

**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 MEMORANDUM IN SUPPORT OF ITS MOTION UNDER FEDERAL
RULE OF CIVIL PROCEDURE 54(B) TO MAKE JUDGMENT
ON PATENT CLAIMS FINAL**

TABLE OF CONTENTS

	Page(s)
I. BACKGROUND	1
II. ARGUMENT	2
A. LEGAL STANDARD.....	2
B. PARTIAL FINAL JUDGMENT UNDER RULE 54(B) IS APPROPRIATE	4
1. The Patent Case Is Completely Final and Separable from the Antitrust Case.....	4
2. There Is No Just Reason for Delay	6
III. CONCLUSION.....	7

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Allis-Chalmers Corp. v. Philadelphia Elec. Co.</i> , 521 F.2d 360 (3rd Cir. 1975)	3
<i>Bank of Lincolnwood v. Fed. Leasing, Inc.</i> , 622 F.2d 944 (7th Cir. 1980)	3, 5, 6
<i>Catlin v. U.S.</i> , 324 U.S. 229 (1945).....	3
<i>Cold Metal Process Co. v. United Eng’g & Foundry Co.</i> , 351 U.S. 445 (1956).....	3
<i>Curtiss-Wright Corp. v. General Elec. Co.</i> , 466 U.S. 1 (1980).....	3
<i>W.L. Gore & Assocs. v. Int’l Med. Prosthetics Research Assocs., Inc.</i> , 975 F.2d 858 (Fed. Cir. 1992).....	2, 3, 4, 5
Statutes	
35 U.S.C. § 101.....	1, 5
Rules	
FED. R. CIV. P. 54(b).....	<i>passim</i>

Plaintiff, Bootler, LLC d/b/a FoodBoss (“FoodBoss”) respectfully submits this Memorandum in Support of its Motion to make the Court’s dismissal of FoodBoss’s patent claims (Counts I–IV) on the ground that U.S. Patent Nos. 10,445,683 and 11,037,090 (the “Asserted Patents”) are invalid under 35 U.S.C. § 101, final pursuant to Federal Rule of Civil Procedure 54(b) (the “Motion”).

I. BACKGROUND

FoodBoss brought two separate sets of claims against Defendant, Google, LLC (“Google”): (1) patent claims for direct and indirect infringement of the Asserted Patents (Counts I–IV) (the “Patent Case”) and (2) antitrust claims on the grounds that Google’s predatory pricing of its free (and therefore, below-cost) Google Food business to compete with FoodBoss in the restaurant delivery advertising market monopolized the relevant market and would lead to a distinct antitrust injury, namely reduced innovation to consumers and higher prices (the “Antitrust Case”). (*See* ECF No. 49, at 3 (describing Patent Case), 12–13 (describing Antitrust Case).)

On September 4, 2025, the Court dismissed all aspects of the case. It found the Asserted Patents directed to ineligible subject matter and therefore invalid under 35 U.S.C. § 101. (*Id.*, 12.) It found FoodBoss had failed to sufficiently plead an antitrust injury to support the Antitrust Case. (*Id.*, 15.) The Court gave FoodBoss until September 25, 2025 to amend its complaint.

Those decisions relied on completely separate facts. The Court’s decision on the Patent Case relied exclusively on the underlying technology asserted in FoodBoss’s patents, as determined entirely from the record of those patents, and was necessarily completely independent of who, what, where and how competitors in the market were using that technology (if at all). The Court’s decision on the Antitrust Case relied entirely on the issue of whether Google could, would or had used its monopoly or attempted monopoly to raise prices for

consumers—a fact that, whether true or not, would have no relevance at all to how the underlying database structures described and claimed in the Asserted Patents worked and therefore whether the Asserted Patents claimed eligible subject matter. Similarly, because the dismissal of the Patent Case depended wholly on the nature of the technology described and claimed in the Asserted Patents, there could be no additional facts to include in any amended complaint that could revive the Patent Case. However, additional facts could (and will) directly address the antitrust injury, *i.e.*, how consumers are experiencing higher prices in a way that is completely separate from whether the nature of the Asserted Patents is abstract.

