IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

INGURAN, LLC d/b/a STGENETICS, XY, LLC, and CYTONOME/ST, LLC, Plaintiffs/Counterclaim-Defendants, v. ABS GLOBAL, INC., GENUS PLC, and PREMIUM GENETICS (UK) LTD, Defendants/Counterclaim-Plaintiffs.	Case No. 3:17-cv-446

REPLY IN SUPPORT OF MOTION FOR ENTRY OF PARTIAL FINAL JUDGMENT UNDER RULE 54(B)

Defendants fail to identify any just reason for delay in entering judgment on the adjudicated XY patent, trade secret misappropriation, and ST breach of confidentiality claims. While Defendants repeatedly state that there is "extensive" and "substantial" factual overlap between the pending and adjudicated claims, they fail to identify any actual overlapping factual issues. Instead, they broadly characterize the claims as relating to the "same accused GSS Technology." Tangential similarities at such a high level of generality are not relevant to determining if claims may be appealed separately under Rule 54(b). In reality, there is almost no overlap in the substantive facts underlying the adjudicated claims—which relate to XY's fluid media patents and trade secrets—and the pending claims—which relate to Cytonome's microfluidic patents and an alleged breach of contractual quality control terms.

Defendants' contention that an appeal of the dismissed claims may eventually become moot similarly fails to raise a just reason for delaying the appeal. Even if relevant under the law, which it is not, Defendants' mootness argument is based purely on speculation about the outcome of a pending *inter partes* review and Defendants' unfounded theory that ST would not pursue an appeal

of the dismissed claims if required to wait until after trial. There is no contention that these claims are in fact moot or that the Court's judgment is not final, nor can Defendants reasonably make such claims.

Because there is no just reason to delay the appeal of the adjudicated claims, the Court should grant Plaintiffs' motion. This is particularly true because an immediate appeal would promote overall judicial economy. While Defendants focus on the posture of this particular lawsuit, they fail to acknowledge the benefit to overall judicial economy in view of the co-pending District of Colorado case. A final resolution of this Court's decision on written description in the '822 Patent would streamline the issues for that court and have no negative impact on the efficiencies in this court. This is precisely why Judge Martinez specifically "encourag[ed] XY to use [his] order as a basis for requesting Rule 54(b) judgment as to the '822 Patent" here. Dkt. 273-1, Ex. A at 6.

A. The Dismissed Claims Are Separable from the Remaining Claims in the Case, Reducing Any Risk of Piecemeal Appeals on Overlapping Issues.

Defendants' brief is heavy on rhetoric, claiming "extensive," "substantial," and "striking" factual overlap between the pending claims and the adjudicated claims, but Defendants fail to identify any specific interrelated factual or legal issues that might create a "just reason for delay." Instead, Defendants refer to the fact that each set of claims generally involves ABS's "GSS Technology." Dkt. 278 at 1, 5. Such a generalized and high-level similarity does not create the type of "piecemeal appeal" that courts are concerned with. In *HTC Corp. v. IPCom GMBH & Co., KG*, for example, the court certified a Rule 54(b) appeal on two patents while proceeding with a third even though the "technology involved in [all] three patents relate[d] to mobile phones." 285 F.R.D. 130, 132 (D.D.C. 2012). The court reasoned that for Rule 54(b) certification, the "[p]atents

de[alt] with different technologies, the infringement evidence for each [wa]s unique, and HTC's invalidity arguments for each [wa]s distinct." *Id.* That is precisely the case here.

Contrary to Defendants' conclusory assertion, there is virtually no substantive factual overlap between the pending and adjudicated claims. The pending Cytonome patents, which are directed to microfluidic sheath flow structures, and the dismissed XY patents, which are directed to media for handling and lessening stress on cells, have different owners, different inventors, different inventive origins, different file histories, involve different technologies, and share none of the same prior art. While ABS does indeed implement both of these families of inventions in aspects of its GSS Technology, the facts underlying the bases for infringement are unrelated for purposes of certification of partial judgment. *See, e.g., Interdigital Commc'ns, Inc. v. ZTE Corp.*, No. CV 13-009-RGA, 2016 WL 3226011, at *2 (D. Del. June 7, 2016) ("Since there is no overlap between the adjudicated power ramp-up patent infringement claims and the unadjudicated '244 patent infringement claims, I conclude that this first fact favors a certification of partial final judgment."). Similarly, there is no overlap with respect to the validity of the patents in light of the differences in the claims, filing dates, and alleged prior art. *Compare* Dkts. 130, 131, 144 (describing the infringement and validity theories related to the Cytonome Patents), *with* Dkts. 135, 145 (describing the infringement and validity theories related to the XY Patents).

Although Defendants make an effort to distinguish it, *WiAV Sols. LLC v. Motorola, Inc.*, discussed in Plaintiffs' motion, is highly instructive. No. 3:09-cv-447, 2010 WL 883748 (E.D. Va. Mar. 9, 2010). Defendants represent that *WiAV* turned solely on standing, but that is not the case. *See* Dkt. 278 at 6. In fact, standing was only one "factor" out of several that supported certification of the claims for appeal. *WiAV*, 2010 WL 883748 at *2, The *WiAV* court examined differences between the patents-in-suit and the dismissed claims and concluded that "factual distinctions

between the claims counsel[ed] in favor of certification." *Id.* The key factual distinctions found in *WiAV* are all present here—including no overlap in inventors, no overlap in disputed claim terms, different prior art references, different invalidity contentions, and different allegations of infringement on the same accused product. *See id.*

There is also no substantive factual overlap between ABS's pending breach of contract claim and the dismissed trade secret misappropriation and breach claims that might justify delay. ABS does not (and cannot) allege any overlap between the pending claims and the dismissed trade secret claims. And the mere fact that both breach claims stem from the 2012 Agreement alone is insufficient to create an overlapping fact issue. The substance of the 2012 Agreement is not at issue at all in the appeal of the Court's res-judicata-based decision on XY's breach claim. In any event, Defendants' breach of contract counterclaim relates to an entirely different provision of the 2012 Agreement. Any overlap between the remaining and dismissed breach of contract claims is purely tangential and should not foreclose Rule 54(b) certification. *W.L. Gore & Assocs., Inc. v. Int'l Med. Prosthetics Research Assocs.*, 975 F.2d 858, 864 (Fed. Cir. 1992) ("[F]actual overlap on only tangential issues or on 'one aspect' of a counterclaim is not adequate to show an abuse of discretion.").

B. Defendants' Speculation Regarding Potential Mootness of Issues Does Not Preclude Rule 54(b) Certification.

Defendants speculate that subsequent proceedings or litigation strategies might render an appeal of the dismissed claims moot, but ABS's mischaracterization of the record and its wishful thinking regarding the outcome of the pending *inter partes* review do not justify delay. As an initial matter, even if true, an attenuated possibility of mootness is not a basis for denying ST's motion. *See Medeva Pharma Suisse A.G. v. Par Pharm., Inc.*, No. CV 10-4008 (FLW), 2011 WL 13147213, at *2 (D.N.J. May 16, 2011) (granting 54(b) certification and explaining that "Plaintiffs'

argument that future developments may render the standing issue moot is not persuasive; the Court finds Plaintiffs' argument too speculative at this juncture to rely upon"). A number of courts have held that Rule 54(b) certification was appropriate even where subsequent proceedings may obviate the need for an appeal. *See, e.g.*, *Cadillac Fairview/Cal., Inc. v. United States*, 41 F.3d 562, 564 n.1 (9th Cir. 1994) (asserting the district court did not abuse its discretion in certifying an appeal despite the fact that subsequent proceedings might render the appeal unnecessary); *Cont'l Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1525 (9th Cir. 1987) (affirming a lower court's Rule 54(b) judgment despite the possibility that plaintiff may never "appeal the instant judgments if the case had been compelled to go forward").

Moreover, Defendants' theories for why the appeal may be moot are highly speculative and involve mischaracterizations of the record. First, Defendants theorize that ST "might not" appeal the dismissed claims because ST has allegedly not adequately pursued its damages theories on infringement of the dismissed patents and trade secret theft. Dkt. 278 at 7–8. With respect to damages for infringement of the fluid media patents, at the hearing on summary judgment, the Court invited ST to provide a rebuttal report quantifying damages for the use of ABS's revised protocols. Dkt. 245 at 38:8–39:13. Less than three weeks later—before ST's expert had the opportunity to complete the report—the Court entered summary judgment on the XY patent claims. *See* Dkt. 270. Accordingly, Defendants' assertion that ST "has not even attempted to provide" a revised report is a gross mischaracterization. *See* Dkt. 278 at 7. Defendants also criticize Plaintiffs for failing "to disclose quantifiable damages for their trade-secret and breach-of-contract claims." *Id.* But this is likewise inaccurate. In a proffer submitted to the Court, Plaintiffs expressly claimed trade secret misappropriation and breach of contract damages in the "$1–2 million range" for each claim. Dkt. 246 at 2–3.

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