

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

CORRECTED APPENDIX

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Dated: June 10, 2020

APPENDIX

APPENDIX TABLE OF CONTENTS

	Page
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.....	13a
Exhibit to Non-Party Diana Robinson’s Pro Per Notice Regarding Issuance of Reexamination Certificate For Us Patent No. 7,234,262 Cancelling All Claims (D.E. 394) filed February 14, 2020: <u>Exhibit:</u> A. Ex Parte Reexamination Certificate United States Paten No. US 7,234,262 C2 issued February 10, 2020	15a

[ENTERED: July 23, 2019]

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

TASER INTERNATIONAL, INC.,
Plaintiff-Appellee

v.

PHAZZER ELECTRONICS, INC.,
Defendant-Appellant

2018-1914

Appeal from the United States District Court
for the Middle District of Florida in No. 6:16-cv-
00366-PGB-KRS, Judge Paul G. Byron.

JUDGMENT

PAMELA BETH PETERSEN, Axon Enterprise,
Inc., Scotts-dale, AZ, argued for plaintiff-appellee.

JOSEPH A. DAVIDOW, Willis & Davidow, LLC,
Naples, FL, argued for defendant-appellant.

THIS CAUSE having been heard and considered,
it is

ORDERED and ADJUDGED:

PER CURIAM (O'MALLEY, REYNA, and CHEN,
Circuit Judges).

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

July 23, 2019
Dated

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

[ENTERED: April 4, 2018]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

TASER INTERNATIONAL, INC.,

Plaintiff,

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

PHAZZER ELECTRONICS, INC.,

Defendant.

ORDER

This cause is before the Court on Plaintiff's Motion for Damages and Reasonable Fees and Costs, (Doc. 242), filed on November 2, 2017. On November 20, 2017, Defendant filed a motion seeking leave to file an untimely response to Plaintiff's Motion for Damages, to which Defendant attached a copy of its Response. (Doc. 255). The Court has reviewed Defendant's response in resolving Plaintiff's Motion for Damages, and therefore will grant Defendant's Motion for Leave to File a Response. (Doc. 255). For the reasons discussed herein, Plaintiff's Motion for Damages and Reasonable Fees and Costs (Doc. 242) is due to be granted.

I. BACKGROUND

A detailed recitation of the procedural history of this case is set forth in the Court's Order granting Plaintiff's Motion for Sanctions and for a Permanent

Injunction. (Doc. 183). The conduct of Defendant Phazzer Electronics, Inc. (“Phazzer”)—exemplified by their persistent and coordinated efforts to frustrate discovery and to delay and confound Taser in its attempt to enforce its Patent—has been egregious. (*Id.* at pp. 2-5). Consequently, the Court was moved to enter default judgment in favor of Plaintiff Taser International, Inc. (“Taser”), order the award of compensatory and treble damages (to be determined in accordance with a briefing and hearing schedule), and order to Taser its attorneys’ fees and costs as sanctions for Phazzer’s bad faith conduct, as well as a permanent injunction. (*Id.* at p. 7). The instant motion contains laser’s briefing regarding the estimated amount of damages it is entitled pursuant to the Court’s Order Granting Sanctions and Permanent Injunction. (Doc. 242).

II. DISCUSSION

In its Order Granting Sanctions (Doc. 183), the Court entered default judgment in favor of Taser and against Phazzer on all claims set forth in the Amended Complaint. (*Id.* at p. 7). By entering default judgment, the “well-pleaded factual allegations of the Complaint are accepted as true, except those related to damages.” *Broad. Music, Inc. v. Mbratta Enters., Inc.*, No. 2:14-CV-125-FTM-29CM, 2015 WL 1507842, at *1 (M.D. Fla. Apr. 1, 2015).

A. Trademark Infringement

As the prevailing party in this action, Taser is entitled “to recover (1) defendant’s profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action.” 15 U.S.C. § 1117(a). “In assessing profits the plaintiff shall be required to prove

defendant's sales only; defendant must prove all elements of cost or deduction claimed." 15 U.S.C. § 1117.

