IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

In re Innovatio IP Ventures, LLC, Patent Litigation	Case No. 1:11-cv-09308 Chief Judge James F. Holderman Magistrate Judge Sidney Schenkier
This Document Relates To: *Cisco Systems, Inc., and Motorola Solutions, Inc., v. Innovatio IP Ventures, LLC*, Case No. 1:11-cv-09309 (originally 1:11-cv-00425 (D. Del.)) and *NETGEAR, INC. v. Innovatio IP Ventures, LLC*, Case No. 1:12-cv-00427 (originally 1:11-cv-01139 (D. Del.))	

SUPPLIERS' MOTION FOR ENTRY OF FINAL JUDGMENT PURSUANT TO RULE 54(B)

Pursuant to Federal Rule of Civil Procedure 54(b) ("Rule 54(b)"), Cisco Systems, Inc., Motorola Solutions, Inc., and NETGEAR, Inc. (collectively, "Suppliers") hereby respectfully move this Court for entry of final judgment with respect to the claims dismissed in the Court's February 4, 2013 Order. *See* Dkt. No. 565. For the reasons set forth below in the Memorandum in Support of Suppliers' Motion for Entry of Final Judgment, the Suppliers respectfully request that their motion be granted and that final judgment be entered pursuant to Rule 54(b) on the claims dismissed in the Court's February 4, 2013 Order.

Counsel for the Suppliers have conferred with counsel for Innovatio, and understand that Innovatio opposes this motion.

Dated: March 19, 2013

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF SUPPLIERS' MOTION FOR ENTRY OF FINAL JUDGMENT PURSUANT TO RULE 54(B)

I. INTRODUCTION

In October 2012, Cisco Systems, Inc., Motorola Solutions, Inc., and NETGEAR, Inc. (collectively, "Suppliers") amended their declaratory judgment complaint to add claims for violation of the Federal Racketeering and Corrupt Organizations Act ("RICO"), violation of California Business and Professions Code § 17200, civil conspiracy, intentional interference with economic advantage, and unclean hands. Innovatio IP Ventures, LLC ("Innovatio") moved to dismiss those claims on November 13, 2013. By Order of February 4, 2013, the Court granted Innovatio's motion to dismiss those claims, finding that Innovatio's actions were subject to the *Noerr-Pennington* doctrine and that the Suppliers had not established that Innovatio's actions as alleged by the Suppliers fell under the "sham" exception to that doctrine.

Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, this Court may enter final judgment as to one or more, but fewer than all, claims if the claims have been resolved and there is no just reason for delay. Fed. R. Civ. P. 54(b). Both factors are met here: the Court's ruling on Innovatio's motion to dismiss resolved the Suppliers' RICO, § 17200, civil conspiracy, intentional interference with economic advantage, and unclean hands claims, and there is no reason to delay an appeal of that resolution. Accordingly, the Suppliers respectfully request that the Court enter final judgment on those claims under Rule 54(b).

II. STATEMENT OF FACTS

As alleged in the Suppliers' complaint, Innovatio allegedly acquired 31 patents from Broadcom Corporation ("Broadcom") in early 2011. Dkt. 431 ¶ 58, 59. As part of that acquisition, Innovatio provided Broadcom with a license and covenant not to sue Broadcom products (including Broadcom's Wi-Fi chips) for infringement of the patents. *Id.* ¶ 59. Before assignment to Innovatio, Broadcom licensed the patents to Qualcomm, which also supplies Wi-Fi chips, and several additional suppliers of Wi-Fi chips. *Id.* ¶ 70. These licensed wireless chip manufacturers comprise a substantial portion of the Wi-Fi chip market. *Id.* ¶ 69. In addition, prior to assigning the patents to Innovatio, Broadcom made binding commitments to the IEEE to license the patents on RAND terms, as had earlier assignees of the patents. *Id.* ¶¶ 60–68.

Also as alleged, soon after acquiring the patents, Innovatio embarked on a licensing campaign, sending thousands of licensing letters to companies throughout the United States, including bakeries, restaurants, cafes, hotels, and other small businesses that do not make or sell devices that provide the accused Wi-Fi functionality. *Id.* ¶ 73. The Suppliers' complaint alleged that Innovatio's licensing campaign is designed to intimidate licensing targets into paying Innovatio for a license without investigating facts such as whether the target is already licensed to the patents. *Id.* ¶ 77, 78.

