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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

FACETEC, INC., a Delaware Corporation Plaintiff, v. JUMIO CORPORATION, a Delaware Corporation Defendant.	Case No. 3:24-cv-03623-RFL Noticed For: October 22, 2024, at 10:00 a.m. **iPROOV LTD.'S REPLY TO PLAINTIFF'S OPPOSITION TO OPPOSED MOTION TO INTERVENE** Assigned Judge: Rita F. Lin

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Proposed Intervenor iProov Ltd. ("iProov") hereby replies to FaceTec, Inc. ("FaceTec")'s Opposition to iProov's Motion to Intervene, Dkt. No. 40, and states as follows:

I. INTRODUCTION

FaceTec cites almost exclusively non-patent cases and asks this Court to draw several unsupported conclusions and to disregard the policy favoring intervention. First, FaceTec argues that iProov's motion is untimely because FaceTec will face "prejudice" in a related litigation, ignoring that this is not relevant to intervention and that FaceTec is the plaintiff in both cases. FaceTec itself chose to file a second suit asserting the same patents against the same technology, creating and accepting its own risk of "restarting the clock."

FaceTec then asks this Court to adopt the unprecedented position that the manufacturer of a product accused of infringement has no interest in the litigation in which its products are accused of infringement absent an indemnification agreement between the manufacturer and its customer. In so doing, FaceTec disclaims the allegations in its Complaint that clearly implicated iProov's technology and feigns ignorance as to Jumio's relationship with iProov. In any event, iProov does have an indemnification obligation. FaceTec is well aware of that fact, since it has a copy of the agreement establishing iProov's defense and indemnification commitment to Jumio for patent infringement claims. FaceTec's argument is moot. And FaceTec knows it.

FaceTec next asks this Court to conclude that a customer accused of infringement will adequately represent the manufacturer of the accused product. To support its claims, FaceTec ignores that this is a "minimal showing" and cites to a Ninth Circuit presumption of adequate representation applicable when parties share the same "ultimate objective." But FaceTec fails to clearly identify what this "shared" objective is. Further, FaceTec's law, which almost exclusively concerns constitutional challenges, is inapposite. Moreover, even if the presumption applies to the facts of this case, it is easily rebutted by iProov.

FaceTec also treats a manufacturer's knowledge of its own products as though it were an afterthought, claiming in pure *ipse dixit* of counsel that this case is not complicated and that iProov's customer fully understands iProov's products in a manner sufficient to represent

iProov's interest. Facetec thus asserts that iProov's involvement would bring nothing to the table—a position that is, again, not supported by the law, and factually false.

FaceTec then asks this Court to exercise its discretion to deny permissive intervention because it can "reconsider" intervention at "a later date," thus holding that a manufacturer must sit on the sidelines, scrupulously monitoring the litigation for the point in time in which its customer fails to represent its interest and only then seek to intervene in another likely opposed motion, but citing to no case in which a court has so held.

FaceTec finally argues iProov should only be granted limited intervention limited to the purposes expressly identified by iProov in its Motion. FaceTec cites no precedent granting such a request against the manufacturer of a product accused of infringement. In such cases, manufacturers routinely intervene as full parties to the suit, and iProov must not be hamstrung in its efforts to defend its customer from FaceTec's claims of infringement.

II. STATEMENT OF FACTS

FaceTec sued iProov for infringement of two of the four patents asserted in this action in the United States District Court for the District of Nevada. *See FaceTec Inc. v. iProov Ltd.,* Case No. 2:21-cv-02252-ART-BNW (the "Nevada Action"). In this action, FaceTec accuses iProov's customer Jumio Corporation ("Jumio") of infringement based on its use of iProov technology. Dkt. No. 1. On August 23, 2024, Jumio filed an Answer to FaceTec's Complaint and asserted counterclaims for declaratory judgment of invalidity and noninfringement. Dkt. No. 18. On September 13, 2024, FaceTec filed its Answer to Jumio's counterclaims for declaratory judgment. Dkt. No. 35. On September 16, 2024, iProov sought to intervene as of right and, in the alternative, permissively. Dkt. No. 36 ("Motion"). On September 30, 2024, FaceTec filed its Opposition to iProov's Motion. Dkt. No. 40 ("Opposition"). On October 10, 2024, FaceTec filed a request for voluntary dismissal on the basis that Jumio offers its own technology distinct from iProov and is "phasing out" its use of iProov technology. Dkt. No. 45.

III. ARGUMENT

A. iProov is Entitled To Intervention of Right Under Fed. R. Civ. P. 24(a)(2)

In its Motion, iProov demonstrated that it was entitled to intervention as of right because its Motion was timely; iProov has significant protectable interests in its products accused of infringement as well as its interest in defending its customers from allegations of infringement; the disposition of this matter would clearly affect iProov's interest; and iProov's interest is not adequately represented by the existing parties. Dkt. No. 36 at § II(A). In its Opposition, FaceTec ignores pertinent law regarding intervention, cites inapposite case law, and relies on the pure *ipse dixit* of its counsel. As discussed below, iProov is entitled to intervene as of right.

