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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the June 8, 2020 Petition, filed nearly 10 months after the Federal Circuit's August 23, 2019 denial of panel rehearing in appeal No. 18-1914, is jurisdictionally barred as untimely.

2. Whether Petitioner's claims are barred by res judicata in any event based on TASER's October 26, 2018 fully-affirmed patent infringement judgment from Petitioner's first Federal Circuit appeal No. 17-2637.

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).[1] Axon has no parent company and, as of the date of this filing, no one owned 10% or more of Axon's stock.

[1] TASER® is a registered trademark of Axon. As an acronym, TASER is always written in all capital letters, including in the company name.

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STATEMENT OF RELATED CASES

All of the following actions are related to Petitioner's myopically-focused damages claim and omitted from the Petition's procedural history:

- *TASER International, Inc. v. Phazzer Electronics, Inc.*, **Case No. 6:16-CV-00366-PGB (M.D. Fla.)** (D.E. 183; SAppx. 1a, July 21, 2017 underlying default judgment, injunction, damages/sanctions award); [2]
- *TASER International, Inc. v. Phazzer Electronics, Inc.*, **Fed. Cir. No. 17-2637** (App. D.E. 64; SAppx. 16a, Oct. 26, 2018 decision affirming default judgment, injunction, damages/sanctions award) (reported at 754 Fed. Appx. 955);
- *In re Phazzer Electronics, Inc.,* **Case No. 19-12281-MFW (D. Del. Bankr.)** (D.E. 390-2; SAppx. 35a, Jan. 2, 2020 Order dismissing voluntary Chapter 7 Petition as filed in bad faith);
- *In re Phazzer Electronics, Inc.,* **Case No. 6:20-bk-00398-LVV (M.D. Fla. Bankr.)** (D.E. 397-1; SAppx. 37a, June, 2, 2020 Order dismissing voluntary Chapter 7 Petition as filed in bad faith);
- USPTO Ex Parte Reexamination **Nos. 90/013,770, 90/013,945; PTAB No. 2019-004963** (regarding TASER Patent 7,234,262).

[2] "SAppx." references are to TASER's Supplemental Appendix filed with this Brief. "Appx." references are to Phazzer's Corrected Appendix filed June 10, 2020. "D.E." references are to the district court's docket, and "App. D.E." references are to the applicable Federal Circuit dockets.

JURISDICTIONAL STATEMENT

This Court lacks jurisdiction as the Petition was not timely filed. The underlying default judgment, sanction and damage awards were fully affirmed by the Federal Circuit on October 26, 2018 in appeal No. 17-2637 (App. D.E. 64; SAppx. 16a), with rehearing en banc denied on January 3, 2019 (App. D.E. 72). No petition for writ of certiorari was filed and all issues concerning Petitioner's patent infringement liability became final long ago. Petitioner's second Federal Circuit appeal No. 18-1914 regarding the district court's damages accounting order was affirmed on July 23, 2019, with panel rehearing denied on August 23, 2019 (App. D.E. 67, 70; Appx. 1-2a, 13-14a). Accordingly, pursuant to Rule 13.3 of this Court and 28 U.S.C. § 2101(c), the 90-day time for filing this Petition expired on November 21, 2019. The Petition was not filed until June 8, 2020, almost 10 months late. Petitioner never sought or obtained an extension of time to file as required by 28 U.S.C. § 2101(c) and Sup. Ct. R. 13.1. Petitioner cites no authority that its voluntary filing of two successive Chapter 7 bankruptcy petitions—both of which were dismissed with prejudice as having been filed in bad faith—somehow tolled its time to file this Petition.

Moreover, Phazzer's assertion that TASER lacks standing to even respond to this Petition challenging its fully-affirmed judgment is nonsensical (Pet. at 8, 13-14). Rule 15.1 of this Court unequivocally states that a "brief in opposition to the petition for a writ of certiorari may be filed by the respondent *in any case*" (emphasis added), and here the Court expressly directed TASER's response on August 5, 2020.

STATEMENT OF THE CASE

Petitioner omits significant, relevant procedural history necessary to properly evaluate this Court's jurisdiction and the propriety of granting the Petition. For this reason alone, the Court should deny the Petition pursuant to Sup. Ct. R. 14.4.

