who are involved in
19 perpetuating the vice of homosexuality?
20 A. No, I don't know of such a
21 communication.
22 Q. Let's go back to page 23 of the
23 Complaint, beginning on paragraph 75.
24 This refers to the 2009
25 conference. Actually, let me read this to

410

1 PEPE JULIAN ONZIEMA
2 you: The antigay conference was organized
3 by Steven Langa, the long-time associate
4 of Lively, an executive director of the
5 Family Life Network. It was held from
6 March 5 through 7, 2009 at the Kampala
7 Triangle Hotel.
8 Is the conference I just
9 described the same 2009 Uganda conference
10 that we've been discussing?
11 A. Yes.
12 Q. The same paragraph ends with the
13 statement, The conference was attended by
14 high-profile religious and government
15 leaders, parliamentarians, police
16 officers, teachers and parents.
17 What knowledge do you have of
18 who attended the conference?
19 (Pause.)
20 A. The knowledge I received from --
21 from our team during debrief meetings.
22 Q. Any other source of knowledge of
23 who attended the conference?
24 A. LGBT people attended the
25 conference.

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1 PEPE JULIAN ONZIEMA
2 Q. From your team?
3 A. Yes.
4 Q. Did the members of the COBRA
5 team that attended the conference
6 specifically report to SMUG that the
7 conference was attended by high-profile
8 religious and government leaders,
9 parliamentarians, police officers,
10 teachers and parents?
11 A. Yes, they did.
12 Q. Each one of those categories of
13 people was reported by the COBRA team to
14 SMUG?
15 A. During our debrief meetings,
16 yes.
17 Q. The only written evidence of who
18 attended --
19 MR. GANNAM: Strike that.
20 Q. What written evidence of who
21 attended the conference exists, to your
22 knowledge?
23 (Pause.)
24 A. Could you please ask the
25 question again?

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1 PEPE JULIAN ONZIEMA
2 the AHB that was ultimately tabled?
3 A. I don't know if all of them were
4 incorporated.
5 Q. Do you know whether any of them
6 were incorporated?
7 A. I believe they were.
8 Q. What?
9 A. I can't say for a fact.
10 Q. Why do you believe that some
11 were?
12 (Pause.)
13 A. Please repeat the question.
14 MR. GANNAM: Can you repeat it?
15 (Record read.)
16 (Pause.)
17 A. Just repeat that question one
18 more time.
19 Q. I'll just ask why do you believe
20 that any of Scott Lively's suggested
21 revisions to the draft AHB were
22 incorporated into the version that was
23 tabled?
24 A. I mentioned earlier that the
25 bill was no different, and I also did say

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1 PEPE JULIAN ONZIEMA
2 that, from what Scott Lively himself said,
3 that he had assisted with drafting the
4 AHA -- AHB. So I believe that -- because
5 I believe it really did not change, that
6 it remained the same.
7 Q. If there was a draft of the bill
8 and Scott Lively gave input and then the
9 final bill was no different from the first
10 draft, wouldn't that mean that Scott
11 Lively's input was not accepted?
12 A. I don't know.
13 Q. Do you have any knowledge of any
14 suggested revisions to the draft AHB by
15 Scott Lively apart from documents shown to
16 you by your attorneys?
17 A. No, I don't.
18 Q. I want to point you back to the
19 Prayer For Relief at the end of the
20 Complaint. It begins on page 59, over
21 onto page 60.
22 In the Prayer For Relief --
23 we've talked about damages -- SMUG also
24 asks for -- category E on page 60 -- for
25 injunctive relief, enjoining the defendant

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1 PEPE JULIAN ONZIEMA
2 from undertaking further actions.
3 Do you understand what
4 injunctive relief is?
5 A. I believe it's putting a stop.
6 Q. So what further actions is SMUG
7 asking this court to stop Scott Lively
8 from undertaking?
9 MR. SULLIVAN: Objection to
10 form.
11 (Witness perusing document.)
12 A. That Scott Lively put an end to
13 his activities with antigay leaders in
14 Uganda in persecuting SMUG and the LGBT
15 community in Uganda.
16 Q. But what specifically does SMUG
17 want the court to tell Scott Lively not to
18 do?
19 MR. SULLIVAN: Objection to
20 form.
21 (Pause.)
22 A. I think I just said it, that he
23 should stop contributing to the
24 persecution of LGBT people through the
25 people that he works with.

