

No. \_\_\_\_\_

---

---

**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**

————— ♦ —————

**PETITION FOR WRIT OF CERTIORARI**

————— ♦ —————

**JOSEPH A. DAVIDOW**  
*Counsel of Record*  
FLORIDA BAR NO. 65885  
WILLIS & DAVIDOW, L.L.C.  
9015 Strada Stell Court, Suite 106  
Naples, Florida 34109  
(239) 465-0531  
j davidow@willis davidow.com

*Counsel for Petitioner*

*Dated: June 8, 2020*

---

---

## QUESTIONS PRESENTED

While this patent case was pending on appeal, the United States Patent and Trademark Office (“USPTO”) issued a judgment in an *ex parte* reexamination invalidating all patent claims on which the Patentee based its infringement claims, and then the USPTO issued a Reexamination Certificate cancelling all of those patent claims. Unfortunately, the Federal Circuit refused to stay the case, a mere nine weeks so that a review that USPTO judgment could be made, necessitating the present Petition for Writ of Certiorari and/or, preferably, remand to the Federal Circuit. Due to the cancellation of the patent claims by the USPTO, all orders related to these patent claims are void *ab initio*. Petitioner requests that either this Petition for Writ of Certiorari be granted or, preferably, the issue be remanded to the Federal Circuit for reconsideration of its Order affirming the District Court judgment so that the action can be remanded to District Court to vacate the patent damages. The questions presented are:

- 1) Is the Federal Circuit affirmation of the patent damages now incorrect in light of the change of circumstances created by the USPTO cancellation of all patent claims?
- 2) Is remand to the US Court of Appeals for the Federal Circuit timely and appropriate in light of the change of circumstances created by the USPTO cancellation of all patent claims?

- 3) Does Respondent lack standing to assert said patent claims since the USPTO cancellation of all patent claims?

**PETITIONER'S CERTIFICATE OF  
INTERESTED PERSONS AND CORPORATE  
DISCLOSURE STATEMENT**

Pursuant to Federal Rules of Appellate Procedure the following individuals/entities have an interest in this litigation. Petitioner, Phazzer Electronics Inc., was the defendant-appellant below. Respondent, Taser International, Inc., was the plaintiff-Appellee below. Petitioner, Phazzer Electronics, Inc., is not a subsidiary. No publicly held corporation owns 10% or more of Phazzer Electronics Inc.

## **STATEMENT OF RELATED CASES/FILINGS**

The following is a list of all proceedings and filings in other courts that are directly related to the case:

- In re: Phazzer Electronics, Inc., No. 6:20-bk-00398-LVV United States Bankruptcy Court, Middle District of Florida, Orlando Division.
- In re: Phazzer Electronics, Inc., No. 6:16-cv-00366-PGB, Docket Entry 394, Middle District of Florida, Orlando Division filed February 14, 2020.

## TABLE OF CONTENTS

	<b>Page</b>
QUESTION PRESENTED FOR REVIEW .....	i
PETITIONER’S CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT .....	iii
STATEMENT OF RELATED CASES/FILINGS .....	iv
TABLE OF CONTENTS.....	v
TABLE OF AUTHORITIES .....	vii
PETITION FOR A WRIT OF CERTIORARI AND/OR, PREFERABLY, REMAND TO THE FEDERAL CIRCUIT .....	1
OPINIONS BELOW .....	1
JURISDICTION .....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	7
INTRODUCTION .....	7
STATEMENT OF THE CASE .....	9
REASONS FOR GRANTING THE PETITION OR REMAND.....	11
I. Taser’s Damages Order Cannot Include Any Patent Damages based on the Asserted ‘262 Patent Claims.....	11