Taser presents the Court with evidence of profits in the form of sales of infringing cartridges. First Taser submits the declaration of Ander Davis, which provides that Phazzer sold at least 40,493 cartridges through February 2017, for a total of \$834,502. (Doc. 242-1).

Taser also provides the Court with evidence of infringing sales of cartridges collected from third-party data. Based on invoices collected from Phazzer's cartridge manufacturer, Phazzer purchased 12,313 additional cartridges for \$69,221.50. (Doc. 242-2). Based on the average sale price of \$20.61,¹ Phazzer generated \$253,770.93 from the sale of 12,313 cartridges. This evidence satisfies Taser's burden of establishing Phazzer's sales of infringing products. Phazzer does not attempt to reduce this amount through evidence of costs or deductions. Nonetheless, the information provided by Taser reflects that Phazzer purchased the additional cartridges for \$69,221.50, and the Court will therefore deduct this amount from Phazzer's total profits.

In its response to Taser's Motion for damages, Phazzer claims that the Court cannot issue damages for trademark infringement, false advertising, and unfair competition "because, despite Defendant being defaulted and physically restrained by this Court

¹ The sale price of \$20.61 is derived from Phazzer's invoices, which show that Phazzer sold 40,493 cartridges for \$843,502. Based on this data, Taser projects that Phazzer's sales price for cartridges equates to \$20.61. (See Doc. 242-1).

from defending itself, Taser has not actually been damaged pursuant to its allegations as set forth in its Amended Complaint, which are the only grounds upon which this Court can determine the amount of damages.” (Doc. 255, p. 16). This argument defies the well-established law regarding default judgment, which holds that “[a] defendant, by his default, admits the plaintiff’s well-pleaded allegations of fact ” *Nishimatsu Const. Co. v. Hous. Nat. Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975)²; *Young Apartments, Inc. v. Town of Jupiter*, 503 F. App’x 711, 726 (11th Cir. 2013) (per curiam). Because the allegations in the Complaint are deemed to be true, any “[a]ttempts by the defendant to escape the effects of his default should be strictly circumscribed; he should not be given the opportunity to litigate what has already been considered admitted in law.” *Nishimatsu*, 515 F.2d at 1206.

In this case, the Court entered default judgment against Phazzer as a sanction for persistent and coordinated efforts to frustrate discovery and to delay this litigation. By defaulting, Phazzer admits to the allegations in the Complaint, which raised claims for trademark infringement, false advertising, and unfair competition. Because liability for these claims is considered admitted by law, Taser is entitled to damages.

Accordingly, the Court finds that Phazzer’s profits from infringing sales amount to \$1,019,051.43. Because the Court previously awarded Taser treble

² In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

damages, the Court will award Taser \$3,057,154.29 in damages for trademark infringement.

B. Patent Infringement

For patent infringement, a patentee's damages must be "adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer" 35 U.S.C. § 284. A reasonable royalty is "the floor below which damages shall not fall." *Stickle v. Heublein, Inc.*, 716 F.2d 1550, 1561 (Fed. Cir. 1983). There are two ways a court can calculate a reasonable royalty fee: "[t]he royalty may be based upon an established royalty, if there is one, or if not, upon the supposed result of hypothetical negotiations between the plaintiff and defendant." *Rite-Hite Corp. v. Kelley Co.*, 56 F.3d 1538, 1554 (Fed. Cir. 1995).

In this case, neither party has presented the Court with an established royalty fee. As such, the Court must determine one based on the supposed result of hypothetical negotiations between Taser and Phazzer. When calculating a royalty fee based on hypothetical negotiations between the plaintiff and the defendant, this Court employs "the use of the Georgia-Pacific factors to frame the reasonable royalty inquiry. Those factors properly tie the reasonable royalty calculation to the facts of the hypothetical negotiation at issue." *LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d 51, 60, n.2 (Fed. Cir. 2012); *Enpat, Inc. v. Budnic*, No. 6:11-CV-86-PCF-KRS, 2011 WL 1196420, at *2 (M.D. Fla. Mar. 29, 2011).

