

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

**DEFENDANT SCOTT LIVELY’S MEMORANDUM IN SUPPORT OF
MOTION TO COMPEL PLAINTIFF TO PRODUCE UNREDACTED DOCUMENTS
AND FOR EXPEDITED CONSIDERATION**

Defendant, Scott Lively (“Lively”), pursuant to Rules 34 and 37, Federal Rules of Civil Procedure, and Local Rules 7.1 and 37.1, files this memorandum in support of his Motion to Compel Plaintiff to Produce Unredacted Documents and for Expedited Consideration (the “Motion to Compel”), filed contemporaneously herewith.

PRELIMINARY STATEMENT

Plaintiff, Sexual Minorities Uganda, is referred to herein as “SMUG” or “Plaintiff.” Defendant, Scott Lively, is referred to herein as “Lively” or “Defendant.” This Court’s Order Regarding Confidentiality of Certain Discovery Material (Dkt. No. 106) is referred to herein as the “Confidentiality Order.” Other capitalized terms not defined herein have the same meaning as ascribed to them in the Motion to Compel in support of which this memorandum is filed.

Lively’s compliance with the discovery conference obligations of Local Rule 37.1 is detailed in paragraphs 5-9 of the Motion to Compel, which are incorporated herein by reference.

The remaining issues to be resolved by the Court are likewise stated in paragraph 10 of the Motion to Compel, which is incorporated herein by reference, and such issues are argued below.

ARGUMENT

I. SMUG’S REDACTIONS OF CONFIDENTIAL INFORMATION FROM RESPONSIVE DOCUMENTS VIOLATE THE CONFIDENTIALITY ORDER.

To the extent SMUG’s redaction category labeled “personal” is intended to denote a subset of Confidential Discovery Material (as defined in the Confidentiality Order), SMUG’s redactions violate the Confidentiality Order, which expressly provides, “**no party may withhold materials or decline to answer questions based solely on a claim that the material sought is Confidential Discovery Material.**” (Confidentiality Order ¶ 11(a) (emphasis added).) Accordingly, the Court should order SMUG to produce unredacted versions of all documents previously produced with redactions of “personal” information intending to denote Confidential Discovery Material.¹

II. SMUG’S REDACTIONS OF PURPORTEDLY “NON-RESPONSIVE” OR IRRELEVANT INFORMATION FROM OTHERWISE RESPONSIVE DOCUMENTS VIOLATE RULE 34.

A. SMUG’s unilateral redactions have no support in the Federal Rules.

“**[A] party may not redact non-responsive portions from a document that is otherwise responsive.**” *HR Tech., Inc. v. Imura Int’l U.S.A., Inc.*, No. 08-2220-JWL, 2011 WL 836734, *3 (D. Kan. Mar. 4, 2011) (emphasis added) (ordering production of unredacted copies of documents previously produced in redacted form). “**The practice of redacting for nonresponsiveness or irrelevance finds no explicit support in the Federal Rules of Civil Procedure**” *Burris v.*

¹ Examples of redactions of “personal” information are included in composite Exhibit C to the Motion to Compel. (Mot. Compel, Ex. C, SMUG009668 (and attachment SMUG009698), SMUG009744, SMUG0020147, SMUG0020357.)

Versa Prod., Inc., No. 07-3938(JRT/JJK), 2013 WL 608742, *3 (D. Minn. Feb. 19, 2013) (emphasis added) (granting motion to compel removal of redactions).

