UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
SPRINGFIELD DIVISION

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

PLAINTIFF'S RESPONSE TO DEFENDANT'S OBJECTION TO ORDER REGARDING MOTION TO COMPEL PRODUCTION OF UNREDACTED DOCUMENTS

Plaintiff Sexual Minorities Uganda ("SMUG") submits this response to Defendant's Objection, dkt. 210, to the August 10, 2015 Memorandum and Order of Judge Robertson ("Order"), dkt. 204. Defendant specifically objects to the portion of the Order correctly affirming the propriety of SMUG's objections and redactions relating to its highly confidential internal and/or non-public campaign strategies to prevent the enactment of Uganda's Anti-Homosexuality Bill ("AHB"). This material is not relevant to either party's claims or defenses and is protected by the associational privilege since it would reveal private campaign strategies to prevent the enactment of a piece of legislation that threatens to criminalize SMUG's very existence. The Order reflected a careful consideration of the parties' arguments and was supported by the facts and law. Thus, Defendant's objection to this portion of the Order should be overruled.

BACKGROUND

A. The Anti-Homosexuality Bill

On April 29, 2009, little more than one month following Defendant's visit to Uganda and meetings with parliamentarians, the AHB was introduced in the Ugandan Parliament. Dkt. 27 at ¶¶ 37, 75. The AHB reflected Lively's strategy to criminalize, among other things, "promotion" of homosexuality, which would have criminalized the very existence of non-governmental organizations like SMUG that advocate for the rights of Uganda's lesbian, gay, bisexual, transgender, and intersex ("LGBTI") community. *See* dkt. 200, Ex. A. Since the introduction of the AHB in the Ugandan parliament, SMUG, together with its partners, have made various efforts to prevent its passage into law. While many of SMUG's strategies have consisted of pubic advocacy and education against the AHB – an activity the law itself sought to criminalize – SMUG and its partners have also had to devise highly confidential, non-public strategies to defeat the proposed legislation.

In spite of the efforts of SMUG and others, the AHB was signed into law on February 24, 2014. SMUG and its partners brought a legal challenge to the enacted law in Uganda's Constitutional Court and secured its nullification five months later on procedural grounds. *See* dkt. 200, Ex. G. However, given that the Constitutional Court did not rule on the law's constitutionality on substantive grounds, more than 200 members of the Ugandan Parliament have reportedly demanded that the law be introduced again and have vowed to ensure it passes. *See* dkt. 200, Ex. H. The media reported in late 2014 that a new version of the law has been drafted and is expected to be re-introduced in Parliament in 2015. *See* dkt. 200, Ex. I.

B. Plaintiff's Objections to Defendant's Discovery Requests Regarding the AHB

On September 1, 2014, Defendant served 196 Requests for Production on SMUG, a

number of which sought documents from SMUG that related to the AHB. Dkt. 199, Ex. A. Prior to making the bulk of its production, SMUG objected to producing documents "beyond those that discuss underlying facts concerning the passage of the AHB, including Lively's role in that regard, and non-privileged documents relating to the legal challenge to the AHB." Dkt. 199, Ex. B. SMUG explained that, "[t]o the extent this request seeks documents relating to SMUG's and/or non-parties' strategies to prevent the passage of the AHB into law, SMUG objects on the ground that it seeks documents that are not relevant nor reasonably calculated to lead to the discovery of admissible evidence [since] SMUG is not seeking damages for its efforts to prevent the passage of the AHB, but only for its efforts to mount a legal challenge to the AHB as enacted." *Id*. Thereafter, SMUG produced documents discussing SMUG's and others' views on the AHB itself; the consequences of the introduction of the AHB in Parliament and potential consequences were the AHB enacted into law; individuals who have had a role in conceptualizing, drafting, and facilitating the passage of the AHB; and SMUG's and others' *public* advocacy and education efforts to prevent the passage of the AHB into law; and SMUG's response to the law's resulting harms; SMUG only withheld information regarding its highly confidential non-public strategies. *See* dkt. 199, Ex. H.