1. FaceTec Relies on Irrelevant "Prejudice" Caused by its Own Actions to Argue iProov's Application for Intervention is Untimely

As both parties have acknowledged, the timeliness of a request to intervene is determined by looking to "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay." *Smith v. L.A. Unified Sch. Dist.*, 830 F.3d 843, 854 (9th Cir. 2016) (quotation and citation removed). iProov demonstrated that it has sought to intervene at the earliest possible stage and FaceTec will not be prejudiced. Dkt. No. 36, §II(A)(1). FaceTec does not dispute iProov's showing regarding the stage of the proceeding. Rather, FaceTec argues that iProov's Motion is untimely—"not because iProov delayed in the above captioned case"—but because FaceTec will supposedly be prejudiced because "allowing iProov to intervene in this litigation as a full participant risks setting back the clock on FaceTec's case against iProov." Dkt. No. 40 at 12.

First, this is not pertinent, because, as shown by iProov, "the only 'prejudice' that is relevant under this factor is that which flows from a prospective intervenor's failure to intervene after he knew, or reasonably should have known, that his interests were not being adequately represented." *Smith v. L.A. Unified Sch. Dist.*, 830 F.3d 843, 857 (9th Cir. 2016) (quotation and citation removed). FaceTec cites two inapposite cases, ignoring that the court in each was weighing prejudice that would be felt in the case in which intervention was sought. *See United States v. Alisal Water Corp.*, 370 F.3d 915, 922 (9th Cir. 2004) (intervention not warranted when sought "in the remedies phase of a case that has been litigated for four years"); *Cty. of Orange v.*

Air Cal., 799 F.2d 535, 538 (9th Cir. 1986) (proposed intervenor failed to explain its delay in seeking to intervene five years into protracted litigation). So-called prejudice that FaceTec might suffer in another litigation is simply not relevant.

Second, FaceTec contradicts statements it made to this Court that "[t]here are no related cases. The action between FaceTec and iProov in the District of Nevada is separate and unrelated to this litigation." Dkt. No. 32, 8:5–6. FaceTec's self-serving reliance on a non-existent factor is irrelevant; iProov's motion is timely. *LG Elecs., Inc. v. Q-Lity Comput., Inc. v. Asustek Comput.*, Inc., 211 F.R.D. 360, 364 (N.D. Cal. 2002); *Honeywell Int'l Inc. v. Audiovox Communs. Corp.*, 2005 U.S. Dist. LEXIS 22933, at *12 (D. Del. May 18, 2005).

Lastly, FaceTec has only itself to blame. It chose to file a second lawsuit accusing iProov's technology, now bringing suit against iProov's customer Jumio, asserting the same patents it asserts against iProov in the Nevada Action.

2. iProov Has a "Significantly Protectable" Interest, and FaceTec's Focus on Indemnification is Irrelevant

iProov demonstrated that it has legally protectable interests in this action in the form of its products that are accused of infringement and in defending its customer. Dkt. No. 36, §II(A)(2). FaceTec again ignores iProov's substantial showing and incorrectly argues that an indemnification agreement is necessary to justify intervention. Opps. At 11–12.

In particular, FaceTec asserts "iProov has not provided any agreement between iProov and Jumio establishing that Jumio even uses iProov's technology. *Id*. at 11. FaceTec also asserts "[w]hile FaceTec suspects that Jumio's infringement is at least in part related to its relationship with iProov, iProov's failure to provide any factual basis to support that business relationship is odd …". *Id.* at 11–12. These statements fly in the face of FaceTec's own Complaint and claim charts, which allege on multiple occasions that Jumio's product uses iProov technology. *See* Dkt. 1 at ¶ 28(a); *Id.* at ¶ 31; *Id.* at ¶ 32; Dkt. 1-5 (Ex. E) at p. 19, n. 2. Counsel for FaceTec also admits that the parties have a business relationship. Dkt. No. 40-1, ¶ 12. Jumio also acknowledged this relationship. Dkt. No. 32 at 5 ("[I]n early 2021, Jumio began migrating some of its customers to a different Liveness Check vendor, iProov").