In response to Innovatio's licensing campaign, the Suppliers filed declaratory judgment complaints. *See* Dkt. No. 1, 11-cv-00425 (D. Del. May 13, 2011) (Cisco and Motorola's Declaratory Judgment Complaint), Dkt. No. 1, 11-cv-01139 (D. Del. Nov. 16, 2011) (Netgear's Declaratory Judgment Complaint). On October 1, 2012, after Innovatio unsuccessfully moved to dismiss the Suppliers' declaratory judgment complaints based on the argument that the Suppliers did not have standing to pursue their declaratory judgment claims, Dkt. No. 274, the Suppliers amended their declaratory judgment complaints to add claims for violation of RICO, violation of Cal. Bus. & Prof. Code § 17200, civil conspiracy, intentional interference with economic advantage, unclean hands, breach of contract, and promissory estoppel. *See* Dkt. No. 431. On November 13, 2012, Innovatio moved to dismiss all of the claims added to the Suppliers' complaint. *See* Dkt. No. 474. By Order of February 4, 2013, this Court granted in part Innovatio's motion to dismiss, dismissing with prejudice the Suppliers' RICO, § 17200, civil conspiracy, intentional interference with economic advantage, and unclean hands claims. *See* Dkt. No. 565. That Order denied Innovatio's motion to dismiss the Suppliers' breach of contract and promissory estoppel claims based on Innovatio's failure to abide by its obligations to license the patents on RAND terms. The Suppliers now move for entry of final judgment on these dismissed claims pursuant to Rule 54(b).

III. ARGUMENT

A. Standard for Certifying a Rule 54(b) Final Judgment

When more than one claim for relief is presented in an action or when multiple parties are involved, the court may direct entry of final judgment as to one of the parties "upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." Fed. R. Civ. P. 54(b); *see also iLOR, LLC v. Google, Inc.*, 550 F.3d 1067, 1072 (Fed. Cir. 2008). In *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 7–8 (1980), the

Supreme Court provided a two-step process to be followed in evaluating a motion for entry of final judgment under Rule 54(b). First, the Court must find that it is addressing a "final judgment," or an "ultimate disposition of an individual claim entered in the course of a multiple claims action." *Id.* at 7 (citing *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427 (1956)).

Second, the district court must determine if there is "any just reason for delay":

> Once having found finality, the district court must go on to determine if there is any just reason for delay. . . . The function of the district court under the Rule is to act as a 'dispatcher.' It is left to the sound judicial discretion of the district court to determine the 'appropriate time' when each final decision in a multiple claims action is ready for appeal. This discretion is to be exercised 'in the interest of sound judicial administration.'

Id. at 8 (citations omitted). In so doing, the Court should consider "judicial administrative interests as well as the equities involved." *Id.* at 8. The Court may also consider "the separateness of the claims." *Trading Techs. Intern., Inc. v. BCG Partners, Inc.*, 883 F. Supp. 2d 772, 780 (N.D. Ill. 2012).

B. The Dismissal of Certain Claims Against Innovatio Meets the "Final Judgment" Requirement of Rule 54(b)

This Court's Order granting in part Innovatio's motion to dismiss is a "final judgment" as to the Suppliers with respect to the dismissed claims. *See Curtiss-Wright*, 446 U.S. at 7 (1980) ("It must be a 'judgment' in the sense that it is a decision upon a cognizable claim for relief, and it must be 'final' in the sense that it is 'an ultimate disposition of an individual claim entered in the course of a multiple claims action.'") (quoting *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 436 (1956)). As the Court's Order dismissed the Suppliers' RICO, § 17200, civil conspiracy, intentional interference with economic advantage, and unclean hands claims with prejudice, that dismissal is "final" for the purposes of Rule 54(b). *See In re Mortgage Registration Systems* (MERS) Litigation, MDL No. 09-2119-JAT, 2011 WL 4550189, at *12 (D.

Ariz. Oct. 3, 2011) (order dismissing claims in MDL with prejudice is "clearly a final judgment").

C. There Is No Just Reason to Delay Certification Pursuant to Rule 54(b)

Judicial administrative interests weigh in favor of certification of the judgment on the Suppliers' dismissed claims. *See Trading Techs.*, 883 F. Supp. 2d at 780. The dismissed claims are separable from those that remain in the remaining litigation, and there is little or no risk of repetitive litigation or appeal of the same claims. *See Schoenhaus v. Genesco, Inc.*, 440 F.3d 1354, 1356 (Fed. Cir. 2006) (noting district court's entry of final judgment as to all patent-related claims where state law trade secrets, conversion, and unjust enrichment claims remained); *W.L. Gore & Assocs., Inc. v. Int'l Medical Prosthetics Research Assocs., Inc.*, 975 F.2d 858, 861 (Fed. Cir. 1992) (finding no abuse of discretion where district court granted final judgment as to infringement claims while antitrust counterclaim and misuse defense remained); *Continental Datalabel, Inc. v. Avery Dennison Corp.*, No. 09-c-5980, 2012 WL 6091248, at *1–4 (N.D. Ill. Dec. 7, 2012) (finding sufficient legal and factual distinction between patent claims and non-patent claims such as Lanham Act violation and tortious interference).

