

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

SEXUAL MINORITIES UGANDA)	
)	
<i>Plaintiff,</i>)	
)	
v.)	
)	Civil Action
SCOTT LIVELY, individually and as)	
President of Abiding Truth Ministries,)	3:12-CV-30051
)	
<i>Defendant.</i>)	
)	

**PLAINTIFF’S OBJECTION TO MEMORANDUM AND ORDER
REGARDING PLAINTIFF’S MOTION TO AMEND EXISTING PROTECTIVE ORDER**

Pursuant to Fed. R. Civ. P. 72(a), Plaintiff Sexual Minorities Uganda (“Plaintiff”) respectfully objects in part to the Memorandum and Order Regarding Plaintiff’s Motion to Amend Existing Protective Order and Defendant’s Motion to Compel Plaintiff to Produce Unredacted Documents entered by Magistrate Judge Katherine A. Robertson on August 10, 2015 (dkt. 204). Specifically, Plaintiff objects to Judge Robertson’s denial of Plaintiff’s motion to designate a subset of documents, amounting to approximately five percent of its production, “Attorneys’ Eyes Only.” Plaintiff asserts that these documents contain highly confidential strategies recently or currently used by Plaintiff and members of Uganda’s lesbian, gay, bisexual, transgender, and intersex (“LGBTI”) community to protect itself from and counter the persecution brought about by Defendant in concert with others in Uganda. The current protective order is insufficient to protect these documents, as like trade secrets exposed to a competitor, Defendant could, even if subconsciously, make use of this information to continue to design strategies to effectively silence Plaintiff and other advocates for the rights of LGBTI

persons in Uganda. Moreover, given the other documents Plaintiff has already produced in this case and the attenuated relevance of the limited universe documents Plaintiff seeks to protect, Defendant would suffer minimal, if any, impediments to fully participating in his own defense were he not able to view these documents.

Judge Robertson's Order was clearly erroneous and contrary to law on this point as it solely relied on a lack of evidence demonstrating that Defendant has violated the terms of the existing protective order. However, "Attorneys' Eyes Only" designation is merited precisely in those situations where a party could misuse the information in the documents without ever purposefully or even knowingly violating the terms of the protective order. The Order should be modified in part, and Plaintiff should be permitted to designate this modest subset of documents "Attorneys' Eyes Only."

BACKGROUND

In a February 14, 2014 ruling in anticipation of the existing Protective Order, dkt. 106, Magistrate Judge Neiman explained that the Court's finding that "Plaintiff has set out plausibly that Defendant worked with associates within Uganda to coordinate, implement, and legitimate 'strategies to dehumanize, silence, and further criminalize the [Ugandan] LGBTI community'" ... provide[s] background to the instant dispute over a protective order." Dkt. 102 at 2 (quoting Dkt. 59 at 34-35 (quoting Plaintiff's Amended Complaint (Dkt. 27) at ¶ 27)). Judge Neiman noted that while "Defendant's counsel would no doubt need to communicate with him," that Defendant had "betrayed an insufficient understanding of how he could run afoul of his intended compliance with an even more carefully crafted protective order." *Id.* at 3. Balancing these concerns, Judge Neiman rejected Plaintiff's request for a provision in the Protective Order under which either party may unilaterally designate certain material to be

viewed by “attorneys eyes only” (“AEO”), but permitted the parties to apply to the Court for such protection “for specific Discovery Material, upon a showing of a particularized and compelling need.” Dkt. 106 at ¶ 17.

In response to Defendant’s 196 document requests, Plaintiff produced more than 5,000 documents, consisting of more than 25,000 pages. *See* dkt. 151 at 2-3. During the course of its document review, Plaintiff identified a subset of documents – amounting to approximately five percent of the documents it already produced – that, on account of their particularly sensitive nature, merit AEO designation. Each of the documents meriting AEO designation fits into one of the four following categories (the “AEO Categories”):

- (1) Security-Related Documents: These documents concern the recent or ongoing planning and organization of SMUG’s efforts to respond to (a) emergent security situations of the LGBTI community, particularly in the wake of the passage of the AHA and (b) the safety and security needs of its member organizations, in particular post-passage of the AHA. *See* dkt. 151 at ¶ 3(a). By contrast, documents relating to past planning and organization of SMUG’s security efforts, which are no longer pertinent, have been produced with a “CONFIDENTIAL” designation pursuant to the existing Protective Order. *See id.* at ¶ 5.
- (2) Health Care- and Security-Related Documents: These documents concern SMUG’s recent or ongoing assistance with and security planning for a health clinic for the LGBTI community, which provides HIV/AIDS testing, treatment and counseling. *See id.* at ¶ 3(b). Other documents concerning SMUG’s efforts with respect to these services, which do not bear on its recent or ongoing security planning and assistance, have been produced with a “CONFIDENTIAL” designation pursuant to the existing Protective Order. *See id.* at ¶ 6.
- (3) Communications with Foreign Government Representatives: These documents contain confidential communications between SMUG and representatives of foreign governments concerning the persecution as part of their effort to ensure the safety and well-being of LGBTI persons in Uganda and guard against additional acts of persecution. *See id.* at ¶ 3(c).
- (4) Video, Photographs, and Emails Concerning a Workshop Raided in 2012: These documents concern a workshop held in February 2012 that was raided by the Minister of Ethics and Integrity, as described in paragraphs 176-185 of Plaintiff’s First Amended Complaint. The videos and photographs contain images of people in attendance whose safety and liberty could be endangered were their images and

identities to be publically disclosed. The videos also contain footage of the closed workshop sessions involving detailed discussions of human rights advocacy strategies for the LGBTI community. *See id.* at ¶ 3(d). By contrast, SMUG has produced other documents concerning this event with a “CONFIDENTIAL” designation that do not reveal images and identities of workshop participants who are not publicly known to be members or supporters of the Ugandan LGBTI community or that do not reveal details about confidential advocacy strategies discussed at the workshop. *See id.* at 7.

Unable to reach an agreement with Defendant regarding the subset of documents falling in the AEO Categories because Defendant refused to permit any documents to be marked AEO, Plaintiff sought to amend the Protective Order to permit designation of this small set of documents with AEO protection. *See* dkt. 149. Separately, Defendant filed a motion seeking to compel unredacted versions of certain documents in Plaintiff’s production.

On August 10, 2015, Judge Robertson issued a ruling denying Plaintiff’s motion to designate certain documents with AEO protection on the sole ground that there was “no evidence that Defendant has failed to comply with the terms of the protective order,” *see* dkt. 204 at 11, without addressing any of the arguments Plaintiff raised in its briefing, *see* dkt. 150, or at oral argument, *see* Declaration of Jeena Shah, Esq. dated Aug. 24, 2015, Ex. A.

In the same ruling, Judge Robertson denied Defendant’s motion to compel to the extent that it sought information redacted on the ground that it was protected by the attorney-client, attorney work product, or associational privileges and granted the motion to the extent it sought information redacted on the ground that it was non-responsive and irrelevant. *Id.*

Plaintiff files the present objection only to the part of Judge Robertson’s ruling denying AEO protection to certain of Plaintiff’s documents.

ARGUMENT

The Court must set aside orders that are timely objected to and are “clearly erroneous or [] contrary to law.” *PowerShare, Inc. v. Syntel, Inc. Eyeglasses*, 597 F.3d 10, 14 (1st Cir. 2010) (quoting Fed. R. Civ. P. 72(a)). A magistrate judge’s legal conclusions require *de novo* review. *See id.* at 15 (“[F]or questions of law, there is no practical difference between review under Rule 72(a)’s ‘contrary to law’ standard and review under Rule 72(b)’s *de novo* standard.”). *See also Trustees of Boston University v. Everlight Electronics Co., Ltd.*, Civil Action Nos. 12–11935–PBS, 12–12326–PBS, 12–12330–PBS, 2015 WL 3407555, at *2 (D. Mass. May 27, 2015) (“Under the ‘contrary to law’ standard, the district court’s review is plenary.” (citing *PowerShare*, 597 F.3d at 15)); *Seaton Ins. Co. v. Clearwater Ins. Co. Eyeglasses*, 736 F.Supp.2d 472, 474 (D.R.I. 2010) (“Even the clearly erroneous standard established by 28 U.S.C. § 636(b)(1)(A) for non-dispositive decisions by a magistrate judge requires *de novo* review of the magistrate judge’s legal conclusions.” (internal quotations omitted)).

A. Forbidding Plaintiff From Designating Limited Categories of Documents AEO Would Cause Irreparable Harm

Disclosure of the contents of the documents in the AEO Categories would cause irreparable harm to Plaintiff and the persecuted LGBTI community in Uganda because it would inform Defendant of critical strategies for securing the safety, health, and wellbeing of the LGBTI community in Uganda. While Judge Robertson denied AEO protection because there was “no evidence that Defendant has failed to comply with the terms of the protective order,” dkt. 204 at 11, the same ruling recognized that the mere “Confidential” designation under the Protective Order is insufficient to protect highly-sensitive information since “documents may be passed on to investigators and experts, including investigators in Uganda, and may be shown to witnesses, including witnesses in Uganda,” which makes “enforcement of the terms of the

protective order in Uganda [] problematic...[e]ven assuming compliance with the protective order by all parties, witnesses, investigators and experts,” *id.* at 8.

Moreover, AEO protection is merited precisely in situations where a defendant is “especially situated to take positions that are directly harmful and antagonistic to [the plaintiff],” such that even if Defendant were to withhold this information from anyone in Uganda and refrain from purposefully, or even knowingly, violating the terms of the Protective Order, he could make “subconscious use [of this information] in his future endeavors” to design persecution strategies against the Ugandan LGBTI community. *Voice Domain Technologies, LLC v. Apple, Inc.*, 2014 WL 5106413, at *4, 5 (D. Mass. Oct. 8, 2014).¹ To assume otherwise would inappropriately decide an ultimate issue of this case on a discovery order, namely that “Defendant work[s] with associates within Uganda to coordinate, implement, and legitimate ‘strategies to dehumanize, silence, and further criminalize the [Ugandan] LGBTI community,’” Dkt. 59 at 34-35 (quoting Plaintiff’s Amended Complaint (Dkt. 27) at ¶ 27). Compelled disclosure to Defendant now would not be curable even if Plaintiff prevails on its claims at trial since nothing at the present time is preventing Defendant from continuing to develop persecutory strategies with his Ugandan co-conspirators and employing the information in the AEO Categories in the development of these strategies, even if only subconsciously.

