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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

FACETEC, INC.,

Plaintiff,

v.

JUMIO CORPORATION,

Defendant

and

IPROOV LTD.,

Defendant-Intervenor.

Case No. 3:24-cv-3623-RFL

JUMIO CORPORATION'S
REPLY IN SUPPORT OF ITS
MOTION TO STAY CASE
PENDING *INTER PARTES*
REVIEW

Date: February 11, 2025

Time: 10:00 AM

Place: Courtroom 15

Hon. Rita F. Lin

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5 2015) 10

6 **STATUTES**

7 35 U.S.C. § 325(d) 2, 4, 5

1 I. INTRODUCTION

2 FaceTec asserts that Jumio's IPRs are "weak," are unlikely to be instituted, and as a result,
 3 the Court should deny Jumio's requested stay. FaceTec asks the Court to weigh the evidence before
 4 the PTAB and speculate about the conclusions the PTAB will draw based on little more than Fac-
 5 eTec's misrepresentations about what is or is not said in four nearly 100-page petitions. The PTAB
 6 is in the best position to review the petitions and decide their strength. And anyway, FaceTec's
 7 representations regarding the IPRs are misleading and factually incorrect. But the Court need not
 8 dive into the weeds of the IPRs because Courts considering motions to stay pending IPRs are
 9 routinely presented with claims by the patent owner that the IPRs are weak. Courts presented with
 10 such assertions, routinely decline to speculate on how the PTAB will approach IPR petitions. This
 11 Court should follow suit.

12 FaceTec makes a similarly irrelevant argument premised on its recently-filed motion to
 13 disqualify. As Jumio will demonstrate in its opposition to that motion—and as it outlines below—
 14 FaceTec's disqualification motion is based on unsubstantiated allegations that are plain false. But
 15 more importantly for present purposes, FaceTec's motion does not suggest that Jumio's Motion to
 16 Stay should be denied—just the opposite, it suggests that Jumio's Motion to Stay should be
 17 granted. This is so regardless of the outcome of the disqualification motion. If the Court denies the
 18 motion to disqualify—as it should—then the case should be stayed pending the IPRs for all of the
 19 reasons described in Jumio's motion. If, on the other hand, the Court were to disqualify Perkins
 20 Coie—which it should not—Jumio would need to retain new counsel, which would necessarily
 21 require that the case be stayed for an extended period of time to allow new counsel to get up to
 22 speed on what is a complicated set of facts involving four patents and complex accused technology.
 23 As Jumio will show in its opposition to FaceTec's motion, Jumio has incurred extraordinary ex-
 24 pense associated with this case as Perkins Coie has devoted more than 2,000 hours to Jumio's
 25 defense including the preparation of Jumio's four separate IPRs. Moreover, Perkins Coie had a
 26 head start because it has long represented Jumio in matters related to the accused technology—
 27 including such matters directly involving FaceTec. Any new counsel would need significant time
 28 to get up to speed, necessitating a stay even more. That necessity, in turn, would allow the IPRs to

run even further ahead of this case, further justifying the stay in view of the IPRs. FaceTec’s disqualification motion thus supports a stay, not its denial.

Finally, FaceTec offers a gumbo of other mostly contradictory *ipse dixit* arguments, each of which can be rejected out of hand. For instance, FaceTec now says that the Court should not stay this case in view of the Nevada case because this case is *not* duplicative of the Nevada case. Yet, little more than two months ago, FaceTec said just the opposite in seeking to dismiss its own case. FaceTec also says that the Court should decline to stay the case because FaceTec and Jumio are competitors, and some undescribed “prejudice” will occur if the Court stays the case. FaceTec fails to offer any evidence of what, specifically, that prejudice is, how it will befall FaceTec, or why FaceTec would not have suffered that same supposed prejudice from its requested dismissal of its own case about two months ago. Simply put, FaceTec’s newest—and contradictory—take on the facts does not justify denial of the requested stay.

A stay in this case pending the IPRs will vastly simplify—if not entirely eliminate—this case. FaceTec can identify no meaningful prejudice that it would suffer resulting from the stay. As such, the Court should grant Jumio’s requested stay.

II. ARGUMENT

A. Jumio’s IPRs Justify Stay

FaceTec makes numerous incorrect or misleading statements in the hope of convincing the Court that the PTAB will discretionarily deny Jumio’s pending petitions under 35 U.S.C. § 325(d). Dkt. 62, 2:15-4:3. Courts considering motions to stay in view of IPRs are routinely faced with patent-owner assertions that the subject IPR is weak and unlikely to be instituted, and routinely, courts so confronted, refuse to speculate about what the PTAB will or will not do. *See, e.g., Longitude Licensing Ltd. v. Apple Inc.*, No. 14-cv-04275-EDL, 2015 WL 12778777, at *4 n. 3 (N.D. Cal. Oct. 29, 2015) (finding the plaintiff’s arguments that the IPR petitions are weak and thus not likely to result in institution or cancellation or amendment to the claims amounted to “speculation about the merits of [the defendant]’s IPR petitions and what the PTAB might do with respect to them, and do not impact the Court’s decision” in granting a motion to stay pending IPR); *Di-Con Fiberoptics, Inc. v. Preciseley Microtechnology Corp.*, No. 15-cv-01362-BLF, 2015 WL 12859346,

*2 (N.D. Cal. Oct. 13, 2015) (“The Court also does not find it proper to engage in an analysis of the merits of Defendant’s IPR petition”); *Apple Inc. v. AliveCor, Inc.*, No. 22-cv-07608-HSG, 2023 WL 9187388 at *2 (declining to weigh the merits of the IPR petitions, finding “there is no reason for the Court to delve into the merits of these IPR petitions”); *Downing Wellhead Equip., LLC v. Intell. Wellhead Sys., Inc.*, No. 1:23-cv-01180-RMR SBP, 2024 WL 625372, *9 (D. Co. Feb. 14, 2024) (granting a stay pending IPR institution and dismissing the plaintiff’s contentions that the IPRs were not likely to be granted because they lacked merit, declining “to duplicate efforts with the PTAB, as it is more efficient to rely on the PTO’s expertise in addressing the IPR Petitions’ prior art”).

But if the Court is inclined to consider FaceTec’s analysis, what the Court will find is that, contrary to FaceTec’s assertions, the IPR petitions do indeed present new invalidity grounds never previously analyzed during prosecution of the ’471, ’606, ’938, and ’910 patents (collectively, “the Challenged Patents”), and Jumio’s related statements to the PTAB have been, at all times, forthcoming and accurate.

FaceTec’s opposition focuses almost exclusively on a single prior-art reference and asserts that “[t]he centerpiece of each of Jumio’s IPR petitions is U.S. Patent No. 8,437,513 issued to Derakhshani (the “Derakhshani Patent”)” Dkt. 62, 2:25-26. FaceTec fails to mention, however, that the Derakhshani Patent is a primary reference in three separate obviousness combinations presented in Ground 1 of each IPR petition, and those combinations further include secondary references U.S. Application No. 2002/0113884 (“Tanii”), U.S. Patent Application No. 2014/0028823 (“Tahk”), and U.S. Patent Application No. 2010/0014720 (“Hoyos”). *See* IPR2025-00106, Paper 1 at 3 (“’471 Petition”); IPR2025-00107, Paper 1 at 2–3 (“’606 Petition”); IPR2025-00108, Paper 1 at 3 (“’938 Petition”); IPR2025-00109, Paper 1 at 3 (“’910 Petition”).¹ Notably, not a single ground in any of the petitions is based solely on the Derakhshani Patent, and each petition includes a second set of grounds that do not cite or even refer to any Derakhshani reference.

¹ Jumio’s petitions for IPR are attached as Exhibits 1–4 to the Kinsel Declaration.

1 Instead, the second set relies on U.S. Patent App. No. 2011/0299741 (“Zhang”) as the primary
2 reference in combination with Tanii, Tahk, and Hoyos. *See id.*

3 FaceTec nevertheless asserts that “the Patent Examiner already considered [the De-
4 rakhshani Patent] teachings during prosecution of the asserted patents and allowed the patents in
5 view of them. Indeed, it was the Examiner who located and cited Derakhshani’s teachings when
6 he reviewed a published Derakhshani patent application that has the same disclosure as the De-
7 rakhshani Patent.” Dkt. 62, 2:28-3:2. This misses the point. As Jumio noted in each petition, a
8 Derakhshani reference was cited in Information Disclosure Statements (IDS) during prosecution,
9 but *no* Derakhshani reference was *ever* substantively discussed during prosecution of the Chal-
10 lenged Patents or even during prosecution of their predecessor applications. ’471 Petition at 82 (“a
11 related Derakhshani publication (2014/0198959) [was] cited—but never applied—during prose-
12 cution.”); *see also* ’606 Petition at 76; ’938 Petition at 79; ’910 Petition at 85.