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1 PEPE JULIAN ONZIEMA
2 Q. Do you want the U.S. court --
3 this court in this case to order Scott
4 Lively not to go to Uganda?
5 A. To promote persecution of LGBT
6 people? Yes.
7 Q. My question was do you want the
8 court to order Scott Lively not to go to
9 Uganda?
10 A. Not to come to Uganda to carry
11 out persecution of LGBT people.
12 Q. That's not my question.
13 My question is do you want the
14 U.S. court to order Scott Lively not to go
15 to Uganda?
16 (Pause.)
17 A. I don't think that's what we're
18 seeking to do.
19 Q. Do you want the U.S. court to
20 order Scott Lively not to sell or give
21 away his books in Uganda?
22 (Pause.)
23 MR. SULLIVAN: I'll add an
24 objection to form to that.
25 (Pause.)

436

1 PEPE JULIAN ONZIEMA
2 A. Please repeat the question one
3 more time.
4 MR. GANNAM: Please read it
5 back.
6 (Record read.)
7 A. Yes.
8 Q. If Lively were to go back to
9 Uganda to preach at Martin Ssempa's church
10 that homosexuality is a sin, that God
11 offers forgiveness to those who repent but
12 that unrepentant homosexuals are destined
13 for hell, would SMUG want the court to
14 prohibit Scott Lively from doing that?
15 A. Yes.
16 Q. If Lively were to go back to
17 Uganda to speak to a group of high school
18 students about what Lively perceives to be
19 the many and serious health hazards of
20 homosexuality, would SMUG want the court
21 to prohibit Lively from doing that?
22 A. Please repeat the question.
23 Q. If Lively were to go back to
24 Uganda to speak to group of high school
25 students about what Lively perceives to be

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1 PEPE JULIAN ONZIEMA
2 the many and serious health hazards of
3 homosexuality, would SMUG want the court
4 to prohibit Lively from doing that?
5 A. Yes.
6 Q. If Lively were to go back to
7 Uganda to speak to a gathering of lawyers
8 and train them on how to use the law to
9 oppose the legalization of same-sex
10 marriage, would SMUG want the court to
11 prohibit Lively from doing that?
12 (Pause.)
13 A. Yes.
14 Q. If Lively were to go back to
15 Uganda to lobby the Ugandan Parliament not
16 to legalize same-sex marriage, would SMUG
17 want the court to prohibit Lively from
18 doing that?
19 A. Yes.
20 Q. If Lively were to go back to
21 Uganda to lobby the Ugandan Parliament not
22 to extend non-discrimination laws to cover
23 sexual orientation and gender identity,
24 would SMUG want the court to prohibit
25 Lively from doing that?

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1 PEPE JULIAN ONZIEMA
2 A. Just say that one more time,
3 please.
4 Q. If Lively were to go back to
5 Uganda to lobby the Ugandan Parliament not
6 to extend non-discrimination laws to cover
7 sexual orientation and gender identity,
8 would SMUG want the court to prohibit
9 Lively from doing that?
10 A. Yes.
11 Q. Now, if this court were to grant
12 the injunction that SMUG wants, would that
13 stop Ugandan tabloids from outing LGBTI
14 people?
15 MR. SULLIVAN: Objection, form.
16 A. The seed is already planted, so
17 I don't think -- please just ask the
18 question again. Sorry.
19 Q. If this court were to grant the
20 injunction that SMUG wants against Scott
21 Lively, do you believe that would stop
22 Ugandan tabloids from outing LGBTI people?
23 A. I don't know, but I think maybe
24 yes.
25 Q. How would it stop tabloids from

439

1 PEPE JULIAN ONZIEMA
2 outing LGBTI people?
3 MR. SULLIVAN: Objection to
4 form.
5 A. I said maybe, so I'm not
6 certain.
7 Q. Why do you think it might?
8 MR. SULLIVAN: Objection to
9 form.
10 (Pause.)
11 A. Because it's our -- it's part of
12 our advocacy to engage the media to
13 understand who LGBT people are, and I
14 believe if they understand who we are,
15 then there won't be such outings and
16 intimidation in the media, or by the
17 media.
18 Q. Did SMUG or members of SMUG or
19 employees of SMUG win a lawsuit against
20 "The Rolling Stone" tabloid in Uganda?
21 A. Pardon?
22 Q. Did any -- did SMUG or any
23 member of SMUG or any employee of SMUG win
24 a lawsuit against "The Rolling Stone"
25 paper or tabloid in Uganda?