B. Defendant Need Not View the Information in the AEO Categories Himself to Meaningfully Participate in His Defense

In assessing whether to issue a requested protective order, courts must weigh the risk of

¹ While *Voice Domain* concerns commercial trade secrets, the improper use of trade secrets can be remedied by an injunction or money damages. Once Defendant and his co-conspirators devise strategies to work around the way Plaintiff and its constituency are currently seeking to protect themselves – which can occur even without Defendant disclosing the information contained in the AEO Categories to others – no injunction or monetary relief from Defendant can stop his co-conspirators from continuing on with such strategies.

harm to a litigant against the relevance and necessity for the information. *Multi-Core, Inc. v. Southern Water Treatment Co.*, 139 F.R.D. 262, 264 (D. Mass. 1991). Plaintiff has already produced documents concerning the persecutory events in its complaint, including the raid of its workshop in February 2012 and the need for and threats to the LGBTI-centered health clinic that SMUG supports, as well as documents discussing the harms to SMUG and its members caused by those events. *See* dkt. 151 at ¶ 5–7. Given that the information contained in the AEO Categories is not necessary to prove Plaintiff’s claims and SMUG is not relying on this information to calculate its damages, Defendant need not view it himself in order to meaningfully participate in his own defense.

With respect to the first two AEO Categories, Plaintiff already produced to Defendant documents concerning its past security strategies and support to an LGBTI health clinic. Plaintiff seeks AEO protection merely for its *recent or ongoing* security strategies and support to the health clinic so as to assure Plaintiff’s effectiveness in continuing to protect itself and the broader Ugandan LGBTI community from persecution and in continuing to provide safe and reliable services to the community. The third AEO Category similarly contains information of Plaintiff’s sensitive relationships with foreign governments to protect itself and the Ugandan LGBTI community from persecution. Disclosure of the workings of these relationships to Defendant would not only jeopardize their effectiveness in protecting LGBTI Ugandans, but also have a chilling effect on future support those governments may provide to Plaintiff. Defendant need not know the details of these relationships in order to defend himself from the claim that he has contributed to the persecution of LGBTI Ugandans. Finally, with respect to the fourth category, SMUG has already produced documents concerning the February 2012 workshop and the raid of the workshop. Defendant need not view video recordings of strategy discussions

among LGBTI activists at the workshop himself in order to dispute facts surrounding the *raid* of the workshop.²

CONCLUSION

For the foregoing reasons and as stated in docket 150, Plaintiff respectfully requests that the Court modify the Magistrate Judge’s ruling denying Plaintiff’s Motion to Amend Existing Protective Order to permit Plaintiff to designate the documents in the AEO Categories as Attorneys’ Eyes Only.

Dated: August 24, 2015

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² While Judge Robertson correctly has permitted Plaintiff “to protect the identities of individuals associated with Plaintiff’s member organizations whose identities have not previously been disclosed,” dkt. 204 at 11, from a practical standpoint, Plaintiff cannot withhold their identities from the video recordings it must produce to Defendant under Judge Robertson’s order.

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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 August 24, 2015. Service will be effectuated by the Court's electronic notification system upon all counsel or parties of record.

/s/ Jeena Shah _____

Attorney for Plaintiff
Sexual Minorities Uganda

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
SPRINGFIELD DIVISION

<u>SEXUAL MINORITIES UGANDA,</u>)	
)	
<i>Plaintiff,</i>)	Civil Action No.
)	
v.)	3:12-CV-30051-MAP
)	
SCOTT LIVELY, individually and as)	
President of Abiding Truth)	
Ministries,)	
)	
<i>Defendant.</i>)	

DECLARATION OF JEENA SHAH

I, Jeena Shah, hereby declare as follows:

1. I am a cooperating attorney with the Center for Constitutional Rights, counsel to Plaintiff Sexual Minorities Uganda (“Plaintiff”) in the above-captioned case, and submit this declaration in support of Plaintiff’s Objection to Memorandum and Order Regarding Plaintiff’s Motion to Amend Existing Protective Order.

2. A true and correct copy of the transcript of a hearing held on June 16, 2015 before Magistrate Judge Katherine A. Robertson is attached hereto as Exhibit A.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on August 24, 2015 at New York, New York.

/s/ Jeena Shah
JEENA SHAH

EXHIBIT A

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

SEXUAL MINORITIES UGANDA	. CIVIL NO. 12-30051-MAP
Plaintiff	.
	.
V.	. SPRINGFIELD, MASSACHUSETTS
	. JUNE 16, 2015
SCOTT LIVELY	.
Defendant	.

.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE KATHERINE A. ROBERTSON
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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Court Reporter:

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

MARYANN V. YOUNG
Certified Court Transcriber
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1 (Court called into session)

2 (10:06:45 AM)

3 THE CLERK: In the matter of Sexual Minorities
4 Uganda v. Scott Lively, Civil Action No. 12-30051.

5 THE COURT: Good morning. Counsel; if you could
6 identify yourselves for the record I would appreciate
7 that. I'll start with you.

8 MS. SHAH: Hi my name is Jeena Shah, counsel for
9 the Plaintiff, Sexual Minorities Uganda.

10 THE COURT: Thank you.

11 MR. MORRIS: Zachary Morris for plaintiff.

12 MR. RYAN: Luke Ryan.

13 THE COURT: Good morning. Good morning, and for
14 the defendant?

15 MR. GANNAM: Roger Gannam, Liberty Counsel for
16 Scott Lively.

17 THE COURT: Great and?

18 MR. MIHET: And good morning, Your Honor, Horatio
19 Mihet also for Scott Lively.

20 THE COURT: Thank you very much. So what I have
21 in front of me this morning is the plaintiff's motion to
22 amend the protective order to add a provision that would
23 permit disclosure of certain information for attorney's
24 eyes only. The other, there are two other motions that
25 have been recently filed. One is by the plaintiff for a

1 protective order with respect to the deposition of Sam
2 Ganafa, if I'm pronouncing that correctly. There is also
3 a motion to compel. There hasn't been an opposition filed
4 to that yet because the time for filing the opposition has
5 not yet come. I haven't review that. I'm not intending
6 to address it today. I do think we may want to get to
7 this question of the protective order with respect to Mr.
8 Ganafa's deposition because that's scheduled for June 19th.

9 MR. MIHET: May I be heard briefly, Your Honor?

10 THE COURT: Well, I was going to first start
11 with a motion to amend the protective order.

12 MR. MIHET: Sure. I just have some compelling
13 reasons why the Court should not expedite the Ganafa issue
14 but perhaps we can take that up after--

15 THE COURT: Yes. Yes.

16 MR. MIHET: --the protective order.

17 THE COURT: Let's do that.

18 MR. MIHET: Thank you.

19 THE COURT: So I will hear from the plaintiffs
20 first with respect to the motion to amend the terms of the
21 protective order. You know, I will say that it looks to
22 me like this issue was in front of Judge Neiman at the
23 outset and that he, you know, he ruled on it and he gave
24 some thought to it so it's sort of in the nature of a
25 motion for reconsideration. So with that just as a

1 backdrop, I will hear from you and I have read everything
2 that the parties have filed. I've reviewed the first
3 amended complaint, although I can't say I've read every
4 line of the first amended complaint. I substantially read
5 the first amended complaint. I've read the parties'
6 memoranda with respect to this motion as well as with
7 respect to the plaintiff's motion, with respect to Mr.
8 Ganafa. So that's, I have a fairly reasonable grasp I
9 think of what, what at least is on paper, but I would like
10 to hear from you.

11 MS. SHAH: Okay. Good morning, Your Honor. So
12 I would like to start with addressing your concern about
13 Judge Neiman having already ruled on this issue.

14 THE COURT: Yeah.

15 MS. SHAH: That protective order issued in this
16 case contemplates in paragraph 17 that certain documents
17 may be designated as attorney's eyes only. So what I
18 would like to discuss today with the Court is describe the
19 information that SMUG seeks the heightened protection
20 over. The harms that SMUG will suffer were it to be
21 disclosed to the defendant even if he were to comply with
22 all the terms of the existing protective order and show
23 how Lively, Mr. Lively will suffer no substantial harm or
24 prejudice were he, were these documents withheld from him
25 given that he has access to a wealth of information SMUG

1 has already produced in this case on events that are also
2 covered by these very sensitive documents.

3 At the outset I think that it's important to
4 highlight that when the Court ordered its existing
5 protective order including paragraph 17's contemplation of
6 AEO designations--

7 THE COURT: I don't think the order contemplated
8 that, I think what Judge Neiman said is that I'm not
9 prepared to include that provision. I'm prepared to hear
10 a party say that there, you know, as to some very small
11 category of - what he did was leave open the possibility
12 that the party could move to amend the protective order
13 but he did consider and reject the request at the outset.
14 I read his memorandum. I've read the various docket
15 entries. Anyway, so I don't think he contemplated that
16 there would be the production of material on an attorney's
17 eyes only basis.

18 MS. SHAH: Well yes, Your Honor. He did not
19 contemplate that a party would be able to unilaterally
20 designate any material as attorney's eyes only and simply
21 produce it in the course of its production, but Judge
22 Neiman did leave open the possibility that there may be
23 information, you know at the time that the parties had
24 first moved for the protective order--

25 THE COURT: Sure.

1 MS. SHAH: --no documents were produced in this
2 case--

3 THE COURT: Sure.

4 MS. SHAH: --so plaintiff could not show any
5 particularized or compelling need for any sort of material
6 to merit heightened protection. Plaintiff had merely
7 proposed that proposition in case there was certain
8 documents that would require that protection.

9 THE COURT: Sure.

10 MS. SHAH: So understanding that plaintiff would
11 have to actually move the Court when certain information
12 actually merited that and showed a compelling and
13 particularized need, that's, SMUG has decided to go ahead
14 and produce all other documents in this case, identified
15 out of, over 25,000 pages, or nearly 25,000 pages of
16 documents that SMUG has produced, identified a discrete
17 set of 220 documents that fit within these four categories
18 that--

19 THE COURT: Sure.

20 MS. SHAH: --the plaintiff was laid out in its
21 papers that we believe merit this heightened protection
22 and demonstrate a compelling and particularized need for
23 such a protection.

24 THE COURT: Okay. Yup.

25 MS. SHAH: So given that Your Honor has already

1 read through all the papers, I could go through the
2 categories of documents and describe them for you if,
3 unless you would like me to skip over that and get to--

4 THE COURT: One is, one involves the security
5 needs--

6 MS. SHAH: Um-hmmm.

7 THE COURT: --of Sexual Minorities of Uganda.
8 One involves plans for security for the health clinic.
9 The third involves communications with representatives of
10 foreign governments, and the fourth involves some
11 documents from the Sexual Minority of Uganda's February
12 2012 workshop which would disclose the identity of people
13 who were present at the workshop?

14 MS. SHAH: Yes, and so just on those last two
15 categories just to clarify, the communications with
16 foreign government representatives or specifically with
17 respect to SMUG seeking to protect itself in relation to
18 this persecution and so SMUG has relationships with
19 representatives of foreign governments in order to address
20 the safety, ensure the safety and well-being of LGBTI
21 Ugandans.

22 THE COURT: Okay.

23 MS. SHAH: So it fits more closely to the first
24 two categories of documents.

25 THE COURT: Okay. Okay.

1 MS. SHAH: The last category of documents
2 regarding the workshop raid a number of witnesses have
3 already been disclosed who were present at that workshop.

4 THE COURT: Sure.

5 MS. SHAH: This category primarily covers images
6 of those who were at the workshop because--

7 THE COURT: Show pictures.

8 MS. SHAH: Pictures.

9 THE COURT: Yup.

10 MS. SHAH: Videos.

11 THE COURT: Yup.

12 MS. SHAH: And it also includes a small subset
13 of participants at that workshop who are highly vulnerable
14 to attack simply because they are not known to be
15 assisted, allied with or part of the LGBTI community in
16 Uganda, and so while SMUG has disclosed the name of many
17 witnesses who have attended this workshop, there's a small
18 subset of witnesses found in these documents--

19 THE COURT: Um-hmmm.

20 MS. SHAH: --that merit heightened protection.

21 THE COURT: Because they're not known to be
22 members of this community.

23 MS. SHAH: Or even associated with.

24 THE COURT: Or associated with it so that they
25 would simply not be known at all.

1 MS. SHAH: Exactly and--

2 THE COURT: Okay.

3 MS. SHAH: --the mere disclosure to Mr. Lively
4 would be us, counsel and ourselves or SMUG outing these
5 individuals in their association with SMUG which we
6 believe would cause them great fear of reprisal and
7 harassment unlike other participants who are already known
8 more generally--

9 THE COURT: Um-hmmm. Okay.

10 MS. SHAH: --to be associated with the same
11 thing.

12 THE COURT: I understand.

13 MS. SHAH: Okay. So this information merits AEO
14 protection because it risks irreparable--

15 THE COURT: I'm sorry, just, so SMUG's already
16 produced more than \$25,000, 25,000 pages--

17 MS. SHAH: Yeah.

18 THE COURT: --of documents. When were those
19 documents turned over to the defendants? How long have
20 they been in the defendant's hands approximately?

21 MS. SHAH: So they were turned over on a rolling
22 basis so--

23 THE COURT: Sure.

24 MS. SHAH: --SMUG started producing the
25 documents in November 2014--

1 THE COURT: Of 2014.

2 MS. SHAH: --and finished its production by mid-
3 April of 2015.

4 THE COURT: Of 2015?

5 MS. SHAH: Yes.

6 THE COURT: Okay. Great, thanks.

7 MS. SHAH: So the harm to SMUG in this case if
8 these documents were disclosed to Mr. Lively would be
9 irreparable. As this Court noted in its 2014 decision in
10 *Voice Domain v. Apple*, AEO designations are particularly
11 suited for situations when the defendant is "especially
12 situated to take positions that are directly harmful and
13 antagonistic to plaintiff and such that his subconscious
14 use of that information in his future endeavors is
15 unavoidable. So courts have found this threat of
16 subconscious misuse of information by a party to be real
17 even when the party's integrity is not in doubt". SMUG
18 would suffer irreparable harm were the Court to order
19 disclosure of this information to Mr. Lively because Mr.
20 Lively would then learn critical strategic information
21 that he can easily use to further refine his campaign of
22 persecution without ever disclosing this information to
23 anyone.

24 THE COURT: I want to stop you there for a
25 minute--

1 MS. SHAH: Yeah.

2 THE COURT: --because I, you know, that stops
3 me, that causes me to think twice and to you know
4 seriously consider, you know, what the request here for an
5 attorney's eyes only designation, but when I read the
6 complaint, what I see what Mr. Lively's involvement is
7 alleged to be, it's as a, and again these are allegations,
8 but it's, he's alleged to be in a sense a strategist,
9 someone who has formulated certain kinds of accusations
10 and thoughts about the community that when they're then
11 spread are very harmful to this community of LGBTI
12 individuals in, particularly in Uganda. He's, you know
13 alleged generally to - so he's alleged to be I guess a
14 strategist and you know in terms of thinking about how to
15 ferment even public reaction to members of the community
16 but he's not really alleged, and he's alleged to be a
17 colleague of people who are I guess I would say active in
18 enforcement measures, but I don't really see him alleged
19 to be the source of I want to say police reaction. You
20 know, I see him more alleged to be the theorist behind the
21 campaign as opposed to somebody who's actively involved in
22 on-the-ground activities to carry out a campaign in
23 Uganda.

24 So am I misreading the complaint or the
25 allegations in the complaint? Is that a clear, you know

1 am I making myself clear when I'm telling you, what I'm
2 explaining to you what I see in the complaint?

3 MS. SHAH: Yes, SMUG alleges that Mr. Lively is
4 what we would describe as an architect behind--

5 THE COURT: Yes.

6 MS. SHAH: --the persecution in Uganda and has
7 carried out conduct and furtherance of his intent to
8 persecute the community though it has been others who have
9 actually taken steps to further the acts intended by this
10 conspiracy.

11 THE COURT: Right, right, right, and I had, and
12 I read that he's alleged to have reviewed the legislation
13 but again that the, that his alleged contribution to the
14 content of the legislation is more that, to encourage a
15 focus on anti-advocacy efforts, to hinder the groups who
16 would be able to provide assistance, you know, and to
17 silence the community. Again, sort of as opposed to
18 actually, you know, taking steps on the ground against
19 members of the community on the grounds of Uganda against
20 members of the community. I'm asking those questions
21 really, you know, only because of the terms of the current
22 protective order and what his, what I see his role to be
23 alleged to be so--

24 MS. SHAH: Yeah, so it's precisely that role is
25 that concerning to SMUG and with respect to these

1 documents. So because Mr. Lively is alleged to play
2 that role, is alleged to play the role of a strategist is
3 alleged to have worked with these co-conspirators and
4 colleagues in Uganda in order to figure out ways exactly
5 to stamp out the existence of SMUG and other organizations
6 and individuals who advocate for the rights of LGBTI
7 Ugandans, his knowledge of how SMUG seeks to protect
8 itself from this very persecution and protect its
9 community from this persecution would naturally, you know,
10 even if he weren't to disclose that to anyone he would be
11 able to take that into account when developing his
12 strategies in order to further persecute SMUG and the
13 LGBTI community in Uganda.

14 So for instance, you know, if he is saying that
15 we need to do is stamp out advocacy for LGBT rights and
16 one way to do that is to criminalize this advocacy and he
17 is also, has strategized on ways to equate to sort of make
18 the ground fertile for--

19 THE COURT: Yes.

20 MS. SHAH: --special legislation and for sexual
21 law to pass in Uganda--

22 THE COURT: Yeah.

23 MS. SHAH: --and to make it acceptable. If he
24 were to further understand how, even with, so this
25 persecution has a, is occurring and SMUG is now working to

1 protect itself, now if he understands the ways in which
2 SMUG is protecting itself from this persecution he can
3 further strategize ways for the persecution to get around
4 those security systems.

5 THE COURT: Okay.

6 MS. SHAH: So it's exactly, it's exactly that
7 role that he plays that makes this information dangerous
8 in his hands even, you know, without doubting his
9 integrity to follow the terms of protective order. As we
10 saw in *Voice Domain*, the Court did not doubt that pattern
11 inventor's integrity or that he would publish his
12 information or he would purposely misuse the information,
13 but the Court recognized that there was no way in his head
14 that he could unlearn this information. So as he
15 continued to develop more technology, he would have
16 Apple's information in his head and he would naturally
17 take that into account in his further development of his
18 products.

19 THE COURT: But I would think that this, you
20 know, that the strategies that the organization would use
21 to protect itself and its members and the people who are
22 members of this community in Uganda would be, you know,
23 very practical just in terms of how you communicate
24 without having other people overhear what you communicate,
25 with where you can be safe. You know, those kinds of

1 things which are critically important, and I assume that
2 the documents that you're talking about when you're
3 talking about the security needs of the Sexual Minorities
4 of Uganda and its member organizations and the members of
5 the community are those kinds of things, the how we stay
6 safe in Uganda which is a country which is very dangerous
7 for our members which is where I don't necessarily see the
8 complaint and the allegations about Mr. Lively's
9 activities linking up so closely as I see the allegations
10 in the complaint as his co-conspirators being directly
11 involved. So that's the, that's the gap I guess that I'm
12 concerned about, you know, and then I suggest I've been
13 saying well you should have accessed information to enable
14 him to, you know, subject to a very strict protective
15 order already that says that the information can only be
16 used for purposes of this litigation, that he, you know,
17 that subject to the terms of that protective order he
18 still should have access to the information that the
19 Sexual Minorities of Uganda produces so that he can really
20 fully participate in communicating with his lawyers.

21 So I guess I see just that little bit of a
22 disconnect--

23 MS. SHAH: Um-hmmm.

24 THE COURT: --so if you, that's really, am I
25 making myself clear?

1 MS. SHAH: Yes, yes, Your Honor.

2 THE COURT: Okay.

3 MS. SHAH: And I can address both of those
4 questions separately.

5 THE COURT: Okay. That would be helpful to me.

6 MS. SHAH: So with respect to the first concern
7 as how does SMUG's actual security plans relate to Mr.
8 Lively's role.

9 THE COURT: Yeah.

10 MS. SHAH: You know security plans generally and
11 therein would include where members choose to--

12 THE COURT: Meet.

13 MS. SHAH: --meet.

14 THE COURT: Sure.

15 MS. SHAH: How they choose to communicate.

16 THE COURT: Right. Exactly.

17 MS. SHAH: Which individuals they might use in
18 and outside of the country in order to relay information
19 in order to potentially travel or to hide somewhere--

20 THE COURT: Sure.

21 MS. SHAH: --and the knowledge of the types of
22 safe spaces for LGBTI Ugandans. The knowledge of those
23 allies who are supporting them in carrying out these
24 security strategies, would, Mr. Lively, someone in Mr.
25 Lively's position could take that into account to further

1 refine for instance legislation or other modes of attack
2 that take into account, you know, certain, if these are
3 the types of places that LGBTI Ugandans are using to
4 protect themselves from the persecution, maybe we should
5 find some way to also make illegal these types of places.
6 So it's that knowledge in his hands that would naturally
7 just be configured in the way he would strategize about
8 stamping out any advocacy for LGBTI rights and the
9 documents concerning, you know, it's concerning security,
10 same with healthcare provisions. It's the way SMUG is
11 actually carrying out these activities today to protect
12 its members from reprisal that they have had to be
13 creative given what is, how they are under attack, and if
14 their new forms of supporting their constituency and
15 protecting their membership were to be known by someone
16 who was an architect behind the sort of initial attack and
17 persecution of this community, he would be able to take
18 that information into account to figure out more nuanced
19 and more detailed ways in order to, in order to carry out
20 persecution that evades their security protocols, that
21 renders their security protocols useless.

22 THE COURT: But that would be a violation of the
23 current protective order.

24 MS. SHAH: Well, he wouldn't have to actually
25 disclose the information in order to do so.

1 THE COURT: But the information is to be used
2 only for purposes of this litigation under the terms--

3 MS. SHAH: Yeah.

4 THE COURT: --of the protective order and not
5 for
6 purpose, any other purpose including not for purposes like
7 what you're describing I think.

8 MS. SHAH: Yeah and--

9 THE COURT: So you're saying it wouldn't be an
10 unconscious use.

11 MS. SHAH: Exactly.

12 THE COURT: I'm not so sure, anyway. Okay.

13 MS. SHAH: Once he learns this information he
14 can't unlearn it. So even if SMUG were to ultimately
15 prevail or if this case is over, he still has this
16 information in his head, and while he might not use the
17 documents for any purpose outside of this litigation, that
18 knowledge is there and he can take that into account in
19 his strategies. In regards to Lively participating
20 meaningfully in his own defense, in these categories
21 regarding the ways SMUG has sought to protect itself,
22 regarding its healthcare services, regarding their
23 workshop rate,--

24 THE COURT: Um-hmmm.

25 MS. SHAH: --SMUG has already produced documents

1 in relation to each of these issues. SMUG's past
2 security strategies have been revealed-

3 THE COURT: Sure.

4 MS. SHAH: --and witnesses have for all acts of
5 persecution you know have been disclosed save for this
6 very small subset of witnesses. So Mr. Lively has
7 sufficient information to continue to participate
8 meaningfully in his defense and it would just be this
9 small subset of material that his attorneys would need to
10 review and be able to advise him competently.

11 THE COURT: Let me ask you another question
12 about these documents--

13 MS. SHAH: Um-hmmm.

14 THE COURT: --because - so I am not hearing an
15 argument from the plaintiffs that the documents are not
16 relevant or that their production, you know, that - do you
17 know what I'm saying? I'm not hearing from Sexual
18 Minorities of Uganda that this set of documents that
19 you're concerned about producing is irrelevant in this
20 litigation. It's responsive but it could still be, you
21 know there's still always the argument that something is
22 perhaps responsive, but if such marginal importance in
23 litigation that there, you know that it shouldn't be
24 produced, but I'm not hearing from the plaintiff that
25 that's the case with these categories of documents. They

1 are documents that the plaintiff wants or essentially is
2 relying on for purposes of this litigation. Is that
3 correct?

4 MS. SHAH: Um--

5 THE COURT: Or would be relying on as the
6 litigation moves forward?

7 MS. SHAH: That's true for only some of these
8 documents but not all of them so they do not go to the
9 crux plaintiff's claims. Plaintiff has--

10 THE COURT: None of them do?

11 MS. SHAH: Except for the actual videos of the
12 2012 workshop that was rated given that the rate of that
13 workshop is an event.

14 THE COURT: Is, is an event.

15 MS. SHAH: In this case.

16 THE COURT: Is an event. Yeah, okay. Okay.

17 MS. SHAH: But otherwise the security strategies
18 you know SMUG has already, can rely on the information
19 that has already been disclosed to show how SMUG has been
20 harmed by this persecution. In terms of the health
21 clinic, SMUG can rely on the information that has already
22 been disclosed regarding the establish, the need to
23 establish this health clinic, the need to protect this
24 health clinic--

25 THE COURT: Um-hmmm.

1 MS. SHAH: --from threats, and as far as
2 communications with foreign governments, that actually is
3 not materially relevant to--

4 THE COURT: Yeah, I wondered about that a little
5 bit.

6 MS. SHAH: --any claims in this matter. SMUG is
7 not planning to rely on those materials--

8 THE COURT: But I didn't--

9 MS. SHAH: They are responsive to the documents--
10 -

11 THE COURT: They're responsive, but I didn't get
12 a protective order, you know, I didn't get a request for a
13 protective order that said we shouldn't be required to
14 produce them because the risk of harm of production, no
15 materially outweighs marginal, you know, marginal
16 relevance--

17 MS. SHAH: Um-hmmm.

18 THE COURT: --and I think in some ways I'd be
19 more inclined to entertain a motion like that that says
20 look, we have this, there is this set of documents and,
21 you know, perhaps with the exception of the videos of the
22 workshop in 2012 that was rated, they're responsive to the
23 defendant's request. We're not going to rely on them in
24 litigation. Their production would put our organization
25 at harm, you know, what about a protective order that says

1 we're not required to produce these documents. Then we
2 don't have the risk of harm to our clients, and we don't
3 have a limitation on the defendant's ability to
4 participate with his lawyers, fully participate with his
5 lawyers in the defense of this case. And if the defendant
6 isn't interested in these documents for any purposes other
7 than for litigation purposes, if we put them off limits
8 they're not relevant, they're not going to be relied on by
9 the plaintiffs, then I suppose that the defendant's
10 interest in these documents--

11 MS. SHAH: Um-hmmm.

12 THE COURT: --is not of, you know, sufficient
13 significance to compel their production.

14 MS. SHAH: Um-hmmm.

15 THE COURT: So I'm just suggesting that that's
16 an alternative way of dealing with the issue that you're
17 bringing to the Court.

18 MS. SHAH: Um-hmmm.

19 THE COURT: So let me hear you on that?

20 MS. SHAH: Yeah, I mean we agree with you on
21 that point. Actually, plaintiff need not rely on any of
22 these documents in this litigation and if plaintiff felt
23 that they are though by their subject matter relevant in
24 sort of the broad understanding of relevance.

25 THE COURT: But we're responsive but, you know,

1 in discovery you can say that a document that's even if
2 it's a responsive document, it's of marginal relevance and
3 there's some reason why, I mean usually it's the
4 burdensomeness of production but here it's the concern
5 that production of the document might disclose information
6 that, you know, even with a protective order in place is
7 very sensitive, and if they're not documents that the
8 plaintiff is going to be relying on, that might be a way
9 to deal with a concern about sensitivity, the sensitive
10 content of those documents.

11 MS. SHAH: Um-hmmm. Yes, Your Honor, I mean I
12 guess we just understood that given the broad
13 understanding of relevance at discovery that these are
14 generally relevant but as you state, we agree that they're
15 not. SMUG need not rely on them in this litigation. They
16 are not crucial to its claims. What has already been
17 produced in discovery and the testimony of witnesses is
18 sufficient to, for SMUG to prove its claims, and so this
19 information while responsive and generally relevant is not
20 necessary to this litigation. It's not of any core
21 relevance as we've seen in other cases where courts have
22 denied designation of AEO protection over certain
23 material.

24 THE COURT: Right. Okay. All right, so that's
25 a thought. And I'll hear, obviously I'll hear the

1 defendants in response to that issue. All right, what
2 else?

3 MS. SHAH: So beyond that there is a matter of,
4 you know I, the cases that, the authorities that defendant
5 relies on in his opposition to our motion directly lend
6 further support to the relief SMUG seeks, and I could go
7 through those authorities if you wish to explain--

8 THE COURT: The case is the, there are three or
9 four cases--

10 MS. SHAH: Yes.

11 THE COURT: --and I read those.

12 MS. SHAH: Okay.

13 THE COURT: I did read those and I can see, you
14 know, it's hard to match up the concerns that the
15 plaintiffs have in this case with the concerns that come
16 to the fore, you know, in the trade secret cases which is
17 what most of these other, most of what these other cases
18 are. You know, they are, the harm is, the risk is the
19 commercial harm.

20 MS. SHAH: Um-hmmm.

21 THE COURT: And the sort of common, potentially
22 common threat I guess is the subconsciousness use of
23 information so.

24 MS. SHAH: Um-hmmm.

25 THE COURT: But otherwise it's a little hard to

1 extrapolate from those cases to the situation that's
2 here I think in front of us.

3 MS. SHAH: Um-hmmm. See I mean this issue
4 arises most naturally in the commercial context, but it's
5 not prohibited from raising outside of the commercial
6 context,--

7 THE COURT: Well no, I understand.

8 MS. SHAH: --and so the way, you know, the way
9 courts have, other courts have permitted AEO designation
10 of witnesses alleged to be vulnerable, they have shown
11 that there is, when there is endangerment of harassment
12 and reprisals, the court through its inherent powers has,
13 you know, has this flexible standard in order to
14 accommodate all the issues as they arise.

15 THE COURT: Right. I think I would have the
16 power. It's just I mean I think the Court has the power
17 to do that it's just the question of when. It's just the
18 question of when, I guess. I guess it's just the question
19 of when. I mean, you know, and clearly this was an
20 appropriate case for entry of a protective order and
21 clearly there are already significant constraints on the
22 use of everything that you've designated, that SMUG has
23 designated, I don't recall SMUG's, Sexual Minorities of
24 Uganda has designated as confidential. There are already
25 you know significant limitations on the use and I think

1 it's not just of the documents but of the information. I
2 mean in the terms of the order confidentiality of
3 discovery materials, confidential discovery materials
4 shall be solely for the purpose of conducting this action
5 and shall not be disclosed. I mean I think it would be,
6 in my view it would be the information, you know, not just
7 the piece of paper--

8 MS. SHAH: Um-hmmm.

9 THE COURT: --but the content of the document
10 that's produced so that the, this order should preclude
11 the use of the information in the confidential documents
12 even if a conscious use of the information in the
13 confidential documents, you know, in addition to you
14 actually turning over a piece of paper.

15 MS. SHAH: Um -hmmm.

16 THE COURT: It says the information material is
17 confidential.

18 MS. SHAH: Yes, and the threat that these
19 particular, this particular material poses is the
20 subconscious use, the inadvertent use of this materials--

21 THE COURT: Okay.

22 MS. SHAH: And so--

23 THE COURT: Okay.

24 MS. SHAH: Yup. Okay. All right.

25 THE COURT: All right. All right, anything else

1 on that?

2 MS. SHAH: No, Your Honor, I mean we do, we have
3 produced a log to defendant of these materials.

4 THE COURT: Yeah. Yeah.

5 MS. SHAH: We have them available if you would
6 want to review them to see that they are not, they do not
7 go to the core of plaintiff's claims. They are not, as
8 you have stated, you know, they are not very materially
9 relevant to these claims but they are highly sensitive and
10 would risk great, real harm to plaintiff were they
11 disclosed to Mr. Lively.

12 THE COURT: I will, I'll think about the
13 question whether or not I would want to see, you know, to
14 see the group of documents submitted under seal for
15 purposes of in camera review. I'll consider that. I will
16 consider that.

17 MS. SHAH: Okay.

18 THE COURT: And I appreciate that. I think
19 that's a helpful offer.

20 MS. SHAH: Okay. Thank you, Your Honor.

21 THE COURT: Thank you. Thank you very much.
22 I'll hear from the defendants or the defendant, I
23 apologize.

24 MR. GANNAM: Before I begin, Your Honor, I'm
25 prepared for the Court--

1 THE COURT: I'm sorry, you prepared?

2 MR. GANNAM: I've prepared a notebook of some
3 materials that I may refer to. I've provided a copy to
4 opposing counsel. May I approach and provide it to Your
5 Honor?

6 THE COURT: Sure.

7 MS. SHAH: Excuse me, Your Honor. I would just
8 like to take a minute to object that these, this notebook
9 contains materials that were not previously filed and so
10 plaintiff did not have adequate opportunity to review them
11 to respond to them.

12 MR. GANNAM: Your Honor, may it please the
13 Court, I'd be happy to address the content of this
14 notebook and why it's appropriate to use it today.

15 THE COURT: So the portions that I've read,
16 obviously, just looking at the table of contents, number 1
17 is the memorandum which I've read. Number 2 is the
18 excerpts of the transcript of the deposition of Mr.
19 Brundidge (ph) which was submitted as an exhibit. I do
20 not know what 3 and 4 are, and I don't believe those are
21 documents that I've seen. I do believe that I've probably
22 seen number 5 because it was probably attached as an
23 exhibit to, with respect to Mr. Ganafa's deposition.
24 Certainly the first amended complaint I have read. I've
25 read Judge Neiman's electronic order denying without

1 prejudice the plaintiff's motion for protective order.
2 I've read Judge Neiman's memorandum and order. I've read
3 the confidentiality order. I believe these others are all
4 cases that are cited by the parties in their submissions.
5 So I think that the portions of this notebook that
6 possibly 5, but 3, 4, and 5 are the items that I'm not
7 familiar with as I sit here and I'll, you know, I'll hear
8 your argument but I'm, I may or may not rely on those
9 particular items.

10 MR. GANNAM: Thank you, Your Honor. Just by
11 means of orientation to the notebook, the excerpts from
12 the Caleb Brundidge deposition in the notebook are from
13 the final transcript. In our memorandum we only had
14 available to us the rough.

15 THE COURT: Sure. Is it a different portion of
16 the deposition?

17 MR. GANNAM: The page numbering is different but
18 the content is the same.

19 THE COURT: The content is the same.

20 MR. GANNAM: I'm just providing it--

21 THE COURT: Yup.

22 MR. GANNAM: --just to show that--

23 THE COURT: Sure. Okay.

24 MR. GANNAM: --that nothing has changed.

25 THE COURT: So it's substantially somewhat to

1 what's already been filed?

2 MR. GANNAM: Yes, Your Honor. The items number
3 3 and 4 in the notebook are all documents produced by SMUG
4 that have been designated confidential, and though we
5 don't necessarily agree with the confidential designation
6 under the current confidentiality order, those things
7 cannot be filed publically. They can only be filed under
8 seal. I've provided them today because I would like to
9 refer to them as examples that contradict some of the
10 things that SMUG has argued in connection with this
11 motion, but I did not want to file them and would only use
12 them, you know, here to have the Court refer to them. I
13 wouldn't even publish the contents to the other non-
14 participants in the courtroom today, but they're important
15 because they provide context to the arguments that SMUG
16 has made and that we'll be making today. The email also
17 is a communication between counsel that provides
18 additional context to this dispute that we should take
19 SMUG's word for what Scott Lively needs for his defense
20 and whether that's been proven reliable for SMUG's counsel
21 to make those decisions without Scott Lively's
22 participation in it. And understood, Your Honor that you
23 may not rely on these in your decision but I do, would
24 like, at least refer to them and then let Your Honor make
25 that decision.

1 I believe Your Honor has correctly discerned
2 that we have been here before. We've argued these issues
3 before. This is not a case where the attorney's eyes only
4 designation is a new idea for the first time before the
5 Court. I would just also like to read something that I
6 hadn't heard anyone mentioned to me and that's just the
7 docket entry 117 from Judge Ponsor where he--

8 THE COURT: I'm - yeah.

9 MR. GANNAM: --where he simply said that--

10 THE COURT: He's addressed a complex and unusual
11 discovery scenario fairly and with sensitivity to the
12 interest of both sides and the disposition is not clearly
13 erroneous or contrary to law.

14 MR. GANNAM: That's right, Your Honor. This was
15 well briefed. It was hard fought and in one of the few
16 concessions that Scott Lively was able to achieve during
17 all of those proceedings was to strike that balance for a
18 confidential designation which he has lived under but not
19 go so far as to create this drastic attorney's eyes only
20 designation.

21 THE COURT: And I understand that Mr. Lively
22 doesn't necessarily agree with the designation, you know,
23 the confidentiality designation with respect to all of the
24 documents that Sexual Minorities of Uganda has produced
25 under a confidentiality designation, but at least to date

1 there hasn't been any dispute. In other words it seems
2 to me that the defendant has lived with the
3 confidentiality designation and not brought any dispute to
4 the Court about the fact that a particular document has
5 been designated confidential. Is that going to remain the
6 case?

7 MR. GANNAM: That remains the case, Your Honor.

8 THE COURT: And will it remain the case?

9 MR. GANNAM: Absolutely, Your Honor. In fact
10 the only evidence before the Court on this issue are two
11 unrefuted declarations by Mr. Lively that he both intends
12 to fully comply with the existing confidentiality order
13 and has in fact--

14 THE COURT: But I'm saying the designation for
15 particular documents I'm talking about. So in other words
16 there have been a number of documents produced by the
17 plaintiff. Some of them have been designated confidential
18 under the terms of the existing protective order, and I
19 have heard you say that you don't necessarily agree, that
20 counsel doesn't necessarily agree in each case with the
21 fact of that designation, but I haven't been presented
22 with any, you know, claim by the defendant or any dispute
23 by the defendant about the designation of a particular
24 document. Do, you know, you haven't come to me and said,
25 here, you know documents Bates Nos. 100-150 were

1 designated confidential. They don't meet the criteria
2 for designation of confidential documents. We want the
3 confidentiality designation removed from these documents.
4 I haven't heard that. Am I going to hear that?

5 MR. GANNAM: No, Your Honor, not at this point.

6 THE COURT: You're just going to live with the
7 designations that Sexual Minorities of Uganda has made
8 with respect to the documents it has produced?

9 MR. GANNAM: At this point, Your Honor, yeah, we
10 don't have any documents that we would like to have the
11 confidential designation undone or--

12 THE COURT: Okay.

13 MR. GANNAM: --or object to that at this point.

14 THE COURT: Okay.

15 MR. GANNAM: And in fact, just getting to the
16 declarations from Scott Lively, you know getting to the
17 heart of this matter. He's also sworn under oath that he
18 has never had any intention nor has he ever revealed the
19 identity of a LGBTI person in Uganda. Has no intention to
20 do that. Has never, you know, perform one of these
21 outings which has--

22 THE COURT: Right.

23 MR. GANNAM: --has been suggested, and I think
24 Your Honor correctly discerned that the only allegation
25 regarding Scott Lively is really into his philosophical

1 opposition to the activities of SMUG and sort of the
2 high level opposition he has to SMUG's activities.
3 There's no allegation of any direct connection between
4 Scott Lively and things happening on the ground in Uganda
5 with respect to security revealing the identity of people.
6 You know, no allegation that Scott Lively's trying to
7 break into their office or interrupt their meetings or
8 come up with these, you know, these strategies on the
9 ground to disrupt some of the activities. All that's been
10 alleged is that Scott Lively has opposition to SMUG's
11 general philosophical views towards human sexuality, and
12 there's nothing in the amended complaint that would
13 suggest that would make that connection that Your Honor's
14 struggling to find between what Scott Lively says in
15 rights and what's actually happening on the ground in
16 Uganda.

17 THE COURT: Well, I think there's a connection
18 alleged election. The connection is that he's a co-
19 conspirator, but I still think you know what I did not see
20 in the complaint was an allegation that he's, and that
21 he's acting in concert with people who are making these
22 decisions about things that are happening on the ground
23 but that he, but I did not see an allegation or I don't
24 see an allegation that he is actively involved or directly
25 involved in those kinds, in directing those kinds of

1 issues staying on the ground activities in Uganda.

2 That's what I guess I didn't see.

3 MR. GANNAM: Yes, Your Honor, and I don't
4 believe that that's there. In fact, and that really
5 brings us to the heart of this matter before the Court
6 today which is that in order to justify an attorney's eyes
7 only designation, the case law that Your Honor just read,
8 it says that the proponent of such a designation must
9 bring forth evidence, must bring forth facts to show that
10 it's necessary. And what we have today is SMUG is still
11 only traveling on its unproven allegations after 18 months
12 of discovery. SMUG has never proved or produced any
13 connection between Scott Lively and anything beyond these
14 mere allegations of, between him and what's going on on
15 the ground in Uganda, and that failure to produce evidence
16 we believe is fatal to their ability to show that this
17 attorney's eyes only designation is necessary. For
18 example, in the cases that have been argued by both
19 parties now, particularly in the *West Side Merrera Jeep*
20 *Eagle* (ph) case which is behind tab 14 in our book, one of
21 the critical points that the court found was that the
22 party who was objecting to the attorney's eyes only
23 designation had already shown a propensity to use
24 confidential information improperly. Well that's a
25 compelling and particularized need for the protection

1 consistent with what Judge Neiman has already said and
2 consistent with the rest of the case law that says it's up
3 to the proponent to show that the existing confidentiality
4 order is not effective for some reason--

5 THE COURT: And not sufficient, yeah.

6 MR. GAMMAN: --to control this issue.

7 Secondly, Your Honor, I want to point to the
8 critical nature of the very facts that SMUG is trying to
9 keep out, you know, keep Scott Lively from seeing.
10 Security was made an issue by SMUG--

11 THE COURT: Well let me just interrupt you for a
12 minute because I did, you know, I did hear the, you know,
13 counsel for Sexual Minorities of Uganda. I did hear her
14 say that this subset of documents is really not a set of
15 documents that's, you know, relevant to the core claims
16 that are being made. If I, you know, with the exception
17 of perhaps the videos and photographs of people who
18 attended the 2012 workshop, which they say is a critical
19 piece of the complaint, if they were to simply, if these
20 documents were simply off limits for purposes of missed
21 litigation because and you know after Minorities of
22 Uganda, it's not going to rely on them and then there's no
23 concern that they're disclosing information that might be
24 damaging to members of this community. What's the
25 defendant's reaction to that? Why doesn't that work?

1 MR. GAMMAN: Well Your Honor, this issue of
2 security was made a critical issue, a central issue by
3 SMUG in its first amended complaint and I'm--

4 THE COURT: Well they say that they're damages
5 are the cost of the security measures that they've had to
6 put in place.

7 MR. GAMMAN: That's correct, Your Honor, and
8 theirs have yet to be quantified, but at this point, Your
9 Honor, Scott Lively who is alleged to be the reason why
10 they've had to take these extra security measures, we need
11 to be able to scrutinize those security measures and Scott
12 Lively needs to be able to look at well here's what they
13 said I did and here's what they claim to be their reaction
14 to it. He was the only one who was in Uganda out of his
15 defense team. None of his lawyers can help with respect
16 to what actually happened in Uganda. He was the only one
17 there, and so for Scott Lively to not be able to look at
18 what these security measures are and then to be able to
19 assist his counsel and making arguments as to why they
20 have something or nothing to do with what he said and did
21 while he was in Uganda. It's seem to not be a big
22 disconnect for them to say, well our security measures
23 aren't relevant even though we're basing our damages claim
24 on our security measure.

25 THE COURT: Well, they're not saying our

1 security measures aren't relevant. They're saying the
2 security measures that are relevant to our claims are
3 security measures as to which we've already disclosed
4 information, I think is what I heard, Ms. Spiegelman, is
5 that right?

