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Attorneys for Defendant Fluxion Biosciences, Inc.

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15
 16 UNITED STATES DISTRICT COURT
 17 NORTHERN DISTRICT OF CALIFORNIA
 18 SAN JOSE DIVISION

19
 20 CELLECTRICON AB and GYROS AB,
 21 Plaintiffs,
 22 v.
 23 FLUXION BIOSCIENCES, INC.,
 24 Defendant.

Civil Action No. 5:09-cv-03150-RMW

**JOINT STIPULATION AND
 [] ORDER REGARDING
 SEVERANCE OF CASE**

Honorable Ronald M. Whyte
 United States District Judge

1 Plaintiffs Celectricon AB and Gyros AB (“Plaintiffs”) and Defendant Fluxion Biosciences,
2 Inc. (“Defendant”) (collectively, “the Parties”), by and through their counsel of record, represent
3 and stipulate the following:

4 WHEREAS on April 25, 2011 the Court issued an order (Doc. No. 151) (“Order”)
5 (i) granting in part and denying in part Plaintiffs’ motion to lift the temporary stay, and
6 (ii) granting Defendant’s motion to sever a portion of the instant action;

7 WHEREAS the Parties have discussed the procedure to comply with the Order and, on
8 June 9, 2011, conferred with the Court regarding that procedure;

9 WHEREAS the Parties have agreed, and the Court has approved that, in compliance with
10 the Order, Plaintiff Celectricon, as the assignee of U.S. Patent No. 5,376,252, will file a new
11 complaint against Defendant Fluxion directed to Celectricon’s allegations of any infringement of
12 that patent, and that the Court will open a new civil action with a new case number in connection
13 with that complaint, with the new civil action designated as “related” to the instant action so as to
14 be heard before the Honorable Ronald M. Whyte in San Jose;

15 WHEREAS because the new civil action will represent a severed portion of the instant
16 action, Plaintiff Celectricon would like the new civil action is to proceed seamlessly and without
17 unnecessary delay from the point where the instant action currently stands;

18 WHEREAS Defendant’s counsel of record agrees to accept service of the new complaint
19 on behalf of Defendant Fluxion, that Fluxion shall answer or otherwise respond to the new
20 complaint within twenty-one (21) days after service, and that Fluxion shall be permitted to present
21 any defense in its answer or response that it would be entitled to present pursuant to Fed. R. Civ. P.
22 12, notwithstanding Fluxion’s filings of responsive pleadings in the instant action;

23 WHEREAS all discovery and submissions in the instant action including, without
24 limitation, all information and materials exchanged by the Parties pursuant to the Patent Local
25 Rules, can be used in the new civil action, except that Celectricon shall have the opportunity to
26 serve Amended Infringement Contentions and additional associated documents pursuant to Patent
27 L.R. 3-1 and 3-2 so as to be received by Fluxion’s counsel on or before June 20, 2011, and Fluxion
28 shall have the opportunity to serve Amended Invalidity Contentions and additional associated

1 documents pursuant to Patent L.R. 3-3 and 3-4 so as to be received by Collectricon's counsel on or
2 before July 11, 2011;

3 WHEREAS discovery relevant to the issues in the new civil action may begin upon filing
4 of the new civil action and the assignment of the corresponding new case number and that such
5 discovery can be used in the instant action;

6 WHEREAS Plaintiff Gyros AB will be amenable to discovery in the new civil action as if
7 it were a party thereto and it will produce one Gyros AB employee pursuant to Rule 30(b)(1) and
8 one Gyros AB employee pursuant to Rule 30(b)(6) as witnesses for a deposition at the law offices
9 of Perkins Coie in Palo Alto, California, but Gyros AB's status as a third-party in the new civil
10 action shall not limit its ability to raise any objections to discovery therein as if it were a party
11 thereto;

12 WHEREAS the Parties will submit a joint proposed scheduling order for the new civil
13 action on or before July 22, 2011, such that any disagreements as to the terms therein may be
14 discussed with and resolved by the Court during the status conference in the instant action that is
15 currently scheduled for July 29, 2011 at 10:30 a.m.;

16 WHEREAS upon partial or complete lifting of the temporary stay in the instant action,
17 Plaintiffs will file an amended complaint in the instant action that omits the allegations of any
18 infringement of U.S. Patent No. 5,376,252 against Fluxion and, because Gyros AB has no
19 ownership interest in the patents remaining in the instant action (U.S. Pat. Nos. 7,470,518;
20 7,390,650; and 7,563,614), removes Gyros AB as Co-Plaintiff, thereby dismissing Gyros AB from
21 the instant action; and

22 WHEREAS the Parties agree that the severance of a portion of the instant action and filing
23 of the new civil action does not preclude the Court from lifting or maintaining the stay in the
24 instant action.

