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.	:	**ORAL ARGUMENT REQUESTED**
	:	
	:	**LEAVE TO FILE GRANTED ON MAY 30, 2017 (Dkt. No. 347)**

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT SCOTT LIVELY'S SPECIAL MOTION TO DISMISS SMUG'S STATE LAW CLAIMS PURSUANT TO THE MASSACHUSETTS ANTI-SLAPP STATUTE

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INTRODUCTION

Defendant, Scott Lively ("Lively"), submits this reply memorandum of law in support of his Special Motion to Dismiss SMUG's State Law Claims Pursuant to the Massachusetts Anti-SLAPP Statute (dkt. 333, the "Special Motion"), and in response to Plaintiff's Memorandum of Law in Opposition to the Special Motion (dkt. 337, SMUG's "Opposition").[1]

ARGUMENT

I. LIVELY'S SPECIAL MOTION IS TIMELY.

A. SMUG Ignores the Fact That a 60-Day Anti-SLAPP Motion Deadline Does Not Apply in Federal Court.

SMUG cites no authority whatsoever addressing whether the MASS 60-day filing requirement applies in **federal** court. To be sure, SMUG completely ignores the authority cited by Lively, *Sarver v. Chartier*, 813 F.3d 891 (9th Cir. 2016), which held unequivocally that the 60-day filing requirement under California's similar anti-SLAPP statute does not apply in federal court. 813 F.3d at 900. The *Sarver* court reasoned that the statute's deadlines for both motion filing and discovery "directly collide with the more permissive timeline Rule 56 provides for the filing of a motion for summary judgment." *Id.* Furthermore, "[a]lthough [the statute] does not prohibit the filing of an anti-SLAPP motion after 60 days, it certainly restricts a party's ability to do so in a way Rule 56 would not." *Id.* Thus, the court declined to apply the timing restriction. *Id.*

The MASS 60-day restriction is materially identical to the California statute's restriction discarded in *Sarver*.[2] Accordingly, this Court should likewise hold that the MASS 60-day restriction does not apply to Lively's Special Motion.

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[1] Capitalized terms in this Reply have the meanings ascribed to them in Lively's Memorandum of Law in support of his Special Motion (dkt. 334, Lively's "Memorandum"), which is incorporated herein by this reference.

[2] *Compare* MASS ("Said special motion to dismiss may be filed within sixty days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper."),

The only federal case cited by SMUG on the timeliness issue, *Shire City Herbals, Inc. v. Blue*, No. 15-30069, 2016 WL 2757366 (D. Mass. May 12, 2016), does not address the question whether the MASS 60-day requirement applies in federal court. (Opp., dkt. 337, at 4.) Rather, the *Shire* court assumed the 60-day restriction of the MASS applied, but allowed as a matter of discretion a special motion filed over seven months after the complaint. 2016 WL 2757366 at *3. In any event, the *Shire* court did not take a strict view of the MASS 60-day requirement, and even noted without disagreement, "Both sides have cited cases in which courts heard a special motion to dismiss **based on developments that took place years after the initial complaint**." *Id.* (emphasis added).

Even if Lively could have filed his Special Motion within 60 days of the service of SMUG's Complaint, it would have been of no timing consequence. Under the dictates of Rule 56, which envisions full discovery before the disposition of properly stated claims, this Court would have been required to hold Lively's motion in abeyance pending discovery and summary judgment motions. *See Godin v. Schencks*, 629 F.3d 79, 91 (1st Cir. 2010) ("If a federal court would allow discovery under Fed. R. Civ. P. 56(d) then, in our view, that would constitute good cause under the [anti-SLAPP] statute."); *Sarver*, 813 F.3d at 900 ("'[B]ecause the discovery-limiting aspects of [the anti-SLAPP statute] collide with the discovery-allowing aspects of Rule 56, these aspects of [the anti-SLAPP statute] cannot apply in federal court.'"); *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001) (same); *Burley v. Comets Cmty. Youth Ctr., Inc.*, 75 Mass. App. Ct. 818, 822, 917 N.E.2d 250, 255 (2009) ("A special motion to dismiss under the anti-SLAPP statute is not intended to be a substitute for a motion for summary judgment . . . .") SMUG therefore can

with Cal. Civ. Proc. Code § 425.16(f) ("The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper.").

articulate no prejudice whatsoever from the timing of the Special Motion, and its vociferous, authority-free argument falls flat.

Even if Lively were required to justify the timing of his Special Motion, he is certainly supported by the permissive *Shire* approach,[3] and even more so by the case-by-case procedural standards for anti-SLAPP motions illuminated by the First Circuit in *Godin*. Although the question in *Godin* was whether a state anti-SLAPP statute applies in federal court at all, which the First Circuit answered in the affirmative, the court also signaled anti-SLAPP procedural issues which may arise within the framework of Rules 12 and 56.[4] The *Godin* court assumed that no rigid timing restrictions would apply to anti-SLAPP motions filed in federal court, and contemplated that the procedures for considering anti-SLAPP motions must fit the particulars of each case:

> Whether the procedures outlined in [the anti-SLAPP statute] will in fact depart from those of Rule 12 and Rule 56 **will depend on the particulars in a given case** of the claim and defense. Some [anti-SLAPP] motions, like Rule 12(b)(6) motions, will be resolved on the pleadings. In other cases, [the anti-SLAPP statute] will permit courts to look beyond the pleadings to affidavits and materials of record, as Rule 56 does.

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[3] Courts regularly exercise their discretion to consider anti-SLAPP motions filed after the provisional statutory deadline. *See, e.g.*, *Shire*, 2016 WL 2757366, at *3; *Pritchard v. Malm*, No. 13–P–732, 2014 WL 1922214, *2 (Mass. App. Ct. May 15, 2014) (rejecting argument that motion untimely because "a judge has discretion to extend the sixty-day filing period in the statute"); *Burley v. Comets Cmty. Youth Ctr., Inc.*, 75 Mass. App. Ct. 818, 819-20, 822, 917 N.E.2d 250, 253, 255 (2009) (acknowledging trial court's discretion to accept motion filed at time of motions in limine, after three years of discovery); *see also Hampton-Stein v. Aviation Fin. Grp., LLC*, 472 F. App'x 455, 457 (9th Cir. 2012) (holding no abuse of discretion by district court in accepting California anti-SLAPP motion after provisional deadline); *Bradbury v. City of Eastport*, 2013 ME 72, ¶ 12, 72 A.3d 512, 516 ("The [Maine] statute clearly leaves the filing of a special motion to dismiss after the sixty-day period to the discretion of the court.").

[4] The *Godin* court was construing the Maine anti-SLAPP statute. This Court has recognized, however, "[t]he Massachusetts anti-SLAPP statute is . . . in all respects identical to the Maine statute." *Bargantine v. Mechanics Coop. Bank*, No. 13-1132-NMG, 2013 WL 6211845, *3 (D. Mass. Nov. 26, 2013).

Godin, 629 F.3d at 90 (footnote omitted) (emphasis added).[5]

The particulars of the instant case are unique, and justify the timing of Lively's Special Motion. The record was developed over approximately four years, 100 hours of depositions, and 40,000 pages of discovery. As shown in Lively's initial and reply memoranda in support of summary judgment (dkt. 257 at 5-38, 43-46; dkt. 305, §§ I, V), SMUG did not meet its obligation to reveal the factual bases for its positions and theories during discovery, but waited until its 3,000 pages of summary judgment opposition filings (dkts. 270-293, 315), which SMUG itself described as "a lengthy and complicated submission involving hundreds of exhibits and numerous declarations." (Dkt. 316 at 3.) Even at the summary judgment hearing, however, SMUG was unable to articulate what acts by Lively were not protected by the First Amendment, requiring SMUG to seek leave to file a post-hearing brief on the grounds that the record was too complex and the hearing too short for SMUG to be able to explain its theory to the Court. (Dkt. 324 at 2-3.) But SMUG's post-hearing brief (dkt. 324-1), too, fell short. (*See* dkt. 332.) In light of these particulars, Lively was justified in filing his Special Motion after SMUG's final failure to overcome the First Amendment.