II.	Taser Lacks Standing to Challenge this Petition for Writ of Certiorari and/or Remand to the Federal Circuit .....	13
III.	This Case Remains Pending and Not Final and Should be Remanded to the Federal Circuit .....	14
	CONCLUSION .....	15
	APPENDIX:	
	Judgment of the United States Court of Appeals For the Federal Circuit (App. D.E. 67). entered July 23, 2019 .....	1a
	Order of the United States District Court For the Middle District of Florida Re: Damages (D.E. 267) entered April 4, 2018 .....	3a
	Order of the United States Court of Appeals For the Federal Circuit Re: Denying Petition for Panel Rehearing (App. D.E. 70) entered August 23, 2019.....	11a

## TABLE OF AUTHORITIES

	Page(s)
<b>CASES</b>	
<i>Commil USA, LLC v. Cisco Sys.</i> , 135 S. Ct. 1920 (2015).....	14
<i>Fresenius USA, Inc. v. Baxter Int’l., Inc.</i> , Case 12-1334, Doc. 65-2 (Fed. Cir. July 2, 2013) .....	13
<i>Fresenius USA, Inc. v. Baxter Int’l., Inc.</i> , 721 F.3d 1330 (Fed. Cir. 2013).....	11, 15
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992).....	8, 13
<i>Moffitt v. Garr</i> , 66 U.S. 273 (1862).....	14
<i>Oil States Energy Svcs, LLC v Greene’s Energy Group, LLC et al.</i> , 584 U.S. ___, 138 S. Ct. 1365 (2018)....	2-3, 8, 11, 12
<i>Simmons Co. v. Grier Bros. Co.</i> , 258 U.S. 82, 42 S. Ct. 196, 66 L. Ed. 475 (1922).....	11
<i>Slip Track Systems, Inc. v. Metal Lite, Inc.</i> , 159 F.3d 1337 (Fed. Cir. 1998) .....	13
<i>Worden v. Searls</i> , 121 U.S. 14, 7 S. Ct. 814, 30 L. Ed. 853 (1887).....	11



**CONSTITUTIONAL PROVISIONS**

US CONST. art. I, § 8, Clause 8..... 7  
US CONST. art. III, § 2, Clause 1..... 7

**STATUTES**

11 U.S.C. § 362(a)(1)..... 1, 2  
28 U.S.C. §1254(1) ..... 2  
35 U.S.C. § 281..... 13

**RULE**

Fed. R. App. P. 13 ..... 2, 6, 12

**REGULATION**

37 C.F.R. § 1.56 .....9

**PETITION FOR A WRIT OF CERTIORARI  
AND/OR, PREFERABLY, REMAND TO  
THE FEDERAL CIRCUIT**

COMES NOW, the petitioner, Phazzer Electronics Inc., and hereby petitions this Honorable Court for a writ of certiorari and/or, preferably, remand to review the judgment of the United States Court of Appeals for the Federal Circuit.

**OPINIONS BELOW**

The decision of the Federal Circuit (App. 1a-2a) and denial of rehearing (App. 11a) are unreported. The decision of the District Court on damages (App. 3a-10a) is unreported.

**JURISDICTION**

The judgment of the Federal Circuit was entered on July 23, 2019 (App. 1a-2a). A timely request for rehearing was filed within 30 days on Aug. 22, 2019 (App. D.E. 069). A denial of the request for rehearing was entered on Aug. 23, 2019 (App. 11a).

Some sixty-three days later, on October 25, 2019, Phazzer Electronics Inc. filed a notice of bankruptcy with the United States Bankruptcy Court for the District of Delaware (its state of incorporation - hereinafter "Bankruptcy 1") (BK DE 001), staying the continuation a judicial action or proceeding under 11 U.S.C. § 362(a)(1) and leaving twenty-seven days for Phazzer Electronic Inc. to file a Petition for Writ of Certiorari and/or remand with United States Supreme Court. On January 2, 2020, an Order was entered dismissing Bankruptcy 1 (BK DE 020).

Some twenty-one days later, on January 23, 2020, Phazzer Electronics Inc. filed a notice of bankruptcy with the United States Bankruptcy Court for the Middle District of Florida (hereinafter “Bankruptcy 2”) (BK FL 001), again staying the continuation a judicial action or proceeding under 11 U.S.C. § 362(a)(1) and leaving six days for Phazzer Electronic Inc. to file a Petition for a Writ of Certiorari and/or remand with United States Supreme Court.<sup>1</sup>

On February 10, 2020, the United States Patent and Trademark Office issued Ex Parte Reexamination Certificate (11639<sup>th</sup>) for US Patent No. 7,2343,262 cancelling all claims (1-18) asserted in the District Court action and the subject of the judgment (App. D.E. 067) thereby voiding all patent damages and orders related thereto *ab initio* (See D.E. 394 - Exhibit A, pages 10 to 13).

On June 2, 2020, an Order was entered dismissing Bankruptcy 2 (BK DE 040).

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1) and is timely filed within ninety day (90 days);<sup>2</sup> a time line is provided for ease of Court:

---

<sup>1</sup> It was present counsel’s understanding that he was prevented from taking any action without the express direction of bankruptcy trustee.

<sup>2</sup> The time to Petition for Writ of Certiorari to the US Supreme Court has not run, so nothing in this Case is final yet. See, Rules of Appellate Procedure Rule 13 (time to file Petition for Writ of is 90 days from any denial of Petition for Rehearing request excluding any time stayed by bankruptcy. See Also, *Oil States Energy Svs, LLC v Greene’s Energy Group, LLC et al.*, 584 U.S.

Action	Date	Days from respective Order	Remaining Appeal Days to file Petition for Writ of Certiori and Remand
US Ct. of Appl. for Fed. Cir. Dock. No. 18-1914 – Appeal of Damages Order of 113A-6 : 6:16-cv-00366-PGB-KRS  ORDER filed denying [69] petition for panel rehearing filed by Phazzer Electronics, Inc. in 18-1914, denying [630408-2] petition for	08/23/2019	0	90

---

\_\_\_\_\_, 138 S. Ct. 1365 (2018). In addition, pursuant to this Honorable Court’s March 19, 2020 Order (589 U.S.) the 90 day period has been extended to 150 days, however, in the abundance of caution Petitioner is moving for this Writ now instead of calculating the additional 60 days prior to expiration.

<p>panel rehearing filed by Phazzer Electronics, Inc. in 18-2059. By: Merits Panel (Per Curiam). Service as of this date by the Clerk of Court.</p> <p>(App D.E. 070)</p>			
<p>US BK. Ct. Dist. Of DE – BK Pet. # 19-12281-MFW</p> <p>Chapter 7 Voluntary Petition. Amount Paid \$335. Filed by Phazzer Electronics, Inc.</p> <p>(BK DE 001)</p>	10/25/2019	63	27
<p>STAY pursuant to US BK code - 11 U.S.C. § 362(a)(1)</p>	<p>Appeal Time Stayed</p>	-----	-----

Order Approving Motion to Dismiss with Prejudice (BK DE 020)	01/02/2020	0	27
US BK. Ct. Dist. Of FL – BK Pet. # 6:20-bk-00398-LVV  Voluntary Petition under Chapter 7. (Fee Paid). Filed by Justin M Luna on behalf of Phazzer Electronics, Inc. (BK FL 001)	01/23/2020	21	6
STAY pursuant to US BK code - 11 U.S.C. § 362(a)(1)	Appeal Time Stayed	-----	-----
US Patent and Trademark Office – Ex Parte Reexamination	02/10/2020	-----	-----

Certificate (11639 <sup>th</sup> ) for US Patent 7,234,262 – all claims cancelled (1- 18)  Patent damages void <i>ab initio</i>  (See D.E. 394 - Exhibit A, pages 10 to 13)			
Order Approving Motion to Dismiss with Prejudice  (BK FL 040)	06/02/2020	0	6
Petition for Writ of Certiorari and Remand Due date <sup>3</sup>	06/08/2020	6	0

---

<sup>3</sup> See, Rules of Appellate Procedure Rule 13 (time to file Petition for Writ of is 90 days from any denial of Petition for Rehearing request excluding any time stayed by bankruptcy).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, Clause 8 of the Constitution sets forth:

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries; ...

Article III, Section 2, Clause 1 of the Constitution sets forth:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

## INTRODUCTION

Since at least 2013, the Federal Circuit has consistently applied legal principles that affirm the authority of the USPTO to determine the validity of patent claims, and upon cancellation of said patent



claims, void *ab initio* any damages found for infringement of the cancelled patent claims. Taser International Inc. (now Axon Enterprises Inc. and hereinafter “Taser”) no longer has a legally protectable interest in the patent damages of said Damages Order and lacks any standing to respond to this Petition for Writ of Certiorari and/or, preferably, remand to the Federal Circuit. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (requiring a “legally protected interest” to maintain constitutional standing).

The unique facts of this case render attractive a remand of the issues to the Federal Circuit. While the Federal Circuit could be deemed to have correctly affirmed the Order on patent damages at the time issued, that is no longer the case -as all patent claims have been cancelled retroactively.

As the Court found for inter partes cases in *Oil States Energy Servs., LLC v. Greene’s Energy Grp, LLC*, “inter parties review protects the public’s paramount interest in seeing patent monopolies are kept within their legitimate scope.” 138 S. Ct. 1365, 1374 (2018). Such public policy also applies to *ex parte* cancellation of claims by the USPTO.

As a result of the USPTO Patent Trial and Appeal Board (“Board”) cancellation of all claims of Taser’s asserted patent and subsequent issuance of Reexamination Certificate, Taser’s asserted patent claims never had any legitimate scope. To allow Taser to recover on these claims solely from Petitioner unfairly transfers monopoly power to Taser that it did not lawfully earn.

## STATEMENT OF THE CASE

In 2016, Taser sued Phazzer Electronics Inc. (“Phazzer”) alleging, *inter alia*, that its conductive energy weapon (“CEW”) infringe US Patent No. 7,234,262 (hereinafter the ‘262 patent”). Phazzer filed Motions to Dismiss, but for almost a year, the District Court refused to rule on the motion while allowing Taser to barrel ahead with discovery. By not ruling on the Motions to Dismiss, the District Court effectively allowed burdensome discovery for Taser while preventing an answer or counterclaims by Phazzer.

Contemporaneously, Phazzer filed a first request for *ex parte* reexamination of the ‘262 patent claims which was granted and ultimately caused certain claims to be amended. Thereafter, Phazzer discovered that Taser had disclosed certain prior art patents in Taser’s other co-pending patent applications before issuance of the ‘262 patent but failed to disclose those material prior art patents in the ‘262 patent application.<sup>4</sup> Phazzer subsequently filed a second request for *ex parte* reexamination of the ‘262 patent claims which was granted on May 22, 2017 finding a substantial question of patentability. Ultimately, the Board in the *ex parte* reexamination found all patent claims to be invalid and, subsequently, all patent claims were cancelled by Reexamination Certificate.

---

<sup>4</sup> 37 C.F.R. § 1.56 - Duty to disclose information material to patentability (“... Each individual associated with the filing and prosecution of a patent application has a duty of candor and good faith in dealing with the Office, which includes a duty to disclose to the Office all information known to that individual to be material to patentability as defined in this section. ...”)

Upon grant of the second *ex parte* reexamination, Phazzer sought a stay of the case in order that the validity of the claims could be ascertained (D.E. 139). Even though the District Court had not ruled on Phazzer's Motion to Dismiss, and knowing that the '262 patent had substantial questions of patentability, the District Court denied the motion to stay. Unfortunately, at that time, Phazzer could no longer continue to fund the one-way burdensome discovery and defaulted. Thus, the District Court entered a default judgment Damages Order on April 4, 2018 against Phazzer without ever entering a substantive ruling on Phazzer's Motion to Dismiss. (D.E. 267)

Thereafter, the Damages Order was appealed to the Federal Circuit. Again, a motion to stay was filed with the Federal Circuit (App. D.E. 065, filed July 18, 2019) since the Board had set oral argument in the second reexamination for September 6, 2019, but that motion was again denied. Subsequently, the Board issued its opinion on September 27, 2019 rejecting all claims as invalid. Taser did not appeal or move for a rehearing of the Board's finding that all claims of the asserted '262 patent were invalid. **Finally, a Reexamination Certificate for the '262 patent issued on Feb. 10, 2020 officially cancelling all claims that had remained in "zombie" status since the granting of the second reexamination on May 22, 2017.**

As referenced above, the present petition for writ of certiorari and/or remand to the Federal Circuit has been lodged within the 90 days, excluding any days stayed.

**REASONS FOR GRANTING  
THE PETITION OR REMAND**

**I. Taser’s Damages Order Cannot Include Any Patent Damages based on the Asserted ‘262 Patent Claims**

As indicated above, on Feb. 10, 2020, the US Patent and Trademark Office issued Reexamination Certificate (11639<sup>th</sup>) (*See* D.E. 394 - Exhibit A, pages 10 to 13) for US Patent No. 7,234,262 (the “‘262 patent”) cancelling claims 1-18 (all claims) of said patent.

Under *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, the US Supreme Court found that a PTAB review involving the same interests as the original grant is “a second look at an earlier . . . grant” and the patent remains “subject to [the Board’s] authority.” 138 S. Ct. 1365 (2018).

It is axiomatic that a patentee's right to damages for infringement is only “founded on the validity of his patent.” *Worden v. Searls*, 121 U.S. 14, 25, 7 S. Ct. 814, 30 L. Ed. 853 (1887). Cancellation of claims during reexamination is binding in a concurrent infringement litigation. *Fresenius USA, Inc. v. Baxter Int’l, Inc.*, 721 F.3d 1330, 1339 (Fed. Cir. 2013). The Supreme Court held that an intervening decision on validity was binding on a pending case where liability had been resolved, but a final decree had not yet been entered. *Simmons Co. v. Grier Bros. Co.*, 258 U.S. 82, 42 S. Ct. 196, 66 L. Ed. 475 (1922).

The present action as a whole is not final as the time to file a Petition for Writ of Certiorari to the US

Supreme Court has been filed within the 90 days.<sup>5</sup> Thus, given the outright rejection of every claim of Taser's '262 patent found in Reexamination Certificate 11639<sup>th</sup>, any further enforcement of the Damages Order [D.E. 267] must be vacated, especially with respect to the asserted '262 patent claims.

Clearly, the lower courts were misled and misinformed by Taser's void '262 patent. For example, requests were made in both the District Court and the Federal Circuit for a stay, but Taser misled these Courts as to the severity of the reexamination by stating that "[t]here is no reason to believe that the second reexam[ination] based on second-tier prior art, will yield any different results." [D.E. 200].<sup>6</sup>

As the '262 patent claims are void *ab initio*, Phazzer respectfully request that this Court should either grant a Petition for Writ of Certiorari and/or, preferably, remand to the Federal Circuit to review and dismiss any continued enforcement of damages Order [D.E. 267] in light of the US Patent and Trademark Office issuance of the Reexamination

---

<sup>5</sup> The time to Petition for Writ of Certiorari to the US Supreme Court has not run, so nothing in this Case is final yet. *See*, Rules of Appellate Procedure Rule 13 (time to file Petition for Writ of is 90 days from any denial of Petition for Rehearing request excluding any time stayed by bankruptcy. *See Also*, *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365 (2018).

<sup>6</sup> It is unlikely that Taser's attorneys, including Mr. Santurri, who attended the Examiner Interview in the first reexamination, negligently failed inform the USPTO of the importance of the documents, especially Mendelsohn et al.

Certificate 11639<sup>th</sup> rejecting of all ‘262 patent claims. For purposes of this petition, the ‘262 patent is void *ab initio* and Taser failed to fulfill its duty of full candor to the USPTO and the Courts.

