

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

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

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**DEFENDANT SCOTT LIVELY’S OBJECTION  
TO ORDER REGARDING MOTION TO COMPEL  
PRODUCTION OF UNREDACTED DOCUMENTS**

Pursuant to Fed. R. Civ. P. 72(a), Defendant, Scott Lively (“Lively”), respectfully objects 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 (Doc. 204) (the “Discovery Order”), which is clearly erroneous and contrary to law to the extent it allows Plaintiff, Sexual Minorities Uganda (“SMUG”), to withhold certain critical discovery under a broad associational privilege.

In the portion of the Discovery Order denying, in part, Lively’s Motion to Compel Plaintiff to Produce Unredacted Documents (Doc. 173) (“Motion to Compel”), Judge Robertson applied an association privilege to two categories of information previously redacted from SMUG’s production: (1) “previously undisclosed identities of donors, supporters, and affiliates” of SMUG, and other information identifying persons, and (2) “information about Plaintiff’s strategies for defeating reenactment of an Anti-Homosexuality Bill” which, “[w]hile relevant . . . is not crucial to the defense against claims that are premised on conduct that occurred prior to July 2012, when

the amended complaint was filed.” (Discovery Order at 9.) Lively objects only to Judge Robertson’s application of an associational privilege to the second category.

Judge Robertson’s application of an associational privilege to substantive information regarding SMUG’s current strategies for advocacy against an “Anti-Homosexuality Bill” (“AHB”) is clearly erroneous because it was based on an erroneous finding that SMUG’s claims are all premised on conduct and events that occurred prior to the July 2012 filing of SMUG’s Amended Complaint (Doc. 27), rendering information about SMUG’s current (*i.e.*, post-Amended Complaint) advocacy not “crucial” to Lively’s defense. (Discovery Order at 9.) SMUG, however, has unequivocally revealed that **it seeks to hold Lively liable for alleged conduct and events subsequent to the 2012 filing of its Amended Complaint**. In its Supplemental Responses to Defendant Scott Lively’s First Set of Interrogatories served in October 2014 (the “Supplemental Responses”), SMUG identifies later incidents of alleged persecution—from August 2012 through May 2014—for which it seeks to hold Lively liable.<sup>1</sup> (Supplemental Responses at 6-11.<sup>2</sup>) Thus, Judge Robertson’s finding upon which she based her application of an associational privilege is clearly erroneous.<sup>3</sup>

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<sup>1</sup> SMUG has yet to adduce a shred of evidence showing any connection between Lively and any alleged acts of persecution.

<sup>2</sup> The relevant portions of the Supplemental Responses are attached hereto as Exhibit A. Because the Supplemental Responses, as served on Lively, included information designated by SMUG as “confidential” under the terms of the Order Regarding Confidentiality of Certain Discovery Material (Doc. 106), only the material, non-designated portions of the Supplemental Responses are included in Exhibit A.

<sup>3</sup> Importantly, Judge Robertson cannot be faulted for this erroneous finding because she did not have before her SMUG’s Supplemental Responses containing the information above regarding SMUG’s post-2012 claims. As Judge Robertson pointed out in the Discovery Order, at the time of Lively’s Motion to Compel, SMUG had not identified an associational privilege as a basis for any of the unilateral redactions to which Lively’s motion was directed. (Discovery Order at 5.) Thus, Lively had no reason to provide the Supplemental Responses to Judge Robertson in support of his Motion to Compel. Accordingly, the Court would be justified in treating this objection as a motion for reconsideration by Judge Robertson as to this issue.

In SMUG's Opposition to Lively's Motion to Compel (Doc. 198) (SMUG's "Opposition"), SMUG admits that injury to its "advocacy and its very existence" as a result of alleged persecution by Lively is the critical issue in this case.<sup>4</sup> (Opposition at 8.) To be sure, SMUG blames Lively for the introduction of the 2009 AHB, and repeatedly and specifically complains that Lively has impaired SMUG's ability to advocate for LGBTI rights in Uganda. (Am. Compl. ¶¶ 9, 71, 172, 175, 185, 189, 208, 214, 224.) Most of the post-Amended Complaint "persecution" SMUG alleges is tied to the AHB. (Supplemental Responses at 6-11.) In short, the AHB is the chief evil SMUG attributes to Lively, and the alleged impairment of SMUG's ability to advocate is its chief injury. Because SMUG seeks relief for injury to or impairment of its advocacy after the filing of the Amended Complaint, particularly in connection with the AHB which SMUG blames on Lively, all substantive information relating to SMUG's actual advocacy against or in connection with the AHB is not only relevant but crucial to Lively's defense. Indeed, such information "goes to the heart of the matter." (Discovery Order at 8 (internal quotations and citations omitted).) If SMUG will persist in claiming Lively is responsible for the AHB (which, after six years, still is not the law in Uganda), then Lively deserves the opportunity to show through discovery that SMUG's advocacy not only has not been impaired by Lively, but has even been successful in defeating and preventing re-passage of the AHB.<sup>5</sup>

