UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
SPRINGFIELD DIVISION

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

DEFENDANT SCOTT LIVELY'S MEMORANDUM
IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE SUR-REPLY

Defendant, SCOTT LIVELY ("Lively"), pursuant to Local Rule 7.1(b)(2), files this memorandum in opposition to Plaintiff's Motion For Leave to File a Sur-Reply in Further Opposition to Defendant's Motion For Summary Judgment (dkt. 311), filed by Plaintiff, Sexual Minorities Uganda ("SMUG"). For the reasons stated herein, the motion should be denied.

I. SMUG'S MOTION FAILS TO JUSTIFY DEPARTURE FROM THIS COURT'S ORDERS AND RULES ON SUMMARY JUDGMENT BRIEFING.

Neither SMUG's motion, nor its proposed sur-reply (dkt. 311-1), demonstrates a justification for departing from this Court's orders and rules on summary judgment briefing. The Court's September 11, 2014 Revised Scheduling Order (dkt. 127) contemplated only each party's summary judgment motion and an opposition thereto, with no provision for a reply. The Court's subsequent scheduling orders, consistent with Local Rule 56.1, allowed for a reply in support of a summary judgment motion, but did not require it. (*See, e.g.*, dkts. 234, 239 ("[R]eplies, if any, shall be filed by . . . .").)

SMUG's opposition memorandum, statements of "facts," and reams of declarations and exhibits filed in opposition to Lively's summary judgment motion (dkts. 270-293) approach

3,000 pages. Although Lively has the burden of the movant, his initial and reply memoranda, declarations, and exhibits **combined** comprise **half** the pages of SMUG's filings. In short, SMUG had every opportunity to argue what it wanted to argue in its Opposition (dkt. 292). Moreover, in violation of Local Rule 56.1, SMUG misappropriated the opportunity to file its own narrative as "facts" (dkt. 270 at 44-115). (*See* Lively Reply Mem. (dkt. 305) at 4-5.) It would be inappropriate, prejudicial, and simply overkill to allow SMUG yet another opportunity to foist more chaff upon the Court.

Indeed, two of the three issues SMUG wishes to raise in its sur-reply – its witnesses' total lack of knowledge and its failure to adduce any evidence on damages – were discussed at length and in great detail in Lively's initial summary judgment memorandum. (*See* dkt. 257 at pp. 7-19; 23-38; 43-46; 130-141.) SMUG could and should have said all that it now wants to say on these subjects in its Opposition, especially since SMUG knew that its Opposition would attempt to rely so heavily on matters as to which SMUG's witnesses claimed that SMUG lacked all knowledge. The only subject which SMUG wishes to raise in its sur-reply which was not discussed in Lively's initial memorandum is SMUG's book, which SMUG improperly withheld from Lively in discovery. Surely SMUG's hiding the ball in discovery does not give it license to now flood the Court with arguments and positions it improperly withheld.

Ultimately, as shown in Lively's initial and reply memoranda (dkts. 257, 305), SMUG did not meet its obligation to reveal the factual bases for its positions and theories during discovery, but waited until its Opposition. (*See generally* MSJ Mem. (dkt. 257) at 5-38, 43-46; Reply Mem. (dkt. 305) §§ I, V.) Thus, to the extent Lively's Reply addressed any matters not raised in his initial memorandum, such was necessitated by SMUG's own doing. Under these circumstances, SMUG is not justified in seeking to file more paper.

II. SMUG'S PROPOSED SUR-REPLY IS A BARELY DISGUISED ATTEMPT TO BLAME LIVELY FOR SMUG'S FAILURE TO ADDUCE EVIDENCE TO PROVE ITS CASE.

A. SMUG Disingenuously Blames Lively For SMUG's Failure To Produce Its Own Book, *Homosexuality: Perspectives from Uganda*, And Disingenuously Downplays The Devastating Impact Of The Book On SMUG's Conspiracy Theory.