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
SPRINGFIELD DIVISION

SEXUAL MINORITIES UGANDA,	:	**CIVIL ACTION**
	:	
Plaintiff,	:	**3:12-CV-30051-MAP**
	:	
v.	:	**JUDGE MICHAEL A. PONSOR**
	:	
SCOTT LIVELY,	:	**MAGISTRATE JUDGE**
	:	**KATHERINE A. ROBERTSON**
Defendant.	:	
	:	**ORAL ARGUMENT REQUESTED**
		Leave to file granted on July 6, 2016

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

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SMUG HAS NO KNOWLEDGE THAT LIVELY DID ANYTHING UNLAWFUL DURING HIS 2002 TRIPS TO UGANDA 7

LIVELY HAD NO SUBSTANTIVE CONTACT WITH UGANDA OR UGANDANS BETWEEN JUNE 2002 AND MARCH 2009, AND SMUG HAS NO KNOWLEDGE THAT LIVELY DID ANYTHING UNLAWFUL IN THIS TIMEFRAME 9

SMUG CLAIMS THAT "HOMOPHOBIA," "PERSECUTION," AND ATTEMPTS TO CRIMINALIZE "PROMOTION OF HOMOSEXUALITY" AND "RECRUITMENT" OF CHILDREN INTO HOMOSEXUALITY WERE PREVALENT IN UGANDAN SOCIETY BETWEEN 1999 AND MARCH 2009, AND SMUG HAS NO KNOWLEDGE OF ANY FACTS LINKING ANY OF IT TO LIVELY 10

IN 2007, SMUG CONDUCTED A VISIBLE, 45-DAY "LET US LIVE IN PEACE" MEDIA CAMPAIGN, WHICH TRIGGERED "ANGRY RESPONSE," "A LOT OF BACKLASH," AND CALLS FOR LEGISLATIVE ACTION, AND SMUG HAS NO KNOWLEDGE OF ANY FACTS LINKING ANY OF IT TO LIVELY 13

SMUG HAS NO KNOWLEDGE THAT LIVELY DID ANYTHING UNLAWFUL DURING HIS MARCH 5-7, 2009 VISIT TO UGANDA 15

LIVELY'S ONLY CONTRIBUTION TO THE ANTI-HOMOSEXUALITY BILL OF 2009 AND THE ANTI-HOMOSEXUALITY ACT OF 2014 WAS TO REPEATEDLY URGE THEIR MODERATION AND THE DRASTIC REDUCTION OF CRIMINAL PENALTIES, TO MAKE THEM EVEN LOWER THAN EXISTING LAW 19

SMUG HAS NO KNOWLEDGE THAT LIVELY DID ANYTHING UNLAWFUL WITH RESPECT TO THE AHA OR AHB 23

SMUG HAS NO KNOWLEDGE OF ANY INVOLVEMENT OR ASSISTANCE PROVIDED BY LIVELY IN ANY OF THE FOURTEEN SPECIFIC INSTANCES OF PERSECUTION ALLEGED BY SMUG 24

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

SEXUAL MINORITIES UGANDA, Plaintiff,	)	
v.	)	C.A. No. 12-cv-30051-MAP
SCOTT LIVELY, Defendant.	)	

MEMORANDUM AND ORDER REGARDING
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
(Dkt. No. 248)

June 5, 2017

PONSOR, U.S.D.J.

I. INTRODUCTION

Plaintiff Sexual Minorities Uganda, which uses the acronym "SMUG," is headquartered in Kampala, Uganda. It comprises member organizations seeking fair and equal treatment of lesbian, gay, bisexual, transgender, and intersex (LGBTI) people in that east African country. Defendant Scott Lively is an American citizen who has aided and abetted a vicious and frightening campaign of repression against LGBTI persons in Uganda.

Defendant's positions on LGBTI people range from the

ludicrous to the abhorrent. He has asserted that "Nazism was in large part an outgrowth of the German homosexual movement,"[1] and that "[i]n seeking the roots of fascism we once again find a high correlation between homosexuality and a mode of thinking which we identify with Nazism."[2] He has tried to make gay people scapegoats for practically all of humanity's ills, finding "through various leads, a dark and powerful homosexual presence in . . . the Spanish Inquisition, the French 'Reign of Terror,' the era of South African apartheid, and the two centuries of American slavery."[3]

This crackpot bigotry could be brushed aside as pathetic, except for the terrible harm it can cause. The record in this case demonstrates that Defendant has worked with elements in Uganda who share some of his views to try to repress freedom of expression by LGBTI people in Uganda,

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[1] Scott Lively, <u>My Life in His Hands: A Testimony of God's Grace and Goodness</u> (Ex. 24), Dkt. No. 293, Attach. 26 at 10.

[2] Scott Lively, <u>The Pink Swastika</u> 129 (4th ed.) (Ex. 177), Dkt. No. 293, Attach. 189.

[3] Scott Lively, <u>The Poisoned Stream: "Gay" Influence in Human History</u> (Ex. 71), Dkt. No. 293, Attach. 79.

deprive them of the protection of the law, and render their very existence illegal. He has, for example, proposed twenty-year prison sentences for gay couples in Uganda who simply lead open, law-abiding lives.