A. The Underlying, Fully-Affirmed Judgment, Injunction, Sanction and Damage Awards.

Respondent TASER International, Inc. (TASER) is the industry leader in the development and sale of conducted electrical weapons (CEWs). On March 2, 2016, TASER filed a 4-Count Complaint against Petitioner Phazzer Electronics, Inc. (Phazzer) for patent infringement in violation of 35 U.S.C. § 271, false advertising in violation of 15 U.S.C. § 1125(a), trademark infringement in violation of 15 U.S.C. § 1114 *et seq.,* and common law trademark infringement/unfair competition based on Phazzer's commercial activities regarding the sale of its "Enforcer" CEW and associated dart cartridges that mirror the protected shape of dart cartridges sold by TASER (D.E. 1). Specifically, TASER alleged that Phazzer infringed its U.S. Patent No. 7,234,262 (the '262 Patent) for an "Electrical Weapon Having Controller for Timed Current Through Target and Date/Time Recording", and U.S. Trademark Registration No. 4,423,789 (the '789 Registration), which encompasses "the non-functional shape" of its CEW dart cartridge (*Id.*, ¶¶ 15, 34).[1]

On July 21, 2017, the district court entered its default sanctions order and permanent injunction against Phazzer based on conduct it described as

[1] TASER's Amended Complaint filed February 24, 2017 (D.E. 95) added an additional party but reasserted the same claims against Phazzer.

"contemptuous", "egregious", "flagrant" and "intentional obstructionist behavior" resulting in the willful "abuse [of] the judicial process." (D.E. 183; SAppx. 4a-5a). The district court found:

> Since the outset of this litigation, Phazzer has engaged in a pattern of bad faith conduct designed and intended to delay, stall, and increase the cost of this litigation. Defendant Phazzer has repeatedly disregarded the Orders of this Court, and **no sanction short of entry of a default judgment in favor of Taser, along with an award of compensatory and treble damages, an award of reasonable attorneys' fees and costs, and injunctive relief is adequate to address these violations.**

(SAppx. 1a, emphasis added).[2]

The district court's default judgment was a final order resolving all issues in the case except for the accounting of damages. The July 21, 2017 order (1) struck Phazzer's Motion to Dismiss the Amended Complaint as a sanction; (2) entered default against Phazzer on all claims; (3) entered an immediate permanent injunction; and (4) awarded TASER compensatory and treble damages for Phazzer's willful infringement of the '262 Patent, '789 Registration, and false advertising, as well as attorneys' fees and costs as sanctions for Phazzer's bad faith conduct, all "in an amount to be determined in accordance with an expedited briefing and hearing schedule." (SAppx. 7a).

[2] Phazzer's bad faith conduct continued with multiple violations of the district court's July 21, 2017 injunction, resulting in the court's May 4, 2018 civil contempt order (D.E. 271), which was summarily affirmed under Rule 36 by the Federal Circuit (No. 18-2059) on July 23, 2019 (D.E. 350). Undeterred, brazen injunction violations continued resulting in the district court initiating criminal contempt proceedings against Phazzer and its principals on March 11, 2020 (D.E. 396). *See also USA v. Phazzer Electronics, Inc.*, Case No. 6:20-cr-00057-PGB (M.D. Fla. Mar. 16, 2020).

On August 10, 2017, Phazzer filed its first Federal Circuit appeal (No. 17-2637) (D.E. 192), which the Petition wholly fails to mention. On October 26, 2018, the Federal Circuit affirmed the district court's July 21, 2017 default judgment "in its entirety," expressly finding that "[t]he record fully supports the [district court's bad faith] findings" quoted above, and that the district court did not abuse its discretion in striking Phazzer's motion to dismiss as a sanction (App. D.E. 64; SAppx. 27a, 34a). Further to Petitioner's assertions here, the Federal Circuit noted that Phazzer failed to "appeal the district court's award of compensatory and treble damages or the award of attorney fees and costs" (SAppx. 24a n.2), and found Phazzer's arguments regarding the patent examiner's April 2018 rejection of the '262 Patent claims "without merit" because the ex parte "reexamination proceedings are ongoing" and "subject to Taser's appellate rights before the Board." (SAppx. 34a).[3]

Phazzer's petition for rehearing en banc was denied on January 3, 2019 (App. D.E. 72), and Phazzer did not file a petition for writ of certiorari with this Court. Accordingly, as aptly stated by the district court, Phazzer's "90-day timeframe to file a petition for writ of certiorari expired in April 2019" and Phazzer "is barred from collaterally attacking the Court's final judgment by well-established principles of res judicata." (D.E. 395 at 10).

