

In the  
**Supreme Court of the United States**

**PHAZZER ELECTRONICS, INC.,**  
*Petitioner,*

v.

**TASER INTERNATIONAL, INC.,**  
*Respondent.*

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

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SUPPLEMENTAL APPENDIX TO  
BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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**Order**

**Dismissing Voluntary Chapter 7 Petition as Filed in Bad Faith**

**U.S. Bankruptcy Court Middle District of Florida Orlando Division**

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**entered June 2, 2020. .... 37a**

**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.

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**ORDER**

This cause comes before the Court on Plaintiff's, Taser International, Inc. ("Taser"), Motion for Sanctions. (Doc. 174). Defendant, Phazzer Electronics, Inc. ("Phazzer") responded in opposition to the motion. (Doc. 178). After consideration and review, the Court finds that sanctions are appropriate in this case and grants Plaintiff's Motion for Sanctions and for a Permanent Injunction.

**I. BACKGROUND**

Plaintiff Taser International, Inc. filed this action for patent and trademark infringement, false advertising, and unfair competition against Defendant Phazzer on March 2, 2016. (Doc. 1). Taser filed its Amended Complaint on February 13, 2017, asserting the same causes of action. (Doc. 95). 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.

**A. Phazzer's Abusive Litigation Practices**

On December 27, 2016, Taser filed a motion to compel the production of documents by Phazzer. (Doc. 72). Notwithstanding the execution of a confidentiality agreement, Phazzer refused to produce documents relevant to the design, manufacture, and sale of the allegedly infringing products. (*Id.*). Magistrate Judge Spaulding thereafter directed Phazzer to supplement its response to the motion to compel by “stating succinctly on a request-by-request basis whether it has possession, custody, or control over any documents responsive to each discovery request,” and ordered Phazzer to submit a privilege log to support each privilege asserted. (Doc. 75). Taser filed a second motion to compel documents on February 20, 2017.<sup>1</sup> (Doc. 94). The Plaintiff asserted that the Defendant failed to produce documents reflecting sales of the allegedly infringing products, and produced a single page summary of sales along with heavily redacted invoices that made it impossible for Taser to identify customers. (*Id.*). Eight-days later, the Magistrate Judge entered an Order granting the motion to compel documents responsive to certain requests.<sup>2</sup> (Doc. 98).

On March 6, 2017, six-days after the Magistrate Judge entered the order granting the second motion to compel, Plaintiff filed its third motion to compel documents. (Doc. 99). Taser averred that “[a]lthough this case has been ongoing for nearly a year, TASER still has not received the most basic information regarding the details and relationships between Phazzer and its manufacturer/suppliers/distributors of the accused . . . [infringing] product.” (*Id.*). Plaintiff did report, however, that Phazzer produced fifteen (15)

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<sup>1</sup> The Amended Case Management and Scheduling Order established September 27, 2017, as the deadline for fact discovery. (Doc. 91, p. 3).

<sup>2</sup> An amended order was entered on February 20, 2017. (Doc. 112).

documents that identify a joint relationship between Phazzer, Double Dragon Development and Trading Corporation, and Sang Min. (*Id.*). The translated document was attached to the motion to compel and demonstrates a joint relationship contrary to Phazzer's prior representations about their relationship. (Doc. 99-1). Accordingly, Taser propounded requests for production designed to ascertain the extent of the relationship between Phazzer and the nonparties. (Doc. 99, pp. 3-4). The requests were served January 19, 2017, and Phazzer did not object nor did they respond to the discovery requests. (*Id.* at p. 4). The Magistrate Judge granted Plaintiff's Third Motion to Compel. (Doc. 120). This time the Court Ordered Phazzer's counsel and corporate representative to verify the discovery response. (*Id.* at pp. 2-3).

On May 19, 2017, Taser requested a discovery conference before the Court to resolve disputes as to deposition scheduling. (Doc. 135). The Plaintiff represented to the Court that "[e]very one of the handful of critical witnesses associated with Phazzer, a small, closely-held company, are represented to be on vacation, out of the country, in surgery, or convalescing." (*Id.* at p. 1). As of the filing of the motion for a discovery conference, Taser had been attempting to schedule depositions for five (5) months. (*Id.*). A discovery conference was set for May 26, 2017. (Docs. 136, 137). The Court instructed the parties to confer in advance of the discovery conference to agree upon the identity and availability of potential deponents. (Doc. 137). On June 15, 2017, the Magistrate Judge entered an Order setting dates for the deposition of Phazzer's Rule 30(b)(6) representative, and the depositions of five fact witnesses. (Doc. 152). The Court further ordered the parties and their counsel to attend the Technology Tutorial scheduled before the undersigned on June 19, 2017. (*Id.* at p. 2). The parties were cautioned that failure to

comply with that Order may result in the imposition of sanctions, including entry of default judgement against the Defendant. (*Id.*). The day the Court entered that Order, counsel for Phazzer moved to withdraw, (Doc. 153), and the Court denied the motion. (Doc. 155).

On June 19, 2017, the undersigned presided over the technology tutorial and observed that the corporate representative for Phazzer was not in attendance, in clear violation of Magistrate Judge Spaulding's Order. (Doc. 158). On June 21, 2017, counsel for Taser reported to the Court that Defendant Phazzer Electronics, Inc.'s corporate representative failed to appear at the scheduled deposition. (Doc. 161). Likewise, neither Mr. Brandon Womack nor Jason Abboud, a licensed attorney, appeared for their scheduled depositions. (*Id.*). On June 22, 2017, Magistrate Judge Spaulding scheduled a hearing to address the Renewed Motion to Withdraw as Counsel filed by Phazzer's attorney. (Doc. 164). The Court specifically ordered that a representative of Phazzer Electronics must attend the hearing, cautioning that “[f]ailure to comply with this Order may result in imposition of sanctions, including entry of a default or default judgment against the offending party or counsel.” (*Id.* at p. 2) (emphasis in original). No representative from Phazzer Electronics attended the hearing in clear violation of the Court's Order. (Doc. 172).

In addition to the flagrant discovery abuse and contemptuous behavior exhibited by Phazzer, the Plaintiff details in their Motion for Sanctions the numerous attempts by Phazzer to derail this litigation by repeatedly attempting to stay the proceedings, (Doc. 174, p. 3), and by filing a last minute emergency motion for a protective order. (*Id.*).

Similarly, Phazzer objected to the Plaintiff's discovery requests based on its proceedings with the USPTO, despite the Court ruling that these objections were

meritless.<sup>3</sup> Phazzer also objected to discovery on the basis of Local Rule 3.05(c)(2)(B), even after the Court denied this objection in its Order granting Taser's first Motion to Compel. (Doc. 98). All of this misconduct rightly caused Magistrate Judge Spaulding, in denying Defendant's motion to stay the case, to remark that "it appears that Phazzer, with the assistance of its counsel, is attempting in bad faith to further delay this litigation." The undersigned agrees with Judge Spaulding's assessment of the Defendant's intentional obstructionist behavior.

