

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

**INHALATION PLASTICS,
INC.,**

Plaintiff,

v.

**Civil Action: 2:07-CV-116
Judge Smith
Magistrate Judge King**

**MEDEX CARDIO-PULMONARY,
INC.,**

Defendant.

OPINION AND ORDER

This matter is before the Court for consideration of the *Plaintiff's Renewed Motion to Compel*, Doc. No. 79, and *Motion to Deem Renewed Motion to Compel Timely Filed*, Doc. No. 80. For the reasons that follow, the motions are denied and granted, respectively.

I.

A brief review of the relevant facts and of the procedural history of this case will assist in the resolution of the motions.

Plaintiff Inhalation Plastics, Inc. commenced this action against Defendant Medex Cardio-Pulmonary, Inc., on February 15, 2007, alleging breach of written and oral contracts. The claims arise in connection with Defendant's purchase of Plaintiff and Plaintiff's business.¹

¹Plaintiff, a manufacturer and distributor of medical products, is incorporated in the State of Illinois and has its principal place of business in that state. *Am. Complaint* at ¶¶ 1-2. Defendant is an Ohio corporation with its principal place of business in the State of California. *Id.* at ¶¶ 3-4.

Am. Complaint at ¶¶ 3-4. After the purchase, Defendant merged with Smiths Medical Holdco Limited [“Smiths Holdco”], a competitor of Plaintiff, and ceased manufacturing and distributing Plaintiff’s former product lines. *Id.* at ¶ 10. Defendant assigned and transferred Plaintiff’s rights under certain written contracts to Smiths Holdco. *Id.* at ¶¶ 10-11.

Count I of Plaintiff’s *Amended Complaint* alleges breach of an oral contract. Specifically, Plaintiff claims that Defendant’s president, Dominick Arena, orally offered to Plaintiff’s president, Walter Levine, payment of “an amount of not less than \$7,000,000, in exchange for [Plaintiff’s] agreement to refrain from interfering with Medex-Smiths arrangement, and in exchange for Mr. Levine agreeing not to resign.” *Id.* at ¶ 22. According to Plaintiff, “Mr. Arena stated in October of 2005 that he would work with [Smiths Holdco] to get between \$7,000,000 and \$10,000,000 to buy out [Plaintiff], and stated that if [Smiths Holdco] would not come up with the money, [Defendant] would pay the money.” *Id.* Plaintiff alleges that it accepted this offer and refrained from filing suit for an alleged breach of the parties’ written contracts. *Id.* at ¶ 26. Mr. Arena resigned from employment and the alleged oral promise to Plaintiff was not fulfilled. *Id.* at ¶¶ 28-30.

Count II of Plaintiff’s *Amended Complaint* is pled in the alternative to Count I and alleges breach of written agreements between Plaintiff and Defendant. *Id.* at ¶¶ 36-45. In particular, Plaintiff alleges that Defendant has acted in breach of the non-assignment clause of the Asset Purchase Agreement as well as of the Machinery and Equipment Production Lease. *Id.* at ¶ 11.

Defendant moved to dismiss Count II of the *Amended Complaint*, Doc. No. 35, but that motion was denied. *Order*, Doc. No. 61. Defendant’s interlocutory appeal from that decision

remains pending. *Inhalation Plastics, Inc. v. Medex-Cardio-Pulmonary, Inc.*, Case No. 08-4550 (6th Cir.). Proceedings on Count II are stayed pending decision by the United States Court of Appeals for the Sixth Circuit. *Order*, Doc. No. 66. With respect to Count I, the Court held that discovery “shall proceed to the extent that it does not present an unreasonable burden on the parties, such as requiring two separate depositions of the same witness.” *Id.*, p. 9.

Prior to the issuance of that *Order*, Doc. No. 66, Plaintiff had filed a motion to compel response to certain interrogatories and to produce certain documents. Doc. No. 49. Because Defendant had represented that it would supplement its written discovery related to Count I to the extent that it possessed additional information, *see Order*, p. 9, Doc. No. 66, Plaintiff’s motion in that regard was denied as moot. *Id.* The deadline for completing written discovery as to Count I, as extended, expired on September 4, 2009, and Plaintiff was granted leave to depose an additional witness no later than September 11, 2009. *Order*, Doc. No. 76.

II.

