

Farnan, District Judge.

Pending before the Court is the Request For Partial Reconsideration Of Claim Construction Decision (D.I. 175) filed by Defendants, SRU Biosystems, LLC, SRU Biosystems, Inc. and SRU Biosystems Holdings, LLC (collectively, "SRU"). By its Motion, SRU requests reconsideration pursuant to D. Del. L.R. 7.1.5 of two terms, "waveguiding structure" and "waveguiding film," construed by the Court in its July 9, 2004 claim construction decision. For the reasons set forth below, the Court will deny SRU's request for partial reconsideration.

DISCUSSION

I. Legal Standard For Reargument Under D. Del. L.R. 7.1.5

Although not explicitly provided for in the Federal Rules of Civil Procedure, Local Rule 7.1.5 provides for the filing of reargument motions. See D. Del. L.R. 7.1.5. The decision to grant a motion for reargument lies within the discretion of the district court; however, such motions should only be granted sparingly. Dentsply Int'l, Inc. v. Kerr Mfg. Co., 42 F. Supp. 2d 385, 419 (D. Del. 1999).

A motion for reargument "should not be used to rehash arguments already briefed or to allow a 'never-ending polemic between the litigants and the Court.'" Id. (citing Ogelsby v. Penn Mutual Life Ins. Co., 877 F. Supp. 872, 892 (D. Del. 1995)). As such, a motion for reargument may only be granted in three

narrow circumstances: (1) where the court has patently misunderstood a party, (2) where the court has made an error not of reasoning, but of apprehension, or (3) where the court has made a decision outside the scope of the issues presented to the court by the parties. Id. (citing Pirelli Cable Corp v. Ciena Corp., 988 F. Supp. 424, 445 (D. Del. 1998)). With this standard in mind, the Court will address SRU's Motion for reconsideration

II. SRU's Motion For Reconsideration

By its Motion, SRU contends that the Court erred in its construction of the terms "waveguiding structure" and "waveguiding film." Specifically, SRU requests the Court to add the following language, indicated by bold, italicized print, to the Court's claim construction.

"Waveguiding structure" means: "A structure ***that confines light***, formed by a waveguiding film and a substrate and containing a diffraction grating."

"Waveguiding film" means: "A film which, in combination with a sample having a lower index of refraction and a substrate can guide light along a path by ***total internal reflection***."

(D.I. 157 at 2). SRU contends that by declining to include the "confining light" limitation in the term "waveguiding structure," the Court overlooked intrinsic evidence contained in Ilan Chabay, "Optical Waveguides," Analytical Chemistry, vol. 54, no. 9, pp. 1071A-1080A (Aug. 1982) (the "Chabay reference"). SRU contends

that the Chabay reference was cited during the prosecution of the '843 patent and identified on the face of the patent, such that it constitutes controlling intrinsic evidence. SRU contends that the Chabay reference is the only intrinsic evidence directly on point, and the Chabay reference makes clear that a waveguiding structure confines light.

With respect to the term "waveguiding film," SRU contends that the Court's construction is based on a misunderstanding of the patent specification. SRU contends that regardless of whether a strip is used for waveguiding, the light is still guided by total internal reflection. SRU contends that this definition is consistent with the treatise P.K. Tien, "Light Waves In Thin Films And Integrated Optics," Applied Optics, vol. 10, pp. 2395-2413 (1971).

Reviewing the Court's claim construction decision, the Markman hearing transcript, and the submissions by the parties in connection with this Motion and the Markman hearing, the Court concludes that reconsideration of its claim construction decision is not warranted. SRU presented the same arguments it advances here at the Markman hearing and in the Markman briefing. The Court considered these arguments in rendering its construction of the disputed terms, and thus, SRU's Motion attempts to relitigate matters already considered and decided by the Court. Accordingly, the Court concludes that SRU has not stated a

cognizable ground justifying reconsideration under D. Del. L.R. 7.1.5.

Further, even if the Court were to consider the substance of SRU's argument, the Court would not grant reconsideration and would render the same claim construction it rendered in its July 9, 2004 decision. Although the Court did not refer to the Chabay reference as intrinsic evidence in its decision, the Court considered the Chabay reference in construing the term "waveguiding structure." Further, the fact that the Chabay reference may be considered intrinsic evidence does not support SRU's assertion that it is controlling as to the definition of "waveguiding structure." In Kumar v. Ovanic Battery Co, 351 F.3d 1364 (Fed. Cir. 2003), the Federal Circuit found a prior art reference cited during the prosecution history of the patent at issue to be controlling where the applicant and the examiner considered the reference to be highly pertinent and it was discussed extensively and distinguished during the prosecution of the patent. Unlike Kumar, in this case, SRU has not demonstrated that the applicant discussed the Chabay reference extensively during the prosecution of the '843 patent or that the applicant embraced the Chabay reference as applying specifically to the claims. Further, the Chabay reference must be considered along

with the other intrinsic evidence¹, and this evidence contradicts SRU's position that the "waveguiding structure" must confine light. As the Court pointed out in its July 9 decision, at least two embodiments, Figures 3 and 7 of the '843 patent, show that a portion of the waveguiding structure is intentionally used to direct light out of the waveguiding structure. Taking the intrinsic evidence as a whole, the Court is not persuaded that the limitation of "confining light" should be added to the Court's definition of "waveguiding structure."

Similarly, with respect to the term "waveguiding film," the Court concludes that the limitation of "total internal reflection" suggested by SRU is not supported by the claim language or the specification. The Federal Circuit has cautioned against importing limitations from the specification into the claim. See Amgen Inc. v. Hoechst Marion Roussel, Inc., 314 F.3d 1313, 1325 (Fed. Cir. 2003); Arlington Indus., Inc. v. Bridgeport Fittings, Inc., 345 F.3d 1318, 1327 (Fed. Cir. 2003). Further, as the Court noted in its July 9 decision, the specification does not support the limitation proposed by SRU. While the specification does describe embodiments which include the requirement of total internal reflection, it also suggests the use of other structures for the purpose of waveguiding, and as

¹ See Rexnord Corp. v. Laitram Corp., 274 F.3d 1336, 1343 (Fed. Cir. 2001); DeMarini Sports, Inc. v. Worth, 239 F.3d 1314, 1324 (Fed. Cir. 2001).

indicated by those skilled in the art, these other structures do not necessarily require total internal reflection. '843 patent, col. 2, ll. 40-44, 53-56, col. 3, ll. 43-47, col. 8, ll. 39-40; Pollock Decl. at ¶ 27-29, 31-33. Accordingly, the Court is not persuaded that the limitation of "total internal reflection" should be added to the Court's construction of the term "waveguiding film."

CONCLUSION

For the reasons discussed, the Court will deny SRU's Request For Partial Reconsideration Of Claim Construction Decision.

An appropriate Order will be entered.

