

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS  
SPRINGFIELD DIVISION**

<b>SEXUAL MINORITIES UGANDA</b>	)	
	)	
<i>Plaintiff,</i>	)	
	)	
v.	)	
	)	<b>Civil Action</b>
<b>SCOTT LIVELY, individually and as President of Abiding Truth Ministries,</b>	)	<b>3:12-CV-30051-MAP</b>
	)	
<i>Defendant.</i>	)	
	)	

**PLAINTIFF’S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR A  
PROTECTIVE ORDER LIMITING THE DEPOSITION OF SAM GANAFA  
AND FOR EXPEDITED CONSIDERATION**

Plaintiff Sexual Minorities Uganda (“SMUG” or “Plaintiff”) respectfully submits this memorandum of law in support of its motion for a protective order pursuant to Fed. R. Civ. P. 26(c) permitting that the deposition of SMUG’s board member Sam Ganafa, residing in Uganda, be taken by video-conference and limited to the events at issue in this litigation for which he has unique, first-hand knowledge. Plaintiff further requests expedited consideration of this motion given that Defendant provided notice that he plans to take Mr. Ganafa’s deposition on June 19, 2015.

Upon a showing of good cause, the Court “may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, undue burden or expense.” Fed. R. Civ. P. 26(c). Defendant refuses to take a deposition by video-conference of Mr. Ganafa, who is a member of SMUG’s board residing in Uganda and has little unique, first-

hand knowledge of the events at issue in this case or SMUG's day-to-day operations. SMUG is already making available for in-person depositions, including a Rule 30(b)(6) deposition, three of its highest-ranking officers with the most knowledge of the facts relevant to this case and incurring the costs of their travel to the United States. Given the time and expenses SMUG and Mr. Ganafa would incur to make him available in the United States on less than one month's notice, both would suffer undue hardship to comply with Defendant's request for an in-person deposition. Depositions by video-conference are routinely permitted by courts and would not prejudice Defendant.

### **Background**

In their Joint Discovery Plan, filed with the Court on November 1, 2013, the parties agreed that the depositions of Defendant and certain representatives of Plaintiff (based in Uganda) would take place in the U.S. *See* dkt. 78. With respect to other witnesses residing abroad, the parties agreed that they "will use reasonable efforts to arrange for depositions of witnesses residing abroad to be scheduled proximate in time or by video conference to minimize the trips that counsel must make outside the United States" and that "[a] party desiring to take deposition or other discovery in a foreign country shall provide the other party with notice of its intent at least 60 days in advance, so that both parties may jointly schedule all of their discovery in that country at the same time." *Id.* at (e).

On August 18, 2014, counsel for Defendant sent Plaintiff's counsel an email indicating that Defendant would like to depose several of SMUG's staff members as identified in SMUG's Rule 26(a) disclosures, including Frank Mugisha, Pepe Onziema, and Richard Lusimbo, as well as a representative of SMUG pursuant to Fed. R. Civ. P. 30(b)(6) "re: claims in this lawsuit, discovery responses and document production." Declaration of Gina Spiegelman dated June 12,

2015 (“Spiegelman Decl.”), Ex. A. Defendant made no mention of wishing to depose Mr. Ganafa or any member of SMUG’s board. Following several extensions on the deadline for fact discovery granted by the Court (*see* dkts. 125, 131, 136), on May 5, 2015, Defendant indicated for the first time that he would also like to depose Mr. Ganafa. *Id.* Ex. B.

Shortly thereafter, on May 14, 2015, Plaintiff’s counsel explained to counsel for Defendant that a deposition of SMUG board member Sam Ganafa is unnecessary because Plaintiff does not intend to rely on his testimony in this case and Mr. Ganafa has limited personal knowledge of the issues in this litigation. *See* Spiegelman Decl. ¶ 4.

On May 21, Defendant sent a formal notice for the depositions of SMUG’s representatives, indicating that he would like to take Mr. Ganafa’s deposition on June 19, 2015. Spiegelman Decl. Ex. C. While Plaintiff agreed to bring to the U.S. for depositions three of its staff with the greatest personal knowledge of the events at issue in this litigation, one of whom could provide testimony on behalf of the organization, Plaintiff objected to bringing Mr. Ganafa to the U.S. for a deposition given his limited knowledge of the events alleged and of Plaintiff’s day-to-day operations, as well as Defendant’s late notice of Mr. Ganafa’s deposition. Plaintiff suggested that instead Defendant conduct Mr. Ganafa’s deposition by telephone or video-conference. Spiegelman Decl. Ex. D. Defendant rejected this proposal and countered that if Plaintiff did not make Mr. Ganafa available in the U.S. for a deposition, Plaintiff would have to take Defendant’s deposition by telephone or pay for Defendant’s counsel to travel to Uganda in approximately one week’s time to take Mr. Ganafa’s deposition. *Id.*

Fact discovery is set to close on June 30, 2015. *See* dkt. 135.

