

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-10052-CIV-MOORE/SIMONTON

DOUGLAS C. KILPATRICK,

Plaintiff,

v.

BREG, INC., a California corporation for profit,

Defendant.

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**DEFENDANT BREG, INC.'S OPPOSITION TO PLAINTIFF'S MOTION TO  
COMPEL [DE # 96] WITH SUPPORTING MEMORANDUM OF LAW**

Defendant, Breg, Inc. ("Breg"), by and through its undersigned counsel, files this opposition to Plaintiff's Motion to Compel Relating to Defendant's Supplemental Responses to Plaintiff's First Set of Interrogatories [DE # 96].

**I. INTRODUCTION**

In this motion to compel, Plaintiff objects to Breg's supplemental responses to plaintiff's interrogatory numbers 8, 10, 13, 14 and 16, which Breg served on May 5, 2009. Plaintiff contends that the responses are not sufficient.<sup>1</sup> *Counsel for plaintiff has never conferred with counsel for Breg regarding these specific interrogatory responses prior to filing the motion to compel.* The Southern District of Florida's CM-ECF "Notice of Electronic Filing" was the first time counsel for Breg heard that plaintiff had objections to these interrogatory responses. Despite the "Certificate of Counsel" attached to plaintiff's motion alleging that counsel

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<sup>1</sup> Plaintiff also objects to Breg's "Prefatory Statement and General Objections" served with these responses. Those statements are addressed by Breg in its combined response to plaintiff's motions to compel, DE #s 97, 98 and 99. The instant motion raises objections to specific interrogatory responses -- counsel for plaintiff never advised Breg of issues with the specific

“attempted to confer with Defense counsel in a good faith effort to resolve the issues raised in this Motion,” *no* such effort occurred. Moreover, plaintiff’s concerns are not well founded. Plaintiff has received the information he seeks, and Breg’s response and productions are complete.

## II. ARGUMENT

### A. Plaintiff’s Motion to Compel Should be Denied Because Plaintiff Failed to Confer with Counsel for Breg Prior to Filing this Motion

Federal Rule of Civil Procedure 37 addresses the procedure for filing a motion to compel. The rule requires the moving party to include a certification that they have attempted to informally resolve a discovery dispute prior to filing a motion. *See* Fed. R. Civ. P. 37(1).

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 effect to obtain it without court action.***

*Id.* (emphasis added).

Local Rule 7.1 A.3 adds to this obligation, further requiring the following:

3. Pre-filing Conferences Required of Counsel. ***Prior to filing any motion*** in a civil case, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, or to involuntarily dismiss an action, ***counsel for the movant shall confer (orally or in writing), or make reasonable effort to confer (orally or in writing), with all parties or non-parties who may be affected by the relief sought in the motion in a good faith effort to resolve by agreement the issues to be raised in the motion.*** Counsel conferring with movant's counsel shall cooperate and act in good faith in attempting to resolve the dispute. At the time of filing the motion, counsel for the moving party shall file with the Clerk of the Court a statement certifying either: (a) that counsel for the movant has conferred with all parties or non-parties who may be affected by the relief sought in the motion in a good faith effort to resolve the issues raised in the motion and has been unable to do so; or (b) that counsel for the movant has made reasonable efforts to confer with all parties or non-

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interrogatory responses prior to the filing of this motion.

parties who may be affected by the relief sought in the motion, which efforts shall be identified with specificity in the statement, but has been unable to do so. If certain of the issues have been resolved by agreement, the statement shall specify the issues so resolved and the issues remaining unresolved. ***Failure to comply with the requirements of this Local Rule may be cause for the Court to grant or deny the motion and impose on counsel an appropriate sanction***, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.  
(Emphasis added.)

Counsel for plaintiff certified that he attempted to resolve his dispute with Breg's specific responses to interrogatory numbers 8, 10, 13, 14 and 16. However, no such attempt has ever occurred. On May 27, 2009, a paralegal in the office of plaintiff's counsel sent an email to counsel for Breg attaching two draft motions to compel, seeking to confer on those objections. See Email from John Hopkins to Mary Novacheck dated May 27, 2009, attached as Ex. A. He attached two draft motions to compel to that email, outlining the alleged discovery deficiencies to be discussed by counsel in the meet and confer. One draft motion raised Plaintiff's objection to Breg's Preliminary Statement and General Objections, and nothing further. See "Plaintiff's Motion to Compel re General Objections," attached as Ex. B. The second draft motion raised Breg's Supplemental Response to Plaintiff's Fifth Request for Production and nothing further. See "Plaintiff's Motion to Compel re 5<sup>th</sup> RTP," attached as Ex. C.<sup>2</sup> After sending this initial email, Counsel for plaintiff sent five additional emails adding items to the list of things he would move to compel, *none* of which raised objections to Breg's May 5, 2009, supplemental responses to interrogatories 8, 10, 13, 14 and 16. (See attached Ex. D.)<sup>3</sup> The email trail and the draft

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<sup>2</sup> These draft motions became the subject of Plaintiff's Motions to Compel, DE #s 97, 98 and 99, which Breg is responding to in a separate filing.