[3] The Federal Circuit's decision details the chronology of the "then-co-pending" reexamination proceedings in the USPTO in relation to the district court case, including Phazzer's first failed reexamination attempt (App. D.E. 64; SAppx. 18a-19a).

B. The District Court's Damages Accounting Order and Phazzer's Second Federal Circuit Appeal.

Following third-party damages discovery and full briefing by the parties, (D.E. 188, 208, 242, 255), on April 4, 2018 the district court issued its damages accounting order as follows:

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; and

d. $4,122.95 in costs.

(D.E. 267; Appx. 11a). On May 11, 2018, the clerk entered final judgment against Phazzer in the amount of $7,869,587.74 (D.E. 273).[4]

On April 30, 2018, Phazzer filed its second Federal Circuit appeal (No. 18-1914) regarding the damages accounting order (D.E. 269). Phazzer, however, did not challenge the district court's actual accounting, instead attacking the underlying default judgment giving rise to the damages and recycling the same arguments rejected in its first appeal (App. D.E. 19 at 13; 40 at 24-26; *see also* App. D.E. 64; SAppx. 33a-34a, rejecting Phazzer's argument that "reversal is warranted because … enforcement of the injunction 'is no longer proper or equitable due to changed conditions' stemming from the PTO's rejection of Taser's patent claims."). And while Phazzer re-urged the '262 Patent reexamination as a basis for relief, nothing had changed since the first appeal—the reexamination was still pending and still subject

[4] Notably, Phazzer's challenge here relates only to the patent infringement damages, not the more than $3.2 million in trademark infringement damages and attorney's fees and costs wholly unrelated to the '262 Patent.

to TASER's appellate rights. Accordingly, on July 23, 2019, the Federal Circuit affirmed the district court's damages accounting order under Fed. Cir. R. 36 (Appx. 1a-2a), and denied Phazzer's petition for panel rehearing on August 23, 2019 (Appx. 13a-14a).

C. Phazzer's USPTO Patent Challenges.

Three months into the litigation, on June 25, 2016, Phazzer filed its first ex parte reexamination challenge to the '262 Patent (PTO No. 90/013,770). On November 8, 2016, a first office action was initiated on all 18 patent claims. However, on April 18, 2017, the PTO issued an Ex Parte Reexamination Certificate deeming claims 1-5 patentable as amended, and confirming the patentability of claims 6-18 as stated, including claim 13 at issue in the litigation (D.E. 95, ¶ 27; D.E. 130).[5]

After its first attempt failed to invalidate TASER's patent-in-suit, on April 27, 2017 Phazzer filed a second ex parte reexamination request (PTO No. 90/013,945), which again was instituted on all 18 claims. Prior to any final office action, on July 21, 2017, as a result of Phazzer's sanctioned default, the district court entered judgment finding TASER's '262 Patent "valid, enforceable, and infringed by Phazzer." (D.E. 183; SAppx. 11a).

[5] On September 13, 2016, Phazzer also filed a trademark cancellation action (No. 92064459) against TASER's '789 Registration in the USPTO. The cancellation action was instituted but subsequently suspended by the Trademark Trial and Appeal Board (TTAB) on October 28, 2016 pending resolution of the first-filed district court action (D.E. 52-1). On February 5, 2020, the TTAB granted TASER's motion for summary judgment on res judicata grounds and dismissed Phazzer's trademark challenge with prejudice as an improper "collateral attack on the district court's decision." (D.E. 397-2 at 11, citing *Nasalok Coating Corp. v. Nylok Corp.*, 522 F.3d 1320, 1329-30 (Fed. Cir. 2008) (upholding dismissal of cancellation petition as impermissible collateral attack on default judgment and injunction)).

On April 2, 2018, the patent examiner mailed a final office action rejecting all claims of the '262 Patent (17-2637 App. D.E. 40 at 22). On April 4, 2018, the district court issued its damages accounting order (D.E. 267; Appx. 3a-12a). On September 4, 2018, TASER appealed the examiner's decision to the Patent Trial and Appeal Board (PTAB No. 2019-004963). The PTAB affirmed the examiner's decision on September 27, 2019. Prior to this ruling, the Federal Circuit had affirmed the default judgment on October 26, 2018 (App. D.E. 64; SAppx. 34a), and the damages accounting order on July 23, 2019 (Appx. 1a-2a).