Unable to reach an agreement on this issue, Plaintiff filed the present motion.

## Argument

### A. As a Mere Corporate Officer, Mr. Ganafa Has Little Unique, Personal Knowledge of Facts Relevant to this Action

The Court has discretion to limit discovery and impose restrictions where the discovery sought “is obtainable from some other source that is more convenient, less burdensome, or less expensive.” Fed. R. Civ. P. 26(b)(1). When determining whether to allow a deposition of a high-ranking corporate officer or director, “courts often consider: (1) whether or not the high-level deponent has unique first-hand, non-repetitive knowledge of the facts at issue in the case and (2) whether the party seeking the deposition has exhausted other less intrusive discovery methods, such as interrogatories and depositions of lower level employees.” *WebSideStory, Inc. v. NetRatings, Inc.*, Civil No. 06cv408 WQH(AJB), 2007 WL 1120567, at \*2 (S.D. Cal. Apr. 6, 2007).<sup>1</sup> See also *Roman v. Cumberland Ins. Group*, Civil Action No. 07-CV-1201, 2007 WL 4893479, at \*1 (E.D. Pa. Oct. 26, 2007) (“Courts throughout the country have prohibited the deposing of corporate executives who have no direct knowledge of a plaintiff’s claim when other employees with superior knowledge are available testify.” (collecting cases)). “If it appears unlikely that [a high-ranking corporate officer or director] has percipient knowledge of material facts, or if there are other witnesses who could testify to the those [*sic*] facts from a similar vantage point, there is more reason to question whether the deposition is being sought for abusive rather than appropriate fact-finding purposes.” *In re Transpacific Passenger Air Transportation Antitrust Litigation*, No. C-07-05634 CRB (DMR), 2014 WL 939287, at \*3 (N.D. Cal. Mar. 6, 2014).

While Mr. Ganafa is a member of SMUG’s board and Executive Director of one of

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<sup>1</sup> The “high-ranking” or “apex” designation is conferred on witnesses based on the witness’s role in the organization, regardless of whether the witness “possess[es] the celebrity status of apex deponents in other cases.” *WebSideStory*, 2007 WL 1120567, at \*3.

SMUG's member organizations, Spectrum Initiative Uganda ("Spectrum"), he does not have personal knowledge of most of the events alleged in this case, *see* Declaration of Sam Ganafa, dated June 14, 2015, ("Ganafa Decl.") ¶ 3, and much of his knowledge is duplicative of that of other SMUG officers already testifying in this matter. As a member of Plaintiff's board, Mr. Ganafa has "no role in, or direct, personal knowledge of, Plaintiff's day-to-day operations." *Id.* ¶ 2. Any information Defendant seeks about SMUG's operations can be learned from SMUG's officers and its Rule 30(b)(6) witness already being deposed in person in this case. *See Cantor v. Equitable Life Assur. Society of U.S.*, No. CIV.A. 97-5711, 1998 WL 544962, at \*2 (E.D. Pa. Aug. 27, 1998) (finding a deposition would "constitute annoyance and harassment, and would be unduly burdensome" where plaintiff had already deposed corporate employees with greatest knowledge of the events and provided no evidence that the higher-ranking corporate officer it wished to depose was involved in the events at issue).

Mr. Ganafa was not identified in either party's initial disclosures as a witness with relevant information. Of the over 25,000 pages of documents Plaintiff produced in this litigation, Mr. Ganafa makes a sparse appearance, and nowhere does his appearance suggest he has direct, personal knowledge of the events at issue in this case. In response to Defendant's interrogatory seeking all witnesses to the acts of persecution Plaintiff alleges in this case, Mr. Ganafa is listed as a witness for only one event, the 'outings' of lesbian, gay, bisexual, transgender, or intersex ("LGBTI") activists in the media following the filing of SMUG's Amended Complaint. This event comprises a February 24, 2013 issue of the Ugandan tabloid *Red Pepper*, which published the headline *BUSTED- HOW GAYS OPERATE IN UGANDA* and alleged that Spectrum was a recruiting agency for homosexuals in Uganda and identified some of Spectrum's staff, forcing it to move offices for its safety, as well as a February 25, 2014 issue of

*Red Pepper*, published the day after the Anti-Homosexuality Act was signed into law, with the headline *EXPOSED! Uganda's 200 Top Homos Named* and featuring on the front-page a photo of Mr. Ganafa. See Ganafa Decl. ¶ 3. Both tabloid issues also outed SMUG's management, including those officers who will be deposed in person in this litigation. Since SMUG officers have personal knowledge of these events, SMUG explained to Defendant through counsel that it is not planning to rely on Mr. Ganafa's testimony in this case. SMUG simply listed Mr. Ganafa as a witness to these events because he and the organization he directs were featured in these media outings.