II. ARGUMENT

A. Legal Standard

Federal Rule of Civil Procedure 54(b) (“Rule 54(b)”) permits a court to “direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay.” FED. R. CIV. P. 54(b). Even though finality of a partial judgment is not unique to patent law, because it affects appellate jurisdiction, the Federal Circuit does simply apply regional circuit precedent to the propriety of a Rule 54(b) order. *W.L. Gore & Assocs. v. Int’l Med. Prosthetics Rsch. Assocs., Inc.*, 975 F.2d 858, 861 (Fed. Cir. 1992) (noting the Federal Circuit would look to the law of “all circuits equally”). The Federal Circuit, however, determined that the Supreme Court had already provided adequate guidance on Rule 54(b), and therefore no additional regional circuit law would be necessary to consider. *Id.*

In deciding whether there is “no just reason for delay,” the Supreme Court directed courts to look to: “whether the claims under review were separable from the others remaining to be adjudicated and whether the nature of the claims already determined was such that no appellate court would have to decide the same issues more than once even if there were subsequent appeals.” *Id.* at 862 (quoting *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 466 U.S. 1, 8 (1980)).

Thus, even if there were some factual overlap of the claims, the critical criterion is whether the issues on appeal would be separate so that the appellate court would not decide the same issue twice. *Id.* at 864 (noting that “only tangential” overlap, or overlap on “one aspect” of a claim, is not sufficient when other criteria favor partial finality). Similarly, “the relationship of the adjudicated claims to the unadjudicated claims is one of the factors which the District Court can consider in the exercise of its discretion.” *Id.* (quoting *Cold Metal Process Co. v. United Eng’g & Foundry Co.*, 351 U.S. 445, 452 (1956)). And, the familiar criterion for “finality” still applies—the decision as to the matter being made final must, at least as to that issue “end[] the litigation on the merits and leave[] nothing for the court to do but execute the judgment.” *Id.* at 863 (quoting *Catlin v. U.S.*, 324 U.S. 229, 233 (1945)). The Court should also consider whether the claims remaining and the one made final involve a single, or separate, claim of relief. *Id.*

To the extent persuasive, the Seventh Circuit (relying on the Third Circuit) considers: “(1) The relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in set-off against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.” *Bank of Lincolnwood v. Fed. Leasing, Inc.*, 622 F.2d 944, 949 (7th Cir. 1980) (quoting *Allis-Chalmers Corp. v. Philadelphia Elec. Co.*, 521 F.2d 360, 364 (3rd Cir. 1975)).

B. Partial Final Judgment Under Rule 54(B) Is Appropriate

The Patent Case is sufficiently final and separable that application of Rule 54(b) is warranted. And, in this case, there is no good reason for additional delay.

1. The Patent Case Is Completely Final and Separable From the Antitrust Case

The Federal Circuit’s decision in *W.L. Gore & Associates v. International Medical Prosthetics Research Associates, Inc.* to allow partial judgment on patent infringement and invalidity claims, and leave patent misuse and antitrust counterclaims pending in the district court, is sufficient to resolve the Motion in FoodBoss’s favor.

In that case, the Federal Circuit evaluated nearly all the same issues that are presented here, in the similar context of co-pending patent claims and an antitrust claim, and found partial judgment on the patent claims appropriate. In fact, in that case, the claims at issue were even more related, and had even more overlap, than do the claims here.

There, the patent case was decided on the basis of non-infringement by defendants and that the patents were invalid over prior art, for lack of written description, and for laches. *Id.* at 860. The Federal Circuit initially dismissed Gore’s appeal of the patent claims on the grounds that the judgment was not final because the patent misuse counterclaim and the infringement claim “constituted a single claim for relief and the misuse defense was not adjudicated.” *Id.* On reconsideration, Gore asked for finality on the grounds that the patent misuse counterclaim was superfluous with the district court having found the patent invalid and not infringed, while defendant opposed on the basis that it was still entitled to a trial on its patent misuse claim. *Id.*¹

¹ While the district court had initially bifurcated the patent misuse and antitrust counterclaims, that bifurcation was not relevant to the Federal Circuit’s analysis. *Id.* at 863 (stating “The district court’s act of bifurcating the misuse defense does not and cannot impact on the finality of its judgment.”).

The Federal Circuit agreed with Gore, vacated its prior dismissal, approved the district court's Rule 54(b) partial judgment, and allowed the appeal of the patent case to proceed. *Id.*

Defendants argued that the factual overlap between the patent misuse counterclaim and the patent claims made it “inevitable that the evidence of patent misuse will be presented at the upcoming antitrust trial in this action.” *Id.* at 863. The Federal Circuit rejected that argument as “irrelevant to our analysis of whether the infringement claim has been finally adjudicated.”

Unlike *W.L. Gore*, where the patent claims were dismissed based on defendant's activities (*i.e.*, non-infringement), the state of the art (*i.e.*, invalidity) and Gore's actions in direct relation to defendant (laches), here the invalidity judgment was based *solely* on the nature of the patents themselves and have *nothing at all* to do with Google or any actions in the relevant market. If the patent claims in *W.L. Gore* were final vis-a-vis the antitrust claims, they are even more so here.

Additionally, in *W.L. Gore* the Federal Circuit rejected any argument that the factual overlap was sufficient to make Rule 54(b) judgment inappropriate. There, like here, the fact that the Federal Circuit would not decide the same issues twice favored finality. *Id.* at 864. That factor applies even more strongly in this case given the Court's basis for dismissing the Patent Case under Section 101.

The Seventh Circuit considerations also favor making the Patent Case final. *First*, there is no factual relationship or interdependency of legal theories or remedies between the Patent Case and the Antitrust Case. *See Bank of Lincolnwood*, 622 F.2d at 949 (first factor). *Second*, nothing that happens with the Antitrust Case further in the district court will moot the Patent Case. *Id.* (second factor). *Third*, as noted, appellate review of the Patent Case and Antitrust Case will present completely distinct legal issues. *Id.* (third factor). *Fourth*, the only claims at issue here

are FoodBoss's claims against Google; there is no potential set-off by any counterclaim at issue. *Id.* (fourth factor). *Fifth*, as described in more detail below, miscellaneous factors such as delay, shortening the overall pendency of the case, and encouraging settlement, all favor finality. *Id.* (fifth factor).

There can be no doubt that the Patent Case is final, and therefore the requirement for finality is easily met here.

2. There Is No Just Reason For Delay

Given the lack of any factual overlap, denial of FoodBoss's motion would only work to the prejudice of FoodBoss by forcing it to wait an indeterminate amount of time to resolve (and potentially revive) a claim whose basis for appeal *will not change* at any point in the future. Notably, even if FoodBoss amends its complaint to cure the deficiencies in the Antitrust Case identified by the Court, Google will inevitably move again to dismiss, delaying resolution of the case for an indeterminate amount of time, all during which the Federal Circuit could be definitively resolving the Patent Case. And, even if Google's motion to dismiss fails, years of discovery, dispositive motions and trial will proceed while the unresolved Patent Case hangs in the balance.

On the other hand, prompt certification of the judgment of the Patent Case as final under Rule 54(b)—which is favored based on each and every factor the Supreme Court has identified for such decisions—will accelerate the ultimate resolution of the case. *First*, clarity of the parties' relative positions earlier rather than later is more likely to allow the parties to achieve (if at all possible) a meeting of the minds on any out-of-court resolution of the case. *Second*, an early revival of the Patent Case would permit the parties to resume FoodBoss's infringement claims (and Google's presumptive other defenses) in parallel with the parties' litigation of the antitrust claim, actually reducing piecemeal appeals. In other words, regardless of what happens

in the Antitrust Case, a successful appeal of the Patent Case will (unless the parties settle at some point) lead to a second appeal of the Patent Case based on an ultimate infringement or invalidity judgment on some other invalidity ground. It makes little sense to wait years for any judgment in the 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 FoodBoss 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*.

III. CONCLUSION

Because all discretionary factors concerning finality and the lack of reason for delay favors a Rule 54(b) final judgment, and prevailing case law from the Federal Circuit, relying exclusively on Supreme Court precedent, counsels the same, FoodBoss respectfully requests that the Motion be GRANTED and that the Court make its judgment of invalidity of the Asserted Patents final under Rule 54(b).

Dated September 15, 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 15th 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