UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
SPRINGFIELD DIVISION

SEXUAL MINORITIES UGANDA,	:	**CIVIL ACTION**
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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 FOR PROTECTIVE ORDER LIMITING THE DEPOSITION OF SAM GANAFA

The Motion for a Protective Order Limiting the Deposition of Sam Ganafa ("Ganafa") (Dkts. 166-169) ("Motion"), filed by Plaintiff Sexual Minorities Uganda ("SMUG"), is utterly without merit and should be denied. The sole justification offered by SMUG for its refusal to bring its Chairman of the Board to its chosen forum – the Chairman's supposed inability to secure time off from work – was meritless and suspect even **before** this Court extended the deadline for Ganafa's deposition. Now that the parties have until **the end of August** to conduct this deposition, SMUG's pretextual claim that its Chairman cannot secure a **three-day** absence within a four-month period from a company which he leads as an executive, to provide critical testimony in an international lawsuit initiated by SMUG defies all credulity. This purported excuse is even less believable than SMUG's similar claim with respect to its Rule 30(b)(6) witness, which this Court recently rejected.

The lack of merit to SMUG's Motion is made even more palpable by the demonstrable omissions, false implications and outright misrepresentations on which it is based. For example, as demonstrated below:

- SMUG claims repeatedly that Ganafa is a "mere corporate officer," and "a member of SMUG's board," when, in fact, Ganafa is **the Chairman of SMUG's Board of Directors** – that is, the highest ranking director of SMUG;
- SMUG claims that Ganafa has "little unique personal knowledge of facts relevant to this action," when, in fact, Ganafa is **one of the most prominent homosexual rights activists in all of Uganda**, who devotes an enormous amount of time to the very advocacy that SMUG claims Lively has made illegal, and who has extensive personal knowledge of many of the critical facts placed in issue by SMUG in this litigation; and
- SMUG implies that Ganafa cannot secure a short, three-day absence from his "full-time job" during an entire four-month period, when, in fact, Ganafa is apparently a high ranking executive of the company that "employs" him, and he routinely devotes a great deal of time outside of that "employment" to advocate for SMUG and its member organizations.

The reason why SMUG must take such great liberties with the facts and depart from its duty of candor to this Court is clear: SMUG has no legal or factual basis for its refusal to submit this key managing executive to a live deposition in its chosen forum. SMUG has also unreasonably rejected Scott Lively's ("Lively") offer to depose Ganafa in Uganda, and has instead offered a videoconferencing alternative that would greatly prejudice Lively's fact-finding and is also expressly prohibited by the applicable rules and law.

For these reasons, SMUG's Motion should be denied, and SMUG should be required to produce its Chairman for deposition in the United States. Alternatively, the Court should grant leave for the parties to depose Ganafa in Uganda, if SMUG bears the reasonable travel expenses of one attorney for Lively and one court reporter, as well as the court reporter fee and any facility expenses in Uganda.

ARGUMENT

I. GANAFA IS A KEY WITNESS WITH EXTENSIVE KNOWLEDGE OF CRITICAL FACTS AT ISSUE IN THIS LITIGATION.

A. Ganafa is SMUG's Highest Ranking Executive and one of the most Prominent Gay Rights Advocates in all of Uganda.

Throughout its Memorandum in Support of its Motion, SMUG continually refers to Ganafa as "a member of SMUG's board." (*E.g.*, dkt. 167, pp. 1, 3, 4, 5, 9). SMUG even goes so far as to characterize Ganafa as "a **mere** corporate officer." (*Id*. at 4) (emphasis added). In reality, Ganafa is not "merely" an "officer" or "board member" of SMUG, but is **the Chairman** of SMUG's Board of Directors – that is, the highest ranking executive of SMUG.[1]

Ganafa's position at the top of SMUG is by no means an honorary title given to a disinterested citizen who has other full-time employment, and whose only involvement is attending a board meeting on rare occasion, as SMUG falsely implies in its Motion. Instead, Ganafa's ranking role at SMUG reflects his leadership as executive director of Spectrum Uganda, one of SMUG's organizational members,[2] which "has been supportive and a part of the many struggles of the LGBTI movement in Uganda more especially with mobilizing grass root communities, court sessions, Litigation and most recently the Anti-Homosexual Bill."[3] Under Ganafa's leadership, his organization also "has partnered with various Local, Regional and International Human Rights Organisations and Health Service Providers to end discrimination based on Sexual Oreintation [*sic*]."[4] As a result of his advocacy for homosexual rights in

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[1] *See, Ugandan court dismisses case against activist Sam Ganafa* (available at http://76crimes.com/2014/10/28/ugandan-court-dismisses-case-against-activist-sam-ganafa/, last visited July 6, 2015).
[2] *Id*.
[3] *See*, *Spectrum Uganda – About Us* (available at http://www.spectrumuganda.net/about-us-1/, last visited July 6, 2015).
[4] *Id*.

