

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

**REPLY 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.

“Lively Br.” – Opening Brief filed by Lively in this appeal on October 6, 2017 (Doc. 00117209013).

“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.

“SMUG Br.” – Response Brief filed by SMUG in this appeal on April 27, 2018 (Doc. 00117282587).

INTRODUCTION

SMUG now admits that the district court had no jurisdiction to determine that Lively committed crimes against humanity and violated international law, and makes no effort to defend those determinations. Instead, SMUG only contends that this Court lacks jurisdiction to reform the district court's extra-jurisdictional, *ultra vires* determinations. But SMUG ignores settled law recognizing that appellate courts **always** have jurisdiction to correct extra-jurisdictional determinations, because they inflict their own cognizable, constitutional injury. Moreover, the court's determination that Lively committed the worst crimes known to humankind, on par with genocide, mass exterminations and slavery, certainly imposes sufficient harm for appellate jurisdiction. There is no jurisdictional bar for this Court to enforce the district court's undisputed jurisdictional bar.

SMUG also ignores settled law that this Court has jurisdiction to convert the dismissal without prejudice of SMUG's state law claims into a dismissal with prejudice. SMUG's judicial estoppel arguments fail for multiple reasons, including that subject-matter jurisdiction can **never** be waived, and that the district court never accepted Lively's argument that SMUG defrauded it.

For these and numerous other reasons, this Court should reform the district court's extra-jurisdictional determinations and dismiss SMUG's state claims with prejudice.

ARGUMENT

I. **SMUG ADMITS THAT THE DISTRICT COURT WAS WITHOUT JURISDICTION TO FIND THAT LIVELY'S POLITICAL SPEECH CONSTITUTED "CRIMES AGAINST HUMANITY" IN VIOLATION OF INTERNATIONAL LAW.**

SMUG offers no merits defense for the district court's determinations that Lively's non-violent political advocacy in Uganda aided and abetted crimes against humanity and "constitute[s] violations of international law." (S.J. Order at 1, 3, 24). SMUG doesn't contend that the court had jurisdiction or authority to enter these findings in the S.J. Order, nor does SMUG argue that they were proper. (SMUG Br. at 13-24). Instead, SMUG solely challenges **this** Court's jurisdiction. (*Id.*).

The reason for this is clear. SMUG candidly admits, as it must, that the district court was "without jurisdiction" to make any of these determinations or declarations:

When statements or determinations ... were **entered without jurisdiction** – as are the statements Lively seeks to challenge on appeal – ...

(SMUG Br. at 18 (emphasis added)).

Therefore, if this Court determines that it does have jurisdiction to entertain this appeal, SMUG has not only waived any argument that the challenged determinations can be saved, *see, e.g., Rivera v. Thompson*, 879 F.3d 7, 14 (1st Cir. 2018) ("[a]ppellee has therefore waived those arguments" not made or developed in its brief), but has admitted that they are extra-jurisdictional and thus unsalvageable.

II. THIS COURT HAS JURISDICTION TO REFORM THE DISTRICT COURT'S ADMITTEDLY EXTRA-JURISDICTIONAL, *ULTRA VIRES* DETERMINATIONS.

A. This Appeal of Extra-Jurisdictional Determinations in a Summary Judgment Order Falls Squarely Within the Third Recognized Exception to the Jurisdictional Bar on Prevailing Party Appeals, Which SMUG Ignores.

SMUG is only two-thirds correct, and therefore entirely wrong, when it claims that there are only two recognized exceptions to the jurisdictional bar on prevailing party appeals. (SMUG Br. at 17-20). In his opening brief, Lively demonstrated with substantial authority that **a third exception** exists, and is well recognized, for appeals such as this one which challenge extra-jurisdictional determinations. (Lively Br. at 25-31) (citing, *inter alia*, *Env't'l Prot. Info. Ctr., Inc. v. Pacific Lumber Co.*, 257 F.3d 1071, 1074-77 (9th Cir. 2001); *New Jersey v. Heldor Indus., Inc.*, 989 F.2d 702, 705-09 & n.10 (3d Cir. 1993); *Unalachtigo Band of Nanticoke Leni Lenape Nation v. Corzine*, 606 F.3d 126, 127-30 (3d Cir. 2010); and *Black Rock City, LLC v. Pershing Cnty. Bd. of Comm'rs*, 637 F. App'x 488, 488-89 & n.1 (9th Cir. 2016)).

To these authorities, another can be added from the Eleventh Circuit. In *Unique Sports Prod., Inc. v. Ferrari Importing Co.*, 720 F.3d 1307 (11th Cir. 2013), the lower court **in the same order** held that plaintiff's trademark was valid, but that defendant had not infringed it. *Id.* at 1309. The Eleventh Circuit concluded that it had jurisdiction over the prevailing defendant's appeal seeking to strike the finding on validity, because the lower court was without jurisdiction. *Id.* at 1310. Once the

lower court concluded that no infringement took place, its finding on validity was extra-jurisdictional and subject to reformation on appeal, because “it had decided a hypothetical controversy.” *Id.* (citing *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 335 (1980), and *Elec. Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241, 242 (1939)).

