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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

APPLE, INC., et al.

Plaintiffs,

v.

ANDREI IANCU, in his official capacity as
Under Secretary of Commerce for Intellectual
Property and Director, United States Patent and
Trademark Office,

Defendant.

Case No. 5:20-CV-06128-EJD

**PROPOSED INTERVENORS' NOTICE
OF MOTION AND MOTION TO
INTERVENE; MEMORANDUM AND
POINTS OF AUTHORITIES**

Honorable Edward J. Davila

Date: December 17, 2020
Time: 9:00 a.m.
Courtroom 4, 5th Floor

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NOTICE OF MOTION AND MOTION TO INTERVENE

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on December 17, 2020 at 9:00 a.m. in Courtroom 4, 5th Floor before the Honorable Edward J. Davila of the United States District Court for the Northern District of California, Intervenor US Inventor, 360 Heros, Inc., Larry Golden, World Source Enterprises, LLC, Dareltech LLC, Tinnus Enterprises, LLC, Clearplay, Inc., E-Watch, Inc. (“Proposed Intervenor”) will move the Court, under Rules 24(a)(1) and 24(b) of the Federal Rules of Civil Procedure, to intervene in this action. The grounds for this motion, as set forth in detail below, in the accompanying Memorandum and Points of Authorities.

ISSUES TO BE DECIDED

1. Whether the Proposed Intervenor-Plaintiffs have a right to intervene under Federal Rule of Civil Procedure 24(a)?
2. Whether the Proposed Intervenor-Plaintiffs should be permitted to intervene under Federal Rule of Civil Procedure 24(b)?

MEMORANDUM AND POINTS OF AUTHORITIES

I. INTRODUCTION

Congress gave the Director of the United States Patent and Trademark Office (“USPTO”) rulemaking responsibilities when it enacted the America Invents Act of 2011 (the “AIA”). In particular, 35 U.S.C. § 316 commands that the Director “shall” promulgate rules to govern what might constitute “sufficient grounds” for instituting a patentability trial under the AIA. The Director and his predecessors have had nearly a decade to complete such rulemaking, but have not done so.

As things presently stand, petitioners who attack patent validity in an AIA trial need to do two things to establish “sufficient grounds” to the satisfaction of the Director before he will institute a patent validity trial within the agency against a patent owner. First, petitioners need to establish that the quality

1 of their invalidity argument is high enough.¹ Second, petitioners need to establish that the Director
2 should *not* exercise his plenary discretion to deny institution.

3 Rulemaking has only occurred thus far under the first of these two prongs. The Director has not
4 conducted notice-and-comment rulemaking on discretionary considerations that would address
5 “sufficient grounds.” Instead, the Director has developed an internal nonstatutory process for
6 designating certain PTAB panel decisions “precedential” that have addressed discretionary factors
7 governing institution in contested cases. All such decisions and designations have arisen in an ad hoc
8 manner, without regard for rulemaking requirements under the Administrative Procedure Act (“APA”),
9 leaving individual panels free to act inconsistently with one another when making the institution
10 decision—a decision that is unreviewable by appeal or mandamus.
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12
13 The original plaintiffs (dubbed here “Original Plaintiffs,” who are Apple Inc., Cisco Systems,
14 Inc., Google LLC, and Intel Corporation) filed the present action to complain that the Director violates
15 the APA when exercising discretion to deny institution of AIA trials on grounds related to parallel
16 federal court litigation involving the same patent. In one of their counts, Original Plaintiffs complain of
17 the absence of rulemaking. The intervenor-plaintiffs (“Small Business Inventors”) seek to intervene as
18 party plaintiffs because the disposition of this action will have lasting impacts on their proprietary and
19 legal interests. Respectfully, the Court should grant this motion to intervene to allow the Small Business
20 Inventors to protect their interests.
21

22 Those interests are distinct from the interests of the Original Plaintiffs, and of the Defendant.
23 Small Business Inventors want to *enhance* (through rulemaking) the authority of the Director to deny
24 institution (not deplete it as the Original Plaintiffs would). Small Business Inventors would do so by
25
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27 ¹ For “inter partes review” (“IPR”), this means there must be a “reasonable likelihood” that a petitioned
28 patent claim will be held unpatentable after a trial. For “post grant review” (“PGR”), this means that it
must be “more likely than not” that a claim is unpatentable. *See* 35 U.S.C. §§ 314(a), 324(a, b). The
Director has delegated this responsibility for deciding “sufficient grounds” to respective panels of the
Patent Trial and Appeal Board (“PTAB”).

