

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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

MEMORANDUM AND ORDER

I. INTRODUCTION

The plaintiff, ISCO International, Inc. (“ISCO”), filed the above-captioned suit against Conductus, Inc. (“Conductus”) and Superconductor Technologies, Inc. (“STI”) (collectively “the defendants”) on July 17, 2001, alleging patent infringement. The parties each filed numerous motions for summary judgment. These included the defendant Conductus’ Motion for Summary Judgment of Invalidity of All Asserted Claims for Causes of Action Existing Prior to the Date of Issuance of a Certificate of Correction and of Invalidity of Claim 13 (D.I. 205). The court denied that motion by an order entered on February 10, 2003 (D.I. 370). The court found, *inter alia*, that the inclusion of the word “planar” in Claim 10 of the patent-in-suit was the result of a clear typographical error, and therefore shall be disregarded. Presently before the court is the defendants’ motion for reargument and/or reconsideration of that aspect of the February 10, 2003 order (D.I. 375). For the reasons that follow, the court will deny the motion.

II. STANDARD OF REVIEW

As a general rule, motions for reconsideration should be granted only “sparingly.” *Karr v. Castle*, 768 F. Supp. 1087, 1090 (D. Del. 1991). In this district, these types of motions are granted only if it appears that the court has patently misunderstood a party, has made a decision outside the adversarial issues presented by the parties, or has made an error not of reasoning, but of apprehension. *See, e.g., Shering Corp. v. Amgen, Inc.*, 25 F. Supp. 2d 293, 295 (D. Del. 1998); *Brambles USA, Inc. v. Blocker*, 735 F. Supp. 1239, 1240 (D. Del. 1990) (citing *Above the Belt, Inc. v. Mel Bonhannan Roofing, Inc.*, 99 F.R.D. 101 (E.D. Va. 1983)); *see also Karr*, 768 F. Supp. at 1090 (citing same). Moreover, even if the court has committed one of these errors, there is no need to grant a motion for reconsideration if it would not alter the court’s initial decision. *See Pirelli Cable Corp. v. Ciena Corp.*, 988 F. Supp. 424, 455 (D. Del. 1998). Finally, motions for reconsideration “should not be used to rehash arguments already briefed.” *TI Group Automotive Systems, (North America), Inc. v. VDO North America L.L.C.*, 2002 WL 87472 (D. Del. 2002) (citation omitted); *see also Quaker Alloy Casting v. Gulfco Industries, Inc.*, 123 F.R.D. 282, 288 (N.D. Ill. 1988) (“[T]his Court’s opinions are not intended as mere first drafts, subject to revision and reconsideration at a litigant's pleasure.”).

III. DISCUSSION

The defendants argue that reargument or reconsideration is necessary for several reasons. First, they contend that, contrary to the court’s suggestion, the plaintiff does not agree that the term “planar amplifiers” has no meaning to someone skilled in the relevant art. Second, the defendants argue that the error at issue is not “minor,” as the court concluded. Third, the movants urge that even if the typographical error is apparent from the patent’s file history, that fact does not support

a decision by the court to disregard the error. Finally, the defendants argue that Federal Circuit precedent does not suggest that courts may disregard typographical errors in contexts analogous to the present one. The court will address each of these arguments in turn.

A. ISCO’s Position Regarding the Term “Planar Amplifiers”

In its February 10, 2003 order, the court noted that the parties agree “that the term ‘planar amplifiers’ is senseless to any person skilled in the relevant art” and cited briefing by ISCO and Conductus for support. *ISCO International, Inc. v. Conductus, Inc.*, 2003 WL 276250, at *4 (D. Del. 2003). The defendants now object that ISCO does not, in fact, agree that the term “planar amplifiers” has no meaning to someone skilled in the art. The movants cite passages of ISCO’s supplemental briefing for support. ISCO, however, reiterates that “the evidence shows that the parties agree that the insertion of the word ‘planar’ was a clear error which anyone skilled in the art would recognize as such.” Pl.’s Answer in Opposition to Def.’s Motion at 3.