## **II. LEGAL STANDARD**

Rule 37 allows district court judges broad discretion to fashion appropriate sanctions for the violation of discovery orders. *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1542 (11th Cir. 1993). This Rule allows for sanctions when a party fails to comply with a discovery order or fails to attend its own deposition. See Fed. R. Civ. P. 37(b)(2)(A), (d)(1)(A)(i). For both of these offenses, the Rule authorizes a variety of sanctions, such as, striking pleadings, rendering a default judgment, and holding the disobeying party in contempt of court. *Id.* at 37(b)(2)(A)(iii), (vi), (vii); 37(d)(3). See also *United States v. Certain Real Prop. Located at Route 1, Bryant*, 126 F.3d 1314, 1317 (11th Cir. 1997). Furthermore, Rule 37 provides that "the court must order the disobedient party, attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(b)(2)(C), (d)(3); See also *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258 (1975). The Supreme Court

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<sup>3</sup> For Phazzer's motions to stay the case, see Docs. 41, 44, 57, 104, 139 and 150. For Phazzer's meritless objections to the discovery requests, see Docs. 20, 45, 57 and 104.

has also held that the intent behind Rule 37 sanctions is both “to penalize those whose conduct may be deemed to warrant such a sanction, [and] to deter those who might be tempted to such conduct in the absence of such a deterrent.” *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 763–64 (1980) (quoting *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976) (per curiam). This deterrence is necessary because “it is not the court’s function to drag a party kicking and screaming through discovery.” *Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 134 (S.D. Fla. 1987).

Specifically, the sanction of default is seen as a “last resort” but a party’s “willfull or bad faith disregard” for discovery orders may call for this type of sanction especially in cases where the party failed to comply with a court order compelling discovery and warning that the failure to comply might result in a default judgment. *See Certain Real Prop. Located at Route 1*, 126 F.3d at 1317–18; *See also BankAtlantic v. Blythe Eastman Paine Webber, Inc.*, 12 F.3d 1045, 1050 (11th Cir. 1994). Bad faith may be found through “delaying or disrupting the litigation or hampering enforcement of a court order.” *Eagle Hosp. Physicians, LLC V. SRG Consulting, Inc.*, 561 F.3d 1298, 1306 (11th Cir. 2009). The Court finds that Defendant Phazzer engaged in the above-described misconduct with the subjective intent to abuse the judicial process. *Purchasing Power, LLC v. Bluestem Brands, Inc.*, 851 F.3d 1218, 1223-24 (11th Cir. 2017) (“The key to unlocking a court’s inherent power is a finding of bad faith.”).

## **B. Sanctions**

Based upon the Defendant’s egregious conduct, which was undertaken in bad faith, **IT IS ORDERED AND ADJUDGED AS FOLLOWS:**



1. The Court Strikes Phazzer's pending Motion to Dismiss the Amended Complaint (Doc. 104), filed on March 10, 2017;
2. The Court hereby enters default in favor Taser and against Phazzer on all claims set forth in the Amended Complaint. (Doc. 95);
3. The Court awards compensatory damages in an amount to be determined in accordance with an expedited briefing and hearing schedule;
4. The Court will award treble damages for Defendant's willful infringement of the '262 patent and willful false advertisement once the compensatory damages have been established;<sup>4</sup>
5. The Court awards Taser International, Inc. its attorneys' fees and costs pursuant to 35 U.S.C. § 285, 15 U.S.C. § 1117(a), as sanctions for Phazzer's bad faith conduct, in an amount to be determined in accordance with an expedited briefing and hearing schedule, and
6. The Court enters an immediate permanent injunction discussed more fully below.

The Court finds the imposition of these sanctions to be necessary to adequately punish Phazzer for its wanton and repetitive disregard of this Court's orders and as a

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<sup>4</sup> Taser's Amended Complaint alleges Phazzer's infringement of the '262 Patent was willful. *Halo Electronics, Inc. v. Pulse Electronics, Inc.*, 136 S. Ct. 1923 (2016) (Enhanced damages under patent law "should generally be reserved for egregious cases typified by willful misconduct."). Similarly, Taser alleged that Phazzer intentionally engaged in false advertising. *Vector Products, Inc. v. Hartford Fire Ins.*, 397 F.3d 1316 (11th Cir. 2005) (Treble damages under the Lanham Act requires proof of intent or knowledge of falsity.). Plaintiff's allegations are accepted as true by virtue of the default judgment. Hence, treble damages are warranted in this case.

consequence of its willful abuse of the discovery process. The imposition of lesser sanctions would underrepresent the seriousness of the offensive conduct.

**C. Permanent Injunction**

A party seeking a permanent injunction must demonstrate:

- (1) that it has suffered an irreparable injury;
- (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury;
- (3) that, considering the balance of hardships between plaintiff and defendant, a remedy in equity is warranted; and
- (4) that the public interest would not be disserved by a permanent injunction.

*Apple Inc. v. Samsung Electrs Co.*, 809 F.3d 633, 639 (Fed. Cir. 2015). Historically, the courts have “granted injunctive relief upon a finding of infringement in the vast majority of patent cases.” *Id.* (citing *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 395 (2006)). In the instant case, the entry of default against Phazzer establishes the existence of an irreparable injury; that is, the default satisfies the first *eBay* factor by showing a “causal nexus relates the alleged harm to the alleged infringement.” *Id.* (citing *Apple Inc.*, 695 F.3d at 1374). The Court finds monetary damages are inadequate to compensate for the infringement of the Taser patent, and considering the balance of harms between Taser and the infringing party—Phazzer—a permanent injunction is warranted. Simply put, an infringing party has no right to continue its wrongful acts, absent a compelling public interest which is absent in this case.

1. *Scope of the Permanent Injunction: nonparties*

Generally, due process prohibits an injunction that enjoins persons who have not participated in the suit and have acted independent of the parties of the suit. *See Additive*

*Controls & Measurement Sys., Inc. v. Flowdata, Inc.*, 96 F.3d 1390, 1394-95 (Fed. Cir. 1998) (“*Adcon I*”). Federal Rule of Civil Procedure 65(d) provides an exception to this prohibition, allowing courts to enter an injunction which binds the following:

- (A) the parties;
- (B) the parties’ officers, agents, servants, employees, and attorneys; and
- (C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

The plain text of subsection (d) limits its application to non-parties who either “abet the [enjoined] defendant, or are legally identified with him.” *Additive Controls & Measurement Sys., Inc. v. Flowdata, Inc.*, 154 F.3d 1345, 1351 (Fed. Cir. 1998) (“*Adconir*”). When the nonparty is not in legal privity with the party subject to the permanent injunction, the court must find by clear and convincing evidence that the nonparty “acted in concert” with the party “in a scheme to allow ... [the party] to continue: activities “in violation of the injunction” *Travelhost, Inc. v. Blandford*, 68 F.3d 958, 962 (5th Cir. 1995). Therefore, Rule 65(d) provides that nonparties in can be bound by an injunction or face contempt for assisting a named party’s violation of an injunction. *Adcon I*, 96 F.3d at 1395.

In *Forest Laboratories, Inc. v. Ivax Pharmaceuticals, Inc.*, 501 F.3d 1263, 1272 (Fed. Cir. 2007), the Court ruled the district court properly included a commercial manufacturer of an accused generic drug in its injunction order against the planned seller of the drug who submitted the infringing product, since by manufacturing the infringing drug with knowledge of the patent, the manufacturer would be inducing infringement of the patent. The Court reasoned that “[a]n inquiry into induced infringement focuses on the party accused of inducement as the prime mover in the chain of events leading to infringement . . . . Under the standards for inducement which we apply to 35 U.S.C.A. §

271(b), . . . it was thus not inappropriate for the district court to include [the manufacturer] within the scope of the injunction.”<sup>5</sup> A manufacture is but one example of an entity which acts in concert with the enjoined party. While this Court lacks the authority to specifically name Double Dragon Development and Trading Corporation, Sang Min International Company, LTD, and Scott Hensler in the injunction, it is clear that nonparties who assist the enjoined party in violating the injunction may be held in contempt by this Court.

2. *The Enjoined Conduct and Products*

Taser brought suit, in part, to address the infringement of its patent 7,234,262 (“the ‘262’ patent”). (Doc. 95, ¶ 17). Taser averred in its Amended Complaint that the Phazzer Enforcer infringes at least claim 13 of the ‘262 Patent.<sup>6</sup> (*Id.* ¶ 27). The crux of Taser’s infringement allegations is that “Phazzer’s Enforcer CEWs include non-volatile memory that stores information regarding the weapon’s past use. The stored information appears to record the date and time of each operation of the trigger and the duration of the stimulus signal provided by the Enforcer.” (*Id.* at ¶ 29). Claim 13 of the ‘262 Patent states:

An apparatus for causing involuntary contractions of skeletal muscles of a human or animal target, the apparatus comprising:

A circuit having a microprocessor that is

- (1) programmed to track date and time;
- (2) programmed to initiate a high voltage pulsed current from the circuit, and
- (3) programmed to record tracked date and time in accordance with each initiation of the current, wherein

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<sup>5</sup> In *Forest Laboratories, Inc.*, the manufacturer was a named party who had appeared in the litigation which allowed the court to name the manufacturer in the injunction.

<sup>6</sup> Taser further alleged “upon information and belief” that Phazzer product also infringed “other claims of the 262 Patent,” without specifying the infringed claims. (Doc. 95, ¶ 27).

the current launches a provided wire-tethered dart toward the target to conduct the current through the target and, when passing through the target, causes involuntary contractions of skeletal muscles of the target.

(Doc. 95-2, Column 8, Line 58 through Column 9, Line 13).

3. *The Permanent Injunction*

In that a default judgment has been entered in favor of Plaintiff, the Court finds that the Phazzer Enforcer CEW violates claim 13 of the '262 patent. Therefore, **IT IS ORDERED AND ADJUDGED THAT:**

1. Taser's U.S. Patent No. 7,234,262, titled "Electrical Weapon Having Controller for Timed Current Through Target and Date/Time Recording" issued June 26, 2007, is deemed valid, enforceable, and infringed by Phazzer. Specifically, the Phazzer Enforcer CEW violates claim 13 of the '262 patent.

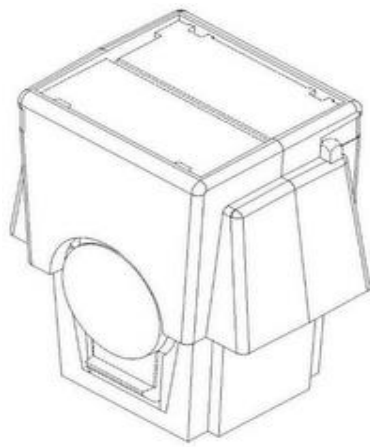
2. Phazzer and its officers, agents, servants, employees, and attorneys; and any other persons who are in active concert or participation with Phazzer or its officers, agents, servants, employees, or attorneys, are hereby enjoined from:

- a. Making or causing to be made,
- b. Using or causing to be used,
- c. Offering for sale, or causing to be offered for sale,
- d. Selling or causing to be sold,
- e. Donating or causing to be donated,
- f. distributing or causing to be distributed,
- g. Importing or causing to be imported,
- h. Exporting or causing to be exported

the Phazzer Enforcer CEW, and any other conducted electrical weapon (“CEW”) or device which infringed upon claim 13 of the ‘262 Patent, and any device not colorably different from the Enforcer CEW. The effect of this injunction shall continue through October 14, 2019, the expiration of the ‘262 Patent.

**D. Permanent Injunction Trademark – ‘789 Registration**

Taser is the owner of a federal trademark registration. Registration No. 4,423,789, issued by the United States Patent and Trademark Office on October 29, 2013, for the non-functional shape, as show below, of cartridges used to launch darts (“Taser Trademark”). (Doc. 95, ¶ 36).



Taser averred in their Amended Complaint that Sang Min and/or Double Dragon manufacture CEW cartridges for Phazzer that bear a confusingly similar shape to the Taser Trademark. (*Id.* ¶ 38). Furthermore, Phazzer sells via E-commerce several versions of cartridges that bear a confusingly similar shape to the shape of the Taser Trademark. (*Id.* ¶ 39). Such conduct by Phazzer is likely to deceive, confuse, and mislead prospective purchasers into believing that cartridges sold by Phazzer are manufactured by, authorized by, or are associated with Taser, resulting in irreparable harm to the

goodwill symbolized by the Taser Trademark and Taser's reputation for quality. (*Id.* at ¶ 43).

Accordingly, the Court finds that a permanent injunction is warranted, because Taser has suffered irreparable injury, remedies available at law to include monetary damages are inadequate to compensate for the injury, and the balance of hardships leads the Court to conclude that a remedy in equity is warranted. The public interest would not be disserved by a permanent injunction, because law enforcement agencies are able to fulfill their need to non-lethal weapons by purchasing such devices from Taser, as opposed to being the recipient of an infringing device.

Therefore, **IT IS ORDERED AND ADJUDGED THAT:**

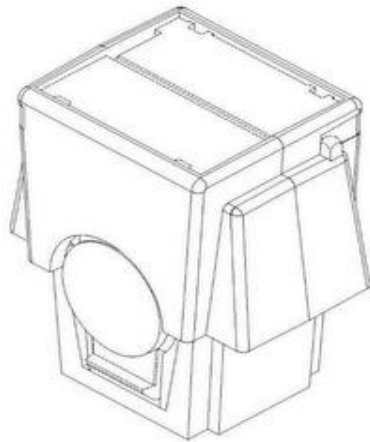
1. Taser's U.S. Trademark Registration No. 4,423,789, issued on October 29, 2013, for the non-functional shape of cartridges used to launch darts, is deemed valid and enforceable, not generic, functional, or merely descriptive, and infringed by Phazzer.

2. Phazzer and its officers, agents, servants, employees, and attorneys; and any other persons who are in active concert or participation with Phazzer or its officers, agents, servants, employees, or attorneys, are hereby enjoined from:

- a. Making or causing to be made,
- b. Using or causing to be used,
- c. Offering for sale, or causing to be offered for sale,
- d. Selling or causing to be sold,
- e. Donating or causing to be donated,
- f. distributing or causing to be distributed,
- g. Importing or causing to be imported,

h. Exporting or causing to be exported

Phazzer product numbers 1-DC15, 1-DC21, 1-DC25, 1-DC21-SIDT, 1-PB30, 1-PB8F, 1-PB15943, 1-RB30, 1-PA30, 1-LOWIMPT2015, or any other CEW cartridge that is confusingly similar or not more than a colorable imitation of the cartridge shown in the '789 Registration and below:



3. Phazzer cartridges currently marketed and sold as compatible with TASER® brand CEWs embody the protected appearance, are confusingly similar, and constitute infringing products enjoined under this Order.

