25-1624

IN THE
United States Court of Appeals
for the Federal Circuit

EPIC TECH, LLC,

Plaintiff-Appellee

v.

PEN-TECH ASSOCIATES, INC.

Defendant-Appellant

On Appeal from the United States District Court for the Northern District of Georgia, No. 1:20-cv-02428
Judge Victoria M. Calvert

COMBINED PETITION FOR PANEL REHEARING AND REHEARING *EN BANC* FOR APPELLEE EPIC TECH, LLC

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October 27, 2026 ***Attorneys for Appellee***

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 2025-1624

Short Case Caption Epic Tech, LLC v. Pen-Tech Associates, Inc.

Filing Party/Entity Epic Tech, LLC

Instructions:

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Date: 10/27/2026

Signature: /s/ L. Clint Crosby

Name: L. Clint Crosby

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	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. ☑ None/Not Applicable	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. ☑ None/Not Applicable
Epic Tech, LLC		

☐ 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).

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5. Related Cases. Other than the originating case(s) for this case, are there related or prior cases that meet the criteria under Fed. Cir. R. 47.5(a)?

☐ Yes (file separate notice; see below) ☑ No ☐ N/A (amicus/movant)

If yes, concurrently file a separate Notice of Related Case Information that complies with Fed. Cir. R. 47.5(b). **Please do not duplicate information.** This separate Notice must only be filed with the first Certificate of Interest or, subsequently, if information changes during the pendency of the appeal. Fed. Cir. R. 47.5(b).

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).

☑ None/Not Applicable ☐ Additional pages attached

TABLE OF CONTENTS

Table of Authorities ii

Statement of Related Cases 1

Federal Circuit Rule 40 Statement 2

Introduction and Points of Law or Fact Overlooked or Misapprehended 4

Background 6

A. Pen-Tech Failed to File an Early Dispositive Motion Under *Alice* 6

B. The District Court Held the '317 Patent Invalid Under *Alice*. 6

C. The District Court Considered *Fusion Skill* and the Subsequent Applications in Correctly Declining to Impose Sanctions. 8

D. Departing From Precedent, The Panel Vacated and Remanded. 11

Reasons to Grant Rehearing 11

I. The Panel Conflicts With the Statutory Presumption of Validity and Precedent Holding Epic Tech Need Not Prove Its Patent is Valid to Bring Suit. 12

II. The Panel Failed to Defer to the District Court's Ruling As Required Under the Applicable Abuse of Discretion Standard of Review. 13

III. The Panel's Decision Conflicts with Precedent on the Rule 11 Pre-Suit Investigation Requirement. 14

IV. The Panel's Decision Creates Confusion in Patentees' Rights. 15

V. This Court Overlooked the District Court's Analysis of Eleventh Circuit Rule 11 Precedent. 16

Conclusion 18

Certificate of Compliance 19

Certificate of Service 20

Addendum: Panel Opinion of This Court

TABLE OF AUTHORITIES

Cases

Am. Axle & Mfg., Inc. v. Neapco Holdings LLC,
977 F.3d 1379 (Fed. Cir. 2020) 15, 16

Application of Herrick,
397 F.2d 332 (C.C.P.A. 1968) 10

Baker v. Alderman,
158 F.3d 516 (11th Cir. 1998) 17

Bayer CropScience AG v. Dow AgroSciences LLC,
851 F.3d 1302 (Fed. Cir. 2017) 13

Cardinal Chem. Co. v. Morton Int'l Inc.,
508 U.S. 83 (1993) 5

Commil USA, LLC v. Cisco Sys., Inc.,
575 U.S. 632 (2015) 2, 4, 5, 6, 10, 11, 12, 13, 15, 18

Deposit Guar. Nat. Bank v. Roper,
445 U.S. 326 (1980) 5

Epic Tech, LLC v. Fusion Skill, Inc.,
2022 WL 22887728, at *3 (S.D. Tex. June 6, 2022) 7

Epic Tech, LLC v. Fusion Skill, Inc.,
534 F. Supp. 3d 741 (S.D. Tex. 2021) 6

Epic Tech, LLC v. Fusion Skill, Inc.,
No. 4:19-CV-2400, 2021 WL 2596433 (S.D. Tex. June 24, 2021) 7

Jeneric/Pentron, Inc. v. Dillon Co., Inc., Chemichl Inc., Chemichl AG.,
171 F. Supp. 2d 49 (D. Conn. 2001) 8

Kearns v. Chrysler Corp.,
32 F.3d 1541 (Fed. Cir. 1994) 2, 12

Medtronic Navigation, Inc. v. BrainLAB Medizinische Computersysteme GmbH,
603 F.3d 943 (Fed. Cir. 2010) 17

Microsoft Corp. v. I4I Ltd. P'ship,
564 U.S. 91 (2011) 12

OneSubsea IP UK Ltd. v. FMC Techs., Inc.,
68 F.4th 1285 (Fed. Cir. 2023) 2, 13, 14

Q-Pharma, Inc. v. Andrew Jergens Co.,
360 F.3d 1295 (Fed. Cir. 2004) 2, 4, 14

Quad Env't Techs. Corp. v. Union Sanitary Dist.,
946 F.2d 870 (Fed. Cir. 1991) 2, 10

United States v. Henning,
344 U.S. 66 (1952) 2, 12

View Eng'g, Inc. v. Robotic Vision Sys., Inc.,
208 F.3d 981 (Fed. Cir. 2000) 2, 5, 14

Statutes

28 U.S.C. § 1927 2

35 U.S.C. § 132 10

35 U.S.C. § 282 ..... 11, 12

35 U.S.C. § 285 2

Rules

Fed. Cir. R. 47.5(a)(1) 1

Fed. R. Civ. P. 11 2

STATEMENT OF RELATED CASES

Pursuant to Fed. Cir. R. 47.5(a)(1), Appellee Epic Tech LLC states that there are no related cases.

