IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

MILLER PRODUCTS CO., INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 01-35-KAJ
	)	
VELTEK ASSOCIATES, INC. and ARTHUR L. VELLUTATO,	)	
	)	
Defendants.	)	

MEMORANDUM ORDER

Presently before me is a Motion for Reargument of the Court's February 10, 2004 Memorandum Order as it Applies to Prior Sales, filed by plaintiff Miller Products Co., Inc. ("Miller"). (Docket Item ["D.I."] 203; the "Motion".) For the reasons that follow, Miller's Motion will be denied.

On February 10, 2004, I issued a Memorandum Order denying, *inter alia*, Miller's Motion for Summary Judgment that U.S. Patent No. 6,123,900 ("the '900 patent) is invalid based on prior sales (D.I. 162; the "Motion for Summary Judgment"). (D.I. 200.) After summarizing the applicable Federal Circuit law, I found that, even though one of the Defendants' suppliers sold aerosol containers sterilized according to the method claimed in the '900 patent to Defendants prior to the critical date, the sale of those containers did not "pose a statutory bar to a claim on the process," because there was no evidence that the method was not kept secret prior to the critical date. (*Id.* at 7-9 (citing *Torpharm, Inc. v. Ranbaxy Pharm., Inc.*, 336 F.3d 1322, 1327 (Fed. Cir. 2003) (citation omitted).) Miller now asserts that

> as a result of the Order wherein the Court treated the supplier, CCL, as if it were a third party stranger to the sale, the issue as now framed is one of first impression and is a novel question of law. The issue is this: Where a future patentee enters into a contract of sale with a supplier to purchase a product made by a process specified by the future patentee (and later patented), does that constitute commercialization of the process and, therefore, an on-sale bar?

(D.I. 203 at 3 (emphasis in original).) Because my Memorandum Order created a novel question of law, Miller argues, its Motion should be granted. (*Id.* at 4.)

The court, in *Schering Corp. v. Amgen, Inc.*, previously summarized the standard that applies to motions for reargument as follows:

> The District of Delaware, through published case law, has developed rules that govern motions for reargument under Local Rule 7.1.5.[1] These governing principles are simply stated: 1) reargument should be granted only when the merits clearly warrant and should never be afforded a litigant if reargument would not result in an amendment of an order, *see StairMaster Sports/Medical Products v. Groupe Procycle, Inc.*, 25 F. Supp. 2d 270, 292 (D. Del. 1998); 2) the purpose of reargument is to permit the Court to correct error without unduly sacrificing finality; 3) grant of the reargument motion can only occur in one of three circumstances: a) "where the Court has patently misunderstood a party," b) "[where the Court] has made a decision outside the adversarial issues presented to the Court by the parties," or c) "[where the Court] has made an error not of reasoning but of apprehension," *see Brambles USA, Inc. v. Blocker*, 735 F. Supp. 1239, 1241 (D. Del. 1990); and 4) a motion for reargument may not be used by the losing litigant as a vehicle to supplement or enlarge the record provided to the Court and upon which the merits decision was made unless "new factual matters not previously obtainable have been discovered since the issue was submitted to the Court," *id.*

25 F. Supp. 2d 293, 295 (D. Del. 1998). Nowhere in its Motion does Miller allege that I have misunderstood a party, made a decision outside of the adversarial issues

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[1]A motion for reargument under Local Rule 7.1.5 is the "functional equivalent of a motion to alter or amend judgment under Federal Rule of Civil Procedure 59(e). *Kavanagh v. Keiper*, 2003 U.S. Dist. LEXIS 23931 at *4 n.2 (D. Del. July 24, 2003) (citing *New Castle County v. Hartford Accidnet and Indem. Co.*, 933 F.2d 1162, 1176-77 (3d Cir. 1991)).

presented to me, or made an error of apprehension. For this reason alone its Motion should be denied.

However, I disagree with Miller's assertion that my Memorandum Order somehow created an issue of first impression that Miller was unable to address in its Motion for Summary Judgment, especially since there has been no intervening change in the law relating to the on-sale bar or in the facts of this case since I issued that order. As I stated in my earlier Memorandum Order, the Federal Circuit has repeatedly held that the on-sale bar does not apply "where a patented method is kept secret and remains secret after a sale of the unpatented product of the method. Such a sale prior to the critical date is a bar if engaged in by the *patentee or patent applicant, but not if engaged in by another.*" (D.I. 200 at 7 (emphasis added) (citing *In re Caveney*, 761 F.2d 671, 675 (Fed. Cir. 1985) (citing *W.L. Gore & Assocs., Inc. v. Garlock, Inc.*, 721 F.2d 1540, 1550 (Fed. Cir. 1983), *cert. denied*, 469 U.S. 851 (1984)); *D.L. Auld Co. v. Chroma Graphics Corp.*, 714 F.2d 1144, 1147-48 (Fed. Cir. 1983).) I applied this and other well-settled law to the facts of this case in reaching the conclusions in my Memorandum Order. (*See* D.I. 200.)

In light of this case law, Miller's attempt to create a distinction between suppliers and third party strangers is without merit, (D.I. 203 at 3), as there are only two categories of people recognized by the Federal Circuit when considering the on-sale bar in the context that it arises in this case: (1) patentees/patent applicants, and (2) all others. *See Caveney*, 761 F.2d at 675.

Within the category of "all others," there is no distinction between third party strangers, suppliers, or anyone else who is not seeking or does not have patent protection for the product or process at issue.

Accordingly, it is hereby ORDERED that Miller's Motion (D.I. 203) is DENIED.

Kent A. Jordan
UNITED STATES DISTRICT JUDGE

June 4, 2004
Wilmington, Delaware