

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

SEXUAL MINORITIES UGANDA,	:	CIVIL ACTION
	:	
Plaintiff,	:	3:12-CV-30051-MAP
	:	
v.	:	JUDGE MICHAEL A. PONSOR
	:	
SCOTT LIVELY, individually and as president of Abiding Truth Ministries,	:	MAGISTRATE JUDGE KATHERINE A. ROBERTSON
	:	
Defendant.	:	

**DEFENDANT SCOTT LIVELY'S RESPONSE IN
OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL**

“[P]laintiffs not only want to conduct a fishing expedition, they want to conduct discovery in order to locate the lake in which to conduct the fishing expedition.”¹

The Motion to Compel Production of Documents and Responses to Interrogatories (Dkts. 161-163) (“Motion”) filed by Plaintiff Sexual Minorities Uganda (“SMUG”) is without merit and should be denied. Three-and-a-half years, thirty thousand documents, and numerous depositions into this litigation, SMUG has not found **any** evidence to support its fanciful and outrageous claims that Scott Lively (“Lively”) has committed “crimes against humanity” in Uganda. Undeterred, SMUG now seeks this Court’s permission to redirect its fishing expedition to another lake (even continent) in the same futile hope that SMUG will locate in “Eastern and Central Europe” what it could not find in Uganda. But the information SMUG seeks regarding Lively’s alleged speech and “conduct” in Europe is utterly irrelevant to SMUG’s claims regarding alleged “persecution” of Ugandans in Uganda. SMUG seeks this information only for the chilling purpose of claiming that Lively’s alleged speech critical of homosexual conduct in Europe is a “crime against humanity,” and for the improper purpose of arguing that Lively’s

¹ *Mills v. Maine*, 118 F.3d 37, 51 (1st Cir. 1997).

alleged speech or “conduct” in Uganda was consistent with his alleged speech or “conduct” in Europe – in direct contravention of Fed. R. Evid. 404(b). SMUG’s Motion should be denied.

ARGUMENT

I. THE DISCOVERY SOUGHT BY SMUG IS IRRELEVANT TO ITS CLAIMS.

“Discovery is not a fishing expedition; parties must disclose some relevant factual basis for their claim before requested discovery will be allowed.” *Milazzo v. Sentry Ins.*, 856 F.2d 321, 322 (1st Cir. 1988). “Clearly discovery is allowed to flesh out a pattern of facts already known to a party **relating to an issue necessarily in the case.**” *Micro Motion, Inc. v. Kane Steel Co., Inc.*, 894 F.2d 1318, 1326 (Fed. Cir. 1990) (emphasis added). “Parties may obtain discovery regarding any nonprivileged matter that is **relevant to any party’s claim or defense.**” Fed. R. Civ. P. 26(b)(1) (emphasis added). “Relevancy, however, does not automatically entitle a plaintiff to discovery.” *Santiago v. Fenton*, 891 F.2d 373, 379 (1st Cir. 1989). “There is no doubt that discovery is broad, but its breadth is not limitless.” *Emhart Indus., Inc. v. New England Container Co., Inc.*, Nos. 06-218, 11-023, 2013 WL 6001076 (D.R.I. Nov. 12, 2013). Parties who, like SMUG, seek materials not probative of a threshold issue are “cast[ing] too wide a net.” *Heifelberg Am., Inc. v. Tokyo Kikai Seisakusho, Ltd.*, 333 F.3d 38, 41 (1st Cir. 2003).

This case is about Uganda. It is brought only by a Ugandan organization, claiming to represent only Ugandans who are allegedly being “persecuted” only in Uganda because of what Lively purportedly said in Uganda.² SMUG’s Amended Complaint makes it abundantly clear

² According to SMUG’s own Amended Complaint, “Plaintiff, SEXUAL MINORITIES UGANDA is an umbrella organization that was founded in 2004 **by a coalition of Ugandan organizations** advocating on behalf of lesbian, gay, bisexual, transgender, and intersex (“LGBTI”) communities, **to unify and support sexual minority groups in Uganda. Plaintiff and its member organizations and staff members have Ugandan citizenship.**” (Dkt. 27, ¶¶ 18-19) (capitalization in original; bold emphasis added).

that the gravamen of its case is Lively's alleged "persecution" of homosexuals in Uganda, and his alleged speech and "conduct" in Uganda.³

In the lengthy fact discovery stage of this case, SMUG sought to test its imaginative theories through comprehensive document requests, interrogatories and deposition inquiries aimed at Lively's alleged speech and "conduct" **in Uganda**. Lively has fully complied with all of these inquisitions. He has answered dozens of pages of interrogatories, provided thousands of documents, and provided extensive deposition testimony over two days about his travels, speech and "conduct" **in Uganda**. **There is no claim by SMUG that its efforts to discover information related to its claims about Uganda have been thwarted or frustrated by Lively in any way.**

Instead, what SMUG seeks now in its belated Motion – filed at the end of fact discovery and **eight months** after the parties' meet-and-confer on this issue – is information about Lively's speech in "Eastern and Central Europe," where SMUG has no members and conducts no

³ See, e.g., Am. Compl., Dkt. 27, ¶ 12 (claiming that Lively's alleged efforts focused on Uganda "specifically because he knew **Uganda** presented fertile ground") (emphasis added); *id.* ¶ 13 (SMUG "acts now to prevent the further escalation of persecution **in Uganda**") (emphasis added); *id.* ¶¶ 25-42 (purporting to provide "An Overview of Persecution **in Uganda**" and specifically claiming that SMUG's claims arise from events and occurrences within Uganda) (emphasis added); *id.* ¶ 25 (claiming that the alleged "coordinated and sustained campaign" against homosexuals was specifically against the "LGBTI community **in Uganda**" and that it was allegedly waged by "Defendant LIVELY and his **Ugandan co-conspirators**") (emphasis added); *id.* ¶ 43 ("LIVELY has worked extensively with key anti-gay political and religious leaders **in Uganda** with the overall purpose and objective of depriving LGBTI persons of their fundamental rights"); *id.* ¶ 45 (claiming that the "core of the conspiracy" that Lively allegedly engaged in "plotted, planned and pursued the persecution of LGBTI persons **in Uganda**") (emphasis added); *id.* ¶ 46 ("LIVELY has worked and schemed with others **in Uganda**") (emphasis added); *id.* ¶ 53 (claiming that "all" of the activities planned by Lively and the co-conspirators were aimed at the alleged "strategy to build an infrastructure or climate **in Uganda**") (emphasis added); *id.* ¶¶ 165-228 (purporting to narrate the alleged "Severe Deprivation of Fundamental Rights By Reason of Identity of the Group or Collectivity" and revealing that **all** of SMUG's alleged persecution occurred entirely **in Uganda**, as no other country is even mentioned).

operations.⁴ (Dkt. 162 at 2). Besides being untimely, SMUG’s Motion is also procedurally deficient because SMUG fails to “state with particularity … each interrogatory … [and] request for production raising an issue to be decided by the court, and the response thereto,” as expressly required by Local Rule 37.1(b)(4), and instead leaves the Court and Lively to sift through a 130-page exhibit to decipher exactly what SMUG complains about.

Timeliness and procedure aside, SMUG’s motion should be denied on the merits because it seeks discovery of irrelevant and immaterial information unrelated to its Uganda claims against Lively. Indeed, the requested discovery relates entirely to events and occurrences that happened not in Uganda, where SMUG’s claims allegedly arise, but in different countries on a different continent. (*See, e.g.*, Dkt. 163-1, SMUG First Set of Interrogatories to Lively at ¶ 16 (seeking information and identities of individuals with whom Lively communicated regarding Latvia and Russia); *id.* ¶ 20 (seeking identities and information concerning individuals with whom Lively spoke in Latvia and Russia about non-Uganda matters)). These inquiries seek information that has nothing to do with Lively’s alleged “persecution” of homosexuals in Uganda. In fact, these discovery requests are actually worse than a prohibited fishing expedition; SMUG is casting its nets to find any lake into which to cast its fishing nets. *Mills*, 118 F.3d at 51. Such discovery is inconsistent with the Federal Rules and should not be countenanced by this Court.

SMUG’s desired exploits into Lively’s speech in other countries outside of Uganda involving matters entirely unrelated to Uganda are improper. Setting aside until summary judgment the fact that Lively’s speech and “conduct,” whether in Uganda or Europe, are entirely

⁴ Exhibit F to the Spiegelman Declaration in Support of SMUG’s Motion (Dkt. 163-1, pp. 90-93) demonstrates that Lively advised SMUG that its non-Uganda discovery attempts were improper, and that Lively would stand on his previous objections, on October 20, 2014.

protected under the First Amendment, SMUG has no basis for inquiring into Lively's speech in Europe for the simple reason that SMUG is not asserting claims alleged to arise from that speech. Nor could SMUG assert such claims, because SMUG has no standing to bring claims on behalf of non-existent members in Europe for harms allegedly suffered in Europe. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). Accordingly, SMUG's assertion that the information concerning Lively's alleged speech in other countries is relevant simply because SMUG mentions something about that speech in the Amended Complaint is erroneous. The few and fleeting allegations in the Amended Complaint concerning Lively's alleged speech in other countries outside of Uganda give rise to nothing of relevance to this action, and certainly give rise to no claim that SMUG has standing to assert in this action.