Two weeks after the PTAB's decision, on October 14, 2019, TASER's '262 Patent expired by its own terms and the injunction as to Phazzer Enforcer CEW sales automatically lifted (D.E. 183; SAppx. 12a, "The effect of this injunction shall continue through October 14, 2019, the expiration of the '262 Patent."). Accordingly, TASER did not further appeal the PTAB's decision to the Federal Circuit, as was its right. After TASER's appeal time expired,[6] the USPTO issued the Ex Parte Reexamination Certificate on February 10, 2020 canceling the '262 Patent claims (Appx. 15a-17a). Because the cancellation was an after-occurring event, this document does not appear in the underlying appellate record and provides no basis for a remand to the Federal Circuit. Phazzer cites no such authority.

[6] *See* 35 U.S.C. § 307(a) and 37 C.F.R. § 90.3 (requiring issuance of ex parte reexamination certificate only when the time for appeal has expired or after termination of appellate proceedings, allowing 63 days to appeal a PTAB decision).

D. Phazzer's Post-Appeal Bad Faith Bankruptcy Filings.

On October 25, 2019, Phazzer filed its first Chapter 7 bankruptcy (Case No. 19-122281-MFW) in the District of Delaware, which was dismissed in open court at a hearing on December 18, 2019 (Del. BK D.E. 22, TR at 32-33, "I will grant the motion to dismiss."), and by formal order on January 2, 2020 (Del. BK D.E. 20; SAppx. 35a, granting motion to dismiss with prejudice, finding "this Chapter 7 corporate case involves a two-party dispute with minimal, if any, assets that was filed in bad faith").

On January 23, 2020, Phazzer filed its second Chapter 7 bankruptcy (Case No. 6:20-bk-00398-LVV) in the Middle District of Florida, which was dismissed in open court at a hearing on May 28, 2020 (Fla. BK D.E. 38, 42), and by formal order on June 2, 2020 (Fla BK D.E. 40; SAppx. 37a-38a, "Dismissing this corporate Chapter 7 case, with prejudice, as having been filed in bad faith" and "[e]njoining Debtor from further bankruptcy filings for a period of one year from the date of this Order.").[7]

It is these back-to-back obstructionist bankruptcy filings that Petitioner contends, without support, extended its time to file this Petition well beyond its November 21, 2019 due date.

E. Phazzer's Pending Motion In District Court To Reconsider Damages Order On Same Grounds Asserted Here.

On October 17, 2019, shortly before filing its first bankruptcy petition, Phazzer filed in the district court a Motion for Reconsideration of the April 4, 2018 damages

[7] While no exclusion of stay days is appropriate here, Phazzer's failure to count the 18 days between the rulings from the bench and the formal dismissal orders in its timeline chart (Pet. 3-6) is unwarranted. Phazzer's counsel was present at both hearings and had immediate actual notice of the dismissals.

accounting order under Fed. R. Civ. P. 54 and 60 (D.E. 374). Like the Petition here, the Motion for Reconsideration challenges the patent damages portion of the accounting order based on the '262 Patent reexamination. That motion is fully briefed (D.E. 380), with notice filed of the subsequent February 10, 2020 PTO cancellation (D.E. 394). On March 11, 2020, the district court expressly deferred ruling on the motion "until the automatic [bankruptcy] stay lifts." (D.E. 395 at 12). The court was notified of the bankruptcy dismissal on June 2, 2020 (D.E. 397).

Although still pending, the motion is due to be denied.[8] The motion itself, however, demonstrates Phazzer's clear ability to have timely filed its certiorari petition with this Court before the November 21, 2019 deadline.

REASONS FOR DENYING THE WRIT

I. PHAZZER'S UNTIMELY PETITION DEFEATS JURISDICTION.

Phazzer's June 8, 2020 Petition, filed nearly 10 months after the Federal Circuit's August 23, 2019 denial of panel rehearing in appeal No. 18-1914, is jurisdictionally barred as untimely. Pursuant to Rule 13.3 of this Court and 28 U.S.C. § 2101(c), Phazzer's 90-day deadline for filing this Petition expired on November 21, 2019. This deadline was "mandatory and jurisdictional." *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 90 (1994). Because Phazzer never sought or obtained an

[8] *Fiskars, Inc. v. Hunt Mfg. Co.*, 279 F.3d 1378, 1380 (Fed. Cir. 2002) (where patent infringement judgment 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."). *See also* D.E. 395 at 10 (noting Phazzer's failure to file a certiorari petition after its first appeal such that Phazzer "is barred from collaterally attacking the Court's final judgment by well-established principles of res judicata.").

extension of time to file as required by 28 U.S.C. § 2101(c) and Sup. Ct. R. 13.5, the Petition should be denied.