The Court's order on the dismissed claims focused on two questions: (1) whether Innovatio's actions were eligible for protection under the *Noerr-Pennington* doctrine; and (2) whether the "sham" exception to the *Noerr* doctrine applied to Innovatio's conduct. *See* Dkt. 565. By contrast, most of the surviving claims against Innovatio are for the invalidity and non-infringement of certain Innovatio patents, claims that were in this action for more than a year before the Suppliers amended their complaint. The Court's Order did not involve consideration of the technical features of the accused products or the scope of the patent claims in determining the motion to dismiss, and these claims are therefore factually and legally distinct.

Further, the Suppliers' breach of contract and promissory estoppel claims are distinct from the claims involved in the requested appeal: the breach of contract and promissory estoppel claims will address specific issues regarding Innovatio's RAND obligations – *i.e.*, the proper RAND royalty rate and the RAND damages base, among other similar issues. The Court's order concerning the dismissed claims focused on whether Innovatio's alleged misrepresentations and failures to disclose information to its licensing targets were protected by the *Noerr* doctrine and whether they constituted a "sham." Although there may be some tangential overlap between the facts in those claims that remain pending and the claims that have been dismissed, such overlap is minimal, warranting 54(b) certification. *See W.L. Gore*, 975 F.2d at 863–64. Simply put, "[t]his is not a case in which the facts underlying the retained and the appealed claims are the same, and the only difference is the legal theory underlying the claims." *Lawyers Title Ins. Corp. v. Dearborn Title Corp*., 118 F.3d 1157, 1163 (7th Cir. 1997). Rather, the issues on appeal for the dismissed claims are almost completely distinct from the pending breach of contract and promissory estoppel claims, involving different facts from different time periods, seeking different relief, and presenting different legal issues. The fact that there may be "some overlap between the facts in the retained and the appealed claims is not fatal." *Id*.; *see W.L. Gore*, 975 F.2d at 863–64.

Equity also favors entering final judgment on the dismissed claims now, rather than waiting until after the entirety of this multi-district litigation, or even the remaining Supplier case, is resolved to enter judgment on the Suppliers' dismissed claims. This consolidated proceeding involves over one hundred and fifty defendants, twenty-three asserted patents, over four hundred and forty asserted patent claims, thousands of accused products, and numerous additional issues including what damages Innovatio is entitled to (if any) in light of its RAND

obligations. In light of the scope of this proceeding, the litigation could remain before this Court for a significant time. Indeed, Innovatio has recently stated in correspondence with its licensing targets that it expects that "Cisco's case against Innovatio will probably not reach final decision for two or more years," using that statement to suggest to the licensing target that a resolution through the courts is at least years away. *See* Ex. A, Sept. 17, 2012 Email from E. Ogawa. Equity therefore favors allowing entry of final judgment on the Suppliers' dismissed claims now, as opposed to waiting until the conclusion of the remainder of the litigation.

Whereas the pending claims may take years to resolve, the dismissed claims turn largely on dispositive "questions of law" separate from those presented in the pending claims, and there is simply no just reason for any delay in presenting those issues to the court of appeals. The Court's Order found that the dismissed claims of the Suppliers' Amended Complaint were protected under the *Noerr-Pennington* doctrine, and that the Suppliers had not sufficiently alleged sham conduct. Whether the *Noerr-Pennington* doctrine extends to the conduct alleged in the Suppliers' dismissed claims is a question of law, as is what constitutes sham conduct. *Cf. Thrasher-Lyon v. CCS Commercial, LLC*, No. 11-c-04473, 2012 WL 5389722, at *2 (N.D. Ill. Nov. 2, 2012) (citing *Ahrenholz v. Board of Trustees of University of Illinois*, 219 F.3d 674, 676 (7th Cir. 2000)). The scope of the *Noerr-Pennington* doctrine, and alternatively what constitutes a sham, are issues that "the court of appeals could decide quickly and cleanly without having to study the record." *Ahrenholz*, 219 F.3d at 677. Further, whether *Noerr-Pennington* bars the Suppliers' claims is "quite likely to affect the further course of the litigation, even if not certain to do so." *Thrasher-Lyon*, 2012 WL 5389722, at *2 (quoting *Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Associates, Inc*., 86 F.3d 656, 659 (7th Cir. 1996)). The Suppliers' claims may impact Innovatio's ability to seek recovery on its patents, what separate recoveries

the Supplier are entitled to, and numerous other issues that would have a significant effect on the further course of the litigation.

Accordingly, final judgment should be entered with respect to the dismissed claims under Rule 54(b).

IV. CONCLUSION

The Order granting in part Innovatio's motion to dismiss meets the criteria for certification as a final judgment. Accordingly, the Suppliers request that this Court make an express finding and enter final judgment on the Suppliers' claims dismissed pursuant to the Order pursuant to Rule 54(b).

Dated: March 19, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on March 19, 2013 a true and correct copy of the foregoing documents were electronically filed with the Court via the CM/ECF system which sent notification of such filing to all Counsel of Record. Copies of documents required to be served by Fed.R.Civ.P. 5(a) have been served.

Dated: March 19, 2013

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