

**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 RESPONSE TO HOSPIRA'S LR 54.3(g) MOTION
FOR INSTRUCTIONS**

Defendant Fresenius Kabi USA, LLC (“Fresenius Kabi”) has complied with its obligation under Local Rule 54.3(d)(1) to provide Plaintiff Hospira, Inc. (“Hospira”) with the “time and work records on which [Fresenius Kabi’s fees] motion will be based.” In accordance with the Rule, Fresenius Kabi’s records have been “redacted to prevent disclosure of material protected by the attorney-client privilege or work product doctrine.” L.R. 54.3(d)(1).

ARGUMENT

Hospira’s motion does not seek instruction but instead improperly argues the merits of Fresenius Kabi’s eventual fees motion. Hospira also mischaracterizes the history of this case, focusing on only one of the two claims eventually asserted at trial—the other claim Hospira kept in the case but never even tried to defend its validity at trial. But for the majority of the period for which Fresenius Kabi will seek fees, Hospira unreasonably kept several additional issues in the case. For example, Fresenius Kabi had to prepare contentions, expert reports, depositions, and trial strategies for multiple claims from six different patents, secondary considerations, and infringement of U.S. Patent No. 8,455,527 because Hospira unreasonably kept these issues in the

case until the eve of trial. Hospira also ignores the fact that the two claims eventually asserted at trial contained many limitations in addition to the stability limitation, and Fresenius Kabi was required to present trial testimony and issue post-trial briefing to address each of them. These additional claim limitations include “ready to use,” “sealed glass container,” “dexmedetomidine...at a concentration of about 4 µg/mL,” and “a pH of about 2 to about 10.” (See D.I. 176 at 9-10.)

As Hospira noted, Fresenius Kabi will not ultimately be seeking all of its attorneys’ fees. (Hospira Br. at 2.) Recognizing Hospira’s need to assess the reasonableness of Fresenius Kabi’s ultimate request, Fresenius Kabi proposed multiple ways to provide such information and still protect privilege. Local Rule 54.3(d)(1) specifically contemplates redacting time entries to protect privileged information, which is exactly what Fresenius Kabi has done. Hospira agrees that Fresenius Kabi can redact privileged time entry information. (Hospira Br. at 5.) Fresenius Kabi appreciates that Hospira must assess the reasonableness of Fresenius Kabi’s requested fees, and for that reason provided general subject matter summaries of each entry. (Hospira Br., Ex. 2.2.) Hospira’s own case law holds that to support a fees motion, “[a]ttorneys, at a minimum, ‘should identify the general subject matter of [their] time expenditures.’” *Stragapede v. City of Evanston*, 215 F. Supp. 3d 708, 719 (N.D. Ill. 2016) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 n.12 (1933)); see also *Duran v. Town of Cicero*, No. 01-cv-6858, 2012 WL 1279903, *9 (N.D. Ill. Apr. 16, 2012) (“th[e] five-month period right before trial is unlikely to have involved much wasted time (on either side). The court is therefore inclined to be much more tolerant of time entries for this period that are lacking in specificity.”). Courts in this District have previously allowed a fees petitioner to submit “billing summaries, as opposed to the original documentation including invoices and time sheets, in support of their Petition.” See,

e.g., *Abrams v. Resolution Trust Corp.*, No. 89-cv-3020, 1994 WL 710766, *3 (N.D. Ill. Dec. 17, 1994).

Hospira objected to Fresenius Kabi's submission of billing summaries, so Fresenius Kabi agreed to provide Hospira a sampling of redacted billing entries in addition to the billing summaries to determine whether that would resolve the dispute. (Hospira Br., Ex. 5.2.) Hospira, however, maintained its objection and insisted that Fresenius Kabi waive privileged and produce most of its entries in unredacted form. There is no requirement that Fresenius Kabi choose between a reasonable request for attorneys' fees and maintaining its attorney-client privilege.

Fresenius Kabi's disclosure provides more than enough information for Hospira to determine the reasonableness of Fresenius Kabi's requested fees. None of the cases Hospira cites involved the present scenario, *i.e.* redacted time entries *plus* a description of the subject matter of those entries. Fresenius Kabi's disclosure includes descriptions of the tasks performed, billing rates, the people involved in the task, and the amount of time required to perform each task. Further, Hospira's motion only specifically objects to redactions relating to the subject matter of hearings and meetings with opposing counsel. (Hospira Br. at 4, 7.) During the parties' January 23, 2019, meet and confer, counsel for Fresenius Kabi stated that its final L.R. 54.3(d)(1) disclosure would not redact the subject matter of hearings or meetings with opposing counsel. Therefore, Hospira's only specific objections have already been resolved by the parties.

The information Fresenius Kabi redacted is particularly sensitive here because this case is presently on appeal to the Federal Circuit (No. 19-1329), and therefore could eventually be remanded to this Court for further proceedings. Without the redactions Fresenius Kabi has applied to its time entries, Fresenius Kabi risks a subject matter waiver of privileged information regarding case strategies and assessments which Fresenius Kabi may need to use before this

Court on remand. Because of this concern, Fresenius Kabi offered to defer its fees motion until after an appellate decision, but Hospira rejected this offer. (Hospira Br., Ex. 3 at 2, 12/28/18 email from S. Horton.) Of course, Fresenius Kabi remains willing to defer its fees motion until after an appellate decision, at which time many of the current redactions would no longer be required.

CONCLUSION

Fresenius Kabi respectfully requests the Court find either its original disclosure (Hospira Br., Ex. 2.2) or its sample redacted disclosure (Hospira Br., Ex. 5.2) complies with L.R. 54.3(d)(1). If the Court finds the latter, Fresenius Kabi will similarly redact the remaining time entries in support of its fees motion to complete its L.R. 54.3(d)(1) disclosure.

Further, to the extent the Court resets Hospira's deadlines in L.R. 54.3(d)(5) to 21 days from Hospira's receipt of Fresenius Kabi's compliant disclosure, Fresenius Kabi requests the Court also reset the deadlines in L.R. 54.3(e) (Joint Statement) and L.R. 54.3(f) (Fee Motion) to 21 days and 42 days, respectively, from the date of Hospira's L.R. 54.3(d)(5) disclosures.

Dated: February 8, 2019

Respectfully submitted,

/s/ Imron Aly

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