1 *channeling the Director's discretion to the rulemaking phase* (not to the ad hoc case-by-case
2 adjudication phase as the Defendant would). Small Business Inventor Intervenors thus endorse the
3 Director's overall goal to make AIA trials more fair for patent owners, but seek their own protection
4 from harms resulting from the Director's unlawful withholding of agency rulemaking, and
5 circumvention of agency rulemaking through unlawful means. As required under Federal Rule of Civil
6 Procedure 24, Small Business Inventors include their own pleading, a Complaint in Intervention, along
7 with this motion as Exhibit 1.
8

9 **II. BACKGROUND**

10 AIA trials are expensive and often ruinous for patent owners to defend. In costs and legal fees,
11 patent owners can expect to spend on average \$451,000 per patent, just to maintain the status quo of
12 keeping a patent that the law already presumed to be valid. 35 U.S.C. § 282. Patent owners who are
13 dragged into an AIA trial have no upside—the USPTO cannot adjudicate infringement and cannot award
14 damages. This is on top of the costs and fees already expended just to obtain the patent right, which can
15 be considerable, sometimes more than \$100,000 per patent. Government fees spent on filing, issuing and
16 maintaining each such patent often exceed \$10,000, but (under current law) a declaration of invalidity in
17 an AIA trial does not entitle the patent owner to any refund of such fees for the “mistaken” work by the
18 government during original examination. Further, patents subject to an AIA trial can be invalidated
19 based on the preponderance of the evidence, as opposed to the clear-and-convincing-evidence standard
20 applied in district court, and effectively lose their statutory presumption of validity. The mere filing of
21 AIA trial petitions by an alleged infringer, followed by trial institution, has the potential to bankrupt
22 small disruptive innovative operating companies, regardless of any ultimate merit, and thus could reduce
23 competition for consumers.
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27 The AIA requires that “The Director shall prescribe regulations...setting forth the standards for
28 the showing of sufficient grounds to institute a review [and] shall consider the effect of any such

1 regulation on the economy, the integrity of the patent system, the efficient administration of the Office.”
2 35 U.S.C. §§ 316(a)(2) & (b).

3 “Sufficient grounds” under the respective statutes include not only the legal and factual merits
4 related to patentability as presented by the petitioner. “Sufficient grounds” also include why the Director
5 should not apply discretionary factors in considering whether to institute review. The USPTO has
6 plenary authority, unreviewable on appeal or mandamus, to deny review of any AIA trial petition for
7 any reason. *Harmonic Inc. v. Avid Tech., Inc.*, 815 F.3d 1356, 1367 (Fed. Cir. 2016) (“[T]he PTO is
8 permitted, but never compelled, to institute an IPR proceeding.”). Small Business Inventors have a
9 substantial interest in the Director promulgating a robust set of regulations that provide clear direction to
10 individual panels concerning when discretionary factors require denial of institution. Small Business
11 Inventors include US Inventor, Inc., 360Heros, Inc., Larry Golden, World Source Enterprises, LLC,
12 Dareltech LLC, Tinnus Enterprises, LLC, Clearplay, Inc. and E-Watch, Inc.²

15 Original Plaintiffs have an opposite interest in key respects. In their original complaint, Original
16 Plaintiffs have attacked one aspect of the Director’s past exercise of discretion to deny institution—that
17 the presence of parallel litigation raising the same issues may have already reached a jury verdict by the
18 time of a future PTAB final decision. This is described in the original complaint as the so-called *NHK-*
19 *Fintiv* rule. Original Plaintiffs point to the absence of rulemaking as part of their argument that the
20 Director has exercised too much discretion to deny institution in such scenarios. Small Business
21 Inventors, on the other hand, point to the absence of rulemaking as part of their argument that the
22 Director has not exercised discretion enough (or with enough clarity) to deny institution, for *all*
23 discretionary scenarios. Thus, both the Original Plaintiffs and the proposed intervenors raise the same
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28 ² For ease of reference, “Small Business Inventors” herein includes reference to co-intervenor US Inventor, Inc., which is actually a nonprofit association formed for the interests of inventors, not an inventor *per se*. Before the Original Plaintiffs filed their suit, US Inventor had petitioned the USPTO for rulemaking on the subject matter of discretionary considerations and “sufficient grounds.”

