

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
ILLINOIS EASTERN DIVISION**

HOSPIRA, INC.

Plaintiff,

v.

FRESENIUS KABI USA, LLC,

Defendant.

C.A. No. 1:16-cv-00651

C.A. No. 1:17-cv-07903

(Consolidated)

Hon. Rebecca R. Pallmeyer

**FRESENIUS KABI'S REPLY TO HOSPIRA'S OBJECTIONS TO
FRESENIUS KABI'S BILL OF COSTS**

Fresenius Kabi is entitled to its taxable costs as the undisputed prevailing party, as identified in its Bill of Costs. Hospira does not dispute \$49,690.72 of costs. Hospira's Objections to the remaining Bill of Costs are overly broad and seek to exclude entire categories of taxable costs based on one or two line items. Hospira's objections should be overturned. A summary of the amounts requested and disputed are attached as Appendix A to this brief.

I. Fees of the Clerk Should Be Taxed

Hospira objects to Fresenius Kabi's request for \$100.00 for the *pro hac vice* fees as not taxable. But the Seventh Circuit has affirmed the award of such fees as taxable costs. *U.S. v. Emergency Med. Associates of Ill., Inc.*, 436 F.3d 726, 730 (7th Cir. 2006). The binding nature of the decision has been acknowledged by this Court holding that "the Seventh Circuit in *Emergency Medical Associates*, after recognizing that the issue had been raised, affirmed on the merits the award of *pro hac vice* fees as costs. That ends the matter as far as a district court is concerned." *Boogaard v. Nat. Hockey League*, No. 13-cv-4846, 2017 WL 5517231, at *1 (N.D.

Ill. Nov. 1, 2017). Hospira does not object to the reasonableness or support for the amount of the fees. As such, the fees are recoverable and Hospira's objection should be denied.

II. Fresenius Kabi's Transcript Fees Should Not be Reduced

Hospira agrees that \$21,578.82 of Fresenius Kabi's transcript costs should be awarded. Hospira's objections to the remaining \$15,228.69 are contrary to the law and should be denied.

A. The Requested Court Reporter Fees Should Be Taxed

The "Realtime" line item on the court reporter's invoice from the July trial (\$1,780.80) is not for Realtime service, but instead was for the creation of daily trial transcripts. These daily rough trial transcripts were necessary for counsel to prepare witnesses examinations, as identified in its Bill of Costs and accompanying Wallace Declaration. (D.I. 185 at 3; D.I. 185-1 at ¶5.) Hospira raises no objection to the recovery of daily transcript fees.

Even assuming this charge were for Realtime, such fees can be taxable if necessary to the litigation. Here, as the Court will recall, the dexmedetomidine trial was "technical and complicated, and these services were reasonably necessary to ensure accurate and precise recording of expert testimony." *Chamberlain Group, Inc. v. Techtronic Indus. Co., Ltd.*, 315 F. Supp. 3d 977, 1022 (N.D. Ill. 2018). As such, it would be reasonable for the Court to tax the costs against Hospira if they were Realtime fees during trial.

B. Fresenius Kabi Can Recover Costs for Videotaping All Depositions Because Each Cost Was Reasonably Incurred at the Time

Hospira misleadingly quotes precedent to argue that, as a rule, the cost of a video may not be recovered if the transcript was also purchased. (D.I. 188 at 4 (citing *SP Tech., LLC v. Garmin Int'l, Inc.*, No. 08-cv-2348, 2014 WL 300987, at *5 (N.D. Ill. Jan. 10, 2014) (Pallmeyer, J.).)

The Court's next sentence reveals the deception: "A party may, however, recover costs for both a

videotaped deposition and transcript of the same deposition provided that both are reasonably necessary.” *SP Tech.*, 2014 WL 300987, at *5.

Hospira is also incorrect that, as a rule, it should be taxed only for the costs of video depositions played at trial. (D.I. 188 at 2.) Instead, in *Chamberlain*, the requesting party had not established the reasonableness of its request for all video fees. *Chamberlain*, 315 F. Supp. 3d at 1023. The actual legal principal is whether it was reasonable to order the video “at the time it was taken.” *Interclaim Holdings Ltd. v. Ness, Motley, Loadholt, Richardson & Poole*, No. 00-cv-7620, 2004 WL 557388, at *7 (N.D. Ill. Nar. 22, 2004) (Pallmeyer, J.) (citing *Cengr v. Fusibond Piping Sys., Inc.*, 135 F.3d 445, 455 (7th Cir. 1998)); *Beam v. Petersen*, No. 07-cv-1227, 2011 WL 4431815, at *5 (N.D. Ill. Sep. 22, 2011) (Pallmeyer, J.).