Dated: October 27, 2026

/s/L. Clint Crosby
L. Clint Crosby
Attorney for Epic Tech, LLC

FEDERAL CIRCUIT RULE 40 STATEMENT

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

- *Commil USA, LLC v. Cisco Sys., Inc.*, 575 U.S. 632, 643 (2015); *United States v. Henning*, 344 U.S. 66, 75 (1952); *Q-Pharma, Inc. v. Andrew Jergens Co.*, 360 F.3d 1295, 1302 (Fed. Cir. 2004); *View Eng'g, Inc. v. Robotic Vision Sys., Inc.,* 208 F.3d 981, 986 (Fed. Cir. 2000); *OneSubsea IP UK Ltd. v. FMC Techs., Inc.*, 68 F.4th 1285, 1294 (Fed. Cir. 2023); *Quad Env't Techs. Corp. v. Union Sanitary Dist.*, 946 F.2d 870, 876 (Fed. Cir. 1991); *Kearns v. Chrysler Corp.*, 32 F.3d 1541, 1550 (Fed. Cir. 1994).

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

(1) Can it be a sanctionable act for a patentee to rely on the statutory presumption of validity?

(2) Whether a patentee can be forced to prove its patent is valid before bringing suit in violation of *Commil*.

(3) Whether a patentee must conduct a pre-suit validity analysis to avoid sanctions under Fed. R. Civ. P. 11, 35 U.S.C. § 285, 28 U.S.C. § 1927, or the court's inherent authority.

The district court's analysis provided for meaningful review of all disputed issues given the statutory presumption of validity and the Appellant's failure to point to law compelling a pre-suit validity analysis, and the panel overlooked the precedent requiring it to defer to the district court under these circumstances, as well as the precedent establishing that a pre-suit infringement analysis plays the key role in determining Rule 11 compliance.

Dated: October 27, 2026

/s/L. Clint Crosby
L. Clint Crosby
Attorney for Epic Tech, LLC

INTRODUCTION AND POINTS OF LAW OR FACT OVERLOOKED OR MISAPPREHENDED

"Under the Patent Act, and the case law before its passage, a patent is 'presumed valid.'" *Commil USA, LLC v. Cisco Sys., Inc.*, 575 U.S. 632, 643 (2015) (quoting 35 U.S.C. § 282(a)). **"That presumption takes away any need for a plaintiff to prove his patent is valid to bring a claim."** *Id*. (emphasis added). The Supreme Court made this pronouncement after *Alice*.

The panel failed to follow *Commil*. The panel held, without citation to authority, "it does not suffice for Epic Tech or its counsel to rely only on the presumption of validity" to avoid sanctions. [Doc. 47] at 6. The panel's decision directly conflicts with the Supreme Court's established precedent that the statutory presumption of validity is unqualified and absolves Epic Tech of the need to prove the '317 Patent is valid.

"[T]he questions courts must address when interpreting and implementing the statutory framework require a determination of the procedures and *sequences* that the parties must follow to prove the act of [infringement] and any related issues of patent validity." *Id*. at 644 (discussing induced infringement). The first step in that "sequence" is for the patentee to conduct a pre-suit infringement analysis which "plays the key role in determining the reasonableness of the pre-filing inquiry made in a patent infringement case under Rule 11." *Id*.; *Q-Pharma, Inc. v. Andrew Jergens Co.*, 360 F.3d 1295, 1302 (Fed. Cir. 2004) (quoting *View Eng'g, Inc. v. Robotic*

Vision Sys., Inc., 208 F.3d 981, 986 (Fed. Cir. 2000)) (emphasis added). The patentee then files suit, and the patent is presumed valid. *Commil*, 575 U.S. at 643. Then, "an accused infringer 'may prevail either by successfully attacking the validity of the patent or by successfully defending the charge of infringement.'" *Id*. at 643 (quoting *Deposit Guar. Nat. Bank v. Roper*, 445 U.S. 326, 334 (1980)). "[I]t is often more difficult to determine whether a patent is valid than whether it has been infringed[.]" *Id*. at 645 (quoting *Cardinal Chem. Co. v. Morton Int'l Inc.*, 508 U.S. 83, 99 (1993)) (internal quotation marks omitted). This is because Congress has chosen a "high bar" for invalidity – clear and convincing evidence. *Id*. at 644. The allocation of the burden to persuade on challengers by clear and convincing evidence is a "concern[] of central relevance to the orderly administration of the patent system." *Id*. But the panel failed to follow the sequence laid out in *Commil* and the congressional imposition of the validity burden on challengers.

The result of the panel's failure to follow the sequence laid out in *Commil* is the creation of a new rule out of whole cloth requiring patentees of presumptively valid patents to conduct pre-suit validity analyses. Because the panel's new rule directly overrides Supreme Court precedent, fails to defer to the district court's correct ruling denying sanctions, and creates confusion over when patentees may assert presumptively valid patents without the risk of sanctions, rehearing should be granted.

BACKGROUND

A. Pen-Tech Failed to File an Early Dispositive Motion Under *Alice*.

Epic Tech filed suit asserting infringement of U.S. Patent No. 8,545,317 (the "'317 Patent") on June 5, 2020. J.A.86-103. The '317 Patent was directed to an electronic sweepstakes system and method enabling a player to play an initial game as well as a second, bonus game-in-game (i.e., a secondary game on the server), where the player becomes eligible to win a prize from the secondary game if the second game is triggered while the player is eligible to win. J.A.2505. The presumption of validity took "away any need for [Epic Tech] to prove [the] patent [wa]s valid to bring" its claim. *Commil*, 575 U.S. at 643. Pen-Tech never moved to dismiss for alleged invalidity under *Alice*.

B. The District Court Held the '317 Patent Invalid Under *Alice*.

The district court held the '317 Patent invalid under *Alice* and correctly declined to award sanctions. The district court found the '317 Patent invalid at *Alice* Step 1 because "it is directed to a process rather than improvements to computer capabilities." J.A.2512. The district court concluded the '317 Patent was invalid at *Alice* Step 2 because "[a] bonus game within a game is not an inventive concept." J.A.2517.

