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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92061215
Party	Plaintiff Schiedmayer Celesta GMBH
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**UNITED STATES PATENT AND TRADEMARK OFFICE**  
**BEFORE THE TRADEMARK TRIAL & APPEAL BOARD**

Schiedmayer Celesta GmbH,            )  
  )  
  Petitioner,                    )  
  )  
v    )  
  )  
Piano Factory Group, Inc.,            )  
  )  
  Respondent.                    )  
\_\_\_\_\_  )

Cancellation No. 92/061,215  
Reg. No. 3,340,759  
Mark: SCHIEDMAYER  
Registration Date: 11/20/2007

**PETITIONER’S MEMORANDUM IN OPPOSITION TO MOTION TO  
DISMISS AND AMENDED PETITION**

June 13, 2016

Petitioner herewith opposes Respondent’s Motion to Dismiss Petitioner’s Amended Petition for Cancellation.

**FACTS**

On May 10, 2016, Petitioner caused to be filed an amended Petition for Cancellation with two counts, False Association and Abandonment.

On May 12, 2016, Petitioner also caused to be filed a Request for Reconsideration of the Interlocutory Decision Striking Petitioner’s Claim of Fraud. That Request for Reconsideration is currently pending. No response has been filed and the Request has apparently been conceded by Respondent.

First, it is noted that the "Simplified Notice Pleading" regime of the Federal Rules of Civil Procedure as practiced in Federal Court litigation, applies equally to oppositions and petitions. See: *Scotch Whiskey Assoc. v. United States Distilled Products Co.*, 952 F 2d 1317, 1319, 21 USPQ 2d 1145, 1147 (Fed. Cir. 1991).

As clearly stated in the TBMP, all that is required is "...a short and plain statement showing why the Opposer (Petitioner) believes he/she or it would be damaged by the registration of the opposed mark and state the grounds for opposition." Trademark Rule 2.104(a) 37 CFR § 2.104(a).

Petitioner is only required to give Respondent fair notice of the claim made, and Petitioner has clearly done so.

#### False Association.

In its False Association claim, Petitioner pleaded that it is successor in interest to the trademark SCHIEDMAYER dating back to its origin in the year 1735.

Petitioner alleged that its Schiedmayer keyboard instruments represent the most coveted and respected keyboard musical instruments in the world.

Petitioner further alleged that its keyboard instruments represent the highest degree of quality and reputation and have been sold and are used by numerous symphonies and orchestras throughout the world.

Petitioner further alleged that the SCHIEDMAYER mark is known throughout the world as being associated with the finest keyboard instruments ever produced and that Petitioner owns the exclusive reputation for the mark SCHIEDMAYER.

Petitioner further alleged that Respondent's mark sought to be cancelled is the same as Petitioner's previously used name or identity and that it would be recognized as such in that it points uniquely and unmistakably to the Petitioner.

Petitioner also alleged that the Schiedmayer name is of sufficient fame and reputation that if and when Respondent's mark is used on its goods or services, a connection with Petitioner will be presumed.

Finally, Petitioner alleged that these factors existed at the time of registration of the trademark registration sought to be cancelled herein.

In response, Respondent has argued in effect that the mark SCHIEDMAYER is a surname and therefore cannot point uniquely to Petitioner

The problem with Respondent's assertion is that it represents nothing more than a defense against the allegations made in the Petition. Respondent is free to argue in the course of this proceeding that the mark SCHIEDMAYER does not point uniquely to the Petitioner. However, that does not render the allegations of the petition itself improper or insufficient.

Parenthetically, the argument is any event incorrect. By way of example, the name Twiggy clearly points uniquely to an actress and personality individual, even though it is a common nickname. see: *Lesley Hornby a/k/a Twiggy v. TJX Companies, Inc., Cancellation No. 92044369, (2008)*. In this case, the mark SCHIEDMAYER clearly points uniquely to the Petitioner in this case and this has been alleged.

Petitioner has alleged sufficient facts to clearly give notice to the Respondent as to the basis of its claim of false association. The allegations of the amended Petition under Section 2a are sufficient and should be maintained.

Abandonment Claim:

Respondent argues that Petitioner has not made a Claim of Abandonment because Petitioner has alleged that Piano Factory has not sold or offered for sale or transported in commerce any of the products set forth in the trademark registration sought to be cancelled herein for at least the past 10 years, and does not specifically mention the trademark SCHIEDMAYER.

First, if Respondent did not sell or offer for sale or transport in commerce any of the products set forth in the trademark registration sought to be cancelled herein for at least the past 10 years, then this would by definition include Schiedmayer marked products.

Second, at Paragraph 17 of Count II of the amended Petition for Cancellation, Petitioner clearly alleged that Respondent has not *used* the trademark SCHIEDMAYER on any of the goods set forth in the said trademark registration sought to be cancelled within at least the past 10 years.

The terminology *used* includes sales, offer for sales, and transport in commerce.