Notably, SMUG claims that a handful of documents voluntarily produced by Lively regarding his discussions **about Uganda** with a couple of European actors somehow give SMUG license to inquire into **all** of Lively's **non-Uganda** communications with **all** European actors. (Dkt. 162 at 6-8). This is because, SMUG contends, these documents "affirm[] Plaintiff's theory and help[] establish Defendant's intent to persecute LGBTI Ugandans." (*Id.* at 8).

In reality, however, the documents to which SMUG refers – Exhibits H through N to the Spiegelman Declaration in Support of its Motion (Dkt. 163-1, pp. 101-130) – establish only that in 2007 and 2008 Lively **attempted** to bring a Russian-organized "Watchmen on the Walls" pro-family conference to Uganda. *Id.* The same documents establish what this conference would have been, had it ever taken place (which indisputably it did not): "WOW conferences are higher profile events with **live music performances** and **worship services** mixed together with pro-family speakers." (Dkt. 163-1, p. 117) (emphasis added). The conference involves "a six-piece

rock band sing[ing] ‘I’m a friend of God’ and similar lyrics.”⁵ The speakers impart a Biblical view on “cohabitation, divorce, abortion, adultery” and homosexuality, while telling audiences that, “If you’ve come to hear a message of hatred, you’ve come to the wrong place,” and never advocating, promoting or condoning any type of violence against anyone. *Id.*

SMUG is essentially asking this Court to criminalize these types of conferences because, to SMUG, a “pro-family conference” is a “euphemism for LGBTI persecution.” This is a breathtaking proposition that would require this Court to build bigger jails, and to haul in said jails the likes of Sen. Ted Cruz (R-Tex), Louisiana Governor Bobby Jindal, New Jersey Governor Chris Christie, Fox News Contributor Todd Starnes, one of the undersigned counsel Mat Staver, an entire student organization at Stanford University, and author/pastor Rick Warren, among countless others, all of whom participate in “pro-family conferences” every year.⁶

SMUG’s offensive theory aside, it is undisputed that Lively’s attempt to invite the Russian-organized WOW “pro-family conference” to Uganda **never materialized, and the conference never took place.** As Lively stated in his sworn interrogatory responses and repeated at his deposition, “WOW has done no work in Uganda” and the conference “never came to

⁵ *No Clashes between protesters, Watchmen on the Walls*, Seattle Times, October 21, 2007 (available at <http://www.seattletimes.com/seattle-news/no-clashes-between-protesters-watchmen-on-the-walls/>, last visited July 2, 2015).

⁶ See e.g., 2014 Conference Speakers at the Pro-Family Legislative Network Annual Pro-Family Conference (available at <http://profamily.com/conference,-nov-5-8,-2015/speakers'-bios>, last visited July 2, 2015); *Stanford Finds Funds for Pro-Family Conference after Fight with Conservative Student Group* (available at <http://www.campusreform.org/?ID=5504>); *Chris Christie to Speak at ‘Pro-Family’ Group* (available at <http://www.politico.com/story/2014/06/chris-christie-headline-road-to-majority-faith-and-freedom-coalition-june-10-ralph-reed-107415.html>, last visited July 2, 2015); *Rev. Rick Warren Addresses Pro-Family Conference at the Vatican* (available at <http://beforeitsnews.com/alternative/2014/11/rev-rick-warren-addresses-pro-family-conference-at-the-vatican-3064196.html>, last visited July 2, 2015).

fruition.” (Lively Response to SMUG Interrogatory 16, Dkt. 163-1, p. 51). Thus, it takes an enormous amount of creativity and willingness to say anything for SMUG to claim that the documents voluntarily produced by Lively regarding the planning of a conference that never happened somehow “affirm” SMUG’s “theory.” These documents show only how far the alternative universe created by SMUG for this litigation is from reality.

To be sure, and it bears emphasis, SMUG is not claiming that Lively has refused to produce his communications **about Uganda** with people outside of Uganda. As the documents discussed above plainly demonstrate, Lively has indeed produced **all** such documents in his custody, possession or control. What SMUG wants now is something entirely different – Lively’s communications with non-Ugandans that do not in any way reference Uganda, SMUG or any other issue about Uganda. This is a bridge too far.