13 On the basis of such incorrect and misleading assertions, FaceTec argues that Jumio’s IPRs
14 “are weak and may never be instituted” because “they all share a potentially fatal flaw...namely
15 that both Jumio’s counsel and its expert declarant have falsely stated multiple times in their IPR
16 filings that the prior art on which they are relying consists almost entirely of ‘new’ references that
17 were not before the Patent Office when it issued the challenged patents.” Dkt. 62, 8:6-10. Not so.
18 The § 325(d) section in each petition correctly noted what art was cited—but not analyzed—during
19 prosecution. Given FaceTec’s insistence on misstating the facts, it is unsurprising that FaceTec’s
20 argument fails to cite the §325(d) sections of Jumio’s petitions. *See* Dkt. 62, 8:10-13 (citing
21 IPR2025-00106, Paper 1 at 5 and IPR2025-00108, Paper 1 at 5).

22 And contrary to FaceTec’s suggestion, the mere citation to a Derakhshani reference in an
23 IDS is not sufficient for discretionary denial under §325(d). This is so because there is no evi-
24 dence—and indeed, FaceTec cites none—that the Examiner ever actually *applied* any Derakhshani
25 disclosure to any of the Challenged Patents during prosecution. The PTAB has repeatedly declined
26 to discretionarily deny institution under § 325(d) on the basis that a reference was only listed on
27 an IDS—as is the case here. *See, e.g., Meta Platforms, LLC v. Mobile Data Techs., LLC*, IPR2024-
28 00251, Paper 11, 18 (Jun. 11, 2024) (no discretionary denial where “[o]ther than the IDS listings,

the record is silent as to the Office’s consideration of [prior art cited but not applied] during prosecution”); *Godbersen-Smith Const. Co. v. Guntert & Zimmerman Const. Div., Inc.*, IPR2024-00835, Paper 9 at 11 (PTAB Nov. 14, 2024) (no discretionary denial where “none of [the previously cited] references were applied, and no statement was made to explain why the claims of the ’318 patent were deemed allowable over these references.”); *Google, LLC v. Dialect, LLC*, IPR2024-00752, Paper 11, 37-38 (Oct. 23, 2024) (no discretionary denial where “the Examiner cited [the prior art] as a considered reference, but did not cite [that art] as the basis for any claim rejections.”); *GMG Prods. LLC v. Traeger Pellet Grills LLC*, PGR2019-00024, Paper 17, 27 (July 17, 2019) (listing on an IDS alone “does not favor denying institution” because “the Examiner did not provide any detailed assessment of [the prior art, and], instead, only indicat[ed] the references had been considered”).

The actual facts—as opposed to FaceTec’s repeated misstatements of those facts—demonstrate just the opposite of what FaceTec suggests: the IPRs are strong, are unlikely to be discretionarily denied, and are likely to result in unpatentability findings for each and every asserted claim, making a stay the most efficient way to handle this case.

B. FaceTec’s Baseless Disqualification is Irrelevant to the Motion to Stay.

FaceTec’s assertions regarding its disqualification motion have little bearing on this Motion to Stay, except to further support it. Jumio and Perkins Coie will respond to FaceTec’s disqualification motion on the merits in due course. But for the Court’s consideration of Jumio’s Motion to Stay, FaceTec’s disqualification concerns are irrelevant because whichever way the Court decides the disqualification motion supports a stay. If the Court denies the disqualification motion, the IPR-related grounds for a stay have full force. But if the Court grants the disqualification motion, the stay becomes even more important. As Jumio will demonstrate in its opposition, Perkins Coie has expended more than 2,000 hours on this case and on all four IPRs and has extensive prior-litigation experience related to Jumio’s products. Any replacement counsel would require substantial time to get up to speed—impossible without a considerable stay. The upshot is that FaceTec’s arguments about the disqualification motion are just noise that the Court can—and should—disregard for purposes of Jumio’s Motion to Stay.

1 Although irrelevant to the merits of the Motion to Stay, FaceTec makes charged accusations
2 to which Jumio and Perkins Coie must at least briefly respond. FaceTec is completely wrong to
3 say that “Perkins represented and received extensive confidential information from FaceTec re-
4 garding precisely the same FaceTec product and same FaceTec patent family that are squarely at
5 issue here.” Dkt. No. 62, 1:9–12. And it should know better than to make that claim.

6 As Perkins will explain in response to FaceTec’s disqualification motion, Perkins Coie had
7 no role in the prosecution of *any* of the asserted patents, *any* of the applications from which those
8 patents issued, or *any* of the patents that are cited in the priority chain to those patents. Instead, the
9 minimal patent-prosecution work that Perkins Coie did for FaceTec—which began in approxi-
10 mately early 2014 and ended less than two years later—concerned patent applications that are
11 unrelated to the asserted patents.