In its summary judgment order, the Court considered all Pen-Tech's alleged "notices" of § 101 invalidity: (1) the *Epic Tech, LLC v. Fusion Skill, Inc.*, 534 F. Supp. 3d 741, 746 (S.D. Tex. 2021) decision temporarily invalidating a related

patent, U.S. Patent No. 8,545,315 (the "'315 Patent"), *vacated by consent* 2022 WL 22887728, at *3 (S.D. Tex. June 6, 2022); and (2) USPTO decisions rejecting subsequent continuation applications. J.A.2519-20.

The district court found the *Fusion Skill* decision invalidating the '315 Patent persuasive. The '315 Patent is directed toward conducting computer-based sweepstakes bonus games. *Fusion Skill* held the '315 Patent invalid under *Alice* for allegedly lacking an improvement on computer technology and an inventive concept. J.A.2519. The court in *Fusion Skill* "acknowledge[d] that Epic Tech's reading of th[e] divided [post-*Alice*] caselaw is colorable," *Epic Tech, LLC v. Fusion Skill, Inc.*, No. 4:19-CV-2400, 2021 WL 2596433, at *3 (S.D. Tex. June 24, 2021), and later vacated its *Alice* ruling by consent.

Below, Epic Tech argued that the '317 Patent literally replaced the allegedly undisclosed or abstract concepts of the '315 Patent, thereby creating § 101 eligibility. J.A.2519-20. Epic Tech relied upon the unexcluded expert testimony of Ivan Zatkovich opining that the '317 Patent was patentably distinguishable from the '315 Patent. J.A. 472-75. The district court acknowledged Epic Tech's argument but disagreed. *Id*. Epic Tech could not have known the district court disagreed prior to bringing suit. Therefore, there was no "notice" to be taken from *Fusion Skill* pertaining to the '317 Patent. Nevertheless, the district court reasoned *Fusion Skill* supported its *Alice* analysis. The district court's consideration of *Fusion Skill* and

acknowledgment of Epic Tech's arguments to distinguish the '317 and '315 Patents confirms that the court thoroughly considered Epic Tech's validity arguments and found them unsanctionable.

The district court was also persuaded by the USPTO's rejection of U.S. Patent Application No. 14/012,113 (the "'113 Application"), which was a continuation application filed after the '317 Patent issued. J.A.2520-21. Epic Tech argued that there is no law holding the "prosecution history of a later patent [can] reach back and limit a claim using the same element in an earlier related patent." *Jeneric/Pentron, Inc. v. Dillon Co., Inc., Chemichl Inc., Chemichl AG.*, 171 F. Supp. 2d 49, 77 (D. Conn. 2001). While the district court noted "it may be true that no court has found that 'the prosecution history of a later patent [can] reach back and limit a claim using the same element in an earlier related patent' in the prosecution history estoppel context, the [c]ourt may still find persuasive value in the prosecution history of a later patent." J.A.2521 (quoting *Jeneric*,171 F. Supp. 2d at 77) (alterations in original). Thus, the district court reasoned the rejection of subsequent applications supported its *Alice* analysis as well.

C. The District Court Considered *Fusion Skill* and the Subsequent Applications in Correctly Declining to Impose Sanctions.

The district court specifically referenced its summary judgment analysis of *Fusion Skill* and the subsequent applications in its order denying sanctions, stating: "in granting Pen-Tech's Motion for Summary Judgment, the Court had before it the

same set of facts Pen-Tech used to support its instant motion for sanctions. Namely, the Court considered both the district court's vacated opinion in *Epic Tech v. Fusion Skill, Inc.* and the USPTO's prior opinions about the '317 Patent persuasive authority supporting the Court's analysis declaring the patent invalid." J.A.13. However, the court "decline[d] to go further" because Pen-Tech provided no case law requiring a pre-suit validity analysis based on these decisions. J.A.13.

The district court addressed *Fusion Skill* in its order denying sanctions and noted the issues surrounding the '315 Patent "were not the exact same" as those presented by the '317 Patent. J.A.13. This was true based on Epic Tech's arguments to distinguish the Patents at summary judgment. The panel took issue with the district court's statement "'the issues were not the exact same'" but misapprehended that the district court had already explained the basis for its determination in its summary judgment order. [Doc. 47] at 8 (quoting J.A.13); J.A.12, 2519-20. Thus, in the absence of authority requiring the district court to impute some "notice" from the '315 Patent, there is nothing additional for the district court to consider or do differently on remand.

The district court also addressed the subsequent applications in its order denying sanctions, stating: "Finally, as to whether the USPTO prior opinions should have put Epic Tech and Baker Donelson on notice that the '317 Patent is invalid, the Court declines to take such a leap, particularly when no court has found that the

prosecution history of a later patent can reach back and limit a claim using the same element in an earlier related patent." J.A.14 (emphasis added). This ruling made sense because this Court has never before suggested a district court should defer to the determinations of a patent examiner, who lacks any formal legal training, in determining sanctions. Indeed, "[t]he courts are the final arbiter of patent validity and, although courts may take cognizance of, and benefit from, the proceedings before the patent examiner, the question is ultimately for the courts to decide, without deference to the rulings of the patent examiner." *Quad Env't Techs. Corp. v. Union Sanitary Dist.*, 946 F.2d 870, 876 (Fed. Cir. 1991).[1]

Thus, there is no question that the district court addressed Pen-Tech's "notice" theory and declined to take Pen-Tech's "leap" to require a pre-suit validity analysis in the absence of controlling law compelling it. The district court's rationale was in accordance with the statutory presumption of validity established in *Commil*.

The district court's order warned about the risk of confusion that a contrary ruling would create in patentees' rights. The district court recognized that if it held Epic Tech unreasonably pursued this litigation, then patentees "would not know, going forward, whether they could protect presumably valid patents from

[1] Even 35 U.S.C. § 132's notice requirement serves only "to insure that *applicants* for patent are properly apprised of the rejection they must meet," *Application of Herrick*, 397 F.2d 332, 333 (C.C.P.A. 1968) (emphasis added) – and Epic Tech did not stand in the shoes of an applicant as to the already-issued claims.

infringement where related patents have been declared invalid." J.A.13-14. Thus, the district court correctly avoided creating such confusion.

The panel's decision then violated settled Supreme Court precedent and injected the exact confusion the district court sought to avoid and reshaped the landscape of Rule 11 jurisprudence in the process.

D. Departing From Precedent, The Panel Vacated and Remanded.

The panel vacated and remanded in a precedential decision. The panel held, without citation to authority, "it does not suffice for Epic Tech or its counsel to rely only on the presumption of validity" to avoid the imposition of sanctions *despite* *Commil*'s admonishment that the "presumption takes away any need for a plaintiff to prove his patent is valid to bring a claim." [Doc. 47] at 6; *Commil*, 575 U.S. at 643. Thus, the panel created a new pre-suit validity analysis out of whole cloth in violation of Supreme Court precedent and imposed it upon Epic Tech in a watershed decision.

REASONS TO GRANT REHEARING

The panel's decision contradicts settled precedent by creating a new pre-suit validity analysis requirement for the first time. The panel also injects confusion into patentees' established rights regarding when patentees may rely on the statutory presumption of validity to enforce those rights since the plain language of 35 U.S.C. § 282(a) contains no qualification for rejections of subsequent applications, district court opinions invalidating related patents, or otherwise. Both warrant rehearing.

I. THE PANEL CONFLICTS WITH THE STATUTORY PRESUMPTION OF VALIDITY AND PRECEDENT HOLDING EPIC TECH NEED NOT PROVE ITS PATENT IS VALID TO BRING SUIT.

"Under the Patent Act, and the case law before its passage, a patent is 'presumed valid.'" *Commil*, 575 U.S. at 643 (quoting 35 U.S.C. § 282(a)). "That presumption takes away any need for a plaintiff to prove his patent is valid to bring a claim*." Id*. (emphasis added). Then, 35 U.S.C. § 282(a) provides: "[t]he burden of establishing invalidity of a patent or any claim thereof *shall rest on the party asserting such invalidity*." 35 U.S.C. § 282(a) (emphasis added).

"Congress said what it meant and meant what it said" in enacting the statutory presumption of validity. *United States v. Henning*, 344 U.S. 66, 75 (1952). Congress has the power to change Section 282, "but it has not done so here and [this Court] cannot legislate in its place." *Kearns v. Chrysler Corp.*, 32 F.3d 1541, 1550 (Fed. Cir. 1994). "Thus, by its express terms, § 282 establishes a presumption of patent validity, and it provides that a *challenger* must overcome that presumption to prevail on an invalidity defense." *Microsoft Corp. v. I4I Ltd. P'ship*, 564 U.S. 91, 100 (2011) (emphasis added). While *Commil* recognizes Rule 11 and Section 285 may be available to curb overbroad assertions of *infringement*, the Supreme Court in no way intimated sanctions were available against a patentee with a presumptively valid patent. *Commil*, 575 U.S. at 646-47.

The panel broke with precedent by shifting the validity burden to the patentee. Rehearing is required.

II. THE PANEL FAILED TO DEFER TO THE DISTRICT COURT'S RULING AS REQUIRED UNDER THE APPLICABLE ABUSE OF DISCRETION STANDARD OF REVIEW.

The applicable "abuse-of-discretion standard of review directs the reviewing court to accept the district court's decision unless 'the district court has made a clear error of judgment in weighing relevant factors or in basing its decision on an error of law or on clearly erroneous factual findings.'" *OneSubsea IP UK Ltd. v. FMC Techs., Inc.*, 68 F.4th 1285, 1294 (Fed. Cir. 2023) (quoting *Bayer CropScience AG v. Dow AgroSciences LLC*, 851 F.3d 1302, 1306 (Fed. Cir. 2017)) (internal quotation marks omitted).

Here, the panel's failure to defer to the district court's denial of sanctions conflicts with existing precedent. The panel pointed to no "error of judgment in weighing relevant factors," no "error of law," and no "clearly erroneous factual findings." *Id*. To the contrary, *Commil* made clear the "presumption takes away any need for a plaintiff to prove his patent is valid to bring a claim*." Commil*, 575 U.S. at 643. The district court also followed applicable Rule 11 precedent which contained no pre-suit validity analysis requirement and correctly noted Pen-Tech failed to point to any law compelling an opposite conclusion. J.A.12-14. The district court considered the *Fusion Skill* decision and subsequent applications as persuasive

just as it had on summary judgment. The district court simply declined to sanction on this basis. Since it is undisputed that there is no law compelling a different outcome, there was no "clear error of judgment in weighing relevant factors" or "clearly erroneous factual finding[]." *OneSubsea*, 68 F.4th at 1294. The district court was within its discretion, and the panel should have deferred.

The panel's break with settled precedent requires rehearing.

III. THE PANEL'S DECISION CONFLICTS WITH PRECEDENT ON THE RULE 11 PRE-SUIT INVESTIGATION REQUIREMENT.

The panel's decision broke with even existing Federal Circuit precedent establishing "'[t]he presence of an **infringement analysis plays the key role** in determining the reasonableness of the pre-filing inquiry made in a patent infringement case under Rule 11." *Q-Pharma*, 360 F.3d at 1302 (quoting *View Eng'g*, 208 F.3d at 986) (alteration in original) (emphasis added). *Q-Pharma* confirms this is true even in the face of alleged "notice" that a presumptively valid patent might ultimately be held invalid. *See id*. at 1303. Like Pen-Tech, Jergens advanced a pre-suit "notice" argument (based on letters from accused infringers) as a basis for sanctions. *Id*. This Court was unpersuaded, concluding "Q-Pharma reasonably believed its patent to be valid in light of the statutory presumption of validity[.]" *Id*. The same is true of Epic Tech. Thus, this Court in *Q-Pharma* correctly focused on the pre-suit infringement analysis – and the panel should have done so as well.

It is undisputed Epic Tech performed a pre-suit infringement analysis of the accused product. It is also undisputed that no law required Epic Tech to conduct the panel's pre-suit validity analysis before Epic Tech filed its Complaint on June 5, 2020. *Commil*, 575 U.S. at 643. Indeed, the district court correctly recognized that, "[t]hough Pen-Tech asserts that a different pre-suit obligation existed, the case law it cites suggests the contrary." J.A. 12. The district court also held "Pen-Tech, crucially, does not point to any case law outlining the precise investigation Epic Tech and its counsel were purportedly obligated to complete" based on any alleged notice of invalidity. *Id*. Pen-Tech's failure to cite case law outlining its proffered pre-suit investigation persisted on appeal.

Thus, the panel broke with precedent. Rehearing is required.

IV. THE PANEL'S DECISION CREATES CONFUSION IN PATENTEES' RIGHTS.

The panel's decision creates confusion in patentees' rights. In the wake of the panel's decision, patentees do not know what type of validity analysis they are required to conduct before filing suits enforcing presumptively valid claims. Judge Moore admits this Court has struggled to apply *Alice*. *See Am. Axle & Mfg., Inc. v. Neapco Holdings LLC*, 977 F.3d 1379, 1382 (Fed. Cir. 2020) (Moore, J., concurring) (recognizing "this court "ha[s] struggled to consistently apply the judicially created exceptions to this broad statutory grant of eligibility, slowly creating a panel-

dependent body of law"). Thus, compliance with the panel's new rule will be a moving target.

The panel's decision leaves more questions unanswered: Are all patentees subject to the panel's new pre-suit validity analysis? If not, what triggers it? Is a single examiner rejection of a subsequent application enough? Can a patentee satisfy the new requirement without overcoming an examiner rejection? Must a patentee prove compliance by attorney affidavit or expert testimony? To what extent would an attorney affidavit waive the attorney-client privilege? Where the patentee presents unexcluded expert testimony, is the patentee protected from sanctions even if the court ultimately invalidates the patent? Does the answer change if the expert is excluded under *Daubert*?

Incorrect answers to any of these questions create sanctions risks under the panel's decision. This was not true prior to the panel's decision. Thus, the panel "destroy[s] the ability of American businesses to invest with predictability" – an outcome Judge Moore decried in a prior § 101 concurrence. *Am. Axle*, 977 F.3d at 1382 (Moore, J., concurring). This outcome is avoidable. The Court should grant rehearing.

V. THIS COURT OVERLOOKED THE DISTRICT COURT'S ANALYSIS OF ELEVENTH CIRCUIT RULE 11 PRECEDENT.

This Court reviews the denial of Rule 11 sanctions under the law of the regional circuit – here, the Eleventh Circuit. [Doc. 47] at 5. The panel overlooked

the district court's analysis of the Eleventh Circuit's Rule 11 precedent in *Baker v. Alderman*, 158 F.3d 516, 524 (11th Cir. 1998). The district court cited *Baker* as providing a three-part test for Rule 11 sanctions. J.A.8 (citing *Baker*, 158 F.3d at 524). In *Baker*, the Eleventh Circuit held sanctions could be awarded "when a party files a pleading that (1) has no reasonable factual basis; (2) is based on a legal theory that has no reasonable chance of success and that cannot be advanced as a reasonable argument to change existing law; and (3) is filed in bad faith for an improper purpose." *Baker*, 158 F.3d at 524. Tellingly, the panel did not dispute the factual basis for infringement. Instead, the panel held that "the court needed to address – in some fashion – why Epic Tech's claim [] had a 'reasonable chance of success' or could 'be advanced as a reasonable argument to change existing law,' and was not brought 'in bad faith for an improper purpose.'" [Doc. 47] at 9 (quoting *Baker*, 158 F.3d at 524). But the district court did both things.

First, the district court held it could not find "that the lawsuit was frivolous or that any party acted in bad faith" on the record before it. J.A.21. Thus, the district court meaningfully addressed *Baker*'s bad faith/improper purpose element and found Pen-Tech failed to satisfy it. Moreover, Pen-Tech wholly failed to address the **"presumption that an assertion of infringement of a duly granted patent is made in good faith."** *Medtronic Navigation, Inc. v. BrainLAB Medizinische Computersysteme GmbH*, 603 F.3d 943, 954 (Fed. Cir. 2010) (emphasis added). The

district court's separate, correct finding of an absence of bad faith and any improper purpose was undisturbed on appeal.

The district court also meaningfully addressed *Baker*'s "reasonable chance of success" element. The district court held that, because "Pen-Tech, crucially, does not point to any case law outlining the precise investigation Epic Tech and its counsel were purportedly obligated to complete. . . the Court cannot say that Epic Tech and Baker Donelson's conduct was so unreasonable as to be frivolous." J.A.12. This provided meaningful review because the presumption of validity "takes away any need for a plaintiff to prove his patent is valid to bring a claim." *Commil*, 575 U.S. at 643. Rehearing is required.

CONCLUSION

The petition should be granted.

Respectfully submitted,

Dated: October 27, 2026

/s/L. Clint Crosby
L. Clint Crosby
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FORM 19. Certificate of Compliance with Type-Volume Limitations **Form 19**
July 2020

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

Case Number: 2025-1624

Short Case Caption: Epic Tech, LLC v. Pen-Tech Associates, Inc.

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Name: L. Clint Crosby

CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2026, I electronically filed the foregoing ***Combined Petition for Panel Rehearing and Rehearing En Banc for Appellee Epic Tech, LLC*** with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the CM/ECF system.

I also certify that on October 27, 2026, I caused same to be served via electronic mail to the following counsel of record:

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Addendum:

Panel Opinion in this Appeal

United States Court of Appeals for the Federal Circuit

EPIC TECH, LLC,
Plaintiff-Appellee

v.

PEN-TECH ASSOCIATES, INC.,
Defendant-Appellant

2025-1624

Appeal from the United States District Court for the Northern District of Georgia in No. 1:20-cv-02428-VMC, Judge Victoria M. Calvert.

Decided: September 30, 2026

L. CLINT CROSBY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Atlanta, GA, argued for plaintiff-appellee. Also represented by TYLER BISHOP.

RICHARD M. LEHRER, FisherBroyles LLP, Atlanta, GA, argued for defendant-appellant. Also represented by ALASTAIR JAMES WARR, Chicago, IL.

Before MOORE, *Chief Judge*, CUNNINGHAM, *Circuit Judge*, and SUBRAMANIAN, *District Judge*.[1]

MOORE, *Chief Judge*.

Pen-Tech Associates, Inc. (Pen-Tech) appeals an order of the United States District Court for the Northern District of Georgia denying Pen-Tech's motion for sanctions under Federal Rule of Civil Procedure 11 and motion for attorneys' fees and costs under 35 U.S.C. § 285, 28 U.S.C. § 1927, and the court's inherent power. Because the court's order provides insufficient detail to permit meaningful review, we vacate and remand for further proceedings.

BACKGROUND

Epic Tech, LLC (Epic Tech) owns U.S. Patent No. 8,545,317, directed to an electronic sweepstakes system and method for connecting electronic gaming terminals on a server network to facilitate an initial game with a secondary game operating in the background. '317 patent at Abstract, Figs. 1, 5. The '317 patent issued in October 2013. J.A. 67. In a December 2013 office action, the United States Patent and Trademark Office (PTO) rejected claims in a related application on nonstatutory double patenting grounds over claims of the '317 patent. J.A. 340–46. The Supreme Court decided *Alice* six months later, describing a two-step test for assessing patent subject matter eligibility under 35 U.S.C. § 101. *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208, 217–18 (2014). Following *Alice*, the PTO reopened prosecution of the related application and rejected claims under § 101. J.A. 369–70. Twice more, the PTO issued office actions rejecting claims in other related applications as unpatentable under § 101. J.A. 398–401; J.A. 2226–35; *see* J.A. 1613–14.

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[1] Honorable Arun S. Subramanian, District Judge, United States District Court for the Southern District of New York, sitting by designation.

The § 101 rejections issued after *Alice* but before Epic Tech filed the suit below. Epic Tech abandoned all three related applications without overcoming the PTO's § 101 rejections. J.A. 309; J.A. 311; J.A. 2136.

In June 2020, six years after *Alice* and two years after Baker, Donelson, Bearman, Caldwell & Berkowitz, PC (Baker Donelson) began prosecuting Epic Tech's patent applications, Epic Tech sued Pen-Tech for allegedly infringing claims 1–2, 4–5, 7–10, and 18 (asserted claims) of the '317 patent. J.A. 86–103; J.A. 689. Pen-Tech counterclaimed seeking declaratory judgment that the asserted claims of the '317 patent are invalid under § 101. J.A. 128; *see* J.A. 2524–25. At that time, Epic Tech had already asserted a related patent against a different party, U.S. Patent No. 8,545,315,[2] in the United States District Court for the Southern District of Texas. First Am. Compl. at 34–37, *Epic Tech, LLC v. Fusion Skill, Inc.*, 4:19-cv-02400 (S.D. Tex. Oct. 10, 2019), ECF No. 79 ("*Fusion Skill*"). The Southern District of Texas, applying *Alice*, held the asserted claims of the '315 patent ineligible under § 101. *Epic Tech, LLC v. Fusion Skill, Inc.*, 534 F. Supp. 3d 741, 746–47 (S.D. Tex. 2021), *vacated*, No. 4:19-cv-02400, 2022 WL 22887728 (S.D. Tex. June 6, 2022).[3] Relying on that order, Pen-Tech sought summary judgment of invalidity as to the asserted claims of the '317 patent before the court below, in part, because those claims were allegedly similar to the claims of the '315 patent invalidated in *Fusion Skill*. Pen-Tech's Mot. for Summ. J. at 14–18, *Epic Tech, LLC v. Pen-Tech Assocs., Inc.*, No. 1:20-cv-02428 (N.D. Ga. Sep. 25, 2023), ECF No. 79-2; *see Fusion Skill*, 534

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[2] The '317 patent claims priority as a continuation-in-part to the application that issued as the '315 patent. J.A. 67; J.A. 1613–14.

[3] The court later vacated its summary judgment ruling as part of the parties' settlement. J.A. 273–77.

F. Supp. 3d at 746. Epic Tech filed a cross-motion for summary judgment of infringement. *See* J.A. 2522. The court granted Pen-Tech's motion, denied Epic Tech's motion, and entered judgment declaring the asserted claims of the '317 patent invalid under § 101. J.A. 2524–25.

Before the court entered summary judgment, Pen-Tech moved for Rule 11 sanctions, contending Epic Tech and Baker Donelson should be held jointly and severally liable for Pen-Tech's attorneys' fees and costs incurred in Pen-Tech's defense against allegedly frivolous infringement claims. J.A. 3, 10. According to Pen-Tech, Epic Tech received notice of the asserted claims' potential invalidity before and after filing its complaint when (1) *Alice* issued, Pen-Tech's Rule 11 Mot. at 2–3, *Epic Tech v. Pen-Tech Assocs., Inc.*, No. 1:20-cv-02428 (N.D. Ga. July 18, 2024), ECF No. 120-1; (2) the PTO rejected patentably indistinct claims under § 101 in three related applications, *id.* at 14–21; and (3) the *Fusion Skill* court held similar claims of the '315 patent invalid under § 101, *id.* at 4 n.6. These notices, in Pen-Tech's view, should have prompted Epic Tech to investigate the asserted claims' validity before filing suit. Pen-Tech also moved for attorneys' fees and costs under § 285, § 1927, and the court's inherent power based on the same facts as its Rule 11 motion. J.A. 3; *see* Appellant's Br. 6.

The court recognized its summary judgment of invalidity lent Pen-Tech's allegations of frivolity "considerable credence." J.A. 11. The court nevertheless denied Pen-Tech's Rule 11 motion, determining neither "Epic Tech [nor] Baker Donelson's conduct was so unreasonable as to be frivolous." J.A. 12. The court also declined to award attorneys' fees and costs under § 285, § 1927, and the court's inherent power because it determined the case was not exceptional and Epic Tech had not unreasonably or vexatiously litigated its case. J.A. 18, 20–21. Pen-Tech appeals. We have jurisdiction under 28 U.S.C. § 1295(a)(1).

DISCUSSION

Pen-Tech argues we should (1) reverse the court's denial of Pen-Tech's Rule 11 motion and motion for fees under § 285, § 1927, and the court's inherent power, and (2) remand for a determination of fees owed. Because the court did not sufficiently explain its rationale for rejecting Pen-Tech's theory of unreasonable conduct based on notice of potential invalidity, we vacate and remand for further proceedings.

I. Denial of Rule 11 Sanctions

We review denial of a motion for Rule 11 sanctions under the law of the regional circuit, here the Eleventh Circuit. *Source Vagabond Sys. Ltd. v. Hydrapak, Inc.*, 753 F.3d 1291, 1298 (Fed. Cir. 2014). The Eleventh Circuit reviews such denials for abuse of discretion. *Thompson v. RelationServe Media, Inc.*, 610 F.3d 628, 636 (11th Cir. 2010). "Rule 11 sanctions are warranted when a party files a pleading that (1) has no reasonable factual basis; (2) is based on a legal theory that has no reasonable chance of success and that cannot be advanced as a reasonable argument to change existing law; and (3) is filed in bad faith for an improper purpose." *Baker v. Alderman*, 158 F.3d 516, 524 (11th Cir. 1998). Meaningful appellate review of a court's order denying a Rule 11 sanctions motion is possible only if the court provides adequate explanation. *See Harris v. Heinrich*, 919 F.2d 1515, 1516–17 (11th Cir. 1990).

Pen-Tech argues the court abused its discretion in denying Rule 11 sanctions by discounting the notice supplied by *Alice*, the PTO's § 101 rejections in three related applications, and the *Fusion Skill* order invalidating claims in a related patent. Appellant's Br. 22–32. We hold only that the court's order does not permit meaningful review of its denial in light of Pen-Tech's validity-based notice theory.

There were a number of strong indicators prior to the filing of the suit at issue that the asserted claims were invalid under § 101. First, the Supreme Court decided *Alice*, which not only affected patent subject matter eligibility under § 101 after the '317 patent issued, but also involved a software patent. Second, the PTO determined claims in two of the three related applications were patentably indistinct from independent claims of the '317 patent, J.A. 342–46; J.A. 390–94, and rejected claims in all three related applications under § 101 post-*Alice*. J.A. 369–70; J.A. 398–401; J.A. 2226–35. Third, and again post-*Alice*, the court in *Fusion Skill* held claims of the related '315 patent ineligible under § 101.[4] *Fusion Skill*, 534 F. Supp. 3d at 746–47. These facts, taken together, created a compelling concern over the validity of the claims before this litigation was brought. In such circumstances, it does not suffice for Epic Tech or its counsel to rely only on the presumption of validity when faced with multiple indicators that these claims were unpatentable under § 101.

The court failed to address whether *Alice* put Epic Tech on notice of its asserted claims' potential invalidity. At best, the court indirectly gestured toward *Alice* by referencing its earlier summary judgment ruling predicated on § 101. J.A. 11–12 ("In light of this Court's [summary judgment] Order, . . . Pen-Tech's allegations have considerable credence . . . ."). Despite acknowledging Pen-Tech's assertion that *Alice* should have prompted a pre-suit validity analysis, J.A. 10, the court relied on testimony from Epic Tech's Rule 30(b)(6) witness regarding his "good faith, pre-

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[4] Pen-Tech alleges these claims are substantively similar to those of the '317 patent, Appellant's Br. 6 n.2, but neither the court nor the PTO appears to have determined that. *See* J.A. 13 (court recognizing only that the invalidity *holdings* below and in *Fusion Skill* were "similar"). We do not address the issue of substantive similarity in the first instance.

suit [infringement] investigation" to determine Epic Tech met its pre-suit obligations. J.A. 12 (quoting Epic Tech's Resp. to Pen-Tech's Rule 11 Mot. at 7, *Epic Tech v. Pen-Tech Assocs., Inc.*, No. 1:20-cv-02428 (N.D. Ga. Aug. 15, 2024), ECF No. 127). The court also determined Baker Donelson met its pre-suit obligations by "creating a claim chart and a cease and desist letter using images from Epic Tech's pre-suit [infringement] investigation." J.A. 12. The court's reliance on Epic Tech's and Baker Donelson's pre-suit *infringement* investigation, however, does not explain why sanctions were unjustified under Pen-Tech's notice theory centered on *validity*. Those facts may bear on whether Epic Tech reasonably investigated infringement before filing suit, but they do not address the distinct question of whether Epic Tech should have investigated validity given the notice of potential invalidity *Alice* provided, whether alone or in conjunction with the *Fusion Skill* holding and the PTO's office actions.

The court also failed to adequately address whether the PTO's office actions served as notice of potential invalidity. The court declined to view them as a form of notice because "no court has found that the prosecution history of a later patent can reach back and limit a claim using the same element in an earlier related patent." J.A. 14. Yet Pen-Tech did not invoke the office actions as claim-limiting prosecution history. Pen-Tech's Rule 11 Mot. at 14–21, *Epic Tech v. Pen-Tech Assocs., Inc.*, No. 1:20-cv-02428 (N.D. Ga. July 18, 2024), ECF No. 120-1. Instead, it argued the office actions put Epic Tech on notice that claims in related applications, including claims the PTO determined were patentably indistinct from claims of the '317 patent, had been rejected under § 101 post-*Alice*. *Id.*; *see* J.A. 342–46 (rejecting claims in a related application for nonstatutory double patenting); J.A. 369–70 (rejecting claims of the same application under § 101 post-*Alice*); J.A. 390–401 (rejecting claims of another related application for nonstatutory double patenting and unpatentability under § 101 post-*Alice*);

J.A. 2226–35 (rejecting claims under § 101 post-*Alice* in another related application). The court's rationale does not squarely confront Pen-Tech's notice theory. It fails to explain why those office actions, whether considered individually or collectively, were insufficient to serve as notice of potential invalidity despite their substantive relevance to the asserted claims. Given the absence of reasoning, we are unable to meaningfully review the court's decision.

The court's analysis regarding the *Fusion Skill* holding likewise fails to provide reviewable reasoning for the court's decision. Pen-Tech argues that Epic Tech should have known it was unreasonable to pursue this litigation when *Fusion Skill* invalidated claims in the related '315 patent under § 101. Appellant's Br. 34–35; *see id.* at 13. The court's only explanation for why that holding would not have put Epic Tech on notice of the serious concern over the validity of the related patent claims was that "the issues were not the exact same." J.A. 13. But the issues need not be identical to provide notice of potential invalidity. That is true taking *Fusion Skill* not only in isolation, but also together with *Alice* and the PTO's § 101 rejections in related applications. The court's reasoning did not suffice under these circumstances to permit meaningful review by this court.[5]

We vacate the court's denial of Rule 11 sanctions. We do not decide whether Epic Tech or Baker Donelson violated Rule 11. Nor do we decide when notice of potential invalidity renders continued assertion of a presumptively valid patent unreasonable. We hold only that the court

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[5] At oral argument, Epic Tech was unable to identify anything in the court's analysis assessing the reasonableness of Epic Tech's validity position given the notice of potential invalidity Pen-Tech alleged Epic Tech had received. Oral Arg. at 17:56–20:00.

failed to provide a sufficiently reasoned explanation for rejecting Pen-Tech's validity-based Rule 11 theory given *Alice*, the PTO's § 101 rejections of similar claims, and the *Fusion Skill* order. In light of the unusually strong factors pointing to the invalidity of the patent-in-suit, the court needed to address—in some fashion—why Epic Tech's claim nevertheless had a "reasonable chance of success" or could "be advanced as a reasonable argument to change existing law," and was not brought "in bad faith for an improper purpose." *See Baker*, 158 F.3d at 524.

II. Denial of Motion for Attorneys' Fees

Federal Circuit law applies to review of a § 285 analysis. *Waymark Corp. v. Porta Sys. Corp.*, 334 F.3d 1358, 1362 (Fed. Cir. 2003). Under § 285, "[t]he court in exceptional cases may award reasonable attorney fees to the prevailing party." 35 U.S.C. § 285. An exceptional case is "one that stands out from others with respect to the substantive strength of a party's litigating position . . . or the unreasonable manner in which the case was litigated." *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 554 (2014). We review a court's exceptionality determination for abuse of discretion. *Gaymar Indus., Inc. v. Cincinnati Sub-Zero Prods., Inc.*, 790 F.3d 1369, 1372 (Fed. Cir. 2015). A court assessing exceptionality should indicate "the reasoning underlying its decision to provide a basis for meaningful appellate review." *AGI SureTrack LLC v. Farmers Edge Inc.*, 176 F.4th 1373, 1380 (Fed. Cir. 2026) (quoting *Superior Fireplace Co. v. Majestic Prods. Co.*, 270 F.3d 1358, 1377 (Fed. Cir. 2001)).

We apply the law of the regional circuit when reviewing the denial of fees and sanctions under § 1927 and the court's inherent power. *Waymark*, 334 F.3d at 1362 (discussing fees under § 1927); *PS Prods. Inc. v. Panther Trading Co. Inc.*, 122 F.4th 893, 898 (Fed. Cir. 2024) (discussing fees under the court's inherent power). The Eleventh Circuit reviews such denials for abuse of discretion. *Peterson v. BMI Refractories*, 124 F.3d 1386, 1390 (11th Cir.

1997) (reviewing denial under § 1927); *Sahyers v. Prugh, Holliday & Karatinos, P.L.*, 560 F.3d 1241, 1244 (11th Cir. 2009) (reviewing denial under court's inherent power). A court "must articulate the reasoning behind its . . . denial of attorney's fees in order to permit meaningful review." *See United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union AFL-CIO-CLC v. Wise Alloys, LLC*, 807 F.3d 1258, 1275 (11th Cir. 2015).

Pen-Tech argues the court abused its discretion by denying attorneys' fees and costs under § 285, § 1927, and the court's inherent power based on the same facts presented in its Rule 11 motion. Appellant's Br. 6, 32–37. We hold only that the court's order does not permit meaningful review of its denial in light of Pen-Tech's validity-based notice theory.

CONCLUSION

We vacate the court's denial of Pen-Tech's Rule 11 motion and motion for attorneys' fees and costs under § 285, § 1927, and the court's inherent power.[6] We do not decide whether Pen-Tech is entitled to those fees and costs. We hold only that the court's decision did not afford this court the opportunity for meaningful review in light of the facts of this case. We therefore vacate and remand for further proceedings.

VACATED AND REMANDED

COSTS

Costs to Pen-Tech.

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[6] The court's inherent-power ruling contains no independent analysis. J.A. 21.