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1 NOW, THEREFORE, the Parties hereby Stipulate and agree that the following Order
2 should enter, and respectfully request that the Court approve this Stipulation as an Order of the
3 Court:

4 1. That Plaintiff Celectricon will file a new complaint against Defendant Fluxion
5 directed to Celectricon's allegations of any infringement of U.S. Patent No. 5,376,252;

6 2. That the Court will open a new civil action with a new case number in connection
7 with that complaint, with the new civil action designated as "related" to the instant action so as to
8 be heard before the Honorable Ronald M. Whyte in San Jose;

9 3. That Defendant's counsel of record shall accept service of the new complaint on
10 behalf of Defendant Fluxion and, within twenty-one (21) days after service shall answer or
11 otherwise respond to the new complaint, and shall be permitted to present any defense in its
12 answer or response that it would be entitled to present pursuant to Fed. R. Civ. P. 12,
13 notwithstanding Fluxion's filings of responsive pleadings in the instant action;

14 4. That all discovery and submissions in the instant action including, without
15 limitation, all information and materials exchanged by the Parties pursuant to the Patent Local
16 Rules, can be used in the new civil action;

17 5. That Celectricon shall have the opportunity to serve Amended Infringement
18 Contentions and additional associated documents pursuant to Patent L.R. 3-1 and 3-2 so as to be
19 received by Fluxion's counsel on or before June 20, 2011, and Fluxion shall have the opportunity
20 to serve Amended Invalidity Contentions and additional associated documents pursuant to Patent
21 L.R. 3-3 and 3-4 so as to be received by Celectricon's counsel on or before July 11, 2011;

22 6. That discovery relevant to the issues in the new civil action may begin upon filing
23 of the new civil action and the assignment of the corresponding new case number and that such
24 discovery can be used in the instant action;

25 7. That Plaintiff Gyros AB will be amenable to discovery in the new civil action as if
26 it were a party thereto and it will produce one Gyros AB employee pursuant to Rule 30(b)(1) and
27 one Gyros AB employee pursuant to Rule 30(b)(6) as witnesses for a deposition at the law offices
28 of Perkins Coie in Palo Alto, California, but Gyros AB's status as a third-party in the new civil

1 action shall not limit its ability to raise any objections to discovery therein as if it were a party
2 thereto;

3 8. That the Parties will submit a joint proposed scheduling order for the new civil
4 action on or before July 22, 2011, such that any disagreements as to the terms therein may be
5 discussed with and resolved by the Court during the status conference in the instant action that is
6 currently scheduled for July 29, 2011 at 10:30 a.m.; and

7 9. That upon partial or complete lifting of the temporary stay in the instant action,
8 Plaintiffs will file an amended complaint in the instant action that omits the allegations of any
9 infringement of U.S. Patent No. 5,376,252 against Fluxion and removes Gyros AB as Co-Plaintiff,
10 thereby dismissing Gyros AB from the instant action.

11 IT IS SO STIPULATED.

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13 Dated: June 17, 2011 David G. Conlin
14 George W. Neuner
15 Brian M. Gaff
EDWARDS ANGELL PALMER & DODGE LLP

16 Dated: June 17, 2011 Neil A. Smith
17 ROPERS, MAJESKI, KOHN, & BENTLEY P.C.
18 /s/Brian M. Gaff
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20 Dated: June 17, 2011 Eric L. Wesenberg
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ORDER

Pursuant to Stipulation, IT IS SO ORDERED.

Dated: June 23, 2011



The Honorable Ronald M. Whyte
UNITED STATES DISTRICT JUDGE