

**SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 23 NASSAU COUNTY**

PRESENT:

HONORABLE LEONARD B. AUSTIN

Justice

Motion R/D: 7-18-03

Submission Date: 7-18-03

Motion Sequence No.: 004,005,006/

MOT D

JOEL BEIGE, individually, and as a
shareholder of RUBIE'S COSTUME
COMPANY, INC.,

Plaintiff,

COUNSEL FOR PLAINTIFF

Certilman, Balin, Adler & Hyman, LLP

90 Merrick Avenue

East Meadow, New York 11554

- against -

MARC BEIGE, HOWARD BEIGE,
MAXINE BEIGE and RUBIE'S
COSTUME COMPANY, INC.,
Defendants.

COUNSEL FOR DEFENDANT

(for Marc Beige, Howard Beige &
Maxine Beige)

Hirsch, Britt & Mose', Esqs.

1225 Franklin Avenue - Suite 470

Garden City, New York 11530

(for Rubie's Costume Company, Inc.)

Meyer, Suozzi, English & Klein, P.C.

1505 Kellum Place

Mineola, New York 11501

ORDER

The following papers were read on Plaintiff's motion to strike Defendants' answers or, in the alternative, to compel responses to interrogatory demands and related relief and the cross-motions of the individual and corporate Defendants for a protective order:

- Notice of Motion date June 12, 2003; (Motion Seq. 4)
- Affirmation of Thomas J. McNamara, Esq. dated June 15, 2003;
- Defendant's Memorandum of Law;
- Notice of Cross-motion dated June 27, 2003; (Motion Seq. 5)
- Affidavit of Kevin Schlosser sworn to on June 27, 2003;
- Affidavit of Marc Beige sworn to on June 27, 2003;
- Notice of Cross-motion dated June 27, 2003; (Motion Seq. 6)
- Affirmation of David B. De Siver, Esq. dated June 27, 2003;

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Defendant's Memorandum of Law;
Reply Affirmation of Thomas J. McNamara, Esq. dated July 3, 2003;
Defendant's Reply Memorandum of Law;
Reply Affidavit of Kevin Schlosser sworn to on July 14, 2003;
Reply Affirmation of David B. De Siver, Esq. dated July 14, 2003.

Plaintiff moves for an order striking the pleadings of each of the Defendants due to their failure to answer interrogatories or, in the alternative, compelling Defendants to answer the interrogatories to which they have objected, and directing Defendants to reimburse Plaintiff for the costs of making this motion, including reasonable attorney's fees.

Defendants Marc Beige, Howard Beige, and Maxine Beige cross-move for a protective order striking Plaintiff's interrogatories as overbroad and unduly burdensome.

Defendant Rubie's Costume Company, Inc. ("Rubie's") likewise cross-moves for a protective order pursuant to CPLR 3103 striking Plaintiff's first set of interrogatories as burdensome and unreasonable.

BACKGROUND

Plaintiff and the individual Defendants are siblings. They each own 25% of Rubie's, the world's largest manufacturer of Halloween costumes and related products with annual sales revenues of approximately \$140,000,000. In his second amended complaint, Plaintiff alleges, on behalf of himself and as a shareholder of Rubie's, claims for usurpation of corporate opportunities, corporate waste, breach of fiduciary duty, neglect of common law and statutory duties and common law dissolution. Essentially, Plaintiff alleges that the individual Defendants have used the name, equipment, credit,

resources and goodwill of Rubie's to subsidize and support separate affiliated businesses that they have formed without him. In the second amended complaint Plaintiff names 35 such related businesses from all around the globe including Mexico, Canada, Hong Kong, Spain, France, England, Germany, Portugal and Japan.

Annexed to Plaintiff's interrogatories is a list of 77 businesses, all allegedly related to Rubie's. Plaintiff seeks information from each of the Defendants regarding each of the businesses, as well as any use by each of Rubie's name, equipment, services of employees, resources, funds, credit, licenses, etc. Plaintiff's attorney describes the material sought as "appropriate" given the "complexity" of the complaint (McNamara Reply Affirmation, ¶¶ 4 and 9).

All of the Defendants object on the grounds that the interrogatories are overbroad and unduly burdensome. They insist that the interrogatories seek massive amounts of "information in the most expansive and broad manner resulting in unnecessary expense, inconvenience and harassment" (Schlosser Reply Affidavit, ¶ 2). Defendants request a protective order, asserting that, as the interrogatories amount to over 16,000 separate requests for information, they would require herculean efforts for a further response. In short, Defendants' objections go to size rather than substance.

New York's liberal disclosure policy has long favored open and far-reaching pretrial discovery. DiMichel v South Buffalo Ry. Co., 80 N.Y. 2d 184, 193 (1992), *cert. den. sub. nom.*, Poole v Consolidated Rail Corp., 510 US 816 (1993). CPLR 3101(a) entitles parties to "full disclosure of all matters material and necessary in the

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prosecution or defense of an action regardless of the burden of proof.” What is “material and necessary” is left to the discretion of the trial court, (Andon v. 302-304 Mott St., 94 N.Y. 2d 740, 746 [2000]), with the test being one of “usefulness and reason.” Allen v. Crowell-Collier Publishing Co., 21 N.Y. 2d 403, 406 (1968).

