

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

MOHAMMAD HAMED , by his)	CIVIL NO. SX-12-CV-370
authorized agent WALEED HAMED ,)	
)	
Plaintiff/Counterclaim Defendant,)	ACTION FOR DAMAGES,
)	INJUNCTIVE RELIEF
v.)	AND DECLARATORY RELIEF
)	
FATHI YUSUF and UNITED CORPORATION ,)	JURY TRIAL DEMANDED
)	
Defendants/Counterclaimants,)	
)	
v.)	
)	
WALEED HAMED, WAHEED HAMED,)	
MUFEED HAMED, HISHAM HAMED, and)	
PLESSEN ENTERPRISES, INC.,)	
)	
Additional Counterclaim Defendants.)	
_____)	

**EMERGENCY MOTION TO FURTHER EXTEND THE DURATIONAL LIMIT OF
THE DEPOSITION OF MOHAMMAD HAMED AND FOR SANCTIONS**

Defendants Fathi Yusuf and United Corporation (collectively, the “Defendants”) respectfully renew their motion to extend the durational limit for the completion of the deposition of plaintiff Mohammed Hamed (“Plaintiff” or “Hamed”). Consistent with the requirement of Rule 30 and this Court’s admonition when it provided notice of the Second Amended Scheduling Order, undersigned made a good faith effort to obtain a stipulated agreement to further extend the duration of the deposition, but could not reach an agreement with opposing counsel.

On March 31, 2014, the deposition of Hamed commenced without any translator since he provided no indication whatsoever that he did not understand English when he testified on January 25, 2013 at the hearing to consider his motion for temporary restraining order. After

testifying without incident at his deposition with respect to his personal information, educational background, and work history, Hamed's understanding of English appeared to grow murkier when he was asked basic questions about why he commenced this action and what relief he was seeking. At one point in his deposition, Hamed clearly stated that he had told his counsel that he needed a translator. A good-faith attempt was made to proceed with the deposition, by having co-counsel for Defendants translate key questions and/or responses, but this stop gap measure proved untenable and the deposition was eventually suspended.

Plaintiff's counsel agreed to obtain a translator for Hamed and at that time Defendants requested that the durational time for the deposition continue until completion, i.e., until Plaintiff has been examined on all topics made relevant by his Amended Complaint. Because of the manner in which the first day of deposition proceeded, counsel for Defendants anticipated it would take an additional two (2) days to complete the examination of Hamed because the translation process, even if handled smoothly, would add considerable time to the deposition. Because counsel for Plaintiff would not agree to extend the durational limit for the completion of the examination, Defendants filed an emergency motion with this Court to extend such time. Although the Court did not rule on the motion, it notified the parties that it was inclined to extend the time at least for one additional day. As a result, the Deposition of Hamed continued for an additional day on April 1, 2014 until approximately 5 p.m., when counsel for Plaintiff purported to conclude it.

The translator provided by the Plaintiff for the deposition had no prior court translating experience and was not certified. Although swearing to faithfully translate from English to Arabic and Arabic to English, the translator on numerous occasions admitted to only translating

the “gist” of the testimony and admitted to spontaneously posing clarification questions in Arabic that were not posed by the examining attorney, without even stating the “new” question in English and requesting permission to pose the additional questions.¹ The translator also admitted to failing to translate fully Hamed’s testimony from Arabic to English. The manifold complications with regards to this deposition increased exponentially because the witness would spontaneously switch from Arabic to English, despite repeated admonitions from the court reporter, the translator, and even his own counsel not to speak in English. This made it very difficult, if not impossible, for the court reporter to create an accurate transcript when Hamed switched back and forth between Arabic and English in the middle of a response to a question.

Compounding this disastrous situation, counsel for Plaintiff engaged in improper, unprofessional conduct which prohibited a fair and complete examination of the Plaintiff. Counsel for Plaintiff’s constant speaking objections were clearly calculated to confuse the translator, disrupt the deposition, and seriously delay its progress. Counsel for Plaintiff interposed a multitude of objections, with the frequency increasing as the level of difficulty of the questions increased. Upon each objection, counsel would repeat the same refrain, sometimes with slight variations: “object as to form, lack of foundation, calls for speculation, calls for a legal conclusion, vague, ambiguous, compound, argumentative, asked and answered, assumes facts not in evidence.” For the poor translator, who was having a difficult enough time translating the questions into Arabic and the answers into English, these constant objections were clearly confusing him and made his job much more difficult and time consuming.

¹ Defendants do not wish to suggest that the translator was biased or did not proceed in the utmost good faith. Unfortunately, he was brought into a very difficult situation without the training or experience to effectively deal with it.