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[5] The First Circuit's comments in *Godin* regarding certain congruencies between the anti-SLAPP statute and Rule 56 (*see, e.g.,* 629 F.3d at 90 ("The [anti-SLAPP] statute . . . is consistent with the allocation of burdens under Rule 56(d) . . . .")), should not be read to be in disagreement with the Ninth Circuit's conclusion of conflict in *Sarver*, because the *Godin* court was answering a different question—whether the matters covered by Rules 12 and 56 were so broad as to preclude application of the anti-SLAPP statute in federal court. *Id.* at 86, 91 ("Neither Rule 12 not Rule 56 . . . purport to be so broad as to preclude additional mechanisms mean to curtail rights-dampening litigation through modification of pleadings standards."). Thus, with *Godin* having established anti-SLAPP protections are available within First Circuit courts as a matter of substantive law, the question before this Court is whether the 60-day filing requirement of the MASS applies in federal court as a matter of procedural law. This was the question before the *Sarver* court, and this Court should follow the *Sarver* holding that the 60-day restriction does not apply. **SMUG has cited no authority giving this Court any reason to hold otherwise**.

B. SMUG Ignores the First Circuit's Holding That Rule 12 Does Not Control Anti-SLAPP Proceedings.

SMUG's argument that the grounds for Lively's Special Motion were waived because they were not included in his Rule 12 motion to dismiss should be disregarded out of hand. (Opp., dkt. 337, at 7-8.) The First Circuit made clear in *Godin* that Rule 12 does not control anti-SLAPP proceedings:

> We conclude that neither Fed. R. Civ. P. 12(b)(6) nor Fed. R. Civ. P. 56, on a straightforward reading of its language, was meant to control the particular issues under [the anti-SLAPP statute] before the district court. . . .
>
> . . . .
>
> Rule 12(b)(6) serves to provide a mechanism to test the sufficiency of the complaint. [The anti-SLAPP statute], by contrast, provides a mechanism for a defendant to move to dismiss a claim on an entirely different basis . . . .

Godin, 629 F.3d 79, 86, 89 (footnote and citations omitted); *see also Hilton v. Hallmark Cards*, 599 F.3d 894, 902 (9th Cir. 2010) ("[A] defendant could prevail on an anti-SLAPP motion, though he would not have been able to win a motion to dismiss.").[6]

[6] SMUG takes issue with Lively's reference to the immediate appealability of the denial of an anti-SLAPP motion (Opp., dkt. 337, at 2-3, 7), not only disagreeing with the legal proposition, but also imputing the worst possible motives to Lively and disregarding the plain meaning and context of the reference—showing the substantive differences between anti-SLAPP motions and summary judgment motions. (*See* Mem., dkt. 34, at 4, n.6.) This kind of false imputation is nothing new for SMUG. And, SMUG is wrong on the legal proposition, too. While the *Godin* court did differentiate the appeal before it, which was from the denial of an anti-SLAPP motion on the grounds that the statute did not apply in federal court, with an appeal of the denial of an anti-SLAPP motion on the merits, 629 F.3d at 84, the *Godin* court in no way suggested that the appeal of a denial on the merits would not satisfy the collateral order doctrine just as easily. *Cf. Godin*, 629 F.3d at 84 ("Three federal circuit decisions hold there is appellate jurisdiction over an order denying an anti-SLAPP motion to dismiss . . . .") Moreover, SMUG has cited no authority to contradict the holding of the Supreme Judicial Court of Massachusetts that the rights protected by the MASS require immediate appealability of the denial of a special motion. *See Benoit v. Frederickson*, 454 Mass. 148, 152, 908 N.E.2d 714, 718 (2009) ("Regardless whether claims or counterclaims remain pending, '[t]he protections afforded by the anti-SLAPP statute against the harassment and burdens of litigation are in large measure lost if the petitioner is forced to litigate