1. SMUG Cannot Avoid Its Obligation To Produce *Perspectives*.

SMUG's proposed sur-reply makes the disingenuous protest that Lively "never asked Plaintiff to provide a copy of the [*Perspectives*] book in discovery . . . ." (dkt. 311-1 at 2.) But at SMUG's deposition, SMUG's counsel stated on the record, "we hadn't located it to produce it" (dkt. 250-7 at 258:7-16), not, "*you didn't ask for it*." SMUG thus admitted *Perspectives* was responsive to Lively's existing discovery requests, but justified its nonproduction as a matter of possession, custody, and control: the book was in the possession of SMUG's senior officer and 30(b)(6) witness, but somehow unreachable by SMUG. (*Id.*) The absurdity of this position is demonstrated in Lively's Reply. (Dkt. 305 at 82-83 and n.22.)

To be sure, SMUG's newly-minted argument that Lively "never asked" for the book presupposes the ludicrous: that Lively's discovery requests encompassed more than *32,000 pages* of SMUG's materials about the status and treatment of homosexuals in Uganda, but somehow excluded SMUG's own book purporting to comprise "a historical record of the debate" on homosexuality in Uganda, for the decade that included the first six years of the alleged Lively conspiracy. (Reply Mem., dkt. 305, at 76-82.)[1] Given the obvious relevance and responsiveness of *Perspectives*, SMUG was obligated to produce it without waiting for Lively to discover its nonproduction at SMUG's deposition, over four months after the close of fact discovery.

[1] SMUG (not SMUG's officer) cited *Perspectives* in preparing a report to the Ugandan government regarding the status and treatment of homosexuals in Uganda in connection with HIV healthcare, identifying the book by name. (Dkt. 253-1 at SMUG025935.)

Likewise disingenuous is SMUG's insinuation that Lively had an obligation to pursue *Perspectives,* even though SMUG was obligated to produce it, and even though Lively had no way to know what was in it. For example, SMUG chides Lively for his "tactical decision not to obtain the book," and even better, for not checking it out of the library—as if Lively's unknowing disregard of the book could excuse SMUG's discovery obligations. (Dkt. 311-1 at 2, n.2.) Of course, Lively did eventually obtain the book without SMUG, and only then learned what SMUG already knew—that the SMUG origin story of Lively's introducing to Uganda in 2002 previously unknown concepts like "recruitment of children" and "promotion of homosexuality" is wholly repudiated by the record SMUG created in *Perspectives*. (Reply Mem., dkt. 305 at 74-82.) Just like SMUG's discredited conspiracy theory, this Court should reject SMUG's weak attempt to impute fault to Lively for SMUG's discovery failure.

2. SMUG Cannot Avoid The Devastating Impact Of *Perspectives* On Its Conspiracy Theory.

After trying to shift the blame to Lively for its failure to produce *Perspectives*, SMUG then tries to shift its theory of the case to deflect the narrative-killing revelations of *Perspectives*, arguing that the book somehow supports SMUG's conspiracy theory. (Dkt. 311-1 at 2-3.) But SMUG's theory depends on Lively as the originator, in 2002, of the ideas so powerful that they "compell[ed] persecution" (Opp. at 70) by his "reliant co-conspirators" in the Ugandan government. (Opp. at 123):

> **The conspiracy in Uganda began in 2002, when Defendant brought his program there** . . . . [T]hey laid the groundwork for public acceptance of, and indeed created a demand for, systematic state action against associations and assemblies of LGBTI people.

(Opp. at 70-71 (citations omitted) (emphasis added).) And:

> **Following the script Defendant set out in writings and presentations during his meetings in Uganda in 2002** and 2009, the co-conspirators justified their persecutory efforts by framing

> advocacy for LGBTI rights as "**promotion of homosexuality**" and "propaganda." The co-conspirators claimed that LGBTI advocacy groups were involved in "**recruitment**," namely of children, into homosexuality, essentially equating the LGBTI community with perpetrators of sexual assault of children.

(Opp. at 73 (citations omitted) (emphasis added).) And again:

> Defendant's assertions that the concepts of "promotion of homosexuality" and "recruitment" were unrelated to him are belied by his own citations to statements of his co-conspirators after they began working with him. **To the extent others in Uganda parroted those same justifications for the persecution of the LGBTI community after 2002, they simply demonstrate the significant impact and "success" of Defendant's efforts.**

(Opp. at 73 n.30 (citations omitted) (emphasis added).)

To be sure, this lynchpin of SMUG's conspiracy theory—that Lively introduced the key ingredients of the persecution conspiracy to Uganda in 2002—is one of the few parts of SMUG's theory that SMUG "knew" at its deposition:

> Q: What groundwork was laid by Scott Lively in 2002?
>
> A: Specific language had come to the Ugandan space, language like the gay agenda, **language like recruitment of children, promotion of homosexuality**, pro-family, pro-life, those were all terms that **at that time were not used in the Ugandan community** as a description of LGBT people.

(Dkt. 250-6 at 212:17-24 (testimony by SMUG 30(b)(6) witness Onziema) (emphasis added).)

In short, *Perspectives* destroys SMUG's theory that Lively introduced the ideas of "promotion" and "recruitment" to Uganda, and SMUG cannot simply claim a new theory to avoid it.

Unable, though desperate, to avoid the explosive revelations of *Perspectives*, SMUG attempts a drive-by rebuttal in a footnote, no doubt hoping its gloss will be the last word on *Perspectives*. (Dkt. 311-1 at 3, n.4.) But the integrity of these proceedings mandates that SMUG's sophistry in dealing with *Perspectives* be exposed.

First, SMUG deems it a "mischaracterization" to suggest that the pre-2002 article "Kubaka slams homos" was "equating homosexuality with pedophilia." (Dkt. 311-1 at 3, n.4.) But by any fair reading, the article quite clearly attributes to the Bugandan Kubaka (King) statements placing homosexuality and "defilement" of children in the same category of "barbaric acts" and "inhuman actions" that must be stopped, even adding to the list "the brutal way children are murdered for sacrifices." (Dkt. 306-10.) Not to put too fine a point on it (*i.e.*, equating homosexuality with pedophilia), the article reports the King's lament, "He regretted the acts of incest among parents and their children and the increasing numbers of homosexual cases." (*Id.*)

Second, SMUG deems it a "mischaracterization" to refer to the pre-2002 headline "Homosexuality is a time bomb in schools" as an exemplar of Ugandan reporting on "recruitment of children and promotion of homosexuality." (Dkt. 311-1 at 3, n.4.) But the last sentence summation of the article itself encapsulates both concepts exactly: "The interesting fact is that the total number of **converts into the homosexuality** [*i.e.*, recruitment of children] is surely rising and it's only a matter of time before they'll start **screaming for attention** [*i.e.*, promotion]." (Dkt. 306-7 at 87 (emphasis added).)

Third, SMUG argues that when the author of the pre-2002 article "Why Homosexuality Should be Shunned" (hereinafter "*Shunned*") wrote in opposition to the "promotion of homosexuality," he was not talking about the same "promotion of homosexuality" concept that Lively discussed (and, according to SMUG, imported to Uganda in 2002). (Dkt. 311-1 at 3 n.4.) Once again, however, SMUG's sophistry is laid bare when the actual language of the article is read, and then compared to Lively's actual language **as quoted by SMUG**.

The central premise of the 2001 *Shunned* article is the problem of promotion of homosexuality by activists, and the solution of government action to protect Ugandans:

> But to see **our own people beginning to advocate** for such weird lifestyles like homosexuality is absurd to say the least. I know that **these gay rights movements** in the US have a lot of money, but we can't afford to sacrifice our morals in exchange for it.
>
> So, I don't agree with those who say that the government should not get involved in the debates about homosexuality. **It is the duty of government to protect its citizens** from harmful behaviour.

(Dkt. 306-7 at 66 (emphasis added).) The author then immediately directs his invocation of government protection towards the "**[a]dvocates** for the recognition of homosexuality as a normal lifestyle." (*Id.* (emphasis added).) After challenging various premises of the "advocates," he concludes with a call to action, which logically can be understood only as **government** action, given the central premise of the article:

> Given the well-documented, socially and medically destructive effects of homosexual behaviour on individuals, families and communities, compassion and prudence should lead us to **discourage any cultural promotion of homosexuality** as a moral and normal activity.

(*Id.* at 66-68 (emphasis added).) Immediately following this call to action, the author gives a concrete example of the "promotion of homosexuality" to which the call is directed:

> Media reports indicate that homosexual experimentation among high schools students has increased considerably in recent years as schools have presented homosexual activity as normal, desirable and even "cool."

(*Id.* at 68-69.)

The *Shunned* author, in 2001, clearly calls for, among other things, government action to discourage (*i.e.*, criminalize) promotion of homosexuality to students in schools. So how does SMUG make its argument that the *Shunned* ideas are distinguishable from what Lively supposedly introduced in 2002? (Dkt. 311-1 at 3 n.4.) Remarkably, by quoting Lively's advocacy years later for, supposedly, **the exact same thing**: "'legal power to prevent sex

activists from advocating their lifestyles to children in public schools . . . .'" (Opp. at 72[2] (cited at dkt. 311-1 at 3 n.4).) Importantly, Lively's advocacy for the prohibition of limited and specific categories of promotion (*see* Reply Mem., dkt. 305 at 59-63) is far more temperate than the *Shunned* call for government discouragement of "**any** cultural promotion of homosexuality." Thus, Lively's ideas regarding any concept of "promotion of homosexuality" were quantitatively lesser in degree than what was already being communicated to Ugandan society, **by Ugandans**, no later than 2001 – one year prior to Lively's arrival and the alleged start of SMUG's imagined "conspiracy."

As shown above, SMUG's proposed sur-reply arguments regarding *Perspectives* are disingenuous attempts to deflect the Court's attention from SMUG's discovery failures and the impact of *Perspectives* on SMUG's conspiracy theory. The Court should not accept the filing.

B. SMUG Presents No Facts Or Law To Avoid Its Witnesses' Disclaimer Of All Knowledge On Critical Elements Of Its Claims.

In arguments that SMUG could have raised (but failed to raise) in its Opposition, SMUG now claims that it is not stuck with the record of "I don't knows" created by it and its witnesses, but is rather free to advance theories and positions it never disclosed in discovery. (Dkt. 311-1 at 3-6.) SMUG's entire argument, besides being late, is premised on a classical strawman fallacy: SMUG contends that Lively is seeking to exclude "his own documents." (*Id*. at 3.) Of course, Lively is not seeking to exclude "his own documents," but rather SMUG's current interpretations, positions and theories based on those documents, which SMUG was required to but utterly failed to disclose in discovery. Despite SMUG's weak efforts to distinguish the mountain of authorities cited by Lively, SMUG cannot change the fact that, in numerous of those authorities, parties who asserted "I don't know" in discovery were precluded from subsequently

[2] To be sure, SMUG deceptively uses Lively's quote out of context to support the demonstrably false premise that Lively drafted and approved the AHB. (*See* Reply Mem., dkt. 305 at 68-69.)

presenting positions, theories and interpretations at summary judgment or trial, **even if those positions, theories and interpretations were based upon documents produced in discovery by others**. *See, e.g., United States v. Taylor*, 166 F.R.D. 356, 363 (M.D.N.C.), *aff'd,* 166 F.R.D. 367 (M.D.N.C. 1996) (expressly rejecting SMUG's argument that a party could claim ignorance at its corporate deposition, and then "review previous deposition testimony **and documents previously produced in discovery [by other parties] after the deposition has concluded to then determine its corporate position. The time for preparation is now** [*i.e.*, before the deposition]." (emphasis added)); *QBE Ins. Corp. v. Jorda Enterprises, Inc.*, 277 F.R.D. 676, 696-98 (S.D. Fla. 2012) (holding that plaintiff had a duty to educate its 30(b)(6) as to information available from documents and witnesses **of other parties**, and plaintiff "will not be able to take a position at trial on those issues for which [its 30(b)(6) witness] did not provide testimony."). This is because counsel for parties, including SMUG, are conduits of those parties, and cannot claim to know positions, theories and interpretations on which their clients expressly disclaim all knowledge. *Taylor,* 166 F.R.D. at 361-2 ("The attorney for the corporation is not at liberty to manufacture the corporation's contentions. Rather, the corporation may designate a person to speak on its behalf and it is this position which the attorney must advocate.") SMUG presents no authority whatsoever to the contrary.

Sensing that it cannot avoid the numerous "I don't knows" proclaimed by its own witnesses, SMUG next makes an astounding claim that defies both reason and credulity: "nearly all of the 'I don't knows' elicited from Plaintiff's witnesses were with regard to assertions not made by Plaintiff in establishing its claims." (Dkt. 311-1 at 4.) Really?

- Does not SMUG claim that Lively entered into an unlawful agreement with others to deprive people in Uganda of fundamental rights on the basis of their sexual orientation and gender identity? If SMUG no longer makes this claim, then why

are we here? If it does, then SMUG's own Chairman of the Board, and its own Executive Director, both testified that they don't know of any such unlawful agreement, and, critically, that **no one else at SMUG knows of any such unlawful agreement either**. (*See* Testimony quoted in MSJ Reply Brief, dkt. 305, at 11-12.)

- And does not SMUG claim that Lively "aided and abetted" "persecution" in Uganda, the only instances of which are fourteen specific acts identified by SMUG? Of course it does, but SMUG's 30(b)(6) designee, and every last one of its other witnesses, testified that neither they, nor SMUG, nor anyone else at SMUG, knows of "**any assistance at all**" provided by Lively, or any involvement at all, "**directly or indirectly**" of Lively in the only acts of persecution alleged. (*See* Testimony quoted in MSJ Reply Brief, dkt. 305, at 12-13, 18-20.) SMUG attempts to brush these case-ending admissions aside, by conceding that Lively had no "**personal involvement** in individual instances of persecution" and then implying that Lively had some other kind of "non-personal" involvement. (Dkt. 311-1 at 4 (emphasis added).) But the questions SMUG and its witnesses were answering were decidedly **not** "Was Lively 'personally involved' in the alleged persecution," but rather did Scott Lively have "**any** involvement, I mean **directly or indirectly**" in the alleged persecution, and did he provide "**any assistance at all**" to the alleged persecutors? SMUG's own witnesses say, under oath, that they and SMUG have no such knowledge. That should be the end of the matter.
- Finally, does not SMUG claim that Lively managed an international crime ring of persecution from the United States, such that the presumption against extraterritoriality is sufficiently displaced? Of course it does. But SMUG's

30(b)(6) designee on domestic conduct uttered a string of no fewer than eight successive "I don't knows" on this subject alone. (*See* Testimony quoted in MSJ Reply Brief, dkt. 305, at 30-32.)

No matter how hard it tries, SMUG cannot avoid the fact that its witnesses proclaimed a complete lack of post-discovery, personal and corporate knowledge on most of the critical elements of SMUG's claims.

Lastly, SMUG seeks refuge in some "Objections" it purportedly served to Lively's 30(b)(6) deposition notice. (Dkt. 311-1 at 5 n.6.) In so doing, SMUG is attempting to pull yet another fast one, because it does not tell the Court that its so called "Objections" were served in response to an old deposition notice, months before the operative deposition notice was served by Lively. The Court will note that SMUG's "Objections," attached as Exhibit 1 to SMUG's proposed sur-reply, were served on June 8, 2015. (*Id*. at 16.) Lively's operative 30(b)(6) deposition notice, on the other hand, was served on October 30, 2015, or almost **five months after** SMUG's purported "Objections." (Dkt. 306-2, at 3.) SMUG did not serve any objections in response to **this** deposition notice, the only one that matters. More importantly, SMUG did not object at the start of the 30(b)(6) deposition, or to most of the questions eliciting its witnesses' "I don't know" responses. And, most importantly, SMUG never sought any protective order whatsoever, nor were there any grounds upon which SMUG could seek such an order. Lastly, even if SMUG had not waived its "Objections," which it clearly did, no objection could alter or alleviate SMUG's duty to provide a designated witness capable of imparting SMUG's knowledge on Lively's clearly articulated deposition topics. (*See* MSJ Reply, Dkt. 305, at 14-26.)

C. SMUG Presents No Facts Or Law To Revive Its Damages Claims.

SMUG's passing arguments on damages could also have been presented in SMUG's Opposition, but were not. They are also meritless and insufficient to revive SMUG's damages claims.

SMUG does not present a single authority supporting its proposition that it can withhold damages documentation and computation in discovery, but still present such evidence to a jury since Lively did not file a motion to compel. (Dkt. 311-1 at 7.) Lively has already shown that the law, in the First Circuit and elsewhere, requires "near automatic exclusion" of information that SMUG chose not to disclose in discovery. (MSJ Reply, dkt. 305, at 95-96.) This outcome does not depend on whether Lively sought an order to compel SMUG's disclosures, because SMUG was already required to provide its damages documents and computation under Rule 26 and by Lively's discovery requests. (*Id*. at 29.) If SMUG's theory of discovery is adopted, then any party could wrongfully withhold responsive information in discovery, only to reveal and rely upon it at trial or in opposition to a summary judgment motion. Discovery under SMUG's rules would be a sham.

Also, it does SMUG no good to remark that several of the authorities adduced by Lively involved the granting of motions *in limine*, precluding introduction of improperly withheld damages proof at trial, as opposed to the granting of summary judgment outright. (Dkt. 311-1 at 7.) There is no need or justification at all for the Court to deny Lively's motion for summary judgment, only to then grant a subsequent motion *in limine* barring any evidence of damages at trial. Either way, Lively is entitled to judgment on evidence-free damages as a matter of law. SMUG presents no authority justifying the delay of the inevitable.

If SMUG is so insistent on filing another brief, it could have used the opportunity to explain to the Court how SMUG could state repeatedly in discovery, often times under oath, that

SMUG would provide an expert report on damages, **including "non-economic" damages such as claimed reputational losses**, only to later fail to provide any such admittedly necessary and required expert evidence. (*See* MSJ Reply, dkt. 305, at 105-07.) Or, SMUG might have used the opportunity to explain to the Court how it could possibly make the case for "non-economic," reputational losses to a jury, when SMUG's own witnesses testified that SMUG's membership and donations have skyrocketed during the term of the alleged "conspiracy." (*Id*. at 107-09.) Or, SMUG might have explained to the Court how it could possibly seek "non-economic" damages on behalf of individual persons now, when SMUG has created a long record of numerous representations – accepted by the Court – that SMUG is only seeking damages for itself as a corporate entity. (*Id*. at 99-100.)

Of course, SMUG does not explain any of these things, because they cannot be explained away. SMUG's claims for all damages, economic or non-economic, are long dead and gone, and SMUG can do or say nothing to revive them.

For these reasons, the Court should deny SMUG's improper attempt to pile on more meaningless and inconsequential paper. SMUG's motion for leave to file a sur-reply should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically with the Court on September 14, 2016. 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