C. The Magistrate Judge's Conclusion that Disclosure Would Present Serious Harm to SMUG and its Partners in Advocacy

Based on the record before the Court, Judge Robertson found that:

> It is uncontroverted that "on past occasions, revelation of the identity of [LGBTI individuals in Uganda] has exposed these [individuals] to economic reprisal, . . . threat of physical coercion [and arrest], and other manifestations of public [and official] hostility." *NAACP*, 357 U.S. at 462. Nor can there be any doubt about a negative reaction by members of the Ugandan government to disclosure of strategies to combat discrimination or enactment of the Anti-Homosexual Bill (Dkt. No. 151 at 3). The potential for harm cannot be wholly mitigated by the existing protective order.

Dkt. 204 at 8. Applying *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2009), Judge Robertson found that "the record supports the conclusion that the potential chilling effect of being required to produce information about Plaintiff's strategies for defeating reenactment of an Anti-Homosexuality Bill could be substantial given threats made by Ugandan officials." *Id*. at 9.[1]

ARGUMENT

The Court may only 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)). With respect to the Order's factual findings, the Court "must accept both the trier's findings of fact and the conclusions drawn therefrom unless, after scrutinizing the entire record, [it] 'form[s] a strong, unyielding belief that a mistake has been made.'" *Phinney v. Wentworth Douglas Hosp. Eyeglasses*, 199 F.3d 1, 4 (1st Cir. 1999).

The Order merely applied established law on the assertion of the associational privilege in discovery disputes. As addressed in the Order, it is well settled that judicial orders compelling disclosure in litigation between private parties can constitute an abridgment of parties' rights of associational privacy. *NAACP v. Alabama,* 357 U.S. 449 (1958). Indeed, the "threat to First Amendment rights may be more severe in a discovery context, since the party directing the inquiry is a litigation adversary who may well attempt to harass his opponent and gain strategic advantage…" *Britt v. Superior Court*, 20 Cal. 3d 844 (1978).[2]

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[1] As SMUG previously explained to the Court, SMUG and its partners will need to employ the same or similar strategies used in its effort to defeat the AHB to defeat attempts to reenact the AHB or a re-packaged form of the legislation. *See* dkt. 198 at 13; dkt. 200 at ¶ 21.

[2] These considerations hold true even when protection is sought by the party bringing suit "so that plaintiffs will not be unduly deterred from instituting lawsuits by the fear of exposure of their private associational affiliations and activities." *Grandbouche v. Clancy*, 825 F.2d 1463, 1467 (10th Cir. 1987).

As the Order recognizes, "Implicit in the right to associate with others to advance one's shared political beliefs is the right to exchange ideas and formulate strategy and messages, and to do so in private." *Perry v. Schwarzenegger*, 591 F.3d 1147, 1162 (9th Cir. 2009). Thus, the associational privilege protects not only an organization's membership or donors, but also "internal policy or campaign communications concerning contested political issues." Dkt. 204 at 6 (citing *Perry,* 591 F.3d at 1162). As the Ninth Circuit explained, "[t]he First Amendment privilege…has never been limited to the disclosure of identities of rank-and-file members." *Perry*, 591 F.3d at 1162 (citing *DeGregory v. Attorney Gen.*, 383 U.S. 825, 828 (1966) (applying the privilege to "the views expressed and ideas advocated" at political party meetings); *Dole v. Serv. Employees Union, AFL–CIO, Local 280*, 950 F.2d 1456, 1459 (9th Cir.1991) (applying privilege to statements "of a highly sensitive and political character" made at union membership meetings). This is because the privilege "turns not on the type of information sought, but on whether disclosure of the information will have a deterrent effect on the exercise of protected activities." *Id*. (citing *NAACP*, 357 U.S. at 460-61; *Brock v. Local 375, Plumbers Int'l Union of Am.*, 860 F.2d 346, 349–50 (9th Cir.1988)).

Defendant mistakenly relies on *United States v. Comley*, 890 F.2d 539 (1st Cir. 1989), to assert that the law in the First Circuit is otherwise. However, in *Comley*, the First Circuit recognized that the associational privilege could cover an organization's strategies and activities in addition to the identities of its members. *See id*. at 545. Indeed, the court would have found the subpoena at issue to violate Comley's associational rights had it not been narrowly tailored to meet a compelling government interest in the substance of the documents in Comley's possession. *Id*. (explaining that the subpoena would have been unconstitutional had it sought "any and all information possessed by Comley concerning nuclear safety violations").

In other words, the First Circuit in *Comley* conducted a balancing test required to protect the associational privilege in finding that the government was entitled to the documents it sought in that case. Here, Judge Robertson carefully conducted such a balancing test with respect to SMUG's redactions of material reflecting its highly confidential, non-public strategies to prevent the enactment of the AHB. *See* dkt. 204 at 6 ("Courts in this country have recognized that '[w]hen . . . discovery would have the practical effect of discouraging the exercise of [constitutionally protected] associational rights, the party seeking such discovery must demonstrate a need for the information sufficient to outweigh the impact on those rights.'" (collecting cases)).

There is no basis in law or fact to disturb the Order in this regard. While the Order misunderstood SMUG's claims to be solely based on conduct that occurred prior to July 2012, *see* dkt. 204 at 9, this should not affect the outcome of the associational privilege's balancing test, since, as explained further below, *see infra* Section B, SMUG's non-public strategies to prevent the passage of the AHB into law are "not crucial to the defense" regardless of the when the acts of persecution at issue here occurred.[3]

A. SMUG Would Suffer Real Harm If It Is Forced to Disclose This Information

As Judge Robertson found based on the record before the Court, "'[E]nforcement of [Defendant's discovery requests regarding SMUG's non-public strategies to defeat the AHB] will result in (1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or 'chilling' of, the members' associational rights.'" Dkt. 204 at 7 (citing *Perry*, 591 F.3d at 1160).

[3] By contrast, Judge Robertson had misconstrued the law governing "Attorneys Eyes Only" protection over documents, by simply relying on the lack of evidence "that Defendant has failed to comply with the terms of the protective order." *See* dkt. 209.

While the AHB was nullified by the Constitutional Court of Uganda, it was only nullified on procedural grounds and a significant number of parliamentarians have vowed to ensure it becomes law again. There is a strong likelihood, then, that SMUG will have to continue to employ both the public and private strategies it had used to try to prevent the enactment of the AHB. Providing SMUG's and its partners' private strategies to Defendant now would not only risk rendering them ineffective, but would also deter SMUG's partners from continuing to collaborate with SMUG on *any* strategies in the future that need to remain private.

First, Defendant provided significant support to the drafting of the AHB and laying the groundwork for its passage. *See* dkt. 27 at ¶¶ 9, 36-39, 75-93. *See also*, *e.g.*, dkt. 199, Ex. D (Defendant's correspondence with co-conspirator Martin Ssempa providing his suggested revisions to the AHB wherein, *inter alia*, he recommends prison sentences of up to five years for promotion); dkt. 200 at ¶ 3. Documents produced by Defendant demonstrate that his role in furthering the threat of criminalization of SMUG's advocacy, and very existence, remains significant and constant. Defendant has remained in communication with his co-conspirators following the filing of this lawsuit, discussing the criminalization of LGBTI advocacy and specifically targeting SMUG, *see* dkt. 199, Ex. F [LIVELY 3737] (contacting co-conspirators Stephen Langa and Martin Ssempa, and Charles Tuhaise, an advisor to the Ugandan Parliament, informing them that "Uganda should . . . adopt the anti-propaganda law that was just passed in Russia. It will accomplish the objective of stopping foreign interference in Uganda, and the destructive propaganda efforts of groups like SMUG"), and singling out events organized by SMUG to promote LGBTI rights, *see id.* [LIVELY 3713] (calling the attention of Langa, Ssempa, and Tuhaise to the first pride parade held in Uganda in 2012, with Tuhaise responding that these "kinds of things will continue until we get a law passed by Parliament to stop them").

If SMUG were compelled to disclose its highly confidential internal and/or non-public strategies to prevent the enactment of the AHB to the very party alleged to be responsible for its introduction, it would impede SMUG's and its partners' implementation of those strategies to prevent the passage of similar pending or future legislation.

Second, it is self-evident that disclosure of sensitive campaign strategies "would have the practical effects of discouraging political association and inhibiting internal campaign communications that are essential to effective association and expression." *Perry*, 591 F.3d at 1163 (internal citations omitted). Disclosure of this information to anyone, particularly Defendant, who conspires with others to criminalize LGBTI advocacy and status in Uganda, would deter SMUG's partners from collaborating with SMUG any further on highly confidential strategies. *See* dkt. 200 at ¶ 21.

B. Defendant Can Show No Compelling Need for This Information

The party seeking to force disclosure of material protected by the associational privilege must prove that its need for the information outweighs the harms that disclosure would likely cause, *NAACP*, 357 U.S. at 463, by demonstrating "a compelling need for the information that will survive 'exacting scrutiny,'" *Sherwin-Williams Co. v. Spitzer*, Civil No. 1:04-CV-185 (DNH/RFT), 2005 U.S. Dist. LEXIS 18700, at *15 (N.D.N.Y. Aug. 24, 2005). Contrary to Defendant's arguments, documents concerning highly confidential, non-public strategies to prevent the passage of the AHB are not relevant to any claims or defenses regardless of when the acts upon which SMUG is relying to establish that the persecution conspiracy occurred.

SMUG claims that Defendant, together with others, contributed to the widespread and/or systematic persecution of the LGBTI community in Uganda. SMUG asserts that Defendant has facilitated this persecution through, *inter alia*, his efforts in support of the drafting and passage

of the AHB and of other means of impeding *public* advocacy for the rights of LGBTI Ugandans. The ways in which SMUG has planned and carried out non-public strategies to prevent the AHB from being enacted have no bearing on the facts relating to the AHB, the persecution resulting from the introduction and enactment of the law, or Defendant's role in helping to conceptualize and draft the law and lay the groundwork for its passage.

Additionally, the harms SMUG has suffered include the additional *public* advocacy and *public* education it has had to conduct to counter the harmful effects of the AHB and the resources it has had to expend to challenge the law in court once it was enacted. Dkt. 199, Ex. E. SMUG is not claiming any damages relating to internal and/or non-public efforts it and third parties have made in connection with attempting to prevent the passage of the AHB into law. Thus, such information also does not make the harms SMUG is asserting it has suffered as a result of the persecution conspiracy more or less likely.

By contrast, SMUG has produced documents concerning the AHB that are relevant to the parties' claims and defenses, including documents discussing SMUG's and others' views on the bill itself; the existing and potential consequences of the bill; individuals who have had a role in conceptualizing, drafting, and facilitating the passage of the bill; SMUG's and others' public advocacy and education efforts to prevent the passage of the bill; and SMUG's response to its resulting harms.

The Ninth Circuit recognized a similar distinction in *Perry*. In *Perry*, two same-sex couples filed suit challenging the constitutionality of California's Proposition 8, and the official proponents of Proposition 8 intervened to defend the suit. *Perry*, 591 F.3d 1147. The plaintiffs served document requests on the proponents of the measure, seeking their internal campaign communications relating to campaign strategy and advertising to ensure the passage of the

measure. *Id*. at 1153. While the plaintiffs argued that their request was relevant to voter intent and the existence of a legitimate state interest behind the measure, the proponents of Proposition 8 argued that their internal campaign communications, including draft versions of communications never actually disseminated to the electorate at large, were irrelevant to the issues in this case. *Id*. The court agreed with the Proposition 8 proponents, finding that though these documents were relevant under Rule 26's broad standard, they did not meet the higher standard required to overcome the associational privilege since what plaintiffs needed to see to determine voter intent was the public material the Proposition 8 proponents actually disseminated to voters and the determination of whether a legitimate state interest existed was an objective standard. *Id.* at 1164-65.

Similarly, while all documents concerning the AHB may be broadly relevant since the persecution caused by the AHB is at issue in this case, internal and/or non-public highly confidential strategies to prevent its passage into law – as opposed to SMUG's public advocacy efforts – do not make any of SMUG's allegations more or less likely, and thus Defendant can show no compelling need for this information.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court overrule Defendant's objection to the Order permitting Plaintiff to redact information revealing its non-public strategies to prevent the passage of the AHB into law.

Dated: September 8, 2015

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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 September 8, 2015. Service will be effectuated by the Court's electronic notification system upon all counsel or parties of record.

/s/ *Jeena Shah*
Jeena Shah