Uganda, Ganafa has been recognized as "one of the country's most prominent queer public figures."[5]

SMUG contends that because it only identified Ganafa as having knowledge on one specific incident of "persecution" – his "outing" by a Ugandan tabloid – Ganafa has "little unique, personal knowledge of facts relevant to this action." (Dkt. 167, p. 4). But SMUG did not identify Ganafa as the leader of one of its member organizations, and did not identify him as having been involved in "Litigation" and advocacy efforts to successfully defeat the infamous Anti-Homosexuality Bill ("AHB") – the cornerstone of SMUG's claims against Lively. Ganafa has critical knowledge on the AHB, its alleged impact in "persecuting" sexual minorities, and its quick demise, which knowledge SMUG did not disclose but Lively is entitled to probe. In addition, because he has prominently fought alleged "discrimination based on Sexual Orientation," which SMUG claims was caused by Lively, Ganafa can shed light on this purported discrimination, and what on earth Lively could have possibly contributed to it.

Moreover, SMUG did not identify Ganafa as one of the "most prominent" homosexual rights advocates in all of Uganda. SMUG does vigorously advance in this lawsuit, however, the ridiculous notion that Lively somehow co-opted the free will of Uganda's entire sovereign legislature, to force them to outlaw the very advocacy in which Ganafa is prominently engaged. Ganafa thus has critical knowledge on the state of affairs in Uganda, and his ability to engage in successful advocacy notwithstanding Lively's supposed criminalization of that advocacy.

For example, SMUG also does not tell the Court, and did not disclose to Lively, that Ganafa was allegedly recently arrested and mistreated by the Ugandan police.[6] In this regrettable

[5] *Ugandan LGBT Activist Sam Ganafa Avoids Homophobic Court Trial* (available at http://www.towleroad.com/2014/10/ugandan-lgbt-activist-sam-ganafa-avoids-homophobic-court-trial/, last visited July 6, 2015).

and unfortunate alleged incident – one that Lively would condemn – Ganafa was apparently charged with a violation of Uganda's sodomy laws which preceded Lively's first visit to Uganda by many decades.[7] With SMUG's help and advocacy,[8] Ganafa was apparently able to vigorously challenge his arrest in Ugandan courts, and to defeat the charges, leading him to praise the "independent" nature of Uganda's courts.[9] Thus, Ganafa has extensive personal knowledge about the ability of allegedly "persecuted" sexual minorities to seek full redress and vindication of their rights in Ugandan courts, another critical fact at issue in this litigation. Ganafa will also confirm that Lively had nothing whatsoever to do with his arrest and prosecution, in the same way that Lively has had nothing to do with the arrest and prosecution of any other Ugandan citizen.

In light of these undisclosed but critical facts, SMUG's claim that Ganafa has "little unique, personal knowledge of facts relevant to this action" hardly seems credible at all, let alone sufficiently compelling to deny Lively an opportunity to probe these naked assertions through a live, in-person deposition. In any event, a mere "claimed lack of knowledge," as SMUG claims in its self-serving Motion, "does not provide sufficient grounds for a protective order." *Digital Equip. Corp. v. System Indus., Inc.*, 108 F.R.D. 742, 744 (D. Mass. 1986) (Alexander, M.J.). Instead, under the law of this District, a party is entitled to "test" such claimed lack of knowledge by deposition. *See Travelers Rental Co., Inc. v. Ford Motor Co.*, 116 F.R.D. 140, 143 (D. Mass. 1987) (Collings, M.J.). Were it otherwise, any witness could escape deposition inquiry by simply

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[6] *See*, *Gay Ugandan Activists Arrested, Detained Without Charge* (available at http://www.advocate.com/news/world-news/2013/11/14/gay-ugandan-activists-arrested-detained-without-charge, last visited July 6, 2015); *see also* notes 1, 5, *supra*.

[7] *See*, *Ugandan Activist Denied Bail; Potential Life Sentence* (available at http://76crimes.com/2013/11/18/ugandan-activist-denied-bail-potential-life-sentence/, last visited July 6, 2015).

[8] *See*, *SMUG Statement on the Arrest and Detention of Ganafa and Four Others* (available at http://www.ugandans4rights.org/attachments/article/418/PR_Sam_Ganafa_Arrest14112013.pdf, last visited July 6, 2015).

[9] *See* note 1, *supra*.

claiming that (s)he lacks knowledge. Such is not the law. SMUG's request that this Court limit Ganafa's deposition to only the subjects on which SMUG claims he has knowledge (dkt. 167 at 9-10) is therefore unsupported and unprecedented. The request should be denied.

Finally, and this bears emphasis, Lively is not seeking to depose Ganafa regarding a car accident involving a lower-level SMUG employee, or regarding a business contract which Ganafa did not negotiate in person. Instead, Lively seeks to depose Ganafa on his own activities – *e.g.*, his advocacy – which earned him the top spot at SMUG, and the very activities in which he personally engages as one of Uganda's most prominent homosexual rights advocates. SMUG's authorities ignore this critical distinction and are therefore inapposite.[10]

B. If Necessary, the Court Should Allow Lively to Submit *In Camera* an Additional Proffer of Ganafa's Extensive, Unique and Personal Knowledge of Critical Facts.

Lively respectfully submits that the foregoing proffer is more than sufficient to establish that Ganafa has critical knowledge of key facts relevant to this case. However, Lively has additional information which reasonably leads Lively to believe that Ganafa has additional, extensive, unique and personal knowledge directly relevant to Lively's defenses. SMUG's announcement that it "does not intend to rely on [Ganafa's] testimony in this case" (dkt. 167 at

[10] For example, *Roman v. Cumberland Ins. Group*, No. 07-1201, 2007 WL 4893479 (E.D. Pa. Oct. 26, 2007) (cited at dkt. 167 p. 4), was a run-of-the-mill insurance coverage case in which a *pro se* plaintiff sought to depose an insurance company's president, vice president, *and* board of directors in connection with a property loss dispute allegedly arising from a clogged sewer pipe that led to a flooded basement and substantial property damage. *Id.* at *1-2; *see also Roman*, *supra*, at Dkt. No. 1, Compl.