Phazzer's suggestion that its two bad faith bankruptcy filings somehow extended its petition time is without merit. Nothing in FRAP 13 (relating to tax court appeals) or *Oil States Energy Svs, LLC v. Greene's Energy Group, LLC,* 138 S. Ct. 1365 (2018) (limited to constitutionality of inter partes review) say anything about "excluding any time stayed by bankruptcy." (Pet. 2-3 n.2, 6 n.3, 12 n.5). *Oil States* did not involve a bankruptcy stay or any issue involving the timeliness of the petition. And even if Phazzer intended to cite Rule 13 of this Court, the plain text of the rule contains no such exclusion. Accordingly, Phazzer has failed to cite any authority to support its position.

Phazzer further fails to cite or otherwise address the automatic bankruptcy stay statute, 11 U.S.C. § 362(a), or explain how its efforts to nullify a portion of TASER's judgment constitutes an action *against* a debtor or to collect a debt. *Chicago Title Ins. Co. v. Lerner*, 435 B.R. 732, 735 (S.D. Fla. 2010) (noting plain language of § 362(a) "stays actions only against a 'debtor'"). TASER can find no case applying a bankruptcy stay to the time for filing a petition for writ of certiorari.

In the context of direct appeals as of right (as opposed to discretionary review by this Court), some courts have held that § 362(a)(1) suspends the time for filing a notice of appeal. *E.g.*, *In re Hoffinger Indus., Inc.,* 329 F.3d 948 (8th Cir. 2003). Importantly, however, *Hoffinger* makes clear that 11 U.S.C. § 108(c) governs the length of any such extension under these circumstances. *Id.* at 952 (where appeal

deadline had not expired as of commencement of Chapter 11 case, it was extended under § 108(c)(2) until "30 days after *notice of the termination* or expiration of the stay") (emphasis added). Thus, even if this authority were extended to certiorari petition deadlines, Phazzer's Petition here is still untimely:

- 10-25-19 – first bankruptcy filing in Delaware (before 11-21-19 Petition due date)
- 12-18-19 – ruling from the bench dismissing Delaware bankruptcy providing "notice of termination" to Phazzer's counsel present at the hearing (Del. BK D.E. 16, 22)
- 1-17-20 – 30-day extension deadline under § 108(c); no petition filed [9]
- 1-23-20 – second bankruptcy filing in Florida

In any event, Phazzer's back-to-back bankruptcy filings were nothing more than a continuation of its well-documented abuse of the judicial process and blatant obstructionist tactics, which this Court can rectify by denying the Petition. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1991) (recognizing inherent power of federal courts to "fashion an appropriate sanction for conduct which abuses the judicial process"). Phazzer should not benefit in the least from filing a no-asset Chapter 7 corporate bankruptcy—not once but twice—which were so frivolous that both judges dismissed the cases from the bench, with prejudice, with the second judge issuing an injunction against further bankruptcy filings (SAppx. 38a). These bad faith filings were a calculated effort to stall TASER's collection efforts in the district court and preserve some semblance of an argument, however misguided, that TASER's

[9] Because Phazzer's filing deadline was November 21, 2019 (or at the latest January 17, 2020), any suggestion that this Court's March 19, 2020 Order related to the COVID-19 pandemic excused its filing failure (Pet. at 3 n.2), must be rejected. That Order only extends the deadline to 150 days for Petitions "due on or after the date of this order," and Phazzer's Petition was due months earlier.

judgment was not yet final while waiting for the '262 Patent reexamination appellate process to run its course. There is simply no legitimate reason why Phazzer's did not instead timely file its certiorari petition in November 2019. It chose not to and that choice has consequences.

II. PHAZZER'S PATENT VALIDITY COLLATERAL ATTACK ON TASER'S FULLY-AFFIRMED JUDGMENT IS BARRED BY WELL-ESTABLISHED PRINCIPLES OF RES JUDICATA.