12 Nor is the technology associated with the patents that Perkins Coie *did* work on related to
13 the *asserted* technology here. FaceTec asserts four patents in this case, all of them narrowly fo-
14 cused on making sure that a user present on a video is really there—in a nutshell, by comparing
15 two images at different distances and making sure they are three-dimensional, not two-dimen-
16 sional. FaceTec makes a lot of statements about other technology it says it developed, but that is
17 all irrelevant, and FaceTec knows that.

18 FaceTec offers further unsupported allegations of conflict, but each is false—but more im-
19 portantly, irrelevant. For instance, FaceTec says that a Perkins Coie partner, Lowell Ness, is the
20 current corporate secretary for FaceTec. But FaceTec’s public corporate records show that is
21 wrong. Someone named Michael Friedman is the secretary, and has been since 2023 or before. *See*
22 Kinsel Decl. ¶¶8–11, Exs. 5–8. The fact is immaterial too. Acting as a corporate secretary is not the
23 same thing as acting as *legal counsel*, and would not warrant disqualification under the Rules of
24 Professional Conduct even if it were true. Similarly, FaceTec says that Perkins Coie owns a sub-
25 stantial number of FaceTec shares. But FaceTec identifies a *separate* legal entity as the shareholder,
26 not Perkins Coie. And in any event, simply owning shares creates no duty that implicates the dis-
27 qualification rules, and FaceTec offers no credible argument that it does.

Even FaceTec’s framing of the interplay between Jumio’s motion to stay and FaceTec’s disqualification motion is misleading. In its motion to disqualify, FaceTec suggests that Jumio hurriedly and unexpectedly sought a stay to avoid the Court’s considering the motion to disqualify. Dkt. 61, 8:20–26. Not at all. In fact, Jumio has been telling the Court that it intended to seek a stay because of its IPRs since at least the September Rule 26 conference statement. Dkt. 32, 9:22–25 (“Jumio anticipates that it will file challenges to the patentability of the FaceTec Asserted Patents before the Patent Trial and Appeal Board ... Jumio will consider moving for a stay of this action pending the PTAB’s review to simplify the issues.”). After filing its IPRs on November 7, Jumio began immediately preparing a motion to stay—just as it said it would if it filed IPRs. When FaceTec first raised disqualification to Jumio by letter on November 26, the motion to stay was essentially completed, and it was filed the next day. As this timeline makes clear, FaceTec’s conflict allegations had nothing to do with Jumio’s Motion to Stay.

But there *is* timing gamesmanship here, and it is FaceTec’s. FaceTec first raised its disqualification concerns on November 26, despite the fact that in February 2024, Perkins Coie deposed FaceTec’s CEO on Jumio’s behalf, despite the fact that Perkins Coie appeared in this case on August 7—almost five months ago—and despite Perkins Coie’s substantial efforts expended so far in this case, spending more than 2,000 hours so far between this litigation and the related IPRs. Kinsel Decl. at ¶3. FaceTec’s delay constitutes a waiver. “It is well settled that a former client who is entitled to object to an attorney representing an opposing party on the ground of conflict of interest but who knowingly refrains from asserting it promptly is deemed to have waived that right.” *Trust Corp. of Montana v. Piper Aircraft Corp.*, 701 F.2d 85, 87 (9th Cir. 1983). Nothing in FaceTec’s factually inaccurate telling of its nearly decade-ago relationship with Perkins Coie justifies disqualification or comes remotely close to satisfying the “particularly strict judicial scrutiny,” *QuickLogic Corporation v. Konda Technologies, Inc.*, 618 F.Supp.3d 873, 883 (N.D. Cal. 2022) (quoting *Optyl Eyewear Fashion Int’l Corp. v. Style Cos., Ltd.*, 760 F.2d 1045, 1050 (9th Cir. 1985)), disqualification motions are subject to.

For similar reasons, FaceTec’s disqualification motion does not support FaceTec’s opposition to Jumio’s requested stay. Indeed, if FaceTec truly believed that its disqualification motion

was necessary to protect its confidential information—and not simply a tactical play to deprive its litigation opponent of its longstanding counsel, *see QuickLogic*, 618 F.Supp.3d at 883 (“[O]utright disqualification is disfavored because it may drastically affect several important interests—a client’s right to choose counsel, an attorney’s interest in representing a client, the financial burden on a client who must replace disqualified counsel, and the possibility that the disqualification motion is merely pursued for tactical reasons.”)—it would *demand* that the case be stayed until the issue was resolved. Stays are commonplace when a party raises a question of disqualification because a stay *protects* the party claiming the conflict. *See, e.g., Am. GNC Corp. v. LG Elecs. Inc.*, No. 17-cv-01090-BAS-BLM, 2018 WL 1250876, *4 (S.D. Cal. Mar. 12, 2018) (finding a stay was warranted in light of the defendant’s IPR petitions and also because of plaintiff’s pending motion to disqualify the defendant’s counsel, further finding that a full stay did not affect the attorney disqualification issue). That FaceTec uses its disqualification motion as justification for the case *not* to be stayed, suggests that FaceTec does not actually believe its confidential information is at risk, and serves to underscore the purely tactical nature of the motion.