SMUG says absolutely nothing about this third exception, and therefore waives any argument. *See Rivera*, 879 F.3d at 14. Moreover, as shown in subsections 1 through 3 below, SMUG also fails to acknowledge that, while applying the third exception, the courts above specifically considered the limitations SMUG posits in connection with the first two exceptions, and concluded that they do not apply in prevailing party appeals of extra-jurisdictional, *ultra vires* district court orders. (SMUG Br. at 17-20).

1. Extra-Jurisdictional Determinations Impose a Special, Recognized Constitutional Harm and Are Reviewable Even When They Have No Controlling Legal Effect.

For example, SMUG contends that “mere dicta or statements in opinions” that “do not establish any ‘controlling law’ in subsequent litigation” are not appealable by a prevailing party. (SMUG Br. at 17-18). That might be true sometimes, when the lower court indisputably had jurisdiction to enter the challenged determinations, as was the case in the two authorities relied upon by SMUG, *Camreta v. Greene*, 563 U.S. 692, 698 (2011), and *In Re Shkolnikov*, 470 F.3d 22, 24-25 (1st Cir. 2006).

Neither decision, however, foreclosed appeals of extra-jurisdictional, *ultra vires* lower court determinations, and both allowed for the possibility that appellate jurisdiction can be exercised in other circumstances not before those courts. *See Camreta*, 563 U.S. at 74 (holding that challenged determinations were appealable because, among other reasons, they “are not mere dicta,” without deciding that determinations must **always** constitute “controlling law” to be appealable); *In Re Shkolnikov*, 470 F.3d at 25 (holding that mere “dissatisfaction” with lower court holdings, “**without more**, cannot confer a right to appeal upon a successful litigant.” (emphasis added)).

One such “more” element missing from *Shkolnikov* but present in the authorities cited by Lively – and in this appeal – was the lower court’s undisputed lack of jurisdiction to enter the challenged determinations. Indeed, none of the five authorities cited by Lively involved lower court determinations that were “controlling law,” yet each was found to be reviewable on appeal notwithstanding arguable “dictum” status, because it was entered without jurisdiction. *See, e.g., Pacific Lumber*, 257 F.3d at 1074-77 (finding that the challenged determinations “**have no collateral estoppel effect**, not only because they are immaterial to the judgment, but also because they were entered without jurisdiction,” and yet concluding that appellate jurisdiction existed to reform the extra-jurisdictional order and purge it of “ultra vires statements,” because “**dicta entered after a court has**

lost jurisdiction over a party inflicts a wrong on that party” sufficient to confer Article III and prudential standing (emphasis added)); *Heldor*, 989 F.2d at 709 & n.10 (appellate jurisdiction exists to reform extra-judicial order, **even though the challenged determinations were arguably “dictum,” “precedent for nothing,” and merely “advisory,”** because appellate courts always have power to “vacat[e]...a constitutional nullity” (emphasis added)); *Unalachtigo*, 606 F.3d at 130 (appellate jurisdiction exists to vacate extra-judicial statements in dismissal order, **even though the statements were merely “advisory” and not controlling law**, because the lower court’s decision to include unauthorized determinations in dismissal order **“renders [challenger] an aggrieved party such that it is entitled to appellate relief”** (emphasis added)); *Black Rock City*, 637 F. App’x at 488 & n.1 (under 28 U.S.C. § 2106, appeals court has jurisdiction to vacate extra-judicial order, **even though it had no subsequent legal effects**, because “[w]here district courts have issued wrongful orders, this court has exercised the power to vacate them”); *Unique Sports*, 720 F.3d at 1310-11 (appellate jurisdiction exists to reform lower court order, even though the challenged determination was an advisory opinion issued in a “hypothetical controversy” and thus of no controlling effect).

SMUG has nothing to say in response. Taking SMUG’s argument to its logical conclusion, courts are free to issue all manner of extra-judicial determinations

with impunity, and they are not subject to any appellate oversight or correction, since, by definition, extra-jurisdictional determinations are **never** “controlling law.” Such cannot be the law, and, not surprisingly, SMUG offers no supporting authority.

2. Extra-Jurisdictional Determinations Are Reviewable Even When Contained in an Order and Not in a Judgment or Decree.

SMUG also contends that only “judgments” and “decrees” are reviewable, and not statements in opinions or orders. (SMUG Br. 15-16). This is wrong for three reasons.

First, SMUG completely ignores the principal statutory authority relied upon by Lively (Lively Br. 25-26), 28 U.S.C. § 2106, which plainly vests appellate courts with the authority to “affirm, modify, vacate, set aside or reverse” not just “any judgment [or] decree,” but also, expressly, “any...**order** of a court....” *Id.* (emphasis added). Indisputably, the S.J. Order containing the determinations Lively challenges is an “order of a court,” within the ambit of 28 U.S.C. § 2106. Nevertheless, this statute is entirely absent from SMUG’s brief—yet another waiver by SMUG.