6 MS. SHAH: Shah. There's two Jeenas in this
7 case.

8 THE COURT: Shah. Okay. I'm sorry. I think
9 that what I heard her say is the security measures that
10 are relevant to Mr. Lively's activities are security
11 measures as to which we've already produced information
12 and that the, you know, information that's reflected in
13 this subset of documents about which we're concerned is
14 not really relevant to, you know, is it, these are not
15 sort of measures that we've taken in response to what Mr.
16 Lively's actions, you know, caused us to do.

17 MR. GAMMAN: But, Your Honor, if they're making
18 an issue of security measures that they've had to take in
19 response to what Mr. Lively has done, I don't think in
20 this adversarial system Mr. Lively should be required to
21 simply take their word for it, that these security
22 measures are relevant and these are not. He has the right
23 to scrutinize those and participate in his own defense.

24 THE COURT: Well except that, you know, the
25 security measures are the basis of what they're saying

1 we're entitled to recover a monetary penalty, I think,
2 from Mr. Lively for, because we had, we incurred the costs
3 of taking these security measures and if they don't
4 produce information, they don't produce documents about
5 certain things, they can't claim to be entitled to
6 recovery on the basis of those things and they're just not
7 part of the litigation I guess. I don't know. I mean--

8 MR. GAMMAN: Your Honor, I don't believe that
9 they've made the statement and I could be corrected, but I
10 don't believe that they've made the statement that these
11 particular security measures are not relevant to the
12 damages that they're claiming. I think the only argument
13 they've made is, well there are other places where he can
14 find out information about the security--

15 THE COURT: Where he can find that information
16 in addition to these documents.

17 MR. GAMMAN: But without being able to look at
18 them together, you know we have no way of knowing if
19 that's a reliable statement or not. But the other concern
20 is that Your Honor, you know part of the, their claim
21 against Scott Lively is just the scope and extent that
22 Scott Lively has fomented this anti-LGBT atmosphere--

23 THE COURT: Yes.

24 MR. GAMMAN: --of persecution.

25 THE COURT: Yes.

1 MR. GAMMON: But we need to be able to look at
2 those security measures and say well do these reflect this
3 massive, you know, change and social view towards LGBTI
4 persons? Do these really reflect that or - in other words
5 to be able to test the scope and the extent of the
6 allegations that they're making against Scott Lively, and
7 we have to be able to scrutinize what they say they've
8 done in response to Scott Lively in order to determine
9 whether, you know, how well they're claims hold up.

10 THE COURT: Okay.

11 MR. GAMMAN: Apart from security, there's the
12 issue of the faces, the identities of persons who were
13 involved in this conference that was raided. I want to
14 point the Court at this point to a document that is
15 designated confidential and so I want to be careful in how
16 I refer to it but this is a document behind tab 3. It's
17 Bates No. SMUG 020147. Generally describing this
18 document, this was produced by Pepe Onzema (ph) who is
19 SMUG's 30(b)(6) representative. This document on its face
20 purports to be a contemporaneous account of what happened
21 at this 2009 conference that Scott Lively attended, but
22 this document is relevant to the current discussion for a
23 couple of reasons. One, it suggests in the last full
24 paragraph on the first page that the number of
25 participants at this conference that apparently, you know,

1 captivated an entire country was 70. It also suggests
2 on the next page that as many as 30 participants of that
3 conference may in fact have been SMUG agents clandestinely
4 attending in order to see what was being said. If it's
5 true that SMUG dispatched people to this conference to
6 watch what was going on, only Scott Lively on his defense
7 team would be able to identify those people and say yes,
8 that person, I remember that person at the conference, I
9 remember that person at the conference. He can only do
10 that if he could see faces. He couldn't do that by names
11 because the names wouldn't mean anything to him.

12 THE COURT: I'm sorry. I'm several steps behind
13 you. This is a document produced by, this is a document
14 produced by Sexual Minorities of Uganda but it's about,
15 not about the conference that was sponsored by Sexual
16 Minorities of Uganda.

17 MR. GAMMAN: Oh no, Your Honor. Forgive me. I
18 did not accurately explain.

19 THE COURT: It's about, and I thought that their
20 concern was documents about their February 2012 workshop
21 where people from Sexual Minorities of Uganda were
22 attendees and this is a document by, you know, that for a
23 conference that Mr. Lively attended in which that
24 organization is alleging that there were members of Sexual
25 Minorities of Uganda present.

1 MR. GAMMAN: That's correct.

2 THE COURT: I just yeah, okay.

3 MR. GAMMAN: I'll do a better job of connecting
4 the two, Your Honor.

5 THE COURT: Okay. Yeah, I don't know what that
6 has to do with a conference where he's, you're saying that
7 if people from Sexual Minorities of Uganda attended this
8 conference, that's relevant? I don't get that. I guess
9 I'm lost. Help me.

10 MR. GAMMAN: The complaint says that Scott
11 Lively's attendance at this conference in 2009--

12 THE COURT: Yeah.

13 MR. GAMMAN: --was the catalyst for this change
14 in public perception.

15 THE COURT: A catalyst, yeah.

16 MR. GAMMAN: This new fomenting of anti-LGBT
17 persecution and attitude in Uganda. This document shows
18 that as many as 30 people were involved on SMUG's side
19 attending that conference and--

20 THE COURT: It shows that an organization that
21 Mr. Lively had some relationship to says that. It doesn't
22 show that that happened.

23 MR. GAMMAN: This is a SMUG document, Your
24 Honor. This is not Mr. Lively's document.

25 THE COURT: No, I understand that but it's not,

1 I understand it's a document produced by SMUG but is
2 this a document that says--

3 MR. GAMMAN: Your Honor, the, all of the - on
4 its face, this all refers to how the committee is going to
5 get out the word on a daily basis to talk about what
6 happened at this conference. It includes observations by
7 the Gay community and its allies.

8 THE COURT: So this is a document that was
9 authored by Sexual Minorities of Uganda?

10 MR. GAMMAN: Yeah, they designated it
11 confidential, Your Honor. This is a document that came
12 from them. My point, Your Honor is to say that if people
13 who are SMUG representatives who were at the conference,
14 unknown to Scott Lively at the time but because of this
15 document known to him now, those people may have, may be
16 relevant witnesses as to what was actually said at the
17 conference versus what has been alleged to have been said
18 at the conference, and if Scott Lively cannot see the SMUG
19 representatives at the 2012 conference that was raided, if
20 he can't see their faces to know who was there, then he
21 can't make the connection and say, yes, these people at
22 the 2012 conference who were all identified by SMUG as
23 SMUG people, I remember seeing that person and that person
24 and that person at the 2009 conference, and so this is
25 important because the more people at the 2009 conference

1 that were actually members of SMUG or agents of SMUG
2 means fewer people at that conference were members of the
3 general public who were supposedly and allegedly, you
4 know, whipped up into this frenzy against SMUG and against
5 its constituents. Scott Lively will have no way to
6 identify who at the 2009 conference were potentially
7 members of SMUG as opposed to members of the public if he
8 doesn't know what they look like. That's why the 2012
9 conference attendees is relevant. Maybe no one at the
10 2012 conference was at the 2009 conference. We don't know
11 that but Scott Lively could only make that determination
12 if he can see who was at the 2012 conference and decide if
13 any of those people were familiar to him, or in the
14 videotape of the 2009 conference which exists to see if
15 any of those people were at the 2009 conference as well.

16 The other point about the 2012 conference is
17 according to SMUG all of these people were already
18 identified at the conference by law enforcement, the very
19 people who they claim will or potentially will take
20 action, punitive action against them for being there.

21 THE COURT: Because it was raided? Because it
22 was raided?

23 MR. GAMMAN: Because it was raided. Yes, Your
24 Honor. So it's hard for us to see how knowing who was
25 there after the fact, how that knowledge by Scott Lively

1 could somehow affect what law enforcement in Uganda has
2 already or the government in Uganda already knows and
3 there's and again, of course there's no connection,
4 remember there's no allegation that Scott Lively has any
5 regular contact with anyone in the government of Uganda
6 that could take this action.

7 THE COURT: Could I just ask you whether you
8 agree that the current confidentiality order prohibits not
9 just the use of a piece of paper but also the use of the
10 contents of that piece, the information on that piece of
11 paper for any purpose other than this litigation?

12 MR. GANNAM: Yes, Your Honor. Absolutely.

13 THE COURT: Yeah. Okay.

14 MR. GANNAM: And it's important to point out
15 Scott Lively never objected to there being a
16 confidentiality order in the first place. The dispute was
17 about how far these restrictions would go and how far it
18 would, you know, limit his ability to participate in his
19 own defense. There is more to be said here, Your Honor,
20 about the fact that there has been no evidence produced by
21 SMUG that any of these bad things will happen or have
22 happened as a result of Scott Lively's knowledge of
23 confidential information. It's only speculative at this
24 point.

25 THE COURT: Right.

1 MR. GANNAM: The other thing I would point out
2 is that in all the cases that talk about this and all the
3 cases where a protective order for attorney's eyes only
4 was actually entered, they deal with trade secrets. They
5 deal with this commercial context where the nature of the
6 competing parties or the adversarial parties as
7 competitors was really not the ultimate issue in the case.
8 It could be determined either it wasn't disputed at all or
9 could be determined on a preliminary basis for purposes of
10 the discovery order. In this case it only makes sense to
11 shield information from Scott Lively if the Court accepts
12 that Scott Lively intends to persecute LGBTI people in
13 Uganda and that he is capable of doing those things.
14 Those are the ultimate issues in this case that Scott
15 Lively denies and that SMUG has the burden of proof at
16 trial to prove that Scott Lively is this persecutor that
17 they claim he is. If they're unable to prove that, then
18 there would simply be no basis to conclude that Scott
19 Lively would have any need or use or desire to know this
20 information outside of the lawsuit. And so as in, whereas
21 in the commercial case, it's an issue that can be
22 determined on a preliminary basis and is largely
23 undisputed. In this case it is the ultimate issue,
24 whether Scott Lively would have any use for this
25 information outside of this lawsuit.

1 THE COURT: Outside of this lawsuit. Yeah.

2 MR. GAMMAN: And finally, I would point out in
3 the case law, Your Honor, in the city of New York case,
4 that was the one that dealt with the law enforcement
5 privilege--

6 THE COURT: Yeah, I read that. Yeah.

7 MR. GAMMAN: In that case, Your Honor, the issue
8 is whether the stuff should be produced at all.

9 THE COURT: At all.

10 MR. GAMMAN: It wasn't simply attorney's eyes
11 only. In fact the Court determined that the information--

12 THE COURT: It shouldn't be produced.

13 MR. GAMMAN: --was so sensitive--

14 THE COURT: Yeah.

15 MR. GAMMAN: --attorney's eyes only wouldn't
16 have even have been good enough.

17 THE COURT: Yeah.

18 MR. GAMMAN: Going in the, to the other case
19 where the attorney's eyes only production was allowed, and
20 this would be in the *Multi-Core v. South Water Treatment*
21 *Company*, in that case, Your Honor, the defendant said, I
22 don't want to produce the information at all and it was
23 the plaintiff that wanted the information who advocated
24 for the attorney's eyes only designation just so they
25 could get it and share it with their experts. Their

1 dispute wasn't the same dispute we're having here.
2 Remember SMUG has not said that the information should not
3 be produced at all. They're saying it should be produced
4 subject to this new restriction that doesn't yet exist in
5 this case. I've already pointed out in the *Multi-Core* and
6 *Voice Domain Technologies* case, I'm sorry, I haven't point
7 out yet that those are the cases where the order was
8 entered but again, these were cases where you know this,
9 these were commercial cases where the court decided that
10 someone who was a competitive decision maker, like a
11 scientist or an engineer or a principal of a corporation,
12 would be in a position to subconsciously use this
13 material. But again, those issues were not largely in
14 dispute and in the *West Side Merrera Jeep Eagle* case
15 again, it was because these litigants had already
16 improperly used confidential information that the Court
17 felt that the, that there was a need to add this.

18 To summarize, Your Honor, the existing-

19 THE COURT: Protective order.

20 MR. GAMMAN: --confidentiality order is more
21 than sufficient. There's been no showing that Scott
22 Lively has violated it or intends to violate it. The
23 argument being made by SMUG is speculative saying that
24 Scott Lively could use these things to SMUG's detriment.
25 They're also trying to argue that on the balance, that the

1 risk of potential harm outweighs Scott Lively's need for
2 the information. This point I just wanted to point the
3 Court to the reason why we don't think that SMUG is
4 necessarily proven reliable in what they decide Scott
5 Lively needs to see or what is relevant or necessary to
6 his defense. I would go back, Your Honor, to the document
7 we were looking at behind tab 3, the account of the
8 action, the conference in 2009. This entire document on
9 its face deals with the 2009 conference and on the second
10 page there is information redacted from it. Under, the
11 only reason is that it's personal, that's what the
12 redaction shows. If it's redacted for being confidential,
13 that would violate the existing confidentiality order
14 because it says quite clearly no party will withhold
15 information on the basis of confidentiality. If the
16 redaction is for some other reason, such as relevance or
17 responsiveness, well that wouldn't make any sense cause
18 the entire document is about the 2009 conference that this
19 case is about. This is an example where whatever SMUG's
20 thinking in holding back information in saying Scott
21 Lively doesn't need this, it's just not reliable. There
22 couldn't be a document more compellingly relevant to his
23 case than a document about the 2009 conference, and yet
24 information has been redacted from it and we still don't
25 know what's there. That will be the subject of another

1 motion, the redaction issue that will be filed if not
2 today, tomorrow. I offer that as an example that SMUG
3 hasn't proved that it's reliable in deciding what Scott
4 Lively should see or shouldn't see.

5 The next example, Your Honor, is behind tab 4
6 which is a heavily redacted email produced by SMUG. It's
7 Bates No. SMUG 020357, also designated confidential. Here
8 is a presumably responsive email, but the vast majority of
9 it has been redacted. Even in the subject has been
10 redacted, and it's difficult to conceive how a responsive
11 email could have it's very subject redacted to use SMUG's
12 word as non-responsive, and yet attached to this email if
13 we flip to the third page of this exhibit is the first
14 attachment to the email. We see that it's an attachment
15 talking about SMUG, talking about the Scott Lively case,
16 and the context is if you'd look at the last paragraph, is
17 that this is in the context of some kind of fundraiser for
18 SMUG and if this email is an email that includes an
19 attachment about fundraising for SMUG around the Scott
20 Lively case, it's difficult to see how anything in that
21 email could be legitimately deemed non-responsive and yet
22 most of it is blacked out as either non-responsive or
23 personal.

24 Again, I just offer those as another example of
25 how SMUG is deciding what Scott Lively needs to see and

1 doesn't need to see and is not, and is doing it the way
2 that is simply not reliable. It's difficult to imagine
3 how this could not be responsive or relevant to what Scott
4 Lively needs.

5 THE COURT: Okay.

6 MR. GAMMAN: So, Your Honor, to conclude, we
7 believe SMUG has not met its burden of producing evidence
8 or fact that show there's a compelling or particularized
9 need for this information. SMUG hasn't met its burden of
10 showing how the existing confidentiality order is not
11 sufficient to protect the information that they are
12 currently withholding because they want this attorney's
13 eyes only designation and therefore their motion should be
14 denied.

15 THE COURT: Okay. Ms. Shah, when you say 220
16 documents, how many pages is it?

17 MS. SHAH: I don't have that number.

18 THE COURT: Okay, but approximately? I don't,
19 it doesn't have to be exact. I mean is it 500? Is it
20 225? Is it--

21 MS. SHAH: I think it would maybe be, maybe
22 around 500.

23 THE COURT: It would be 500 so 220 documents
24 multipage but not--

25 MS. SHAH: Yes.

1 THE COURT: Okay.

2 MS. SHAH: Many of the documents are also
3 duplicative.

4 THE COURT: Oh. Okay. Okay. Okay. All right.
5 All right. I'm going to take the motion under advisement.
6 I'm going to consider, are the documents that are - I know
7 you're not from the Springfield, does Mr. Ryan have a set
8 of the documents in the event that I do want to review
9 them in camera?

10 MS. SHAH: Yes.

11 THE COURT: Okay, so they would be here in
12 Western Massachusetts?

13 MS. SHAH: Yes.

14 THE COURT: Okay. Okay. Would the defendants
15 have an objection to an in camera review?

16 MR. GAMMAN: No, Your Honor.

17 THE COURT: No. Okay. All right. All right.
18 I'm going think about that and I'll let you know within,
19 you know very soon, whether or not I think that that's
20 something that I need to do.

21 MS. SHAH: Would I be able to just respond to
22 briefly, Your Honor?

23 THE COURT: Yes. Please go ahead. Yeah,
24 absolutely. Absolutely.

25 MS. SHAH: I just want to make point--

1 THE COURT: Yeah. Absolutely. No, I, please.
2 Take your time. This is important.

3 MS. SHAH: All right. Thank you.

4 THE COURT: Very important.

5 MS. SHAH: I first want to respond to the fact
6 that defendant is trying to argue the ultimate issues of
7 this case which are not appropriate for a discovery
8 motion. Plaintiff's allegations have not yet been proven
9 before the Court because we are not yet at that stage--

10 THE COURT: We're not there. You're not there,
11 yeah.

12 MS. SHAH: --and so it's not appropriate to
13 decide whether or not Lively is in fact doing what SMUG is
14 alleging Lively is doing that are at the very core of
15 SMUG's claims to this case.

16 THE COURT: Right.

17 MS. SHAH: I also want to point out that, you
18 know, as I objected to, you know, defendant's use of
19 SMUG's production since we had not had the chance to
20 review them and respond to them--

21 THE COURT: Sure.

22 MS. SHAH: --just to make a couple of points.
23 One is that Mr. Gannam has mischaracterized the document
24 that he's read, he'll have the opportunity to depose Pepe
25 Onzima--

1 THE COURT: The author.

2 MS. SHAH: --the author of this document, to
3 question

4 him about it. His suggestions are that, you know, Mr.
5 Lively must somehow see the pictures of every member of
6 SMUG's community in order to know who was present at this
7 conference or not are just, they're incomprehensible given
8 that Mr. Lively is in close concert with those who
9 organize the conference and would be able to tell Mr.
10 Lively who was present at the conference that Mr. Lively
11 spoke at and so there's no need for Mr. Lively to see
12 pictures from an unrelated workshop in order to determine
13 who was present at this conference.

14 Additionally these redactions, you know, that is
15 a subject of just another debate and they are, those that
16 are non-responsive merely have nothing to do with--

17 THE COURT: With the case.

18 THE SHAH: --the claims or allegations in the
19 case.

20 THE COURT: The allegations. Right, right.

21 MS. SHAH: And it's just, the emails had
22 attachments

23 that did have some responsive information. You know,
24 defendant propounded a 125 document requests so there was
25 a lot of information--

1 THE COURT: Sure.

2 MS. SHAH: --that was responsive and SMUG was
3 trying to be as--

4 THE COURT: --as comprehensive as possible.

5 MS. SHAH: Exactly.

6 THE COURT: Yup. Yup.

7 MS. SHAH: And so the information that has been
8 redacted is not relevant. It's, the names of individuals
9 and they're not relevant, they're not witnesses to
10 anything, SMUG has disclosed witnesses already and they're
11 protected by the associational privilege and if they would
12 like to challenge that, that's just a subject of some
13 other motion.

14 THE COURT: Of a different debate, yup.

15 MS. SHAH: And this idea that SMUG and Mr.
16 Lively, the fact that they're competitors is not yet,
17 cannot be presumed in this case unlike in commercial
18 context just doesn't make sense given that you know, Mr.
19 Lively has admitted already in this case and in his answer
20 that he is concerned with the LGBTI community in Uganda as
21 a SMUG. So if we were to draw the analogy, they are in
22 the same market and their views are antagonistic to each
23 other. Their strategies are antagonistic to each other.
24 We have not been able to put this before the Court but,
25 you know, documents produced in this litigation show that

1 Lively has actually suggested that efforts need to be
2 made to stamp out SMUG's work. So the fact that--

3 THE COURT: I think that's and I think that's
4 kind of alleged in the complaint at least indirectly if
5 not directly--

6 MS. SHAH: Exactly. Exactly.

7 THE COURT: --because the complaint says that
8 you know a substantial part of what he has suggested is
9 that it's important to counter advocacy efforts for
10 members of that community.

11 MS. SHAH: Yes. And to--

12 THE COURT: So I think that's alleged.

13 MS. SHAH: And to the extent that Mr. Lively has
14 admitted any allegations in the complaint, the fact that
15 they're concerned with the LGBTI community in Uganda and
16 that their views are opposing views--

17 THE COURT: Right.

18 MS. SHAH: --is sufficient to show that they are
19 competitors and so his knowledge of certain information
20 could be used adversely against plaintiff.

21 THE COURT: All right. Okay. I think I
22 understand the party's positions. I think I'm going to
23 return this notebook rather than have any document in my
24 possession that's not filed with the Court under seal and
25 that has been designated as confidential.

1 Is there anything else from the defendant's
2 side on that issue because I do want to get to Mr. Ganafa.

3 MR. GAMMAN: Your Honor, just on this issue of
4 the participants in the 2009 conference, the only way for
5 Scott Lively to know whether they were from SMUG or not
6 would be to see them. Knowing their names or the names of
7 all the registered participants would not allow him to
8 know who was there from SMUG and who was there from
9 somewhere else.

10 THE COURT: Sure.

11 MR. GAMMAN: That's it.

12 THE COURT: Okay. All right. Mr., the plain,
13 this motion, I wanted to deal with it or I wanted to
14 address it today even though the defendants haven't had
15 the opportunity or the time to file an opposition to a
16 motion for a protective order because of the date of the
17 deposition. If the date of the deposition has changed by
18 agreement of the parties, you know we, I'd be happy to
19 hear that.