**B. Requiring Mr. Ganafa to Travel for a Deposition from Uganda, Where Video-Conferencing Is Available, Imposes an Undue Hardship**

Having to testify at an in-person deposition in the United States would cause Mr. Ganafa substantial hardship. Mr. Ganafa resides in Uganda and has a full-time job that has no relation to SMUG or Spectrum. Ganafa Decl. ¶ 4. Traveling to the U.S. would require Mr. Ganafa to take at least one week off of work, given the time it takes to fly from Uganda to the United States, to recover from the trip, to sit for a deposition, and to fly back. *Id.* ¶ 5. The Court has authority to “exercise[e] greater control over discovery directed to foreign litigants.” *Cotracom Commodity Trading Co. v. Seaboard Corp.*, No. CIV.A. 97-2391-GTV, 2000 WL 796142, at \*3 (D. Kan. June 14, 2000) (citing *Societe Nationale Industrielle Aerospatiale v. United States District Court for Southern District of Iowa*, 482 U.S. 522 (1987)) (finding it unreasonable to permit “international depositions of individuals who profess no knowledge of the limited matters subject to discovery”).

At the same time, SMUG is already paying for three of its highest-ranking officers to travel to the United States to sit for individual depositions and a Rule 30(b)(6) deposition; adding in costs for Mr. Ganafa's travel at this late stage in discovery would be unduly burdensome for

SMUG. While Defendant's counsel offered to take his deposition in Uganda in a week's time provided Plaintiff pays for their expenses, the parties' joint discovery plan expressly stated the parties agreed that they "will use reasonable efforts to arrange for depositions of witnesses residing abroad to be scheduled proximate in time or by video conference to minimize the trips that counsel must make outside the United States," and that "[a] party desiring to take deposition or other discovery in a foreign country shall provide the other party with notice of its intent at least 60 days in advance, so that both parties may jointly schedule all of their discovery in that country at the same time." Dkt. 78 at (e). Defendant only first indicated to Plaintiff his intent to notice Mr. Ganafa's deposition less than two months before the end of fact discovery and did not serve a formal notice of Mr. Ganafa's deposition until less than one month before the date he desired to conduct it.

**C. Conducting Mr. Ganafa's Deposition by Video-Conference, Routinely Permitted by Courts, Would Not Produce Substantial Prejudice to Defendant**

Under the Federal Rules, the court may order that a deposition be taken by telephone or other remote means. Fed. R. Civ. P. 30(b)(4). *See also* Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2112 (3d ed. 2009). "[P]arties routinely conduct depositions via videoconference, and courts encourage the same, because doing so minimizes travel costs." *Forauer v. Vermont Country Store, Inc.*, No. 5:12-cv-276, 2014 WL 2612044, at \*7 (D. Vt. June 11, 2014) (quoting *Gee v. Suntrust Morg., Inc.*, 2011 WL 5597124, at \*2 (N.D. Cal. Nov. 15, 2011)). *See also, e.g., ClearOne Communications, Inc. v. Chiang*, 276 F.R.D. 402, 405 (D. Mass. 2011) (permitting deposition by video-conference where party was to be absent from the country); *Tower Mfg. Corp. v. Shanghai ELE Mfg. Corp.*, 244 F.R.D. 125, 127 (D.R.I. Aug. 10, 2007) (permitting deposition of party's 30(b)(6) witness, residing in China, to be conducted by video-conference); *Planadeball v. Wyndham Vacation Ownership*, Civil No.

12-1485 (JAG), 2013 WL 864612, at \*3 (D.P.R. Mar. 7, 2013) (ordering that deposition of party's 30(b)(6) witness take place at the site of the corporation's principal place of business or by video-conference).<sup>2</sup> Video depositions are particularly not unusual in litigations brought under the Alien Tort Statute, where plaintiffs often reside abroad. *See Adhikari v. Daoud & Partners*, Case no. 4:09-cv-01237, Order, Dkt. 470, (S.D. Tx. Jan. 31, 2013) (denying defendants motion to compel depositions in Houston for plaintiffs in Nepal). *See also Bowoto v. Chevron Corp.*, Case No. C 99-2506, Letter Br., Dkt. 2006 (N.D. Cal. Oct. 16, 2008) (in case where violations occurred in Nigeria, "both plaintiffs and defendants videotaped several depositions"); *Quinteros v. Dyncorp*, 1:07-cv-01042-RWR, Minute Order (D.D.C. June 8, 2009) (permitting video depositions of witnesses in Ecuador).