4. Phazzer shall not challenge or continue to challenge the validity or enforceability of the '789 Registration in any manner in any forum, including the USTPO.

5. Phazzer is further enjoined from directing or causing any of its employees, officers, agents, servants, and attorneys, and other persons who are in active concert or participation with Phazzer's employees, officers, agents, servants, and attorneys, to perform any prohibited act set forth in paragraph 2, page 11 of this order (pertaining to the '262 Patent), paragraph 2, page 13 of this order (pertaining to the '789 Registration), or paragraph 4 above that Phazzer cannot itself perform under this injunction.



6. This Court retains jurisdiction to enforce the injunctions set forth herein, to include the commencement of contempt proceedings if warranted.

**DONE AND ORDERED** in Orlando, Florida, on July 21, 2017.



PAUL G. BYRON  
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record  
Unrepresented Parties

NOTE: This disposition is nonprecedential.

**United States Court of Appeals  
for the Federal Circuit**

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**TASER INTERNATIONAL, INC.,**  
*Plaintiff-Appellee*

**v.**

**PHAZZER ELECTRONICS, INC.,**  
*Defendant-Appellant*

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2017-2637

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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.

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Decided: October 26, 2018

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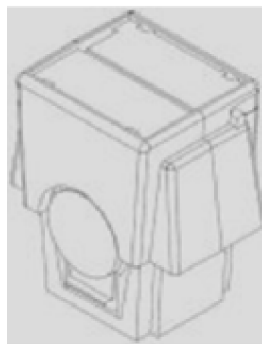
Before O'MALLEY, CHEN, and STOLL, *Circuit Judges*.

O'MALLEY, *Circuit Judge*.

Phazzer Electronics, Inc. (“Phazzer”) appeals from the district court’s order granting Taser International, Inc.’s (“Taser”) motion for sanctions. *Taser Int’l, Inc. v. Phazzer Elecs., Inc.*, No. 6:16-cv-366, 2017 WL 3584906 (M.D. Fla. July 21, 2017). Specifically, the district court: (1) struck Phazzer’s motion to dismiss the amended complaint; (2) entered default judgment in favor of Taser; (3) awarded Taser compensatory and treble damages as well as attorney fees and costs; and (4) entered a permanent injunction against Phazzer. *Id.* at \*3. As explained below, we *affirm*.

## I. BACKGROUND

Taser manufactures and sells conducted electrical weapons (“CEWs”), commonly known as stun guns. Taser is the sole owner of U.S. Patent No. 7,234,262 (“the ’262 patent”), which is entitled “Electrical Weapon Having Controller For Timed Current Through Target and Date/Time Recording.” Taser also owns U.S. Trademark Registration No. 4,423,789 (“the ’789 registration”) for “launching devices comprising projectiles in the nature of wire tethered darts for use with electronic control devices used as weapons.” Taser explains that the trademark encompasses the shape of the CEW dart cartridge, as shown below:



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In March 2016, Taser filed a four-count complaint against Phazzer alleging patent and trademark infringement, false advertising, and unfair competition stemming from Phazzer's sale of its "Enforcer" CEW and associated dart cartridges. The complaint also named as a co-defendant Sang Min International Co. ("Sang Min"), Phazzer's Taiwanese CEW manufacturer. Phazzer moved to dismiss the complaint, arguing that Taser impermissibly "lumped together" Phazzer's conduct with that of Sang Min, such that Phazzer was not on notice of the allegations against it. The motion alternatively sought a more definite statement and redesignation of the case to "track three," which would add another year to the scheduling order deadlines.

Phazzer subsequently supplemented its motion to dismiss and alternatively moved to stay the case based on the Patent and Trademark Office's ("PTO") institution of an ex parte reexamination of the '262 patent. Although a first office action in the reexamination rejected all 18 claims of the '262 patent, the PTO ultimately (in April 2017) issued an ex parte reexamination certificate deeming claims 1–5 patentable as amended and confirming the patentability of claims 6–18 as stated.

In September 2016—six months after Taser filed this case—Phazzer filed a trademark cancellation action against Taser's '789 registration and moved to stay the district court litigation the same day. The Trademark Trial and Appeal Board ("TTAB") instituted the cancellation action in September 2016, but subsequently suspended proceedings pending resolution of the district court case. Given the TTAB's suspension order, the district court denied Phazzer's motion to stay as moot.

On February 24, 2017, Taser filed an amended complaint, asserting the same causes of action, but adding an additional defendant. That same day, the district court denied Phazzer's original motion to dismiss and its sup-

plement as moot. Phazzer filed a motion to dismiss the amended complaint and a stay application based in part on then-co-pending reexamination proceedings.

Phazzer filed a second ex parte reexamination request in April 2017, and the PTO instituted on all claims. Phazzer then filed what it captioned as an “emergency” motion to stay the district court proceedings pending the outcome of the second reexamination. The district court denied that motion, cautioning Phazzer that unwarranted designation of a motion as an emergency could result in the imposition of sanctions. The second reexamination remains pending.<sup>1</sup>

Over the course of the litigation, Taser filed three separate motions to compel discovery, all of which were granted in large part, and Phazzer was ordered to produce responsive documents. *Taser*, 2017 WL 3584906, at \*1. After Phazzer failed to produce witnesses for depositions for five months on grounds that they were all unavailable, the magistrate judge held a discovery conference in May 2017. *Id.* at \*2. At the conference, the parties agreed to dates for the depositions of Phazzer witnesses. Three days before those depositions were set to begin, however, counsel for Phazzer requested a conference “to discuss its ‘controlled default’ in these proceedings,” stating that Phazzer “has very limited financial resources at this time and can no longer financially participate in the defense of this action.” Phazzer’s Mot. for Conference at 1–2, *Taser Int’l, Inc. v. Phazzer Elecs., Inc.*, No. 6:16-cv-366 (M.D. Fla. June 14, 2017), ECF No. 147. The magistrate judge held a telephone conference the next day, at which counsel for Phazzer sought to postpone depositions and the

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<sup>1</sup> In April 2018, the examiner in the second reexamination issued a rejection of all claims of the ’262 patent. As discussed below, Taser appealed that decision, and proceedings are ongoing.

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upcoming technology tutorial, citing financial difficulties. Phazzer's motion stated that it had offered a "default and/or stipulated default judgment" as part of preliminary settlement negotiations, but Phazzer ultimately declined to stipulate to liability or entry of default at the conference. Order at 1, *Taser Int'l, Inc. v. Phazzer Elecs., Inc.*, No. 6:16-cv-366 (M.D. Fla. June 15, 2017), ECF No. 151. The court stated that, "because it appears that Phazzer, with the assistance of its counsel, is attempting in bad faith to further delay this litigation rather than in a good faith attempt to resolve this case, I will not recommend that the Court stay the litigation." *Id.* at 2.