Second, SMUG also ignores the fact that the Judgment in this case expressly references and incorporates the S.J. Order, noting that the Judgment is being rendered “**pursuant to** the [S.J. Order].” (Judgment, Addendum 148 (emphasis added)). Thus, even if there were a requirement for the challenged statements to be included in a judgment, that requirement would easily be satisfied. *See Blockel v.*

J.C. Penney Co., 337 F.3d 17, 23-24 (1st Cir. 2003) (judgment issued “pursuant to [an earlier] memorandum and order of the court” should be read “to incorporate **the entirety** of [that] memorandum,” making the entire memorandum reviewable on appeal (emphasis added)).

Third, SMUG inexplicably reprises its serious citation error by claiming that *Pacific Lumber* limits appellate reformation solely to “judgments.” (SMUG Br. at 17). SMUG cites to the first half of the *Pacific Lumber* opinion, holding that proposition to be true generally, where jurisdiction is present, but omits the second half of the opinion holding that determinations in orders entered without jurisdiction are reviewable on appeal even if they are not “judgments.” *Pacific Lumber*, 257 F.3d at 1076-77. The whole point of *Pacific Lumber* was to reform just such an order. *Id.* SMUG made the same grievous error in the briefing of its motion to dismiss this appeal, which Lively pointed out in his brief. (Lively Br. at 29, n.2).

3. Extra-Jurisdictional Determinations Are Reviewable Even When Contained in the Same Order Noting the Absence of Jurisdiction.

Finally, although SMUG says nothing of the third exception itself, SMUG does make a meager, one-paragraph attempt to distinguish *Pacific Lumber*, *Heldor*, *Unalachtigo* and *Black Rock* on the same, solitary ground – that they supposedly “**all** presented unique instances in which the prevailing party successfully challenged opinions issued *after* the case had already settled or been rendered moot, not

statements that formed part of the opinion in which the court determined whether the case should be dismissed.” (SMUG Br. at 20-21 (bold emphasis added)).

First, SMUG is wrong as a matter of fact. At least two, and possibly all four, of these decisions vacated extra-jurisdictional statements contained **in the same order** announcing dismissal for lack of jurisdiction. *See, e.g., Unalachtigo*, 606 F.3d at 127-128 (successfully challenged *ultra vires* determinations and dismissal for lack of jurisdiction were “**in a single order**” (emphasis added)); *Pacific Lumber*, 257 F.3d at 1073, 1077 (vacating *ultra vires* determinations “**contained in the opinion holding the case to be moot**” (emphasis added)).¹

SMUG continues its sustained and merciless attack on the language and import of *Pacific Lumber*, this time claiming that the Ninth Circuit only vacated *ultra vires* statements included in a separate order, issued subsequent to the order announcing absence of jurisdiction. (SMUG Br. at 21). But the Ninth Circuit made it clear that it was vacating and reforming extra-jurisdictional statements not only in the subsequent, “May 5, 1999” order identified by SMUG, but also in the initial, “March 15, 1999” order – **the same order** “holding the case to be moot.” *Id.* at 1073,

¹ The other two decisions are less clear on the timing of the challenged determinations. Both *Heldor* and *Black Rock* indicate that the lower court had lost jurisdiction earlier, *see Heldor*, 989 F.2d at 707 (9 days prior to issuing challenged determination); *Black Rock*, 637 F. Appx. at 488 (“six weeks earlier”), but neither case indicates that the courts had announced that fact in an earlier, separate order, as SMUG intimates. *Id.*

1074, 1077 (“[w]e therefore remand and order the district court to **vacate its March 15 order** and reform the May 5 order” (emphasis added)).

Second, SMUG is wrong as a matter of law. The unifying theme in this appeal and in *Pacific Lumber*, *Heldor*, *Unalachtigo* and *Black Rock*, is that the lower courts were indisputably without jurisdiction to enter the challenged determinations. The timing of jurisdictional loss is immaterial. Indeed, SMUG does not say how much time – six weeks, six days or six hours – would be permissible to lapse between jurisdictional loss and extra-jurisdictional statements. Exempting extra-jurisdictional statements from appellate oversight merely because they are included in the same order announcing loss of jurisdiction would make no sense, and would incentivize **early** inclusion of unauthorized matter in court orders, rather than disincentivize the practice altogether.

B. History Refutes SMUG’s Dire Prediction Regarding Appellate Floodgates, and This Court Should Too.

SMUG’s hyperbolic prediction about appellate floodgates swinging wide open is premised on a policy decidedly **not** before this Court – allowing appellate review of mere “harsh words” or “critical comments,” thereby transforming appellate courts into “civility police.” (SMUG Br. at 21-22). That, of course, is not what Lively is advocating. Lively is not merely appealing the district court’s “harsh words” and “critical comments,” but the court’s admittedly unauthorized, *ultra vires*

determination of SMUG's central claim in this action – that Lively's political speech violated international law.

Quite the contrary, continuing to recognize the well established third exception to the bar on prevailing party appeals – applicable only in those limited circumstances where district courts run afoul of Article III's strictures and issue extra-jurisdictional determinations – would help disincentivize the practice, keep it to rare occurrences, and act as an important safety-valve on judicial overreach. Indeed, although some of the decisions applying the third exception go back two-and-a-half decades, *see e.g., Heldor* (decided in 1993), there has been no indication of any appellate floodgates being swung open in any jurisdiction to correct extra-judicial pronouncements. SMUG's dire prediction lacks merit.