Similarly, *Cantor v. Equitable Life Assurance Soc. of U.S.*, No. 97-5711, 1998 WL 544962 (E.D. Pa. Aug. 27, 1998) (cited at dkt. 167, p. 5), involved a single plaintiff dispute regarding a claim for reinstatement of disability benefits. *Id.* at *1. Even though defendant had already produced for deposition all of the individuals who had actually handled the adverse benefits determination, plaintiff still sought to depose an "upper-management Vice-President," the former CEO, *and* "an additional" corporate designee, but "provided no evidence, however slight" that the senior-level proposed deponents were personally involved. *Id.* at *1-2. Here, Lively has put forward ample evidence demonstrating Ganafa's materiality and relevancy.

3) does not surprise Lively, because Lively himself intends to rely extensively on Ganafa's testimony to directly refute SMUG's outlandish claims. SMUG's decision not to rely on Ganafa's testimony has no bearing on Lively's ability to fully depose Ganafa in person, to establish Lively's own defenses. *See e.g.*, *Atchison Casting Corp. v. Marsh, Inc.*, 216 F.R.D. 225, 227 (D. Mass. 2003) (Neiman, M.J.) (rejecting as "simply wrong" an argument that a party can limit discovery of information on which it does not intend to rely, and holding that "it practically goes without saying that Plaintiff ought not be empowered to decide what may or may not be relevant for Defendant's purposes.").

Lively is entitled to Ganafa's candid and unrehearsed testimony on all discoverable information relevant to SMUG's claims **or Lively's defenses**. Fed. R. Civ. P. 26(b)(1); Fed. R. Civ. P. 30. It would be manifestly unjust and unfair to require Lively to prematurely disclose to SMUG even more of a roadmap for the Ganafa deposition than presented here. Lively certainly did not receive such a roadmap from SMUG at his deposition. Accordingly, should the Court require an additional proffer regarding Ganafa's status and stature as a key witness to Lively's defense, Lively respectfully requests permission to provide that proffer *in camera*. Lively respectfully submits, however, that no such additional proffer should be required, and that the Court has more than sufficient grounds upon which to deny SMUG's Motion.

II. SMUG HAS A CLEAR OBLIGATION TO PRODUCE ITS CHAIRMAN FOR DEPOSITION IN SMUG'S CHOSEN FORUM.

For good reason, SMUG makes very little effort to dispute that it has an obligation to bring its officers, directors and managing agents to the United States – SMUG's chosen forum – for deposition. Federal courts have long recognized a policy requiring a "non-resident plaintiff who chooses this district as his forum to appear for deposition in this forum absent compelling circumstances." *See Clem v. Allied Van Lines Int'l Corp.*, 102 F.R.D. 938, 939 (S.D.N.Y. 1984)

(ordering plaintiff in Hong Kong to appear in New York for deposition). The line of precedent applying this policy to far flung plaintiffs, including international plaintiffs, is extensive.[11]

This policy extends to the officers, directors or managing agents of non-resident corporate plaintiffs. *See*, *e.g.*, *MPD Accessories B.V. v. Target Corp.*, No. 12-7259, 2013 WL 1200359, *1 (S.D.N.Y. Mar. 1, 2013) ("Plaintiff shall make its employees available to Defendants for deposition in New York," notwithstanding its contention that it was a "small business" that would be "significantly burdened" and suffer "financial hardship" in having to transport employees to New York); *Schindler Elevator Corp. v. Otis Elevator Corp.*, 657 F. Supp. 2d 525, 529 (D.N.J. 2009) (collecting cases where courts ordered depositions of foreign nationals to be held in the United States). Indeed, a "foreign corporation's agents are frequently compelled for deposition on American soil." *Custom Form Mfg., Inc. v. Omron Corp.*, 196 F.R.D. 333, 336 (N.D. Ind. 2000) (collecting cases).

III. SMUG HAS NO GOOD REASON FOR ITS REFUSAL TO PRODUCE ITS CHAIRMAN FOR DEPOSITION IN THE UNTED STATES.

It is true that, in limited circumstances, some foreign plaintiffs may be exempted from the general policy of having to appear for deposition in their chosen forum, but they must show "extreme hardship" and truly "compelling circumstances." *Clem*, 102 F.R.D. at 939-40 (rejecting

[11] *See*, *e.g.*, *Restis v. Am. Coalition Against Nuclear Iran, Inc.*, No. 13-5032, 2014 WL 1870368, *3 (S.D.N.Y. Apr. 25, 2014) (directing plaintiff who resided in Greece to "appear in this judicial district, on a date and at a time determined by the defendants" for an in-person deposition); *Dieng v. Hilton Grand Vacations Co., LLC*, No. 10-1723, 2011 WL 1299695, *2 (D. Nev. Mar. 1, 2011) ("Mere inconvenience or expense is an insufficient reason to refuse to appear in the district where Plaintiff field her lawsuit to have her deposition taken."); *Aerocrine AB v. Apieron Inc.*, 267 F.R.D. 105, 108 (D. Del. 2010) ("The general rule with respect to the location of depositions is that the plaintiff must produce its witnesses in the district in which the plaintiff instituted the action[.]"); *A.I.A. Holdings, S.A. v. Lehman Bros., Inc.*, No. 97-4978, 2002 WL 1041356, *1 (S.D.N.Y. May 23, 2002) (directing plaintiffs residing in Cyprus and Beirut to appear "in this District for a deposition"); *Daly v. Delta Airlines, Inc.*, No. 90-5700, 1991 WL 33392, *2 (S.D.N.Y. Mar. 7, 1991) (requiring plaintiff residing in Ireland to appear in New York for a deposition "[i]n view of the fact that plaintiff chose to file his lawsuit here rather than in Ireland," and rejecting any alleged substantial hardship in having to appear in-person).