Finally, the Court should be aware that SMUG attempted to depose two witnesses of Russian descent – Vlad Kusakin and Vadim Privedenyuk – who apparently reside in the United States, and whom SMUG claims had some involvement with the Russian-organized WOW conferences and with Lively’s trips and speaking engagements in Europe. (Becker – Kumar Email Communications, attached hereto as **Exhibit A**). Through their own counsel, Kusakin and Privedenyuk apparently resisted being deposed on the ground that their interactions with Lively had nothing to do with Uganda or SMUG’s claims in this case. (*Id.*) Though it apparently disagreed, SMUG allowed fact discovery to close and ultimately decided to abandon those depositions, taking them “off the calendar.” (*Id.*) SMUG’s continued insistence that Lively provide irrelevant discovery that SMUG properly abandoned elsewhere should be rejected. In sum, SMUG’s motion should be denied.

II. THE NON-UGANDA DISCOVERY SOUGHT BY SMUG IS INAPPROPRIATE AND INADMISSIBLE UNDER FED. R. EVID. 404.

Having no other justification for its improper fishing expedition into Lively's alleged speech and "conduct" around the world, SMUG rests on its equally baseless claim that the information sought is "other acts" evidence admissible in certain limited circumstances under Fed. R. Evid. 404(b)(2). (Dkt. 162 at 6). However, "other acts" evidence "is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b)(2). This is precisely what SMUG is seeking to do here. Because SMUG has found no evidence to support its outrageous claims about Lively's alleged activity in Uganda, SMUG now seeks to discover and use information concerning Lively's alleged speech and "conduct" outside of Uganda to somehow revive its case. SMUG has, after all, promised this Court quite a billing if only it would be allowed to conduct discovery into Lively's speech and activities in Uganda, and SMUG now knows that it cannot live up to that billing at the summary judgment stage.

"It is well settled that prior acts may not be admitted to prove that a person acted in a similar fashion in the case at hand." *Lataille v. Ponte*, 754 F.2d 33, 35 (1st Cir. 1985). This is because "other acts" evidence is often of "slight probative value" and "tends to distract the trier of fact from the main question of what actually happened on the particular occasion." *Id.* (quoting Advisory Committee Note to Fed. R. Evid. 404). SMUG's attempt to revive its meritless accusations of Lively's alleged "persecution" of homosexuals in Uganda by pursuing other hollow allegations concerning his alleged activities in other countries having nothing to do with SMUG's claims here is improper.

"The threshold inquiry a court must make before admitting similar acts evidence under Rule 404(b) is whether that evidence is probative of a **material issue** other than character."

Huddleston v. United States, 485 U.S. 681, 686 (1988). “We have interpreted Rule 404(b) to require some ‘**special relevance**’, that is, a ‘purpose other than solely to prove the defendant had a propensity to commit the crime in question.’” *United States v. Jimenez*, 507 F.3d 13, 17 (1st Cir. 2007) (quoting *United States v. Aguilar-Aranceta*, 58 F.3d 796, 798 (1st Cir. 1995)) (emphasis added). As demonstrated above, the discovery sought by SMUG here is entirely irrelevant to its claims of persecution in Uganda.

Presumably cognizant of this shortfall, SMUG retreats to the oft-quoted but rarely successful exceptions enumerated in Federal Rule of Evidence 404. But “[t]he mere recitation ... that evidence of the accused’s bad acts is offered under an exception is not sufficient for its admission.” *United States v. Ring*, 513 F.2d 1001 (6th Cir. 1975).

SMUG’s claim that the information it seeks is probative of motive or intent is without merit. In fact, the First Circuit has rejected what appears to be SMUG’s precise argument here for the admissibility of “other acts” evidence. In *Lataille*, the First Circuit flatly rejected the argument that evidence of a defendant’s prior attempts at accomplishing the alleged wrongdoing in the instant matter is probative of motive. *Id.* at 37.

[Such an] argument totally ignores the principle behind the exclusion of this type of evidence. Evidence that Lataille has tried to escape in the past is not admissible to show that he was trying to escape in this instance. This is precisely what Rule 404(b) prohibits.

Additionally, evidence of other acts not specifically related to the alleged wrong being litigated in the instant matter “goes more to the inadmissible purpose of proving that the defendant is a bad man than to the admissible purpose of proving intent.” *United States v. Kirk*, 528 F.2d 1057, 1061 (5th Cir. 1976). SMUG’s attempt to bring in evidence of Lively’s alleged speech and “conduct” in other countries is an impermissible attempt to prove Lively acted in conformity therewith in Uganda. That attempt should be rejected.

The information SMUG seeks would also not be admissible under the preparation exception, as there is no allegation or indication that Lively's alleged activities in other countries were somehow done in preparation for his alleged speech or "conduct" in Uganda. To meet the exception for admitting other acts to show preparation, the evidence introduced must actually show **acts in furtherance of the actually alleged wrongdoing**, not some other act previously done. *See, e.g., United States v. Jimenez*, 507 F.3d 13 (1st Cir. 2007); *United States v. Leftwich*, 461 F.2d 586 (3d Cir. 1972).

In sum, SMUG's claim that non-Uganda discovery should be ordered because the information it seeks would be admissible under Rule 404(b) is meritless. SMUG seeks to embark on a fishing expedition to locate on a different continent that which it could not find in Uganda. This evidence has no relevance to SMUG's claims, and is not reasonably calculated to lead to the discovery of any **admissible** evidence. SMUG is therefore not entitled to the discovery it seeks.

CONCLUSION

For the foregoing reasons, SMUG's motion should be denied.

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 July 2, 2015. Service will be effectuated by the Court's electronic notification system upon all counsel or parties of record.

/s/ Horatio G. Mihet _____
Horatio G. Mihet
Attorney for Defendant Scott Lively

From: kumar.vikram@dorsey.com
To: freedomxlaw@gmail.com
Cc: Sullivan.Mark@dorsey.com; Gannam, Roger; Mihet, Horatio
Subject: RE: SMUG v. Lively- Kusakin and Privedenyuk
Date: Friday, June 26, 2015 5:23:58 PM

Hi Bill,

That is correct. Monday's deposition is off the calendar. Thanks so much.

Best,
Vik

Vikram Kumar

Associate

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From: William Becker [mailto:freedomxlaw@gmail.com]
Sent: Friday, June 26, 2015 5:22 PM
To: Kumar, Vikram
Cc: Sullivan, Mark; Gannam, Roger; Mihet, Horatio
Subject: Re: SMUG v. Lively- Kusakin and Privedenyuk

Gentlemen,

Having not heard from you following my last e-mail (Tuesday) and knowing you have by now taken the opportunity to question Mr. Lively concerning Privedenuk, I will assume Monday's deposition has been taken off calendar. As I would be prejudiced by not securing travel arrangements after failing to hear from you, by copy of this e-mail to all counsel, I am confirming same.

All for His glory!
1 Corinthians 10:31

Bill Becker
President/CEO/General Counsel
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From: William Becker <freedomxlaw@gmail.com>
Date: Tue, Jun 23, 2015 at 10:56 AM
Subject: Re: SMUG v. Lively- Kusakin and Privedenyuk
To: kumar.vikram@dorsey.com
Cc: Sullivan.Mark@dorsey.com

Gentlemen,

Thank you for your patience in awaiting this delayed response. As I earlier informed you, I was traveling, in some places without internet connection and sometimes spotty connection. I have finally spoken to Mr. Privedenyuk, who authorizes me to accept the subpoena on his behalf.

Today, your office or co-counsel is deposing Mr. Lively. We expect you to question him regarding his relationship with Mr. Privedenyuk, following which you will recognize that there is no need for Privedenyuk's deposition.

I address your points regarding the basis for your interest in Privedenyuk's deposition:

It's our understanding that Mr. Privedenyuk served as a translator between Lively and Alexei Ledyaev.

While true he translated on two occasions several years ago, he has no recollection of what the conversations about and would not be able to have his memory refreshed. He is certain, however, that the translations had nothing to do with homosexuality, a movement, a strategy, Lively's agenda or any other matter relevant to the issues raised in this case.

You already know where we stand on Watchmen on the Walls. We think he can shed light on those interactions, the Watchmen, New Generation Church and Lively's outlook on how to address homosexuality.

He cannot. All he would be able to testify to is his Christian faith and moral interest in preserving the traditional family as a basis for living out a true Christian lifestyle. He is not interested in political activism, has never engaged in political activism and can shed no light on the political activism of others.

Based on your representations and the information I elicited from Mr. Privedeyuk, we will not be appearing for his deposition. We repeat our offer to submit a sworn affidavit attesting to the fact of Privedeyuk's disinterest in the political side of the debate concerning the normalization of homosexuality and his inability to recall any conversations he may have had with Lively or others.

Of course, should Lively testify concerning a material fact implicating Privedenyuk as somehow involved in Lively's political efforts, we will reconsider our decision.

All for His glory!
1 Corinthians 10:31

Bill Becker
President/CEO/General Counsel
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