Plaintiff has filed this lawsuit under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, seeking monetary damages and injunctive relief based on Defendant's crimes against humanity. Defendant now seeks summary judgment in his favor arguing that, on the facts of record, the ATS provides no jurisdiction over a claim for injuries -- however grievous -- occurring entirely in a foreign country such as Uganda. Because the court has concluded that Defendant's jurisdictional argument is correct, the motion will be allowed.

Anyone reading this memorandum should make no mistake. The question before the court is not whether Defendant's actions in aiding and abetting efforts to demonize, intimidate, and injure LGBTI people in Uganda constitute violations of international law. They do. The much narrower and more technical question posed by Defendant's motion is whether the limited actions taken by Defendant <u>on</u>

American soil in pursuit of his odious campaign are sufficient to give this court jurisdiction over Plaintiff's claims. Since they are not sufficient, summary judgment is appropriate for this, and only this, reason.[4]

II. FACTUAL BACKGROUND

The facts will be viewed in the light most favorable to Plaintiff, as required by Fed. R. Civ. P. 56. Few facts are actually in dispute.[5] The summary below will concentrate mainly on actions allegedly taken by Defendant within the United States, since that is the focus of the ATS analysis.

It is undisputed that Defendant strongly opposes what he calls the "gay movement" and has spoken in numerous venues to express his view that "homosexual activism" is a "very fast-growing social cancer" that has harmed America. ("Letter to the Russian People" (Ex. 3), Dkt. No. 293,

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[4] Defendant has offered several satellite arguments in support of judgment in his favor in addition to lack of jurisdiction. Because the jurisdictional argument prevails and judgment must enter for Defendant on that basis, it is not necessary to address any of Defendant's peripheral contentions.

[5] The facts are drawn from Defendant's Memorandum of Law in Support of Summary Judgment (Dkt. No. 257) and the exhibits relied on therein, as well as Plaintiff's Counter Statement of Material Facts (Dkt. No. 270) and its exhibits in support (Dkt. No. 293).

Attach. 3.) He has, in addition, published several books on this topic, including Defend the Family: Activist Handbook (Ex. 9, Dkt. No. 293, Attach. 9) and Redeeming the Rainbow (Ex. 20, id. at Attach. 20), which expand on this theme. As noted above, in his book, The Pink Swastika: Homosexuality in the Nazi Party, he offers the bizarre argument that a fascistic and violent gay movement in pre-war Germany propelled the rise of Nazism. (Excerpts in Ex. 177, Dkt. No. 293, Attach. 189.) Some of his suggestions sink to bizarre depths, such as the following:

> We can see that the roots of Nazism are fundamentally interrelated with the homosexuality of its philosophers.... (Although it may be mere coincidence, we are reminded that the Latin root of fascism is *fasces*, "a bundle of rods." A diminutive of fasces is "faggot," a common pejorative for homosexuals.)

(The Pink Swastika 141 (Ex. 177), Dkt. No. 293, Attach. 189 141.)

More chillingly, he has stated, "[T]he Bible treats homosexuality as a form of rebellion against God even worse (from God's perspective) than mass murder." (Scott Lively, "Is Homosexuality Worse than Mass Murder in the Bible?" (posted Dec. 9, 2014) (Ex. 2), Dkt. No. 293, Attach. 2).

Defendant's first contact with Uganda, so far as the

record reveals, occurred in 2002, when he traveled there twice to participate in a conference, to give speeches, and to make media appearances in which he forcefully presented his execrable views about the supposed evils of homosexuality. No evidence suggests that the two appearances in Uganda in 2002 involved any significant activity in the United States, beyond -- it may be inferred -- receipt of the invitations and arrangements for travel.

In the years that followed these first trips to Uganda, Defendant traveled to other foreign countries attending meetings and making speeches to encourage persecution of LGBTI people. He eventually built somewhat of an international reputation for his virulently hateful rhetoric. During this period the record contains negligible evidence of actions taken by Defendant from the territory of the United States directed specifically at Uganda or the LGBTI community there.

In October of 2007, Defendant and Stephen Langa, Executive Director of the Family Life Network in Uganda, exchanged emails discussing another possible trip to Uganda by Defendant to attend a contemplated conference -- again,

on the supposed dangers of homosexuality. In December of 2007, they exchanged views on who should be invited to the conference, and Defendant sent Langa a copy of his book, Defend the Family: Activist Handbook.