II. SMUG FAILS TO OVERCOME LIVELY'S SPECIAL MOTION ON THE MERITS.

Still traveling on the now inapposite denial of Lively's motion to dismiss, and still without proof, SMUG's Opposition variously relies on slick language (Opp., dkt. 337, at 11 ("His statements were made . . . as a persecution consultant advising his colleagues in Uganda . . . .")), and the repackaging of its unproven allegations of conspiracy and "persecution" (Opp. at 10 ("SMUG's **claims arise from allegations** . . . ."), 13 ("[A]s SMUG **alleged in its complaint** . . . ."), 14 ("In its ruling denying Lively's Motion to Dismiss, the Court **noted SMUG's allegations** . . . ."), 18 ("In its ruling denying Lively's motion to dismiss, the Court **noted that the allegations** . . . ."), 19 ("This Court noted two distinct sets of harms **set out in SMUG's complaint** in its ruling on the motion to dismiss . . . .") (emphases added)). Ultimately, however, SMUG made no serious attempt to respond to Lively's Special Motion, inevitably conceding in its Conclusion that it wants "time for a more comprehensive submission."[7] (Opp., dkt. 337, at 20.) SMUG has failed to meet its burden to overcome Lively's Special Motion.

A. SMUG Fails to Remove Lively's Speaking and Writing from the Petitioning Protections of the MASS.

SMUG fails in its attempt to recast Lively's speaking and writing as actionable conduct, whether by claiming Lively had wrong motives (Opp., dkt. 337, at 10-11), or by claiming Lively's speaking and writing somehow was not petitioning (Opp. at 11-13). Lively overwhelmingly demonstrated in his summary judgment papers that, despite SMUG's repeated assurances to the

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a case to its conclusion before obtaining a definitive judgment through the appellate process.'") In any event, this Court is not asked to decide the immediate appealability question.

[7] SMUG's request for yet more time and more paper to do that which it has not been able to do in four years and with 40,000 pages of record materials, is plainly ridiculous. However, if SMUG is given the opportunity to make still an additional submission to the Court in opposition to Lively's Special Motion, Lively respectfully requests the opportunity to make an appropriate counter submission.

contrary,[8] SMUG bases its claims against Lively exclusively on his speaking and writing in public discourse regarding homosexuality. (MSJ Br., dkt. 257, at 83-119; MSJ Reply, dkt. 305, at 55-73.) This is quintessential petitioning activity under the MASS.

The MASS defines the petitioning activity it protects in the broadest possible terms, coextensive with the right of petition under the First Amendment. *See Duracraft Corp v. Holmes Prod. Corp.*, 42 Mass. App. Ct. 572, 575, 678 N.E.2d 1196, 1199 (1997). "Consistent with the expressed legislative intent, petitioning has been consistently defined to encompass a very broad range of activities in the context of the anti-SLAPP statute." *N. Am. Expositions Co. Ltd. P'ship v. Corcoran*, 452 Mass. 852, 861, 898 N.E.2d 831, 840–41 (2009) (internal quotation marks omitted). "In order to determine if statements are petitioning, we consider them in the over-all context in which they were made. **Statements made outside any formal governmental proceedings have often been considered petitioning activity**." *Id.* at 841 (emphasis added) (citations omitted). Even statements to the media to reach and influence the public towards petitioning may be "[i]n context and totality" legitimate petitioning activity. *See Blanchard v. Steward Carney Hosp., Inc.*, 89 Mass. App. Ct. 97, 102, 46 N.E.3d 79, 84 (2016), *rev. granted*, 474 Mass. 1106, 56 N.E.3d 26 (2016). And statements which may not be petitioning activity otherwise, are petitioning activity if they are "essentially mirror images" of protected statements. *See Blanchard*, 46 N.E.3d at 88-89 ("We interpret the qualifier 'essentially' as requiring only that the statements be close to or very similar to the protected statements.").

Lively's speaking and writing easily fit within the broad definition of petitioning under the MASS. SMUG attempts to avoid the MASS the same way it attempted to avoid summary

[8] *See, e.g.*, First Am. Compl., dkt. 27, ¶ 11; Pl.'s Mem. Law Opp'n Def.'s Mot. Dismiss First Am. Compl., dkt. 36, at 1, 3, 13; Pl.'s Mem. Law Opp'n Def.'s Mot. Summ. J., dkt. 292, at 8-9.