C. The District Court's Extra-Jurisdictional Determinations, Which SMUG Unequivocally Promises to Use Against Lively in Litigation Around the Globe, Impose Sufficient Harm upon Lively to Confer Standing for This Appeal.

As the discussion above and in Lively's opening brief demonstrates, determinations of lower courts that are not merely extraneous but also extra-jurisdictional impose a special and cognizable harm on their own, and are appealable even without any other showing of particularized harm to the appellant. However, to the extent an additional showing of individual harm is required, Lively has certainly demonstrated it.

SMUG acknowledges that “putting someone on a blacklist,” which may impair professional or business prospects, can be a sufficient harm for appellate standing. (SMUG Br. at 19-20). SMUG relies on *United States v. Accra Pac, Inc.*, 173 F.3d 630 (7th Cir. 1999), a case that, like SMUG’s other cases, did **not** involve a challenge to the lower court’s jurisdiction. *Accra Pac*, 173 F.3d at 631. Nevertheless, in the context of **lawfully** entered determinations, the court acknowledged that “it is possible to imagine situations in which language alone would meet the adverse effect requirement” for appellate standing. *Id.* at 633. As an example, the court pointed to *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 139 (1951), where organizations labeled as “communist” were found to have standing to appeal, because the designation was alleged to “damage the reputation of those organizations in their respective communities.” *Accra Pac*, 173 F.3d at 633; *McGrath*, 341 U.S. at 139.

It is no hyperbole to say that “crimes against humanity” are “**shockingly egregious** violations of...international law,” *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 167 (5th Cir. 1999) (emphasis added), “reserved for **the most egregious** violations of international law, such as **genocide and slavery**,” *Villeda Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285, 1300 (S.D. Fla. 2003) (emphasis added), *vacated in part on other grounds*, 416 F.3d 1242 (11th Cir.

2005), and encompass **“only the most heinous of crimes, such as murder and extermination, slavery, ethnic cleansing, and torture.”** *Id.* (emphasis added).

Thus, when it purported to determine that Lively’s political speech and conduct aided-and-abetted crimes against humanity, and unmistakably “constitute violations of international law” (S.J. Order at 1, 3, 24), the district court purported to put Lively on par with the most heinous mass-murders known to humankind. It defies all logic for SMUG to concede that being labeled “communist” or put on a “blacklist” imposes sufficient harm for appeal, yet contend that a judicial order purporting to equate Lively with Pol Pot, Mao Zedong or other genocidal killers visits only a “speculative” harm, unworthy of an appellate court’s time. If being judicially designated as a purveyor of genocide, ethnic cleansing and other monstrosities does not impose a sufficient harm to confer appellate standing, it is impossible to imagine what could ever suffice.

Lastly, even as it admits that the district court’s determinations were entered without jurisdiction, SMUG also admits that it and its counsel have publicly promised to use those *ultra vires* determinations to sue Lively around the globe, as detailed on pages 21-22 of Lively’s opening brief. Rather than tempering or retracting its promises of future litigation, SMUG merely claims in a footnote, without any support, that they “are insufficient.” (SMUG Br. at 18, n.7). Even without SMUG’s promises, the court’s determination that Lively committed crimes

against humanity would be more than sufficient for appellate jurisdiction. SMUG’s promises of future harm remove all doubt. *See e.g., Jarvis v. Nobel/Sysco Food Servs. Co.*, 985 F.2d 1419, 1425 (10th Cir. 1993) (prevailing party “has the requisite stake in this appeal,” because avoiding subsequent litigation “would substantially reduce [its] future litigation costs”).

III. THIS COURT HAS MERGER-RULE JURISDICTION OVER THE DISTRICT COURT’S DENIAL OF LIVELY’S MOTION TO DISMISS, AND SHOULD REVERSE IT BASED UPON SMUG’S CLEAR AND UNEQUIVOCAL ADMISSIONS, WHICH ARE BINDING UPON SMUG.

A. The Merger Rule Brings the Order Denying Lively’s Motion to Dismiss Squarely Before This Court.

SMUG acknowledges that the MTD Order “merge[s] in the final judgment,” but concludes that this precludes, rather than enables, this Court’s review. (SMUG Br. at 22-23). This is exactly the opposite of how the merger rule works. *See, e.g., United States ex rel. Booker v. Pfizer, Inc.*, 847 F.3d 52, 55 (1st Cir. 2017) (“it has been uniformly held that a notice of appeal that designates the final judgment encompasses not only that judgment, **but also all earlier interlocutory orders** that merge in the judgment”) (emphasis added) (reviewing earlier ruling on motion to dismiss along with final summary judgment); *In re SW Boston Hotel Venture, LLC*, 748 F.3d 393, 402 n.6 (1st Cir. 2014) (reviewing interlocutory order denying motion to dismiss along with final judgment).