The Georgia-Pacific factors include:

(1) royalties the patentee has received for licensing the patent to others; (2) rates paid by the licensee for the use of comparable patents; (3) the nature and scope of the license (exclusive or nonexclusive, restricted or nonrestricted by territory or product type); (4) any established policies or marketing programs by the licensor to maintain its patent monopoly by not licensing others to use the invention or granting licenses under special conditions to maintain the monopoly; (5) the commercial relationship between the licensor and licensee, such as whether they are competitors; (6) the effect of selling the patented specialty in promoting sales of other products of the licensee; (7) the duration of the patent and license term; (8) the established profitability of the product made under the patent, including its commercial success and current popularity; (9) the utility and advantages of the patent property over old modes or devices; (10) the nature of the patented invention and the benefits to those who have used the invention; (11) the extent to which the infringer has used the invention and the value of that use; (12) the portion of profit or of the selling price that may be customary in that particular business to allow for use of the invention or analogous inventions; (13) the portion of the realizable profit that should be credited to the invention

as opposed to its non-patented elements; (14) the opinion testimony of qualified experts; and (15) the results of a hypothetical negotiation between the licensor and licensee.

i4i Ltd. P'ship v. Microsoft Corp., 598 F.3d 831, 853 n.3 (Fed. Cir. 2010), *aff'd*, 564 U.S. 91 (2011).

Taser submits that the majority of these factors weigh in favor of applying a high royalty rate in this case. For example, Taser represented that it is unlikely that Taser would ever have licensed to Phazzer, claiming that it would negatively impact Taser's brand based on Phazzer's lack of ethics and sale of lesser-quality and knock-off products. (Doc. 242, p. 5). Also, Taser claims that it consistently exploits its own patents rather than licensing to competitors. Taser and Phazzer are direct competitors, who both offer products primarily to law enforcement agencies. In other words, it is unlikely that Taser would ever enter into negotiations with Phazzer to license its patent. Indeed, Taser submits that, "having spent significant resources to acquire and protect its patented technology, [it] would not give up a license unless the royalty rate were significant." (*Id.* at p. 6). Accordingly, Taser recommends the Court apply a 40% royalty fee.

Phazzer, in its response, does not contest the reasonableness of a 40% royalty rate. Instead, Phazzer argues that Taser's damages calculations overreach because they include sales of products that do not infringe upon Taser's patent. According to Phazzer, there are two relevant types of products sold by Phazzer—an Enforcer with dataport and an

Enforcer without dataport. Phazzer contends that it is impossible for the Enforcer without dataport to infringe upon Taser's '262 patent, and thus, damages for the sale of the Enforcer without dataport are improper. (Doc. 255, pp. 13-15).

Phazzer's argument, however, goes to liability and not to the appropriate amount of damages. The Court has already entered judgment in this case. That judgment was based on Phazzer's continued attempts to delay and otherwise avoid adjudicating this case on the merits. Ordinarily in a patent case, the Court would be advised on the details of the patent at issue in a claim construction hearing, during which Phazzer would have had the opportunity to present evidence that could establish the existence of non-infringing products. But Phazzer's repeated failure to appear before the Court or otherwise comply with Court orders has robbed the Court of the opportunity to review such evidence. The subject of the injunction ordered by this Court was the Phazzer Enforcer. Because Phazzer failed to provide the Court with evidence of non-infringing Enforcers at the appropriate stage of the litigation, Phazzer cannot raise the issue now in response to a motion for damages and attorney's fees. Because Phazzer does not suggest a more reasonable royalty rate, the Court finds that 40% is a reasonable royalty rate.

According to evidence provided by Taser, Phazzer sold 8,297 Enforcers for a total of \$3,837,979. Based on the royalty fee of 40%, Phazzer's damages for patent infringement equal \$1,535,191.60. Because the Court previously awarded Taser treble damages, the Court will award Taser \$4,605,574.80 in damages for patent infringement.