FaceTec cannot disclaim its own allegations, especially given that it has made no attempt to dispute iProov's interest as the manufacturer of an accused product. "As [iProov] sells the [software] that [FaceTec] alleges infringe its patents, there can be no question that [iProov] has a legally protectable interest in the products that [FaceTec] seeks to place at issue in this patent infringement action." *LG Elecs.*, 211 F.R.D. at 365; *see also U.S. Ethernet Innovations, LLC v. Acer, Inc.*, No. C 10-03724 JW, 2010 U.S. Dist. LEXIS 145889, at *22 (N.D. Cal. Dec. 21, 2010); *Nazomi Communs., Inc. v. Nokia Corp.*, No. SACV 10-151 DOC (RNB), 2010 U.S. Dist. LEXIS 148819, at *12 (C.D. Cal. June 21, 2010); *Honeywell Int'l*, 2005 U.S. Dist. LEXIS 22933, at *12.

iProov also demonstrated that it has an economic interest in defending its customers. Dkt. No. 36 at 11–12. FaceTec does not dispute this, instead arguing that the absence of discussion regarding iProov's indemnification agreement is fatal to iProov's claim. Dkt. No. 40 at 12. First, even if there were no indemnification agreement, which is not the case, iProov would still have a significant protectable interest in defending its customers. *U.S. Ethernet Innovations*, 2010 U.S. Dist. LEXIS 145889, at *22 ("Broadcom also has an economic interest in defending its customers from infringement allegations."). Second, iProov does in fact have an indemnification agreement with Jumio. Declaration of Ryan E. Hatch ("Hatch Decl."), ¶ 7. And FaceTec *already knows this*, because FaceTec received a full copy of the November 23, 2020 Jumio-iProov agreement in discovery in the Nevada Action. *Id.* This factor therefore favors intervention. *See U.S. Ethernet Innovations, LLC v. Acer, Inc.*, No. 6:09-cv-448-JDL, 2010 U.S. Dist. LEXIS 150649, at *13 (E.D. Tex. May 10, 2010) ("[A] manufacturer … faces the loss of its customer base and reputation as a result of patent infringement allegations."); *See also Team Worldwide Corp. v. Wal-Mart Stores, Inc.*, No. 2:17-CV-00235-JRG, 2017 U.S. Dist. LEXIS 201769, at *12 (E.D. Tex. Dec. 7, 2017).

3. FaceTec Does Not Dispute That the Disposition of this Action May Impair or Impede iProov's Ability to Protect its Interest

iProov demonstrated that its interests will be impaired by this action. Dkt. No. 36, §II(A)(3). FaceTec does not dispute this factor. As previously demonstrated, iProov's interest would be impaired. *Nazomi Communs.*, 2010 U.S. Dist. LEXIS 148819, at *13 ("[Intervenor-Manufacturer]'s interests … is not a mere "economic interest in the outcome of the lawsuit," but

is a concrete and fundamental interest in the issues in this litigation."); *Select Retrieval, LLC v. ABT Elecs.*, No. 11 C 03752, 2013 U.S. Dist. LEXIS 174442, at *8 (N.D. Ill. Dec. 13, 2013) ("[iProov] would be subject to potentially inconsistent judgments regarding whether its technology infringes the patent. Without intervening in this case, [iProov]'s ability to defend its technology could be compromised."); *see also Honeywell Int'l* 2005 U.S. Dist. LEXIS 22933, at *12 (finding manufacturer could "rightly claim" its interest would be impaired).

4. iProov's Interest is Not Adequately Represented

iProov demonstrated that patent owners routinely intervene as of right in cases in which their products are accused of infringement. Dkt. No. 36, §II(A)(4). FaceTec does not address this issue head on. Instead, faced with the reality that a patent owner has a right to intervene, FaceTec cites Ninth Circuit case law to argue that iProov has not made a "compelling showing" sufficient to rebut a presumption that its interest is adequately protected by Jumio. Dkt. No. 40 at 8–11. FaceTec's argument is flawed and its law unavailing. Even if the presumption applies, the Ninth Circuit has held that the presumption is rebutted by a showing that interests "might diverge" and that, consistent with Supreme Court precedent, the relevant inquiry is whether 'there is sufficient doubt about the adequacy of representation to warrant intervention.'" *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 824 (9th Cir. 2001) (reversing denial of petition for intervention) (quoting *Trbovich v. UMW*, 404 U.S. 528, 538, 92 S. Ct. 630, 636 (1972)).

a) The Presumption of Adequate Representation Does Not Apply

The presumption of adequacy of representation applies when a proposed intervenor and a party share the same "ultimate objective." *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1305 (9th Cir. 1997). Tellingly, FaceTec fails to state what this ultimate objective is, stating only that Jumio and iProov share it "[a]s established by Jumio's counterclaims for declaratory judgment of invalidity and noninfringement." Dkt. No. 40 at 5. FaceTec further states "iProov has not met its burden to overcome the presumption that iProov's and Jumio's interests ***are aligned***." *Id.* at 9. But this is not the standard. FaceTec conflates adequacy of representation with ultimate objective:

> Indeed, Jumio's Answer and counterclaims confirm that iProov and Jumio are aligned. Jumio's counterclaims for invalidity and noninfringement alone establish two of the three factors considered for adequacy of representation. Jumio therein confirms that it will be [*sic*] make iProov's arguments regarding non-infringement and patent invalidity and has the capability and willingness to do so. (Id.) This conclusively establishes Jumio's willingness and ability to take those positions.