exemption). SMUG makes only a cursory claim of "undue hardship" and "substantial hardship" (dkt. 167 at 6), and does not come even close to meeting its burden of proving extreme hardship.

First, SMUG claims that its Chairman could not secure sufficient time off from his "full-time job" prior to the June 30, 2015 discovery cut-off – supposedly on account of Lively's "late notice."[12] (Dkt. 167, pp. 6, 3). The Court has already resolved this claimed "hardship" by providing the parties **sixty additional days** in which to complete certain depositions, including Ganafa's. (Dkt. 191). Nevertheless, SMUG is apparently now contending that, in the entire **four-month** period from May 5, 2015, when it first learned of Lively's need to depose Ganafa, until August 31, 2015, the new deposition deadline, Ganafa cannot secure even **three days** off from his job.[13] This claim is even more incredible once the Court realizes that Ganafa is not a rank-and-file employee at the mercy of his superiors for time off, but is apparently a high level executive at his telecommunications firm – another important fact omitted from SMUG's Motion.[14] Presumably, Ganafa's executive position at his firm provides him with the flexibility to set his schedule so that he can concurrently lead two of Uganda's largest homosexual rights advocacy groups, which in turn allows him to devote substantial amounts of time outside of his regular job to advocate for SMUG and its member organizations. If Ganafa can muster sufficient time off work to lead two organizations and be one of Uganda's most prominent activists, it

[12] According to SMUG's own account, Lively first notified SMUG that he wished to take Ganafa's deposition on May 5, 2015 – **eight weeks** prior to the close of fact discovery, and more than **six weeks** prior to the June 19, 2015 date ultimately selected by Lively after SMUG refused to provide an available date for Ganafa. (Dkt. 167 at 3). SMUG's definition of "late" is way off.

[13] SMUG claims that Ganafa needs "at least one week off of work," (dkt. 167 at 6), but does not explain why Ganafa could not leave Uganda on a Wednesday morning, arrive in New York Wednesday night, rest and sightsee on Thursday, provide deposition testimony on Friday, and travel back to Uganda on Saturday and Sunday to be back at work by Monday. While one week off work might provide for more leisurely travel, Ganafa can adequately be deposed in the United States with just three days off work.

[14] *See* note 7, *supra*.

defies reason to claim that he cannot muster three days off work anytime within the new discovery period. The Court recently rejected as unpersuasive the almost identical claim made by SMUG with respect to its Rule 30(b)(6) designee, and the same outcome should obtain here.[15]

Second, SMUG devotes exactly **one sentence** to a fleeting claim that bringing Ganafa to the U.S. for deposition is prohibitively expensive (dkt. 167 at 6), but this claim is likewise too extravagant to maintain. As a threshold matter, SMUG's failure to "sufficiently detail [its] financial position so that this Court might assess the prohibitiveness of the deposition" is alone fatal to SMUG's claim of extreme hardship. *Clem*, 102 F.R.D. at 940 (rejecting unsubstantiated claim of financial hardship and requiring in-person testimony of plaintiff in chosen forum).

SMUG's failure to document its alleged financial hardship is not surprising, because SMUG apparently has virtually unlimited resources at its disposal for this litigation. For example, SMUG now employs no fewer than **fourteen** attorneys in this matter. SMUG has taken many depositions across the United States, seemingly without regard to cost as they were staffed by multiple attorneys, recorded by video staff and transcribed by court reporters who provided real-time transcripts at very high costs. In addition, when convenient to SMUG, SMUG offers to pay "in full" travel expenses of Ugandan non-party witnesses if they volunteer to be deposed in New York. (Dkt. 143-2, p. 2). And SMUG has raised substantial funds specifically for its discovery efforts in this case.[16]

Importantly, Lively has not abused in any way his right to depose SMUG's corporate representatives in the United States. Including Ganafa, SMUG will likely end up having to bring to its chosen forum only **four** witnesses, **one of whom is already here for other purposes**. (*See*

[15] Importantly, Ganafa has not alleged a physical or legal inability to travel to the United States, or a medical condition preventing a long-distance trip.
[16] *See, e.g.*, https://www.crowdrise.com/stopscottlively, last visited July 6, 2015.

dkt. 181, p. 10). This is substantially fewer witnesses than SMUG's total number of directors, officers and managing agents, and substantially fewer than the ten depositions available to Lively under Fed. R. Civ. P. 30(a).

