

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
SPRINGFIELD DIVISION

SEXUAL MINORITIES UGANDA,

Plaintiff,

CIVIL ACTION

v.

NO. 3:12-CV-30051-MAP

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

Defendant.

**PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION
TO POSTPONE THE DEPOSITION OF PLAINTIFF**

PRELIMINARY STATEMENT

Plaintiff Sexual Minorities Uganda (“Plaintiff” or “SMUG”) respectfully submits this opposition to Defendant Scott Lively’s (“Defendant” or “Lively”) Motion to Postpone the Deposition of Plaintiff Sexual Minorities Uganda (the “Motion”). The Motion is a transparent attempt to unilaterally alter the previously agreed-upon schedule for the Rule 30(b)(6) deposition of SMUG (the “SMUG 30(b)(6) Deposition”), and should be denied for the following reasons: First, all of the alleged facts in the Motion were true at the time the parties agreed to the schedule for the SMUG 30(b)(6) Deposition, belying Defendant’s claim that its need to take that deposition after the close of fact discovery arose as a result of any of the ongoing issues in dispute. Second, none of the purported “grounds for postponing SMUG’s deposition” have merit: (1) SMUG produced its documents in a timely fashion, SMUG properly produced folder information, and Defendant was in no way prejudiced by any purported failure to “label” production documents; (2) Defendant’s motion to compel unredacted documents is without merit

and comes months after SMUG's production of those documents; (3) Defendant could have requested the production of the documents for which SMUG has requested attorneys' eyes only ("AEO") protection under that protection but chose not to do so and cannot now claim prejudice; (4) SMUG has offered a designee who can testify on all the topics noticed by Defendant and the fact that SMUG preserved its right to object to certain questions that seek privileged information and/or that constitute harassment is not grounds for postponing the SMUG 30(b)(6) Deposition; and (5) SMUG has consented to Defendant taking the deposition of Mr. Victor Mukasa and another third-party witness after the close of fact discovery and, thus, Defendant cannot claim that it is prejudiced by any purported "scheduling conflict." Third, altering the schedule for the SMUG 30(b)(6) Deposition will cause prejudice to SMUG. SMUG already agreed to two extensions of fact discovery sought by Defendant, and now, certain third-party discovery is moving beyond the June 30th deadline. At the very least, the parties' depositions should be conducted before the set deadline. Moreover, SMUG's 30(b)(6) designee, Mr. Pepe Onziema, has numerous commitments during the month of July and has set aside time from his busy schedule at the end of June in reliance upon the schedule the parties had agreed to for the SMUG 30(b)(6) Deposition. Changing that schedule, absent good cause, at this late juncture will cause great disruption to Mr. Onziema's professional activities and is manifestly unfair. Finally, the same arguments Defendant makes in support of his motion to postpone the SMUG 30(b)(6) Deposition apply equally or more to Defendant's individual and 30(b)(6) deposition which is scheduled for Tuesday, June 23, and Wednesday, June 24, 2015. If the SMUG 30(b)(6) Deposition is postponed beyond the end of fact discovery, fairness dictates that Defendant's deposition should be postponed as well.

ARGUMENT

A. The Alleged Facts in the Motion Have Been Known to Defendant Since Before the Parties Agreed to the Schedule for the SMUG 30(b)(6) Deposition.

On May 21, 2015, Defendant noticed the deposition of SMUG's corporate representative for June 15, 2015. *See* Exhibit A to Defendant's Motion. After a series of discussions regarding the availability of deponents, on June 10, 2015, the parties agreed to schedule the SMUG 30(b)(6) Deposition for June 26, 2015, and, if necessary, June 30, 2015. *See* Email chain between H. Mihet, K. McNeely, and others, dated June 9 and June 10, 2015, attached as Exhibit A to the Declaration of Pamela C. Spees, dated June 21, 2015 (the "Spees Decl."). At the time Defendant noticed the SMUG 30(b)(6) Deposition (nearly one month ago) and at the time the parties reached a final agreement on the dates for that deposition (over one week ago), Defendant was fully aware of all the purported grounds for postponing the SMUG 30(b)(6) Deposition listed in the Motion. For example, the parties' dispute over SMUG's document production (including the use of redactions), the AEO dispute, and SMUG's objections to the scope of topics in Defendant's 30(b)(6) notice were all known to Defendant.

Notwithstanding its knowledge of those disputes, however, Defendant noticed the SMUG 30(b)(6) Deposition for June 15 and subsequently agreed to schedule that deposition for June 26 and June 30. In reliance upon that schedule, SMUG's designee committed to making himself available on those dates. On June 12, 2015, however, two days after the parties had finally reached an agreement on the SMUG 30(b)(6) Deposition schedule, Defendant informed SMUG that it would be filing a motion to conduct the SMUG 30(b)(6) Deposition in July, after the close of fact discovery. *See* Exhibit E to Defendant's Motion. Defendant failed to inquire if SMUG's 30(b)(6) designee was even available during the month of July. *See id.*

Given that Defendant was fully aware of the issues in dispute at the time it noticed the

SMUG 30(b)(6) Deposition, and at the time the parties reached a final agreement on the dates for that deposition, Defendant cannot now claim surprise or prejudice. On the contrary, and as set forth more fully *infra*, it is SMUG that will be prejudiced if Defendant's belated attempt to alter the deposition schedule and take the SMUG 30(b)(6) Deposition after the close of fact discovery is successful.

B. Defendant's Purported Grounds for Postponing the SMUG 30(b)(6) Deposition are Without Merit.

A discovery schedule may be modified *for good cause* and with the judge's consent. Fed. R. Civ. P. 16(b)(4) (emphasis added). "Rule 16(b)'s 'good cause' standard emphasizes the diligence of the party seeking the amendment." *O'Connell v. Hyatt Hotels of Puerto Rico*, 357 F.3d 152, 155 (1st Cir. 2004) (citations omitted). For the Court's scheduling order to operate effectively, "litigants cannot be permitted to treat [it] as a 'frivolous piece of paper idly entered, which can be cavalierly disregarded without peril.'" *Id.* at 155 (internal quotations omitted).

Not only did Defendant delay in bringing his Motion until less than a week before the date set for the SMUG 30(b)(6) Deposition, Defendant's purported grounds for postponing that deposition are without merit.

1. SMUG produced its documents in a timely fashion and SMUG properly produced folder information.

In its Motion, Defendant claims that SMUG's alleged delay in completing its document production and purported failure to properly "label" and "organize" its production warrants postponement of the SMUG 30(b)(6) Deposition. In fact, SMUG produced documents in a timely fashion, particularly given that Defendant served 196 document requests as late as September 1, 2014, just 30 days before original deadline for fact discovery to be completed. Moreover, Defendant can hardly claim prejudice as a result of SMUG's recent completion of

document production when Defendant waited until June 14, 2015, just days ago, to complete his document production. *See* Email from H. Mihet to D. Beebe *et al.*, dated June 14, 2015, Spees Decl., Exhibit B.

Furthermore, Defendant's specious claim that he cannot effectively review SMUG's production because SMUG allegedly failed to "label" and "organize" its documents is not grounds for delaying the SMUG 30(b)(6) Deposition. First, SMUG had no duty to "label" its documents. *See* Fed. R. Civ. P. 34(b)(2)(E)(i) ("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.") (emphasis added). Second, any delay in producing folder information did not result in prejudice since the vast majority (more than 80%) of SMUG's production consisted of emails, for which there was no folder information. *See* Spees Decl. ¶ 2. Third, Defendant's categorizing of his initial production was effectively no more specific or informative than was SMUG's. *See, e.g.*, Spees Decl., Ex. C at 4 (in response to Plaintiff's Request for Production No. 8 seeking documents relating to communications with Defendant's co-conspirators identified in Plaintiff's complaint, merely referring to broad categories of documents – "communications about Uganda" and "documents regarding the Anti-Homosexuality Bill" – spanning 561 pages, only a small subset of which related to communications with the co-conspirators). And he neither labeled nor provided folder information for two subsequent productions recently made to Plaintiff. Spees Decl. ¶ 3. Fourth, the redactions SMUG made on the folder index it provided to Defendant were proper, the redacted text would not have provided useful information regarding the production, and SMUG provided Defendant with a redaction log providing even greater information regarding the folders than the redacted text would have. *See* Exhibit G to Defendant's Motion to Compel

Plaintiff to Produce Unredacted Documents [Dkt. No. 173-7].

2. Defendant's motion to compel unredacted documents is untimely and without merit.

Defendant's claim that the motion to compel unredacted documents that he only filed on June 18, 2015 is grounds for postponement of the SMUG 30(b)(6) Deposition is similarly without merit. SMUG produced documents on a rolling basis beginning November 14, 2014 and completed its document production on April 14, 2015, yet Defendant inexplicably waited until June 18 (just over a week before the date of the SMUG 30(b)(6) Deposition) to bring his motion to compel. Defendant has only himself to blame for his delay in raising this issue. Moreover, and as SMUG will demonstrate in its opposition to Defendant's motion to compel, that motion is without merit because, *inter alia*, SMUG redacted only non-responsive and/or irrelevant information and privileged information. As such, none of the redacted information is necessary or proper for Defendant to take the SMUG 30(b)(6) Deposition. Finally, SMUG also has a pending motion to compel (Dkt. 161), seeking documents that SMUG has requested for more than 14 months, but SMUG has not sought to use that issue to delay depositions beyond the close of fact discovery. However, if the SMUG deposition is postponed, in fairness Defendant's should be postponed as well pending the resolution of SMUG's motion to compel.