At the end of 2008, the Ugandan High Court issued an opinion awarding monetary damages to victims of police violence that occurred at the home of the SMUG founder, Victor Mukasa. The opinion also confirmed the right of LGBTI people in Uganda to seek redress in the courts for violations of their civil liberties. Plaintiff alleges that as a result of this court decision, Defendant's associates in Uganda became alarmed. An exchange of emails ensued in December 2008, through which Defendant communicated with Martin Ssempa, a United States citizen and Ugandan pastor who, to some extent, shared Defendant's views. Ssempa sought permission to make copies of Defendant's book Seven Steps to Recruit Proof Your Child. The book laid out Defendant's baseless and contemptible claim that gay people present special risks to minors.[6] Ssempa also requested

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[6] The United States Supreme Court itself has recognized the dignified and proper status of "tens of thousands of children now being raised by same-sex couples."

additional resource materials from Defendant regarding the dangers supposedly posed by gay persons generally.

In 2009, Langa organized the conference in Uganda discussed by Defendant and him back in 2007. The event was billed as a "Seminar on Exposing the Homosexual Agenda," and Defendant again appeared and spoke. After his return, Defendant had further email exchanges with Ssempa, as well as with James Buturo, a Ugandan cabinet minister, and David Bahati, a member of the Ugandan parliament. These internet communications discussed a draft piece of legislation being placed before the Ugandan parliament, called the "Anti-Homosexuality Bill" ("AHB"), proposing the death penalty for homosexuality. Defendant reviewed and offered suggestions regarding the draft, recommending certain modifications to soften public backlash, including a reduction of the penalty from death to twenty years imprisonment.[7]

United States v. Windsor, 133 S. Ct. 2675, 2694 (2013). As the Court noted, these children do not deserve to be told by anyone that their parents' "marriage is less worthy than the marriages of others." Id. at 2696.

[7] The Anti-Homosexual Bill (AHB) was first introduced into Uganda's parliament in 2009. The earliest version included the penalty of death for certain "aggravated" acts of homosexuality. During the four years that the legislation was under consideration, that provision was

The record thereafter contains evidence of a dozen or so substantive emails in the 2009-2014 time frame between Defendant and individuals in Uganda discussing ways to move the AHB forward, to draft modified legislation aimed at repressing LGBTI people in Uganda, and to deter advocacy on behalf of LGBTI people and exercise by them of their civil rights. So far as the record indicates, these substantive emails were not numerous or frequent. A larger number of social, non-substantive emails were also exchanged, as well as emails communicating internet links to articles or attaching copies of written material. Plaintiff's counsel has identified specific emails sent by Defendant in aid of the Ugandan campaign in December 2009; July and August 2010; February, July, August, and December 2012; August 2013; and April 2014.[8]

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modified to life imprisonment. The revised bill ultimately passed the Ugandan parliament on December 20, 2013, and was signed into law the following February, upon which it became the Anti-Homosexuality Act of 2014 (AHA). However, on August 1, 2014, the Constitutional Court of Uganda ruled the AHA invalid on the ground that it was not passed by a sufficient quorum of legislators. (Tuhaise Decl. ¶¶ 9-12, Dkt. No. 249, Attach. 3.)

[8] As Defendant's counsel points out, it is unclear exactly where Defendant was when he sent these emails.

To summarize now that discovery has closed, the evidence that the actions of the Defendant have "touched and concerned" the territory of the United States is that Defendant is a citizen of the United States living in Massachusetts, that he traveled from the United States to Uganda twice in 2002 and once in 2009, that he sent copies of his writings and other material to Uganda on a few occasions, and that over twelve years he transmitted emails, probably from the United States, to various people in Uganda. Of these perhaps a score, at most, included encouragement, advice, and guidance regarding the campaign to intimidate and repress the Ugandan LGBTI community.

III. DISCUSSION

As noted above, Plaintiff relies for jurisdiction entirely on the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. After the complaint was filed in March of 2012, Defendant responded with threshold motions to dismiss

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Plaintiff points to contextual details in some emails that suggest that Defendant hit the "SEND" button while he was physically within the territory of the United States. As to others, Defendant's location cannot be discerned. Defendant notes that during this time he was frequently traveling outside the United States for various reasons.

pursuant to Fed. R. Civ. P 12(b) (Dkt. Nos. 21 and 30), attacking this court's jurisdiction under the ATS on two grounds.

First, Defendant argued that aiding and abetting persecution of LGBTI people, no matter how unhinged and malignant, simply did not violate international norms with sufficient clarity to place it within the narrow class of claims subject to ATS jurisdiction. This court emphatically rejected that argument, holding that "[w]idespread, systematic persecution of LGBTI people constitutes a crime against humanity that unquestionably violates international norms." Sexual Minorities of Uganda v. Lively, 960 F.Supp.2d 304, 316 (D. Mass. 2013). Aiding and abetting the commission of this crime, this court held, "is one of the limited group of international law violations for which the ATS furnishes jurisdiction." Id. at 316-321 (discussing persecution of LGBTI people as a crime against humanity).

