No. 19-1378

In the
Supreme Court of the United States

PHAZZER ELECTRONICS, INC.,
Petitioner,

v.

TASER INTERNATIONAL, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

RESPONDENT'S SUPPLEMENT TO BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Respondent TASER International, Inc., now known as Axon Enterprise, Inc. following an April 5, 2017 name change, is a publicly-traded company (AAXN). Axon has no parent company and, as of the date of this filing, no one owned 10% or more of Axon's stock.

SUPPLEMENT REGARDING INTERVENING DISTRICT COURT RULING

Respondent TASER International, Inc. ("TASER") submits this supplement to inform the Court of an intervening ruling by the district court relevant to the pending Petition. Sup. Ct. R. 15.8. As discussed in TASER's Brief in Opposition at 8-9, pending with the district court was Petitioner Phazzer Electronics, Inc's ("Phazzer") fully briefed October 17, 2019 Motion for Reconsideration (D.E. 374) of the same damages accounting order (D.E. 267; Appx. 11a) on the same patent reexamination grounds raised in the instant Petition. On September 23, 2020, the district court denied the motion, finding "established principles of res judicata bar Phazzer from attacking the Court's judgment." (D.E. 409 at 10).

The district court correctly held Phazzer's motion raised arguments already presented to and rejected by the Federal Circuit in Phazzer's first appeal (D.E. 409 at 9-11) (citing D.E. 300, October 26, 2018 Fed. Cir. affirmance; SAppx. 16a), which "fully affirmed the judgment deciding *all issues of validity and infringement*" more than a year before the USPTO's February 2020 cancellation of the '262 Patent's claims, and well after the expiration of Phazzer's 2019 deadlines to file petitions for writ of certiorari (D.E. 409 at 10) (emphasis added).

The Petition should be denied.

Dated: October 5, 2020 Respectfully submitted,

/s/ Pam Petersen
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ADDENDUM

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

TASER INTERNATIONAL, INC.,

Plaintiff,

v. Case No: 6:16-cv-366-Orl-40LRH

PHAZZER ELECTRONICS, INC., STEVEN ABBOUD, PHAZZER GLOBAL LLC and PHAZZER IP, LLC,

Defendants.
_____/

ORDER

This cause comes before the Court on the following matters:

1. Defendant's Motion for Reconsideration with Renewed Stay Application (Doc. 374);
2. Magistrate Judge Leslie R. Hoffman's Order (Doc. 398);
3. Defendant's Rule 72(a) Objection to Magistrate's Order (Doc. 399); and
4. Plaintiff's Response to Defendant's Objections (Doc. 406).

With briefing complete, the matter is ripe for review. Upon due consideration Phazzer's Objection is overruled, and the Motion is denied.

I. BACKGROUND

Plaintiff Taser International, Inc. ("**Taser**"), filed this action in 2016 for patent and trademark infringement, false advertising, and unfair competition against Defendant Phazzer Electronics, Inc. ("**Phazzer**"). (Doc. 1). Due to Phazzer's pattern of misconduct designed to delay and increase the cost of this litigation, the Court struck Phazzer's Motion to Dismiss, entered default judgment in favor of Taser, awarded compensatory

and treble damages, awarded Taser attorneys' fees and costs, and entered an immediate permanent injunction. (Doc. 183, pp. 6–7). The Court ordered damages in the amount of $7,869,578.74, encompassing damages for trademark infringement, patent infringement, and reasonable attorneys' fees and costs. (Doc. 267 ("**Damages Order**")).

Following the entry of default judgment, Taser recorded the judgment in Osceola County and moved for a writ of execution. (Doc. 289). The Court granted Taser's motion, and the Clerk of Court issued the writ of execution on September 19, 2018. (Doc. 296). On September 21, 2018, Taser filed a motion to commence proceedings supplementary pursuant to FLA. STAT. § 56.92(1), to schedule an in-court examination of Defendant pursuant to § 56.92(2), and for an award of attorney fees pursuant to §§ 56.29(11) and 57.115. (Doc. 297). Phazzer opposed the motion. (Doc. 298). On October 5, 2018, the Court granted Taser's request to commence proceedings supplementary and clarified that Taser is entitled to conduct discovery in aid of execution. (Doc. 299). After it commenced proceedings supplementary, Taser began conducting discovery in aid of execution, including discovery from or about Steven Abboud, Phazzer's alleged principal, and two other entities, Phazzer Global, LLC ("**Phazzer Global**") and Phazzer IP, LCC ("**Phazzer IP**"). (*See, e.g.*, Docs. 317, 320, 333).

On October 16, 2018, the Federal Circuit affirmed the Court's judgment and injunction in its entirety. (Doc. 300). Phazzer's 90-day deadline to file a petition for writ of certiorari as to the Federal Circuit's decision expired in April 2019. (Doc. 316). Phazzer subsequently filed a petition for panel rehearing, which the Federal Circuit denied. (Doc. 352). Phazzer's 90-day deadline to file a petition for writ of certiorari as to the Federal Circuit's denial expired in November 2019. (Doc. 406, p. 4 n.3).

On May 4, 2018, the Court held Phazzer and Phazzer executive, Steven Abboud, in civil contempt for violation of the permanent injunction (Doc. 271, p. 8), which the Federal Circuit affirmed on July 23, 2019. (Docs. 350, 351, 355, 356). Taser filed a Motion for Order to Show Cause why Phazzer, Mr. Abboud, and Diana Robinson should not be held in criminal contempt. (Doc. 357). Phazzer moved the Court to stay adjudication of the Motion for Order to Show Cause pending the Patent Trial and Appeal Board's ("**PTAB**") decision on the validity of Taser's '262 patent (Doc. 367), which the Court denied (Doc. 369). Phazzer filed a Motion for Reconsideration with Renewed Stay Application shortly thereafter. (Doc. 374 (the "**Reconsideration Motion**")).

On October 21, 2019, Taser filed a Motion for Leave to File Judgment Creditor Proceedings. (Doc. 376). Taser also filed a Motion for Leave to File a Supplemental Complaint impleading Mr. Abboud, Phazzer Global, and Phazzer IP. (Doc. 376 (the "**Impleader Motion**"). The proposed supplemental complaint asserts three claims: (1) piercing the corporate veil and/or alter ego liability against Mr. Abboud; (2) Phazzer Global is a mere continuation of Phazzer; and (3) fraudulent transfers to Phazzer Global and Phazzer UP in violation of §§ 726.105–.106. (Docs. 376, pp. 2–4; 376-1, pp. 13–18).

Less than a week later, Phazzer filed a suggestion of bankruptcy regarding its voluntary petition of Chapter 7 relief in the United States Bankruptcy Court for the District of Delaware. (Doc. 378). The Delaware Bankruptcy Court dismissed Phazzer's action with prejudice as having been filed in bad faith. (Doc. 390-2). On January 24, 2020, Phazzer again filed a suggestion of bankruptcy under Chapter 11 with the United States Bankruptcy Court for the Middle District of Florida. (Doc. 393). The Court denied Phazzer's request to stay enforcement of the Court's permanent injunction and damages

orders, but it deferred ruling on Phazzer's Reconsideration Motion pursuant to the bankruptcy stay. (Doc. 395, p. 9). Subsequently, the Florida Bankruptcy Court dismissed Phazzer's second action with prejudice as having been filed in bad faith. (Doc. 397).

Phazzer filed an untimely petition for writ of certiorari on June 8, 2020. (Doc. 406, p. 4 n.3). Magistrate Judge Leslie R. Hoffman granted Taser's Impleader Motion on August 10, 2020. (Doc. 398 (the "**Order**")). Phazzer filed an Objection to the Order on August 24, 2020 (Doc. 399), and Taser responded (Doc. 406). The Court now considers Phazzer's Objection to Taser's Impleader Motion as well as Phazzer's Reconsideration Motion, which is ripe for review now that Phazzer's successive bankruptcy petitions have been dismissed with prejudice.

II. STANDARD OF REVIEW

A. Review of Magistrate Judge's Orders

1. Rule 72(a)

Rule 72(a) authorizes a district court reviewing a litigant's objection to a magistrate judge's nondispositive order to "modify or set aside any part of the order that is clearly erroneous or is contrary to law." Fed. R. Civ. P. 72(a); *see also Howard v. Hartford Life & Acc. Ins. Co.*, 769 F. Supp. 2d 1366, 1372 (M.D. Fla. 2011). "A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Tempay, Inc. v. Biltres Staffing of Tampa Bay, LLC*, 929 F. Supp. 2d 1255, 1260 (M.D. Fla. 2013) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). "An order is contrary to law when it fails to apply or misapplies relevant statutes, case law or rules of

procedure." *Id.* (quoting *S.E.C. v. Kramer*, 778 F. Supp. 2d 1320, 1326–27 (M.D. Fla. 2011)).

2. Impleader into Proceedings Supplementary

"Proceedings supplementary are not independent causes of action but are post-judgment proceedings that permit a judgment creditor to effectuate a judgment lien that already exists." *ABM Fin. Servs., Inc. v. Express Consolidation, Inc.*, No. 07-60294, 2011 WL 915669, at *1 (S.D. Fla. Mar. 16, 2011) (citations omitted).[1] Under Fed. R. Civ. P. 69(a), the law of the state where the court is located governs the procedure of proceedings supplementary to and in aid of judgment or execution. Thus, the Court applies Florida law when proceedings supplementary are instituted.

Under Florida law, creditors may pursue assets held by third parties after initiating proceedings supplementary by impleading the third parties into the proceeding. *Kennedy v. RES-GA Lake Shadow*, 224 So. 3d 931, 933 (Fla. Dist. Ct. App. 2017) (citations omitted). Section 56.29(2) provides that:

> Upon filing of the motion and affidavits that property of the judgment debtor, or any debt, or other obligation due to the judgment debtor in the custody and control of any other person may be applied to satisfy the judgment, then the court shall issue a Notice to Appear.

The Notice to Appear must "describe with reasonable particularity the property, debt, or other obligation that may be available to satisfy the judgment." *Id.*

"If the party satisfies the statutory requirements and alleges that the judgment debtor has transferred property to delay, hinder, or defraud creditors, no other showing is

[1] "Unpublished opinions are not controlling authority and are persuasive only insofar as their legal analysis warrants." *Bonilla v. Baker Concrete Const., Inc.*, 487 F.3d 1340, 1345 (11th Cir. 2007).

necessary in order to implead the third party[.]" *Forster v. Nations Funding Source, Inc.*, 648 F. App'x 850, 851 (11th Cir. 2016) (internal quotation marks and citations omitted). The creditor must then file an impleader complaint to proceed on its claims for alter ego liability, mere continuation, and/or fraudulent transfer. *See* § 56.29(9); *SMS Fin. J, LLC v. Cast-Crete Corp.*, No: 8:18-mc-00008-CEH-JSS, 2018 WL 1726434, at *2 (M.D. Fla. Apr. 10, 2018). Once it is impleaded under § 56.29, the third-party defendant "must appear before the court and show cause why the contested property should not be applied toward satisfaction of the judgment creditor's judgment." *Office Bldg., LLC v. CastleRock Sec., Inc.*, No. 10-61582-CIV, 2011 WL 1674963, at *3 (S.D. Fla. May 3, 2011).

B. Reconsideration

Reconsideration is an extraordinary remedy which will only be granted upon a showing of one of the following: (1) an intervening change in law, (2) the discovery of new evidence which was not available at the time the Court rendered its decision, or (3) the need to correct clear error or manifest injustice. *Fla. Coll. of Osteopathic Med., Inc. v. Dean Witter Reynolds, Inc.*, 12 F. Supp. 2d 1306, 1308 (M.D. Fla. 1998). "A motion for reconsideration cannot be used to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." *Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 957 (11th Cir. 2009) (internal quotation marks omitted). It is wholly inappropriate in a motion for reconsideration to relitigate the merits of the case or to "vent dissatisfaction with the Court's reasoning." *Madura v. BAC Home Loans Servicing L.P.*, No. 8:11-cv-2511-T-33TBM, 2013 WL 4055851, at *2 (M.D. Fla. Aug. 12, 2013) (citation omitted). Instead, the moving party must set forth "strongly convincing" reasons for the Court to change its prior decision. *Id.* at *1.

III. DISCUSSION

A. Phazzer's Objection

Since proceedings supplementary have already commenced, the only question is whether Taser may implead Mr. Abboud, Phazzer Global, and Phazzer IP. In its Objection, Defendant raises three points of error with the Order. (Doc. 399). It contends that the Order is clearly erroneous because: (1) Plaintiff's Impleader Motion failed to allege accrued costs and interest under § 56.29(1); (2) Plaintiff's Impleader Motion failed to describe Defendant's non-exempt property in the hands of third parties under § 56.29(2); and (3) the Court's Damages Order (Doc. 267) is void ab initio. (*Id.* at pp. 7–10).

1. Accrued Costs and Interest Under § 59.29(1)

Defendant argues that the Order erroneously granted Plaintiff's Impleader Motion because the Impleader Motion failed to comply with § 56.29(1)'s requirement to include accrued costs and interest. (*Id.* at p. 8). Defendant asserts that the plain language of § 56.29(2) mandates compliance with the requirements of § 56.29(1). The Court disagrees.

Section 56.29(1) governs the procedure for instituting proceedings supplementary, and § 56.29(2) governs the procedure for impleading third parties into proceedings supplementary. *See Longo v. Associated Limousine Servs., Inc.*, 236 So. 3d 1115, 1119–20 (Fla. 4th DCA 2018). "The judgment creditor's entitlement to proceedings supplementary is a *separate issue* from whether the judgment creditor complied with section 56.29(2)'s procedure for impleading third parties into the proceedings." *Id.* (emphasis added). Because proceedings supplementary were commenced via an earlier ruling (Doc. 299), Taser was not obligated to comply with the requirements of § 56.29(1).

Defendant argues that the language "[t]he judgment creditor shall, in the motion described in subsection (1) or in a supplemental affidavit" supports its position that Plaintiff's Impleader Motion failed to satisfy the applicable statutory requirements. (*Id.*). The first sentence of § 56.29(2) reads, in its entirety:

> The judgment creditor shall, in the motion described in subsection (1) or in a supplemental affidavit, describe any property of the judgment debtor not exempt from execution in the hands of any person or any property, debt, or other obligation due to the judgment debtor which may be applied toward the satisfaction of the judgment.

The plain language of this sentence allows the judgment creditor to implead a third party either in its motion to institute proceedings supplementary or in a supplemental affidavit. This first sentence also directs the impleading party to include a description of non-exempt property. Notably, the language does not require the impleading party to comply with § 56.29(1) or reiterate the accrued costs and interest requirement contained in that subsection. The plain language of § 56.29(2) thus fully aligns with Magistrate Judge Hoffman's conclusion that Plaintiff did not have to comply with § 56.29(1) in the Impleader Motion. Therefore, Magistrate Judge Hoffman's Order was not clearly erroneous.

2. Description of Non-Exempt Property Under § 59.29(2)

Defendant asserts that the Order erroneously granted Plaintiff's Impleader Motion because the Impleader Motion failed to properly describe non-exempt property in the hands of third parties. (Doc. 399, p. 8). The Court finds this technical argument inapposite because Plaintiff cured any defect in its Motion by filing an Amended Notices to Appear (Doc. 404) pursuant to Magistrate Judge Hoffman's instructions (Doc. 398, p. 6). Furthermore, Magistrate Judge Hoffman determined that Plaintiff's Amended Notices to Appear satisfied the requirements of § 56.29(2). (Doc. 405).

3. Damages Order as Void Ab Initio

Finally, Defendant argues that the Order failed to address the invalidity of the Damages Order. (Doc. 394, Ex. A; Doc. 399, p. 9–10). Rule 72(a) allows parties to object to a magistrate judge's *nondispositive* decision. Fed. R. Civ. P. 72(a). Here, Magistrate Judge Hoffman merely rejected Defendant's argument that the Court should not rule on the Impleader Motion until it resolves Defendant's pending Reconsideration Motion. (Doc. 398, p. 8). Since it targets the validity of the underlying Damages Order rather than the nondispositive Order, Phazzer's argument is improper under Rule 72(a). However, the Court addresses it below in conjunction with its decision regarding the Reconsideration Motion.

B. Phazzer's Reconsideration Motion

In its Reconsideration Motion, Defendant argues that the Damages Order is void ab initio because (1) PTAB's September 29, 2019 ex parte reexamination decision rejected Plaintiff's patent claims, and (2) Plaintiff's appellate brief to the Federal Circuit contained an alleged admission of fraud. (Doc. 374, pp. 5–6, 7–11). Defendant's Objection asserts that the Damages Order is void ab initio because PTAB's February 10, 2020 ex parte reexamination decision rejected Taser's patent claims. (Doc. 399, pp. 9–10).

Defendant presented these arguments to the Federal Circuit in 2018. (Doc. 300). The Federal Circuit rejected these arguments and *fully affirmed* this Court's judgment. (*Id.*). Defendant cites no legal authority for voiding a fully affirmed underlying judgment. (Docs. 374, 399). In fact, the Federal Circuit has stated that where a patent infringement judgment is affirmed "in all respects," Rule 60 is "unavailable to reopen a judgment on the

grounds that new evidence has come into being after the trial has been concluded." *Fiskars, Inc. v. Hunt Mfg. Co.*, 279 F.3d 1378, 1380–82 (Fed. Cir. 2002).

Furthermore, the cancellation of patent claims during reexamination is binding in concurrent infringement litigation only where a judgment is not final. *See WesternGeco, L.L.C. v. ION Geophysical Corp.*, 913 F.3d 1067, 1071–72 (Fed. Cir. 2019) (citing *Fresenius USA, Inc. v. Baxter Int'l, Inc.*, 721 F.3d 1330) (Fed. Cir. 2013)). In the instant case, there is no "concurrent infringement litigation" because the Federal Circuit fully affirmed the Court's judgment deciding all issues of validity and infringement. (Doc. 300). Because the Court's judgment became final in 2019 upon the expiration of Defendant's deadlines to file petitions for writ of certiorari, established principles of res judicata bar Phazzer from attacking the Court's judgment. (Doc. 316; Doc. 395, p. 10; Doc. 406, p. 4 n.3); *see, e.g.*, *VirnetX Inc. v. Apple Inc.*, 931 F.3d 1363, 1376 (Fed. Cir. 2019) (holding that judgment is final for res judicata purposes when it terminates the litigation on the merits and leaves nothing else for the district court to do but execute the judgment). Defendant's untimely petition to the United States Supreme Court does not divest the Court of jurisdiction to rule on the Reconsideration Motion or the Objection. *See U.S. v. Sears*, 411 F.3d 1240, 1242 (11th Cir. 2005).

Finally, the Court notes that the fully affirmed Damages Order awards damages not only for patent infringement, but also for trademark infringement and attorneys' fees and costs. (Doc. 267, p. 8). PTAB's ex parte reexamination decisions therefore cannot serve as a basis for voiding the entirety of the Damages Order.

For the above reasons, Defendant fails to demonstrate an intervening change in law, the discovery of new evidence that was unavailable at the time the Court rendered

its decision, or a clear error or manifest injustice. Therefore, the extraordinary remedy of reconsideration is unwarranted.

IV. CONCLUSION

For the reasons set forth herein, it is **ORDERED AND ADJUDGED** as follows:

1. Magistrate Judge Leslie R. Hoffman's Order (Doc. 398) is **ADOPTED**;
2. Defendant's Rule 72(a) Objection to Magistrate's Order (Doc. 399) is **OVERRULED**; and
3. Defendant's Motion for Reconsideration with Renewed Stay Application (Doc. 374) is **DENIED**.

DONE AND ORDERED in Orlando, Florida on September 22, 2020.

PAUL G. BYRON
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Parties