Id. at 9–10.

This is not a showing that Jumio and iProov share the same ultimate objective. This is at most a demonstration pertinent to two of the three factors for adequacy of representation. But even there, it falls short because those two factors are "(1) whether the interest of a present party is such that it will ***undoubtedly*** make ***all*** the intervenor's arguments; [and] (2) whether the present party is capable and willing to make such arguments …". *Sw. Ctr. for Biological Diversity*, 268 F.3d at 822–23 (emphasis added) (holding that even if presumption of adequate representation applied it was rebutted by a showing that interests "might diverge"); *Team Worldwide Corp.*, 2017 U.S. Dist. LEXIS 201769, at *17 (granting intervention of right for three manufacturers of accused products, noting all that is required is that the parties' interest "may diverge").

In support of its argument that the presumption applies, FaceTec cites a number of Ninth Circuit cases, the majority of which pertain to constitutional challenges, not patent matters.[1] The application of the presumption of adequate representation in the context of a constitutional challenge is clear. There, the proposed intervenor seeks precisely the same ultimate objective as one of the parties: to uphold or strike down the challenged law, ordinance, ballot measure etc. But this same logic does not apply to the context of a manufacturer seeking to intervene in a patent case against a customer who has its own products, because the customer and the manufacturer do not share the same ultimate objective. They may each seek a finding of

[1] *See Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 949 (9th Cir. 2009) (constitutionality of Proposition 8); *Arakaki v. Cayetano*, 324 F.3d 1078, 1081 (9th Cir. 2003) (constitutionality of provision of benefits to native Hawaiians); *Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, 960 F.3d 603, 608 (9th Cir. 2020) (constitutionality of ordinance and resolution barring coal); *Prete v. Bradbury*, 438 F.3d 949, 951 (9th Cir. 2006) (constitutionality of ballot measure); *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1300 (9th Cir. 1997) (constitutionality of Proposition 187). While not a Ninth Circuit case, *League of United Latin Am. Citizens, Council No. 4434 v. Clements* also involved a constitutional challenge. 884 F.2d 185, 187 (5th Cir. 1989).

invalidity, but their objective is to prevent a finding of infringement as to each of their own products or services. This is not the same ultimate objective. *See Nazomi Communs.*, 2010 U.S. Dist. LEXIS 148819, at *14; *Team Worldwide Corp.*, 2017 U.S. Dist. LEXIS 201769, at *17.

The only patent case cited by FaceTec in which an intervenor was held to share the same ultimate objective with a party is *Droplets, Inc. v. Yahoo! Inc.*, No. 12-cv-03733-JST, 2019 U.S. Dist. LEXIS 232392 (N.D. Cal. Nov. 19, 2019). FaceTec cites this case for the proposition that the parties can "easily obtain" technical documentation and source code from iProov via a subpoena. Dkt. No. 40 at 11. But that case is distinguishable. There, the defendant underwent significant restructuring during a stay in the litigation in which it transferred the pertinent assets, including source code and technical documents, to a new entity, which then sought to intervene. *Droplets, Inc.*, 2019 U.S. Dist. LEXIS 232392, at *3–4. The proposed intervenor argued that its interest would not be adequately represented because the existing party did not have ready access to the technical documentation, source code, and engineering documents. *Id.* at *8. The Court rejected this argument, noting "Yahoo's obligation to preserve evidence and provide access to relevant witnesses and documents persists regardless of [its] voluntary actions unrelated to this litigation." *Id.* (internal quotations and citations omitted). "The Court, therefore, [was] not persuaded by Yahoo's alleged loss of pertinent evidence due to corporate restructuring." *Id.*

Moreover, the presumption of adequate representation applied in *Droplets* because the parties were affiliated and offered the same product. This is clear from the ultimate objective that they shared: "to prove that Yahoo's products do not infringe Droplets's patent." *Id.* at *7. Here, it appears as though FaceTec is accusing Jumio of infringement based on both (1) its use of iProov technology; and (2) its own branded liveness detection technology. *See* Dkt. No. 1 at ¶ 28 (defining "Accused Instrumentalities" as including iProov technology and Jumio technology); *id.* at ¶ 32 (alleging Jumio has both persisted in using iProov technology and introduced its own branded technology that infringes for "similar reasons"). Jumio thus seeks to prove its *use* of iProov technology and its own products do not infringe. iProov seeks to prove that its technology does not infringe. Jumio's broader concerns, as well as the focus on its use of iProov technology, mean it does not share the same ultimate objective as iProov. *See* Dkt. No.