In any event, the court may exercise its broad discretion to set reasonable limits for discovery. Schobel v. Godwin, 264 A.D. 2d 832 (2nd Dept. 1999). Where the majority of the interrogatories are proper, the better practice is to prune the requests rather than vacate them in the interests of economy and efficiency. See, Woods v. Alexander, 267 A.D. 2d 1060 (4th Dept. 1999).

The nature of the discovery sought here, information regarding 77 businesses, is vast because of the nature of the misconduct alleged; namely, the use of so many affiliated sister companies to freeze out the Plaintiff from business opportunities available to Rubie’s all around the world. That only 35 such companies are listed in the second amended complaint, while 77 are listed in the interrogatories, is of no consequence because Plaintiff states that he has learned of the additional companies since his pleading was served.

The Court notes that with respect to interrogatories 4 and 5 to the individual Defendants, Defendant Rubie’s admits that Plaintiff is entitled to know whether Defendants are owners, officers, or directors of the 77 listed businesses, and whether Defendants are owners, officers, or directors of any other manufacturer of Halloween costumes and/or related merchandise. (See, Schlosser Reply Aff. ¶ 4). However

Defendants' further objection appears to be to the definitions of the terms "identify," and "communication" rather than to the substance of the interrogatories themselves.

These disputed definitions provide:

7. "Identify" or "identity" when used with respect to an individual person means to state (i) their full name and present or last known residence, (ii) their present or last known business address, and (iii) the positions and business affiliations at the time in question.

8. "Communications" means every manner of transmitting and receiving facts, information, opinion and thoughts, whether orally, by document, writing or copy thereof, or otherwise.

9. Where an interrogatory asks that Plaintiff "identify" a communication or whether in response to an interrogatory it is stated that any communication was written or oral in whole or in part:

(a) If written, in whole or in part, a true copy of such writing may be attached to the answer . If a true copy of such writing is not attached, then identify that writing in accordance with the provisions of paragraph 4 above.

(b) If oral, in whole or in part, set forth in detail and in particularity (i) the date and place of each such conversation; (ii) each person present at each such conversation; (iii) whether each such conversation was in person, by telephone or otherwise; and (iv) the substance of each conversation specifying who said what to whom. If there are any notes, memoranda, diary entries or other writing substantiating or

relating in any way to any such conversation identify or set forth a true copy of each such writing Plaintiff's First Set of Interrogatories, Definitions ¶¶ 7, 8 and 9.

The Court agrees that these definitions are overbroad and grants Defendants a protective order striking them. The plain and ordinary meanings of these terms would be appropriate drafting for a response to the interrogatories.

Returning to the interrogatories, the Court finds that each Defendant's interest in a total of 17 domestic and foreign real estate acquisitions meets the test of usefulness and reason if the acquisition was a corporate opportunity of Rubie's. Likewise, each Defendant's knowledge of the use by any of the 77 businesses of Rubie's computer systems, Rubie's name, Rubie's employees' services, Rubie's personnel or resources, Rubie's funds, Rubie's credit, Rubie's licenses and/or Rubie's molds, meets the test with regard to the claim for corporate waste. Defendants' objection to providing detailed information about the consideration the 77 entities used or paid concerning various transactions, personnel at trade shows, traveling or dining, payment to vendors for goods, acquiring of real estate cannot be sustained because such information is exactly the information to which Plaintiff is entitled, if and only if, the consideration was provided by Rubie's.

Finally, Defendants attempt to address the discovery issues in the depositions that are scheduled rather than the interrogatory demands cannot be sustained. The factual detail sought by Plaintiff is necessary if the depositions are to proceed with any purpose. Moreover, in complex commercial cases, the initial use of interrogatories is

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preferred in order to save time and money. See, Barouh Eaton Allen Corp. v. International Business Machines Corp., 76 A.D. 2d 873 (2nd Dept. 1980).

Accordingly, it is,

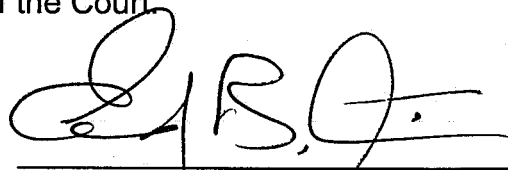
ORDERED, that Plaintiff's motion for an order striking the pleadings of all Defendants due to their failure to answer interrogatories or, in the alternative, compelling Defendants to answer the interrogatories to which they have objected, is **granted** to the extent that the definitions ¶¶ 7, 8 and 9 are hereby stricken from all of Plaintiff's interrogatories, and as such, Defendants are directed to answer the subject interrogatories forthwith; and it is further,

ORDERED, that Plaintiff's further request for costs including reasonable attorney's fees is **denied**, and it is further,

ORDERED, that the cross-motions by the individual Defendants and Rubie's for a protective order striking the interrogatories as overbroad is **granted** to the limited the extent that the definitions ¶¶ 7, 8 and 9 in Plaintiff's interrogatories are stricken as overbroad, and **denied** as to the remainder of the interrogatories.

This constitutes the decision and Order of the Court.

Dated: Mineola, N.Y.
September 30, 2003



HON. LEONARD B. AUSTIN, J.S.C.

ENTERED

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COUNTY CLERK'S OFFICE