Hospira does not dispute that incurring the cost of each videotaped deposition was reasonable at the time, as detailed in the Bill of Costs and Wallace Declaration. (D.I. 185 at 3-10; D.I. 185-1, ¶¶ 6-8.) Hospira’s objection relies only on its non-existent bright-line rules, and so should be denied. Hospira’s objection to Fresenius Kabi incurring the cost of taping its own witnesses is curious (DI. 188 at 2), given that Hospira, as the taking party, arranged the videotaped depositions. At the time, Hospira thought the cost was reasonable and necessary, and so the full cost of \$17,199.57 is taxable.

C. Fees for Deposition Exhibit Copies Are Taxable

Hospira objects to paying costs for the actual deposition exhibits marked at each deposition based on the single example of Hospira’s expert Mr. Seaton, where 953 pages of exhibits were marked. (D.I. 188 at 2-3.) Hospira uses that example to conclude that all identified costs are excessive. Hospira does not object to the per-page cost, only to the number of pages.

Unlike Hospira’s cited cases, the charges here are for the official exhibits that were actually marked and used at deposition. These marked copies were identified and used at trial.

This practice was particularly important here where the same documents often appeared multiple times in a party's production, and so deposition questions referring to particular Bates-labeled pages could be confused if different versions were used.

Hospira has not articulated why—even if the number of pages for *Mr. Seaton's* deposition were unreasonable—the remaining exhibits for other witnesses are also unreasonable. For example, Hospira's counsel marked 877 pages of exhibits during its deposition of Fresenius Kabi's expert Dr. Maile. (188-3 at 2.) Hospira does not explain why its own counsel marked an “unreasonable” number of pages, or why Fresenius Kabi should not be able to recover costs for the exhibits Hospira thought were reasonable and necessary at the time of the deposition. Hospira should be taxed \$5,912.65.

D. Fresenius Kabi's Requests for Expedited Transcripts Should Be Included

Hospira objects to the fees for the expedited delivery of particular expert depositions on the grounds that there was no responsive deposition scheduled afterwards. This objection ignores the truncated discovery schedule in the case.

In order to comply with the Court's June 25 Final Pretrial Order deadline (see 4/18/18 Order, D.I. 98), the parties agreed to exchange information for the Final Pretrial Order, including motions in limine, on June 18 and June 22. Hospira objects to obtaining expedited delivery of transcripts for witnesses deposed in the two weeks before the exchange date: June 15 (Dr. Sheinin), June 13 (Dr. Kipp and Mr. Seaton), June 8 (Mr. Hofmann), and June 5 (Dr. Maile). As explained in its Bill of Costs and Wallace Declaration, it would not have been feasible to wait for normal delivery—14 days—of each of these final deposition transcripts and still meet the schedule in the case. (D.I. 185 at 6; D.I. 185-1, ¶ 7.) Courts have granted costs for expediting in similar situations, where expedited transcripts were requested for hearings or submissions more than a month after the deposition was taken. *Chamberlain*, 315 F. Supp. 3d at 1022 (granting

expedited transcript fees for July 2016 deposition transcripts for an August 30, 2016 hearing). Expediting transcripts was reasonable, and so the costs should not be reduced.

III. Fresenius Kabi's Fees for Witness Disbursements Should Not Be Reduced

Hospira seeks to reduce the costs incurred by Fresenius Kabi's expert witnesses, pursuant to Rule 26(b)(4)(E). Hospira does not dispute that preparation time can be recovered, but instead argued—based on a single example—that insufficient detail was provided.

In *Waters*, this Court awarded expert expenses for time spent reviewing documents in preparation for deposition and only excluded time spent in conversation with counsel before the deposition. *Waters v. City of Chicago*, 526 F. Supp. 2d 899, 901 (N.D. Ill. 2007). This is the same approach Fresenius Kabi has taken here, as detailed in the Wallace Declaration. (D.I. 185-1, ¶ 10.) Fresenius Kabi requested only 6 hours of Dr. Kipp's time to "Review materials prior to SH meeting downtown," (185-10 (Ex. 9) at 5). Similarly, Dr. Maile's bill reflects 13 hours for "Document Review/Deposition Preparation" on June 4, 2018, the day before his deposition. (*Id.* at 6.) Fresenius Kabi reduced the requested time to remove time spent with counsel. Mr. Hofmann's invoice indicates he spent 4 hours reviewing prior related testimony, reviewing documents, and discussing them with his staff—time with counsel is not included. (*Id.* at 10.) Finally, Mr. Lankau's time entry for 5.5 hours of deposition preparation (*id.* at 3) has been reduced to 1.5 hours to remove time spent speaking with counsel. The costs should not be reduced by \$10,300.

IV. Fresenius Kabi's Exemplification and Printing Costs Should Not Be Reduced to Zero

Hospira does not dispute that Fresenius Kabi is entitled to recover some costs for exemplification and printing, but instead contends that a handful of charges cost are not sufficiently described or qualify as a taxable cost. It then concludes that no costs, even from other categories, should be awarded. Hospira's draconian objection should be denied.

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