36 at 14. Indeed, FaceTec recently moved to dismiss this action on the basis that Jumio offers its own technology which uses a "different methodology than the inventions described and claimed in the asserted FaceTec patents" and is "phasing out its use of iProov liveness detection technology." Dkt. No. 45 at 2. Again, as demonstrated by iProov, Jumio and iProov may have overlapping interests, but that is not the same as sharing the same ultimate objective. Courts have recognized that a customer and a manufacturer have interests that might diverge, which is sufficient to satisfy the minimal showing of inadequacy of interest.[2] *Nazomi Communs.*, 2010 U.S. Dist. LEXIS 148819, at *14; *Sw. Ctr. for Biological Diversity*, 268 F.3d at 823; *Team Worldwide Corp.*, 2017 U.S. Dist. LEXIS 201769, at *17.

b) iProov is not Speculating as to the Inadequacy of Representation

FaceTec argues that iProov is speculating that Jumio will not adequately represent its interest. Dkt. No. 40 at 9.[3] Similarly, FaceTec argues that iProov's assertion that Jumio may stipulate to a finding of infringement is "speculation and hypothetical." Dkt. No. 40 at 10. FaceTec again cites cases that all involved rebutting the presumption of adequate representation and do not squarely address the issue before this court. In *Wilson*, the proposed intervenor admitted that party would adequately represent its interest but speculated that they might diverge after the next election cycle. 131 F.3d at 1307. In *Moosehead San. Dist. v. S.G. Phillips Corp.*, the state sought to intervene on the basis it would have an equitable claim to restitution if the plaintiff received any recovery, but the Court held the state could institute a timely suit to recover against whatever recovery the plaintiff may receive. 610 F.2d 49, 54–55 (1st Cir. 1979). In *Clements*, a county sought to intervene on behalf of its citizens and judges, and, in addition to

[2] This is also sufficient to rebut the presumption of adequate representation, as discussed below.
[3] Despite claiming that iProov is speculating, FaceTec cites cases for the proposition that a party must assert more than disagreements over litigation strategy and legal tactics to warrant intervention, which are inapplicable. *Id.* In *Callahan v. Brookdale Senior Living Cmtys., Inc.*, the proposed intervenor had sued the same defendant and sought to intervene in another case to challenge the amount of settlement. 42 F.4th 1013, 1018 (9th Cir. 2022). And in *United Latin Am. Citizens*, the proposed intervenor contended that the litigation was not moving fast enough. 131 F.3d at 1306. iProov is not seeking to intervene to challenge litigation strategy or legal tactics; it must intervene for substantive reasons to protect its interest in its products.

not having any protectable interest, it presented no evidence to rebut the presumption of adequate representation by the Attorney General. 884 F.2d 185, 189.

Moreover, FaceTec recently stated "Jumio has represented that it is in the process of transitioning Jumio's customers away from technology sourced from iProov to a different liveness detection technology." Dkt. No. 45 at 4. Jumio—which is both ceasing its use of iProov technology and already beginning to differentiate its products from iProov's—cannot be expected to adequately represent iProov's interest. iProov is not speculating as to inadequate representation by a party that clearly shares the same objective. Rather, iProov is relying on the principle that a customer does not adequately represent a manufacturer's interest, especially when that customer is more inclined to defends its own business. *See Nazomi Communs.*, 2010 U.S. Dist. LEXIS 148819, at *14 ("[A]s ARM argues, the defendants may seek to settle this lawsuit and stipulate to a finding of infringement, even though ARM may stand to lose valuable market share from such a stipulation."); *Team Worldwide Corp.*, 2017 U.S. Dist. LEXIS 201769, at *17.

FaceTec also asserts that "iProov has not identified any argument or defense that it would assert that Jumio would not assert [which] should be fatal to its motion to intervene." Dkt. No. 40 at 10. FaceTec cites no case that holds this is a requirement.[4] Indeed, the Ninth Circuit has squarely rejected this argument. *Sw. Ctr. for Biological Diversity*, 268 F.3d at 824 (reversing denial of petition for intervention) ("[I]t is not Applicants' burden at this stage in the litigation to anticipate specific differences in trial strategy.").

c) Jumio's Involvement Does Not Entail Adequate Representation

FaceTec also argues that iProov fails to provide any declaration support for its contentions that Jumio is a customer of iProov and the accused technology is one of many embedded

[4] The case cited by FaceTec is wholly inapposite. *Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977) (reversing joinder because district court allowed parties into the case and awarded relief without ever hearing a formal request for intervention). FaceTec nonetheless asserts that intervention should not be allowed until iProov's "speculative" claims "have [a] basis in reality." *Id.* This ignores iProov's very real interest and the prejudice it would suffer if forced to wait until Jumio failed to assert an argument or defense. *See* § II(B) *infra*.

