

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

ISCO INTERNATIONAL, INC.,)	
)	
Plaintiff,)	
)	C.A. No. 01-487-GMS
v.)	
)	
CONDUCTUS, INC. AND)	
SUPERCONDUCTOR)	
TECHNOLOGIES, INC.,)	
)	
Defendants.)	

MEMORANDUM AND ORDER

I. INTRODUCTION

On October 30, 2002, the court issued an order as to the construction of the disputed claims of the patent-in-suit. The plaintiff, ISCO International, Inc. (“ISCO”) has requested clarification as to the court’s construction of Claim 10. In the event that the court’s construction was intended as ordered, ISCO requests supplemental briefing on the issue, which it believes to have been impacted by the court’s construction as ordered. Because the claim construction order is correct as issued, and for the reasons that follow, the court will grant ISCO’s request for supplemental briefing.

II. DISCUSSION

A. Clarification Regarding the October 30, 2002 Order

The relevant part of the court’s construction of Claim 10 reads: “For purposes of this litigation, the term should read ‘planar amplifiers’ and not ‘amplifiers.’” The court did not transpose the operative terms of the claim construction in its order. The order is correct as issued.

B. ISCO's Request for Supplemental Briefing

The plaintiff contends that supplemental briefing should be allowed on the grounds that “ISCO previously assumed that the typographical error in the term ‘planar amplifier’ would govern the claim construction on this issue” and that, therefore, the issue “was not treated in ISCO’s briefs.” The court looks upon this argument with great disfavor. It is not the plaintiff’s role in the litigation to assume a particular claim construction, or any other issue clearly within the court’s discretion. Having “assumed” incorrectly, the plaintiff garners little sympathy. Furthermore, ISCO can hardly complain that, because it did not adequately prepare for a ruling it perceives as unfavorable, it should be allowed supplemental briefing. The preparedness and foresight of counsel, or lack thereof, is not compelling grounds to alter the court’s briefing schedule.

In addition, the plaintiff argues that it assumed a particular claim construction because it had relied upon the parties’ Joint Claim Construction. The court finds this argument somewhat disingenuous. The plaintiffs mentioned the relevant Joint Claim Construction passage only once in its two *Markman* briefs, and never mentioned it at all in the *Markman* hearing itself. It was only upon the court’s *sua sponte* questioning on the issue¹ that the disputed footnote of the Joint Claim Construction was discussed at all in the hearing. ISCO’s claim that it had relied upon the footnote is unpersuasive, particularly given that a Joint Claim Construction, while helpful to the court, certainly is not a binding legal stipulation.

Nevertheless, because the construction of these terms may bear upon the disposition of motions pending before the court, and in the interests of fairness, the court will grant the plaintiff’s motion for supplemental briefing. Although the court does not condone the plaintiff’s grounds for

¹ See Tr. 92:15-17.

requesting such supplemental briefing, the court finds that the significance of the issue at hand warrants thorough treatment by the parties.

III. CONCLUSION:

For the aforementioned reasons, IT IS HEREBY ORDERED that:

1. The plaintiff's request for supplemental briefing is GRANTED.
2. Such briefing shall constitute no more than one brief by the plaintiff and one brief by the defendants. Each brief shall constitute no more than five (5) pages, and shall relate only to the issue of "planar amplifiers" or "amplifiers," as these terms relate to pending motions already submitted to the court.
3. The plaintiff's brief shall be submitted by November 12, 2002. The defendants' brief shall be submitted by November 18, 2002.

Dated: November 6, 2002

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE