

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

THE MANGROVE PARTNERS MASTER FUND, LTD., APPLE INC.,
and BLACK SWAMP IP, LLC,
Petitioner,

v.

VIRNETX INC.,
Patent Owner.

Case IPR2015-01047¹
Patent 7,490,151 B2

Before MICHAEL P. TIERNEY, KARL D. EASTHOM, and
STEPHEN C. SIU, *Administrative Patent Judges*.

SIU, *Administrative Patent Judge*.

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

VirnetX Inc. (“Patent Owner”), in its Request for Rehearing (“Req. Reh’g.” or “Request”), seeks reversal of the Board’s Decision (“Decision”)

¹ Apple Inc. and Black Swamp IP, LLC, which filed petitioners in IPR2016-00063 and IPR2016-00167, respectively, have been joined as Petitioners in the instant proceeding.

pertaining to Patent Owner's arguments regarding Petitioner's alleged failure to name all real parties in interest and disputes all references to Exhibit 1003 in the Decision. *See* Req. Reh'g. 1. For the reasons that follow, the Board denies the requested relief.

The applicable standard for a request for rehearing is 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, opposition, or a reply.

Patent Owner argues that The Mangrove Partners Master Fund, Ltd. failed to name all real parties in interest and that “[t]he Decision misapprehended or overlooked that a number of new arguments were presented in Patent Owner’s Response.” Paper 82, 7. In particular, Patent Owner argues that “the Decision misapprehended or overlooked [that]:

In a form filed with the SEC on March 17, 2016, Petitioner Mangrove admitted that the US Feeder and the Cayman Feeder are “controlling shareholders” of the Mangrove Petitioner and, because of this relationship, shares of RPX Corporation owned by the Mangrove Petitioner “may be deemed to be beneficially owned by the US Feeder and the Cayman Feeder.” Ex. 2057 at 14; Response at 51–52.

Paper 82, 8.

We are not persuaded by Patent Owner’s argument. Even assuming that Petitioner, in fact, “admitted that the US Feeder and the Cayman Feeder are ‘controlling shareholders’ of the Mangrove Petitioner,” as Patent Owner

asserts, Patent Owner does not demonstrate persuasively that Petitioner also “admitted” that the “US Feeder and the Cayman Feeder” exerted control over the filing or preparation of the Petition. Nor does Patent Owner provide sufficient evidence demonstrating such control.

Patent Owner also argues that we “misapprehended or overlooked” the following argument that was allegedly previously presented:

The SEC filing explained that by virtue of the relationship between Nathaniel August, the Mangrove Partners Hedge Fund, Mangrove Capital, and the Mangrove Petitioner, “each of [the] Mangrove Partners [Hedge Fund], Mangrove Capital, and Mr. August may be deemed to beneficially own the Shares owned by the [Mangrove Petitioner].” Ex. 2057 at 14; Response at 52.

Paper 82, 8

We are not persuaded by Patent Owner’s argument. Even assuming that an SEC filing, in fact, states that “each of [the] Mangrove Partners [Hedge Fund], Mangrove Capital, and Mr. August may be deemed to beneficially own the Shares owned by the [Mangrove Petitioner],” as Patent Owner asserts, Patent Owner does not demonstrate persuasively that the alleged SEC filing also states that “each of [the] Mangrove Partners [Hedge Fund], Mangrove Capital, and Mr. August” exerted control over the filing or preparation of the Petition. Nor does Patent Owner provide sufficient evidence demonstrating such control.

Patent Owner also argues that we “misapprehended or overlooked” that Ward Dietrich (Chief Operating Officer of the Mangrove Partners Hedge Fund) allegedly reimbursed the filing fees for filing the Petition in accordance with a prior “agreement to reimburse such fees.” Paper 82, 8–9 (citing Ex. 2058, 24, 25, 29; Response 55; Paper No 56, 22). Patent Owner does not demonstrate sufficiently that a party honoring a prior agreement to

reimburse fees to Petitioner constitutes sufficient control of the preparation or filing of the Petition. Therefore, we are not persuaded by Patent Owner's argument.

Patent Owner also argues that we "misapprehended or overlooked" the following argument that was allegedly previously presented:

Nathaniel August, Ward Dietrich, and Jeff Kalicka (who, as discussed above, work for the Mangrove Partners Hedge Fund), also commented extensively on the petitions and expert declarations in IPR2015-01046 and IPR2015-01047, even asking for changes to be made after Petitioner Mangrove's attorneys thought the papers "were ready to file." Ex. 2058 at 12–18, 20–23, 28, 29; see also Ex. 2059 at 3 ("It is likely that Mr. Dietrich had one or more oral conversations that were not immediately reduced to writing with Nathaniel August and/or Jeff Kalicka pertaining to Mr. Dietrich's involvement in the preparation and filing of the Petitions."); Response at 55.

Paper 82, 9.

Upon review of the cited portions of Exhibit 2058, we note that the only suggestions provided are a "few small nits" and questioning the use of the term "see" with no subsequent use of the term "see also." Exhibit 2058, 22, 28. While it is stated that suggestions are embedded in the draft, no other specific suggested modifications are noted, much less any indication that any alleged suggested modifications were actually adopted. In any event, we conclude that these suggestions (e.g., a "few small nits" and the use of the term "see") are minor and do not rise to the level of exerting control over the filing or preparation of the Petition. Therefore, we are not persuaded by Patent Owner's argument.

Patent Owner also argues that we "misapprehended or overlooked" the following argument that was allegedly previously presented:

Petitioner Mangrove and the Mangrove Partners Hedge Fund in fact had a pre-established plan as to the hiring of “intellectual property advisors and attorneys,” and fees that the Mangrove Partners Hedge Fund would receive based on the success of Petitioner Mangrove. Ex. 2042 at 9, 10; Response at 55–56.

Paper 82, 9.

We note that the cited portion of Exhibit 2042 states that “[t]he Master Fund” pays a “monthly management fee” to “the Investment Manager” and that “[t]he Funds . . . will reimburse the Investment Manager for . . . operating expenses of the Master Fund” that includes “legal and other costs.” Ex. 2042, 9, 10. In other words, Petitioner agrees to pay a management fee and reimburse legal costs to the Investment Manager. We do not identify, and Patent Owner does not indicate, where this agreement also mandates that the Investment Manager (or any specific entity other than Petitioner) controls the filing or preparation of the Petition. Therefore, we are not persuaded by Patent Owner’s argument.

Patent Owner also argues that we “misapprehended or overlooked” the following argument that was allegedly previously presented:

An agreement between Mangrove Partners Hedge Fund and Petitioner Mangrove shows that the former, as investment manager in its “sole and absolute discretion,” has the authority to “effect all necessary registrations, notices or other filings with governmental or similar agencies” (Ex. 2042 at 2–3), which would include the Patent Office. See also Ex. 2058 at 7 (providing Ward Dietrich with authorization to execute the power of attorney in this proceeding); Response at 56.

Paper 82, 9-10.

While Patent Owner asserts that a general agreement exists between Mangrove Partners Hedge Fund and Petitioner that Mangrove Partners

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