

**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

Honorable Rebecca Pallmeyer

PUBLIC VERSION

FRESENIUS KABI USA, LLC'S REPLY CLAIM CONSTRUCTION BRIEF

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Pursuant to the Local Patent Rules and Scheduling Order entered in this case Defendant Fresenius Kabi USA, LLC submits this Reply Claim Construction Brief in response to Plaintiff Hospira Inc.’s Responsive *Markman* Brief dated November 8, 2016 concerning U.S. Patent Nos. 8,242,158; 8,338,470; 8,455,527; and 8,648,106 (“the patents-in-suit”). D.I. 19.

I. INTRODUCTION

Fresenius Kabi respectfully requests that the Court adopt its proposed constructions of the three terms at issue: “ready to use,” “sealed glass container,” and “intensive care unit.” Consistent with Federal Circuit authority, Fresenius Kabi relies on the intrinsic evidence including the patent specification and prosecution history. To the extent extrinsic evidence is helpful, the inventor of the patents-in-suit and Hospira’s own corporate representative admitted by deposition that Fresenius Kabi’s proposed constructions are correct. Hospira, nevertheless, seeks to read extraneous limitations into the claims, and for the sole and express purpose of saving them from invalidity. And they do so by contradicting what the patent itself says about the claim terms now at issue. Claim construction is not a results-oriented determination. Rather, the purpose of claim construction is to determine the proper scope of the claims, even if that renders the claims invalid. *Tate Access Floors, Inc. v. Interface Architectural Resources, Inc.*, 279 F.3d 1357, 1372 (Fed. Cir. 2002) (“[W]here claim language is clear we must accord it full breadth even if the result is a claim that is clearly invalid.”).

II. ARGUMENT

A. “ready to use”

Fresenius Kabi’s Proposed Construction	Hospira’s Proposed Construction
“suitable for administration to a patient without requiring dilution”	“formulated to be suitable for administration to a patient upon

	manufacture without dilution or reconstitution” ¹
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Each claim of the ’158 patent, ’470 patent, and ’106 patent is directed to a “*ready to use* liquid composition for parenteral administration to a subject.” JA-14 (’158 claims), JA-28 (’470 claims), JA-57 (’106 claims). The ’527 patent is directed to a “method of providing sedation to a patient in need thereof . . . wherein the composition is a ready to use liquid pharmaceutical composition for parenteral administration. . . .” JA-42 (’527 claims). The dispute about this term is what in particular the claim covers, as between how a composition is made versus what the composition is. Fresenius Kabi submits that the claim covers the latter, which is the composition itself, and what a composition was before the time of analysis is irrelevant.

Hospira, on the other hand, seeks to convert its composition claims into product-by-process claims or method claims. That violates black-letter patent law that “[a] novel product that meets the criteria of patentability is not limited to the process by which it was made.” *Vanguard Prods. Corp. v. Parker Hannifin Corp.*, 234 F.3d 1370, 1372 (Fed. Cir. 2001); *see also Baldwin Graphic Sys., Inc. v. Siebert, Inc.*, 512 F.3d 1338, 1344 (Fed. Cir. 2008) (“Court must generally take care to avoid reading process limitations into an apparatus claim. . . .”). The claims at issue were drafted as compositions, regardless of how they were made; if Hospira wanted to draft their claims as method claims, they could have done so. It is too late now and claim construction cannot be used to rewrite the claims.

¹ Hospira chose not to disclose its proposed constructions until after Fresenius Kabi set forth its position in its Opening Brief, and relied instead on “plain and ordinary meaning.” Thus, by waiting to spring its proposed construction for the first time in its Responsive Brief, Hospira seeks to obtain an unfair advantage and prejudice Fresenius Kabi. Therefore as an initial matter, Fresenius Kabi requests the Court reject Hospira’s proposed constructions and arguments in support thereof.

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