1 lapse by the Director, but do so to achieve conflicting goals (i.e., Original Plaintiffs seek to eliminate the
2 PTAB's discretionary authority whereas Small Business Inventors seek to clarify it).

3 **III. ARGUMENT**

4 **A. The Proposed Intervenor-Plaintiffs Have a Right to Intervene Under Federal Rule** 5 **Of Civil Procedure 24(a)**

6 Federal Rule of Civil Procedure 24(a) states in relevant part:

7
8 On timely motion, the court must permit anyone to intervene who...(2) claims an interest
9 relating to the property or transaction that is the subject of the action, and is so situated
10 that disposing of the action may as a practical matter impair or impede the movant's
11 ability to protect its interest, unless existing parties adequately represent that interest.

12 The Ninth Circuit applies a four part test for determining if an applicant has a right to intervene under
13 Rule 24(a)(2). These four factors include: "(1) the motion must be timely; (2) the applicant must claim a
14 'significantly protectable' interest relating to the property or transaction which is the subject of the
15 action; (3) the applicant must be so situated that the disposition of the action may as a practical matter
16 impair or impede its ability to protect that interest; and (4) the applicant's interest must be inadequately
17 represented by the parties to the action." *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1177
18 (9th Cir. 2011) (citation omitted). A movant is not required to satisfy the requirements for Article III
19 standing when it satisfies the requirements for intervention as of right under Rule 24(a). *See Perry v.*
20 *Proposition 8 Official Proponents*, 587 F.3d 947, 950 n.2 (9th Cir. 2009); *Portland Audubon Soc'y v.*
21 *Hodel*, 866 F.2d 302, 308 n.1 (9th Cir. 1989), *abrogated on other grounds by Wilderness Soc'y v. U.S.*
22 *Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011).

23
24 The Ninth Circuit follows "'practical and equitable considerations' and construe[s] the Rule
25 'broadly in favor of proposed intervenors.'" *Id.* at 1179 (citations omitted). There is a "'liberal policy in
26 favor of intervention [which] serves both efficient resolution of issues and broadened access to the
27 courts.'" *United States v. City of Los Angeles*, 288 F.3d 391, 397-98 (9th Cir. 2002) (citations omitted).
28 The purpose of this liberal interpretation is to involve "'as many apparently concerned persons as is

1 compatible with efficiency and due process.” *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d
 2 1489, 1496 (9th Cir. 1995), *abrogated on other grounds by Wilderness Soc’y v. U.S. Forest Serv.*, 630
 3 F.3d 1173 (9th Cir. 2011); *Fresno Cty. v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980) (citations omitted).

4 The Small Business Inventors satisfy each prong of this test and therefore should be permitted to
 5 intervene as of right.

7 **1. The Application is Timely**

8 A motion to intervene is made at a sufficiently early stage of the proceedings when it occurs
 9 “before any hearings or rulings on substantive matters.” *Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d
 10 1392, 1397 (9th Cir. 1995) (allowing environmental groups to intervene four months after the complaint
 11 was filed, even though plaintiff had already moved for a preliminary injunction). This motion is timely
 12 under this factor. The complaint was filed less than three weeks before this motion to intervene. This
 13 case is still in its earliest phases.

14 Movants thus meet the first prong for intervention as of right.

17 **2. The Intervenor-Plaintiffs have Significant Protectible Interests**

18 The sufficiency of an intervenor’s legally protectable interest “is a practical, threshold inquiry
 19 [and n]o specific legal or equitable interest need be established.” *Sw. Ctr. for Biological Diversity v.*
 20 *Berg*, 268 F.3d 810, 818 (9th Cir. 2001) (*citing Greene v. United States*, 996 F.2d 973, 976 (9th Cir.
 21 1993)). “[I]t is generally enough that the interest is protectable under some law, and that there is a
 22 relationship between the legally protected interest and the claims at issue.” *Wilderness Soc’y*, 630 F.3d
 23 at 1176 (citations omitted); *see also Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983)
 24 (intervenor’s interest need not be protected by statute put at issue by complaint so long as it is protected
 25 by law and relates to claim). A legally protectable interest could be an “existing legal right, contract, or
 26 permit[] relating to” the subject of the litigation. *Sw. Ctr. for Biological Diversity*, 268 F.3d at 819. This
 27 requirement is met here.
 28

1 Original Plaintiffs seek relief that would eliminate the *NHK-Fintiv* rule, *i.e.*, which would make
2 it more difficult or impossible for the Director to exercise his discretion by denying institution of AIA
3 trials on discretionary grounds on factors relating to parallel litigation of the same patent. Chipping away
4 at the Director's discretionary power to deny institution will plainly affect the legally protected interests
5 of the proposed Small Business Inventor intervenors. All patent owner Small Business Inventors are
6 either in currently pending institution-decision proceedings involving an argument for the application of
7 discretionary considerations, have brought such arguments in prior proceedings, and/or are reasonably
8 likely to have a need to raise discretionary considerations again to respond to future AIA trial petitions.
9 For example, for those of the proposed intervenors who are patent owners, relief requested in the
10 original complaint would adversely impact and may even eliminate an argument that Small Business
11 Inventors might make in currently-pending or future AIA trial petitions filed against their patents.
12
13

14 Proposed association intervenor US Inventor in particular has filed a Petition for Rulemaking at
15 the USPTO before the Original Plaintiffs ever filed their complaint. US Inventor's petition seeks
16 rulemaking that would ensconce and bolster (not eliminate) the *NHK-Fintiv* rule, among others. By its
17 filing alone, US Inventor has a legally protected interest in the matters raised in the original complaint.
18 US Inventor also has a day-to-day mission of educating the public about how to deal with AIA trial
19 petitions—a mission that would be impaired by the absence of proper rulemaking that should already
20 exist to guide PTAB panels about discretionary considerations.
21

22 The economic effects on the Small Business Inventors of the relief sought by the Original
23 Plaintiffs are thus in no way "speculative." "[A] non-speculative, economic interest may be sufficient to
24 support a right of intervention." *United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004).
25 *See also generally Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994) (discussing the centrality of settled
26 and legitimate expectations under various fundamental legal principles). The original complaint itself is
27 founded on the supposed economic impacts of the Director applying discretionary considerations
28

1 without rulemaking. The economic upheaval that would follow from the relief the Original Plaintiffs
2 seek establishes both that the Small Business Inventors have legally protected interests and that there is a
3 direct relationship between those interests and “resolution of plaintiffs’ claim.” *City of Los Angeles*,
4 288 F.3d at 398 (citation omitted); *Conservation Law Found. of New England v. Mosbacher*, 966 F.2d
5 39, 41-44 (1st Cir. 1992) (holding that commercial fishermen impacted by regulatory plan to address
6 overfishing had a recognizable interest in the timetable for implementing that plan).

7
8 The accompanying Complaint in Intervention goes even further to describe the legally
9 protectible interest at hand. Each patent owner plaintiff-intervenor has had to expend resources that
10 would otherwise have not been needed if clear rulemaking on discretionary factors had occurred. It is
11 reasonably likely they will have to do so again in future AIA trial challenges. And association plaintiff-
12 intervenor US Inventor has a right to instructive guidance from the agency to share with its membership
13 and the public. *Am. Anti-Vivisection Soc. and Avian Welfare Coalition v. U.S. Dep’t Agric.*, 946 F.3d
14 615, 618-19 (D.C. Cir. 2020).

15
16 The APA reflects the bedrock principle that businesses and associations affected by federal
17 executive branch regulatory measures have a legal right to participate in the development of, and
18 ultimately to challenge, such measures. *See generally*, 5 U.S.C. §§ 500 *et seq.* Here, the Original
19 Plaintiffs ask this Court to order the Director to stop applying one aspect of previously-used
20 discretionary considerations as a basis for finding no “sufficient grounds” to institute a patent trial.
21 Infringers want to make it easier to infringe, and impose procedural burdens on patent owners to force
22 their acquiescence. The Original Plaintiffs also ask this Court to set aside the current way the Director
23 exercises such discretion because it did not arise through notice-and-comment rulemaking. This
24 implicates the Small Business Inventors’ need for clear regulations promulgated lawfully by the Director
25 that *preserves and improves* (not eliminates) the Director’s full powers of discretionary denial.
26
27

28 Movants thus meet the second prong for intervention as of right.

1 **3. Disposition of this Action will Impede the Intervenor-Plaintiffs' Ability to**
 2 **Protect Their Interests**

3 To show impairment of interests for the purposes of Rule 24(a)(2), a proposed intervenor need
 4 show only that the disposition of an action “*may* as a practical matter” impede the intervenor’s ability to
 5 protect its interests in the subject of the action. Fed. R. Civ. P. 24(a)(2) (emphasis added). In evaluating
 6 this question, “the court is not limited to consequences of a strictly legal nature.” *Forest Conservation*
 7 *Council*, 66 F.3d at 1497-98 (citation omitted); *see also* Fed. R. Civ. P. 24 advisory committee’s notes to
 8 1966 Amend. (“If an absentee would be substantially affected in a practical sense by the determination
 9 made in an action, he should, as a general rule, be entitled to intervene. . . .”). Where the relief sought by
 10 the Original Plaintiffs would have direct, immediate, and harmful impact on a third party’s interests, that
 11 adverse impact is sufficient to satisfy Rule 24(a)(2). *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735
 12 (D.C. Cir. 2003) (stating that “there is no question” that proposed intervenor Mongolia’s environmental
 13 agency’s interests would be impaired by a decision in favor of an environmental group in a case
 14 regarding the application of the U.S. Endangered Species Act to sheep located within Mongolia);
 15 *Sagebrush Rebellion*, 713 F.2d at 528 (holding that “an adverse decision in this suit would impair
 16 [proposed intervenor environmental groups’] interest in the preservation of birds and their habitats”).

17 As noted previously, the declaratory and injunctive relief that the Original Plaintiffs seek would
 18 force the Director to end abruptly one of his main ways of exercising discretion to deny institution of an
 19 AIA trial against a patent owner, thereby dramatically increasing the possibility of attacked patent
 20 owners having to defend their patents in a full AIA trial (with a preponderance-of-the-evidence standard
 21 for unpatentability), even if the same parties are litigating the same issues in advanced-stage, parallel
 22 litigation before a district court (where the clear-and-convincing-evidence standard applies). Put another
 23 way, granting relief requested in the original complaint would make it easier for infringers to infringe,
 24 easier for infringers to invalidate patents, and easier to force acquiescence by a patent owner by
 25 increasing its procedural and economic burdens (potentially reducing competition and consumer
 26
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 28

1 welfare). Association intervenor US Inventor would likewise lose the ability to educate its membership
 2 on one currently-viable way to avoid an AIA trial, and furthermore would face a court ruling having the
 3 opposite effect of certain aspects of proposed rules it has submitted to the agency in its Petition for
 4 Rulemaking on the same topic.

5 Movants thus meet the third prong for intervention as of right.

6
 7 **4. The Original Plaintiffs Do Not Adequately Represent the Intervenor-
 8 Plaintiffs' Interests**

9 The requirement under Federal Rule of Civil Procedure 24(a)(2) to show inadequate
 10 representation “is satisfied if the applicant shows that representation of his interest ‘may be’ inadequate;
 11 and the burden of making that showing should be treated as minimal.” *Trbovich v. United Mine Workers*
 12 *of America*, 404 U.S. 528, 538 n.10 (1972) (citation omitted). The “burden of showing inadequate
 13 representation . . . is not onerous.” *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986).
 14 In assessing this factor, a court must consider whether “the interests of a present party to the suit are
 15 such that it will *undoubtedly* make all of the intervenor’s arguments[;]” whether “the present party is
 16 capable of and willing to make such arguments[;]” and whether “the intervenor would not offer any
 17 necessary element to the proceedings that the other parties would neglect.” *Fresno Cty.*, 622 F.2d at 439
 18 (emphasis added).
 19

20
 21 As described already, the original complaint advances the interests of Original Plaintiffs. It is in
 22 their interest to curtail the Director’s authority to deny AIA trial petitions against patents they stand
 23 accused of infringing. The proposed Complaint in Intervention seeks an opposite outcome. It seeks to
 24 bolster the application of discretionary factors (not eliminate any of them) by making sure that they get
 25 implemented by individual AIA trial panels following lawfully promulgated rules. Further, the Director
 26 will likely not advance arguments regarding the procedural and economic burdens that would be
 27 imposed on patent owners if the Director was prohibited from exercising his discretion to deny
 28 institution of AIA trials on factors relating to parallel litigation of the same patent. Finally, the Director

1 will almost certainly not argue in this Court in favor of the Small Business Inventors' efforts to have him
2 do what he has avoided doing—promulgate lawful regulations on discretionary factors. The Director
3 would preserve his ability to develop ad hoc common law in this area based on an easier-to-implement
4 “precedential” designation for panel decisions in contested cases—a procedural shortcut that both the
5 Original Plaintiffs and the proposed intervenors allege to be unlawful (albeit, for different ends).
6

7 Movants thus meet the fourth prong for intervention as of right. For the foregoing reasons, the
8 Court should grant intervention as of right.

9 **B. Alternatively, Permissive Intervention Should be Granted**

10 Federal Rule of Civil Procedure 24 contemplates two forms of intervention—intervention
11 of right and permissive intervention—and a court may grant an intervenor's motion on either basis.
12 *UAW, Local 283 v. Scofield*, 382 U.S. 205, 217 n.10 (1965). Permissive intervention under Rule 24(b)
13 should be allowed when: (1) the applicant has independent grounds for jurisdiction; (2) the applicant's
14 motion is timely; and (3) the applicant's claim or defense, and the main action, have a question of law or
15 a question of fact in common. *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 839 (9th Cir. 1996).
16 Under this standard, neither the inadequacy of representation, nor a direct interest in the subject matter
17 of the action, need to be shown. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1108 (9th Cir.
18 2002), *abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir.
19 2011). In exercising its discretion, the Court must also consider “whether the intervention will unduly
20 delay or prejudice the adjudication of the rights of the original parties.” Fed. R. Civ. P. 24(b)(2).
21
22

23 As previously demonstrated, the Small Business Inventors' motion to intervene is timely, will
24 not cause undue delay, and will not prejudice the Original Plaintiffs or the Director. Moreover, as
25 discussed above, the Small Business Inventors possess legally protectable interests in the Director's (and
26 the PTAB's) application of discretionary considerations (and how those discretionary considerations are
27 decided and promulgated) subject to the Original Plaintiffs' challenge. The potential for harm to those
28

1 interests from the original suit provides an independent basis for jurisdiction, particularly given the
 2 minimal showing required by Federal Rule of Civil Procedure 24(b). *See, e.g., In re Cal. Micro Devices*
 3 *Sec. Litig.*, 168 F.R.D. 276, 277 (N.D. Cal. 1996) (using cursory analysis to find pension fund could
 4 intervene under Rule 24(b)). And jurisdiction is clearly present. *See Make the Rd. N.Y. v. Wolf*, 962 F.3d
 5 612, 631 (D.D.C. 2000) (“Jurisdiction to review agency action under the APA is found in 28 U.S.C. §
 6 1331.”), quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 317 n.47 (1979); *Allen v. Milas*, 896 F.3d
 7 1094, 1099 (9th Cir. 2018) (holding “§ 1331 supplies ample basis for [a district court’s] subject matter
 8 jurisdiction” for an APA action brought under 5 U.S.C. § 706).

9
 10 As previously noted, the Small Business Inventors seek to compel lawful notice-and-comment
 11 rulemaking in the same subject areas where the Original Plaintiffs have attacked the exercise of agency
 12 discretion (themselves pointing to the unlawful absence of notice-and-comment rulemaking). Small
 13 Business Inventors also seek a declaration (in common with Original Plaintiffs) that the current
 14 “precedential” designation of ad hoc decisions cannot substitute for notice-and-comment rulemaking.
 15 US Inventor in particular has already sought rulemaking on a subject for which the Original Plaintiffs
 16 seek a court declaration that there can be no rule (*i.e.*, US Inventor wants to promulgate rules preserving
 17 and enhancing *NHK-Fintiv* discretion, rather than eliminating it). *See, e.g., Conservation Nw. v. U.S.*
 18 *Forest Serv.*, No. CV-05-0220, 2005 WL 1806364, at *2 (E.D. Wash. July 28, 2005) (finding private
 19 company’s interest in defending a lumber harvesting project in order to guard against a court order
 20 barring it was sufficient to establish common claims and defenses). Without question, the standards for
 21 permissive intervention, including common legal and factual questions, exist here.

22
 23 Because intervention would contribute to the just and equitable adjudication of the legal
 24 questions presented, it should be permitted.

25 26 27 **IV. CONCLUSION**

28 For the foregoing reasons, Small Business Inventors respectfully request that the Court grant
 their motion for leave to intervene as of right under Fed. R. Civ. P. 24(a) with respect to all of the

1 Original Plaintiffs’ claims. In the alternative, they request that they be granted permissive intervention
2 under Fed. R. Civ. P. 24(b) with respect to all of the Original Plaintiffs’ claims.
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Respectfully submitted,

/s/ Lewis E. Hudnell, III

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CERTIFICATE OF SERVICE

The undersigned certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of the forgoing REPLY IN SUPPORT OF MOTION TO DISMISS via the Court’s CM/ECF system pursuant to the Federal Rules of Civil Procedure and Local Rule CV-5(b)(1) this 14th day of September, 2020.

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