In June 2017, the magistrate judge entered an order setting dates for the Rule 30(b) representative's deposition and the depositions of five fact witnesses. The court further ordered the parties and their counsel to attend the technology tutorial. The parties were cautioned that failure to comply with that order might result in the imposition of sanctions, including entry of default judgment against Phazzer. Order at 2, *Taser Int'l, Inc. v. Phazzer Elecs., Inc.*, No. 6:16-cv-366 (M.D. Fla. June 15, 2017), ECF No. 152. That same day, counsel for Phazzer moved to withdraw, citing both irreconcilable differences and Phazzer's failure to pay. The court denied the motion without prejudice, noting that it could be reasserted after Phazzer obtained substitute counsel.

After Phazzer failed to appear at the technology tutorial, the court set a status hearing and informed Phazzer that failure to attend "may result in the imposition of sanctions, including entry of default or default judgment against the offending party or counsel." *Taser*, 2017 WL 3584906, at \*2. Counsel for Phazzer filed a renewed motion to withdraw, notifying the court that Phazzer had terminated his representation in writing, claiming to be insolvent and advising that no substitute counsel would be retained. The court issued a notice of hearing and ordered a representative of Phazzer to personally appear.

Phazzer failed to do so, and the court granted its attorney's motion to withdraw.

On June 26, 2017, Taser filed a motion for sanctions pursuant to Rule 37 of the Federal Rules of Civil Procedure, asking the district court to strike Phazzer's responsive pleading, enter default judgment, issue a permanent injunction, and award Taser its damages, attorney fees, and costs. Therein, Taser argued that Phazzer engaged in bad faith litigation conduct and deliberately violated numerous district court orders.

New counsel entered an appearance on behalf of Phazzer and responded to the motion for sanctions. In its response, Phazzer indicated that it "is defaulting in this matter." Def.'s Resp. in Opp'n to Pl.'s Mot. for Sanctions at 7, *Taser Int'l, Inc. v. Phazzer Elecs., Inc.*, No. 6:16-cv-366 (M.D. Fla. July 10, 2017), ECF No. 178. Phazzer argued that: (1) Taser's requested order demanded relief in excess of that requested in the complaint; (2) the proposed order cannot enjoin all of the named nonparties to the case; and (3) the PTO is "best equipped to determine the validity of the patent and trademark at issue." *Id.* at 3–7. Phazzer acknowledged, however, that, "[u]nder a default granting the relief sought in the Amended Complaint, a declaratory judgment of general validity and enforceability of the patent and trademark would have no additional effect on Phazzer, who would already be bound on [sic] infringers." *Id.* at 8.

On July 21, 2017, the district court entered the order at issue in this appeal, granting Taser's motion for sanctions. The court explained that, "[s]ince 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." *Taser*, 2017 WL 3584906, at \*1. Given Phazzer's "egregious conduct," the court struck the pending motion to dismiss the amended complaint, entered default judgment in favor of Taser,

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awarded compensatory damages and treble damages for willful infringement of the '262 patent and willful false advertisement as alleged in the complaint, awarded attorney fees and costs, and entered a permanent injunction against Phazzer. *Id.* at \*3.

With respect to the patent claims, the district court “deemed” the '262 patent “valid, enforceable, and infringed by Phazzer.” *Id.* at \*5. Specifically, the court found that “the Phazzer Enforcer CEW violates claim 13 of the '262 patent.” *Id.* The court enjoined Phazzer and its officers, agents, and other persons in active concert or participation with them from making, using, offering, selling, donating, distributing, importing, or exporting the Enforcer CEW “and any device not colorably different from the Enforcer CEW.” *Id.*

With respect to the trademark claims, the district court found that: (1) Taser owns the '789 registration “for the non-functional shape. . . of cartridges used to launch darts,” (2) Phazzer sells several versions of cartridges that bear a confusingly similar shape to the shape of the TASER trademark; and (3) prospective purchasers are likely to be misled as to their source. *Id.* The court “deemed” the '789 registration “valid and enforceable, not generic, functional, or merely descriptive, and infringed by Phazzer.” *Id.* at \*6. The court then enjoined Phazzer and its officers, agents, or other persons in active concert or participation with them from making, using, offering, selling, donating, distributing, importing or exporting the offending cartridge product numbers and colorable imitations. *Id.* The injunction further barred Phazzer from challenging or continuing to challenge “the validity or enforceability of the '789 Registration in any manner in any forum, including the USPTO.” *Id.*

Phazzer timely appealed the district court’s order granting the motion for sanctions. We have jurisdiction pursuant to 28 U.S.C. §§ 1292(c)(1) and 1295(a)(1).



## II. STANDARD OF REVIEW

Because a decision to sanction a litigant pursuant to Rule 37 of the Federal Rules of Civil Procedure is one that is not unique to patent law, we apply the law of the regional circuit. *Transclean Corp. v. Bridgewood Servs., Inc.*, 290 F.3d 1364, 1370 (Fed. Cir. 2002). In the Eleventh Circuit, it “is well settled that ‘the standard of review for an appellate court in considering an appeal of sanctions under rule 37 is sharply limited to a search for an abuse of discretion and a determination that the findings of the trial court are fully supported by the record.’” *BankAtlantic v. Blythe Eastman Paine Webber, Inc.*, 12 F.3d 1045, 1048 (11th Cir. 1994) (quoting *Pe-saplastic C.A. v. Cincinnati Milacron Co.*, 799 F.2d 1510, 1519 (11th Cir. 1986)).

We likewise review the scope of a district court’s injunction for abuse of discretion. *ePlus, Inc. v. Lawson Software, Inc.*, 700 F.3d 509, 516 (Fed. Cir. 2012). Abuse of discretion is a deferential standard that requires a showing that “the court made a clear error of judgment in weighing relevant factors or exercised its discretion based upon an error of law or clearly erroneous factual findings.” *Titan Tire Corp. v. Case New Holland, Inc.*, 566 F.3d 1372, 1375 (Fed. Cir. 2009) (quoting *Genentech, Inc. v. Novo Nordisk, A/S*, 108 F.3d 1361, 1364 (Fed. Cir. 1997)).

## III. DISCUSSION

On appeal, Phazzer argues that the district court abused its discretion in entering default judgment as a discovery sanction without first ruling on the pending motion to dismiss. Phazzer further argues that: (1) default judgment was inappropriate because its non-compliance was neither intentional nor in bad faith and equally effective sanctions were available; (2) the relief granted in the injunction exceeds that requested in the amended complaint; and (3) new developments in the

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PTO office actions “relating to the validity of Appellee’s patent requires reversal of the lower court’s sanctions Order.” Appellant Br. 9.<sup>2</sup> We address each argument in turn.