<sup>3</sup> Counsel for Breg replied to the issues raised by plaintiff's threatened motions to compel by letter dated May 28, 2009, attached as Ex. E, and by email on May 29, 2009, attached as Ex. F.

motions fail to discuss or identify any perceived deficiencies with respect to Breg's supplemental responses to interrogatory numbers 8, 10, 13, 14 and 16.

The spirit and purpose of the meet and confer obligation is for parties to understand each other's position and make any reasonable compromises before involving the Court. Indeed, counsel for Breg has diligently worked in an effort to resolve discovery disputes without requiring Court involvement. *See* attached letter from Mary Novacheck to Mr. Warriner dated May 28, 2009, attached as Ex. E, and email from Mary Novacheck to Mr. Warriner dated May 29, 2009. However, it appears that counsel for plaintiff was less interested in working things out through a meet and confer (see his comment: 'we are not interested in oral 'meet and confers,'"' contained in his email dated May 27, 2009, in Ex. D) than he was in bringing motions in an attempt to raise unsubstantiated issues with Breg's discovery practice in this Court. (See email from M. Novacheck to Mr. Warriner dated May 29, 2009: "I have personally worked very hard to be cooperative in discovery, and despite those efforts you seem intent on painting a different picture for the court." Ex. F.)

Plaintiff entirely failed to provide Breg with an opportunity to confer on the subject of the instant motion to compel. This is insufficient under the rules and Plaintiff's Motion to Compel supplemental responses to Interrogatory numbers 8, 10, 13, 14 and 16 should be denied. Plaintiff has received the information he seeks, and Breg's response and productions are complete.

**B. Breg's Supplemental Responses to Int. Numbers 8, 10, 13, 14 and 16 were Sufficient, and Plaintiff has Received the Information He Seeks**

Plaintiff's objections to Breg's supplemental responses to Interrogatory numbers 8, 10, 13, 14 and 16 must be denied. First, plaintiff fails to repeat the entire substance of Breg's responses to these interrogatories verbatim. Had he done so, counsel for plaintiff may have seen that indeed, these responses are complete and sufficiently detailed.

***Interrogatory No. 8:***

**INTERROGATORY NO. 8:** State whether any individual, including any of Your employees, ever raised concerns or questions related to whether placing the Pain Pump catheter within the shoulder joint space could cause damage to the joint, including cartilage damage or loss and/or Chondrolysis. For each such individual, identify him or her by name, title, address and phone number, and state with specificity the substance of the information that was raised and when and in what manner it was raised.

Breg served this response on January 21, 2009:

**RESPONSE:** Breg refers plaintiff to the transcript for the November 20, 2008, deposition of Kathleen Barber, Breg's Vice President of Quality Assurance and Regulatory Affairs, which Breg previously produced on December 12, 2008. In that deposition, Ms. Barber discussed Breg's internal communications regarding chondrolysis. Please also see the October 2006 publication authored by Breg employee Patrick Cawley, entitled "The Controversy Regarding Chondrolysis Following Arthroscopic Shoulder Surgery: A Review of the Literature and Discussion of Potential Etiologies," produced herewith as BREG 00003060.0001 – 00003060.0008. See also Darby Webb, Patrick Cawley, et al., *Continuous Infusion of a Local Anesthetic Versus Interscalene Block for Postoperative Pain Control After Arthroscopic Shoulder Surgery*, *Arthroscopy* 23:9:1006 (2007), produced herewith as BREG 00003058.0001 – 00003058.0006. Breg produced information and records related to safety, chondrolysis and the use of the Pain Care 3000 on December 12 and 19, 2008, which are contained within the records referred to in Breg's response to request for production numbers 4, 5, 6, 9, 21, 22, and 23. Breg has and will continue to conduct a diligent search within its corporate records, where kept in the ordinary course of business, and will produce additional responsive documents if found.

To the extent Plaintiff seeks further information, Breg objects that the interrogatory is overly broad, vague, ambiguous, unduly burdensome, and asks for information that is not relevant and not reasonably calculated to lead to the discovery of admissible evidence.

Breg also objects to the extent the interrogatory asks for information protected by the work product doctrine or the attorney-client privilege.