Among the **thousands of redactions** pervading SMUG's production, SMUG has redacted information labeled "non-responsive." (Mot. Compel ¶ 4, Ex. C.) Subsequently, SMUG purported to re-categorize some of its "non-responsive" redactions as redactions based on a previously asserted relevance objection. (Mot. Compel ¶¶ 7-8.) However, SMUG's unilateral redactions on the grounds of responsiveness or relevance are fundamentally inconsistent with Rule 34:

Redaction is an inappropriate tool for excluding alleged irrelevant information from documents that are otherwise responsive to a discovery request. It is a rare document that contains only relevant information. And irrelevant information within a document that contains relevant information may be highly useful to providing context for the relevant information. Fed. R. Civ. P. 34 concerns the discovery of "documents"; it does not concern the discovery of individual pictures, graphics, paragraphs, sentences, or words within those documents. Thus, **courts view "documents" as relevant or irrelevant; courts do not, as a matter of practice, weigh the relevance of particular pictures, graphics, paragraphs, sentences, or words, except to the extent that if one part of a document is relevant then the entire document is relevant for the purposes of Fed. R. Civ. P. 34.** This is the only interpretation of Fed. R. Civ. P. 34 that yields "just, speedy, and inexpensive determination[s] of every action and proceeding." Fed. R. Civ. P. 1.

This interpretation is buttressed by the fact that the Federal Rules of Civil Procedure do not grant parties the power to unilaterally redact information on the basis of relevance. The Federal Rules of Civil Procedure explicitly provide when redaction may be used. The Federal Rules of Civil Procedure also explicitly provide a method for a party to object to a request for production of documents. . . . This method for objection does not explicitly include the option of producing redacted documents. In addition, the Federal Rules of Civil Procedure provide parties with the option to bring a motion for a protective order. Thus, a party seeking the power to unilaterally redact documents for relevance should request leave to redact those portions that the party contends are irrelevant.

Bartholomew v. Avalon Capital Grp., Inc., 278 F.R.D. 441, 451-52 (D. Minn. 2011) (citations omitted) (emphasis added).

Abundant precedent makes clear that SMUG has no authority to deem itself the sole arbiter of responsiveness or relevance of information within the admittedly responsive and relevant documents it produces to Lively. *See, e.g., Burris*, Civil No. 07-3938(JRT/JJK), 2013 WL 608742 *3 (D. Minn. Feb. 19, 2013) (“Gulf offers no support for the proposition that a party may properly redact portions of a document on the grounds that some, but not all, of the document is relevant or responsive. . . . And if the Court were to allow such a practice it would improperly incentivize parties to hide as much as they dare.”); *ArcelorMittal Cleveland Inc. v. Jewell Coke Co., L.P.*, No. 1:10-CV-00362, 2010 WL 5230862, *3 (N.D. Ohio Dec. 16, 2010) (“The Court sees no compelling reason for Jewell to not disclose information solely on the grounds that Jewell thinks the non-disclosed materials are not relevant or responsive where that information appears in a document that contains otherwise relevant or responsive information.”); *Orion Power Midwest, L.P. v. American Coal Sales Co.*, No. 2:05-cv-555, 2008 WL 4462301, *2 (W.D. Pa. Sept. 30, 2008) (“There is no express or implied support for the insertion of another step in the process (with its attendant expenses and delay) in which a party would scrub responsive documents of non-responsive information. In sum, the Court cannot countenance Defendants’ ‘redaction campaign.’”) (“Certainly, a party that seeks to ‘inspect’ a document would anticipate being able to inspect the entire document.”); *Howell v. City of New York*, No. CV-06-6347(ERK)(VVP), 2007 WL 2815738, *2 (E.D.N.Y. Sept. 25, 2007) (“It is not the practice of this Court to permit parties to selectively excise from otherwise discoverable documents those portions that they deem not to be relevant.”); *John Wiley & Sons, Inc. v. Book Dog Books, LLC*, 298 F.R.D. 184, 186 (S.D.N.Y. 2014) (“[R]edactions of portions of documents are normally impermissible unless the redactions

are based on a legal privilege”); *Burris v. Versa Prod., Inc.*, No. 07-3938(JRT/JJK), 2013 WL 608742, *3 (D. Minn. Feb. 19, 2013) (“[T]he only bases for prohibiting a party from seeing a portion of a document in the Rules are claims of privilege or work-product doctrine.”).