The court is of the opinion that the plaintiff consistently has maintained that the phrase “planar amplifiers” is a typographical error obvious to anyone skilled in the art. The fact that ISCO argued otherwise in a supplemental briefing in response to the court’s initial claim construction does not alter the parties’ otherwise unceasing insistence that the typographical error is a clear mistake and/or that it renders claim 10 senseless to those skilled in the art. Advocates, of course, are permitted to assert inconsistent positions. *See, e.g.*, FED. R. CIV. P. 8 (“A party may also state as many separate claims or defenses as the party has regardless of consistency . . .”). Furthermore, as the court’s February 10, 2003 order was not grounded in the parties’ constructions of the claim,

this objection by the defendants is largely irrelevant. Even if ISCO had argued otherwise, the court would have disregarded the error at issue.

B. Nature of the Error

The court distinguished the error at issue in this case – the inadvertent inclusion of a single word – from cases in which, for example, an entire appendix was mistakenly omitted from a patent application. *See ISCO International, Inc.*, 2003 WL 276250, at *4 n.4. The defendants object that the *nature* of the error at issue renders it significant, because disregarding the typographical error “would substantially broaden claim 10.” Def.’s Opening Brief at 3.

The court is mindful of the significance of the error at issue and the consequences of disregarding it. The court disagrees, however, that disregarding an obvious typographical error would broaden the claim. Disregarding the printing mistake does not change the meaning or scope of the claim at all, but merely recognizes the meaning and scope of the claim as any skilled person in the relevant art would perceive them.

In addition, the court noted in its order that the nature of the correction at issue comported with the policy considerations at issue in Federal Circuit precedent holding that a Certificate of Correction has prospective effect only. The court wrote that its conclusion

does not offend the policy considerations underlying *Southwest* and its progeny, *i.e.*, to allow “reasonable competitors” to “conduct[] their affairs” according to a reasonable understanding of the claim terms. Here, the evidence shows that the parties agree that the insertion of the word “planar” was a clear error which anyone skilled in the art would recognize as such, especially because the phrase “planar amplifiers” occurs nowhere else in the patent claims. Thus, a reasonable competitor would know that a mere typographical error had occurred, and would conduct its

affairs accordingly. It would be illogical for *reasonable* competitors to rely upon an inadvertent error such as the one at issue here as the sole basis for avoiding a patent infringement lawsuit or a finding of infringement as to that claim.

ISCO International, Inc., 2003 WL 276250, at *5 n. 4 (citing *Southwest Software, Inc. v. Harlequin, Inc.*, 226 F.3d 1280 (Fed. Cir. 2000)) (holding that Certificate of Corrections issued pursuant to 35 U.S.C. § 254 have prospective effect only). Thus, the court considered the nature of the error at issue in its original order.

Moreover, the court notes that the significance of the correction is grounded, too, in the fact that it removes an invalidity challenge from the defendants' arsenal. By disregarding the typographical error, the court renders moot the defendants' assertion that the phrase "planar amplifiers" causes claim 10 to be indefinite. This consequence of the court's ruling, although significant and distasteful to the defendants, does not constitute appropriate grounds for reconsideration of the order.

C. Relevance of the File History

The defendants argue that the determination "as to whether the error is readily apparent must be made with reference only to the patent itself, and not to the prosecution history." Def.'s Opening Brief at 3. Relevant precedent holds otherwise, however. For example, in *Superior Fireplace Co. v. Majestic Prods. Co.*, the court held that "a broadening correction of a clerical or typographical error [is] allowed only where it is clearly evident from the specification, drawings, and prosecution

history how the error should appropriately be corrected.”¹ *Superior Fireplace*, 270 F.3d 1358, 1373 (Fed. Cir. 2001). Similarly, in *EMI Group North America, Inc. v. Cypress Semiconductor Corp.*, the court “agree[d] that the claims should be corrected as advocated by EMI” because the “printing error[s] are apparent from the file history.” *EMI Group*, 68 F. Supp. 2d 421, 438 (D. Del. 1999), *aff’d in relevant part*, 268 F.3d 1342 (Fed. Cir. 2001). Both of these appeals are post-*Southwest*. Thus, it seems reasonable that the Federal Circuit intended that obvious typographical errors, when apparent from the patent and its file history, may be disregarded or corrected by courts, just as they would be disregarded or corrected by those skilled in the relevant art. As stated in the court’s February 10, 2003 order, this approach does not offend the policy considerations which motivated the decision in *Southwest*.

