

22-1145

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IN THE  
**United States Court of Appeals**  
**FOR THE FEDERAL CIRCUIT**

SEOUL VIOSYS CO., LTD.,  
*Plaintiff-Appellee,*

— v. —

P3 INTERNATIONAL CORPORATION,  
*Defendant-Appellant.*

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK  
HONORABLE JUDGE ALISON J. NATHAN  
16-cv-6276

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PETITION FOR REHEARING AND REHEARING EN BANC

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JAMES A. POWER JR  
MARGUERITE DEL VALLE  
POWER DEL VALLE LLP  
233 West 72<sup>nd</sup> Street  
New York, New York 10023  
212-877-0100

*Attorneys for Defendant-Appellant*

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**UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT**

**CERTIFICATE OF INTEREST**

**Case Number** 2022-1145  
**Short Case Caption** Seoul Viosys Co., Ltd. v. P3 International Corporation  
**Filing Party/Entity** Defendant-Appellant P3 International Corporation

**Instructions:** Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box.** Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 10/06/2022

Signature: /s/ James A. Power Jr

Name: James A. Power Jr

| <p><b>1. Represented Entities.</b><br/>Fed. Cir. R. 47.4(a)(1).</p>                            | <p><b>2. Real Party in Interest.</b><br/>Fed. Cir. R. 47.4(a)(2).</p>   | <p><b>3. Parent Corporations and Stockholders.</b><br/>Fed. Cir. R. 47.4(a)(3).</p>   |
|--|---|---|
| <p>Provide the full names of all entities represented by undersigned counsel in this case.</p> | <p>Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.</p> <p><input checked="" type="checkbox"/> None/Not Applicable</p> | <p>Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.</p> <p><input type="checkbox"/> None/Not Applicable</p> |
| <p>P3 International Corporation</p>  |   | <p>PKI Electronic Int'l GmbH</p>  |
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Additional pages attached

**4. Legal Representatives.** List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

None/Not Applicable  Additional pages attached

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**5. Related Cases.** Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

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**6. Organizational Victims and Bankruptcy Cases.** Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

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## STATEMENT OF COUNSEL SUPPORTING EN BANC REHEARING

Based on my professional judgment, I believe the panel decision is contrary to the following decisions of United States Supreme Court and of this Court:

*Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 554-55 (2014), that subjective bad faith in pursuing an objectively meritless claim is not a prerequisite to an exceptional case determination;

*Adjustacam, LLC v. Newegg, Inc.*, 861 F.3d 1353, 1360-61 (Fed. Cir. 2017), that denying attorney fees on a clearly erroneous view of the facts, including crediting the claimant with assumed arguments it did not make, and weighing them against an exceptional case determination, amounts to an abuse of discretion;

*Gaymar Indus., Inc. v. Cincinnati Sub-Zero Products, Inc.* 790 F.3d 1370, 1373-77 (Fed. Cir. 2015), that instances of the movant's conduct must be supported by the evidence, constitute litigation misconduct, and rationally mitigate against an exceptional case determination to be weighed against it so as not to constitute an arbitrary determination and abuse of discretion; and

*Octane* and *Adjustacam, supra*, in failing to address or consider the compelling factor of Viosys' egregious assertion of the invalidated claims against others, in disregard of the importance *Octane* confers on the consideration of deterring further misconduct.



Based on my professional judgment, I believe this appeal also requires an answer to the following precedent-setting question of exceptional importance:

Whether a party seeking an exceptional case determination can be faulted for seeking an award of its attorney fees early in and throughout the case, and that conduct weighed against an exceptional case determination, on the sole ground that the movant's demands "hampered" settlement due to the refusal of the proponent of the baseless claim to discuss attorney fees. This Court's affirmance of such ruling impermissibly chills patent litigants' efforts to deter the pursuit of objectively meritless claims pursuant to §285, defeating the recognition in *Octane Fitness, supra* at 554 n.6, that discretion be exercised in consideration of its purpose as a deterrent, and this Court's decisions *Sionyx LLC v. Hamamatsu Corp.*, 981 F.3d 1339, 1355 (Fed. Cir. 2020), that settlement is not an obligation in any context, including exceptional case applications, and *Thermolife Int'l LLC v. GNC Corp.*, 922 F.3d 1347, 1357-58 (Fed. Cir. 2019), that early notice to one's adversary that its case is exceptional and warrants an award of attorney fees is a factor that favors, not mitigates against, an exceptional case determination.

/s/James A. Power Jr

## **POINTS MISAPPREHENDED OR OVERLOOKED BY THE COURT**

It is respectfully submitted that the panel failed to appreciate that Seoul Viosys did, *unambiguously*, allege factual infringement by the very product that had been on sale since prior to the critical date. The resulting anticipation of its asserted claims, pursuant to *Evans Cooling Sys., Inc. v. GM Corp.*, 125 F.3d 1448 (Fed. Cir. 1997) and *Vanmoor v. Wal-Mart Stores, Inc.*, 201 F.3d 1363 (Fed. Cir. 2000), was founded upon those *factual* allegations that established by clear and convincing evidence the presence of each claim element in the P7880, and not upon the *de jure* contention theory underpinning each of Viosys' misleading arguments that purported to limit the effects of its factual contentions to damages and legal liability for infringement. The impact of Viosys' factual infringement allegations as conclusive evidence of patent invalidity, however, survives any legal ramification as to liability or remedy. The panel's misapprehensions were the direct result of Viosys' misleading arguments, constructed on the fallacy that there was any product, prior version, batch or shipment that it did not treat as falling within the scope of its asserted claims.

The district court engaged in no analysis construing Viosys' unambiguous infringement allegations apart from their plain language that the district court characterized as "self-evident" (Appx1025), nor did Viosys proffer any different construction. Had it done so, it necessarily would have abandoned its allegations

that the entire first P7880 shipment infringed, which it chose not to do (Appx19; Dkt26) because that would have resulted in a failure of proofs of infringement of both shipments because it could not show from which shipment its sample originated. The district court merely reaffirmed the plain meaning of those allegations, once it realized that Viosys sought to have it “both ways,” alleging the presence of each claim element in the P7880 for infringement purposes but disregarding it as proving anticipation.

### **ARGUMENT**

The district court, after having been misled by Viosys for two years as to the scope and legal impact of its *de facto* infringement assertions, ultimately granted summary judgment in favor of P3, invalidating the asserted claims of its ‘207 patent on the ground that the accused P7880 had been on sale since prior to the critical date of that patent, a fact apparent to all since the start of this action, and dismissing its claims of infringement of the ‘626 process patent because Viosys did not provide prior notice required by §287(b)(2). Appx665-674. This Court affirmed without opinion. 19-2384, June 15, 2020 (Newman, Bryson, O’Malley).<sup>1</sup>

No competent patent litigation counsel, absent a wager that his adversary would capitulate, would continue to pursue those claims in the face of clear,

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<sup>1</sup> No member of the merits panel was assigned to participate in this appeal in response to P3's Statement of Related Case.

documented and corroborated evidence of pre-critical date sales as was presented to Viosys and its first-hand knowledge of the absence of its prior notice regarding the product made by its patented process. Such embarrassing predicament occasions a humble withdrawal, if not also an apology.

Although Wal-Mart and the manufacturers bore the burden of proving that the cartridges that were the subject of the pre-critical date sales anticipated the '331 patent, that burden was satisfied by Vanmoor's allegation that the accused cartridges infringe the '331 patent.

*Vanmoor, supra* at 1366. Such claim is not merely exceptional, it is futile:

[I]f WPEM prevailed on its assertion that the Accused Technology is *covered* by the Asserted Patent, it would have had the effect of invalidating, rather than infringing, the Asserted Patent. . . . Because it is undisputed that the Accused Technology is prior art to the '762 patent, *WPEM could not bring a successful infringement suit.* [emphasis supplied]

*WPEM LLC v SOTI, Inc.*, 837 Fed.App'x 773 (Fed. Cir. 2020), *cert. denied*, 141 S.Ct. 2628 (2021). Viosys' only way out of this predicament would have been to present a reasonable argument that the district court misconstrued Viosys' *factual* infringement allegations to have literally included the first shipment, or that *Evans, Vanmoor*, and their progeny be overruled. Viosys did neither. Instead, it confounded the district court's proper resolution of this case for over two years, and this Court's appreciation of the futility of its claims, by conflating the legal remedies for infringement with the factual allegations that operated to invalidate its claims.

The district court, therefore, severely misjudged, if not outright disregarded, the objective futility of this case by excusing Viosys' conduct as a mere desire to prevail on its purported merits. Appx7. That contravened *Octane* and was an abuse of its discretion. *Rothschild Connected Devices Innov., LLC v. Guardian Prot. Servs., Inc.*, 858 F.3d 1383, 1388 (Fed. Cir. 2017); *Adjustacam, supra* at 1360. Had this Court recognized the fallacy inherent in Viosys' misleading arguments, *viz.*, that there was any separate product on sale prior to critical date that was not alleged to fall within the scope of its claims, an affirmance could not have been justified.<sup>2</sup>

Instead of holding Viosys responsible for the unreasonable pursuit of its baseless claims, the panel affirmed the district court's penalizing P3 merely for seeking its attorney fees which, it said, "hampered" settlement with a plaintiff that refused to discuss the subject, a clearly erroneous ruling that, sanctioned by this court, would impermissibly chill §285 motions as an effective deterrent.

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<sup>2</sup> That Judge Prost, who authored the opinion in *WPEM*, failed to deem futile the same claim when asserted by Viosys, suggests the panel's oversight of the facts that Viosys' *factual* infringement allegations encompassed the entirety of the P7880 product, including the first shipment, and that Viosys made no argument that the district court misconstrued those allegations in its complaint.

**A. The Panel Was Misled, as Was the District Court, by Viosys' Misrepresentation that There Was Any Shipment of the Accused Product Sold Prior to the Critical Date that Was Not Factually Alleged to Fall Within the Scope of Its Claims**

The panel, misled by Viosys and its counsel, thus misapprehended the operative circumstance of this case: that there was *no* separate product in the shipment sold prior to the critical date that was not alleged as a *de facto* infringement. The district court recognized this in granting summary judgment:

As Defendant convincingly explains, the remaining cases cited by Plaintiff are not to the contrary: in those cases, the patentee had not clearly asserted infringement of the defendant's prior art product. [Appx670]

Viosys misled the district court, and then this panel, by deliberately conflating its factual allegations of infringement with their legal ramifications by premising its arguments on the fallacy that there was any shipment or product sold prior to the critical date that was not alleged to fall within the scope of its claims.<sup>3</sup>

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<sup>3</sup> The cases involving assertion of infringement by a product on sale since prior to the critical date fall into three categories: (1) the prior product or version was not the same as that alleged to infringe but was shown to be materially identical to it, as in *Evans*, *Vanmoor*, and *WPEM*; (2) the prior product was not the same as that alleged to infringe, which cases the district court conclusively distinguished (Appx670); and (3) there is one product alleged to infringe and its sales began prior to the critical date. Viosys' allegations fall within the third category, treating both shipments as identical for purposes of infringement. Appx1025. Viosys, however, conflated this third category with the first two by the illusion that there was any separate product to compare to its infringement allegations. Viosys' distinction of *Evans* and *Vanmoor*, where evidence of similarity was proffered, only emphasized that its case is even more frivolous, with no two products to compare.

Judge Taranto opened the argument with the misunderstanding, “I thought it was uncertain whether [the product alleged to infringe and that sold prior to the critical date] were the same” and asked, “on summary judgment, did you put in evidence of your own testing [of the pre-critical date sales] to see if in fact they were the same as . . . the post-patent units?” This evinced the panel’s confusion, engendered by Viosys that there was any separate product, pre- or post-patent, first or second shipment, that was not alleged to fall within the scope of its claims; it was but one product.<sup>4</sup> The next comment, that “[t]he district court, in ruling in your favor, relied entirely on an interpretation of an assertion in the . . . complaint . . . to mean all of the P7880s were infringing, regardless of date, and that must have included the pre-critical date ones,” and the question whether the district court “couldn’t properly conclude . . . that [it was] meritless but not unreasonable for Seoul to contest [that interpretation],” then revealed the panel’s oversight that Viosys *did not* in fact contest the court’s assessment of the scope of its factual allegations of infringement or the proper role of *de facto* infringement allegations

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<sup>4</sup> In fact, all of the P7880 was “pre-patent,” the second of the only two shipments of the product having been received by P3 on May 6, 2008, within nine months of the first (Appx121) and more than three years before the ‘207 patent issued on July 19, 2011. Appx49. Moreover, pieces of product from the first shipment remained in inventory and were sold after the patent issued. Appx650-651. So, even apart from the immateriality of Viosys’ *de jure* infringement theory, it was wholly unsupported in fact. Viosys’ arguments were more than frivolous, they were deliberately misleading.

in the *Evans/Vanmoor* analysis.

Viosys simply *made no* argument construing its allegations that was not based solely on legal liability for infringement, a matter immaterial to P3's defenses.<sup>5</sup> The district court abused its discretion, whether by crediting those unreasonable arguments or by assuming others that Viosys did not make.

*Adjustacam, supra.* at 1360. Viosys alleged that the P7880 embodied every limitation of its asserted claims, identifying the accused product in the manner that every patentee must plead its case. The only cause the district court had to address the scope of Viosys' infringement allegations was to firmly reject Viosys' frivolous arguments that its prayer for relief, not its factual infringement allegations, was the relevant inquiry of *Evans* and *Vanmoor*. Instead, Viosys deliberately disregarded those precedents without making any argument to distinguish or overrule them. It just flouted the law.

Viosys' argument that P3's pre-critical date sales must be shown to have been substantially identical to the sample upon which Viosys relied in its complaint (Appx1055-1056) was rejected by the district court on summary

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<sup>5</sup> Viosys argument (Brief p.32), first made on reconsideration of summary judgment (Appx693-695), that the panel likely misapprehended as reasonably contesting the district court's interpretation of Viosys' infringement allegations, was merely that the district court construed its royalty calculation to necessarily include the prior art sales as the basis of its judgment, which the court properly rejected as incorrect as well as immaterial. Appx9-11; Appx1024-1025.



judgment as not only “weak” but *precluded* by Viosys’ infringement allegations:

By alleging that defendant’s sale of the P7880 product infringed its patent . . . without regard to which batch the P7880 product came from, Plaintiff adopts the same assumption it criticizes Defendant for making. Plaintiff cannot have it both ways: it cannot both maintain that the identity of the products within each sale batch is a disputed fact and yet maintain that its test of one item of the product establishes infringement as to all such products. [Appx668-669]

Viosys’ speculation that all inventory of the first shipment might have been sold before the ‘207 patent issued (Appx694) ignored the fact that Viosys asserted the presence of each claim element in the P7880 product, a *factual* allegation that survives any legal ramification as to remedy, and disregards the reality that every on-sale bar necessarily involves a product sold prior to the issuance of the patent.

Viosys proposal (Appx690) that excluding pre-issuance product from its damage calculations somehow salvaged its asserted claims was rejected by the district court on summary judgment as not merely “weak,” but futile, again because it failed to account for the *factual* allegations of infringement in the complaint:

[T]he interpretation upon which [Viosys’] argument is premised is flawed: the Court’s invalidity determination rested on Plaintiff’s infringement allegations, and specifically on the indiscriminate nature of such allegations. . . which self-evidently rested on the congruence of Plaintiff’s infringement allegations with Defendant’s entire product batch. [Appx1024-1025]

When examined closely, it becomes apparent that Viosys’ arguments were

nothing more than efforts to exclude the first sales of its accused product from its infringement allegations on the ground that it sought no remedy for their infringement. But, of course, there already was no way it could recover on sales made prior to issuance of the patent. Viosys' arguments were not only frivolous and ineffective, they were absurd and, if accepted, would preclude any party from ever prevailing on an *Evans/Vanmoor* defense.

Viosys' argument, made for the first time on this appeal [Brief p.31] that it alleged infringement only by products that could be "reverse engineered" to the claims, would dubiously have required testing of every unit alleged to infringe. That position, along with counsel's concession at argument that, had it alleged no more than infringement "by the P7880" and omitted any reference to testing, its claims indeed may have been anticipated thereby, unwittingly confirmed the materiality of its factual allegations. Again, this is an illogical, if not absurd, proposition that in no way could avoid the conclusion that the district court abused its discretion in attributing any plausibility whatsoever to Viosys' positions.

Viosys' arguments were not merely "weak," they were absolutely and unredeemably futile, as the district court concluded without reservation on the merits. Yet it declined to acknowledge that it had been misled by Viosys in that regard for over two years, with no new facts or evidence in addition to those submitted by P3 at the inception of the case and on its Rule 12(c) motion, a

compromising recognition that could not have been avoided in deeming this case to be exceptional. While the district court indeed “lived with” that contradiction for over two years before ultimately granting summary judgment on the same evidence and arguments presented to it at the commencement of the litigation, its closeness to the case provided no basis for deference but, rather, emphasized that it had been misled by Viosys on the merits and chose to overlook its costly error rather than to hold Viosys accountable by acknowledging the court’s long-held misperceptions.<sup>6</sup>

It is respectfully submitted that these misapprehensions and oversights of this Court, directly caused by Viosys’ misleading characterizations of the effect of its factual infringement allegations, led to the central error that supports rehearing or en banc review of its judgment. Viosys’ offensive obfuscation, injurious to its adversaries as much as an affront to our judiciary, must be tolerated no longer and put to rest here.

**B. The Panel’s Affirmance of the District Court’s Denial of Attorney Fees on the Ground that It Found No Subjective Bad Faith in Viosys’ Pursuit of its Futile Claim of Infringement Was Contrary to *Octane***

The Panel’s decision to affirm the district court’s denial of attorney fees on

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<sup>6</sup> *Contrast, Highmark, Inc. v. Allcare Health Management Systems, Inc.*, 572 U.S. 559, 564 (2014) (a district court is “better positioned” to decide whether a case is exceptional because it “lives with the case over a prolonged period of time”). Here, the district court lived only with its mistaken view of Viosys’ futile claims for that prolonged period prior to granting summary judgment.

the ground that the patentee had “no ulterior motive” in pursuing its futile claim of infringement by a product undisputedly sold prior to the critical date of its patent (Appx3), in a “genuine, albeit misguided, attempt to prevail on the merits” (Appx7), was contrary to the decision of the United States Supreme Court in *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545 (2014), expressly rejecting this Court’s rule in *Brooks Furniture Mfg., Inc. v. Dutailier Int’l, Inc.*, 393 F.3d 1378 (2005), that the pursuit of a meritless claim can be exceptional only when accompanied by subjective bad faith.

This is not a case in which the strength of its merits can be measured along a continuum – a sliding scale of merit – and then judged as “weak,” yet not exceptional, as the Court affirmed here. Rather, Viosys’ case was not merely “weak,” it was utterly futile. It defeated itself, precisely due to the patentee’s own contentions. This case stands out, not only among run-of-the-mill patent cases, but among all exceptional cases, because there was zero chance that Seoul Viosys could prevail on its claim: either it invalidated its patent by proving infringement, or failed in its infringement proofs absent withdrawal of its claims. It was objectively unreasonable as an absolute no-win case, misjudged by the district court, *Rothschild* at 1388, on the basis of assumed arguments that Viosys did not make, *Adjustacam* at 1360, and improperly justified merely by lack of an “ulterior motive,” contrary to *Octane*.

**C. This Court’s Affirmance of the District Court’s Decision on the Ground that P3 “Hampered” Settlement Negotiations By Seeking Its Attorney Fees Was Clear Error and Dangerously Sanctioned a Ruling that Would Chill the Use of §285 as the Deterrent Embraced By *Octane***

The district court suggested throughout the case that it did not condone P3's demands to recover its attorney fees, criticizing it as “focused on the prospect of an exceptional case recovery from the outset” (Appx998). The court, in denying P3's motion for attorney fees, accordingly faulted P3 for seeking its attorney fees in settlement negotiations, erroneously assigning to it the responsibility for Viosys’ unilateral withdrawal from a settlement conference because it refused to discuss P3's demand for attorney fees. That ground was not only based on a clearly erroneous view of the facts (P3 Brief at 14n.8, 36-37), but its affirmance by this Court will improperly chill litigants from discouraging further misconduct by seeking their attorney fees, defeating the purpose and policy embraced in *Octane*.

An exceptional case determination and award of attorney fees to a defending party is warranted based solely on the weakness of the patentee’s arguments and objectively frivolous case and the need to deter future "wasteful litigation" on similar claims. *Inventor Holdings, LLC v. Bed, Bath & Beyond, Inc.*, 876 F.3d 1372, 1377-78 (Fed. Cir. 2017).

P3's early notice to Viosys of the facts establishing the futility of its infringement case and of its intention to seek attorney fees undermined Viosys’ attempts to blame others for its purported lack of awareness of the exceptionality

of its case. *Blackbird Tech. LLC v. Health in Motion LLC*, 944 F.3d 910, 916 (Fed. Cir. 2019). An attorney fees award is warranted in such case to deter future abusive litigation. *Id.* at 917.

Moreover, P3 and other parties subjected to a patentee's objectively meritless claims are entitled to defend themselves against baseless claims of patent infringement and are not to be faulted for seeking their attorney fees. *Sionyx* at 1355 (dismissing off-hand that a defendant is obligated to settle a patentee's meritless claims).

**D. The Panel's Affirmance of the District Court's Reliance on Its Procedural Denial of P3's Rule 12(c) Motion and P3's Motion for Reconsideration Without Any Suggestion of Fault or Misconduct Contravened *Octane* and this Court's Precedents**

While *Octane Fitness* relaxed the standard under which the district courts may find a case exceptional, it did not open the door for the district courts to arbitrarily deny attorney fees based upon circumstances that neither amount to misconduct by the applicant nor a valid excuse for pursuing a frivolous case. *Gaymar, supra*. The district court abused its discretion, not only by misjudging the exceptionality of Seoul Viosys' case and requiring a subjective "ulterior motive" for pursuing it, but by attributing any weight to its purely procedural ruling, erroneously attributing to P3's attorney fees demands Viosys' withdrawal from settlement negotiations, and by penalizing P3 for moving for reconsideration

with no finding of fault or misconduct.<sup>7</sup>

**E. The District Court’s Disregard of Viosys’ Egregious Assertion of Its Invalidated Patent Claims Against Others Has Been Ignored and Thus Sanctioned by This Court**

Neither the district court nor the panel on this appeal took account of the fact that Viosys continued to assert the invalidated claims of its ‘207 patent against Kmart, after having learned of P3's pre-critical date sales, and in its pending suit against Bed Bath & Beyond, where Viosys’ counsel flatly misrepresented to the Central District of California that the judgment affirmed by this Court, invalidating “at least claims 1, 6 and 7,” of Viosys’ ‘207 patent, “did not touch” claim 7, which is asserted there. See Appx805-807; P3 Reply Brief pp.22-25. Deterrence of further misconduct is an essential goal of §285. *Octane* at 554; *Blackbird*, supra at 917. To have ignored so compelling a factor was an abuse of discretion. *Adjustacam*.

**F. The Panel’s Decision to Enter a Rule 36 Judgment Affirming Without Opinion Was Not Fairly Supported by the Circumstances of this Case**

It is respectfully submitted that the Panel’s decision to affirm the district court’s denial of attorney fees in a Rule 36 judgment without opinion was not

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<sup>7</sup> Judge Stoll noted at argument, in response to counsel’s citation of *Energy Heating LLC v. Heat-on-the-Fly LLC*, 889 F.3d 1291, 1307 (Fed. Cir. 2019), that the district court articulated its grounds. Counsel’s point, however, was that each of those grounds was either contrary to law or clearly erroneous. A district court may not just consider the “totality of the circumstances.” It must articulate how each supports its decision. *Energy Heating* provides that starting point.

fairly supported insofar as the district court's denial of attorney fees was entirely based on clearly erroneous findings and misapplication of the law governing §285, and because a written opinion supporting that judgment would have had precedential effect as an improbable exception to *Octane* and its progeny in this Court, thus chilling the employment of §285 as a deterrent to further misconduct. This Court should not underestimate the effect that its affirmance of this anomalous decision will have in the district courts, with or without written opinion, where the opinion below may be cited as having the imprimatur of this Court, inviting confusion and a bevy of resulting appeals to this Court.

### CONCLUSION

For the foregoing reasons, it is respectfully submitted that the panel rehear this appeal and reverse and remand this case to the district court, or that this Court grant rehearing en banc to conform this case to binding precedent and to resolve the precedent-setting question of exceptional importance raised by this appeal.

Respectfully submitted,

/s/ James A. Power Jr  
JAMES A. POWER JR  
MARGUERITE DEL VALLE  
POWER DEL VALLE LLP  
233 West 72<sup>nd</sup> Street  
New York, New York 10023  
212-877-0100  
*Attorneys for Defendant-Appellant*



NOTE: This disposition is nonprecedential.

**United States Court of Appeals  
for the Federal Circuit**

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**SEOUL VIOSYS CO., LTD.,**  
*Plaintiff-Appellee*

v.

**P3 INTERNATIONAL CORPORATION,**  
*Defendant-Appellant*

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2022-1145

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Appeal from the United States District Court for the Southern District of New York in No. 1:16-cv-06276-AJN-SN, Judge Alison J. Nathan.

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**JUDGMENT**

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MICHAEL EISENBERG, Steptoe & Johnson, LLP, New York, NY, argued for plaintiff-appellee. Also represented by ANNA M. TARGOWSKA, Chicago, IL.

JAMES A. POWER, JR., Power Del Valle LLP, New York, NY, argued for defendant-appellant. Also represented by MARGUERITE DEL VALLE.

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THIS CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

PER CURIAM (PROST, TARANTO, and STOLL, *Circuit Judges*).

**AFFIRMED. See Fed. Cir. R. 36.**

ENTERED BY ORDER OF THE COURT

September 8, 2022  
Date

/s/ Peter R. Marksteiner  
Peter R. Marksteiner  
Clerk of Court

## STATUTES INVOLVED

### 35 U.S.C. § 285

The court in exceptional cases may award reasonable attorney fees to the prevailing party.

### 35 U.S.C. § 102(b) (pre-AIA)

A person shall be entitled to a patent unless —

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States.

### 35 U.S.C. § 287(b)(2)

No remedies for infringement under section 271(g) shall be available with respect to any product in the possession of, or in transit to, the person subject to liability under such section before that person had notice of infringement with respect to that product. The person subject to liability shall bear the burden of proving any such possession or transit.

**UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT**

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS**

**Case Number:** 22-1145

**Short Case Caption:** Seoul Viosys Co. Ltd. v. P3 International Corporation

**Instructions:** When computing a word, line, or page count, you may exclude any items listed as exempted under Fed. R. App. P. 5(c), Fed. R. App. P. 21(d), Fed. R. App. P. 27(d)(2), Fed. R. App. P. 32(f), or Fed. Cir. R. 32(b)(2).

The foregoing filing complies with the relevant type-volume limitation of the Federal Rules of Appellate Procedure and Federal Circuit Rules because it meets one of the following:

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Date: 10/06/2022

Signature: /James A. Power Jr/

Name: James A. Power Jr