Accordingly, the Court should compel SMUG to comply with its fundamental discovery obligations, and order SMUG to produce unredacted versions of all documents previously redacted on the grounds of responsiveness or relevance.²

B. SMUG’s purported retroactive relevance objection has no merit and was already waived as untimely.

After counsel conferred regarding SMUG’s “non-responsive” redactions, SMUG changed its basis for certain of the redactions and purported to retroactively fit the redactions to a relevance objection previously made in SMUG’s Supplemental Responses, directed to Lively’s production request 4. (Mot. Compel ¶¶ 7-8.) SMUG’s reimagining of the basis for its redaction should be rejected, as SMUG’s relevance objection is both meritless and untimely.

Lively production request 4, to which SMUG made its relevance objection, seeks the following:

All Documents, including but not limited to meeting minutes, notes or recordings, Concerning any meeting of SMUG, or any meeting of a member of SMUG, where there was any discussion of (a) Lively; (b) any visit by Lively, or conference attended by Lively, in Uganda; (c) any Persecution or alleged Act of Persecution; (d) **the Anti-Homosexuality Bill**; (e) this Lawsuit; (f) David Kato’s murder; or (g) David Bahati, Martin Ssempe, Stephen Langa, James Buturo, or Simon Lokodo.

² Examples of redactions of “non-responsive” information are included in composite Exhibit C to the Motion to Compel. (Mot. Compel, Ex. C, SMUG009698 (attachment to SMUG009668), SMUG009744 (and attachments SMUG009747, SMUG009782, SMUG009783), SMUG0020357 (and attachment SMUG020362).) SMUG’s redactions also include some labeled simply “redacted.” (Mot. Compel, Ex. C, SMUG002128, SMUG002211.) As shown herein, these “redacted” redactions are improper whether based on confidentiality, responsiveness, relevance, or any basis other than legal privilege.

(First Req. (Mot. Compel Ex. A) at 6 (emphasis added).) SMUG’s relevance objection to request 4, raised for the first time in its Supplemental Responses, states:

To the extent this request seeks documents relating to SMUG’s and/or non-parties’ strategies to prevent the passage of the [Anti-Homosexuality Bill] into law, SMUG objects on the ground that it seeks documents that are not reasonably calculated to lead to the discovery of admissible evidence.

(Supp. Responses (Mot. Compel Ex. B) at 3-4.)

“Rule 26(b) generally permits liberal discovery of relevant information,” and the rule “must be construed broadly to encompass any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case.” *Trustees of Boston Univ. v. Everlight Elec. Co., Ltd.*, No. 12-cv-11935-PBS, 2014 WL 5786492, *2 (D. Mass. Sept. 24, 2014) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978)). A cursory reading of SMUG’s Amended Complaint (Dkt. No. 27) reveals the eminent relevance of Lively’s production request 4.

SMUG blames Lively for the 2009 introduction the Anti-Homosexuality Bill (“AHB”).³ (Am. Compl. ¶ 9.) And SMUG repeatedly and specifically complains that Lively has impaired SMUG’s ability to advocate for LGBTI rights in Uganda. (Am. Compl. ¶¶ 71, 172, 175, 185, 189, 208, 214, 224.) In short, the AHB is the chief evil SMUG attributes to Lively, and the alleged impairment of SMUG’s ability to advocate is its chief injury. Thus, SMUG loses all credibility when it argues that a production request seeking documents regarding SMUG’s advocacy against passage of the AHB is not *relevant*. SMUG’s relevance objection should be rejected out of hand.

Even if SMUG had an argument to support its relevance objection (which it does not), it was untimely and therefore waived. Rule 34 requires that “[t]he party to whom the request is

³ SMUG has yet to adduce a shred of evidence in support of this spurious claim.

directed must respond in writing within **30 days** after being served” and that such “response **must** either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons.” Fed. R. Civ. P. 34(b)(2)(A), (B) (emphasis added).

Fed. R. Civ. P. 34(b) requires that a party upon whom a request for discovery is served respond within thirty days, either stating its willingness to comply or registering its objections. **If the responding party fails to make a timely objection, or fails to state the reason for an objection, he may be held to have waived any or all of his objections.**

Marx v. Kelly, Hart & Hallman, P.C., 929 F.2d 8, 12 (1st Cir. 1991) (emphasis added). This Court’s Local Rules make it absolutely clear that such an objection is waived when not filed in the time provided by the Federal Rules: “any ground not stated in an objection within the time provided by the Federal Rules of Civil Procedure, or any extensions thereof, **shall be deemed waived.**” Local Rule 34.1(c)(1) (emphasis added).

Lively served his First Request on September 1, 2014. (Mot. Compel ¶ 1, Ex. A.) SMUG first asserted its relevance objection to request 4 in its Supplemental Responses, which SMUG served on January 30, 2015—**151 days after the First Request**. Under Rule 34 and Local Rule 34.1, SMUG’s (meritless) relevance objection was untimely, and therefore waived.

IV. SMUG’S REDACTIONS CONCEALING HOW ITS DOCUMENTS ARE KEPT IN THE USUAL COURSE OF BUSINESS VIOLATE RULE 34.

SMUG’s initial production of nearly 25,000 pages was not organized and labeled to correspond to Lively’s requests, nor did SMUG provide information showing how the documents were kept in the usual course of business. (Mot. Compel ¶ 4.) After multiple discovery conferences, SMUG provided a table purporting to show the custodian and electronic file directory and folder information for the production. (Mot. Compel ¶¶ 5-9.) However, SMUG redacted certain directory and folder information from the table, effectively concealing how certain documents were kept in the usual course of business. (Mot. Compel ¶ 9, Ex. F at 8-10, 17, 18, 33,

38, 39, 46-48, 65, 81, 142-145, 180-183, 232-239, 274, 275, 305, 306, 308, 309.) Having elected to produce the documents as kept in the usual course of business, SMUG's concealment of how the documents were organized by SMUG is a violation of Rule 34.

A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request. The producing party can choose whether to produce the documents as they are kept in the usual course of business or label and organize them. **The usual course of business alternative, however, is only available when the documents' natural organization makes finding critical documents reasonably possible.**

The producing party bears the burden of showing that the documents were produced as they were kept in the usual course of business. A party demonstrates that it has produced documents in the usual course by revealing information about where the documents were maintained, who maintained them, and whether the documents came from one single source or file or multiple sources or files.

Enargy Power (Shenzhen) Co. vs. Xiaolong Wang, No. CIV.A. 13-11348-DJC, 2014 WL 4687542, at *3-4 (D. Mass. Sept. 17, 2014) (internal quotations and citations omitted) (emphasis added).

If SMUG did not want to show how its produced documents were kept in the usual course of business, Rule 34 allowed SMUG the option to organize and label its production to correspond to Lively's requests. But SMUG chose the other Rule 34 option, and must comply with its election.⁴ And, as shown in sections I and II above, neither the Confidentiality Order nor Rule 34 permit SMUG to unilaterally redact information SMUG decides Lively does not need. Without all of the redacted file origin information, Lively's efforts to review and evaluate nearly 25,000 pages of unorganized production is unreasonably hampered. Accordingly, the Court should order SMUG to provide complete file origin information clearly showing how SMUG's produced documents

⁴ SMUG's "explanations" of its redactions of file origin information are unavailing. (Mot. Compel ¶ 9, Ex. G.) SMUG cannot both elect to produce its documents as kept in the usual course of business, and simultaneously conceal how its documents are kept in the usual course of business.

are kept in the usual course of business, or to organize and label its production to correspond to Lively's requests.

CONCLUSION

For all of the foregoing reasons, and the reasons stated in Lively's Motion to Compel, the Court should grant expedited consideration of the Motion to Compel and grant the motion, ordering SMUG to produce unredacted versions of all redacted documents previously produced, and produce complete file directory and folder name information showing how the produced documents were kept in the usual course of business or, alternatively, organize and label all produced documents to correspond to Lively's requests.

Respectfully submitted,

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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 June 18, 2015. Service will be effectuated by the Court's electronic notification system upon all counsel or parties of record.

s/ Roger K. Gannam
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