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, individually and as president of Abiding Truth Ministries,	:	**MAGISTRATE JUDGE KATHERINE A. ROBERTSON**
	:	
Defendant.	:	

DEFENDANT SCOTT LIVELY'S RESPONSE IN OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR LEAVE TO FILE POST-HEARING BRIEF

Defendant, SCOTT LIVELY ("Lively"), for his response in opposition to the Cross-Motion for Leave to File Post-Hearing Memorandum in Further Opposition to Defendant's Motion for Summary Judgment (dkt. 324) filed by Plaintiff, SEXUAL MINORITIES UGANDA ("SMUG"), shows the Court as follows:

Though it has been said, "desperate times call for desperate measures," SMUG should be embarrassed; not only by the inadequacy of its proposed post-hearing brief to meet the questions posed by the Court, but also by having to ask the Court to suspend the rules so that SMUG can attempt to do on paper what it could not do at the hearing—answer the Court's simple questions about what Lively did and what remedy SMUG wants.

SMUG's excuse for not showing the Court any material examples of domestic conduct at the hearing—SMUG found the record too complex and the hearing too short—cannot suffice. (*See* Cross-Mot., dkt. 324, at 2-3.) Even taking SMUG at its word, the excuse could only go so far as to change the conclusion compelled by the hearing and prior briefing, that SMUG *cannot answer* the question, to the more embarrassing and no less dispositive conclusion, that SMUG *was not prepared to answer* the question. But even if the Court would consider suspending Local Rule

56.1[1] and excusing SMUG's noncompliance with its pre-hearing order on such grounds, SMUG's excuse is hardly plausible. Assuming that SMUG, cognizant of Local Rule 56.1, put forth *all* of its *best* evidence to satisfy "touch and concern" in its response to Lively's Rule 56.1 statement of facts, where SMUG had unlimited space and more than two years to scour the documents (*see* dkt. 306-1), SMUG still pointed the Court to just eight pages of record documents to establish the domestic conduct critical to ATS jurisdiction, including two e-mails which on their face were written outside the United States. (*See* Reply Mem. Law Supp. Lively's Mot. Summ. J., dkt. 305, at 36-42 (Pgs. 49-55 of 150).) Under Local Rule 56.1, for purposes of summary judgment, SMUG is bound to this (insufficient) evidence, alone, to counter Lively's showing of no relevant domestic conduct. (*Id.* at 36 (Pg. 49 of 150).) Furthermore, SMUG had a full two days before the summary judgment hearing to hone its presentation to answer this one of only two questions designated by the Court for oral argument. (Order Reg. Oral Arg., dkt. 321.) And still, SMUG brought nothing. But now, SMUG implores, it can answer the question. Even if believable, not even the most liberal principles of pleading and practice justify giving SMUG yet another bite at the apple.

In any event, SMUG's preview of the substance of its proposed post-hearing brief betrays its inadequacy to answer the Court's question on domestic conduct. Rather than providing the Court with specific acts of relevant conduct, SMUG posits that "the reasonable *inferences* from numerous documents, ***when viewed as*** *part of an integrated plan and timeline*, serve to illustrate

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[1] Local Rule 56.1 provides, in pertinent part, "Material facts of record set forth in the statement required to be served by the moving party will be deemed for purposes of the motion to be admitted by opposing parties unless controverted by the statement required to be served by opposing parties." "Such rules are designed to function as a means of focusing a district court's attention on what is-and what is not-genuinely controverted. When complied with, they serve to dispel the smokescreen behind which litigants with marginal or unwinnable cases often seek to hide and greatly reduce the possibility that the district court will fall victim to an ambush." *Rios-Jimenez v. Principi*, 520 F.3d 31, 38 (1st Cir. 2008) (internal quotation marks and citations omitted).

both practical assistance from Defendant to carry out persecution (as well as Defendant's contribution to an unlawful agreement among co-conspirators) and Defendant's relevant conduct occurring in the United States." (Cross-Mot., dkt. 324, at 2-3 (emphasis added).) In other words, SMUG wants the Court simply to assume what SMUG has the burden of proving—"an integrated plan and timeline" orchestrated by Lively from the United States. This is precisely "the smokescreen behind which litigants with marginal or unwinnable cases often seek to hide."[2] *Rios-Jimenez*, 520 F.3d at 38.

Regarding the injunctive relief SMUG seeks, and wants now to "clarify" for the Court, the excuse that the relief sought "did not receive substantial attention in the briefing" is absurd. (*See* Cross-Mot., dkt. 324, at 3.) SMUG prays in its Complaint,

> For injunctive relief enjoining the Defendant from undertaking further actions, and from plotting and conspiring with others, to persecute Plaintiff and the LGBTI community in Uganda on the basis of their sexual orientation and gender identity, and strip away and/or severely deprive Plaintiff and LGBTI community in Uganda of fundamental rights, including the rights to freedom of expression, association and assembly, to be free from torture and other cruel, inhuman and degrading treatment, and arbitrary arrest and detention . . . .