B. SMUG is Bound by Its Unequivocal, End-of-Discovery Admissions Regarding Lively’s Lack of Domestic Conduct and Lack of Participation in Any Conspiracy, and Those Admissions Require Dismissal.

As demonstrated by Lively, SMUG – both corporately and through each one of its officers and directors who was deposed – unequivocally and repeatedly proclaimed complete lack of knowledge on most of the essential elements of SMUG’s claims, through **hundreds** of “I don’t know” responses at their depositions, **including at SMUG’s Rule 30(b)(6) deposition.** (Lively Br. at 10-15). SMUG now derides as “silly” the notion that it is bound by its lack of “**personal** knowledge.” (SMUG Br. at 7 n.5 and 25 n.12 (emphasis added)).

SMUG does not address the fact, and therefore waives argument, that it did not merely disclaim “personal knowledge” of any wrongdoing by Lively, but that, **with all discovery completed,** its Rule 30(b)(6) designee, prepared by SMUG to provide SMUG’s position on Lively’s conduct (domestic and international), fully disclaimed all **corporate** knowledge by SMUG as well. (Lively Br. at 10-15).

“The testimony provided by [SMUG’s] corporate representative at a Rule 30(b)(6) deposition binds [SMUG].” *Trustees of Boston Univ. v. Everlight Elecs. Co.*, No. 12-CV-11935-PBS, 2014 WL 5786492, at *3 (D. Mass. Sept. 24, 2014). “If [SMUG] states it has no knowledge or position as to a set of alleged facts or area of inquiry at a Rule 30(b)(6) deposition, **it cannot argue for a contrary position** at trial.” *United States v. Taylor*, 166 F.R.D. 356, 361-63 (M.D.N.C., 1996) (emphasis

added), *aff'd*, 166 F.R.D. 367 (M.D.N.C., 1996). “The attorney[s] for [SMUG] [are] not at liberty to manufacture [SMUG’s] contentions. Rather, [SMUG] may designate a person to speak on its behalf and it is this position which the attorney[s] must advocate.” *Taylor*, 166 F.R.D. at 361–62. *See also Ierardi v. Lorillard, Inc.*, No. CIV. A. 90-7049, 1991 WL 158911, at *2-3 (E.D. Pa. Aug. 13, 1991) (“If the designee testifies that [SMUG] does not know the answer to [Lively’s] questions, [SMUG] will not be allowed effectively to change its answer by introducing evidence during trial.”)²

Accordingly, “silly” or not, “[SMUG] is stuck with the record it has created.” *Aldridge v. Lake Cty. Sheriff’s Office*, No. 11 C 3041, 2012 WL 3023340, at *5 (N.D. Ill. July 24, 2012). SMUG’s unequivocal admission **at the end of discovery** that it **still** lacked **all** corporate (not just “personal”) knowledge of any action taken by Lively in the United States to persecute Ugandans (Lively Br. at 36-37) confirms that SMUG could not **and did not** allege in good faith, prior to discovery, sufficient domestic conduct in its Amended Complaint to overcome the extraterritorial bar. The district court was without jurisdiction *ab initio*, and the MTD Order should be vacated.

² Numerous additional authorities and examples of litigants who were bound by their corporate “I don’t know” responses are provided in Lively’s Reply in Support of Motion for Summary Judgment, dkt. 305, pp. 6-30.

IV. “OBVIOUSLY,” THIS COURT HAS JURISDICTION TO REVIEW THE DISTRICT COURT’S REFUSAL TO DISMISS SMUG’S STATE LAW CLAIMS WITH PREJUDICE, AND SHOULD REVERSE BASED UPON THE FULL RECORD AND SMUG’S UNEQUIVOCAL ADMISSIONS.

A. This Court Has “Obvious” Jurisdiction to Convert Dismissals Without Prejudice into Dismissals with Prejudice.

SMUG claims that Lively has cited “no law supporting [the district court’s refusal to dismiss its state claims with prejudice] as a cognizable injury sufficient to confer standing” for appeal. (SMUG Br. at 29). SMUG has overlooked page 39 of Lively’s Brief, where Lively cites, *inter alia*, *Corujo v. Eurobank*, 299 F. App’x 1, 1 (1st Cir. 2008) (reviewing appeal of prevailing party wishing to convert dismissal without prejudice into dismissal with prejudice), and 15A Fed. Prac. & Proc. Juris. § 3914.6 (2d ed. 2002) (collecting numerous cases for the proposition that “**obviously**, a defendant **must** be allowed to appeal a dismissal without prejudice in order to argue that the dismissal should have been with prejudice.” (emphasis added)). *See also*, *Jarvis*, 985 F.2d at 1424–25 (appellate jurisdiction exists to convert dismissals without prejudice into dismissals with prejudice because “a successful appeal...would eliminate any possible re-filing...in state court).

B. Lively Is Not Judicially Estopped from Seeking Dismissal with Prejudice of SMUG’s State Claims.

SMUG’s argument that Lively is judicially estopped from seeking dismissal with prejudice of its state claims (SMUG Br. 25-30), fails for three independent reasons.