judgment—by trotting out the same failed conspiracy theories it has employed throughout this litigation (Opp. at 10-13), attempting to impute to Lively the alleged conduct and motives of others, without any evidence that Lively intended or even knew of the alleged persecutory acts for which SMUG seeks recovery. In the same way, SMUG's summary judgment papers failed to identify any "conduct" by Lively beyond protected speech. (MSJ Reply at 55-73 (applying *strictissimi juris* standard of *United States v. Spock*, 416 F.2d 165 (1st Cir. 1969), requiring SMUG to prove Lively **personally agreed to employ criminal means of persecution**, through Lively's **clear conduct or unambiguous statements**, and **without relying on statements of alleged co-conspirators**).) At the summary judgment hearing, despite having these questions from the Court ahead of time (dkt. 321), SMUG failed again to present any example of conduct or speech by Lively which is not protected by the First Amendment. And again, in SMUG's post-hearing briefing (dkt. 324-1), which SMUG requested to rehabilitate its claims after self-impeaching them at the hearing, SMUG failed to present anything close to meaningful evidence of wrongful conduct or speech by Lively which could overcome the First Amendment. (*See* dkt. 332.)

Lively has also documented, in detail, archetypal examples of SMUG's mischaracterizations and outright misrepresentations of Lively's speech and motives, laying bare SMUG's strategy to construct a strawman caricature of Lively which SMUG can blame for alleged persecution carried out by the Ugandan government. (MSJ Reply at 59-70.) Now, SMUG's Opposition to Lively's Special Motion offers more of the same, and fails anew to identify any "conduct" by Lively which is not protected petitioning. In the end, SMUG offers nothing new—only its tired insistence that Lively's speech is not protected because of his beliefs, and others' alleged acts.

B. Lively's Petitioning Activity in Uganda is Still Protected by the First Amendment.

Notwithstanding SMUG's protest (Opp. at 8-10), the First Amendment protects Lively's petitioning activity in Uganda, and the petitioning activity protected by the MASS is coextensive with the right of petition under the First Amendment. *See Duracraft Corp v. Holmes Prod. Corp.*, 42 Mass. App. Ct. 572, 575, 678 N.E.2d 1196, 1199 (1997). Though the Court's initial conclusion in the MTD Order (dkt. 59) was that the First Amendment right of petition does not apply outside the United States (MTD Order at 62), that conclusion relied on authority which has been either vacated or rejected as "the minority view."[9] Lively has provided extensive authority in his summary judgment briefing demonstrating the applicability of the First Amendment, and specifically *Noerr-Pennington* immunity, to Lively's foreign petitioning activity. (MSJ Br., dkt. 257, §§ V.A, E, at 84-87, 112-119.) Lively commends to the Court, and incorporates by reference, that briefing here. In sum, the First Amendment secures Lively's right of petition not only in the United States, but throughout the world; and *Noerr-Pennington* immunity for petitioning activity is an application of the First Amendment, which immunizes Lively from tort liability both outside the antitrust context and outside the United States. In today's global, cross-cultural economy, where U.S. companies and individuals are routinely involved in business and political transactions

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[9] In the MTD Order, this Court limited *Noerr-Pennington* Immunity to domestic petitioning. (MTD Order at 62.) However, one of the two district court cases relied upon by this Court to establish this limitation, *Australia/E. U.S. A. Shipping Conference v. United States*, 537 F. Supp. 807 (D.D.C. 1982), **was vacated**, 1986 WL 1165605 (D.C. Cir. Aug. 27, 1986), and has not been used to confine First Amendment protections to the United States. The other district court case, *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971), has been repeatedly rejected as "the minority view." *See, e.g., Friends of Rockland Shelter Animals, Inc. v. Mullen*, 313 F. Supp. 2d 339, 344 (S.D.N.Y. 2004) (rejecting *Occidental Petroleum*-based argument that "the First Amendment right to petition the Government for a redress of grievances only applies to petitions to one's own government"); *Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358, 1366-67 (5th Cir. 1983); *Coca-Cola Co. v. Omni Pac. Co.*, 1998 U.S. Dist. LEXIS 23277, *28-30 (N.D. Cal. Dec. 9, 1998).

outside of the United States, any other outcome would render the vital protections afforded by the First Amendment quite narrow and completely hollow outside our borders. (*See* MSJ Br., dkt. 257, § V.A, at 83-87.)

C. SMUG Fails to Carry its Burden of Proof to Overcome Lively's Special Motion.

Having established that SMUG's claims are based on Lively's protected petitioning activity, "the burden shifts to [SMUG] to demonstrate . . . that [Lively's] petitioning activities were 'devoid of **any** reasonable factual support or **any** arguable basis in law' and the petitioning activities '**caused actual injury** to the responding party.'" *Wenger v. Aceto*, 451 Mass. 1, 5, 883 N.E.2d 262, 266 (2008) (emphasis added) (quoting MASS). "If that standard is not met for one or both elements, the special motion to dismiss must be allowed." *Id.* Any evidence adduced by SMUG must be viewed in the light most favorable to Lively because SMUG bears the burden of proof. *Godin*, 629 F.3d at 82.

1. SMUG Fails to Show Lively's Petitioning Had No Reasonable Factual or Legal Basis.

Given SMUG's burden to show the absence of **any** reasonable factual support or **any** arguable legal basis for Lively's petitioning activity, "the question before the Court at this stage is whether [Lively's petitioning] 'contains **any reasonable factual or legal merit at all**.'" *Bargantine v. Mechanics Co-op. Bank*, No. 13-11132-NMG, 2013 WL 6211845, at *5 (D. Mass. Nov. 26, 2013) (emphasis added) (quoting *Wenger*, 883 N.E.2d at 267). SMUG comes nowhere close to meeting this standard.

Rather than attempt to refute the factual bases for Lively's petitioning, as it must to show the absence of **any reasonable factual merit at all**, SMUG overly and falsely generalizes Lively's speech, and then posits SMUG's own inference as the falsity that disqualifies Lively's speech from petitioning protection. In other words, SMUG does not seriously attempt to dispute what Lively

actually said. For example, SMUG presents, but makes no attempt to refute, Lively's account of actual knowledge, of an actual boy, who was actually raped, or that the incident affected Lively's speaking regarding homosexuality. (Opp. at 15; *see also* Lively Decl., dkt. 257-1, ¶ 4.) Rather, SMUG posits as false SMUG's cynical, narrative-driving inference from the account. (Opp. at 15.) And SMUG presents, but makes no attempt to factually refute, Lively's book *The Pink Swastika*, but rather posits as false SMUG's own over-generalization of the book's thesis. (Opp. at 15.) To be sure, SMUG cites general criticisms of the book, **from sources outside the record**, but even SMUG's citation concedes the book includes "serious scholarship" and "truths" along with the material the critics find objectionable (Opp. at 16, n.8), which is exactly the opposite of lacking **any reasonable factual merit at all**.[10] Finally, SMUG presents Lively's off-the-cuff and admittedly conjectural Rwanda comment (Opp. at 17), comprising 4 seconds (39 seconds in context) of three lectures given over a full day during Lively's 2009 Uganda visit, which lectures followed several hours of presentations given by Lively on the preceding two days. (Lively Decl., dkt. 257-1, ¶¶ 20, 23, 25.d, Exs. 5, 6 (2009 Conference Lectures) at 2:26:31-2:27:10; Not. Filing

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[10] SMUG is barred from relying on its newly identified, non-record sources because it failed to disclose them in response to Lively's First Interrogatories, served May 2, 2014. The new sources would have been directly responsive to Lively's Interrogatory 12:

> Identify each false statement or assertion concerning homosexuality, or concerning homosexuals . . . which you contend Lively has made and which you contend is material to this Lawsuit. Separately for each such statement or assertion, state the basis for your contention that such statement or assertion is false, **and identify all evidence, including specific Documents** . . . **that you contend supports your contention that such statement or assertion is false**.

(Def.'s First Interrogs. to Pl. at 8.) SMUG never provided any information beyond the complaint allegations in response to this interrogatory, and its objections were either improper or waived as untimely. A true and correct copy of an excerpt (excluding confidential information) of Plaintiff's Supplemental Responses to Defendant Scott Lively's First Set of Interrogatories Containing Confidential Information Subject to the Terms of Protective Order, which incorporates Lively's Interrogatory 12, and SMUG's original and supplemental responses to the interrogatory, is attached hereto as Exhibit A.

Digital Media, dkt. 252 (noticing filing of Lively Decl. Ex. 6); Clerk's Not., dkt. 259 (acknowledging receipt of Lively Decl. Ex. 6).) This single comment, even if ultimately inaccurate, cannot honestly be isolated from "the over-all context" of Lively's speech activities, *Corcoran*, 898 N.E.2d at 840–41, to establish the absence of **any reasonable factual merit at all**. SMUG's disproportionate emphasis on Lively's admitted 4-second conjecture reveals the paucity of SMUG's substantive grounds to oppose Lively's Special Motion.

When Lively's speech is viewed in its overall context, and in a light most favorable to Lively, as it must be for purposes of the MASS, SMUG cannot show it lacks **any reasonable factual merit at all**. SMUG offers nothing more than strawmen, and falls far short of its burden of proof.

SMUG's second argument at this stage (Opp. at 18-19), to meet its burden to prove Lively's petitioning lacked **any legal merit at all**, is a fallacious remix of SMUG's conspiracy song. SMUG essentially argues that, because Lively's speech was part of a conspiracy of criminal persecution, it cannot be protected petitioning activity. As shown above, however, SMUG has never met its burden under the First Amendment to prove culpable participation by Lively in any conspiracy. Furthermore, Lively's relevant petitioning (prior to this lawsuit) was never in the context of a legal proceeding in which Lively asserted legal positions. Accordingly, SMUG again fails to carry its burden to overcome Lively's Special Motion.

SMUG's state law negligence claim hung by a mere thread following the Court's MTD Order, in which the Court 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.) The Court also predicted, correctly, that "it will be difficult for Plaintiff to assemble facts

during discovery to justify a finding of liability," and that "the First Amendment may make this count particularly difficult to defend at the summary judgment stage." (MTD Order at 78-79). SMUG also failed at the summary judgment stage to overcome the other categorical bars to not only its negligence claim, but its state law civil conspiracy claim as well. (*See* MSJ Reply, dkt. 305, § VIII, at 125-136.) Since SMUG's state law claims are legally defunct for summary judgment purposes, SMUG cannot overcome Lively's Special Motion to save these claims for anti-SLAPP purposes.

2. SMUG Proves No Injury Caused by Lively or Anything He Spoke or Wrote.

To overcome Lively's Special Motion, SMUG has the burden to prove that Lively's petitioning caused SMUG actual injury. *Wenger*, 883 N.E.2d at 266. SMUG's Opposition utterly fails to establish a causal link between any alleged injury to SMUG and any petitioning by Lively. SMUG merely recites its alleged damages categories. (Opp. at 19-20.) This current failure is a continuation of the complete and total causation failure in SMUG's summary judgment opposition, which is fatal to all its claims. (*See* MSJ Br., dkt. 257, at 141-150; MSJ Reply, dkt. 305, at 73-93.) Moreover, and likewise fatal to all its claims, SMUG is foreclosed from claiming damages because it never proved any, despite a four-year opportunity to offer actual proof. (*See* MSJ Br. at 130-141; MSJ Reply at 93-116.) Accordingly, SMUG cannot satisfy its burden under the MASS as to causation or damages.

CONCLUSION

For all of the foregoing reasons, Defendant Scott Lively's Special Motion to Dismiss SMUG's State Law Claims Pursuant to the Massachusetts Anti-Slapp Statute should be granted.

Respectfully submitted,

/s/ Roger K. Gannam

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically with the Court on May 30, 2017. 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

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
SPRINGFIELD DIVISION

SEXUAL MINORITIES UGANDA,

Plaintiff,

v.

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

Defendant.

Civil Action No.

3:12-CV-30051

PLAINTIFF'S SUPPLEMENTAL RESPONSES TO DEFENDANT SCOTT LIVELY'S FIRST SET OF INTERROGATORIES CONTAINING CONFIDENTIAL INFORMATION SUBJECT TO THE TERMS OF PROTECTIVE ORDER

Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure, Plaintiff Sexual Minorities Uganda ("SMUG") supplements its objections and responses to Defendant Scott Lively's First Set of Interrogatories as follows:

GENERAL OBJECTIONS

1. SMUG objects to each and every interrogatory, definition, and instruction to the extent it seeks to impose any obligations inconsistent with or in addition to SMUG's obligations under the applicable rules, including the Federal Rules of Civil Procedure and the Local Rules for the District of Massachusetts, or any order of the Court in this matter.