(Am. Compl., dkt. 27, at 60.) In his memorandum of law in support of summary judgment (dkt. 257), Lively argues, in no uncertain terms,

> Finally, even if SMUG's unsubstantiated injuries could be redressed through equitable relief, which they cannot, the Court could not

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[2] In its flailing attempt to transmogrify Lively's disparate, protected speaking and writing into "an integrated plan and timeline" and "a causal link with the injuries suffered by Plaintiff," SMUG apparently advocates elevation of the Butterfly Effect to a theory of legal causation. (*See* Cross-Mot., dkt. 324, at 2.) "The **Butterfly Effect** is a concept invented by the . . . American meteorologist Edward N. Lorenz (1917-2008) to highlight the possibility that small causes may have momentous effects." Catherine Rouvas-Nicolis & Gregoire Nicolis, *Butterfly Effect*, Scholarpedia, 4(5):1720 (2009), http://www.scholarpedia.org/article/Butterfly_effect. "On December 29, 1972 Lorenz presented a talk in the 139th meeting of the American Association for the Advancement of Science held in Washington, D.C. entitled *Predictability: Does the Flap of a Butterfly's Wings in Brazil Set a Tornado in Texas?*" *Id.*

> redress them through an unconstitutional remedy. As discussed in Section V, *infra*, what SMUG really seeks in this lawsuit is to enjoin pure political speech and protected activity that lies at the core of the First Amendment. Since this Court cannot enter the equitable relief sought by SMUG, the Court cannot redress SMUG's alleged injuries.

(Mem. Law Supp. Lively's Mot. Summ. J., dkt. 257, at 128 (Pg. 150 of 198).)

SMUG had an unrestricted opportunity in its opposition to Lively's summary judgment motion to meet Lively's argument and show the Court what form of injunction could be entered against Lively without violating the First Amendment, but did not. (*See* Pl.'s Mem. Law Opp'n Lively's Mot. Summ. J., dkt. 292, at 117 (Pg. 136 of 152).) And there is a reason SMUG did not address the details of the injunction in its briefing, which is the same reason SMUG did not want to answer the Court's question at the hearing: SMUG has never been able to articulate a constitutionally permissible injunction against Lively's speech, and does not want the Court to know that silencing Lively's speech is what SMUG really wants. But Lively has already shown the Court, with record facts, exactly what SMUG wants in its injunction, such as—

> 171. SMUG wants this Court to enjoin Lively from selling or giving away his books in Uganda. (Onziema 435:19-436:7).
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> 172. SMUG wants this Court to enjoin Lively from going to Uganda and preaching at Martin Ssempa's church . . . . (Onziema 436:8-15).
>
> 173. SMUG wants this Court to enjoin Lively from going to Uganda to speak to a group of high school students about what Lively perceives to be the many and serious health hazards of homosexual conduct. (Onziema 436:23-437:5).
>
> 174. SMUG wants this Court to enjoin Lively from going to Uganda to train lawyers on how to use the law to oppose the legalization of same-sex marriage. (Onziema 437:6-13).
>
> 175. SMUG wants this Court to enjoin Lively from going to Uganda to lobby the Ugandan Parliament not to legalize same-sex marriage. (Onziema 437:14-19).

(Mem. Law Supp. Lively's Mot. Summ. J., dkt. 257, at 42-43 (Pgs. 64-65 of 198).) In its summary judgment opposition, SMUG simply "denied" these record facts, without pointing to any material record facts of its own. (Pl.'s Mem. Law Opp'n Lively's Mot. Summ. J., dkt. 292, at 39-40.)

SMUG's "lack of attention in the briefing" to the obvious and paramount constitutional problems with its desired injunction, like its utter avoidance of the Court's question at the hearing, was both conscious and consequential.[3] SMUG has presented the Court with no good reason to allow SMUG to prolong the pretense that it seeks a constitutionally permissible injunction.

At some point, enough is enough; at some point, the elaborate arguments of counsel must yield to the rules and the record. SMUG insisted on the last word in briefing, and was allowed a sur-reply over Lively's objection. SMUG was given the last word at the hearing. Allowing yet another brief, to which Lively would have to respond, would serve no purpose. The "put up or shut up moment in litigation" has passed. *Jakobiec v. Merrill Lynch Life Ins. Co.*, 711 F.3d 217, 226 (1st Cir. 2013). SMUG's cross-motion for leave to file should be denied.

Respectfully submitted,

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[3] Not surprisingly, perusal of SMUG's proposed post-hearing brief reveals SMUG's unwillingness to answer the Court's question even now. (*See* Pls. Proposed Post-Hearing Mem. Opp'n Def.'s Mot. Summ. J., dkt. 324-1, at 9-10 (Pgs. 10-11 of 17).) SMUG merely rehearses the same non-specific legal argument presented at the hearing, hardly "clarifying" what was already said.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically with the Court on November 17, 2016. Service will be effectuated by the Court's electronic notification system upon all counsel or parties of record.

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