C. The Nevada Litigation Justifies a Stay.

FaceTec’s previous statements to this Court bely its new position that the Nevada case does not justify a stay. FaceTec now claims that a stay in favor of the Nevada case is inappropriate because the “Nevada case is not close to reaching resolution.” Dkt. 62, 10:10–11. Of course, neither is this case. And in October when FaceTec requested dismissal, FaceTec made the opposite point, urging the Court to dismiss this case in favor of the Nevada case because the Nevada case “has been ongoing for nearly 3 years and is now at a more advanced stage.” Dkt. 45, 4:19–20. Similarly, when it suited FaceTec to seek dismissal of this case in favor of the Nevada case, FaceTec confirmed that the Nevada case “involves the same technology and several of the same FaceTec patents that have been asserted here.” *Id.* Now that it no longer suits FaceTec, FaceTec claims the exact opposite, namely that the case concerns “two different patents ... [and] is likely to involve different products as well.” Dkt. 62, 10:15–16.

Putting aside FaceTec’s lack of credibility given its prior inconsistent positions, and taking FaceTec’s newest position at face value, a stay is still appropriate. The two “different patents”

FaceTec references are continuations of the patents at issue in Nevada with essentially identical specifications. As such, there is significant—if not complete—overlap in the subject matter claimed in the patents. *See Transco Prods. Inc. v. Performance Contracting, Inc.*, 38 F.3d 551, 555 (Fed. Cir. 1994) (“A continuation application claims the same invention claimed in an earlier application”); *Lexos Media IP, LLC v. eBay Inc.*, 722 F. Supp. 3d 1042, 1053 (N.D. Cal. 2024) (same). Nor are there “different products” at issue. FaceTec’s misrepresentations of its communications with counsel aside, *see* Dkt. 49-1, FaceTec’s infringement contentions confirm that FaceTec has no basis to assert that Jumio’s products infringe. Inf. Cont. at 4–5 (“FaceTec does not presently include Jumio Liveness as an Accused Instrumentality”), Ex. 9. FaceTec has made no effort to amend these contentions to identify any supposedly “different products” that might be at issue.²

D. FaceTec Fails to Identify Any Competitive Risk Resulting From a Stay.

FaceTec claims it will suffer competitive injury resulting from a stay but fails to say what that injury is and offers no evidence to substantiate its claim. The Court should reject FaceTec’s say-so.

In its Opposition, FaceTec presents no substantive showing of prejudice if a stay were granted. Instead, FaceTec’s Opposition simply states that the parties are direct competitors in providing verification services and concludes there is “obvious prejudice” without further explanation. That supposed “obvious prejudice” did not stop FaceTec from requesting dismissal of its *own complaint*, and at no point does FaceTec identify or describe what that “obvious prejudice” is or how it would suffer any prejudice if a stay were granted. Without this, FaceTec’s argument fails. *See, e.g., Sec. People, Inc. v. Ojmar US, LLC*, No. 14-cv-04968-HSG, 2015 WL 3453780, at *5 (“courts in this district require evidence to substantiate an argument that direct competition will result in prejudice to the non-moving party”); *Wonderland Nursery Goods Co., Ltd. v. Baby Trend, Inc.*, No. EDCV 14-01153-VAP (SPx), 2015 WL 1809309, *5 (C.D. Cal. Apr. 20, 2015) (“absent a showing that monetary damages are inadequate, the Court is faced with nothing to support

² Even though FaceTec’s operative infringement contentions suggest it is not asserting infringement by Jumio, FaceTec’s briefing says it is, demonstrating why Jumio has its own separate interest in pursuing the IPRs.

1 Plaintiff's argument beyond the *ipse dixit* of Plaintiff's counsel. This dearth of evidence under-
2 mines the weight that should be accorded" to the factor whether a stay would prejudice the non-
3 moving party).

4 **III. CONCLUSION**

5 For all the reasons set forth above and in Jumio's Motion to Stay, an immediate stay of this
6 case is warranted.

1 Dated: December 23, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2024, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record for the parties.

/s/ Grant E. Kinsel

Grant E. Kinsel