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<sup>4</sup> Although Plaintiff has now received Lively's production and taken Lively's deposition, for two days, Plaintiff still cites primarily to the unproven allegations of its Amended Complaint as "evidence" of Lively's alleged persecution and "significant support" for the AHB. (Opposition at 8.)

<sup>5</sup> According to a public statement in March of this year by Frank Mugisha, SMUG's Executive Director, this lawsuit itself is more properly viewed as a SMUG advocacy scheme rather than a bona fide attempt to prevail on "persecution" claims against Lively. According to Mugisha, **"Our goal is not actually about the outcome of the case; our goal is the advocacy we've been able to do around the case."** James McDonald, *3 Questions on The Battle for Uganda: Frank Mugisha brings the fight against oppression to America* (May 11, 2015 6:00 AM), <http://www.advocate.com/world/2015/05/11/3-questions-battle-uganda> (emphasis added).

In addition to being clearly erroneous, as shown above, Judge Robertson's application of an associational privilege to substantive discovery regarding SMUG's advocacy is contrary to law. The associational privilege cannot be properly extended to relevant, substantive information concerning SMUG's advocacy. Rather, application of the privilege is limited to the identities of persons associated with SMUG.

“[T]he Supreme Court has held that compelling private organizations to reveal the **identities of its members** where such disclosure will result in the harassment of existing members . . . can constitute a violation of the right to freedom of association.” *United States v. Comley*, 890 F.2d 539, 543 (1st Cir. 1989) (emphasis added). Protection under the associational privilege does not extend to substantive information that a party is otherwise entitled to discover; rather, it merely shields identifying and personal information (such as names, addresses or telephone numbers) that may be likely to cause harassment of a specific individual because of her association with the party to whom discovery is directed. Indeed, “[t]hose cases that have applied the First Amendment associational privilege have done so ‘**only in situations where the discovery request specifically required disclosure of the names of a group’s members or financial disclosures.**’” *Filanowski v. Wal-Mart Stores, Inc.*, No. CIV 99-147-B, 1999 WL 33117058 (D. Me. Oct. 29, 1999) (emphasis added).

Numerous courts have consistently recognized and applied this limitation. *See, e.g., NAACP v. Button*, 357 U.S. 449, 465 (1958) (holding that the associational privilege provided “immunity from state scrutiny of **membership lists**”); *Comley*, 890 F.2d at 544 (“the disclosure requirements in the majority of the cases . . . directly require[d] the disclosure of the **identities** of Comley’s associates and informants” (emphasis added)); *Marfolk Coal Co., Inc. v. Smith*, 274 F.R.D. 193 (S.D.W.V. 2011) (“Courts has consistently found that information respecting the

**identities** of other members of groups organized to conduct protests falls under the First Amendment privilege.” (emphasis added)); *Int’l Action Ctr. v. United States*, 207 F.R.D. 1, 3-4 (D.D.C. 2002) (noting that a discovery request that “seeks the **names, addresses, and telephone numbers** of [associated] individuals” was aimed at “exactly the kind of information the First Amendment is designed to protect” (emphasis added)); *Wilkinson v. FBI*, 111 F.R.D. 432, 436 (C.D. Cal. 1986) (“A review of the cases applying the privilege reveals that in each case the discovery that was subject to enhanced First Amendment scrutiny was a **specific request for a group’s membership list or list of financial contributors.**” (emphasis added)); *id.* at 437 (“the First Amendment associational privilege has been applied only in situations where the discovery request specifically required **disclosure of the names of a group’s members or financial contributors.**” (emphasis added)); *Beinin v. Ctr. for Study of Popular Culture*, No. C 06-02298 JW, 2007 WL 179693 \*4 (N.D. Cal. June 20, 2007) (“the First Amendment associational privilege applies to the **names of Plaintiff’s email correspondents**” (emphasis added)).

