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

JAMIE S. LEACH, and LEACHCO, INC.	)	
Plaintiffs,	)	
v.	)	Case No. CIV-16-1034-SLP
PHARMEDOC, INC.	)	
Defendant.	)	

O R D E R

Before the Court is Plaintiffs' Motion for Entry of Rule 54(B) Final Appealable Judgment as to Count I of *Leachco I* and Counts I, II, and VI of *Leachco II* and Stay of Remaining Claims [Doc. No. 191]. Defendant has responded to the Motion [Doc. No. 192] and the matter is at issue. For the reasons that follow, Plaintiffs' Motion is DENIED.

I. Relevant Procedural History

As the Court has detailed in many prior orders, the parties to this action have been litigating a claim of patent infringement in two actions, now consolidated, concerning U.S. Patent No. 6,499,164 for the Snoogle®, a J-shaped, full-body, pregnancy pillow (the '164 Patent).[1] On April 12, 2021, the Court granted Defendant's Motion for Partial Summary Judgment, finding no literal infringement of Claim 1 of the '164 Patent and further finding

[1] The Court previously consolidated with this action (*Leachco I*) a related patent-infringement action involving these same parties. *See Jamie S. Leach and Leachco, Inc. v. Day to Day Imports, et al*., No. CIV-17-1230 (*Leachco II*); *see also* Order of Consolidation [Doc. No. 149].

that prosecution history estoppel bars Plaintiffs' reliance upon the doctrine of equivalents to establish infringement of Claim 1 of the '164 Patent. *See* Order [Doc. No. 186].

Thereafter, the Court held a status conference with the parties to address the remaining claims Plaintiffs assert against Defendant as set forth in the Amended Complaint filed in *Leachco II*, prior to consolidation with this action. *See id*., Am. Compl. [Doc. No. 66], **Count III** – Federal Trademark Infringement (15 U.S.C. § 1114); **Count IV** – Federal Unfair Competition and False Designation of Origin (15 U.S.C. § 1125(a)); **Count V** – Federal False Advertising (15 U.S.C. § 1125(a)); **Count VII** – California Unfair Competition (Cal. Bus. & Prof. Code § 17200); and **Count VIII** – Oklahoma Common Law Unfair Competition).

Following the status conference, Plaintiffs filed the instant Motion. Plaintiffs request the Court to direct final judgment as to less than all of the remaining claims pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. Specifically, Plaintiffs ask the Court to direct final judgment as to the following:

- Plaintiffs' claim against Defendant Pharmedoc for infringement of the '164 Patent;
- Defendant Pharmedoc's claim for a declaratory judgment of non-infringement of the '164 Patent;
- Plaintiffs' claims against the Non-Pharmedoc Defendants[2] for: (1) direct infringement of the '164 Patent; (2) inducement to infringe the '164 Patent;

[2] Plaintiffs fail to designate who each of the "Non-Pharmedoc Defendants are, but the Court presumes that Plaintiffs include the following Defendants with respect to these claims: Day to Day Imports, Inc., Yakov Kroll, Eli Kroll, Yehuda Nourollah, Akiva Nourollah, Yosef Nourollah, Yaakov Nourollah and Josh Levin.

(3) contributory trademark infringement; (4) federal unfair competition; (5) false advertising; and (6) false designation of origin.[3]

Plaintiffs further request the Court to stay any further proceedings in this case pending the outcome of the appeal.

Defendant Pharmedoc opposes the request. Pharmedoc requests that this action proceed on the remaining claim in *Leachco I*: Pharmedoc's counterclaim for non-infringement and invalidity of the '164 Patent. Pharmedoc further requests the action to proceed on the remaining claims in *Leachco II*: Plaintiffs' claims against Pharmedoc for federal trademark infringement (Count III); federal unfair competition and false designation of origin (Count IV), federal false advertising (Count V), California unfair competition under Cal. Bus. & Prof. Code § 17200 (Count VII), and Oklahoma common law unfair competition (Count VIII).

II. Governing Standard

Rule 54(b) of the Federal Rules of Civil Procedure provides:

> **(b) Judgment on Multiple Claims or Involving Multiple Parties**. When an action presents more than one claim for relief – whether as a claim, counterclaim, crossclaim, or third-party claim – or when multiple parties are involved, the court may 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. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

[3] These claims are set forth in the First Amended Complaint. *See Leachco II,* First Am. Compl. [Doc. No. 66]. The Court dismissed these claims on December 16, 2020. *See Leachco I*, Order [Doc. No. 185].

Fed. R. Civ. P. 54(b).[4]

Rule 54(b) certification requires a finding that a judgment is final, i.e., the judgment is an "'ultimate disposition of an individual claim entered in the course of a multiple claim action.'" *Osage Tribe of Indians of Okla. v. United States*, 263 F. App'x 43, 44 (Fed. Cir. 2008) (quoting *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 436 (1956)). "[A] judgment is not final for the purposes of Rule 54(b) unless the claims resolved are distinct and separate from the claims left unresolved." *Okla. Tpk. Auth. v. Bruner*, 259 F.3d 1236, 1243 (10th Cir. 2001). A claim is generally understood to be all the connected elements of a particular case. *Id*.

Additionally, consideration must be given to "'judicial administrative interests . . . the equities involved . . . [and] the historic federal policy against piecemeal appeals.'" *Osage Tribe*, 263 F. App'x at 44 (quoting *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 8 (1980)); *see also Okla. Tpk. Auth.*, 259 F.3d at 1242 (a district court must make two express findings under Rule 54(b): first, the court must find that the order it is certifying is a final order; And second, the court must find there is no just reason to delay review of the final order until all claims have been conclusively ruled upon).[5]

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[4] The certification required under Rule 54(b) governs in the context of consolidated actions. *See Trinity Broadcasting Corp. v. Eller, 8*27 F.2d 673, 675 (10th Cir. 1987).

[5] The parties do not directly address whether regional circuit law or Federal Circuit law applies to the Court's Rule 54(b) analysis. As one court has observed:

> The Federal Circuit has applied the law of the regional circuit to determine whether a district court's entry was final relative to all pending issues. *See Golan v. Pingel Enterprise, Inc*., 310 F.3d 1360, 1366 (Fed. Cir. 2002). But it has also stated that it applies Federal Circuit law "instead of regional circuit law to issues involving Rule

III. Discussion

Plaintiffs argue that Rule 54(b) certification is proper because there is "relatedness of the conduct underlying the disposed-of claims and the remaining claims." Pl.'s Mot. at 6. Plaintiffs further argue:

> [T]he conduct underlying the already-resolved claims and the remaining claims is substantially related, ***if not entirely the same***, in that all claims stem [from] the Defendants' sale and offer for sale of full-body pregnancy pillows that directly compete with those offered by Plaintiffs. Even though those claims are separable, meaning that the adjudication of the remaining claims is not intertwined with or directly dependent on the outcome of the already-resolved claims, ***there is significant overlap in the alleged conduct of those claims, rendering a second trial on those same factual issues redundant and a misuse of the Court and the Parties' resources***.

Pl.'s Mot. at 6-7 (emphasis added). But Plaintiffs' argument – focused on the relatedness of the conduct forming the basis for the remaining factual and legal issues – cuts *against* certification. *See, e.g.*, *Osage Tribe*, 263 F. App'x at 44-45 ("[T]he matters asserted in the first phase of this case are not asserted to be factually and legally distinct from remaining issues in this case. Thus, we are not convinced that the CFC properly exercised its discretion in determining that there was no just reason for delay." (citing Okla. Turnpike Auth., 259 F.3d at 1242-43)). Additionally, Plaintiff's argument is misdirected, focusing on a purported "misuse" of *this Court's* resources. Instead, the inquiry is directed to a

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> 54(b) certification." *Storage Technology Corp. v. Cisco Systems, Inc.*, 329 F.3d 823, 830 (Fed. Cir. 2003).

02 Micro Int'l Ltd. v. Monolithic Power Sys., Inc., No. C04-2000 CW, 2007 WL 2070275, at *2, n.1 (N.D. Cal. July 16, 2007) (unpublished op.). Both parties rely primarily on Federal Circuit authority. Applying either authority, the Court would reach the same result under the facts and circumstances of this case.

misuse of *the appellate court's* resources. *See, e.g., Okla. Tpk. Auth.*, 259 F.3d at 1241 (Rule 54(b) recognizes the "historic federal policy" that "relieves appellate courts of the need to repeatedly familiarize themselves with the facts of a case"); *Continental Materials Corp. v. Valco, Inc.*, 740 F. App'x 893, 899 (10th Cir. 2018) (the policy against piecemeal appeals "is intended to promote efficiency at the appellate-court level").

The Court finds Plaintiffs' request for certification does not arise from a "*distinctly separate claim*" such that this case falls within the "relatively select group" and "even more limited category of decisions" to which Rule 54(b) certification is intended. *Waltman v. Georgia-Pacific, LLC*, 590 F. App'x 799, 808 (10th Cir. 2014) (emphasis in original, citations omitted). Plaintiffs' own arguments establish this is the correct result, as does the Court's independent review of the matter. *See Continental*, 740 F. App'x at 899 ("Interrelated claims should be litigated and appealed together.").

Moreover, Plaintiffs have failed to demonstrate there is no just reason for delay. To the contrary, judicial administrative interests dictate resolving this matter in full at the district court level. Although Plaintiffs cite concerns over a potential backlog in this Court, *see, e.g.*, Pls.' Mot. at 6 (citing COVID and *McGirt v. Oklahoma*[6] as potential contributing factors), those unique (and waning) factors are not the proper focus of a Rule 54(b) inquiry. And contrary to the concerns expressed by Plaintiff, the Court is ready to proceed with a trial of this action and to expedite setting pretrial deadlines and placing this matter on a trial docket.

[6] -- U.S.--, 140 S.Ct. 2452 (2020).

The equities further weigh in favor of proceeding to trial on the remaining claims rather than permitting a stay of this action as requested by Plaintiffs. A review of the lengthy procedural history of this case demonstrates Plaintiffs' tactical decisions have significantly delayed a final resolution of the claims brought. Plaintiffs have repeatedly (and unnecessarily) protracted this litigation. Plaintiffs' current request is yet another in its arsenal of procedural maneuverings to stall the final resolution of this litigation. As Defendant argues, yet another delay will cause undue prejudice. *See* Def.'s Resp. at 2, 9.

Finally, Plaintiffs have demonstrated no undue hardship absent Rule 54(b) certification. As noted, Plaintiffs' concerns about undue delay in proceeding before this Court are unfounded.

In sum, this Court adheres to the precept that Rule 54(b) is intended to be used sparingly. *See, e.g., Curtiss-Wright Corp.*, 446 U.S. at 10 ("Plainly, sound judicial administration does not require that Rule 54(b) requests be granted routinely."); *Okla. Tpk. Auth.*, 259 F.3d at 1242 ("Rule 54(b) entries are not to be made routinely."). Judicial administrative interests are best served if the claims are not separated for purposes of appeal. And Plaintiffs have not shown that any hardship or injustice would likely result from the inability to file an immediate appeal.

IV. Conclusion

For all these reasons, certification under Rule 54(b) is not appropriate in this case. Plaintiffs' Motion for Entry of Rule 54(B) Final Appealable Judgment as to Count I of *Leachco I* and Counts I, II, and VI of *Leachco II* and Stay of Remaining Claims [Doc. No. 191] is DENIED.

IT IS SO ORDERED this 29th day of June, 2021.

SCOTT L. PALK
UNITED STATES DISTRICT JUDGE