Second, Defendant argued that, even if his conduct fell substantively under the ATS umbrella, the exercise of jurisdiction by this American court when the injury occurred in a foreign country was improper under the ATS as construed

by the Supreme Court in Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013). In other words, the argument ran, even if a crime against humanity may have been committed, this court could not exercise jurisdiction under the ATS where the crime occurred in Uganda. In denying Defendant's motions to dismiss on this ground, the court found that the allegations of the complaint were sufficient at that preliminary stage to clear the relatively low Rule 12 hurdle. 960 F.Supp.2d at 310-311. The court emphasized, however, that it was reaching this conclusion based on the summary of facts as alleged in the complaint. 960 F.Supp.2d at 311 n.2.

With discovery now completed, the court is in a position to weigh this second argument on a fully developed record. The parties agree that the jumping-off place for this analysis is the Supreme Court's Kiobel decision, which came down after the complaint was filed.

The petitioners in Kiobel were residents of Ogoniland in Nigeria, where the respondents Royal Dutch Petroleum and Shell Transport and Trading Company -- incorporated in the Netherlands and England respectively -- were conducting oil

exploration and production. After local residents began protesting the destruction of the environment caused by a joint subsidiary of the respondents, the respondents enlisted the help of the Nigerian government to violently suppress this opposition. For years, the two respondent corporations, acting outside the United States, aided and abetted the Nigerian military and police -- providing supplies, transportation, and compensation -- in carrying out beatings, rapes, murders, and arbitrary arrests of residents, including the four petitioners. Suit was filed in the Southern District of New York, asserting jurisdiction under the Alien Tort Statute and alleging crimes against humanity aided and abetted by the respondent corporations.

Chief Justice Roberts's majority opinion began by noting the brief text of the ATS, passed as part of the Judiciary Act of 1789, which simply states that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. He noted that the statute did not provide any substantive cause of action but was "enacted

on the understanding that the common law would provide a cause of action for [a] modest number of international law violations." Kiobel, 133 S. Ct. at 1663 (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 714 (2004)) (quotations omitted and alterations in original).

As in the case now before this court, the question in Kiobel was not whether petitioners stated a substantive cause of action under the ATS. A claim for aiding and abetting a crime against humanity, both in this case and in Kiobel, could potentially state a proper substantive cause of action under the ATS. The question -- again, here as well as in Kiobel -- was whether the ATS provided a court with jurisdiction over such a claim when the offensive conduct and the injury occurred "in the territory of a foreign sovereign." Id. at 1664.

Chief Justice Roberts held that the ATS did not provide such jurisdiction. His analysis began with the recognition of "a canon of statutory interpretation known as the presumption against extraterritorial application." Id. Under this canon, unless a particular law contains a "clear indication of an extraterritorial application, it has none."

Id. (citing Morrison v. National Australia Bank Ltd., 561 U.S. 247, 255 (2010)) (quotations omitted). The Chief Justice found that there was "no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms." Id. at 1668. Where neither respondent was an American citizen and where neither was alleged to have taken any action in the United States directed at Nigeria, the mere fact that the respondents had a corporate presence in this country was insufficient to provide a jurisdictional foundation under the ATS.

It must be recognized that Kiobel presents, in some ways, a weaker case for extraterritorial application of the ATS than the case now before this court. Neither respondent corporation in Kiobel was a citizen of the United States, whereas Defendant here is. Moreover, beyond "mere corporate presence," id. at 1669, neither corporation had any connection to the United States, and neither committed acts in this country related to the outrages in Nigeria. In contrast, Defendant in this case resides in Springfield, Massachusetts, and at least some of the emails he sent to

Uganda to aid and abet the campaign of repression against LGBTI people in that country originated in the United States.

It is important to note, however, that even where a plaintiff's claims "touch and concern the territory of the United States," Kiobel holds that jurisdiction under the ATS will not lie unless this contact has "sufficient force to displace the presumption against extraterritorial application." Id. (citing Morrison, 561 U.S. at 266-74). As the Court noted in Morrison, "the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever some domestic activity is involved in the case." Morrison, 561 U.S. at 266 (emphasis in original). The question before the court now is whether the sporadic emails sent by Defendant from the United States offering encouragement, guidance, and advice to a cohort of Ugandans prosecuting a campaign of repression against the LGBTI community in their country constitutes the sort of forceful contact with the United States that would overcome the presumption against extraterritoriality.

The clear import of Kiobel is that the level of contact presented in this case is not enough. Justice Alito offered a concurrence for himself and Justice Thomas suggesting a stricter view of the ATS than the majority opinion describes. Justice Alito would permit an action to escape the presumption against extraterritorial application "only if the event or relationship that was the "focus" of congressional concern under the relevant statute takes place within the United States." Kiobel, 133 S. Ct. at 1670 (internal quotations omitted). While it is difficult to discern exactly how this "focus" test might be applied, it is equally hard to see how the scenario revealed here, no matter how disturbing, could pass muster.