Judge Robertson’s application of an associational privilege to information about SMUG’s actual advocacy against and around the AHB goes well beyond the recognized scope of the associational privilege and improperly shields relevant, substantive content and information from Lively. Such an expansive application of associational privilege has been rejected by the First Circuit and other courts. *See, e.g., Comley*, 890 F.2d at 544 (rejecting assertion of associational privilege when subpoena sought “to discover the substance of the information passed between [persons], not the identities of the informants or associates who may have been involved in obtaining this information”); *Wilkinson*, 111 F.R.D. at 437 (“The cases do not justify the blanket assertion of the First Amendment associational privilege against a general discovery request.”). This Court should likewise reject an expansive application of the associational privilege. The

privilege simply does not cover the relevant, substantive, non-personally identifying information redacted from SMUG's production.

**CONCLUSION**

For all of the foregoing reasons, this Court should set aside the portion of the Discovery Order which is clearly erroneous and contrary to law, and order SMUG to unredact all non-personally identifying information previously redacted on the basis of associational privilege, and produce the unredacted documents to Lively with Bates numbering clearly corresponding to the previously redacted versions.

Respectfully submitted,

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/s/ Roger K. Gannam  
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Attorneys for Defendant Scott Lively

**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/ Roger K. Gannam  
Roger K. Gannam  
Attorney for Defendant Scott Lively

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS  
SPRINGFIELD DIVISION

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**SEXUAL MINORITIES UGANDA,**

*Plaintiff,*

v.

**Civil Action No.**

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

**3:12-CV-30051**

*Defendant.*

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**PLAINTIFF'S SUPPLEMENTAL RESPONSES TO DEFENDANT SCOTT  
LIVELY'S FIRST SET OF INTERROGATORIES CONTAINING CONFIDENTIAL  
INFORMATION SUBJECT TO THE TERMS OF PROTECTIVE ORDER**

Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure, Plaintiff Sexual Minorities Uganda ("SMUG") supplements its objections and responses to Defendant Scott Lively's First Set of Interrogatories as follows:

**GENERAL OBJECTIONS**

1. SMUG objects to each and every interrogatory, definition, and instruction to the extent it seeks to impose any obligations inconsistent with or in addition to SMUG's obligations under the applicable rules, including the Federal Rules of Civil Procedure and the Local Rules for the District of Massachusetts, or any order of the Court in this matter.

2. SMUG objects to each and every interrogatory to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, or any other applicable privilege or immunity. Inadvertent disclosure of such information shall not constitute the waiver of any applicable privilege, doctrine, immunity, or objection, and nothing contained in SMUG's

**EXHIBIT A**

Sexual Health and Reproductive Rights for Youth  
Plot 81 Bukoto Street  
Kamwokya  
P.O. Box 2566  
Kampala, Uganda  
CONFIDENTIAL – Tel. [REDACTED]

GALA Uganda  
Kampala, Uganda

Angels Refugee Support Association  
Kampala, Uganda

Queer Youth Uganda  
Munyonyo Road  
Kampala, Uganda

Frank & Candy  
P.O. Box 31933  
Kampala, Uganda

Uganda Health Service Providers Association  
Plot 4a, Kimera Road, Ntinda  
Kampala, Uganda  
CONFIDENTIAL – Tel. [REDACTED]

Supplemental Response No. 1.

SMUG has no supplemental Response to Interrogatory No. 1 and incorporates herein its original Response to Interrogatory No. 1.

Interrogatory No. 2:

Separately for each Person identified in Interrogatory 1, and for any other Person whom you contend in this Lawsuit to have been Persecuted, describe in detail each Act of Persecution that each such Person has suffered, and, for each such Act of Persecution:

- a) identify the Date(s) on which and Location where such Act of Persecution took place;
- b) identify each Person who committed such Act of Persecution, stating:
  - i. what each Person who committed such Act of Persecution did or failed to do to carry out the Persecution;
  - ii. the specific section and/or subsection of the specific law, treaty, international accord, or any other legal authority which you contend each Person who committed such Act of Persecution violated; and
- c) identify each specific fundamental right which such Act of Persecution infringed, with

reference to the specific legal source (section and/or subsection number) conferring that right.

