

**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 is before the Court on Plaintiff's Motion for Contempt (Doc. 202), and Plaintiff's Supplement to Motion for Contempt (Doc. 269). Plaintiff seeks to hold Defendant Phazzer Electronics, Inc. ("Phazzer"), Phazzer executive Mr. Stephen Abboud, and Phazzer attorney Mr. Stephenson in civil contempt for their violation of this Court's permanent injunction. (Doc. 183).<sup>1</sup> Mr. Stephenson filed a response on September 28, 2017 (Doc. 216), Phazzer filed a response on October 2, 2017 (Doc. 224), and Mr. Abboud filed a response on October 3, 2017 (Doc. 225). The Court held a civil contempt hearing on October 12, 2017. (Doc. 229). All parties filed final closing statements. (Docs. 236, 237, 238, & 239).

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<sup>1</sup> The Court's Order granting a permanent injunction is currently on appeal in front of the Federal Circuit Court of Appeals. (Doc. 211). However, "[a] notice of appeal does not stay enforcement of a district court's order. A judge may—and should—enforce an un-stayed injunction while an appeal proceeds." *Thornton v. Wahl*, 787 F.2d 1151 (7th Cir. 1986).

## I. BRIEF BACKGROUND<sup>2</sup>

Plaintiff Taser International, Inc. (“Taser”) filed this action in 2016, alleging that Phazzer infringed upon its registered trademark. Throughout the course of the litigation, the conduct of Phazzer—exemplified by Phazzer’s persistent and coordinated efforts to frustrate discovery and to delay and confound Taser in its attempt to enforce its Patent—was egregious. (*Id.* at pp. 2–5). Consequently, the Court was moved to enter default judgment in favor of Plaintiff Taser, enjoining Phazzer and its officers, agents, servants, employees, and attorneys, and any other persons acting in concert or participation with Phazzer, from making, using, offering for sale, selling, donating, distrusting, importing or exporting Phazzer Enforcer CEWs with 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 to the cartridge shown in Taser’s U.S. Trademark Registration No. 4,423,789. (*Id.* at pp. 13–14). The injunction also barred Phazzer from “challeng[ing] or continu[ing] to challenge the validity of the enforceability of the ‘789 Registration in any manner in any forum, including the [United States Trademark and Patent Office] USTPO.” (Doc. 183).

On September 14, 2017, Taser filed the instant motion for contempt, alleging that Phazzer and Mr. Abboud continue to sell and export infringing products in violation of the Court’s injunction. Taser also claims that Phazzer, through Mr. Stephenson, violated the Order by filing reports with the Trademark Trial and Appeal Board (“TTAP”). The Court conducted an evidentiary hearing on Taser’s contempt motion on October 12, 2017.

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<sup>2</sup> A more detailed recitation of the procedural history of this case is set forth in the Court’s Order granting Plaintiff’s Motion for Sanctions and for a Permanent Injunction. (Doc. 183).

On April 25, 2018, Taser filed a supplemental report to its motion for contempt, alleging that Phazzer continues to willfully disobey the Court's injunction by creating market confusion as to the status of the injunction. (Doc. 268). For support of this allegation, Taser submitted an email sent out to "Phazzer Customers," in which Phazzer advises its distributors and customers that "all distributors, users, LEA's or security agencies that were not named in the current litigation can lawfully sell and use our product." (Doc. 268-4).

## II. STANDARD OF REVIEW

District courts have inherent power to enforce compliance with their orders through civil contempt. *E.g. Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764–65 (1980); *SEC v. Solow*, 682 F. Supp. 2d 1312, 1324 (S.D. Fla. 2015), *aff'd*, 396 F. App'x 635 (11th Cir. 2010). "A party seeking civil contempt bears the initial burden of proving by clear and convincing evidence that the alleged contemnor has violated an outstanding court order." *Commodity Futures Trading Comm'n v. Wellington Precious Metals, Inc.*, 950 F.2d 1525, 1529 (11th Cir. 1992) (per curiam). Once the moving party makes a *prima facie* showing that a violation has been made, "the burden of production shifts to the alleged contemnor, who may defend his failure on the grounds that he was unable to comply." *Id.* "[T]he absence of willfulness is not a defense to a charge of civil contempt." *FTC v. Leshin*, 618 F.3d 1221, 1232 (11th Cir.2010) (quoting *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191(1949)). "[S]ubstantial, diligent, or good faith efforts are not enough; the only issue is compliance." *Id.* "[I]n a civil contempt proceeding the question is not one of intent but whether the alleged contemnors have complied with the court's order." *Id.* at 1233 (citation omitted).

### **III. DISCUSSION**

Taser accuses Phazzer of violating the Court's injunction through continued sales and marketing demonstrations of infringing products. Taser also contends that Phazzer violated the Court's injunction by filing a report with the TTAB challenging the validity of this Court's injunction and the validity of Taser's registered CEW cartridge trade dress. (Doc. 202). The Court will address each of these alleged violations in turn.

#### **A. Sales of Enforcer CEWs**

At the contempt hearing on October 12, 2017, Taser presented evidence that Phazzer continues to promote and sell the Phazzer Enforcer CEW; for instance, Phazzer sold and shipped the enjoined CEW to Taser's investigator, Thomas Mysinger, in Florida. (See, e.g., Pl. Exs. 1, 7, 8, 9; Doc. 233, 17:3–11, 18:17–24, 19:11–20:6). Mr. French, the owner of Phazzer, admitted these facts. (Doc. 233, 42:9–11, 45:4–8, 75:5–8.). Taser also presented evidence that Phazzer, through Mr. Abboud, conducted demonstrations of the Phazzer Enforcer CEW and the ammunition cartridge enjoined by this Court to eight law enforcement agencies in September. (See, e.g., Pl. Exs. 10-13; Doc. 233, 37:16–38:9, 39:1–7). Again, these activities were undisputed by Phazzer. (Pl. Ex. 4; Doc. 233, 14:25-16:1). Based on this evidence, Taser met its burden of establishing by clear and convincing evidence that Phazzer was in violation of the Court's injunction.

In response, Phazzer and Mr. Abboud claim that they made a "good faith" effort to comply with the Court's injunction, but that they reasonably believed that the injunction did not prohibit them from selling non-infringing products. According to Phazzer, there are two relevant types of products sold by Phazzer—an Enforcer with dataport and an Enforcer without dataport. Phazzer contends that it is impossible for the Enforcer without

dataport to infringe upon Taser's patent. Phazzer thus presented evidence regarding the differences between the two types of Enforcers, claiming that it "reasonably and in good faith took this to mean that it could not sell any Phazzer Enforcer that included the Dataport feature." (Doc. 224, p. 2).

Phazzer's defense fails for several reasons. First, good faith is not a defense to contempt. *See, e.g., Leshin*, 618 F.3d at 1232 ("[S]ubstantial, diligent, or good faith efforts are not enough; the only issue is compliance."). More importantly, Phazzer cannot attempt to relitigate the merits of the case in an attempt to avoid contempt. *United States v. Rylander*, 460 U.S. 752, 756 (1983) ("It would be a disservice to the law if we were to depart from the long-standing rule that a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed . . . ."). The Court has issued judgment in this case and enjoined Phazzer from selling or attempting to sell Phazzer Enforcer CEWs, or any other CEW cartridge that is confusingly similar to Taser's patent. The scope of the Court's injunction does not differentiate between CEWs with dataport and CEWs without dataport. This is because the Court was not afforded the opportunity to review any evidence regarding the different products during the course of the litigation, on account of Phazzer's repeated failure to appear before the Court or to otherwise comply with the Court's orders. Phazzer cannot now, faced with contempt, litigate this case on the merits.

The evidence before the Court establishes, beyond doubt, that Phazzer has continued to sell, market, and distribute infringing Enforcer CEWs in violation of the Court's injunction. This finding is sufficient to hold Phazzer and Mr. Abboud in civil contempt.

## **B. Filings with the TTAB**

Taser next argues that Phazzer, through Mr. Stephenson, filed certain reports and documents with the TTAB in violation of the Court's injunction prohibiting Phazzer from "challeng[ing] or continue to challenge the validity of the enforceability of the '789 Registration in any manner in any forum, including the USTPO [United States Trademark and Patent Office]." (Doc. 183).

In arguing for sanctions against Mr. Stephenson for the TTAB filings, Taser contends the default judgment issued by this Court constitutes *res judicata* for purposes of both claim and issue preclusion. (Doc. 237, p. 8) (citing *Sewell v. Merrill Lynch, Pierce, Fenner & Smith*, 94 F.3d 1514, 1518 (11th Cir. 1996)). Thus, Taser reasons, the Court's injunction was "entirely proper" because Phazzer is barred from filing the report with the TTAB by claim preclusion. (Doc. 237, p. 9).

In response, Stephenson argues that he took no affirmative actions "to challenge or continue to challenge the validity or enforcement of the '789 Registration," but instead sought to truthfully inform the TTAB of the status of this proceeding. (Doc. 236, p. 10). Insofar as Mr. Stephenson's actions can be construed as violating the Court's injunction, Mr. Stephenson argues that the injunction is overbroad. The Court agrees.

To begin, the Court notes that district courts have the power to enjoin litigants from instituting further litigation based on the facts alleged in the case before it. 28 U.S.C. § 1651(a) ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."); *Shell v. U.S. Dep't of Hous. And Urban Dev.*, 355 F. App'x 300, 308 (11th Cir. 2009) (per curiam) (holding that "an injunction that enjoined

litigants from relitigating specific claims or claims arising from the same set of circumstances would be acceptable”) (citation and quotation marks omitted); *Harrelson v. United States*, 613 F.2d 114, 115 (5th Cir.1980) (per curiam)).<sup>3</sup> However, courts generally reserve this power as a sanction against a party who abuses of the judicial process. *Klayman v. DeLuca*, 712 F. App'x 930, 933 (11th Cir. 2017) (per curiam). Based on Phazzer’s egregious failure to abide by Court orders and otherwise participate in this litigation, the Court finds that enjoining Phazzer from “challeng[ing] or continue to challenge the validity of the enforceability of the ‘789 Registration” was proper.

Nevertheless, the Court does not agree that Mr. Stephenson violated the Court’s injunction by submitting filings to the TTAB. The report filed by Mr. Stephenson was submitted in response to Taser’s motion to the TTAB to resume proceedings and dismiss the cancellation proceedings with prejudice. (Doc. 216-2). Phazzer was entitled to respond to Taser’s motion, and did so through its filing of the report Taser takes issue with in its contempt motion. (Doc. 216-3). The Court finds nothing in its injunction that could be interpreted as enjoining Phazzer from responding to a filing before the TTAB. Indeed, the Court questions its authority to do so. See *Smith v. Bayer Corp.*, 564 U.S. 299, 307 (2011) (explaining that “a court does not usually get to dictate to other courts the preclusion consequences of its own judgment”).

Accordingly, the Court finds nothing improper with the filings Phazzer submitted to the TTAB.

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<sup>3</sup> In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

### **C. Consequences of Phazzer and Mr. Abboud's Contempt**

It is the conclusion of this Court that Defendant Phazzer, and Phazzer executive Mr. Stephen Abboud, have violated the Court's permanent injunction by continuing to sell and offering to sell infringing merchandise. Based on the Court's inherent powers to enforce compliance with its injunction, the Court holds Phazzer and Mr. Abboud in civil contempt. The Court thus has "the power to impose coercive and compensatory sanctions." *Citronelle-Mobile Gathering, Inc. v. Watkins*, 943 F.2d 1297, 1304 (11th Cir. 1991). In fashioning a sanction, however, the Court is mindful that it must "stay within the bounds of due process," and may not issue a sanction that is so excessive that it is "punitive in nature." *Id.*

Since granting default judgment and issuing the injunction, the Court has resolved Taser's motion for damages and attorney's fees and costs. (Doc. 267). In resolving the motion for damages, the Court addressed many of Phazzer's arguments raised in these contempt proceedings; namely, the Court held that the injunction applied to all Phazzer Enforcer CEWs—those with and without dataport technology. Consequently, the Court granted Taser a total of \$7,869,578.74 in damages, fees, and costs. (*Id.* at p. 8). Given the magnitude of damages already awarded to Taser, and given that Phazzer has now been informed of the applicability of the injunction, the Court finds that the issuance of additional monetary sanctions would be punitive as opposed to coercive in nature. The Court thus declines to impose any further sanctions against Phazzer at this time.

However, Phazzer, *and all of its officers, agents, servants, employees, and attorneys*, are hereby notified by way of this Order that any continued violations of the



injunction will prompt this Court to initiate criminal contempt proceedings pursuant to Federal Rule of Civil Procedure 42.

**IV. CONCLUSION**

Therefore, it is **ORDERED AND ADJUDGED** as follows:

1. Plaintiff's Motion for Contempt (Doc. 202) is **GRANTED IN PART**. The Court holds Defendant Phazzer Electronics, Inc. and Mr. Stephen Abboud in **CIVIL CONTEMPT**. However, the Court declines to issue further sanctions at this time.
2. Defendant Phazzer Electronics, Inc., and all of its officers, agents, servants, employees, and attorneys are hereby **NOTIFIED** that any continued violations of this Court's injunction will result in the initiation of criminal contempt proceedings pursuant to Federal Rule of Civil Procedure 42.

**DONE AND ORDERED** in Orlando, Florida, on May 4, 2018.

  
PAUL G. BYRON  
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record  
Unrepresented Parties