First, SMUG grossly misrepresents the record when it claims that Lively did not seek dismissal with prejudice below, and seeks it here “for the first time.” (SMUG Br. at 12). At summary judgment, Lively sought dismissal with prejudice **on the merits** of SMUG’s state claims, briefing the **merits** extensively (Mot. S.J. “MSJ,” dkt. 248, p.1; MSJ Memo, dkt. 257, pp.165-170, 173-75; MSJ Reply Memo., dkt. 305, pp.125-136). It is axiomatic that Lively’s decision to present an **alternative** jurisdictional argument did not waive his request for a merits dismissal. *See, e.g., Jarvis*, 985 F.2d at 1421-22, 1424-25 (following jurisdictional dismissal without prejudice of state claim, prevailing defendant who had alternatively sought both, merits and jurisdictional dismissal, was not precluded from appealing jurisdictional dismissal without prejudice to convert it into merits dismissal with prejudice).

Second, Lively could not waive, through estoppel or otherwise, the court’s diversity subject-matter jurisdiction, because “[s]ubject-matter jurisdiction can **never** be waived or forfeited.” *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012) (“courts are obligated to consider *sua sponte* issues [of subject-matter jurisdiction] that the parties have disclaimed or have not presented”). The Supreme Court has made it clear that diversity jurisdiction is mandatory and cannot be relinquished. *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 356 (1988) (“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, whether by a remand **or by a**

dismissal.” (emphasis added)). This Court likewise has made clear that, even when “the parties fail[] to note the less-than-precise nature of the pleadings as to the establishment of the required diversity of citizenship, **we of course have the obligation to consider such subject matter jurisdictional issues sua sponte.**” *Leon v. Municipality of San Juan*, 320 F.3d 69, 70 (1st Cir. 2003) (emphasis added) (confirming that diversity jurisdiction exists and deciding state claims). This Court has reversed for abuse of discretion district courts’ refusal to exercise diversity jurisdiction when properly invoked by the parties, because of their “**virtually unflagging obligation** to exercise their lawful jurisdiction and resolve the matters properly before them.” *Nazario-Lugo v. Caribevision Holdings, Inc.*, 670 F.3d 109, 113-14, 119 (1st Cir. 2012) (emphasis added).

SMUG’s heavy reliance on *D’Amico v. Compass Group, USA, Inc.*, 52 F. App’x 524, 527 (1st Cir. 2002), is badly misplaced. (SMUG Br. at 26-27). The purported waiver of diversity jurisdiction there was rooted in **plaintiff’s** failure to properly invoke, develop and alert the district court as to that jurisdiction. *Id.* at *2-3. In sharp contrast, SMUG repeatedly invoked the court’s diversity jurisdiction and the court repeatedly acknowledged that fact. (Lively Br. at 40). In any event, to the extent *D’Amico* purports to hold that diversity jurisdiction can be waived, or that courts can refuse to decide diversity jurisdiction claims, (1) *D’Amico* is unpublished and therefore of no precedential value; (2) *D’Amico* has never been cited by any

court for this erroneous proposition; (3) *D'Amico* flatly contradicts the Supreme Court's earlier pronouncement in *Carnegie-Mellon*; and (4) *D'Amico* has been overruled by this Court's subsequent holdings in *Leon* and *Nazario-Lugo*.

Third, even if waiver by estoppel were possible, SMUG acknowledges that it could not take place absent Lively's "succeed[ing] in persuading [the] court to accept [his] prior position," relying on *Alternative Sys. Concepts, Inc. v. Synopsys, Inc.*, 374 F.3d 23, 33 (1st Cir. 2004), a case **not** involving waiver of subject matter jurisdiction. (SMUG Br. at 30). *See also, Gens v. Resolution Tr. Corp.*, 112 F.3d 569, 572-73 (1st Cir. 1997) (rejecting estoppel argument because lower court did not accept party's position). Here, Lively's **sole** argument against diversity jurisdiction was that SMUG had perpetrated a fraud on the court by pleading in bad faith damages in excess of \$75,000, while knowing it suffered no damages. (Lively Br. at 41-42). **The court never accepted this argument, and never concluded that diversity jurisdiction was absent, for any reason, let alone fraud.** Instead, the court simply dismissed the state claims without ever considering its mandatory, diversity jurisdiction. Since the court never accepted Lively's argument that SMUG defrauded it, and since the court never concluded that it lacked diversity jurisdiction, there is no "specter or inconsistent determinations" were this Court to exercise mandatory diversity jurisdiction and dispose of SMUG's state claims. *Alternative Systems*, 374 F.3d at 33.