Response to Interrogatory No. 2:

SMUG objects to this interrogatory because it seeks information from nonparties. SMUG further objects to the interrogatory because the term “describe in detail” is vague, overly broad, and unduly burdensome in seeking a detailed narrative account. SMUG further objects to subparts (b)(ii) and (c) of this interrogatory because they call for legal conclusions. Subject to and without waiving its specific or general objections, SMUG responds as follows: SMUG refers Defendant to paragraphs 165-226 of the Amended Complaint (Dkt. No. 27), which list the individual acts of persecution SMUG alleges in this lawsuit, including the victim(s) of such persecution, the relevant dates and locations, and those who carried out such persecution. SMUG further refers Defendant to paragraphs 43-164 of the Amended Complaint (Dkt. No. 27), which provide the identities of others who contributed to the persecution and the form of their contribution.

Supplemental Response No. 2.

SMUG incorporates its original Response to Interrogatory No. 2 herein and further responds as follows: This Interrogatory assumes that SMUG will identify individuals in response to Interrogatory No. 1, which SMUG has not done for reasons explained in its Response to Interrogatory No. 1. Subject to and without waiving its specific or general objections, SMUG supplements its Response to Interrogatory No. 2 in order to identify acts of persecution that occurred subsequent to the filing of the Amended Complaint in this action:

Raid of 2012 Pride Parade

SMUG states that on Aug. 4, 2012, Ugandan activists held their first Pride gathering, an

event that celebrates LGBTI culture and pride, at the Botanical Gardens in Entebbe. The police raided the gathering and arrested several of the participants.

Passage and Enactment of the Anti-Homosexuality Bill

SMUG states that the Anti-Homosexuality Bill was passed by Parliament on December 20, 2013, and signed into law on February 24, 2014. The bill then became the Anti-Homosexuality Act (AHA), officially broadening the criminalization of same-sex acts between consenting adults, including “touching with the intention of committing the act of homosexuality,” which carried sentences of up to life imprisonment. The law also imposed criminal penalties for, inter alia, speech, advocacy, and association and the provision of counseling and health services, by criminalizing the “promotion of homosexuality” and “aid[ing], abet[ting], counsel[ing] or procur[ing] another to engage in acts of homosexuality.” While a Ugandan court invalidated the AHA on August 1, 2014 on the basis of a parliamentary irregularity, efforts are now underway to appeal that ruling and/or reinstate the AHA.

Investigation of Refugee Law Project (“RLP”) and Suspension of Services

SMUG states that the Refugee Law Project is a non-governmental organization based at Makerere University and established in 1999 to provide legal aid to asylum seekers and refugees in Uganda. Following the passage of the AHA, the government initiated an investigation into RLP to determine if it was violating the new law. On March 14, 2014, the Minister of Relief, Disaster Preparedness and Refugees wrote to all Refugee Settlement Commandants and Refugee Desk Officers advising them to suspend the activities and services of RLP pending investigation into allegations that the organization was “promoting homosexuality” in the settlements. On May 20, 2014, RLP received another letter from the Permanent Secretary, signed off on by the Commissioner for Refugees in the Office Prime Minister, extending the suspension to RLP’s

Kampala office.

#### Raid and Shut-down of Walter Reed Clinic

SMUG states that the Makerere University Walter Reed Project is a U.S.-funded medical research facility in Kampala that conducted HIV research and provided services to LGBTI people. On April 3, 2014, Ugandan police raided the clinic and arrested one of the facility's employees, allegedly for conducting "unethical research" and "recruiting homosexuals." The operations of the clinic were temporarily suspended to ensure the safety of staff and beneficiaries of the programs. When the clinic reopened, it discontinued its serves to men who have sex with men.

#### Threats Against LGBTI Organizations

SMUG states that following the enactment of AHA, SMUG and a number of SMUG member organizations have been surveilled, exposed by the media, threatened with closure and calls for attack and/or evicted. As a result, many have had to suspend their operations serving Uganda's LGBTI community.

#### Additional Media Outings and Threats

On February 24, 2013, Ugandan newspaper Red Pepper published the headline: *BUSTED- HOW GAYS OPERATE IN UGANDA*. It featured a picture of SMUG staff. It alleged that SMUG member organization Spectrum Initiative Uganda ("Spectrum") was a recruiting agency for homosexuals in Uganda and identified some of Spectrum's staff. Spectrum had to move offices as a result.