Furthermore, the court relied upon other evidence for its conclusion that the mistake was obvious. For example, it noted that “the term ‘amplifier’ is introduced in claim 10 without the preceding modifier ‘planar’” and that “Claim 10 reads, in relevant part, ‘a plurality of amplifiers,’ and, later, ‘the plurality of planar amplifiers.’” *ISCO International, Inc.*, 2003 WL 276250, at *4, *4 n.2. The defendants’ own argument that the court should look only to the patent in determining whether an error is readily apparent, then, supports the court’s conclusion.

¹ The court recognizes that the error at issue in *Superior Fireplace* was corrected by 35 U.S.C. § 255, “Certificate of correction of applicant mistake,” whereas in the present case the relevant statute is 35 U.S.C. § 254, “Certificate of correction of Patent and Trademark Office mistake.” To the extent the statutes are analogous, the court believes *Superior Fireplace* is relevant and instructive. In addition, the distinction would tend to support the court’s holding, in that it would be illogical for the standard for correcting a mistake of the PTO to be more strict than the standard for correcting an error of the patent applicant himself.

The defendants further argue that “even if an error was readily apparent from the patent itself, it is not determinative.” Def.’s Opening Brief at 3 n.4. The movants cite *Southwest* for support, arguing that in that case “the error was readily apparent from the patent, which, in its original form, made reference to, but did not include, the appendix.” *Id.* In this aspect, however, *Southwest* is utterly distinguishable from the present case. Although the absence of the appendix may have been apparent from the patent, the correction was not. The appendix constituted 330 pages which contained source code necessary to enable certain calibrations according to the invention. *Southwest*, 226 F.3d at 1291, 1296. Obviously, the patent did not render obvious the contents of the missing 330 pages of source code. Thus, the court, nor the public, nor those skilled in the art, could know how to correct the mistake until the Certificate of Correction issued and the appendix itself was added to the patent. By contrast, in the present case, and in all of the cases which the court has reviewed in which courts have disregarded obvious typographical errors, the mistake as well as the intended meaning were both apparent. In the instant case, it is clear that the word “planar” was inadvertently added before “amplifiers” and that the claim should read simply “amplifiers.” Thus, the defendants’ attempted reliance upon *Southwest* in this context fails to support their appeal for reconsideration.

D. Relevant Federal Circuit Precedent

Finally, the movants argue that “Federal Circuit has not established a rule for disregarding typographical errors.” Def.’s Opening Brief at 4. This argument was asserted by the defendants and considered by the court in the course of the disposition of the original

summary judgment motion. The court recognizes that, since *Southwest*, there has not been a direct confrontation of the exact question raised in the present case, that is to say, the court's ability to disregard an obvious typographical error, notwithstanding a Certificate of Correction that issued after the lawsuit was initiated. These considerations, however, were addressed in the court's February 10, 2003 order. Thus, the defendants have not shown by this argument that reconsideration is warranted.

IV. CONCLUSION

The defendants fail to raise any significant or relevant argument that was not briefed by the parties and considered by the court in connection with the original motion for summary judgment. The movants have not shown that the court patently misunderstood a party, made a decision outside the adversarial issues presented by the parties, or made an error not of reasoning, but of apprehension. Therefore,

IT IS HEREBY ORDERED that:

1. The defendants' Motion for Reargument and/or Reconsideration (D.I. 376) is DENIED.

Date: March 6, 2003

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE