

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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APPLE INC.,  
Petitioner,

v.

VIRNETX INC.,  
Patent Owner.

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Case IPR2015-00810  
Patent 8,868,705 B2

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Before KARL D. EASTHOM, JENNIFER S. BISK, and  
GREGG I. ANDERSON, *Administrative Patent Judges.*

ANDERSON, *Administrative Patent Judge.*

DECISION  
Request for Rehearing  
*37 C.F.R. § 42.71(d)*

## SUMMARY

Patent Owner, VirnetX Inc., requests rehearing of the Board’s decision (Paper 8) (“Decision to Institute or Dec.”), entered September 11, 2015, instituting *inter partes* review of U.S. Patent 8,868,705 (Ex. 1001, “the ’705 patent”). In the Decision to Institute, we determined, on the present record, that Petitioner, Apple Inc., had shown a reasonable likelihood that claims 1–4, 6–10, 12–26, and 28–34 would have been obvious over Beser<sup>1</sup> combined with RFC 2401<sup>2</sup> and that claims 5, 11, and 27 would have been obvious over Beser, RFC 2401 and Brand.<sup>3</sup> Paper 12 (“Req. Reh’g”). For the reasons that follow, Patent Owner’s request for rehearing is *denied*.

## DISCUSSION

The applicable standard for granting a request for rehearing of a petition decision is abuse of discretion. 37 C.F.R. § 42.71(c). The requirements for a rehearing are set forth in 37 C.F.R. § 42.71(d), which provides in relevant part:

A party dissatisfied with a decision may file a request for rehearing, without prior authorization from the Board. The burden of showing a decision should be modified lies with the party challenging the decision. The request must specifically identify all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed in a motion, an opposition, or a reply.

Patent Owner argues that the Board erred by (1) overlooking the absence of evidence in Apple’s Petition tending to show that RFC 2401 is a printed publication (Req. Reh’g. 2–6) and (2) finding that RFC 2401 included indicia

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<sup>1</sup> U.S. Patent No. 6,496,867 B1 (Ex. 1007) (“Beser”).

<sup>2</sup> S. Kent and R. Atkinson, *Security Architecture for the Internet Protocol*, Request for Comments: 2401, BBN Corp., November 1998 (Ex. 1008) (“RFC 2401”).

<sup>3</sup> U.S. Patent No. 5,237,566 (Ex. 1012) (“Brand”).

sufficient to establish a reasonable likelihood that RFC 2401 is a printed publication (*id.* at 7–10). Patent Owner bases its argument on its assertion that “[t]he Board’s own case law . . . contradicts the Board’s conclusion that [the indicia on the face of RFC 2401] were sufficient to meet Apple’s burden of establishing that RFC 2401 constitutes a printed publication.” Req. Reh’g 2; *see also id.* 2–10 (discussing several non-precedential Board cases with different facts in which institution was denied on the reference at issue).

We are not persuaded that Patent Owner has identified any matters that we misapprehended or overlooked.<sup>4</sup> Instead, Patent Owner’s request reiterates arguments contained in its Preliminary Response that we have already considered. *See* Dec. 8–9 (acknowledging Patent Owner’s arguments related to RFC 2401’s status as a printed publication). A request for rehearing is not an opportunity to express disagreement with a decision.

Nonetheless, as noted in our Decision to Institute, we are persuaded that the record contains enough evidence on this issue to proceed to a trial. *Id.* at 8–9. The reasonable likelihood standard for instituting *inter partes* review asks whether the same preponderance standard is reasonably likely to be met at a later time. Thus, for institution purposes, we assess the persuasiveness of the petitioner’s evidence while “recognizing that [we are] doing so without all evidence that may come out at trial.” *New England Braiding Co. v. A.W. Chesterton Co.*, 970 F.2d 878, 883 (Fed. Cir. 1992) (reviewing a decision on a preliminary injunction where patentee has the burden of demonstrating “that it will likely succeed on all disputed liability

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<sup>4</sup>Patent Owner questions our citation to the Tamassia Declaration when it was not cited in the Petition. Req. Reh’g. 6, n1. However, Patent Owner raised the issue when it cited to paragraph 152 of the Tamassia Declaration in its Preliminary Response. Prelim. Resp. 4.

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issues at trial”). Here, we have not decided that Petitioner has shown, for purposes of a final decision, that RFC 2401 was publicly available as of the critical date, but instead, that there is a reasonable likelihood that Petitioner may yet, during the course of an *inter partes* review trial, adduce evidence sufficient to prove that fact. Indeed, we specifically noted that Patent Owner will have further opportunities to contest these issues during the trial, if desired. Dec. 9, n.8. We are not persuaded of error in that decision.

### ORDER

Patent Owner’s request for rehearing is *denied*. PETITIONER:

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