On February 25, 2014, the day after the AHA was signed into law, the Red Pepper continued its media outings with the headline *EXPOSED! Uganda's 200 Top Homos Named*. Four photos appeared on the front page, with additional photos on the inside pages, along with

names, addresses and other identifying information on 200 people that the paper reported to be gay.

Two of the four front-page photos were of well-known LGBT rights activists Sam Ganafa and Victor Mukasa. Ganafa served as the executive director of Spectrum. Mukasa is a SMUG co-founder who secured the 2008 High Court ruling referenced in paragraph 34 of the Amended Complaint. The issue also had three interior pages with more names and photos of Ugandans described as LGBTI. Some of the names and photos were of well-known activists, such as SMUG staff members Frank Mugisha and Pepe Onziema, and former Executive Director of SMUG member organization Freedom and Roam Uganda, Kasha Jacqueline Nabagasera. However, the overwhelming number of those named were private citizens and not well-known activists or celebrities. Many of the names were of ordinary salespeople, shopkeepers, and employees of other larger businesses. The evidence for their alleged sexual orientation was not given.

The following day, the February 26, 2014 edition of Red Pepper included more front-page headlines promising “new pictures of gays inside” along with an alleged threat that “homos vow to shed blood over M7 [Museveni] law.”

The February 27, 2014 issue of Red Pepper included a cover story with the headline *Homos go to court over anti-gay law*. The next several issues continued to spread anti-gay propaganda including outings by anti-gay pastor Solomon Male, mischaracterizations of statements of LGBT advocates, and photos, names and addresses of LGBT Ugandans who were allegedly part of a “homo cabinet.” One issue had another feature entitled, *How to prevent your child from becoming a homo*.

The February 28, 2014 issue of the Red Pepper publicly identified SMUG staff member,

Richard Lusimbo. Lusimbo received threatening calls and mail in the aftermath and was forced to take additional security precautions.

Interrogatory No. 3:

Separately for each Act of Persecution identified in Interrogatory 2, identify each Person who witnessed that Act of Persecution.

Response to Interrogatory No. 3:

SMUG incorporates by reference its objections to Interrogatory No. 2. SMUG further objects to this interrogatory because it calls for information that is protected by the associational privilege of certain witnesses. Subject to and without waiving its specific or general objections, SMUG responds as follows: The following persons are among those who witnessed some portion of each instance of persecution described in response to Interrogatory No. 2:

Simon Lokodo  
State Minister for Ethics & Integrity  
Government of Uganda

David Bahati Parliament of Uganda Uganda

Martin Ssempe James Buturo Giles Muhame Fred Ruhindi  
State Minister for Justice & Constitutional Affairs  
Government of Uganda

Kihumuro Apuuli

Frank Mugisha  
c/o Sexual Minorities Uganda

Pepe Julian Onziema  
c/o Sexual Minorities Uganda

Richard Lusimbo  
c/o Sexual Minorities Uganda

David Kato  
*deceased*

Victor Mukasa

Supplemental Response No. 16.

SMUG incorporates its original Response to Interrogatory No. 16 herein and further incorporates its Supplemental Response to Interrogatory No. 2 for specific acts of persecution taken in furtherance of the conspiracy.

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*Attorneys for Plaintiff*

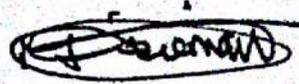
/s/ Pamela Spees  
Pamela C. Spees, *admitted pro hac vice*  
Baher Azmy, *admitted pro hac vice*  
Jeena Shah, *admitted pro hac vice*  
Center for Constitutional Rights  
666 Broadway, 7th Floor  
New York, NY 10012  
212-614-6431- Phone  
212-614-6499- Fax  
pspees@ccrj ustice.org

Mark S. Sullivan *admitted pro hac vice*  
Joshua Colangelo-Bryan *admitted pro hac vice*  
Gina S. Spiegelman *admitted pro hac vice*  
Dorsey & Whitney LLP  
51 West 52nd Street  
New York, NY 10019  
212-415-9200- Phone  
212-953-7201 – Fax  
sullivan.mark@dorsey.com

**VERIFICATION**

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

Executed on October 21, 2014.

A handwritten signature in black ink, appearing to read "Pepe Julian Onziema", is written over a horizontal line.

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Pepe Julian Onziema