

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

BOOTLER, LLC d/b/a FOODBOSSE,

Plaintiff,

v.

GOOGLE, LLC,

Defendant.

Case No. 1:24-cv-03660

Judge Jeffrey Cummings

**PLAINTIFF’S BOOTLER, LLC’S REPLY TO DEFENDANT’S OPPOSITION TO
PLAINTIFF’S MOTION UNDER RULE 54(B) TO MAKE JUDGEMENT ON PATENT
CLAIMS FINAL**

Plaintiff respectfully submits this Reply in support of its Motion Under Rule 54(b) to Make Judgment on the Patent Claims Final (ECF No. 50, the “Motion”).

I. Summary of Arguments in Reply

Defendant’s Opposition dated September 23, 2025 (ECF No. 53, the “Opposition”) fails to address *any* of the Federal Circuit or Seventh Circuit Rule 54(b) factors. The standard for granting a Rule 54(b) certification requires the court to find that there is “no just reason for delay,” and the case law identifies the relevant factors. *W.L. Gore & Assocs., Inc. v. Int’l Med. Prosthetics Rsch. Assocs., Inc.*, 975 F.2d 858, 861 (Fed. Cir. 1992). The Opposition fails to address *any* of them, stating only that there is “considerable doubt that Plaintiff will be able to plead antitrust claims that can withstand a motion to dismiss,” and that Rule 54(b) finality therefore “risks multiple, concurrent appeal proceedings that would waste judicial resources and unfairly burden Google.” (Opposition at 1.) Because neither argument has merit, and therefore neither presents a relevant consideration, Plaintiff’s motion should be granted.

Defendant does not dispute that the Patent Case is final. Instead, Defendant's argues that Plaintiff's request is "premature," contending that "prior to filing an amended complaint, there is no way for Google ... or the Court to determine ... the critical questions of the overlap of legal issues or factual interrelatedness among the claims." (*Id.* at 1, 3.) And, that "[a]gainst this uncertainty, the Court need not take Plaintiff's word that its amended complaint ... will not result in judicial inefficiency and piecemeal appeals." (*Id.* at 5.) But, Plaintiff did not merely ask the Court to '*take its word*' that its amended complaint will not include facts or legal theories that overlap with the Patent Case. Instead, Plaintiff offered clear reasoning that because the dismissal of the Patent Case was determined entirely from the record of the Asserted Patents and their underlying technology, there could be no additional facts to include in any amended complaint that could revive the Patent Case.¹ Second, Plaintiff's Amended Complaint filed September 25, 2025 (ECF No. 54, the "Amended Complaint") completely renders Defendant's foregoing reservations moot.² The Amended Complaint no longer contains any patent allegations and therefore unmistakably separates the Amended Antitrust Case (defined and discussed below) from the dismissed Patent Case, both legally and factually.

Defendant pivots to its position that dismissal of the Amended Complaint is inevitable, and will therefore result in piecemeal litigation. But here, it is *Defendant* who asks the Court to

¹ Plaintiff further demonstrated that the dismissed Patent Case is sufficiently final and separable from the Antitrust Case, which was not disputed by Defendant in its Opposition.

² Further, Defendant's additional assertion that there is "considerable doubt about whether Plaintiff will be able to plead antitrust claims that can withstand a motion to dismiss," thereby "risk[ing] multiple, concurrent appeal proceedings" is not well taken as it lacks sufficient and credible evidence. It is improper to assert that 54(b) certification is not warranted because it is unlikely that Plaintiff's Amended Antitrust Case will survive a motion to dismiss. Defendant has no way of knowing whether Plaintiff's Amended Antitrust Case will survive a motion to dismiss. The Defendant is improperly tying the 54(b) analysis with an unknown, unlikely outcome.

“take its word for it” by resting its opposition on the unknowable, unbriefed, and unjustified presumption that Plaintiff cannot state an antitrust claim. Defendant’s confidence cannot carry the weight Defendant thinks it bears. And, Defendant’s belief that a Rule 54(b) judgment would *prevent* piecemeal appeals is true *only if* Defendant’s confidence is doubly justified—successful appeal of this Court’s decision in the Patent Case would *guarantee* piecemeal litigation.

The Opposition offers no persuasive reason to depart from the legal conclusions supported in Plaintiff’s Motion. Thus, for the reasons set forth in the Motion and reinforced herein, entry of final judgement under Rule 54(b) is proper because the Patent Case is a final, appealable decision distinct from the Amended Antitrust Case.

II. ARGUMENT

A. Partial Final Judgement Under Rule 54(b) Is Appropriate

In its Amended Complaint, Plaintiff brought antitrust claims against Defendant on the grounds that Defendant’s “anticompetitive predatory pricing and self-preferencing scheme” is injuring Plaintiff and the “Comparative Restaurant Delivery Search market” (the “Amended Antitrust Case”). (Amended Complaint, ECF No. 53, at 29–30.)

Plaintiff’s reliance on the Federal Circuit’s decision in *W.L. Gore & Associates v. International Medical Prosthetics Research Associates, Inc.* remains pertinent to Plaintiff’s position and sufficient to resolve the Motion in Plaintiff’s favor.³ In *W.L. Gore*, the plaintiff sued defendant for patent infringement to which defendant raised an antitrust counterclaim based on patent misuse. *W.L. Gore & Assocs., Inc. v. Int’l Med. Prosthetics Rsch. Assocs., Inc.*, 975 F.2d 858, 860 (Fed. Cir. 1992). The district court certified the patent infringement judgement

³ The Seventh Circuit considerations discussed in the Motion also remain in favor of making the Patent Case final in view of the Amended Antitrust Case. (See ECF No. 51, at 5–6.) Defendant does not address any of those factors.

final pursuant to Rule 54(b) while the antitrust counterclaim for *patent misuse* remained unadjudicated. *Id.* The Federal Circuit affirmed that the Rule 54(b) certification was proper. *Id.* at 864–865. In reaching this conclusion, even while noting that the antitrust counterclaim related to the enforcement of the invalid patent (*i.e.*, patent misuse), the Federal Circuit dismissed defendant’s “conclusory assertions” of factual overlap and further held “factual overlap on only tangential issues or on one aspect of a counterclaim is not adequate to show an abuse of discretion.” *Id.* at 864. If the patent claims in *W.L. Gore* were final vis-à-vis the antitrust counterclaim (which related to enforcement of the patent in suit), they are even more so here (where the antitrust counterclaim has nothing to do with the underlying patented technology but relates to Google’s actions in the Comparative Restaurant Delivery Search market). Neither Defendant nor the Court has to take Plaintiff’s word on this because the Amended Complaint makes this unmistakably clear.

B. Final Judgment Under Rule 54(b) Will Necessarily *Shorten* the Litigation

Plaintiff further disagrees with Defendant and continues to hold that denial of a Rule 54(b) certification will prejudice Plaintiff. As a threshold matter, Defendant’s statement that the claims can be adjudicated in a “single final judgement” is erroneous. There would only be a single final judgement if (a) there is a judgement in Defendant’s favor on the Antitrust Case, *and* (b) the Federal Circuit affirms the Court’s invalidity judgment in the Patent Case on the basis of 35 U.S.C. § 101. Otherwise, there will be multiple judgements leading to multiple appeals, thus making certification proper. Further, Plaintiff *knows*⁴ Defendant will move to dismiss the Amended Complaint, which will delay resolution of the case for an indeterminate amount of

⁴ In its Opposition, Defendant’s statements all but confirmed that Defendant will move to dismiss the Amended Complaint.

time, all during which the Federal Circuit could be definitively resolving the Patent Case. And, even if Defendant's motion to dismiss fails, years of discovery, dispositive motions and trial will proceed while the unresolved Patent Case hangs in the balance. Thus, even if there is a single final judgment, *i.e.*, Defendant wins both in this Court on the Antitrust Case *and* at the Federal Circuit on the Antitrust Case *and* its Section 101 patent invalidity defense, that is the shortest time it will take to resolution, regardless of whether the Patent Case is final now or later. But, if Plaintiff prevails in its Section 101 appeal to the Federal Circuit, and especially if Plaintiff survives a motion to dismiss the Antitrust Case, the case will be certain to go on *longer* without a final judgment of the Patent Case under Rule 54(b).

Prompt certification of the judgment of the Patent Case as final under Rule 54(b) would permit the parties to definitively resolve the patent claims in parallel with the parties' litigation of the Amended Antitrust Case, actually reducing piecemeal appeals. It makes little sense to wait years for any judgment in the Amended Antitrust Case here, followed by appeal of that judgment and the very first appeal of the Patent Case, just to *begin* much later the Patent Case if Plaintiff is successful. That schedule would nearly ensure the case goes on *longer*, whereas a Rule 54(b) judgment now will, under every possible circumstance, mean the case will be resolved *sooner*.

Even if Defendant succeeds in dismissing the Amended Complaint, resolution of the case will not be delayed by allowing the Patent Case to proceed. If the Federal Circuit affirms this Court's decision invalidating the Asserted Patents, the case will simply go on as long as it takes to terminate the Antitrust Case (including the resolution of any potential appeal), whether by motion to dismiss here or later. If the Federal Circuit reverses this Court's decision in the Patent Case, then that case can be remanded for resolution in this Court sooner than would otherwise happen if all parties had to wait out the Antitrust Case—regardless of how and when the

Antitrust Case is resolved. Defendant's unsubstantiated concern about its "unfair burden" and piecemeal litigation wasting judicial resources simply will not pan out. Rule 54(b) is about "no just reason for delay," and a Rule 54(b) judgment on the Patent Case is the only way to *ensure* there is no delay in resolution of the case—the *whole* case.

III. CONCLUSION

Because all factors concerning finality and the lack of reason for delay favors a Rule 54(b) final judgment, Plaintiff respectfully requests that its Motion be GRANTED.

Dated: September 30, 2025

Respectfully submitted,

BOOTLER, LLC d/b/a FOODBOS

By: /s/ Daniel H. Shulman
By its Attorneys

Daniel H. Shulman
dshulman@vedderprice.com
Sudip K. Mitra
smitra@vedderprice.com
Monika J. Malek
mmalek@vedderprice.com
Vedder Price P.C.
222 North LaSalle Street, 26th Floor
Chicago, Illinois 60601
Tel: (312) 609-7500
Fax: (312) 609-5005

Brian K. McCalmon (*pro hac vice*)
bmccalmon@vedderprice.com
Vedder Price P.C.
1401 New York Ave. NW, Suite 500
Washington, DC 20005
Tel: (202) 312-3320
Fax: (202) 312-3322

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of September, 2025, I filed the aforementioned document with the Clerk of the above Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Daniel H. Shulman