A. The District Court Did Not Abuse  
its Discretion in Entering Default Judgment

Rule 37 of the Federal Rules of Civil Procedure gives district courts “broad discretion to fashion appropriate sanctions for violation of discovery orders.” *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1542 (11th Cir. 1993). In relevant part, the rule expressly authorizes sanctions where a party fails to comply with a discovery order or fails to attend its own deposition. Fed. R. Civ. P. 37(b)(2)(A), (d)(1)(A)(i). The rule provides that, where appropriate, the court is authorized to strike pleadings, stay proceedings, dismiss the action or any part thereof, or render a judgment by default against a disobedient party. Fed. R. Civ. P. 37(b)(2)(A); 37(d)(3).

The Eleventh Circuit has stated that, although Rule 37 gives district courts broad discretion, that discretion is “not unbridled.” *United States v. Certain Real Prop. Located at Route 1, Bryant, Ala.*, 126 F.3d 1314, 1317 (11th Cir. 1997). The decision to dismiss a claim or enter default judgment “ought to be a last resort—ordered only if noncompliance with discovery orders is due to willful or bad faith disregard for those orders.” *Id.* (quoting *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1556 (11th Cir. 1986)). “Violation of a discovery order caused by simple negligence, misunderstanding, or inability to comply will not justify a Rule 37 default judgment or dismissal.” *Malautea*, 987 F.2d at 1542.

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<sup>2</sup> Phazzer does not appeal the district court’s award of compensatory and treble damages or the award of attorney fees and costs.

Here, the district court found that Phazzer engaged in bad faith litigation misconduct “with the subjective intent to abuse the judicial process.” *Taser*, 2017 WL 3584906, at \*3. The court further found that imposition of sanctions including the entry of default judgment was “necessary to adequately punish Phazzer for its wanton and repetitive disregard of this Court’s orders and as a consequence of its willful abuse of the discovery process.” *Id.*

As Taser points out, Phazzer waived all issues concerning the propriety of the district court’s entry of default judgment against it. Indeed, it was Phazzer who first requested a judicial conference to discuss its “controlled default.” Phazzer’s Mot. for Conference at 1–2, *Taser Int’l, Inc. v. Phazzer Elecs., Inc.*, No. 6:16-cv-366 (M.D. Fla. June 14, 2017), ECF No. 147. Even if it had not invited default as a sanction, however, the record is clear that Phazzer failed to attend its own Rule 30(b)(6) deposition, failed to produce other company witnesses for deposition, failed to attend the technology conference, and failed to attend the status of counsel hearing, all in violation of express court orders warning of potential default sanctions for noncompliance. Given these circumstances, the district court did not abuse its discretion in finding that sanctions were warranted, and that entry of default was appropriate.

On appeal, Phazzer argues—for the first time—that the district court erred in entering default judgment without first ruling on its pending motion to dismiss. In particular, Phazzer cites *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353 (11th Cir. 1997), for the proposition that “[f]acial challenges to the legal sufficiency of a claim or defense, such as a motion to dismiss based on failure to state a claim for relief, should . . . be resolved before discovery begins.” Appellant Br. at 34 (quoting *Chudasama*, 123 F.3d at 1367). As explained below, however, Phazzer’s reliance on *Chudasama* is misplaced.

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First, despite Phazzer's suggestion to the contrary, nothing in *Chudasama* states that discovery must be stayed pending a decision on a motion to dismiss or that such a motion must be resolved before discovery can begin. Instead, it stands "for the much narrower proposition that courts should not delay ruling on a likely meritorious motion to dismiss while undue discovery costs mount." *Koock v. Sugar & Felsenthal, LLP*, No. 8:09-cv-609, 2009 WL 2579307, at \*2 (M.D. Fla. Aug. 19, 2009) (quoting *In re Winn Dixie Stores, Inc.*, No. 3:04-cv-194, 2007 WL 1877887, at \*1 (M.D. Fla. June 28, 2007)). Indeed, the Eleventh Circuit has since clarified that it "only found an abuse of discretion [in *Chudasama*] because the district court ordered the parties to engage in substantive discovery despite failing to rule on the defendants' motion to dismiss for over eighteen months." *Zow v. Regions Fin. Corp.*, 595 F. App'x 887, 889 (11th Cir. 2014). Courts have recognized, moreover, that a "request to stay discovery pending a resolution of a motion is rarely appropriate unless resolution of the motion will dispose of the entire case." *McCabe v. Foley*, 233 F.R.D. 683, 685 (M.D. Fla. 2006). Here, however, Phazzer's motion to dismiss the amended complaint did not seek dismissal of the false advertising claim (count two) and thus could not have disposed of the case in its entirety.

Second, the facts in *Chudasama* are readily distinguishable from those in this case. The district court in *Chudasama* delayed resolution of a motion to dismiss for more than a year and a half and repeatedly failed to rule on the defendants' objections to abusive discovery requests. 123 F.3d at 1356–60. Resolution of that motion would have narrowed the relevant issues by eliminating a "dubious" fraud claim. *Id.* at 1368. "Thus, when faced with a motion to dismiss a claim for relief that significantly enlarges the scope of discovery," the *Chudasama* court

held, “the district court should rule on the motion before entering discovery orders, if possible.” *Id.*

Here, by contrast, Phazzer’s motion to dismiss the amended complaint had only been pending for four months, and the district court was actively managing discovery. Although Phazzer submits that it was “struggling to meet [Taser’s] premature and abusive discovery tactics,” it fails to point to any improper conduct on behalf of Taser. Appellant Br. at 38. Indeed, the district court found that it was Phazzer—not Taser—that “engaged in a pattern of bad faith conduct designed and intended to delay, stall, and increase the cost of this litigation” since its inception. *Taser*, 2017 WL 3584906, at \*1. Accordingly, *Chudasama* is factually inapposite.

Finally, Phazzer argues that its noncompliance was neither intentional nor in bad faith and that “less draconian but equally effective sanctions were available.” Appellant Br. at 40. Phazzer did not raise these arguments in response to the motion for sanctions before the district court, and cannot do so for the first time on appeal. *See Stauffer v. Brooks Bros. Group, Inc.*, 758 F.3d 1314, 1322 (Fed. Cir. 2014) (“Issues not properly raised before the district court are waived on appeal.”); *BUC Int’l Corp. v. Int’l Yacht Council Ltd.*, 489 F.3d 1129, 1140 (11th Cir. 2007) (“As a general rule, we do not consider issues not presented in the first instance to the trial court.”).

In any event, the district court specifically found that Phazzer “engaged in a pattern of bad faith conduct” “since the outset of this litigation” and that “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.” *Taser*, 2017 WL 3584906, at \*1. The record fully supports these findings. And, although Phazzer now argues that the

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district court should have imposed lesser sanctions and allowed the case to be tried on the merits, it expressly told the court that it was “defaulting in this matter.” Def.’s Resp. in Opp’n to Pl.’s Mot. for Sanctions at 7, *Taser Int’l, Inc. v. Phazzer Elecs., Inc.*, No. 6:16-cv-366 (M.D. Fla. July 10, 2017), ECF No. 178.

On this record, we find that the district court did not abuse its discretion in striking Phazzer’s motion to dismiss and entering default judgment in favor of Taser as a sanction.

#### B. The Scope of the Injunction

Next, Phazzer argues that the injunction the district court entered exceeds the scope of the relief requested in the amended complaint because it deemed Taser’s trademark valid when the prayer for relief only requested an injunction prohibiting infringement. Because a default judgment is limited to the relief demanded in the complaint, Phazzer contends that the injunction order is void.

Pursuant to Rule 54(c) of the Federal Rules of Civil Procedure, “[a] default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings.” The rule for default judgments contrasts with “[e]very other final judgment,” which “should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.” Fed. R. Civ. P. 54(c). Indeed, it “was well settled even before the adoption of the Rules of Civil Procedure that in rendering a default judgment the Court can only give to the plaintiff such relief as was proper upon the face of the bill.” *Nat’l Disc. Corp. v. O’Mell*, 194 F.2d 452, 456 (6th Cir. 1952) (citing *Thomson v. Wooster*, 114 U.S. 104, 113–14 (1885)).

It is well established that the defendant, by its default, is deemed to admit the plaintiff’s well-pleaded allegations of fact. *Cotton v. Mass. Mut. Life Ins. Co.*, 402 F.3d 1267, 1278 (11th Cir. 2005). That said, the defaulted

defendant “is not held to admit facts that are not well-pleaded or to admit conclusions of law.” *Id.* (quoting *Nishimatsu Constr. Co. v. Houston Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975)).

Here, Taser's amended complaint alleged that “TASER is the owner of a federal trademark registration, Registration No. 4,423,789, issued by the United States Patent and Trademark Office on October 29, 2013 for the non-functional shape . . . of cartridges used to launch darts.” Amended Complaint at 6, *Taser Int'l, Inc. v. Phazzer Elecs., Inc.*, No. 6:16-cv-366 (M.D. Fla. Feb. 24, 2017), ECF No. 95. The '789 registration was attached as an exhibit to the amended complaint and incorporated by reference therein. As noted, the amended complaint contained four counts: patent infringement, false advertising, trademark infringement, and common law trademark infringement and unfair competition. The prayer for relief requested that the court enter judgment in favor of Taser and requested, among other things: (1) “a declaration that the Phazzer Enforcer CEW is within the scope of the claims of the '262 Patent;” (2) a permanent injunction prohibiting patent and trademark infringement and Phazzer's false advertising practices; (3) compensatory and treble damages; and (4) attorney fees and costs. *Id.* at 12.

Although nothing in the amended complaint requested an assessment of trademark validity, the district court's permanent injunction order stated that “Taser's U.S. Trademark Registration No. 4,423,789, issued on October 29, 2013, for the non-functional shape of cartridges used to launch darts, is deemed valid and enforceable, not generic, functional, or merely descriptive, and infringed by Phazzer.” *Taser*, 2017 WL 3584906, at \*6.<sup>3</sup>

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<sup>3</sup> The permanent injunction also stated that the '262 patent “is deemed valid, enforceable, and infringed

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The court further stated that “Phazzer shall not challenge or continue to challenge the validity or enforceability of the ’789 Registration in any manner in any forum, including the USPTO.” *Id.* Both of these statements were included in the proposed order attached as an exhibit to Taser’s motion for sanctions.

In its response to the motion for sanctions, Phazzer acknowledged that the amended complaint “calls for relief in the form of . . . a permanent injunction prohibiting infringement, including making, using, importing, offering for sale, and selling Phazzer cartridges that infringe on TASER’s Trademark.” Def.’s Resp. in Opp’n to Pl.’s Mot. for Sanctions at 7–8, *Taser Int’l, Inc. v. Phazzer Elecs., Inc.*, No. 6:16-cv-366 (M.D. Fla. July 10, 2017), ECF No. 178. Phazzer then admitted that, “[u]nder a default granting the relief sought in the Amended Complaint, a declaratory judgment of general validity and enforceability of the patent and trademark would have no additional effect on Phazzer, who would already be bound on [sic] infringers.” *Id.* at 8. In other words, Phazzer conceded that the validity language in the proposed order added nothing to the requested infringement declaration as it relates to Phazzer.<sup>4</sup>

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by Phazzer. Specifically, the Phazzer Enforcer CEW violates claim 13 of the ’262 patent.” *Taser*, 2017 WL 3584906, at \*5. Because Phazzer’s Rule 54(c) arguments on appeal seem to focus solely on the declaration of validity with respect to the ’789 registration, we do not address the declaration of validity as to the ’262 patent. Appellant Br. 11–16.

<sup>4</sup> On appeal, Phazzer cites a district court decision where the court found that, because the complaint did “not seek a declaration that the patents [we]re enforceable and valid, including this proposed language in the default judgment would violate Rule 54(c) of the Federal



Phazzer expressed concern, however, that a declaratory judgment of validity would “serve to prejudice third parties who may come into conflict with Taser in the future.” *Id.* But, as counsel for Taser admitted at oral argument, “those folks would not be bound by a default order or an injunction specific to Phazzer.” Oral Arg. at 21:06–21:35, available at <http://oralarguments.ca9.uscourts.gov/default.aspx?fl=2017-2637.mp3>. Indeed, it is well established that “no court can make a decree which will bind any one but a party; a court of equity is as much so limited as a court of law; it cannot lawfully enjoin the world at large, no matter how broadly it words its decree.” *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 832 (2d Cir. 1930) (Hand, J.). This rule was codified in Rule 65(d) of the Federal Rules of Civil Procedure, which provides that an injunction “binds only the following who receive actual notice of it by personal service or otherwise: (A) the parties; (B) the parties’ officers, agents, servants, employees, and attorneys; and (C) other persons who are in active concert or participation” with them. Fed. R. Civ. P. 65(d)(2). Accordingly, while the district court’s injunction is binding with respect to Phazzer, and those working on behalf of or in concert with it, and while the court’s judgment resolves all disputes between these parties with

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Rules of Civil Procedure.” Appellant Br. at 13 (quoting *LG Elecs., Inc. v. Advance Creative Comput. Corp.*, 212 F. Supp. 2d 1171, 1176 (N.D. Cal. 2002)). That decision is distinguishable, however. While the defaulting parties in *LG Electronics* never appeared in the case or responded to the motion for default, Phazzer appeared before the district court and admitted that the validity language in the proposed order had no effect on it. Importantly, as the *LG Electronics* court recognized, injunctions are “discretionary depending on the facts of the case.” *Id.* at 1175.

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respect to the products specified in the order, it does not, and indeed cannot, bind unrelated third parties.

On appeal, Phazzer submits that “the validity of the trademark should be referred back to the TTAB for substantive determination.” Appellant Br. at 16. Specifically, Phazzer: (1) explains that the TTAB stayed the cancellation proceedings because it was under the impression that the district court would address whether the mark was functional; and (2) requests “leave to prosecute its TTAB proceeding to fruition.” *Id.* at 16–17. Phazzer cites no authority for its request that we refer the issue of validity to the TTAB. Nor could it, given that this appeal arises from the district court’s decision granting Taser’s motion for sanctions and for a permanent injunction.