2. SMUG objects to each and every interrogatory to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, or any other applicable privilege or immunity. Inadvertent disclosure of such information shall not constitute the waiver of any applicable privilege, doctrine, immunity, or objection, and nothing contained in SMUG's

Interrogatory No. 11:

Separately for each Communication that you contend Lively undertook in furtherance of any conspiracy or any Persecution alleged by you, identify the Date of such Communication, Lively's Location when he undertook such Communication, each other participant to such Communication, the detailed substance of such Communication, and all evidence you contend supports your contentions concerning such Communication.

Response to Interrogatory No. 11:

SMUG objects to this Interrogatory because it characterizes Lively's communications solely as being in furtherance of, as opposed to also being evidence of, his participation in the conspiracy and/or joint criminal enterprise as alleged in the Amended Complaint (Dkt. No. 27).

Subject to and without waiving its specific or general objections, SMUG responds as follows: The communications SMUG contends constitute evidence of Defendant's participation in and furtherance of the conspiracy and/or joint criminal enterprise as alleged in the Amended Complaint (Dkt. No. 27) include, but are not limited to, those described in paragraphs 47-56, 58-74, and 76-93 of the Amended Complaint (Dkt. No. 27).

Supplemental Response No. 11.

SMUG has no supplemental Response to Interrogatory No. 11 and incorporates herein its original Response to Interrogatory No. 11. SMUG further objects to the extent that this interrogatory seeks information that is in already in Defendant's possession, custody, or control.

Interrogatory No. 12:

Identify each false statement or assertion concerning homosexuality, or concerning homosexuals, lesbians, transgendered, intersex or bisexual Persons, which you contend Lively has made and which you contend is material to this Lawsuit. Separately for each such statement or assertion, state the basis for your contention that such statement or assertion is false, and identify all evidence, including specific Documents (with reference to specific page numbers for paper documents, and specific hour/minute location for audio/visual documents) that you contend supports your contention that such statement or assertion is false.

Response to Interrogatory No. 12:

SMUG objects to this interrogatory because it is unduly burdensome and improperly calls for a narrative response, and because it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving its specific or general objections, SMUG responds as follows: Defendant's statements that SMUG contends are false include, but are not limited to, those described in paragraphs 54, 59, 72-73, and 81-82 of the Amended Complaint (Dkt. No. 27).

Supplemental Response No. 12.

SMUG has no supplemental Response to Interrogatory No. 12 and incorporates herein its original Response to Interrogatory No. 12. SMUG further objects that the term "material" requires SMUG to draw or render a legal conclusion or prematurely seeks an opinion or contention that relates to fact or the application of law to fact before designated discovery is complete.

Interrogatory No. 13:

Do you contend that Lively has ever advocated violence or criminal penalties against homosexuals, lesbians, transgendered, intersex or bisexual Persons? If yes, state the basis for your contention; identify the substance, Date and Location of such advocacy; identify any Person who was actually subjected to violence or criminal penalties as a result of such advocacy; identify the Date, Location and nature of the violence or criminal penalties; and identify each Person who perpetrated such violence or imposed such criminal penalties.

Response to Interrogatory No. 13:

SMUG objects to this interrogatory because it is unduly burdensome and improperly calls for a narrative response, and because it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving its specific or general objections, SMUG responds as

Supplemental Response No. 16.

SMUG incorporates its original Response to Interrogatory No. 16 herein and further incorporates its Supplemental Response to Interrogatory No. 2 for specific acts of persecution taken in furtherance of the conspiracy.

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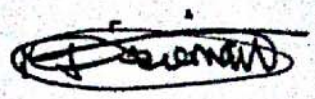
VERIFICATION

I declare under penalty of perjury that the foregoing responses are true and correct.

Executed on October 21, 2014.



Pepe Julian Onziema