Justice Breyer's separate concurrence on behalf of himself and three other justices is also very unhelpful to Plaintiff here. He agreed that jurisdiction under the ATS did not lie in Kiobel.

> The plaintiffs are not United States nationals but nationals of other nations. The conduct at issue took place abroad. And the plaintiffs allege, not that the defendants directly engaged in acts of torture, genocide, or the equivalent, but that they helped others (who are not American nationals) to do so.

Id. at 1678.

All three of the factors identified by Justice Breyer's concurrence as deterrents to the exercise of ATS jurisdiction are present in this case. Thus, at least six of the nine justices in Kiobel seem to line up against Plaintiff.

Circuit court opinions subsequent to Kiobel, while not precisely on point, support the conclusion that no ATS jurisdiction adheres in this case. The most instructive are Al Shimari v. CACI Premier Technology, Inc., 758 F.3d 516 (4th Cir. 2014); Mastafa v. Chevron Corp., 770 F.3d 170 (2d Cir. 2014); and Adhikari v. Kellogg Brown & Root, Inc., 845 F.3d 184 (5th Cir. 2017).

Al Shimari involved a corporate defendant that trained and supervised the non-military, contract employees who committed acts of torture at the Abu Ghraib detention facility during the Iraq war. 758 F.3d 516. Extensive relevant conduct within the United States included that the defendant (an American corporation based in the United States) actually hired the employees who directly perpetrated the acts of torture, received substantial payments based on contracts issued by the U.S. government in

the United States, was aware of its employees' misconduct, encouraged the misconduct, and attempted to cover it up when it was discovered. Based on this, the Fourth Circuit found that the plaintiffs' claims touched and concerned the territory of the United States with sufficient force to rebut the presumption against extraterritorial application of the ATS. Defendants' conduct in Al Shimari went far beyond simply aiding and abetting; they had direct responsibility through actions taken in the United States for the crimes against humanity committed by their employees. Nothing approaching this level of conduct based in the United States can be found in the record of the case now before this court.

In Mastafa, the plaintiffs were victims of human rights abuses committed by the regime of Saddam Hussein. 770 F.3d 170. They brought suit against American corporations who aided Hussein in obtaining illegal payments in violation of the United Nations Oil-for-Food program. Chevron's conduct included "multiple domestic purchases and financing transactions" in the United States that facilitated kickbacks and surcharge payments to the Hussein regime. Id.

at 191. This conduct, the Second Circuit found, touched and concerned the United States with sufficient force to displace the presumption against extraterritorial application of the ATS.[9] Again, no domestic conduct by Defendant here approaches the level found on the part of the defendants in Mastafa.

In Adhikari, the plaintiffs accused the defendant, a U.S. military contractor, of aiding and abetting in unlawful human trafficking to obtain cheap labor to work at the Al Asad Air Base, a U.S. military installation near Ramadi, Iraq. 845 F.3d 184. The plaintiffs were family members of Nepali workers who were dragooned and forced against their will to work in Iraq. Tragically, most were eventually murdered by Iraqi insurgents. The record reflected payments by the defendant from the United States to middlemen who arranged the illegal trafficking, as well as knowledge on the part of the defendant of the trafficking. Nevertheless, the Fifth Circuit upheld the ban against the exercise of

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[9] Despite this finding, the court ultimately concluded that the allegations of the complaint were insufficient to demonstrate that the defendants acted with the purpose of violating international law and therefore affirmed the dismissal of the complaint. Mastafa, 770 F.3d at 194.

extraterritorial jurisdiction, finding that "all the conduct comprising the alleged international law violations occurred in a foreign country." Id. at 197. The financial transactions, the court held, were insufficient to displace the presumption against extraterritoriality, and the actual knowledge of trafficking was limited to the defendant's overseas employees. Id. at 198.

In this case, now that discovery is complete, the record reveals that Defendant supplied no financial backing to the detestable campaign in Uganda, he directed no physical violence, he hired no employees, and he provided no supplies or other material support. His most significant efforts on behalf of the campaign occurred within Uganda itself, when he appeared at conferences, meetings, and media events. The emails sent from the United States providing advice, guidance, and rhetorical support for the campaign on the part of others in Uganda simply do not rise to the level of "force" sufficient to displace the presumption against extraterritorial application.

The world is now wrapped in a vast network of internet communications. If emails -- or at least emails of the

number and type disclosed on the record here -- were enough to supply the "force" sufficient to justify the exercise by American courts of jurisdiction over wrongs committed in foreign countries, the presumption against extraterritoriality described in Kiobel would be a fiction.

