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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Respondent neither disputes nor contests the truth of the legal voidance of its entire patent claims by the U.S. Patent and Trademark Office and the void *ab initio* effect on all of its claimed patent rights. *See Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC,* 138 S. Ct. 1365 (2018). Rather, Respondent, despite lacking standing as a non-patentee, improperly attempts to argue the untimeliness of Petitioner's writ of certiorari and/or remand to the United States Court of Appeals for the Federal Circuit.

However, contrary to Respondent's machinations, "[i]t is hornbook law that limitations periods are 'customarily subject to 'equitable tolling.'" *Young v. United States,* 535 U.S. 43, 49 (2002) (quoting *Irwin v. Department of Veterans Affairs,* 498 U.S. 89, 95 (1990)); *See also, Blount v. United States,* 860 F.3d 732 (D.C. Cir. 2017) ("Statutory tolling pauses the clock …").

Likewise, Respondent seeks to overturn and/or misapply the automatic stays imposed by US Bankruptcy law, 11 U.S.C. § 362(a)(1) to the timeliness of the petition. Yet, conversely, in *Young, supra* at 50 (emphasis added), this Court found **"[t]olling is in our view appropriate regardless of petitioners' intentions when filing back-to-back Chapter 13 and Chapter 7 petitions — whether the Chapter 13 petition was filed in good faith or solely to run down the lookback period."**

Beyond that, the rest of Respondent's arguments concern its own bad faith misapplication of the Permanent Injunction Order as *res judicata* to the appealed damages Order thereby seeking to evade the U.S. Patent and Trademark Office ("USPTO") cancellation of all claims (1-18) of U.S. Patent No. 7,2343,262 by Ex Parte Reexamination Certificate (11639th) (causing the appealed Damages Order to be void *ab initio).* **But, "[l]ooking to general res judicata principles governing the preclusive effect of a judgment, it is well-established that where the scope of relief remains to be determined, there is no final judgment binding the parties (or the court): '*Finality will be lacking* if *... the amount of the damages, or the form or scope of other relief, remains to be determined.*"'** *Fresenius USA, Inc. v. Baxter Int'l, Inc.,* 721 F.3d 1330, 1341-42 (Fed. Cir. 2013).

I. Respondent Lacks Standing and Respondent's Response Has Made No Substantive Arguments Addressing the Voidance of the Patent.

Respondent does not contest the legal voidance of its entire patent claims by the USPTO and the void *ab initio* effect on all of its claimed patent rights. Respondent also does not address that cancellation of the patent claims have stripped Respondent of standing regarding the patent in this matter.

Respondent merely states it had a right under the rules to file a response, but a right to file a response does not confer standing. *See* 35 U.S.C. § 281 (only a patentee may bring an action for infringement), *Lujan v. Defenders of Wildlife,* 504

U.S. 555, 560 (1992) and *Moffitt v. Garr,* 66 U.S. 273, 283 (1862) (legal cancellation of a patent extinguishes the patent and cannot be the foundation for a right asserted thereafter).

Given that, Respondent did not brief either of these issues and Petitioner respectfully requests this Honorable Court grant Petitioner's writ of certiorari and/or, preferably, remand the case to the United States Court of Appeals for the Federal Circuit.

II. Respondent's Procedural Objections As To Alleged Untimeliness of Filing Are Meritless.

As Petitioner explained in its merits brief (Petitioner's brief at 1-6), the Petitioner timely filed its petition for writ of certiorari and/or, preferably, remand to the United States Court of Appeals for the Federal Circuit within ninety days (90 days) [1] of the Order denying petition for panel rehearing at the U.S. Court of Appeals for the Federal Circuit. (App D.E. 070).

A. The Bankruptcies Stayed The Time For Filing the Petition To The U.S. Supreme Court.

Respondent improperly argues that this Court should disregard the automatic stay imposed by

[1] The time to petition for writ of certiorari to the U.S. Supreme Court has not run, so nothing in this Case is final yet. *See*, Rule 13 of the Federal Rules of Appellate Procedure (time to file petition for writ of is 90 days from any denial of petition for Rehearing request excluding any time stayed by bankruptcy. *See also, Oil States supra*.

bankruptcy. (Respondent's brief at 10). Respondent's argument is incongruous because Petitioner is the debtor. Under *Young supra,* at 50, and the applicable bankruptcy statute (11 U.S.C. § 362(a)(1)), the Petitioner can rely upon the automatic stay during the two bankruptcy periods. *See also, Blount supra* ("Statutory tolling pauses the clock …").

When these stays are considered, from the subject Orders of Dismissal as set forth in the merits brief (Petitioner's brief at 1-6), it is uncontroverted that the Petitioner is timely filing under a simple counting of the days. Moreover, what is glaring in Respondent's response is its fails to cite to any applicable law or authority to support its position on this matter.

The case of *Chicago Title Ins. Co. v. Lerner,* 435 B.R. 732, 735 (S.D. Fla 2010), cited by Respondent (Responsive brief at 10), deals with the issue of whether the automatic stay enjoins litigation against non-bankrupt co-defendants of the debtor. There are no co-defendants in this case and it has nothing to do with debtor itself. Petitioner is the only defendant and the record is clear that it is the debtor. Hence, Respondent's argument is misleading and attempting to deride the Court from axiomatic law regarding the automatic stay.

The Order of Dismissal for the Delaware Bankruptcy (BK DE 019, emphasis added) specifically enumerates that the automatic stay applies to Petitioner:

> 1. The Court hereby clarifies that the automatic stay imposed by 11 U.S.C. § 362(a)(1) when this bankruptcy petition was filed only **applied to efforts to collect a debt against the Debtor [Petitioner]** and did not apply at any time to any claim asserted or action taken against *any non-debtor third party* in pending litigation.

BK DE 019 (emphasis added).

Furthermore, the undersigned at all material times, was expressly constrained by the bankruptcy trustee from taking any action until each Order dismissing the bankruptcy and lifting the stay was entered. (DE 383).

B. Bankruptcy Stays are Acknowledged by Respondent and the District Court.

Respondent further attempts to mislead the Court as to the period of the applicable bankruptcy stays (Respondent's brief at 11). However, the record is clear, the January 2, 2020 Order Clarifying Applicability of the Automatic Stay in the Delaware Bankruptcy (BK DE 019, emphasis added) specifically enumerates that the automatic stay applies to Petitioner:

1. The Court hereby clarifies that the automatic stay imposed by 11 U.S.C. § 362(a)(1) when this bankruptcy petition was filed only applied to efforts to collect a debt against the Debtor [Petitioner] and did not apply at any time to any claim asserted or action taken against any non-debtor third party in pending litigation.

2. This Court shall retain jurisdiction to resolve any disputes arising from or related to this Order.

3. **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.

BK DE 019 (emphasis added). Clearly, the automatic stay applied to Petitioner, not non-debtor third parties, and the Order only became effective upon the January 2, 2020 entry.

Likewise, the January 2, 2020 Order Approving the Motion to Dismiss with Prejudice (BK DE 020, emphasis added) specifically enumerates that the Motion to Dismiss only became effective as of the date of its entry:

> 1. The Motion to Dismiss, with prejudice, is hereby granted.
>
> …
>
> 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.

BK DE 020 (emphasis added).

There is no justification for Respondent's misleading of this Court as to the scope and effective date these Orders (January 2, 2020) as they are clear on their face.

Further, Respondent admits that District Court found that bankruptcy stays applied to the proceedings filed by Petitioner (Respondent's brief at 9). Specifically, its Response brief states: "[o]n March 11, 2020, the district court expressly deferred ruling on the motion [Petitioner's Fed. R. Civ. P. 54 and 60 motion (DE 374)] 'until the automatic [bankruptcy] stay lifts." (Respondent's brief at 9). The facts and law of this case support the grant of the timely filed petition for certiorari and/or remand to the US Court of Appeals for the Federal Circuit.