C. Attorneys' Fees and Costs

Taser requests \$202,726.70 in attorneys' fees and \$4,122.95 in costs. Phazzer raises no objection to Taser's fees or costs. Accordingly, Phazzer has "abandoned any argument as the reasonableness of the hours expended or the rates charged." *Young Apartments*, 503 F. App'x at 727. The Court finds the amounts to be reasonable and will award Taser \$202,726.70 for attorneys' fees and \$4,122.95 in costs incurred as a result of this litigation.

III. CONCLUSION

Based on the foregoing, it is **ORDERED AND ADJUDGED** as follows:

1. Defendant's Motion for Leave to File Response to Motion for Damages (Doc. 255) is **GRANTED**.
2. Plaintiff's Motion for Damages and Reasonable Fees and Costs (Doc. 242) is **GRANTED**.
3. Plaintiff, Taser International, Inc., shall recover from Defendant, Phazzer Electronics, Inc.:
 - a. \$3,057,154.29 in damages for trademark infringement.
 - b. \$4,605,574.80 in damages for patent infringement.
 - c. \$202,726.70 in reasonable attorneys' fees.
 - d. \$4, 122.95 in costs.

12a

DONE AND ORDERED in Orlando, Florida,
on April 4, 2018.

/s/

PAUL G. BYRON
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record

Unrepresented Parties

[ENTERED: August 23, 2019]

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

TASER INTERNATIONAL, INC.,
Plaintiff-Appellee

v.

PHAZZER ELECTRONICS, INC.,
Defendant-Appellant

2018-1914

Appeal from the United States District Court
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00366-PGB-KRS, Judge Paul G. Byron.

TASER INTERNATIONAL, INC.,
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v.

PHAZZER ELECTRONICS, INC.,
Defendant-Appellant

STEVEN ABBOUD
Sanctioned Party

2018-2059

Appeal from the United States District Court
for the Middle District of Florida in No. 6:16-cv-
00366-PGB-KRS, Judge Paul G. Byron.

ON PETITIONS FOR PANEL REHEARING

Before O'MALLEY, REYNA, and CHEN, *Circuit
Judges*. PER CURIAM.

O R D E R

Appellant Phazzer Electronics, Inc. filed
petitions for panel rehearing in the above-captioned
appeals.

Upon consideration thereof,

IT IS ORDERED THAT:

The petitions for panel rehearing are denied.

The mandate of the court will issue on August
30, 2019.

FOR THE COURT

August 23, 2019
Date

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

EXHIBIT A



US007234262C2

**(12) EX PARTE REEXAMINATION
CERTIFICATE (11639th)**

**United States Patent
Smith**

(10) Number: US 7,234,262 C2

(45) Certificate Issued: Feb. 10, 2020

**(54) ELECTRICAL WEAPON HAVING
CONTROLLER FOR TIMED CURRENT
THROUGH TARGET AND DATE/TIME
RECORDING**

**(75) Inventor: Patrick W. Smith, Scottsdale, AZ
(US)**

(73) Assignee: Taser International, Inc.

Reexamination Request:

No. 90/013.945, Apr. 27, 2017

Reexamination Certificate for:

Patent No.: **7,234,262**

Issued: **Jun. 26, 2007**

Appl. No.: **11/164,710**

Filed: **Dec. 2, 2005**

Reexamination Certificate CI 7.234,262 issued Apr.
18, 2017

Certificate of Correction issued Oct. 4, 2011

Related U.S. Application Data

(60) Division of application No. 10/673,901, filed on Sep. 28, 2003, now Pat. No. 7,075,770, which is a continuation of application No. 10/016,082, filed on Dec. 12, 2001, now Pat. No. 6,636,412, which is a continuation of application No. 09/398,388, filed on Sep. 17, 1999, now abandoned.