20 MR. SHAH: It has not, Your Honor.

21 THE COURT: It has not so Ms. Shah, so the
22 motion for protective order, it's still, there's still a
23 date of June 19th for the deposition of Mr. Ganafa and it's
24 expected by the plaintiff that he will appear in New York?

25 MS. SHAH: No.

1 THE COURT: Oh, or in Springfield or
2 something?

3 MS. SHAH: No. He, as plaintiff has conveyed to
4 defendant, Mr. Ganafa is unable to travel to New York.

5 THE COURT: He's unable to be here. Okay. All
6 right. So what is the defendant's position with respect
7 to Mr. Ganafa?

8 MR. MIHET: Good morning, Your Honor.

9 THE COURT: Good morning.

10 MR. MIHET: With respect to Mr. Ganafa, I would
11 submit to the Court that there is no need to consider the
12 motion on an expedited basis but rather the Court can
13 allow the briefing to take place in the regular course and
14 once the Court decides how the deposition is to take
15 place, then his deposition can be rescheduled at that time
16 to take place under the advisement and the stipulations
17 provided by the Court. Let me show the Court why the
18 request for an expedited review is improper here.

19 On May 5, six weeks ago, we told SMUG's counsel
20 that we expected Mr. Ganafa to appear for a deposition.
21 We had a meet and confer 10 days later on May 14th where
22 the counsel told us that he would not appear and that they
23 would seek a protective order. That was--

24 THE COURT: Okay, now I did read in the
25 plaintiff's filing that there was an agreement between

1 counsel and I have not gone back and looked at the prior
2 rulings of the Court, but that there was an agreement that
3 counsel that as to any deposition that was going to
4 require international travel, there was going to be 60
5 days' notice or something like that?

6 MR. MIHET: That was for non-party witnesses.
7 The understanding has always been that parties would have
8 to appear in the forum and the records, the chairman of
9 the board of the party would necessarily be a party. But,
10 Your Honor, on May 15th when they advised us that they
11 would seek a protective order, we wrote an email and I
12 have a copy I can provide to the Court, in which we said
13 to SMUG, we said we believe the motion that you are
14 contemplating would be meritless; however, if you are
15 going to file it we ask that you do so immediately, i.e.
16 this week, so that the issue can be timely resolved well
17 in advance of the contemplated June 19th deposition. We
18 said that to them, Your Honor, a month ago and instead of
19 timely bringing that motion to you, they waited until just
20 three days before the deposition to bring the motion for
21 protective order at a time when it can no longer be
22 decided on an expedited basis. Now we have a number of
23 reasons why this motion should be denied.

24 THE COURT: Before I hear from you on that, I
25 think I'd like to hear to from Ms. Shah on why it should

1 be allowed. It is the plaintiff's motion.

2 MR. MIHET: Sure, but what I'm saying is I'd
3 like the opportunity to provide those reasons in briefing
4 to the Court rather than here today, the day after the
5 motion was filed, and I'd like for the Court to bring that
6 issue up at another time.

7 THE COURT: Okay. That's--

8 MR. MIHET: Yes, fact discovery closes June 30th.

9 THE COURT: June 30th. Exactly.

10 MR. MIHET: But there's no imminent trial or
11 imminent even dispositive motion date so there's nothing
12 that would prohibit this Court or the parties to say,
13 okay, we'll take up the motion in two weeks after the
14 briefings--

15 THE COURT: One deposition after June 30.

16 MR. MIHET: One deposition after? Sure, and
17 then the Court will tell us, I think it should take, you
18 know, take place in New York, in Uganda, telephone, video
19 conference, however it takes place, it can all be done--

20 THE COURT: Okay.

21 MR. MIHET: --then there's no need to do it--

22 THE COURT: To do it today.

23 MR. MIHET: --on a rocket docket.

24 THE COURT: Yeah, Ms. Shah, so I think why don't
25 you, so I, you know I've read your motion for protective

1 order and I sort of, you know, I do think I'd like to
2 have briefing from the other side and I do hear the
3 defendants agree that it's okay to postpone the, you know,
4 Mr. Shah's, that they're not expecting Mr. Ganafa to
5 appear on June 19th and that the plaintiffs and the
6 defendants will have the opportunity then to sort of fully
7 brief and fully argue. That can be by telephone. I don't
8 expect everybody to come back to Springfield. We can do
9 this by telephone, but I'll have the opportunity to hear
10 from both parties about why he should not you know be
11 required to travel to New York, and I'm sympathetic to the
12 notion that it's costly and that it's intrusive for him
13 and that he's employed and that it takes a week out of his
14 life so, and that there are some benefits to a video
15 deposition specifically if there are areas where there may
16 be objections to questions as irrelevant or overbroad or
17 for some reason inappropriate harassing, you know, under
18 the terms of the rule. If the deposition is being
19 conducted from this country, I'm more available to rule on
20 objections as the deposition is going forward. So there
21 are reasons why I think a video deposition may you know
22 maybe make some sense, but I do want to hear and I sort of
23 advise the defendants that I've had that concern in mind,
24 but I would like to hear from the parties on both sides I
25 think before we make a decision on where and how the

1 deposition will take place. Is that acceptable to the
2 plaintiffs?

3 MS. SHAH: Yes, Your Honor, in fact defendant
4 had not conveyed to us that, you know, we could take, it's
5 still a possibility to take a video deposition after that
6 date. Defendant hadn't really said that if we don't
7 produce him in person on June 19th or agree to and produce
8 him in person at all then we would have to take Mr.
9 Lively's deposition by telephone.

10 THE COURT: Yeah, and that's not going to
11 happen.

12 MS. SHAH: So--

13 THE COURT: Mr. Liveley's deposition is going to
14 be taken in person.

15 MS. SHAH: --so given that this you know we
16 couldn't come to an agreement, we didn't, we didn't know
17 any other choice.

18 THE COURT: You did the motion for protective
19 order.

20 MS. SHAH: Exactly.

21 THE COURT: So I will have an opposition, I know
22 I have another motion to compel, that the opposition's not
23 due to that motion for a while. What I'd like to
24 anticipate is that I'll hear both those motions at the
25 same time. I'm perfectly happy to have a telephone, you

1 know, hearing by telephone so that you know not
2 everybody's required to drive to Springfield
3 Massachusetts, and I can hear both of those motions at the
4 same time. It would be understood that the June 30th
5 deadline for fact discovery is extended only for purposes
6 of Mr. Ganafa's deposition and that we'll decide the terms
7 and conditions of that deposition. At the time that I
8 rule on the plaintiff's motion to compel, we'll also deal
9 with the motion protective order, with the motion for
10 protective order with respect to Mr. Ganafa's deposition.

11 MS. SHAH: Okay, Your Honor.

12 THE COURT: Mr.--

13 MR. MIHET: Your Honor, I would simply add that
14 the discussions that we had all took place before they
15 filed a motion for protective order. The civil rule is
16 clear that once a party files a motion for protective
17 order it automatically stops the deposition. So we
18 understood that when they filed--

19 THE COURT: Yeah that would happen. Okay.

20 MR. MIHET: --that no deposition would take
21 place.

22 THE COURT: All right, but now we're talking so
23 okay. So now we know what the next steps are going to be.

24 MR. MIHET: Sure. I would just like to let the
25 Court know that there are a number of additional discovery

1 disputes brewing between the party, and I think over the
2 next couple of days the Court will be flooded with
3 additional motions from both sides and there may be a need
4 for an omnibus discovery hearing at some point.

5 THE COURT: That's fine. I just, I think that
6 at least, you know, so these are, these are matters are
7 about what has been produced, what hasn't been produced,
8 redactions from documents that have been produced, you
9 know, I would like to think that at least the depositions
10 have been completed, and I know you've scheduled most of
11 the depositions within the next few weeks, so I think I
12 would still deal with Mr. Ganafa, the conditions for Mr.
13 Ganafa's deposition in advance of whatever other discovery
14 disputes come to the Court.

15 MR. MIHET: And the only thing I'd say, Your
16 Honor, is that one of the motions that we will file will
17 address the SMUG 30(b)(6) deposition that has been
18 scheduled to take place before discovery; however, we have
19 a number of compelling reasons why that deposition should
20 also be postponed and that motion may require expedited
21 hearing by the Court simply because there's no agreement
22 from the other side that we could take that discovery
23 after the close of deposition, after close of discovery
24 and the principle dispute there is SMUG has objected to
25 the scope of our 30(b)(6) topics. They haven't bothered

1 to file a motion for protective order but they're going
2 to file it this week. There's no way that motion can be
3 decided before SMUG's deposition takes place at the end
4 and we'd simply say because of that, because we may see
5 some additional documents from today's hearing and because
6 there are other disputes brewing that the Court needs to
7 resolve, we will ask the Court to postpone that one
8 additional deposition and that motion may require
9 expedited consideration just because of the timing here.

10 THE COURT: Or maybe not. Ms. Shah?

11 MS. SHAH: Your Honor, the parties have actually
12 stopped to confer to the scope of the 30(b)(6) deposition
13 and counsel for defendant had delayed and so we will
14 actually be conferring today and plaintiff expects to be
15 able to actually resolve a number of those issues because
16 depositions in this case had been rescheduled a number of
17 times, and SMUG has had to reschedule its entire life
18 every time depositions are rescheduled, and we cannot push
19 fact discovery back one more time given that we've already
20 had several extensions in this case.

21 THE COURT: And you're bringing people in from
22 overseas or from Uganda?

23 MS. SHAH: Exactly. Exactly, and so we are
24 hoping to just resolve the scope of the 30(b)(6) issues so
25 that the depositions can just proceed as scheduled.

1 THE COURT: Okay. All right. Well, it sounds
2 to me as though you have talking to do and then, will the
3 30(b)(6), will the Sexual Minorities of Uganda, will that,
4 the 30(b)(6) deposition, will the deponent be somebody
5 who's also going to be deposed personally so that--

6 MS. SHAH: Yes, Your Honor.

7 THE COURT: --so that it would be, we would only
8 want that individual to make a single trip. I mean we're
9 not going to have that individual going back and forth or
10 that deposition, if the 30(b)(6) deposition were to be
11 postponed, that individual's deposition would also have to
12 be, have to be rescheduled.

13 MS. SHAH: Yes, Your Honor.

14 MR. MIHET: Correct.

15 THE COURT: Yeah. Okay. No, I understand.
16 That's not going to happen that they're scheduled at
17 separate times.

18 MS. SHAH: Yeah.

19 THE COURT: So, potentially three depositions,
20 possibly three depositions, if you're not able to agree on
21 the scope of the 30(b)(6) but you may be able to agree.

22 MS. SHAH: Yes, Your Honor.

23 THE COURT: Okay. All right.

24 MR. MIHET: Thank you, Your Honor.

25 MR. SHAH: Thank you.

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THE COURT: Thank you.

(Court adjourned)

(11:24:46 AM)

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CERTIFICATION

I, Maryann V. Young, court approved transcriber,
certify that the foregoing is a correct transcript from
the official digital sound recording of the proceedings in
the above-entitled matter.

/s/ Maryann V. Young

June 18, 2015

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