In any event, Phazzer did not object to the language in the proposed order precluding Phazzer from challenging or continuing to challenge the validity or enforceability of the ’789 registration. As Taser points out, moreover, a default judgment in an infringement proceeding can operate as *res judicata* in a subsequent cancellation proceeding before the TTAB. *See Nasalok Coating Corp. v. Nylok Corp.*, 522 F.3d 1320, 1330 (Fed. Cir. 2008). As we explained in *Nasalok*, to hold otherwise would allow “success in the cancellation proceeding” to “negate relief secured . . . in the infringement proceeding.” *Id.* at 1329. “Such a collateral attack is barred by claim preclusion.” *Id.* at 1330 (“Because Nasalok’s claim of trademark invalidity, in its petition to cancel the ’840 Registration, amounted to a collateral attack on the district court’s judgment in the earlier infringement suit, the rules of defendant preclusion are properly applied to bar Nasalok from asserting that claim.”).<sup>5</sup>

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<sup>5</sup> Of course, as the district court made clear in its order on Taser’s motion for contempt, the TTAB has the

Because Phazzer conceded that a declaratory judgment of general validity of the '789 registration would not affect it, and because we interpret the scope of the injunction as limited to these parties and the particular products identified therein (and those not colorably different therefrom), we find no error in the district court's permanent injunction.

C. Phazzer's Remaining Arguments  
Concerning PTO Proceedings Are Without Merit

Phazzer also argues that reversal is warranted because: (1) Taser engaged in "misconduct and/or fraud on the PTO" in connection with the '789 registration; and (2) 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 in the second reexamination. Appellant Br. at 19–32. Neither argument has merit.

As to the first point, Phazzer did not allege fraud or misconduct before the PTO in the district court proceedings, and cannot do so for the first time on appeal.

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authority to determine the preclusive effect of the default judgment on the cancellation proceeding. *See Smith v. Bayer Corp.*, 564 U.S. 299, 307 (2011) ("After all, a court does not usually 'get to dictate to other courts the preclusion consequences of its own judgment.' Deciding whether and how prior litigation has preclusive effect is usually the bailiwick of the second court . . . ."(internal citation omitted)). Indeed, to the extent the original order could have been read to direct the TTAB's conduct of its proceedings, the district court clarified that it did not intend for its order to sweep so broadly. *See Order at 7, Taser Int'l, Inc. v. Phazzer Elecs., Inc.*, No. 6:16-cv-366 (M.D. Fla. May 4, 2018), ECF No. 271.

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As to the second point, Phazzer points to the fact that the PTO examiner recently issued a final rejection of all 18 claims of the '262 patent in the pending reexamination. According to Phazzer, the PTO's finding that all claims of the '262 patent are unpatentably obvious is a change in factual conditions that warrants reversal of the sanctions order. As Taser points out, however, Phazzer's argument is premature, not properly before this court, and is subject to Taser's appellate rights before the Board. Because the reexamination proceedings are ongoing, they do not affect the district court's permanent injunction.

#### IV. CONCLUSION

We have considered Phazzer's remaining arguments and find them unpersuasive. Because the district court did not abuse its discretion in entering default judgment against Phazzer, and because we interpret the resulting permanent injunction as limited to resolving all disputes between these parties with respect to the particular products at issue, we *affirm* the district court's order imposing sanctions in its entirety.

**AFFIRMED**

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re:

Phazzer Electronics, Inc.,

Debtor.

Chapter 7

Case No. 19-12281 (MFW)

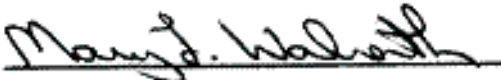
**ORDER APPROVING MOTION TO DISMISS WITH PREJUDICE**

Upon consideration of TASER International, Inc. n/k/a Axon Enterprise, Inc.'s *MOTION TO DISMISS CHAPTER 7 PETITION OR, IN THE ALTERNATIVE, GRANT STAY RELIEF, TRANSFER VENUE, AND RESCHEDULE CREDITORS' MEETING*, and a hearing having been held by the Court, after sufficient notice to all parties concerned on the Motion and all objections thereto, and all objections having been overruled, and all premises considered,

**IT IS HEREBY ORDERED THAT:**

1. The Motion to Dismiss, with prejudice, is hereby granted.
2. For the reasons more fully set forth at the December 17, 2019 hearing, the Court finds that this Chapter 7 corporate case involves a two-party dispute with minimal, if any, assets that was filed in bad faith.
3. This Court shall retain jurisdiction to resolve any disputes arising from or related to this Order.
4. This Order shall become effective immediately upon entry of this Order notwithstanding anything in the Federal Rules of Bankruptcy Procedure or otherwise to the contrary.

Dated: January 2nd, 2020  
Wilmington, Delaware

  
MARY F. WALRATH  
UNITED STATES BANKRUPTCY JUDGE

## Notice Recipients

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Case: 19-12281-MFW

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TOTAL: 5


### Recipients submitted to the BNC (Bankruptcy Noticing Center):

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14233388	Axon Enterprise, Inc	fka Taser International, Inc.	17800 N 85th St Scottsdale, AZ 85255
14233399	Department of Labor	Division of Unemployment Insurance	P.O. Box 9953 Wilmington, DE 19809
14233389	Hoagland Partners	101 Park Place Blvd, Ste 3	Kissimmee, FL 34741
14233390	IRS	P.O. Box 7346	Philadelphia, PA 19101-7346
14233391	Kambio Corp	16400 NW 59th Ave Fl 2	Hialeah, FL 33014
14233392	Nebraska Dept. of Revenue	PO Box 98912	Lincoln, NE 68509
14233393	Ryan Thomas Santurri, Esq	Allen, Dyer, Doppelt & Gilchrist, PA	255 S. Orange Ave, Ste 1401 PO Box 3791 Orlando, FL 32801
14233394	Sage Group PLC	12120 Sunset Hills Road	Reston, VA 20190
14233398	State of Delaware	Division of Revenue	820 N. French Street, 8th Floor Wilmington, DE 19801-0820
14233395	Wells Fargo	Payment Remittance Center	PO Box 51174 Los Angeles, CA 90051
14233396	Willis & Davidow, LLC	9015 Strada Stell Ct	Ste 106 Naples, FL 34109

TOTAL: 12

ORDERED.

**Dated: June 02, 2020**

  
\_\_\_\_\_  
Lori V. Vaughan  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION  
[www.flmb.uscourts.gov](http://www.flmb.uscourts.gov)

In re: Case No.: 6:20-bk-00398-LVV  
Chapter 7

Phazzer Electronics, Inc.,

Debtor.  
\_\_\_\_\_/

**DISMISSAL ORDER**

THIS CASE came on Creditor Axon Enterprise, Inc.'s Motion to Dismiss (Doc. 26), Responses filed by Sang Min International Corp. (Doc. 29) and Debtor Phazzer Electronics, Inc. (Doc. 30), Axon's Replies to same (Docs. 31 and 33, respectively), and arguments of counsel at a hearing held via video conference on May 28, 2020,

Accordingly, it is **ORDERED**:

1. Granting Axon's motion;
2. Dismissing this corporate Chapter 7 case, with prejudice, as having been filed in bad faith;

3. Enjoining Debtor from further bankruptcy filings for a period of one year from the date of this Order.

The Court's reasons for its ruling were stated orally on the hearing record.

Attorney Pamela Petersen is directed to serve a copy of this order on interested parties who do not receive service by CM/ECF and file a proof of service within three days of entry of the order.