

RPAC Racing, LLC v. JSG Partners, LLC, 2017 NCBC Order 11.

STATE OF NORTH CAROLINA
MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
16 CVS 12896

RPAC RACING, LLC d/b/a Richard
Petty Motorsports and ALC
MANUFACTURING, INC. d/b/a
Rocky Ridge Custom Trucks,

Plaintiffs,

v.

JSG PARTNERS, LLC; J.
STREICHER & CO., LLC; J.
STREICHER GROUP, LLC; J.
STREICHER CAPITAL, LLC; J.
STREICHER ASSET
MANAGEMENT, LLC; J.
STREICHER ADVISORY, LLC;
JEFFREY JAMES MAYO PRIEBE
and PATRICK POWER,

Defendants.

**ORDER ON PLAINTIFF ALC'S
BCR 10.9 REQUEST AND AMENDED
NOTICE OF HEARING**

1. **THIS MATTER** is before the Court pursuant to Rule 10.9 of the General Rules of Practice and Procedure of the North Carolina Business Court (“BCR 10.9”) in the above-captioned case.

2. On June 9, 2017, Plaintiff ALC Manufacturing, Inc. d/b/a Rocky Ridge Custom Trucks (“ALC”) e-mailed the Court requesting a BCR 10.9 telephone conference regarding Jeffrey James Mayo Priebe (“Priebe”), JSG Partners, LLC, J. Streicher Asset Management, LLC, and J. Streicher Advisory, LLC’s (collectively, the “Priebe Defendants”) failure to respond to ALC’s discovery requests by the May 29, 2017 deadline set forth in the Case Management Order (the “BCR 10.9 Request”). ALC seeks an order compelling the Priebe Defendants to answer and respond to all ALC’s outstanding discovery requests and for sanctions.

3. ALC served its first set of interrogatories and first request for production of documents on the Priebe Defendants contemporaneously with the Complaint on August 19, 2016. The Court subsequently stayed this litigation by order dated December 6, 2016. The stay expired on March 6, 2017.

4. On April 4, 2017, the Court entered a Case Management Order, which required the Priebe Defendants to answer ALC's outstanding discovery requests by May 29, 2017, a date agreed upon by ALC and the Priebe Defendants.

5. In addition, in his affidavit filed May 17, 2017, Priebe averred that "between now and June 8th, I intend on fully cooperating with the required Case Management Order, including that I shall provide discovery responses to the plaintiffs." (Aff. Priebe ¶ 15.)

6. The Priebe Defendants did not answer, serve any objections to, or produce any documents responsive to, any of ALC's outstanding discovery requests by the May 29, 2017 deadline in the Case Management Order or at any time thereafter.

7. By order dated June 9, 2017, the Court permitted the Priebe Defendants an opportunity to file a response to ALC's BCR 10.9 Request on or before June 13, 2017. The Priebe Defendants did not file a response to ALC's BCR 10.9 Request at any time. The Court is therefore permitted to consider this as an uncontested matter. BCR 7.6.

8. The Court convened a telephone conference to address the BCR 10.9 Request on June 15, 2017, at which all parties were represented by counsel. The

Court issued its ruling at the telephone conference and memorializes its ruling herein.

9. “Under the rules governing discovery, a party may obtain discovery concerning any unprivileged matter as long as relevant to the pending action and reasonably calculated to lead to the discovery of admissible evidence.” *Wagoner v. Elkin City School Bd. of Educ.*, 113 N.C. App. 579, 585, 440 S.E.2d 119, 123 (1994) (citing N.C. R. Civ. P. 26(b)). When a motion to compel is filed, “[t]he party resisting discovery bears the burden of showing why the motion to compel should not be granted.” *Smithfield Bus. Park, LLC v. SLR Int’l Corp.*, 2014 U.S. Dist. LEXIS 110535, at *7 (E.D.N.C. Aug. 11, 2014). Ultimately, the decision whether a “party’s motion to compel discovery should be granted or denied is within the trial court’s sound discretion[.]” *Wagoner*, 113 N.C. App. at 585, 440 S.E.2d at 123.

10. When the Court grants a motion to compel under Rule 37, the Court is required to order “the party . . . whose conduct necessitated the motion . . . to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney’s fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.” N.C. R. Civ. P. 37(a)(4); *see also* N.C. R. Civ. P. 37(d).

11. When a party fails to respond or serve objections to request for production of documents or serve answers or objections to interrogatories, “the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subdivision a,

b, and c of subsection (b)(2) of [Rule 37].” N.C. R. Civ. P. 37(d). *See Pugh v. Pugh*, 113 N.C. App. 375, 379–80, 438 S.E.2d 214, 219 (1994) (holding that where the parties failed to “respond or object within the time limits set forth in Rule 34”, the parties seeking discovery “were entitled to move for imposition of sanctions under Rule 37(d).”) “The failure to act described in [Rule 37(d)] . . . may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).” N.C. R. Civ. P. 37(d).

12. **WHEREFORE**, the Court hereby memorializes its oral rulings at the telephone conference, **GRANTS** ALC’s request for an order compelling answers and responses to all of ALC’s outstanding discovery requests, and **FINDS**, **CONCLUDES**, and **ORDERS** as follows:

- a. The Court finds that the Priebe Defendants have failed to answer, serve objections to, or produce documents in response to, ALC’s outstanding discovery requests within the time limits set forth in N.C. R. Civ. P. 33 and 34.
- b. The Court further finds that the Priebe Defendants’ failure to answer, serve objections to, or produce documents in response to, ALC’s outstanding discovery requests violated this Court’s April 4, 2017 Case Management Order.
- c. The Court further finds that the Priebe Defendants’ conduct necessitated ALC’s BCR 10.9 Request and that the Priebe Defendants’ failure to answer, serve objections to, or produce documents in

response to, ALC's outstanding discovery requests as required under the April 4, 2017 Case Management Order was not substantially justified. The Court further finds that the Priebe Defendants have failed to identify any circumstances, and the Court concludes, based on its own review, that there are no such circumstances now existing, that make an award of expenses on this 10.9 Request unjust. *See* N.C. R. Civ. P. 37.

- d. The Court further finds that the Priebe Defendants have not offered a persuasive justification or shown good cause for their failure to respond or object to ALC's outstanding discovery requests, and the Court concludes, based on its review of the record and in the exercise of its discretion, that the Priebe Defendants' failure to object to the outstanding discovery requests at any time results in a waiver of any objections they may have to the outstanding discovery requests, except for constitutional privileges such as the right to assert the privilege against self-incrimination under the Fifth Amendment of the United States Constitution. *See, e.g., Golding v. Taylor*, 19 N.C. App. 245, 248, 198 S.E.2d 478, 480 (1973) (“[F]ailure to object to interrogatories within the time fixed by the rule is a waiver of any objection [but] must yield to the privilege against self-incrimination guaranteed by the Fifth Amendment to Federal Constitution.”); *Harrington Mfg. Co. v. Powell Mfg. Co.*, 26 N.C. App. 414, 415, 216 S.E.2d 379, 380 (1975)

(stating that a failure to respond to interrogatories waives the “right to object to the interrogatories absent some overriding constitutional privilege such as self-incrimination”); *see also e.g., Kansas-Nebraska Natural Gas Co., Inc. v. Marathon Oil Co.*, 109 F.R.D. 12, 24 (D. Neb. 1983) (“A failure to make a timely objection to a request for production or interrogatories results in a waiver of any otherwise-valid objections.”); *Precision Fabrics Group, Inc. v. Tietex Int’l, Ltd.*, 1:13CV645/1:14CV650, 2015 U.S. Dist. LEXIS 104382, *9–10 (M.D.N.C. Aug. 10, 2015) (holding that failure to timely object under Fed. R. Civ. P. 34 waived all objections, including those based on privilege or work product immunity, where party failed to show good cause for untimely objections); *see generally* N.C. R. Civ. P. 33, 34.

- e. The Priebe Defendants are ordered and directed to answer all of ALC’s outstanding discovery requests and to produce documents responsive to those requests no later than 5:00 PM on June 28, 2017.
- f. Pursuant to Rule 37(a)(4) and (d), the Court hereby awards ALC, as the party applying for an order to compel discovery, its reasonable expenses incurred in obtaining this Order, including attorneys’ fees, against the Priebe Defendants (but not against the Priebe Defendants’ counsel). The Court orders ALC to file its petition for payment of its reasonable expenses, including attorneys’ fees, with supporting affidavits and any other supporting materials, no later than June 22,

2017. The Priebe Defendants and any other interested party may file a response, with supporting materials, if any, no later than July 6, 2017. The Court will hear any objections to the reasonableness of ALC's expenses, including attorneys' fees, at the July 10, 2017 hearing previously scheduled in this action.

- g. The Court further finds that additional sanctions may be warranted under Rule 37 for the Priebe Defendants' failure to answer, serve objections to, or produce documents in response to, ALC's outstanding discovery requests as required under the April 4, 2017 Case Management Order. The Court therefore orders ALC to file a motion and brief, with supporting materials, if any, no later than June 22, 2017 addressing any additional sanctions that ALC contends are appropriate under the circumstances. The Priebe Defendants and any other interested party may file a response, with supporting materials, if any, no later than July 6, 2017. The Court will hear the parties' arguments on additional sanctions under Rule 37 at the July 10, 2017 hearing previously scheduled in this action.

13. **TAKE NOTICE** that a hearing will be held on Monday, July 10, 2017 at 2:00 PM in Courtroom 6370 of the Mecklenburg County Courthouse, 832 East Fourth Street, Charlotte, North Carolina on (i) Berutti and the Weiner Law Group LLP's Motion to Withdraw as Counsel, (ii) Skufca and Moretz & Skufca, PLLC's Motion to Withdraw, (iii) ALC's anticipated petition for payment of reasonable

expenses, including attorneys' fees, incurred in obtaining this Order, and (iv) potential sanctions under Rule 37(b) and (d) against Jeffrey James Mayo Priebe, JSG Partners, LLC, J. Streicher Asset Management, LLC, and J. Streicher Advisory, LLC for the Priebe Defendants' failure to answer, serve objections to, or produce documents in response to, ALC's outstanding discovery requests as required under the April 4, 2017 Case Management Order.

SO ORDERED, this the 19th day of June, 2017.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Special Superior Court Judge
for Complex Business Cases