

**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 OPPOSITION TO
PLAINTIFF’S MOTION FOR LEAVE TO FILE OMITTED EXHIBITS**

Defendant, SCOTT LIVELY (“Lively”), pursuant to Local Rule 7.1(b)(2), files this memorandum in opposition to the Motion for Leave to File Omitted Exhibits Referenced in Its Rule 56.1 Statement and an Errata Correcting Citations in Its Rule 56.1 Statement (dkt. 316, the “Motion”), filed by Plaintiff, Sexual Minorities Uganda (“SMUG”). For the reasons stated herein, SMUG’s Motion should be denied.

ARGUMENT

I. SMUG FAILS TO JUSTIFY THE UNTIMELINESS OF ITS FILING.

This Court’s orders and Local Rule 56.1 plainly required SMUG to file all of its “documentation” months ago, concurrently with its summary judgment opposition. Inadvertence is an insufficient justification for missing a filing deadline. “When an act may or must be done within a specified time, the court may, for good cause, extend the time . . . on motion made after the time has expired **if the party failed to act because of excusable neglect.**” Fed. R. Civ. P. 6(b)(1)(B) (emphasis added). The rule reflects that deadlines mean something. SMUG, however, offers only inadvertence as justification for completing its incomplete filings over two months

after its opposition to Lively's summary judgment motion was due (and over a month after its off-schedule sur-reply). (Mot. at 1, 3.)

SMUG suggests its inadvertence is owing to "the process of filing a lengthy and complicated submission involving hundreds of exhibits and numerous declarations." (Mot. at 3.) But the length of its incomplete filing does not constitute excusable neglect. To be sure, lengthy filings are unavoidable in this case, necessitated by the numerous (and meritless) substantive issues raised by SMUG's lawsuit. But SMUG upped the ante considerably by misappropriating the opportunity to file its own "fact" narrative to oppose Lively's summary judgment motion (dkt. 270, *et seq.*), rather than complying with Local Rule 56.1. (*See* Reply Mem. Supp. Def. Mot. Summ. Judgment (dkt. 305, Lively's "SJ Reply") at 4-5 (quoting *Rios-Jimenez v. Principi*, 520 F.3d 31, 38 (1st Cir. 2008) ("[W]e say again that parties are required to straightforwardly comply with the dictates of local rules such as Local Rule 56, and to state clearly and concisely the facts claimed to be undisputed or disputed, or qualified, and the record evidence supporting those claims Local Rule 56 is intended to prevent parties from shifting to the district court the burden of sifting through the inevitable mountain of information generated by discovery in search of relevant material.")).) SMUG's errors and omissions may well have been inadvertent, but SMUG's inflation of the summary judgment record was intentional.¹ SMUG has shown no good cause for allowing still further additions and adjustments to the record more than two months after its responsive papers were due.

¹ SMUG's opposition memorandum, statements of "facts," and reams of declarations and exhibits filed in opposition to Lively's summary judgment motion (dkt. 270-293) approach **3,000 pages**. Although Lively has the burden of the movant, his initial and reply memoranda, declarations, and exhibits **combined** comprise **half** the pages of SMUG's filings.

II. SMUG’S LATE FILING OF ITS OMITTED EXHIBITS IS PREJUDICIAL TO LIVELY.

While both parties have sought and received extensions of time in this case, in every instance the extension was either by agreement of the parties or in a context where the extension would not prejudice the other side’s ability to present its case (apart from any general prejudice inherent in delaying the conclusion of litigation). In the instant Motion, SMUG seeks to file ostensibly substantive material to be added to the record and considered by the Court nearly two months after Lively was required to file his final brief. Such an out-of-time allowance would be highly prejudicial to Lively, and unjustified by any excuse offered by SMUG.

Also prejudicial to Lively is the apparent hiding of SMUG’s proposed Izama Declaration (dkt. 317-4) for almost two years. Dated November 5, 2014, the Izama Declaration was not previously produced. Securing a declaration from Kampala, Uganda certainly indicates SMUG thought the subject of the declaration to be important, but SMUG did not see fit to include it in any of over a dozen separate document productions. Not having produced the declaration for **years**, SMUG has shown no justification for allowing its use at all; SMUG’s failure to file it for **months** simply adds insult to injury.

III. SMUG’S OMITTED EXHIBITS ARE IMMATERIAL TO THE ISSUES RAISED IN LIVELY’S SUMMARY JUDGMENT MOTION.

Even in the absence of prejudice to Lively from SMUG’s out-of-time filing, on initial review the new declaration exhibits proposed by SMUG (dks. 317-1 - 317-4) are not material to any issue raised in Lively’s summary judgment motion. All of the declarations purport to authenticate news articles about statements and actions of Ugandan government officials, none of which mention or implicate Lively, or contradict any statement of Lively.

For example, none of the declarations erases even one of the hundreds of “I don’t know” or any other non-answer given by SMUG on the material elements of Lively’s alleged crimes (*see*

SJ Reply at 6-30); none shows any domestic conduct of Lively, which is necessary to SMUG's ATS claims (*see* SJ Reply at 30-46); none shows any agreement by Lively to engage in criminal persecution, which is necessary to displace Lively's First Amendment rights (*see* SJ Reply at 46-73); and none shows even a remote causal link between Lively and SMUG's claimed (but unsubstantiated) damages (*see* SJ Reply at 73-116). The new exhibits only serve SMUG's improper and inapposite "fact" narrative, thickening "the smokescreen behind which litigants with marginal or unwinnable cases often seek to hide" *Rios-Jimenez*, 520 F.3d at 38. The Court should not allow SMUG's subversion of the Court's "attention on what is—and what is not—genuinely controverted." *Id.*

CONCLUSION

For all of the foregoing reasons, the Court should deny SMUG's Motion.

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 October 26, 2016. 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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Attorney for Defendant Scott Lively