3. Defendant cannot claim prejudice based on the pending Attorneys' Eyes Only Motion.

SMUG's AEO motion is also not a basis for postponing the SMUG 30(b)(6) Deposition. Defendant has been aware of that issue for months but only recently claimed that it should affect the timing of the SMUG 30(b)(6) Deposition. In addition, as explained at the hearing on the AEO motion held on June 16, 2015, the vast majority of the withheld documents are of marginal relevance to any issues in this case. Finally, Defendant could have asked to review those

documents under an AEO designation, but neglected to do so. Defendant cannot now claim prejudice as a basis for postponing the SMUG 30(b)(6) Deposition.

4. SMUG’s objections to Defendant’s 30(b)(6) topics are not grounds to postpone that deposition.

Contrary to Defendant’s contention, the fact that SMUG served objections to the scope of certain topics in Defendant’s notice of the SMUG 30(b)(6) Deposition is not a basis for postponing that deposition (particularly as Defendant was aware of those objections at the time the parties agreed to a schedule for that deposition). SMUG has offered a designee who can testify on all the topics noticed by Defendant but has stated, as is its right, that it reserves its rights to object to certain questions that seek privileged information and/or that constitute harassment. Moreover, SMUG has informed Defendant that it believes any issues can be resolved during the deposition without the involvement of the Court. *See Neponset Landing Corp. v. Northwestern Mut. Life Ins. Co.*, 279 F.R.D. 59, 62 (D. Mass. 2011) (holding that party could object to designated topics and was not obligated to file a protective order and stating “NML was not seeking to preclude the deposition—rather, it was producing the individual it expected to have the most corporate knowledge about the designated topics. While under some circumstances a protective order may have been the appropriate procedure, this court will not fault NML for preserving its objections to certain topics, producing a witness who addressed the large majority of designated topics without objection, and waiting until after the deposition to see if any remaining issues could be resolved without court intervention.”). Accordingly, SMUG’s objections to certain of the designated topics are not grounds to delay the SMUG 30(b)(6) Deposition until after the close of fact discovery.

5. Defendant has no “scheduling conflict” because SMUG has consented to Defendant taking Mr. Mukasa’s deposition at a later date.

Defendant claims that he will be prejudiced if the SMUG 30(b)(6) Deposition proceeds on the agreed-upon dates because he was “forced” to notice a third party witness, Victor Mukasa (“Mr. Mukasa”) on June 30, 2015, one of the dates set for the SMUG 30(b)(6) Deposition. Defendant’s claim is wholly specious because there is no necessity for Mr. Mukasa’s deposition to occur on June 30 as the parties have already agreed to take the deposition of another third-party witness after the close of fact discovery and could do the same here. Thus, even if Defendant’s claim that his counsel cannot effectively staff two depositions on the same day is true, there is no “scheduling conflict” that would justify moving the date of the SMUG 30(b)(6) Deposition.

C. Scheduling the SMUG 30(b)(6) Deposition after the Close of Fact Discovery will Cause Prejudice to SMUG.

Notwithstanding Defendant’s laundry list of reasons why he claims he will be prejudiced by holding the SMUG 30(b)(6) Deposition on the agreed-upon dates, it is SMUG that will be prejudiced if that deposition is postponed. SMUG’s 30(b)(6) designee, Mr. Onziema has numerous commitments during the month of July in connection with a fellowship program that he is attending. *See* Declaration of Pepe Julian Onziema, dated June 21, 2015 (“Onziema Decl.”) ¶¶ 2-5. This fellowship is an important opportunity for Mr. Onziema and demands a significant amount of his time. *Id.* ¶ 3. Mr. Onziema has already expended considerable effort to request time off for the dates to which the parties had already agreed, *id.* ¶ 4, and due to prior commitments related to the fellowship program, taking two or more days off in July is not an option for Mr. Onziema, *id.* ¶ 5. Changing that schedule just days before the deposition will cause great disruption to Mr. Onziema’s professional activities and is manifestly unfair,

particularly since Defendant can show no good cause for this postponement, *see supra*. *See O'Connell*, 357 F.3d at 155 (“Rule 16(b)’s ‘good cause’ standard emphasizes the diligence of the party seeking the amendment. Prejudice to the opposing party remains relevant but is not the dominant criterion.”). SMUG and its 30(b)(6) designee should not be prejudiced because Defendant is unready or unwilling to adhere to the agreed-upon deposition schedule.

CONCLUSION

For the reasons stated above, Plaintiff respectfully requests that Defendant’s Motion to Postpone the Deposition of Plaintiff Sexual Minorities Uganda be denied, and the SMUG 30(b)(6) Deposition take place on June 26 and June 30, 2015, the agreed-upon dates for that deposition. Alternatively, if Defendant’s Motion is granted, Plaintiff asks that the Court allow the postponement of Defendant’s deposition as well to allow the parties to take into account the disposition of SMUG’s Motion to Compel.

Dated: June 21, 2015

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 21, 2015. Service will be effectuated by the Court's electronic notification system upon all counsel or parties of record.

/s/ Kaleb McNeely
Kaleb McNeely
Attorney for Plaintiff
Sexual Minorities Uganda