Counsel for Plaintiff also improperly instructed the deponent not to answer questions posed to him that did not call for the disclosure of privileged information. Although Defendants cannot presently identify the questions at issue since the deposition transcript is not yet available,² Defendants can represent that the questions Hamed was instructed not to answer did not implicate privileged information.

Moreover, Plaintiff, through his counsel, gave notice that he and some of his sons may leave the jurisdiction before the extended fact discovery deadline of April 30, 2014. In short, while engaging in conduct that made a travesty of the deposition examination of the Plaintiff, his counsel adds insult to injury by suggesting the unavailability of the Plaintiff and other witnesses during the extended period for fact discovery.

ARGUMENT

Rule 30 of the Federal Rules of Civil Procedure, made applicable to proceedings in this Court by Super. Ct. R. 39(a), governs the conduct of parties, counsel, and deponents at depositions. The rule provides that “examination and cross-examination of a deponent [should] proceed as they would at trial under the Federal Rules of Evidence” Specifically, Rule 30 permits objections by counsel under the following circumstances: “[a]n objection, at the time of the examination ... must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be **stated concisely in a nonargumentative and nonsuggestive manner**. A person may instruct a deponent not to answer only when

² Although Defendants ordered an expedited transcript, because the court reporter is leaving the jurisdiction permanently, she was uncertain as to how quickly she would be able to prepare the deposition transcript. However, the videographer has indicated that he would be able to provide the video of the deposition during the week of April 7th, 2014. Defendants will supplement this motion with the relevant video transcript and stenographic transcript as soon as they become available.

necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3)” (emphasis supplied).

Superior Court Rule 39(b) specifically addresses the conduct of counsel during depositions. It provides:

Counsel shall refrain from any conduct, including but not limited to the following, which impedes, delays or otherwise frustrates the fair and reasonable examination of the deponent:

1. Coaching the deponent by objecting in any manner other than by stating the objection for the record and briefly describing the basis.
2. Directing the deponent not to answer any question posed unless the question calls for privileged information.

* * *

Any failure by counsel to refrain from engaging in the conduct herein could result in the imposition of appropriate sanctions by the Court upon motion of opposing counsel.

Examination of the deposition record will show that it is replete with improper speaking objections by the Plaintiff’s counsel as well as instructions not to answer questions that do not call for the disclosure of privileged information. This improper conduct was purposely done to obstruct the examination process and to waste time in clear violation of Super. Ct. R. 39(b) (1) and (2). Specifically, the transcript of the deposition will show that Attorney Carl Hartman repeatedly and improperly disrupted the deposition by making lengthy speaking objections, which coached the witness. For example, the record will show that between 10:09 a.m. and 11:55 a.m., Attorney Carl Hartman interposed not less than 15 speaking objections to practically every question posed to Hamed and insisted that his objections be translated before the deponent answered. This caused needless confusion and unnecessary delays. Despite repeated warnings and admonitions to refrain from making speaking objections, the afternoon session progressed in

the in same manner with frivolous objections made with respect to almost every question. By the time counsel for Plaintiff purported to conclude the deposition, very little progress has been made to cover the issues addressed by the First Amended Complaint and First Amended Counterclaim.

As a result of the repeated improper speaking objections by counsel for Plaintiff designed to “coach” his purportedly English impaired client, the deposition of Hamed was severely impeded and could not be completed. Because counsel for Plaintiff’s conduct was so egregious and clearly designed to impede, delay, and frustrate the fair examination of Plaintiff, Defendants should have the opportunity to continue Hamed’s deposition until it is completed and Plaintiff’s counsel should be sanctioned by imposing the reasonable costs and expenses of such continued depositions upon him. See, Fed. R. Civ. P. 30(d)(2) (providing that “[t]he court may impose an appropriate sanction—including the reasonable expenses and attorneys’ fees incurred by any party—on a person who impedes, delays, or frustrates the fair examination of the deponent.”)

Because Defendants were unable to address basic topics necessary for a thorough examination of Hamed in the time provided for the reasons set forth above, counsel for Defendants inquired as to counsel for Plaintiff’s availability to discuss whether they would agree to allow additional time for Hamed’s deposition pursuant to the Court’s admonition to the parties to attempt to reach an agreement amongst themselves. See Exhibit A – Email communications. Counsel for Defendants was advised that lead counsel for Plaintiff would be unavailable for the next ten (10) days. In lead counsel’s absence, co-counsel for Plaintiff was unwilling to agree to an extension of time. Because there is very limited time remaining in the extended discovery period, Defendants do not have the luxury of awaiting lead counsel for Plaintiff’s return from

vacation and, therefore, are forced to seek the Court's intervention by way of this emergency motion.

In the seminal case of *Hall v Clifton Precision*, the Court described the deposition process as follows:

A deposition is meant to be a question-and-answer conversation between the deposing lawyer and the witness. There is no proper need for the witness's own lawyer to act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answers. The witness comes to the deposition to testify, not to indulge in a parody of Charlie McCarthy,³ with lawyers coaching or bending the witness's words to mold a legally convenient record. It is the witness—not the lawyer—who is the witness.

Hall v. Clifton Precision, a Div. of Litton Systems, Inc., 150 F.R.D. 525, 528 (E.D.Pa.1993)

The deposition transcript will show that Attorney Hartmann improperly interposed objections when counsel for Defendants asked questions concerning: a) why Hamed did not know the contents of his amended complaint; b) why Hamed did not know what relief he was seeking; c) why the witness did not know the contents of his sworn answers to interrogatories; and d) that the witness did not know the purpose or the contents of the powers of attorneys that he signed, among other matters.

Because the witness was ill-prepared and required the most fundamental statements from his own complaint and answers to interrogatories to be translated into Arabic and read to him, the deposition was an arduous exercise, which, unfortunately, was made much more difficult and frustrating by counsel for Hamed's unjustified litany of objections that disrupted the questioning of his client. Rule 30 makes clear that counsel should not engage in any conduct during a

³ A comedian dummy, Charlie McCarthy started life as a block of wood. At the request of Edgar Bergen—who was a ventriloquist—a carpenter carved a dummy based on a kid Bergen knew. Charlie and Bergen had a very successful career in show business beginning on the stage, movies, on to radio, movies and eventually television.
<http://www.charliemccarthy.org/links.html>

deposition that would not be allowed in the presence of a judicial officer. *See, e.g., Van Pilsum v. Iowa State Univ. of Science and Technology*, 152 F.R.D. 179, 180 (S.D.Ia.1993); *Hall v. Clifton Precision, a Div. of Litton Systems, Inc.*, 150 F.R.D. at 530. Defendants respectfully submit that counsel for Plaintiff would never have engaged in the improper conduct described above if the examination of Hamed had taken place before this Court. Because attorneys are prohibited from making any comments, either on or off the record, in the presence of a judicial officer, which might suggest or limit a witness's answer to an unobjectionable question, such behavior is likewise prohibited at **depositions**. *See Hall v. Clifton Precision*, 150 F.R.D. at 530–531. Thus, “speaking objections” that cue a witness how to answer (or avoid answering) a question are prohibited. *See Meyer Corp. U.S. v Alfay Designs, Inc.*, 2012 U.S. Dist. LEXIS 113819 * 8 (E.D.N.Y. Aug. 13, 2012) (“certain objections . . . were suggestive and inappropriate. These include objections which included comments that questions called for speculation, were vague or were ambiguous.”); *Morales v. Zondo, Inc.*, 204 F.R.D. 50, 54 (S.D.N.Y. 2001) (“Nelson’s interruptions were persuasive, and clearly intended to cause problems for Diederich in his examination. Nelson appears on more than 85 percent of the pages of the deposition transcript (215/241) with statements other than an objection as to form or a request to the court reporter to read back a question.”). Similarly here, the record will show that Attorney Hartmann made improper objections or comments to more than 85% of the questions.

For the foregoing reasons, Defendants respectfully request this Court to order Plaintiff to submit to an additional two days or 14 hours of deposition and to sanction Attorney Hartmann in an amount considered appropriate by this Court to ensure that his improper deposition conduct is not repeated, and to provide such further relief as is just and proper.

DUDLEY, TOPPER and FEUERZEIG, LLP

Dated: April 8, 2014

By:



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Attorneys for Fathi Yusuf and United Corporation

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of April 2014, I caused the foregoing **EMERGENCY MOTION TO FURTHER EXTEND THE DURATIONAL LIMIT OF THE DEPOSITION OF MOHAMMAD HAMED AND FOR SANCTIONS** to be served upon the following via e-mail:

Joel H. Holt, Esq.
LAW OFFICES OF JOEL H. HOLT
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Carl Hartmann, III, Esq.
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Mark W. Eckard, Esq.
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P.O. Box 24849
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Cordelia L. Jones

EXHIBIT

A

Charlotte Perrell

From: Joel Holt <holtvi@aol.com>
Sent: Tuesday, April 08, 2014 8:32 AM
To: dewoodlaw@gmail.com
Cc: Charlotte Perrell; carl@carlhartmann.com; kglenda@cameronlawvi.com; Gregory H. Hodges
Subject: Re: Continued Deposition of Mohammed Hamed

I will address this discovery issue when I return from my vacation next week-thanks

Joel H. Holt, Esq.
2132 Company Street
Christiansted, St. Croix
U.S. Virgin Islands 00820
(340) 773-8709

-----Original Message-----

From: Nizar DeWood <dewoodlaw@gmail.com>
To: Joel Holt <holtvi@aol.com>
Cc: Charlotte Perrell <cperrell@dtflaw.com>; Carl Hartmann <carl@carlhartmann.com>; 'K. Glenda Cameron' <kglenda@cameronlawvi.com>; Gregory H. Hodges <ghodges@dtflaw.com>
Sent: Mon, Apr 7, 2014 2:27 pm
Subject: Continued Deposition of Mohammed Hamed

Joel,

Are you available to discuss Defendant's request to continue the deposition of Mohammed Hamed?

Thanks.

Nizar A. DeWood, Esq.

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From: Carl Hartmann [mailto:carl@carlhartmann.com]
Sent: Monday, April 07, 2014 4:14 PM
To: Nizar DeWood; Joel Holt; mark@markeckard.com; Gregory H. Hodges
Cc: Charlotte Perrell; K. Glenda Cameron; Japinga, KiM; Cordelia Jones
Subject: RE: Continued Deposition of Mohammed Hamed [et omnis]

Nizar:

Joel is away for 10 days – and out of contact. But perhaps I can assist. I will check with Kim, but I believe you have less than 1 hour remaining of the 7 hours you were given for Tuesday. What date do you propose for that time?

Also, I had asked Greg for dates and times for Counterclaim Defendants, including my client Willie Hamed's, depositions of Fathi Yusuf and United – he said he would get back to me after checking his availability. I will, as I attempted to say in my "me too motion" limit myself to a total of 7 hours (combined with the examination by Plaintiff – unless delay requires me to approach the Court for more time as Greg did.)

More important, at the moment, is the Judge's attached new order.

Defendants' attempted compliance with their obligation to provide mutual access to financial information by supplying a backup copy containing last month's accounting records is patently inadequate. Defendants shall provide real-time access to Plaintiff (and representatives) to current data and records, including the Sage50 accounting system, in a manner that protects the security and integrity of the information provided. The parties shall mutually determine the means of providing such access, by shared password or newly issued password(s) or otherwise.

Failure of the parties to devise a mutually acceptable workable process for providing access to required financial information may result in an assessment of costs or imposition of other sanctions against any party or counsel deemed responsible.

Since Mr. Gaffney had admitted that a live password with "read only capability" will have no security or integrity effect – I expect that to be delivered *immediately* pending our discussions on full live access. Also, please inform Mr. Gaffney immediately that he will be equally responsive to requests from Hamed as from Yusuf when the Hamed's instruct or request with regard to financials. Hopefully this will clear up his confusion as to what the Court has "ordered" as that Judge Brady's "opinion" is.

Finally, the Judge has ordered United to submit all signed signature cards and resolutions with instructions to bank/investment companies that the Hameds are to have *100% identical access to all accounts*. Please confirm when this is done before the end of the week.

Carl

From: Nizar DeWood [mailto:dewoodlaw@gmail.com]
Sent: Monday, April 07, 2014 1:28 PM
To: Joel Holt

From: Carl Hartmann [mailto:carl@carlhartmann.com]
Sent: Monday, April 07, 2014 4:30 PM
To: Nizar DeWood
Subject: RE: Continued Deposition of Mohammed Hamed [et omnis]

Another FULL day ?

What could you possibly question him about – after spending an hour and a half on a claim it appears you are not even pursuing.

You will have to discuss with Joel.

Carl

From: Nizar DeWood [mailto:dewoodlaw@gmail.com]
Sent: Monday, April 07, 2014 2:27 PM
To: 'Carl Hartmann'; 'Joel Holt'; mark@markeckard.com; 'Gregory H. Hodges'
Cc: 'Charlotte Perrell'; 'K. Glenda Cameron'; 'Japinga, KiM'; 'Cordelia Jones'
Subject: RE: Continued Deposition of Mohammed Hamed [et omnis]

Carl,

I didn't ask if we had an hour or less remaining. I asked to discuss Defendants' request to continue the deposition of Mohammed Hamed?

Is the "one hour or less" your final position? Or are you willing to discuss making him available for an additional day?

Nizar A. DeWood, Esq.

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