(See Ex. C attached to plaintiff's Motion DE # 96. )

The supplemental response that is the subject of this motion was served by Breg on May 5, 2009,

and is repeated here:

**SUPPLEMENTAL RESPONSE:** Without waiving its prior response or objections, Breg answers by exercising its option under Fed. R. Civ. P. 33(d) to produce business records in response to this interrogatory. Breg refers plaintiff to these previously produced business records of employee communications:

- Bates # BREG 00005893.0001 through BREG 00006555.0001 (gaps in sequence), produced to plaintiff on April 14, 2009

- Bates # BREG 00005884.0001 through 00006719.0001 (gaps in sequence), produced to plaintiff on April 17, 2009
- Bates # BREG 00005891.0001 through BREG 00006732.001 (gaps in sequence), produced to plaintiff on April 24, 2009

(See Ex. A attached to plaintiff's Motion DE # 96. )

Plaintiff now claims that the May 5<sup>th</sup> supplemental response is not sufficiently detailed. He claims (incorrectly) that the last supplemental response presents a "document dump." This is not correct – the records referred to in the supplemental response were the specific email records produced to plaintiff in response to his keyword search request. These records reflect Breg's employee communications and response to the issue of whether pain pump catheter placement is associated with chondrolysis. Plaintiff fails to acknowledge Breg's right to exercise its option under Fed. R. Civ. P. 33(d) to produce business records in response to an interrogatory. Breg produced not only the email records, including attachments, but also produced four of Breg's key employees for deposition who wrote and received the records produced in this case. It is simply extremely misleading to say this is evasive or incomplete. Plaintiff has received the information he seeks, and Breg's response and productions are complete.

***Interrogatory No. 10:***

**INTERROGATORY NO. 10:** Identify and describe with specificity any efforts undertaken by You to evaluate the safety of continuous infusion of non-narcotic pain medications via a Pain Pump directly into the glenohumeral joint space for periods of time exceeding 24 hours.

Breg produced the same documents, and served the same initial response and the same supplemental response to this Interrogatory that it served in response to Interrogatory No. 8 on January 21, 2009, and May 5, 2009. (See Exs. A and C attached to plaintiff's Motion DE # 96. ) Interrogatories 8 and 10 seek very similar information, and the same response is appropriate. Again, plaintiff now claims that the supplemental response is not sufficiently detailed. He claims

(incorrectly) that the last supplemental response refers to a “document dump.” This is not correct – the records referred to in the supplemental response were the specific email records produced to plaintiff that reflect Breg’s employee communications and response to the issue of whether pain pump catheter placement is associated with chondrolysis. Plaintiff fails to acknowledge Breg’s right to exercise its option under Fed. R. Civ. P. 33(d) to produce business records in response to this interrogatory. Breg produced not only the emails and their attachments, but also four of the key employees for deposition who wrote and received the emails and records produced in this case. It is simply extremely misleading to say this is evasive or incomplete. Plaintiff has received the information he seeks, and Breg’s response and productions are complete.

***Interrogatory No. 13:***

**INTERROGATORY NO. 13:** State whether You ever received information or had knowledge that Your Pain Pumps were being used by surgeons by placing the catheter directly into the shoulder joint space. If so, state when and how You first learned that Your Pain Pumps were being used in such an application.

Breg produced the same documents, and served the same initial response and the same supplemental response to this Interrogatory that it served in response to Interrogatory No. 8 on January 21, 2009, and May 5, 2009. (See Exs. A and C attached to plaintiff’s Motion DE # 96. )

It added this statement to the May 5, 2009 supplemental response:

In addition, Breg refers plaintiff to the depositions of Breg employee fact witnesses being taken in this case, including the deposition of Mr. Pat Cawley on April 24, 2009, Ms. Mary Albertson on May 7, 2009, Mr. Mark Howard on May 7, 2009 and Ms. Kathleen Barber on May 8, 2009.

(See Ex. A attached to plaintiff’s Motion DE # 96 at p. 9.) Plaintiff raises the same issues with Breg’s supplemental response to Interrogatory No. 13. Breg maintains that the supplemental response is appropriate and sufficient. What plaintiff fails to realize is that he had the

opportunity to fully explore his questions about what Breg did and did not do related to allegations of an association between pain pump catheter placement and chondrolysis with Breg's key employees in their depositions in this case. Plaintiff has received the information he seeks, and Breg's response and productions are complete.

***Interrogatory No. 14:***

**INTERROGATORY NO. 14:** Identify and describe with specificity the nature and substance of any and all communications made by You, or by any individual or entity on Your behalf, in which it was communicated that Your Pain Pumps could be used with the catheter being placed directly into the shoulder joint.

Breg produced the same documents, and served the same response and supplemental response to this Interrogatory that it served in response to Interrogatory Nos. 8 and 10 on January 21, 2009, and May 5, 2009. It added this statement to the May 5, 2009, supplemental response to Int. 14:

In addition, Breg refers plaintiff to the depositions of Breg employee fact witnesses being taken in this case, including the deposition of Mr. Pat Cawley on April 24, 2009, Ms. Mary Albertson on May 7, 2009, Mr. Mark Howard on May 7, 2009 and Ms. Kathleen Barber on May 8, 2009. In addition, Breg refers plaintiff to the records referred to in its supplemental response to plaintiff's RFP Set 1, No. 29.

(See Ex. A attached to plaintiff's Motion DE # 96 at p. 10.) Breg produced sales training literature provided to its third party product distributors in response to RFP No. 29, which discuss, among other things, catheter placement. Plaintiff raises the same issues with Breg's supplemental response to Interrogatory No. 14. Breg maintains that the response is appropriate and sufficient. What plaintiff fails to realize is that he had the opportunity to fully explore this question with Breg's key employees in their depositions in this case. Plaintiff has received the information he seeks, and Breg's response and productions are complete.

*Interrogatory No. 16:*

**INTERROGATORY NO. 16:** State whether You ever had any communication with anyone regarding Pain Pumps and whether using one can cause loss of joint space or Post-Arthroscopic Glenohumeral Chondrolysis.

Breg produced the same documents, and served the same response and supplemental response to this Interrogatory that it served in response to Interrogatory Nos. 8 and 10 on January 21, 2009, and May 5, 2009. It added this statement to the May 5, 2009 supplemental response to Int. 16:

In addition, Breg refers plaintiff to the depositions of Breg employee fact witnesses being taken in this case, including the deposition of Mr. Pat Cawley on April 24, 2009, Ms. Mary Albertson on May 7, 2009, Mr. Mark Howard on May 7, 2009 and Ms. Kathleen Barber on May 8, 2009.

(See Ex. A attached to plaintiff's Motion DE # 96 at p. 10.) Plaintiff raises the same issues with Breg's supplemental response to Interrogatory No. 16. Breg maintains that this response is appropriate and sufficient. What plaintiff fails to realize is that he had the opportunity to fully explore this question with Breg's key employees in their depositions in this case. Plaintiff has received the information he seeks, and Breg's response and productions are complete.

**III. CONCLUSION**

Plaintiff's counsel failed to meet and confer with counsel for Breg prior to filing this motion, and his motion should be denied on that ground alone. Moreover, plaintiff received the information he sought in discovery. Breg's supplemental responses and productions are appropriate and complete. Breg requests that this Court deny plaintiff's motion to compel in its entirety.

Dated: June 15, 2009

/S/Jeffrey B. Shapiro  
Jeffrey B. Shapiro  
Florida Bar No.: 484113  
Neville M. Leslie  
Florida Bar No.: 107492  
Andrea Cox  
Florida Bar No.: 173495  
jbshapiro@arnstein.com  
ARNSTEIN & LEHR LLP  
Attorneys for Defendant  
200 So. Biscayne Blvd., Suite 3600  
Miami, Florida 33131-2395  
Telephone: (305) 374-3330  
Facsimile: (305) 374-4744  
E-mail: jbshapiro@arnstein.com

and

**BOWMAN AND BROOKE LLP**

/S/Mary T. Novacheck  
Kim M. Schmid  
Mary T. Novacheck  
Monica A. Kelly  
150 South Fifth Street, Suite 3000  
Minneapolis, MN 55402  
Tel: 612.339.8682

For Breg, Inc.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 15th day of June, 2009 I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

S/Jeffrey B. Shapiro  
JEFFREY B. SHAPIRO  
Florida Bar No. 484113  
NEVILLE M. LESLIE  
Florida Bar No. 107492  
ANDREA COX  
Florida Bar No. 173495  
Arnstein & Lehr LLP  
Attorneys for Defendant  
200 S. Biscayne Boulevard, Suite 3600  
Miami, FL 33131  
Telephone: 305-374-3330  
Facsimile: 305-374-4744  
E-Mail: [jbshapiro@arnstein.com](mailto:jbshapiro@arnstein.com)

and

S/ Mary T. Novacheck  
Kim Schmid (*pro hac vice*)  
Mary T. Novacheck (*pro hac vice*)  
Monica Kelly (*pro hac vice*)  
Bowman and Brooke LLP  
150 South Fifth Street, Suite 2600  
Minneapolis, MN 55402  
Tel: 612.339.8682  
Fax: 612.672.3200

**Service List**

**DOUGLAS C. KILPATRICK V. BREG, INC.**

**CASE NO: 08-10052 CIV-MOORE/SIMONTON**

**UNITED STATES DISTRICT COURT**  
**SOUTHERN DISTRICT OF FLORIDA**

C. Cal Warriner III, Esq.  
Searcy Denney Scarola Barnhart & Shipley  
P.O. Drawer 3626  
West Palm Beach, FL 33402-3626  
Tel: (561) 686-6300  
Fax: (561) 478-0754  
Email: CCW@searcylaw.com

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