(51) **Int. Cl.**

F42B 12/02 (2006.01)

F41H 13/00 (2006.01)

F42B 12/36 (2006.01)

(52) **U.S. Cl.**

CPC..... *F41B 13/0025* (2013.01); *F42B 12/36*
(2013.01)

(58) **Field of Classification Search**

None

See application file for complete search history

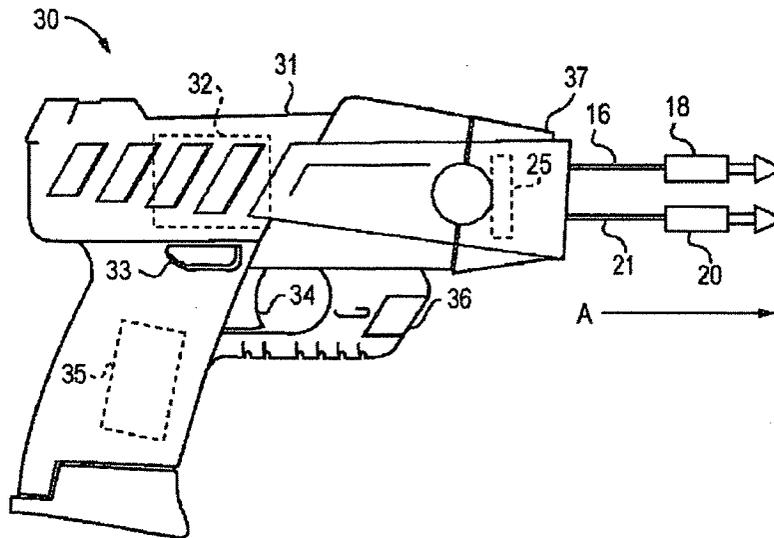
(56) **References Cited**

To view the complete listing of prior art documents cited during the proceeding for Reexamination Control Number 90/013,945, please refer to the USPTO's public Patent Application Information Retrieval (PAIR) system under the Display References tab.

Primary Examiner -- Peter C English

(57) **ABSTRACT**

An apparatus for interfering with locomotion by a human or animal target includes a microprocessor programmed to track date and time, to initiate and maintain for a period an electrical current, and to record tracked date and time for each initiation of the current. The current, when conducted through the target, interferes with use by the target of the skeletal muscles of the target during the period.



I

**EX PARTE
REEXAMINATION CERTIFICATE**

THE PATENT IS HEREBY AMENDED AS
INDICATED BELOW.

AS A RESULT OF REEXAMINATION, IT HAS
BEEN DETERMINED THAT:

Claims 1-18 are cancelled.

* * * * *

In The
Supreme Court of the United States

No. _____

PHAZZER ELECTRONICS, INC.,
Petitioner,

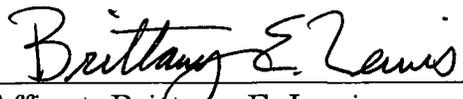
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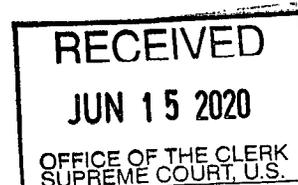
TASER INTERNATIONAL, INC.,
Respondent.

AFFIDAVIT OF SERVICE

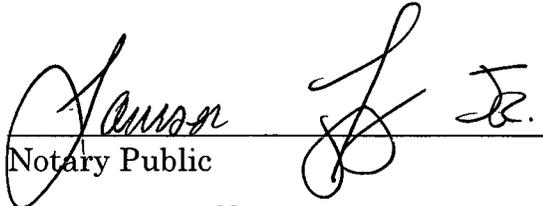
I, Brittany Lewis, of lawful age, being duly sworn, upon my oath state that I did, on the 10th day of June, 2020, hand file a paper copy of this Corrected Appendix with the Clerk's Office of the Supreme Court of the United States and further sent three copies, via UPS Ground Transportation, and one PDF copy, via email, of said Petition to:

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(202) 955-0001



I am duly authorized under the laws of the District of Columbia to administer oaths.


Notary Public

District of Columbia : SS

Subscribed and Sworn to before me, in my presence,

this 10th day of JUNE, 2020

Lawson Forgry Jr.

Notary Public, D.C.

My commission expires

1/1/24

My Commission Expires:

To be filed for:

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Dated: June 10, 2020

