

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

UNIVERSAL TRUCK & EQUIPMENT COMPANY, INC., :  
NEW LONDON MINING, MANUFACTURING & :  
PROCESSING, LLC, NICHOLAS E. CAMBIO, :  
VINCENT A. CAMBIO, and NICHOLAS E. CAMBIO, :  
as Trustee of THE NICHOLAS E. CAMBIO, :  
RODNEY A. MALAFRONTE AND VINCENT A. :  
CAMBIO TRUST, :  
Plaintiffs, :  
v. : CA 10-466 S  
CATERPILLAR, INC., et al., :  
Defendants, :  
and :  
CATERPILLAR FINANCIAL SERVICES CORPORATION :  
and SOUTHWORTH-MILTON, INC., :  
Defendants and :  
Plaintiffs-in- :  
Counterclaim. :

**MEMORANDUM AND ORDER**  
**GRANTING MOTION TO COMPEL**

Before the Court is Southworth-Milton's Motion to Compel, for Sanctions and for Protective Order against New London Mining, Manufacturing & Processing, LLC, Universal Truck & Equipment Company, Inc. and Nicholas E. Cambio (Docket ("Dkt.") #22) ("Motion to Compel" or "Motion"). The Motion seeks to compel Plaintiff Nicholas E. Cambio ("Mr. Cambio") to complete his deposition, to answer the questions posed to him, and to observe appropriate decorum. In support of the Motion, Southworth-Milton, Inc. ("Southworth"), has filed a memorandum and also a reply memorandum.

See Memorandum in Support of Southworth-Milton's Motion to Compel, for Sanctions and for Protective Order against New London Mining, Manufacturing & Processing, LLC, Universal Truck & Equipment Company, Inc. and Nicholas E. Cambio ("Southworth's Mem."); Southworth-Milton's Reply to Plaintiffs' Objection to Motion to Compel, for Sanctions and for Protective Order (Dkt. #31) ("Southworth's Reply").

Plaintiffs Universal Truck & Equipment Company, Inc., New London Mining, Manufacturing & Processing, LLC, Nicholas E. Cambio, Vincent A. Cambio, and Nicholas E. Cambio, as Trustee of the Nicholas E. Cambio, Rodney A. Malafrente and Vincent A. Cambio Trust ("Plaintiffs") have filed an objection to the Motion. See Plaintiffs' Objection to Defendant Southworth Milton's Motion for Protective Order and Sanctions (Dkt. #28) ("Objection"). In support of their Objection, Plaintiffs have filed a memorandum. See Plaintiffs' Memorandum in Support of Its Objection to Defendant Southworth Milton's Rule 26(c) and Rule 37(a) Motion to Compel, Sanctions and Protective Order ("Plaintiffs' Mem.").

#### **Discussion**

The Court has read the memoranda and considered the arguments made by counsel at the October 11, 2011, hearing. Most importantly, the Court has read the entire transcript of Mr. Cambio's deposition which was conducted on June 30 and July 1, 2011. After doing so, the Court makes the following findings:

1. Mr. Cambio, who was represented by counsel, responded to some questions by stating: "Asked and answered." See, e.g., 6/30/11 Tr. at 7, 8, 60; 7/1/11 Tr. at 115. Although Plaintiffs argue that these responses were prompted by repetitious questioning interspersed with ridicule and taunting remarks from Southworth's counsel, see Plaintiffs' Mem. at 4, 15-16, the transcript reflects that Mr. Cambio commenced this practice within the first few minutes of his deposition and prior to anything occurring which could even remotely be characterized as a provocation, see 6/30/11 Tr. at 4-7.<sup>1</sup> Moreover, as a deponent represented by counsel, any objections to questions were to be made by his counsel. Accordingly, these responses by Mr. Cambio were improper.

2. Relatedly, the first question to which Mr. Cambio gave his "Asked and answer[ed]," 6/30/11 Tr. at 7, response was: "Do you have any knowledge of the factual basis as to why the Nicholas E. Cambio, Rodney A. Malafrente and Vincent A. Cambio Trust sued Southworth-Milton?" id. This question was unobjectionable and entirely proper. Nevertheless, Mr. Cambio refused to provide any information about the factual basis for the Trust's claims against Southworth:

Q. The trust sued Southworth-Milton. Why did they sue Southworth-Milton?

THE WITNESS: They who?

---

<sup>1</sup> Mr. Cambio's deposition testimony begins on page 4 of the transcript with his being sworn. See 6/30/11 Tr. at 4.

MR. RATCLIFFE: The trust. Why did it sue Southworth-Milton?

A. That's why I have the attorneys.

Q. So you don't know why the trust sued Southworth-Milton, the Nicholas E. Cambio, Rodney A. Malafronte and Vincent A. Cambio Trust?

A. I believe it was done pursuant to legal advice.<sup>[2]</sup>

Q. But you don't know the factual basis -- just so the record is clear, you have no knowledge of the factual basis as to why the Nicholas E. Cambio, Rodney A. Malafronte and Vincent A. Cambio Trust sued Southworth-Milton?

A. Upon advice of counsel that's why I did it.

Q. The question is either a yes or a no. Do you have any knowledge of the factual basis as to why the Nicholas E. Cambio, Rodney A. Malafronte and Vincent A. Cambio Trust sued Southworth-Milton?

A. Asked and answered.

Q. It has not been asked and answered. It calls for a yes or no answer.

MR. LUKENS: Excuse me. I am going to object.

MR. RATCLIFFE: Wait a minute. We're not going to have a running, like, telling people how to answer the question. It calls for a yes

---

<sup>2</sup> Plaintiffs assert that following this answer "Southworth's attorney ... pressed on his questions in a mocking tone[.]" Plaintiffs' Mem. at 6. The Court notes that at no time during the deposition did Plaintiffs' counsel object on the basis that Southworth's counsel was mocking Mr. Cambio or otherwise not treating him with respect. The Court also believes it improbable that Southworth's counsel would have engaged in such conduct at the very outset of the deposition when it would be in his interest to obtain the maximum amount of information possible from Mr. Cambio.

or no answer.

Q. Do you have any knowledge of the factual basis as to why the Nicholas E. Cambio, Rodney A. Malafronte and Vincent A. Cambio Trust sued Southworth-Milton?

A. I told you. Asked and answer. [sic]

Q. It has not been asked and answered, Mr. Cambio.

A. So what are you going to do? Arrest me?

Q. You're refusing to answer the question?

A. Asked and answered.

MR. LUKENS: Objection.

Q. Explain to me how that has been asked and answered, Mr. Cambio.

A. Asked and answered.

Q. Explain to me how you answered that.

A. I don't have to explain anything. To the best of my knowledge, right, what I can tell you is it's been asked and answered.

6/30/11 Tr. at 6-8.

Plaintiffs' attempt to defend Mr. Cambio's responses is unpersuasive:

**Did Mr. Cambio have "any knowledge" of the facts underlying the Trust and its relation to the case. Of course he did.** But did Mr. Cambio understand the precise legal relationship of the Trust with Southworth Milton in the instant litigation? No. Did he understand the legal issues which underlay the Trust's inclusion as a Plaintiff in the case? Probably not. On these matters Mr. Cambio relied on his attorneys and stated that fact. When Mr. Ratcliffe tried to bully another answer out of him, Mr. Cambio stood firm and stated "asked and answered."

Plaintiffs' Mem. at 7 (bold added). It is plain from the transcript excerpt above that Mr. Cambio was not asked about "the precise legal relationship of the Trust with Southworth[-]Milton . . . ." Id. He was asked a basic question: Why had the Trust sued Southworth-Milton? As Trustee of the Trust, Mr. Cambio presumably would have some knowledge of the factual basis for the claims against Southworth-Milton. Indeed, Plaintiffs now readily admit that he does. See id. However, when Southworth's counsel attempted at the deposition to ascertain whether he had such knowledge, Mr. Cambio repeatedly responded "asked and answered," 6/30/11 Tr. at 7-8, and then refused to explain how he had answered the question, see id. at 8. This conduct occurred at the very beginning of the deposition, and the transcript does not support Plaintiffs' claim that Southworth's counsel was "bullying" Mr. Cambio. The Court sees nothing improper or objectionable in the questions posed by Southworth's counsel.

Where a party or person refuses to answer questions at a scheduled deposition, Federal Rule of Civil Procedure 37(a)<sup>3</sup>

---

<sup>3</sup> Federal Rule of Civil Procedure 37(a) provides in relevant part:

- (a) Motion for an Order Compelling Disclosure or Discovery.  
(1) *In General.* On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

....

provides a procedure whereby the party seeking the discovery may adjourn the deposition and seek an order to compel the party or person to respond to the questions and to pay the expenses ancillary thereto. R.W. Int'l Corp. v. Welch Foods, Inc., 937 F.2d 11, 15 (1<sup>st</sup> Cir. 1991); see also Somascan Plaza, Inc. v. Siemens Med. Sys., Inc., 187 F.R.D. 34, 45 (D.P.R. 1999) ("When a party refuses to answer specific questions at a deposition, the party seeking the response can move to compel the deponent's answers pursuant to Federal Rule 37(a)(2).") "If the court determines when analyzing a motion for a Rule 37(a) order that a party was not 'substantially justified' in refusing to answer deposition questions, it can initially award sanctions including 'the

---

(5) *Payment of Expenses; Protective Orders.*

(A) *If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing).* If the motion is granted--or if the disclosure or requested discovery is provided after the motion was filed--the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:

(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

(ii) the opposing party's nondisclosure, response, or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust.

Fed. R. Civ. P. 37(a).

reasonable expenses incurred in obtaining the order, including reasonable attorney's fees.'" Somascan Plaza, Inc., 187 F.R.D. at 45 n.4 (quoting R.W. Int'l Corp, 937 F.2d at 15 (quoting Fed. R. Civ. P. 37(a)(4))). Under Rule 37(a)(5) the award of fees and expenses is mandatory, unless one of the three enumerated exceptions applies. See Meridith v. Great Wolf Lodge of Kansas City, LLC, Civil Action No. 07-2529-DJW, 2008 WL 4305110, at \*1 (D. Kan. Sept. 18, 2008).

It is clear that the first exception to the mandatory award of fees and expenses, i.e., where a movant files the motion before attempting in good faith to obtain the discovery without court action, is inapplicable. Mr. Cambio walked out of his deposition on July 1, 2011, see 7/1/11 Tr. at 117, and Plaintiffs have not disputed Southworth's statement that Mr. Lukens advised its attorney on August 11, 2011, that Mr. Cambio would not agree to resume his deposition with the stipulation that he answer questions and refrain from interposing his own objections,<sup>4</sup> see Southworth's

---

<sup>4</sup> Plaintiffs state that they:

stand ready to provide Southworth responses to all the discovery they seek through specific supplements to completed depositions, through admissions, stipulations and the deposition of other witnesses. But further depositions of Mr. Cambio will not work unless a limit is placed on Mr. Ratcliffe's attempts to ask the same questions over and over again on a matter which has truly been asked and answered.

Plaintiffs' Mem. at 16-17. Thus, the Court infers from this statement that Mr. Cambio will not resume his deposition without an order from this Court. Parenthetically, the Court states that the question about whether Mr. Cambio had any knowledge of the factual basis as to why the Trust

Mem. at 11. Accordingly, the first exception does not apply.

Regarding the second exception, the Court has little difficulty in finding that Mr. Cambio's refusal was not substantially justified. As already noted, the refusal occurred at the outset of the deposition, and Southworth's counsel had not engaged in any conduct that was even arguably objectionable. Plaintiffs' contention to the contrary is rejected.

With respect to the third exception, Plaintiffs presumably contend that questions and statements by Southworth's counsel following Mr. Cambio's initial refusal were so improper and provocative that the award of expenses and costs would be unjust.<sup>5</sup> See Plaintiffs' Mem. at 3 ("When Mr. Cambio refused to elaborate on his second or third answer to substantially the same question and stated 'asked and answered,' Southworth refused to move on. This was the cause of much of the escalating animosity in the deposition."); id. at 4 (asserting that "questions were not designed to elicit testimony or information from Mr. Cambio but to get him to admit that Plaintiffs had no claims against Southworth"); id. (asserting that "questions were interspersed with ridicule and taunting remarks"); id. at 5 (citing example of arguably patronizing and taunting comments by Southworth's

---

sued Southworth was by no means "asked and answered."

<sup>5</sup> The Court uses the term "presumably" here because Plaintiffs do not specifically cite this provision of Fed. R. Civ.P. 37(a).

counsel);<sup>6</sup> id. at 8 ("the questions were almost entirely devoted to getting Mr. Cambio to admit to the proposition that since Southworth was not a party to the written Security Agreement and Promissory Note (between Plaintiffs and [Caterpillar Financial Services Corporation ("CAT Financial")]), therefore it was impossible for Southworth to breach any agreement with the plaintiffs"); id. at 13 (citing arguably "patronizing comments to Mr. Cambio that because Cambio was a signatory of over 100 contracts in his career he should know that before signing a

---

<sup>6</sup> Plaintiffs cite as an example the following exchange:

Q. To your knowledge was Caterpillar, the manufacturer, and Southworth or Milton CAT, the dealer, the same company?

A. They -- the dealer and the manufacturer would be involved in the same contracts more or less.

Q. That's not my question.

A. But they are separate companies.

Q. They are separate companies. And you knew that?

A. Yeah, I always knew that. They still are to the best of my knowledge.

Q. If they were the same company, you wouldn't have had to sue them separately, correct?

A. I'm not a lawyer.

Q. But -- I thought you knew more law than -- I think you have the reputation that you know more than all the lawyers in the room.

A. I don't have a badge. I went to high school.

6/30/11 Tr. at 26-27.

document you should check to make sure that the terms of your agreement are reduced to writing");<sup>7</sup> id. at 14 ("A lecture on what Mr. Cambio should know about signing contracts was intended to poke a finger in Mr. Cambio's eye."); id. at 15 ("It was only in response to Mr. Ratcliffe's repeated attempts to manipulate Mr. Cambio into agreeing with Southworth's dubious and argumentative legal proposition that because Southworth was not referenced in the finance documents between Plaintiffs and CAT Financial, there was no oral agreement between Plaintiffs and Southworth, that Mr. Cambio stated 'asked and answered' and refused to elaborate."); id. at 16 ("In asking questions which were outside of the knowledge of the deponent or in repetitiously demanding that Mr. Cambio make admissions contrary to the facts as Mr. Cambio understood them, Mr. Ratcliffe created a hostile and unproductive environment.").

The Court agrees that there were questions asked of Mr. Cambio where the desired responses or admissions could have been obtained more efficiently through requests for admissions or stipulations. Indeed, Plaintiffs now represent that they "will stipulate that Southworth is not a party to these agreements or any obligations contained therein." Plaintiffs' Mem. at 16; see also id. at 16-17 ("Plaintiffs stand ready to provide Southworth responses to all the

---

<sup>7</sup> Plaintiffs note in support of this complaint that Southworth's counsel "repeat[ed] three times ... that ... Cambio was a signatory of over 100 contracts ...." Plaintiffs' Mem. at 13; see also 7/1/11 Tr. at 105-06.

discovery they seek through specific supplements to completed depositions, through admissions, stipulations and the deposition of other witnesses." ). However, Plaintiffs have pointed to nothing in the record which indicates that they conveyed to Southworth's counsel their willingness to stipulate to these matters prior to or during the deposition. Accordingly, the Court declines to fault Southworth's counsel for seeking to obtain these admissions through questioning of Mr. Cambio regarding the written agreements.

A somewhat closer question is presented by Plaintiffs' complaint that Southworth's counsel contributed to the breakdown in the deposition by patronizing and taunting Mr. Cambio during the interrogation. It is difficult to determine the "tone" of a question or statement from a cold transcript. However, the comment from Southworth's counsel, "I think you have the reputation that you know more law than all the lawyers in the room," 6/30/11 Tr. at 27, was unnecessary and inappropriate. It also occurred relatively early in the deposition and could have been understood by Mr. Cambio to be patronizing or taunting. Relatedly, Southworth's counsel's repeated references to Mr. Cambio having signed over 100 contracts, see 7/1/11 Tr. at 102-06, in the course of asking whether he knew that before signing a contract he should check to make sure it reflected the terms of an oral agreement, see id. at 106-07, arguably supports Plaintiffs' complaint that this series of questions was "intended to poke a finger in Mr. Cambio's eye,"

Plaintiffs' Mem. at 14.

Nevertheless, taking the transcript as a whole, it is clear that Mr. Cambio bears a significantly greater share of the blame for the negative atmosphere that developed. As already noted, his improper "[a]sked and answered" responses began at the very outset of the deposition and well before Southworth's counsel had made any even arguably inappropriate comments. Indeed, if there was any taunting at the deposition, it began early with Mr. Cambio's response: "So what are you going to do? Arrest me?" 6/30/11 Tr. at 8. In addition, Mr. Cambio later threatened to throw Southworth's counsel out the window, see 7/1/11 Tr. at 103, and called him a "piece of shit," id. at 104. This conduct far exceeded anything by Southworth's counsel which was arguably objectionable. Accordingly, the Court concludes that "other circumstances do not make the award of expenses unjust," Fed. R. Civ. P. 37(a)(5), to the point that no expenses should be awarded. Rather, the Court finds that an award of expenses should be made but the amount reduced to reflect the fact that there were some mitigating circumstances surrounding Mr. Cambio's suspension of the deposition.

### **Conclusion**

For the reasons stated above, the Motion to Compel is GRANTED.

1. Mr. Cambio shall complete his deposition and shall conduct

himself in an appropriate manner.<sup>8</sup> Specifically, Mr. Cambio shall refrain from threatening counsel and from using vulgar, insulting, or abusive language. The appearance fee for the court reporter for such deposition shall be paid by Plaintiffs.

2. When the deposition is resumed, it shall be conducted in the John O. Pastore Federal Building & U.S. Post Office, Second Floor, Two Exchange Terrace, Providence, Rhode Island. Southworth's counsel is directed to contact Deputy Clerk Martha Saucier ((401) 752-7218) to make arrangements for a room.

3. Plaintiffs shall pay fifty percent (50%) of Southworth's attorney's fees which are attributable to preparation of the Motion to Compel, the memoranda in support of the Motion, and attendance at the October 11, 2011, hearing. Southworth's counsel shall submit to the Court within 14 days an itemized statement showing the hourly rate (or fee charged) for these matters without the fifty percent reduction. The Court, after determining that fifty percent of this amount would be reasonable, will issue an order directing Plaintiffs to pay to Southworth that amount (or whatever amount the Court determines is reasonable).

---

<sup>8</sup> Plaintiffs have represented that they will stipulate to a number of facts which Southworth's counsel sought to establish at the deposition. Accordingly, Southworth is strongly encouraged to utilize stipulations and requests for admissions to reduce the amount of additional testimony that will be required from Mr. Cambio. Counsel for Caterpillar and CAT Financial are similarly encouraged to explore utilizing these tools to save time.

So ordered.

/s/ *David L. Martin*  
DAVID L. MARTIN  
United States Magistrate Judge  
January 3, 2012