C. The District Court Erred in Refusing to Dismiss SMUG’s State Claims with Prejudice.

1. SMUG’s State Claims Are Time-Barred.

SMUG’s state claims are time-barred because they were filed more than three years after the allegedly persecutory acts. (Lively Br. at 47-49.) SMUG’s binding admissions (*supra* § III.B) that (1) SMUG knew all about Lively’s visiting and speaking in Uganda in 2002, when SMUG claims the alleged conspiracy was hatched, and (2) SMUG believed it was being persecuted and harmed by Lively upon hearing his speeches, **and considered suing him**, prior to March 7, 2009, dictate that SMUG’s **claims accrued by March 7, 2009, at the latest**, if not years before, making SMUG’s March 14, 2012 filing out of time. (*Id.*)

The Court should reject SMUG’s imaginary, nonsensical accrual standard, pegging accrual when a plaintiff fully investigates and establishes all “the requirements of a legal claim.” (SMUG Br. at 37–38). Completing such an investigation is what the limitations period and post-filing discovery are for, not the event that starts the limitations clock. *See Catrone v. Thoroughbred Racing Associations of N. Am., Inc.*, 929 F.2d 881, 886–87 (1st Cir. 1991). As this Court has recognized, the “limitations period commences **at [the] time of initial injury**, not at a later date when plaintiff learned the full extent of his injuries.” *Price v. Shawmut Bank N.A.*, 39 F.3d 1166, at *2 (1st Cir. 1994) (emphasis added) (unpublished).

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

SMUG has no knowledge of conduct by Lively which is not protected speech. (Lively Br. at 49–55.) Neither SMUG's negligence claim, nor its civil conspiracy claim, survives the First Amendment.

SMUG's negligence claim is defunct. The Supreme Court has repeatedly held that "speech on public issues occupies the highest rung of the hierarchy of First Amendment values." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011). 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). 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).

Nor may speech be regulated based upon "listeners' reaction." *Forysth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 134 (1992). "Speech is powerful. It can stir people to action...and...inflict great pain. [But] we cannot react to that pain by punishing the speaker." *Snyder*, 562 U.S. at 460–61. As this Court recognized, "Throughout our decisions there has recurred a distinction between the statement of an idea which may prompt its hearers to take unlawful action, and advocacy that such action be taken. **Every idea is an incitement.**" *United States v. Spock*, 416 F.2d 165, 170 n.11 (1st Cir. 1969) (emphasis added).

SMUG’s negligence claim depends on the unsupportable proposition that Massachusetts law imposes a duty not to create “a virulently hostile environment” through speech. (Am. Compl., ¶258, App’x 100.) Even if Massachusetts recognized such a cause of action, the First Amendment precludes it.

SMUG’s civil conspiracy claim likewise fails under the First Amendment and this Court’s decision in *Spock*, requiring the application of *strictissimi juris* to conspiracy-type claims which are “in the shadow of the First Amendment.” 416 F.2d at 172-73. SMUG tries to bury *Spock* under piles of formulaic recitations of conspiracy elements (SMUG Br. at 39–46), ignoring *Spock*’s admonition that “[t]he **metastatic rules of ordinary conspiracy are at direct variance with the principle of *strictissimi juris*.**” *Id.* at 173 (emphasis added).

Where alleged illegal group activity is centered around speech, and involves any legal purposes and means, a member of the group must not stand trial for the illegal purposes and acts of other members without clear evidence of specific intent to **personally** engage in illegality. *Id.* at 172-73. And, “[t]he **specific intent of one defendant in a case such as this is not ascertained by reference to the conduct or statements of another even though he has knowledge thereof.**” *Id.* at 172–173 (emphasis added). Even “vigorous” speech is protected where “the natural consequences might...lead to unlawful action,” *id.* at 170, and even a defendant’s knowledge of other group members’ illegal purposes is not enough to remove the

protection. *Id.* at 178-79. Thus, in the absence of substantial evidence of either unambiguous statements or clear conduct showing the specific intent to **personally** participate in illegality, there can be no liability of a defendant for the illegal acts of others. *Id.* at 173, 179.

This case is governed by *Spock*.³ The record shows numerous legal purposes for all the Ugandan group activity in which Lively was involved. (Lively’s Stmt. Material Facts (“MF”), dkt. 257, ¶¶10-20, 47-72 (showing numerous speaking engagements, including with other speakers not considered “co-conspirators,” involving expression of religious viewpoints).) Thus, the record evidence forecloses dispute as to the legal purposes of any association involving Lively, making it, at worst, “bifarious” and “within the shadow of the First Amendment” under *Spock*. Accordingly, any alleged illegal intent of Lively must be determined *strictissimi juris*, requiring evidence that Lively **personally** agreed to employ illegal means of persecution, **meaning the 14 persecutory acts set forth in SMUG’s Amended Complaint.** (Lively Br. at 7-8).

³ *Spock’s strictissimi juris* rule applies to any alleged “bifarious” conspiracy implicating the First Amendment, not only to the inchoate crime of conspiracy as supposed by SMUG. (SMUG Br. at 45.) See *United States v. Dellinger*, 472 F.2d 340, 392–93 (7th Cir. 1972) (applying *Spock* to acts that “occurred **in the context of a group undertaking with legal. . .and allegedly illegal (violent) branches.**” (emphasis added)).

SMUG has admitted that it has no knowledge—corporate, personal, or any other kind—of any unambiguous statement or clear conduct **by Lively** evidencing his personal agreement to the illegal means involved **in any of the fourteen alleged acts of persecution**. (Lively Br. at 7-15). These unequivocal admissions are binding on SMUG. (*Supra* § III.B). The only one of the alleged acts Lively even had knowledge of was the “Anti-Homosexuality Bill,” (“AHB”) which he did not draft and did not agree with, and which he tried constantly and consistently to moderate. (Lively Decl., dkt. 257-1, ¶¶ 28-32.) In any event, no one was ever charged or punished under the enacted version of the AHB. (MF, ¶¶ 95, 113.) This complete absence of evidence of specific illegal intent is fatal to SMUG’s claims.