technologies in Jumio's portfolio. Dkt. No. 40 at 9.[5] These claims are undermined by FaceTec's own allegations. Dkt. No. 1 at ¶ 28 (referring to iProov as a vendor and partner of Jumio); ¶ 31 (alleging that iProov "deployed for Jumio" an allegedly infringing technology); ¶ 32 (alleging that Jumio has introduced products that "constitute or incorporate" iProov technology). Moreover, the attached declaration attests to the fact that iProov and Jumio entered a business relationship in which iProov provides technology to Jumio, who then uses that technology in its own products. Hatch Decl., ¶ 8. That Jumio has other products that do not incorporate iProov technology is well-known to iProov. Indeed, FaceTec has recently moved to dismiss this action on the basis that Jumio offers its own technology distinct from iProov. Dkt. No. 45 at 2. And FaceTec knew this at the time of the September 12 Joint Case Management Statement, in which it stated, "in recent communications, Jumio has indicated that its 'own' liveness detection technology is different from iProov's." Dkt. No. 32 at 4.

FaceTec argues that iProov's claim that it would bring expertise in its products "overstates the importance of this case". Dkt. No. 40 at 11. FaceTec argues that Jumio sufficiently understands iProov technology, citing nothing but the *ipse dixit* of its counsel. *See* Dkt. No. 40-1 (Dilger Decl.), ¶ 15 ("The software and service provided by iProov is well known by Jumio. Jumio will thus be well-equipped to examine any source code or products and to determine where iProov ends and Jumio begins. There is not a high level of expertise needed to read iProov's code."). FaceTec's counsel offers no support for how he—counsel for neither Jumio nor iProov—has the requisite knowledge to make such claims. These statements should be given no weight. *See Nguyen v. 3M Co.*, No. C 10-04064 SBA, 2011 U.S. Dist. LEXIS 4062, at *7 (N.D. Cal. Jan. 11, 2011) ("[C]ounsel fails to disclose what particular records or type of records she allegedly reviewed. Nor does she explain *how* she reached *her conclusions* regarding

[5] FaceTec also argues iProov contradicts these contentions by claiming it "does not know the extent or manner to which Jumio uses iProov's technology." *Id*. This is a mischaracterization of iProov's statement that "the manner in which Jumio uses the accused technology may be different than iProov." Dkt. No. 36 at 14. The general fact that Jumio may embed iProov technology into one of many products is distinct from the intricacies of how Jumio embeds and uses that technology. There is no contradiction.

the [amount in controversy]. In the absence of such information, 3M's counsel's ipse dixit statements in her declaration are not persuasive evidence for purposes of sustaining a removal.”).

Lastly, FaceTec asserts “iProov has failed to make any showing or present any evidence to support its position that any specialized knowledge is even required.” Dkt. No 40 at 11. iProov is not required to make such a showing. *See Sw. Ctr. for Biological Diversity*, 268 F.3d at 824 (reversing denial of intervention where district court had concluded that Applicants had not identified “any necessary elements that applicants will bring to these proceedings that the City will neglect” because it was not movant’s burden).[6] In any event, iProov has made the showing that as the manufacturer of an accused product it has specialized knowledge of that product, which is sufficient for intervention. *LG Elecs.*, 211 F.R.D. at 365 (“Quanta may not have the same knowledge that Apple has about the design of the Apple products, and thus may not be able to adequately represent Apple’s interests.”); *Honeywell Int'l*, 2005 U.S. Dist. LEXIS 22933, at *13 (“Finally, because [intervenor] is uniquely situated to understand and defend its own product, its interests are not adequately represented.”).

d) iProov Can Ultimately Rebut the Presumption of Adequate Representation

FaceTec’s argument ultimately fails because even if the presumption applies, it is easily rebutted. As noted, FaceTec cites to inapplicable case law, most of which are not patent cases, and the one patent case FaceTec cites to is readily distinguishable. A more apt case is *Indus. Tech. Research Inst. v. LG Elecs., Inc.*, No. 3:13-cv2016-GPC-WVG, 2014 U.S. Dist. LEXIS 148865 (S.D. Cal. Oct. 15, 2014). There, the Court considered a motion to intervene by the manufacturer of various display monitors. *Id.* at *4. The manufacture provided these monitors to the defendant, who was accused of infringing by “making, using, selling, offering for sale, and/or importing” the monitors. *Id.* The manufacturer had agreed to indemnify the defendant

[6] FaceTec cites *Oakland Bulk* to allege this is a required showing. 960 F.3d at 621. But, again, *Oakland Bulk* involved a constitutional challenge and the presumption of inadequate representation clearly applied. *Id*. at 620. Further, in *Oakland Bulk*, an unrelated third-party intervenor claimed specialized knowledge in environmental issues, and the issue was whether there was sufficient evidentiary support that the government could not obtain the specialized knowledge through discovery or experts. *Id.* at 621. The issue was not whether a manufacturer has specialized knowledge of its products that would benefit the litigation.

and thus sought to intervene as of right and permissively, which only the plaintiff opposed. *Id.* at *4–5. The Court analyzed all factors in favor of the intervenor, noting that it had a significantly protectable interest that would be impaired because it manufactured the monitors. *Id.* at *10.