Moreover, the record reveals that in this case serious potential "foreign policy concerns" exist -- a problem explicitly identified in Kiobel. 133 S. Ct. at 1664. Plaintiff's complaint accuses highly placed members of the Ugandan legislative and executive branches of complicity with Defendant. Moreover, the Ugandan judicial system has weighed in vigorously on the local issues that Plaintiff wishes to have this court adjudicate here in the United States. More than in Al Shimari, Mastafa, Adhikari -- and even, perhaps in Kiobel -- this case presents the potential for conflict with the sovereignty of a foreign nation. This counsels a "need for judicial caution." Kiobel, 133 S. Ct. at 1664.

For the reasons described above, the court will allow Defendant's motion to dismiss, finding no jurisdiction under the Alien Tort Statute over Plaintiff's federal claims.

Given the absence of jurisdiction over the federal law claims, the court will decline to exercise supplemental jurisdiction over the state law claims. 28 U.S.C. § 1367(c)(3). See United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726 (1966). While the court has the discretion to address these claims, the sensitivity of the issues raised makes it more prudent to allow a court of the Commonwealth of Massachusetts to take the lead. The state law claims will therefore be dismissed, without prejudice to their refiling in state court, if Plaintiff wishes to take this route.

IV. CONCLUSION

Several features emerge from the discussion above.

First, the allegations in the complaint fully supported the court's 2013 denial of Defendant's threshold motion to dismiss. Concrete averments set forth the extremity of Defendant's homophobia and his determination to vilify, repress, and injure the LGBTI community, both generally and in Uganda particularly. Specific allegations confirmed that Defendant took some action from inside the United States in pursuit of his goal. The ruling that the complaint passed

muster under Fed. R. Civ. P. 12, however, "d[id] not obviate the district court's continuing obligation to ensure its own jurisdiction as the case proceed[ed] to discovery." Mustafa, 770 F.3d at 187. Where the record as it evolved during discovery cast doubt on the court's jurisdiction, the court had an obligation to revisit the issue.

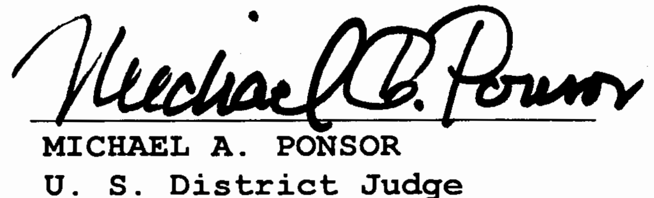
Second, discovery confirmed the nature of Defendant's, on the one hand, vicious and, on the other hand, ludicrously extreme animus against LGBTI people and his determination to assist in persecuting them wherever they are, including Uganda. The evidence of record demonstrates that Defendant aided and abetted efforts (1) to restrict freedom of expression by members of the LBGTI community in Uganda, (2) to suppress their civil rights, and (3) to make the very existence of LGBTI people in Uganda a crime. The record also confirms that these efforts to intimidate and injure the LGBTI community in Uganda were, unfortunately, to some extent successful.

Third, Defendant's status as an American citizen and his physical presence in the United States is clearly not enough under controlling authority to support ATS

extraterritorial jurisdiction. The sporadic trail of emails sent by Defendant to Uganda does not add enough to the record to demonstrate that Plaintiff's claims "touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application." Kiobel, 133 S. Ct. at 1669.

For the foregoing reasons, Defendant's motion for summary judgment (Dkt. No. 248) based on lack of jurisdiction is hereby ALLOWED. As noted, the court will decline to exercise supplemental jurisdiction over the two purely state law claims. As to them, the motion for summary judgment is ALLOWED, without prejudice to re-filing in state court if Plaintiff desires. The clerk will enter judgment of dismissal. This case may now be closed.

It is so ordered.



MICHAEL A. PONSOR
U. S. District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SEXUAL MINORITIES UGANDA, Plaintiff,	)	
v.	)	CIVIL ACTION NO. 3:12-cv-30051-MAP
SCOTT LIVELY, Defendant.	)	

JUDGMENT IN A CIVIL CASE

Michael A. Ponsor, D.J.

[ ] **Jury Verdict.** This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

JUDGMENT of dismissal pursuant to the court's memorandum and order entered this date, granting defendant's motion for summary judgment.

ROBERT M. FARRELL,
CLERK OF COURT

Dated: June 5, 2017

By /s/ Maurice G. Lindsay
Maurice G. Lindsay
Deputy Clerk

(Civil Judgment of Dismissal -8 - MGM.wpd - 11/98)
[jgm.]