3. SMUG’s State Law Claims are Barred by SMUG’s Failure to Prove any Damages.

Stripping away its inapposite authorities, SMUG’s damages claims boil down to two unsupportable positions. Because SMUG is wrong about both, this Court should order dismissal of SMUG’s state claims, with prejudice, for complete failure of proof on the essential element of damages. (Lively Br. at 56; MSJ Reply Memo., dkt. 305, at 115–16).

The first unsupportable position is that SMUG’s failure to prove damages with an expert, after **swearing that an expert calculation is required**, can be cured by producing a spreadsheet claiming as damages every Ugandan schilling SMUG spent from 2007 to 2014, including all rent and gardening expenses. (SMUG Br. at 49-50;

Lively Br. at 55-56; MSJ Reply Memo., dkt. 305, at 93–98.) The second is that SMUG can bring non-economic damages to a jury without adducing **any evidence** whatsoever, or disclosing **any computation** in discovery. (SMUG Br. at 47–49; MSJ Reply Memo., dkt. 305, at 98–115.) SMUG is precluded from recovering non-economic damages because SMUG is a corporate entity and abandoned any recovery on behalf of individual persons; because SMUG failed to substantiate any goodwill or reputational losses with an expert, and its own witnesses’ testimony forecloses the possibility of any; because SMUG cannot meet the exacting First Amendment standard of *New York Times v. Sullivan* for goodwill or reputational damages; and because SMUG’s economic damages failing forecloses punitive and exemplary damages. (MSJ Reply Memo., dkt. 305, at 98–115.)

V. NO REMAND IS NECESSARY IN LIGHT OF THE FULL RECORD AND SMUG’S UNEQUIVOCAL ADMISSIONS, BUT IF THIS COURT DOES REMAND, IT SHOULD ORDER RE-ASSIGNMENT TO A DIFFERENT JUDGE.

A. This Court Has All That It Needs to Dispose of SMUG’s Defunct State Claims.

“The validity *vel non* of a summary judgment entails a pure question of law and, therefore, [this Court is] fully equipped to resolve the question as a matter of first-instance appellate review.” *In re Varrasso*, 37 F.3d 760, 763 (1st Cir. 1994); *see also Piccicuto v. Dwyer*, 39 F.3d 37, 40 (1st Cir. 1994) (remand for reconsideration of summary judgment order “would serve no useful purpose”). The

record is fully developed. (Lively Br. at 9 (“40,000 pages of documents...100 hours of depositions...5,000 pages of summary judgment papers...5 and ½ year span”). **No live testimony was taken below**, so no deference is owed to any credibility determinations. The law, SMUG’s admissions, and the absence of critical evidence for SMUG’s claims are clear. Thus, this Court is fully equipped to properly dispose of SMUG’s defunct state claims. It “would serve no useful purpose” to remand the state claims to the district court for reconsideration.

B. If this Court does Remand, It Should Order Re-Assignment to a Different Judge.

The district judge’s numerous and personal epithets against Lively in the S.J. Order are detailed in Lively’s opening brief (Lively Br. at 4–5, 16.) Though perhaps not sufficient by themselves to require reassignment,

the appellate courts will nevertheless order reassignment of a case upon remand **where necessary to preserve the appearance of fairness**. A three-stage inquiry is used to determine whether such reassignment is advisable:

- (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected,
- (2) whether reassignment is advisable to preserve the appearance of justice, and
- (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

Maldonado Santiago v. Velazquez Garcia, 821 F.2d 822, 832 (1st Cir. 1987).

The firmness with which the court disparaged Lively, and adjudicated him **the enemy of mankind**, provide an emphatic “no” on the first factor. *Id.* at 832. The court’s strident “flout[ing] of the dictates of Article III,” *Pacific Lumber Co.*, 257 F.3d at 1077, to make the *ultra vires* determinations satisfy the second. On the third, there is no trial to repeat, “and the questions remaining are confined to some relatively narrow issues of liability” *Maldonado*, 821 F.2d at 833. Thus, to preserve the appearance of fairness and justice, and the public integrity of any further proceedings, any remand should be assigned to a different judge. *See Black Rock*, 637 F. App’x at 489 (ordering reformation of extra-jurisdictional order, and re-assigning case, because district judge aggressively exercised jurisdiction over clearly moot controversy and “excoriated and mocked counsel.”).

CONCLUSION

This Court should (1) vacate for lack of jurisdiction the MTD Order; (2) reform the S.J. Order to purge the extra-jurisdictional determinations; (3) require dismissal with prejudice of SMUG's state claims; and (4) if remanding, re-assign this matter to another judge.

Respectfully submitted,

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Dated: May 16, 2018

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I hereby certify that on this 16th day of May, 2018, 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
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