The plaintiff argued in opposition that the existing defendant adequately represented the intervenor's interest. The Court held that the presumption of adequate representation applied because the parties shared the same objective of invalidity and noninfringement. *Id.* at *13–14. As discussed above in connection with *Droplets*, the application of the presumption is distinguishable because the manufacturer and customer ultimately sought a finding of noninfringement by the same product. *See* § II(A)(4)(a) *supra.* Nonetheless, the Court found the presumption rebutted by the intervenor on posture similar to this case:

> [F]irst, [Intervenor] does not state which arguments Defendants will not make that [Intervenor] would. Second, Defendants lack [Intervenor]'s depth of technical knowledge regarding liquid crystal displays because Defendants are purchasers of the liquid crystal displays that [Intervenor] manufactures. Thus Defendants may not be capable of adequately arguing defenses to Plaintiff's patent infringement causes of action. Third, [Intervenor] has necessary technical knowledge and documents that would otherwise be absent … [Intervenor]'s knowledge of and documents related to the [Accused Products] weigh strongly against adequacy and rebut the presumption of adequacy.

Indus. Tech., 2014 U.S. Dist. LEXIS 148865, at *13-14 .

Thus, even if Jumio was doing nothing more than simply using iProov technology, iProov would still have a right to intervene. Indeed, the Ninth Circuit has found the presumption to be rebuttable by a mere showing that interests "might diverge." *Sw. Ctr. for Biological Diversity*, 268 F.3d at 823-24 ("[E]ven if the presumption applies, it is rebutted here because Applicants and Defendants do not have sufficiently congruent interests").

Accordingly, even if this Court finds the presumption of adequate representation applies, it is easily rebutted by factors favoring intervention, and iProov's Motion should be granted.

B. iProov is, Alternatively, Entitled to Permissive Intervention Pursuant to Fed. R. Civ. P. 24(b)

iProov demonstrated that it should be permitted to intervene because, *inter alia*, there exists many common questions of law and fact between iProov's defenses and the main action. Dkt. No. 36 at §II(B). FaceTec does not dispute this; rather, it asks this Court to consider "other

factors" to exercise its discretion to deny iProov's Motion. Dkt. No. 40 at 13–15.

One such other factor asserted by FaceTec is the "option for reexamination of intervention at a later time." Dkt. No. 40 at 14. FaceTec is flipping the factor on its head. When making a discretionary decision on permissive intervention, "[t]he court may also consider whether changes have occurred in the litigation so that intervention that was once denied should be reexamined." *Spangler*, 552 F.2d 1326 at 1329. This is a far cry from claiming that a court should deny intervention on the basis that it could reconsider the issue later, and FaceTec has not provided any case in which a court so held. Consider the prejudice that would result if the Court held that iProov must wait to intervene until Jumio fails to adequately represent its interests. At that point in time, significant substantive developments prejudicial to iProov may have occurred, at which point FaceTec would surely argue that intervention should be denied. FaceTec is effectively arguing that a proposed intervenor with an interest in a case must sit on the sidelines until its interest becomes prejudiced, at which point it can intervene. This flies in the face of the preference for intervention at the earliest possible time and the policy favoring intervention.[7]

FaceTec asserts that iProov's participation would hinder resolution of and unduly delay this case. Dkt. No. 40 at 14. FaceTec does not specify how iProov would hinder or delay the litigation. The only patent case FaceTec cites involved a proposed intervenor involved in another litigation and who had "no interest in either the [Asserted] Patent or in [the] accused instrumentality" seeking to intervene "to present alternative claim constructions." *Freeman v. Delta Air Lines, Inc.*, No. C 13-04179 JSW, 2014 U.S. Dist. LEXIS 158651, at *6 (N.D. Cal. Nov. 10, 2014). The Court denied permissive intervention, noting consolidated claim construction was more appropriate. *Id.* at *13–14.[8] Moreover, there is no prejudice when a manufacturer intervenes at the early stages of the case. *U.S. Ethernet Innovations*, 2010 U.S.

[7] FaceTec also claims two more "other factors" weigh against intervention: "iProov's interests are adequately represented," and "iProov's intervention will not significantly contribute to full development of the underlying factual and legal issues in this suit." Dkt. No. 40 at 14. As discussed above, both of these factors favor intervention. *See* § II(A)(4) *supra*.

[8] *Pharm. Research & Mfrs. of Am. v. Sandoval*, also cited. is even less applicable. There, an independent third party sought to intervene in the challenge to a new law and thus brought no new perspective to the case. 2017 U.S. Dist. LEXIS 184201, at *8 (D. Nev. Nov. 7, 2017).