Because Mr. Ganafa resides in Uganda and can provide little in the way of unique, first-hand knowledge of the facts in this case, a deposition by video-conference would help avoid "undue hardship." *Palma v. Safe Hurricane Shutters, Inc.*, 07-22913-CIV-HUCK/SIMONTON, 2009 U.S. Dist. LEXIS 22704, at \*10-14 (S.D. Fla. Mar. 12, 2009) (permitting plaintiffs to be deposed telephonically because they had moved out of the district to find employment and travel to the district would subject them to undue expense). At the same time, Defendant has not provided to Plaintiff any "compelling reason" why Mr. Ganafa's deposition must take place in person. *Forauer*, 2014 WL 2612044, at \*7 (citing *Geer v. Challenge Fin. Investors Corp.*, 2007 WL 1341774, at \*4-5 (D. Kan. May 4, 2007)). Nor can he. Video-conferencing would permit

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<sup>2</sup> While *Clearone, Tower*, and *Planadeball* address the depositions of defendant's corporate agents, Plaintiff no more chose the forum for this litigation than Defendant did, given that Defendant resides in Springfield, Massachusetts and is not within the jurisdiction of courts in Uganda, where Plaintiff suffered the harms resulting from Defendant's conduct. *See Forauer*, 2014 WL 2612044, at \*6 ("While VCS is correct to point out that Plaintiffs have voluntarily opted in to a lawsuit in the District of Vermont, they 'did not choose the forum; the forum was chosen for them' because it is in the District of Vermont where Plaintiffs' cause of action arises." (internal citation omitted)).

Defendant's counsel to assess Mr. Ganafa's demeanor and credibility just as an in-person deposition would. *See Morangelli v. Chemed Corp.*, 10 Civ. 0876 (BMC), 2010 U.S. Dist. LEXIS 139138 (E.D.N.Y. Nov. 10, 2010) ("The marginal difference between a live deposition and a video deposition in defendants' ability to judge the credibility of each witness is too insubstantial to warrant the enormous expense of flying lawyers or witnesses all over the country."). *See also Goldenson v. Steffens*, No. 2:10-cv-00440-JAW, 2014 WL 3105367, at\* (D. Me. July 7, 2014) ("Videoconference testimony can be extremely effective."); *Thornton v. Snyder*, 428 F.3d 690, 698-99 (7th Cir. 2005) (finding appropriate safeguards for video testimony where the jury was "able to see and hear" the testifying witness); *United States v. Cabrera-Ruiz*, CR. NO. C-09-8, 2009 U.S. Dist. LEXIS 25923, \*7 (S.D. Texas Mar. 27, 2009) ("The sentencing court can make credibility findings based upon video depositions."); *Neidhardt v. D.H. Holmes Co.*, 21 Fair Empl. Prac. Cas. (BNA) 452, 38 (E.D. La. 1979) (determining that the witness was "forthright, candid, clear, and convincing" by viewing his video deposition). Prejudice is particularly protected against here where Plaintiff is already producing for in-person depositions three of its most knowledgeable witnesses and a corporate representative to provide Rule 30(b)(6) testimony.

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Because of the hardship, and because of his limited knowledge, it would be unreasonable to require Mr. Ganafa to travel 7,000 miles for a costly live deposition in the United States. The Court should grant a protective order, consistent with the law governing depositions of high-ranking corporate directors, *see infra*, limiting Mr. Ganafa's deposition to one taken by video conference and to the limited, non-duplicative subjects over which he has personal knowledge, namely his knowledge of SMUG's operations as a board member and the media outings in

February 2013 and February 2014. *See In re Transpacific Passenger Air*, 2014 WL 939287, at \*5-6 (permitting deposition of CEO “for no longer than two hours on the subjects discussed at the hearing [deciding this issue]”). *See also The Apple iPod iTunes Antitrust Litigation*, No. C05–00037 JW (HRL), 2011 WL 976942, at \*3 (N.D. Cal. Mar. 21, 2011); *WebSideStory*, 2007 WL 1120567, at \*5.

### Conclusion

For the foregoing reasons, Plaintiff respectfully requests that its Motion For A Protective Order Limiting The Deposition Of Sam Ganafa And For Expedited Consideration Be Granted.

Dated: June 15, 2015

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