Defendant provided supplemental responses to Plaintiff’s written discovery requests as to Count I on September 4, 2009. *Renewed Motion to Compel*, p. 2, which Plaintiff characterizes as “still woefully inadequate.” *Id.* Plaintiff seeks supplementation to interrogatories 9, 15, 19 and 20, and responses to production requests 1, 2, 3, 5 and 8.

In opposing the *Renewed Motion to Compel*, Defendant complains that Plaintiff failed to meet and confer prior to filing the motion. *Memorandum contra*, Doc. No. 81. A series of electronic mail messages exchanged by counsel on September 4 and 10, 2009, attached as exhibits to Defendant’s *Memorandum contra*, outlines the dialogue leading up to the filing of the

Renewed Motion to Compel.

Plaintiff's counsel first identified alleged deficiencies in Defendant's responses to Plaintiff's interrogatories and production requests. Exhibit 4 attached to *Memorandum contra*. In response, Defendant's counsel insisted that Defendant had fully complied with Plaintiff's discovery requests and contemplated a detailed further response. Exhibit 7, *Id.* Plaintiff's counsel disagreed and anticipated a motion to compel. Exhibit 10, *Id.* Defendant's counsel suggested delaying the filing of such a motion until counsel could meet and confer. Exhibit 11, *Id.* Plaintiff's counsel rejected the suggestion, stating that counsel had met and conferred "many months ago" during a teleconference. Exhibit 14, *Id.*

This exchange of e-mails between counsel reveals frustration on the part of the parties and their counsel. The discovery process in this case has indeed been protracted due, in part, to the proceedings relating to Count II of the *Amended Complaint*. Nevertheless, this Court has ordered that discovery as to Count I proceed. The obligation of counsel to meet and confer to resolve differences as to discovery disputes is a requirement of the Federal Rules of Civil Procedure as well as of the Local Rules of this Court. F.R. Civ. P. 37(a)(1) (a motion to compel "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."); S.D. Ohio Civ. R. 37.2 ("a motion to compel shall be accompanied by a supporting memorandum and by a certification of counsel setting forth the extrajudicial means which have been attempted to resolve differences. . . .").

In support of the *Renewed Motion to Compel*, Plaintiff's counsel states that he has attempted "in good faith, on many occasions over the course of more than a year to resolve all

discovery disputes with opposing counsel without the need for court intervention.” *Declaration of Richard H. Lehman*, Doc. No. 79, Exhibit 3, ¶ 4. Defendant’s counsel disagrees and contends that Plaintiff’s counsel “entirely disregarded” the meet and confer requirement. *Memorandum contra*, p. 7.

This Court concludes that plaintiff has not satisfied the requirement of F.R. Civ. P. 37(a)(1). Defendant’s counsel invited further discussion of remaining issues relating to Defendant’s responses to Plaintiff’s interrogatories and production requests.² Rather than filing a motion to compel, Plaintiff’s counsel should have accepted that invitation.

For this reason, the Court denies the *Renewed Motion to Compel*. Counsel are **DIRECTED** to meet, within the next fourteen (14) days, in an attempt to resolve any remaining issues relating to Defendant’s responses to Plaintiff’s interrogatories and document production requests. If the issue remains unresolved, Plaintiff may renew its motion to compel, articulating with specificity the alleged deficiencies in Defendant’s responses. Any such renewed motion to compel must be filed within fourteen (14) days after counsel have conferred in conformity with this Court’s directive.

Plaintiff has also filed a *Motion to Deem Renewed Motion to Compel Timely Filed*. Doc. No. 80. Plaintiff explains that its *Renewed Motion to Compel* was filed on September 13, 2009 only because the Court’s electronic case filing system was unavailable to receive filings after 6:00 p.m. on Friday, September 11, 2009. Under these circumstances, the Court will deem the *Renewed Motion to Compel* as timely filed.

²In particular, Defendant’s counsel stated in his September 10, 2009 e-mail that “I will be happy to schedule [a meet and confer] meeting at our mutual convenience.” Exhibit 15, p. 7, attached to *Memorandum contra*.

Plaintiff's *Renewed Motion to Compel*, Doc. No. 79, is **DENIED** without prejudice to renewal in accordance with the foregoing. Plaintiff's *Motion to Deem Renewed Motion to Compel Timely Filed*, Doc. No. 80, is **GRANTED**.

IT IS SO ORDERED.

April 12, 2010
DATE

s/Norah McCann King
NORAH McCANN KING
UNITED STATES MAGISTRATE JUDGE