Clearly, both Respondent and the District Court were aware of and acknowledged that the stay applied to Petitioner and were in effect at all times during the bankruptcies.

III. Contrary to Respondent's Assertions In Its Response, the Doctrine of Res Judicata Is Inapplicable.

Respondent disingenuously argues that the Permanent Injunction Order falls under *res judicata;* however, that Enjoinment Order is separate, and apart, from the appealed Damages Order, which never became final prior to this direct petition. "[L]ooking to general res judicata principles governing the preclusive effect of a judgment, it is well-established that where the scope of relief remains to be determined, there is no final judgment binding the parties (or the court): '*Finality will be lacking* if … *the amount of the damages, or the form or scope of other relief, remains to be determined.*'" *Fresenius* at 721 F.3d at 1341-42.

Respondent further argues that Petitioner did not challenge the amount of the patent infringement damages; However, the facts clearly do not support a good faith basis for making such an assertion. (Respondent's brief at 9). Petitioner unquestionably challenged the amount of these damages on a number of grounds, including the amount, form and scope. For example: "Phazzer contends that it is impossible for the Enforcer without dataport to infringe upon Taser's '262 patent, and thus, damages for the sale of the Enforcer without dataport are improper." (Appl. D.E. 019 at 16). Hence, the amount of damages was directly appealed under *Fresenius* and remains not final for determination in this petition for writ of certiorari and/or remand to the U.S. Court of Appeals for the Federal Circuit.

On Feb. 10, 2020, a change of circumstances occurred when USPTO issued the Reexamination Certificate (11639th) (*See* Petitioner's brief - Exhibit A (D.E. 394), pages 10 to 13) for US Patent No. 7,234,262 (the "'262 patent") cancelling claims 1-18 (all of the claims) of said patent. After the cancellation of all of the '262 patent claims, the damages Order became void *ab initio* thereby vacating all patent damages. *Oil States supra.*

Respondent's *res judicata* argument is a veiled attempt to maintain a right Respondent was never entitled to the contested patent damages in the separate damages Order.

IV. Respondent's Assertions Regarding The Bankruptcy Court's Ultimate Determination Are Irrelevant To The Procedural Tolling Established By The Filing of the Bankruptcy Petition.

Respondent's duplicitous argument that the bankruptcies were filed in bad faith is irrelevant. This Court has already found that a good faith finding is not required in the filing of bankruptcies for the automatic tolling period to be applicable. *Young supra,* at 50 ("[t]olling is in our view appropriate regardless of petitioners' intentions when filing back-to-back Chapter 13 and Chapter 7 petitions — whether the Chapter 13 petition was filed in good faith or solely to run down the lookback period"). As a result, contrary to Respondent's assertions, Petitioner's subjective intentions are irrelevant to the procedural effect of filing a bankruptcy petition, the stay, as a matter of law. *Id.* Respondent's argument is meritless and made in an attempt to distract from the

issues. As such, the Court should grant the petition for writ of certiorari and/or remand to the US Court of Appeals for the Federal Circuit.

V. CONCLUSION

Petitioner respectfully that this Honorable Court grant the petition for writ of certiorari and/or, preferably, enter an order remanding the Damages Order to the Federal Circuit for dismissal of the patent damages. The patent at issue is *void ab initio* and the voidness is not disputed by Respondent. Petitioner could not file the pending petition for writ of certiorari in this pending matter while the bankruptcy stays were still in effect. Once the bankruptcy stays were no longer in effect, Petitioner proceeded to file its Writ of Certiorari timely in this Court. Respondents only challenge the procedural timeliness of the petition, and do not advance any argument as to why Respondents should be entitled to a continued damages judgment under a void patent.

Respectfully submitted,

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