The issuance of Reexamination Certificate 11639 finding all of the ‘262 claims are invalid is binding and retroactive during the pendency of the action and requires a “dismissal of the interfering patent[] suit.” *Fresenius USA, Inc. v. Baxter Int’l., Inc.*, Case 12-1334, Doc. 65-2, p. 17 (Fed. Cir. July 2, 2013), *quoting*, *Slip Track Systems, Inc. v. Metal Lite, Inc.*, 159 F.3d 1337, 1340 (Fed. Cir. 1998).

Phazzer kindly requests that this Court grant its Petition for Writ of Certiorari and/or remand to the Federal Circuit of the Damages Order for dismissal of the patent damages.

## **II. Taser Lacks Standing to Challenge this Petition for Writ of Certiorari and/or Remand to the Federal Circuit**

Constitutional standing throughout the case requires that the plaintiff suffered an injury in fact due to an “invasion of a legally protected interest.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). In a patent case, only a patentee may bring an action for infringement. 35 U.S.C. § 281. Here, Taser lost its patent rights on which it based its suit against Phazzer as result of the Ex Parte Reexamination Certificate cancelling all claims of the asserted ‘262 patent. Thus, Taser is no longer a patentee with respect to the asserted claims and does

not have a legally protected interest.<sup>7</sup> See *Moffitt v. Garr*, 66 U.S. 273, 283 (1862) (legal cancellation of a patent extinguishes the patent and cannot be the foundation for a right asserted thereafter). It is the simple truth that an invalid patent cannot be infringed. See *Commil USA, LLC v. Cisco Sys.*, 135 S. Ct. 1920, 1929 (2015) (“to be sure, if at the end of the day, an act that would been an infringement ... pertains to a patent that is shown to be invalid, there is no patent to be infringed.”).

After cancellation of the ‘262 patent claims, Taser lacks standing, and its Damages Order based thereon should be remanded for dismissal of the patent damages.

Phazzer kindly requests that this Court grant this Petition for Writ of Certiorari and/or remand to the Federal Circuit of the Damages Order for dismissal of the patent damages.

### **III. This Case Remains Pending and Not Final and Should be Remanded to the Federal Circuit**

The *Fresenius* preclusion principle established by the Federal Circuit applies general preclusion principles to the patent case-specific principles of the court of appeals’ affirmance of a judgment from the Board invalidating all patent claims while a court

---

<sup>7</sup> It is the simple truth that an invalid patent cannot be infringed. See *Commil USA, LLC v. Cisco Sys.*, 135 S. Ct. 1920, 1929 (2015) (“to be sur, if at the end of the day, an act that would been an infringement ... pertains to a patent that is shown to be invalid, there is no patent to be infringed.”).

case is still pending. *See, generally, Fresenius USA, Inc. v Baxter Int'l, Inc.*, 721 F.3d 1330 (Fed. Cir. 2013). Specifically, the Federal Circuit concluded that to rise to a level of finality, “the litigation must be entirely concluded so that [the] cause of action [against the infringer] was merged into the final judgment ... one that ‘ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.’” *Id.* Thus, this litigation is not final as Phazzer has filed the Petition for Writ of Certiorari and/or remand to the Federal Circuit against the patent damages found in the Damages Order.

Phazzer kindly requests that this Court grant this petition for writ of certiorari and/or remand to the Federal Circuit of the Damages Order for dismissal of the patent damages.

### CONCLUSION

The Court should grant the petition for writ of certiorari and/or, preferably, remand the Damages Order to the Federal Circuit for dismissal of the patent damages.

Respectfully submitted,

/s/ Joseph Davidow

Joseph A. Davidow

Florida Bar No. 65885

WILLIS & DAVIDOW, L.L.C.

9015 Strada Stell Court, Suite 106

Naples, Florida 34109

(239) 465-0531

[jdavidow@willisdavidow.com](mailto:jdavidow@willisdavidow.com)

Attorney for Petitioner