Phazzer's Petition is a misguided collateral attack on TASER's October 26, 2018 fully-affirmed patent infringement judgment (SAppx. 16a), and as such is barred by well-established principles of res judicata. The district court's underlying judgment affirmed in its entirety in Phazzer's first Federal Circuit appeal conclusively determined for the purpose of this litigation the validity of TASER's '262 Patent and Phazzer's infringement of it. (SAppx. 11a, deeming '262 Patent "valid, enforceable and infringed by Phazzer" as a result of its sanctioned default and awarding compensatory and treble damages for willful infringement). *See* 28 U.S.C. § 1292(c)(2) (conferring exclusive jurisdiction on Federal Circuit of "an appeal from a judgment in a civil action for patent infringement which … *is final except for an accounting*.") (emphasis added).

Thereafter, there was no "pending" or "concurrent" cause of action in the district court that could be extinguished by a subsequent patent cancellation in a reexamination proceeding. *See Fresenius USA, Inc. v. Baxter Int'l, Inc.*, 721 F.3d 1330, 1340 (Fed. Cir. 2013) (holding cancellation of claims by PTO under reexamination statute is binding in "pending district court infringement litigation."); *see also* Pet. 11

(citing *Fresenius* for proposition that cancellation of claims during reexamination is binding in "concurrent infringement litigation."). Timing matters.

Fresenius involved two Federal Circuit appeals from parallel proceedings in the PTO and the district court involving the same patent. The bottom line is that the Federal Circuit affirmed the PTO's invalidity determination which resulted in the patent's cancellation *before* a Federal Circuit decision on the district court's final judgment in the patent infringement case. 721 F.3d at 1334, 1336. Here, the reverse is true. The Federal Circuit upheld the district court's infringement judgment ending the litigation on the merits in October 2018, well before the PTO issued its cancellation certificate in February 2020. *In re Bass*, 314 F.3d 575, 577 (Fed. Cir. 2002) ("A reexamination is [only] complete upon the statutorily mandated issuance of a reexamination certificate") (citing 35 U.S.C. § 307(a)). The underlying judgment therefore must be accorded res judicata effect. *E.g.*, *VirnetX Inc. v. Apple Inc.*, 931 F.3d 1363, 1376 (Fed. Cir. 2019) (holding judgment is final with res judicata effect where it "ends litigation *on the merits* and leaves nothing for the court to do but execute the judgment.") (emphasis added).

To be clear, Phazzer is not challenging the *amount* of patent infringement damages assessed in the district court's damages accounting order, which was the *only* issue remaining in Phazzer's second Federal Circuit appeal and which amount was wholly uncontested there. Instead, Phazzer is challenging its liability for patent infringement altogether, claiming the "'262 patent claims are void *ab initio*" (Pet. 12). Critically, however, TASER's execution efforts are no longer based on its patent, but

on its fully-affirmed judgment. *Fresenius* makes clear that the "cancellation of a patent's claims cannot be used to reopen a final damages judgment ending a suit based on those claims," because title to moneys recovered on judgments "does not depend upon the patent, but upon the judgment of the court." 721 F.3d at 1340 (quoting *Moffit v. Garr*, 66 U.S. 273, 283 (1861)). *See also WesternGeco L.L.C. v. ION Geophysical Corp.*, 913 F.3d 1067, 1071-72 (Fed. Cir. 2019) (subsequent invalidation of asserted patent claims did not support reopening final judgment regarding royalty award); *DeLorme Publishing Co., Inv. v. Int'l Trade Com'n,* 805 F.3d 1328, 1336 (Fed. Cir. 2015) ("If the underlying order upon which a civil penalty or civil contempt sanction is based is final and no longer subject to appeal, the penalty or sanction cannot be vacated by subsequent events such as invalidation of the [patent] claims."); *ePlus, Inc. v. Lawson Software, Inc.*, 789 F.3d 1349, 1358 (Fed. Cir. 2015) (stating that *Moffit* held that cancellation of a patent precluded recovery of damages "'unless [the patent] exists, and is in force at the time of trial and judgment'") (alterations in original).

Here, there is no question that TASER's '262 Patent existed and was in force both at the time of the district court's July 21, 2017 judgment *and* at the time of the Federal Circuit's October 26, 2018 affirmance. Indeed, the PTO had not yet cancelled the patent at the time of the district court's April 4, 2018 damages accounting order, or the Federal Circuit's July 23, 2019 affirmance of that order, or by Phazzer's deadline for filing this Petition on November 21, 2019. Accordingly, Phazzer's

attempted collateral attack on TASER's judgment is barred by res judicata. The Petition should be denied.

CONCLUSION

For all these reasons, TASER respectfully requests that the Court deny the Petition.

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Respectfully submitted,

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