Dist. LEXIS 145889, at *23 ("[A]llowing Broadcom to intervene would not unduly delay the case or prejudice Plaintiff, as discovery is in its initial stages, no discovery deadline has yet been set by the Court, and the Broadcom products were already at issue.").

FaceTec ignores that "[p]ermitting the intervention by a manufacturer in a patent infringement case against its customers is well supported by case law." *HBB Ltd. Pshp. v. Ford Motor Co.*, No. 92-C-3287, 1992 U.S. Dist. LEXIS 17543, at *4 (N.D. Ill. Oct. 2, 1992) (collecting cases); *see also LG Elecs.*, 211 F.R.D. at 366 (granting permissive intervention). iProov should be permitted to intervene.

C. iProov is Entitled to Full Party Status

FaceTec argues that iProov's involvement should be limited to "opposing the only specific purpose raised by iProov," *i.e.*, the "stipulation to indirect infringement by Jumio." Dkt. No. 40 at 16. FaceTec cites no law providing that a manufacturer's intervention should be so limited. FaceTec relies on a strawman: "[i]t appears that iProov might be using this motion to intervene as a pretext for later seeking to stay the above-captioned case or to seek transfer or consolidation of this case with the existing iProov case." *Id.* at 15–16. This is pure speculation that ignores the facts. iProov's technology is accused of infringement, and it must intervene as a party to protect its interest. Moreover, even if iProov were seeking a stay, its intervention is not limited to that purpose and FaceTec's case law is thus inapposite. *See Tech. Licensing Corp. v. Thomson, Inc.*, 684 F. Supp. 2d 1206, 1207 (E.D. Cal. 2010) ("Movants likewise are not entitled to permissive intervention because they do not seek to become parties to this action. Rather, their sole purpose of intervening is to stay the action ….").[9] iProov is entitled to full party status. *U.S. Ethernet Innovations*, 2010 U.S. Dist. LEXIS 145889, at *23.

IV. CONCLUSION

iProov respectfully requests this Court grant its Motion to Intervene as of Right, or, in the alternative, its Motion for Permissive Intervention.

[9] FaceTec also asserts "[s]eeking to intervene merely to attack or thwart a remedy rather than participate in the future administration of the remedy is disfavored." Dkt. No. 40 at 16. iProov fails to see the relevance of this assertion. iProov is seeking to intervene as a party to fully engage with the substance of the claims.

Dated: October 14, 2024 By: /s/ *Ryan E. Hatch*

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

FACETEC, INC., a Delaware Corporation Plaintiff, v. JUMIO CORPORATION, a Delaware Corporation Defendant.	Case No. 3:24-cv-03623-RFL Noticed For: October 22, 2024, at 10:00 a.m. **DECLARATION OF RYAN E. HATCH IN SUPPORT OF iPROOV LTD.'S OPPOSED MOTION TO INTERVENE** Assigned Judge: Rita F. Lin

I, Ryan E. Hatch, declare as follows:

1. I am an attorney duly licensed to practice law before all courts of the State of California and am principle at Hatch Law, PC, 13323 W. Washington Blvd., Suite 302, Los

Angeles, CA 90066. I am an attorney for Proposed Intervenor iProov, Ltd. ("iProov") in this action. I have personal knowledge of the facts stated therein. If called upon to testify, could and would testify competently to the following facts.

2. FaceTec Inc. ("FaceTec") has sued iProov in the United States District Court for the District of Nevada claiming that iProov infringes two of FaceTec's patents. *See FaceTec Inc. v. iProov Ltd.,* Case No. 2:21-cv-02252-ART-BNW (the "Nevada Action").

3. I have been counsel for iProov in the Nevada Action since May of 2023. I also represent iProov in various other matters, including this action.

4. As its attorney, I have knowledge of iProov's technology, its products, and the nature of its business.

5. iProov develops biometric liveness detection software, which is used to ensure that a live human is present during authentication by means of facial recognition ("Liveness Detection Software").

6. iProov provides its Liveness Detection Software via partnerships with governments, financial institutions, and other businesses. One such company is Jumio Corporation ("Jumio"), the defendant in this action.

7. iProov and Jumio have entered into an agreement dated November 23, 2020, (the "iProov-Jumio Agreement"). The iProov-Jumio Agreement includes an indemnification obligation and was previously produced to FaceTec in the Nevada Action at Bates No. IP0255884–0255959.

8. Under the terms of the iProov-Jumio Agreement, iProov provides its Liveness Detection Software to Jumio for use in Jumio's own products. iProov maintains the source code for its Liveness Detection Software, as well as the technical documentation and employs the personnel involved in its development. iProov provides binary files to Jumio, who then embeds iProov technology into its products.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this day of October 14, 2024, at Los Angeles, California.

By: */s/ Ryan E. Hatch*

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