Ultimately, neither SMUG nor Ganafa can "seriously contend" that travel to the United States is "unexpected" or that such travel to Massachusetts or New York "imposes a severe burden," when SMUG decided to file its lawsuit in the District of Massachusetts. *See Sugarhill Records Ltd. v. Motown Record Corp.*, 105 F.R.D. 166, 171 (S.D.N.Y. 1985). SMUG's proffered excuses are neither "compelling" nor "extreme" and should be rejected.

IV. THE VIDEOCONFERENCE ALTERNATIVE SUGGESTED BY SMUG IS NOT ADEQUATE AND NOT FEASIBLE UNDER THE LAW.

Contrary to SMUG's suggestion, a videoconference deposition is not a remote substitute for the in-person deposition of Ganafa. Indeed, "the defendant is entitled to depose the plaintiff face-to-face in order to adequately prepare for trial." *Clem*, 102 F.R.D. at 940 (denying protective order, rejecting remote deposition and requiring plaintiff to travel to New York from the Middle East for his deposition). *See also Chiu v. Au*, No. 03-1150, 2005 WL 2452565, *4 (D. Conn. Sept. 30, 2005) ("In-person depositions are the norm, and the defendants are well within their rights to insist on having an opportunity to depose the plaintiff face-to-face.").

There are at least **three separate reasons** why the videoconference deposition proposed by SMUG is unfeasible and in violation of the rules and law, and none of the authorities cited by SMUG requires the Court to overlook these serious defects.

A. The Time Difference between Uganda and the United States Precludes a Videoconference Deposition.

Most of the dozens of potential witnesses identified by SMUG are located in Uganda. As already briefed by SMUG elsewhere, there is no meaningful opportunity to depose ordinary Ugandan witnesses because Uganda is not a treaty member to the Hague Convention on the

Taking of Evidence Abroad in Civil and Commercial Matters. (*See* dkt. 142, pp. 2, 6). Accordingly, Lively is forced to find out what he can about SMUG's voluminous allegations from only the handful of witnesses who are SMUG's directors, officers or managing agents, and whom SMUG is required to produce for deposition without subpoena. Because of these limitations, Lively has only been able to take two depositions thus far (both SMUG officers), and Lively currently anticipates taking only four additional depositions, including Ganafa's and SMUG's corporate depositions – well short of the ten deposition limit in a typical case.

The upshot of these discovery limitations is that Lively must take full advantage of his deposition time with each witness whom he **can** depose. Fully utilizing the seven-hour limit available under Fed. R. Civ. P. 30(d)(1), including lunch and other breaks, means that Lively's depositions of SMUG's corporate witnesses necessarily must stretch approximately nine hours each, as was the case with the two depositions already taken. Given Ganafa's critical role within SMUG, his extensive knowledge of many relevant facts as detailed above, and Lively's inability to obtain information from other fact witnesses, Lively reasonably expects that Ganafa's deposition will also last approximately nine hours including breaks.

Uganda is located in the Eastern Africa time zone, which is seven hours ahead of the Eastern United States time zone.[17] If the deposition were to take place from 9 a.m. until 6 p.m. Uganda time, the parties' counsel, support staff, court reporter and video specialist would have to be awake and working from 2 a.m. until 11 a.m. in the United States. Conversely, if the deposition were to take place from 9 a.m. until 6 p.m. New York time, Ganafa would have to report for his deposition at 4 p.m. Uganda time, and remain awake and alert until 1 a.m. There is no reason to require such feats.

[17] Time Zone Map (available at http://www.timeanddate.com/time/map/, last visited July 5, 2015).

Even if there were compelling enough reasons to require the parties to depose Ganafa long after the midnight oil has burnt, doing so may well deprive the parties of the opportunity to secure this Court's guidance and supervision on any issues that might arise during the deposition. "Obviously, conducting depositions in [Uganda], over [seven] time zones away … would severely compromise—to put it mildly—the court's ability to intervene should problems arise." *New Medium Techs. LLC v. Barco N.V.*, 242 F.R.D. 460, 467 (N.D. Ill. 2007) (requiring foreign witnesses to be deposed in Chicago). *See also In re Vitamin Antitrust Litig.*, No. MDL NO. 1285, 2001 WL 35814436, *5 (D.D.C. Sept. 11, 2001) (requiring foreign witnesses to be deposed in the United States so that the Court could be available to quickly resolve any disputes in light of approaching discovery cutoff). On this point, when it suited its position in a different context, SMUG readily conceded that, "While some courts have permitted depositions overseas (or telephonically), **recent cases have concluded that the appearance [of a foreign witness] must be within the United States because courts do not have jurisdiction to supervise depositions outside the United States**." (SMUG Memo. in Supp. of Motion for Issuance of Ssempa Subpoena, dkt. 142, p. 6) (emphasis added). If a remote deposition is not suitable for Martin Ssempa, a non-party, it is certainly not suitable for the highest ranking executive of Plaintiff who initiated this suit.

There is no reason – let alone a compelling reason – to impose this kind of hardship on the parties, counsel, court reporters, support staff and potentially the Court.

B. The Inability to Effectively Use Numerous Exhibits Precludes a Videoconference Deposition.

Lively anticipates that he will need to use numerous exhibits at Ganafa's deposition, as he and SMUG did at the depositions taken thus far. Many of those exhibits will not be known to Lively's counsel in advance of the deposition. As Lively cannot possibly question Ganafa or any

of SMUG's witnesses on all of the critical documents in this case within the allotted seven hours, Lively's counsel must decide which exhibits to prioritize, and these decisions are typically made "on the fly," based upon the witness' responses at the deposition. As a result, Lively cannot send a large stack of potential exhibits to Ganafa in advance of the deposition, for him to reference at the time of his deposition. Questioning Ganafa for seven hours on multi-page exhibits that he does not have in front of him would be unfair to Lively and to Ganafa, and would make for a cumbersome deposition and a poor record.

Even if Lively could determine each and every exhibit for the Ganafa deposition in advance, which he cannot, there would be no court reporter or other neutral party to whom Lively could send the exhibits in advance of the deposition. SMUG has not identified the existence of suitable court reporters who meet U.S. litigation standards in Uganda, and Lively is not aware of any. As such, SMUG's videoconference proposal must anticipate that a court reporter would be situated with counsel in the U.S. while Ganafa testifies remotely. Requiring Lively to provide advance copies of the exhibits directly to Ganafa or another SMUG representative in Uganda would breach work product privilege, would provide SMUG and Ganafa with a roadmap to Ganafa's deposition, and would ensure that Lively does not obtain Ganafa's candid and unrehearsed testimony. All of this would unduly and unnecessarily prejudice Lively.

C. The Inability to Have a Court Reporter or other Officer Present with Ganafa Violates the Rules and Precludes a Videoconference Deposition.

SMUG's apparent proposal to have a court reporter in New York or Massachusetts remotely transcribe the testimony and administer the oath to Ganafa in Uganda directly contravenes the Federal Rules governing depositions, which require that the officer who administers the oath must be physically present with the witness being examined.

Rule 28(b) governs the taking of depositions in a foreign country.[18] Fed. R. Civ. P. 28(b). To satisfy this rule, a deposition in a foreign country may occur "(A) under an applicable treaty or convention; (B) under a letter of request, whether or not captioned a 'letter rogatory'; (C) on notice, before a person authorized to administer oaths either by federal law or by the law in the place of examination; or (D) before a person commissioned by the court to administer any necessary oath and take testimony." Fed. R. Civ. P. 28(b)(1). As noted earlier, no treaty or convention applies to Uganda. Also, the cumbersome nature and potential sovereignty concerns regarding letters rogatory are not practical in light of the parties' limited timetable for completing Ganafa's deposition. The remaining circumstances, however, require the deposition to be taken "before" a person who is authorized to administer the proper oath.

Courts have consistently held that "the word 'before' in Rule 28(b)(1)(D) **requires that the witness and the person who administers the oath be in the same place**." *Menovcik*, 2010 WL 4867408 at *5.[19] Indeed, the "most logical and obvious construction" requires the officer delivering the oath to be in the physical presence of the deponent during a remote deposition. *Aquino v. Auto. Serv. Indus. Ass'n*, 93 F. Supp. 2d 922, 923-24 (N.D. Ill. 2000) (holding remote

[18] Rule 30 expressly provides that a deposition taken by remote means "takes place where the deponent answers the questions." Fed. R. Civ. P. 30(b)(4). *See also Menovcik v. BASF Corp.*, No. 09-12096, 2010 WL 4867408, *5 (E.D. Mich. Nov. 23, 2010) ("Courts have uniformly held that the last sentence of Rule 30(b)(4) means that the deposition is 'taken' where the witness—not the parties or their counsel—is located.") (collecting cases). Here, under SMUG's videoconference proposal, Ganafa's deposition would be taken in Uganda.

[19] *See also Tile Unlimited, Inc. v. Blanke Corp.*, No. 10-8031, 2013 WL 1668194, *2 (N.D. Ill. Apr. 17, 2013) (holding that a Rule 28(b) deposition "must be conducted before an officer appointed or designated under Rule 28"); *Phye v. Thill*, No. 06-1309, 2007 WL 2681106, *1 (D. Kan. Sept. 7, 2007) ("Case law on this issue, while not abundant, is clear. 'Rule 28(b) specifically requires that the witness testify 'before' an official, i.e., **at the same place as the official**, and that the official be authorized to administer oaths where the examination is held.'") (emphasis added) (quoting *Loucas G. Matsas Salvage & Towage Maritime Co. v. M/T Cold Spring I*, Nos. 96-621, 96-931, 1997 WL 102491, *2 (E.D. La. Mar. 5, 1997)).

depositions **procedurally defective and inadmissible** because court reporter delivered oath to witness over the phone).

Multiple courts have applied this reasoning to reject proposed videoconferencing depositions that failed to satisfy the requirements of Rule 28. For example, in *Menovcik*, the court denied a motion for leave to conduct a videoconference deposition of a witness located in Thailand because no arrangements were made for a duly authorized person to be physically with the deponent to administer the oath. *Menovcik*, 2010 WL 4867408 at *1. Similarly, in *Tile Unlimited*, the court rejected a videoconference proposal where a Chicago-based court reporter would have remotely administered the oath to an individual residing in Germany, indicating that there is no authority "to dispense with the requirement of an appropriate officer present personally to administer the oath," and noting that "[t]he requirements of Rule 28(b) mitigate concerns over the accuracy and identity of deponents and documents inherent in foreign depositions." *Tile Unlimited*, 2013 WL 1668194 at *3. Furthermore, in *Loucas*, the Eastern District of Louisiana struck from the record as improperly sworn the deposition testimony of a witness located in Poland because the oath was telephonically administered by a court reporter in Louisiana. *Loucas*, 1997 WL 102491, at *1; *see also Phye*, 2007 WL 2681106, at *2 (requiring remote depositions of witnesses located in Mexico to be administered the oath by a person "in the same location" as the witnesses).

Critically, the requirements of Rule 28 could not be met by having a Ugandan official physically present with Ganafa to administer an oath, while a separate court reporter transcribes the deposition remotely from the United States. If the court reporter and the official administering the oath are not one and the same, then the court reporter must be "acting **in the presence** and under the direction of the officer." Fed. R. Civ. P. 30(c)(1) (emphasis added).

Here, SMUG has made no effort to identify suitable court reporters in Uganda that would meet U.S. litigation standards. While English is widely spoken in Uganda, experience thus far has taught that the difference in dialects presents special challenges that require capable court reporters to ensure an accurate record. Accurate transcription is challenging even when a foreign witness is physically present with and right next to the court reporter, let alone 7,000 miles away.

While SMUG may be content to have a U.S.-based court reporter remotely administer the oath and remotely transcribe Ganafa's deposition, such procedure is clearly prohibited by the applicable rules and law. The resulting transcript would be inadmissible, and thus useless. SMUG's proposal is thus not feasible and should be rejected.

D. None of the Authorities Cited by SMUG Requires the Imposition of these Litigation Burdens and Handicaps on Lively.

SMUG's cases do not compel this Court to overlook the significant concerns discussed above, and to relegate Lively to a remote deposition of a key witness.

As an initial matter, a substantial number of SMUG's cases involve remote depositions of opt-in plaintiffs to a collective action under the Fair Labor Standards Act (FLSA), and any reliance upon same is unfounded. As explained by the very courts cited by SMUG, the FLSA collective action is a statutory device crafted to further a public policy specifically designed to pool resources of plaintiffs with limited means.[20] No comparable legislative policy exists here.

[20] *See*, *e.g.*, *Forauer v. Vermont Country Store, Inc.*, No. 12-276, 2014 WL 2612044, *1, *6 (D. Vt. June 11, 2014) (FLSA plaintiffs joined lawsuit in Vermont for wage dispute arising from work performed in that state but resided in Virginia, South Carolina, Missouri, and Ohio); *Gee v. Suntrust Mortg., Inc.*, No. 10-1509, 2011 WL 5597124, *2-3 (N.D. Cal. Nov. 15, 2011) (permitting defendant to conduct FLSA plaintiff depositions in the "fourteen cities" across the United States proposed by plaintiffs as "more convenient" for them rather than the four cities chosen by the defendant); *Geer v. Challenge Fin. Investors Corp.*, No. 05-1109, 2007 WL 1341774, *4 (D. Kan. May 4, 2007) (defendant noticed more than 250 plaintiff depositions in the State of Kansas, even though these FLSA plaintiffs moved to states contiguous with Kansas and "states that are not contiguous," such as Florida, Virginia, Texas, Ohio and California).

Moreover, the FLSA cases involve interstate, not international, depositions,[21] and thus do not trigger the same concerns regarding time zones, exhibits and availability of court reporters/officers discussed above.

The case of *Planadeball v. Wyndham Vacation Ownership*, No. 12-1485, 2013 WL 864612, *1 (D.P.R. Mar. 7, 2013) (cited at dkt. 167, pp. 7-8), also provides no support for SMUG's request. The deposition at issue there was of the non-resident corporate **defendant**, a distinct calculus altogether and one which begins with a directly opposite presumption than the one governing this dispute—*i.e.*, while a nonresident **defendant** is generally not required to sit for a deposition in the forum jurisdiction, a **plaintiff** is generally so required.

Further, the deposition order entered in *ClearOne Commc'ns, Inc. v. Chiang*, 276 F.R.D. 402, 403-05 (D. Mass. 2011) (cited at dkt. 167, p. 7), is an odd place for SMUG to look for support, because it actually supports Lively's position and directly refutes SMUG's. In *ClearOne*, the deponent **had already been deposed in the case once before**. *Id*. at 404-05. Notwithstanding, the district court ordered the deponent to sit for another deposition and, although it permitted a video deposition, **it did not order that format**, instead leaving it to the noticing party (here, Lively) to decide whether the deposition could "proceed via video conference." *Id*. at 405. If not, **the deponent was ordered to either appear at his own expense in the state where noticing counsel worked, or pay noticing counsel's travel costs and expenses to hold the deposition elsewhere**. *Id*. *See also Sugarhill Records Ltd. v. Motown Record Corp.*, 105 F.R.D. 166, 172 (S.D.N.Y. 1985) ("[SMUG] is hereby given the choice, however, of producing its witness in [Massachusetts or New York] or paying the airfare and hotel costs of counsel for [Lively] incurred if the deposition is conducted in [Uganda].").

[21] *See* note 20, *supra*.

Otherwise, SMUG erroneously cobbles together separate orders to concoct an alleged general rule in favor of video depositions under the Alien Tort Statute (ATS). However, in-person depositions of foreign individuals are the rule, not the exception, in ATS cases. *See*, *e.g.*, *Al Shimari, et al. v. CACI Int'l Inc., et al.*, No. 08-827, Dkt. No. 205 (E.D. Va. Feb. 14, 2013) (requiring plaintiffs residing in Iraq and Qatar to "make themselves available for depositions in the Eastern District of Virginia," over their objections); *Giraldo, et al. v. Drummond Co., Inc.*, No. 09-1041, Dkt. No. 268 (N.D. Ala. Dec. 12, 2011) (Columbian plaintiffs appeared in Birmingham, Alabama for depositions). Moreover, SMUG's ATS citations are easily distinguishable. The defendants in *Adhikari, et al. v. Daoud & Partners, et al.*, No. 09-1237, Dkt. No. 356 (S.D. Tex. Sept. 6, 2012), sought in-person depositions of **more than 20** foreign individuals in Texas. Furthermore, in both *Boweto, et al. v. ChevronTexaco Corp.*, No. 99-2506, Dkt. 2006 (N.D. Cal. Oct. 16, 2008), and in *Quinteros, et al. v. Dyncorp, et al.*, No. 07-1042 (D.D.C. June 8, 2009), the parties **agreed** on videoconference depositions, which agreement is obviously lacking here.

In sum, SMUG has presented no good reason and no authority to support the relief it seeks and the attendant difficulties and prejudice to Lively. SMUG's Motion should be denied.

V. SMUG HAS UNREASONABLY REJECTED LIVELY'S EFFORTS TO ACCOMMODATE ITS PURPORTED SCHEDULING CONCERNS BY TAKING THE GANAFA DEPOSITION IN UGANDA.

At the June 24, 2015 Status Conference, the Court extended the parties' deadline to complete the Ganafa and a handful of other depositions until August 31, 2015. (Dkt. 191). The Court then encouraged the parties to revisit their disagreement regarding the Ganafa deposition, in light of the additional time now available to complete it. Lively attempted once again to resolve the issue with SMUG, and offered again (as a last resort) to take the Ganafa deposition in

Uganda, if SMUG covers the attendant travel and logistical expenses. (Mihet Email to SMUG Counsel, attached hereto as **Exhibit A**). SMUG never responded and thus rejected this offer.

With the additional sixty days provided by the Court, SMUG's rejection of Lively's offer cannot possibly be motivated by scheduling concerns. Nor can SMUG's refusal be motivated by financial considerations. Both of these pretextual excuses are rebutted at pp. 8-11, *supra*.

Taking Ganafa's deposition in Uganda would impose substantial hardship on Lively, separate and apart from travel costs, not the least of which is the significant attorney time required for international travel. A deposition in Uganda would also be fraught with the difficulties discussed above, such as the inability of this Court to supervise it, and the need to take a U.S.-based court reporter along. Lively submits that ample grounds exist for denying SMUG's Motion altogether, and requiring SMUG to produce Ganafa for deposition in the United States. This is the just and fair result that Lively urges here.

However, a live deposition in Uganda would still be much better and less prejudicial to Lively than a remote deposition. Lively reluctantly remains amenable to this alternative only as a last resort, and only if SMUG is required to: (a) reimburse one Lively attorney for reasonable travel (airfare, lodging and meals) to Uganda;[22] (b) cover the travel costs and professional fees for a U.S.-based court reporter to travel to Uganda to administer the oath and transcribe Ganafa's deposition; and (c) arrange for a suitable deposition location in Uganda at SMUG's expense. *See* relief provided in *ClearOne* and *Sugarhill*, discussed on p. 18, *supra*.

CONCLUSION

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

[22] This expense would be presumably offset by SMUG not having to bring Ganafa to the United States. Thus, only the expenses in (b) and (c) would be over and above what SMUG would incur if it produced Ganafa for deposition in the United States as noticed.

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 6, 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: Horatio Mihet
To: pspees@ccrjustice.org; jshah@kinoy.rutgers.edu; Sullivan.Mark@dorsey.com; beebe.daniel@dorsey.com; kumar.vikram@dorsey.com; mcneely.kaleb@dorsey.com
Cc: Roger Gannam
Subject: Ganafa Deposition
Date: Thursday, June 25, 2015 12:28:01 PM

Team SMUG:

At yesterday's status conference, the Court encouraged us to revisit our disagreement regarding the Ganafa deposition, in light of the additional time we have been granted to complete depositions.

We remain firm in our belief that SMUG is obligated under the rules to bring its Chairman of the Board to the US. A video conference deposition is not suitable for many reasons, including the time difference between the U.S. and Uganda (viz our expectation to spend a full 7 hours with him), and the impossibility of effectively using our many anticipated exhibits, some of which we likely will not be aware of until the deposition is under way.

Since we now have until August 30 to complete the Ganafa Deposition, we would ask you to reconsider SMUG's and his refusal to come to the United States to be deposed. A claim that Mr. Ganafa has no availability whatsoever within this new time frame would be no more persuasive than the claim made by Onziema, which the Court has rejected.

We earnestly hope that the guidance received from the Court yesterday on scheduling disputes will usher in a new era of cooperation. In the spirit of that cooperation, and only if Mr. Ganafa refuses to come to the United States, we offer again to depose Mr. Ganafa in Uganda, if SMUG covers the travel cost for one Lively lawyer and one court reporter. This is a much less desirable alternative that would work considerable hardships and unanticipated costs on us, but we offer it in our continued efforts to accommodate SMUG and Mr. Ganafa.

Kindly let us know SMUG's position on the above prior to the close of business tomorrow, so that we know how to address these issues in our forthcoming response to the Ganafa motion, or whether a response will even be necessary.

On a separate but related note, thank you for your hospitality in hosting depositions at your office this week.

HGM

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