15 U.S.C. § 1127 defines, in pertinent part, abandonment as follows:

“A mark shall be deemed to be abandoned if either of the following occurs:

1. When its *use* has been discontinued with intent not to resume such use. Intent not to resume may be inferred from circumstances, non-use for three consecutive years shall be prima facie evidence of abandonment. “Use of a mark means the bona fide use of such mark made in the ordinary

Use of a mark clearly includes the offer for sale, sale or transport in commerce of goods under that mark.

Accordingly, it appears clear that Petitioner has properly alleged abandonment of the subject registration.

If a mark has not been used, then it cannot by definition have been sold, offered for sale or transported in commerce.

Nevertheless, in order to move this proceeding forward, Petitioner, pursuant to TBMP § 503.03 herewith submits an amended Petition for Cancellation meeting the concerns of Respondent.

Specifically, TBMP § 503.03 states in part the following:

“...plaintiffs to proceedings before the Board ordinarily can, and often do, respond to a Motion to Dismiss by filing, inter alia, an amended Complaint. If the amended Complaint corrects the defects noted by the Defendant in its Motion to Dismiss, and states a claim upon which relief can be granted, the Motion to Dismiss normally will be moot.”

The appended amended Petition for Cancellation repeats Petitioner's false association claims without change. The amended Petition slightly amends the claim to abandonment to meet the concerns of the Respondent.

In the view of all of the above, Respondent's motion should be dismissed in all respects.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'M. Striker', with a long horizontal flourish extending to the right.

Michael J. Striker  
Attorney for Petitioner  
Reg. No.: 27233  
103 East Neck Road  
Huntington, New York 11743

**UNITED STATES PATENT AND TRADEMARK OFFICE**  
**BEFORE THE TRADEMARK TRIAL & APPEAL BOARD**

Schiedmayer Celesta GmbH, )  
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 Petitioner, )  
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 Respondent. )  
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Cancellation No. 92/061,215  
Reg. No. 3,340,759  
Mark: SCHIEDMAYER  
Registration Date: 11/20/2007

**AMENDED PETITION FOR CANCELLATION OF  
U.S. TRADEMARK REGISTRATION NO. 3,340,759**

June 13, 2016

Petitioner herewith files its Amended Petition for Cancellation:

Petitioner, Schiedmayer Celesta GmbH (Schiedmayer), herewith petitions to cancel U.S. Trademark Registration No. 3,340,759 for the mark SCHIEDMAYER owned by Piano Factory Group, Inc. (Piano Factory) and registered on November 20, 2007.

In support of this Petition, Schiedmayer hereby alleges as follows:

1. Schiedmayer Celesta GmbH is a limited liability company organized under the laws of the Country of Germany and having offices in Wendlingen, Germany. Schiedmayer Celesta GmbH is the successor in interest to the trademark SCHIEDMAYER dating to its origin in the year 1735. Schiedmayer Celesta GmbH is owned and operated by Elianne Schiedmayer successor to the Schiedmayer name and trademark dating back to its origin in 1735.

2. Upon information and belief, Piano Factory is a California corporation having offices in Burbank, California.

3. Upon information and belief, Piano Factory, the Respondent herein, is engaged in the business of offering for sale pianos.

4. For many years, and long prior to any use or registration or filing of the trademark Schiedmayer by Piano Factory, Schiedmayer and its predecessors in interest have manufactured and sold Schiedmayer keyboard instruments, representing some of the most coveted and respected keyboard musical instruments in the world.

5. For many years and long prior to any use or registration by Piano Factory, Schiedmayer has manufactured and offered for sale the Celesta piano, which

is a piano keyboard instrument having four or five octaves and in which a plate is struck rather than a wire to create sound.

6. Schiedmayer keyboard musical instruments represent the highest degree of quality and reputation. Schiedmayer keyboard musical instruments have been sold and are used by numerous symphonies and orchestras throughout the United States, by way of the following examples:

Boston Symphony, Washington National Symphony, San Francisco Symphony, New York Philharmonic Orchestra, Florida Philharmonic Orchestra, St. Louis Symphony Orchestra, Chicago Symphony Orchestra, Memphis Orchestra, Philadelphia Orchestra and several others.

7. Schiedmayer and its predecessors in interest currently and long prior to any use or registration by Piano Factory, offers for sale and has sold within the United States, Schiedmayer marked keyboard instruments. Among recent purchasers are the following:

Chicago Symphony Orchestra, Detroit Symphony Orchestra, New York Philharmonic, Cleveland Orchestra, New York University, Pittsburgh Orchestra, Paul Simon Arkansas Symphony Orchestra, Cincinnati Symphony and Pops Orchestra.

8. Piano Factory has never had any relationship whatsoever with Schiedmayer.

COUNT I – FALSE ASSOCIATION

Petitioner herewith repeats and realleges paragraphs 1-8 above as fully as set forth herein. Petitioner further states that it is a 'person' within the meaning of Sec. 2 (a) of the Act, Lanham Act Sec. 45, 15 U.S.C. Sec. 1127.

9. Long prior to any use or registration by Piano Factory, the trademark SCHIEDMAYER has been known throughout the world as being associated with the finest musical keyboard instruments ever produced.

10. Petitioner and through its predecessors in interest, owns the exclusive reputation for the mark SCHIEDMAYER.

11. Petitioner herewith states that Respondent's mark sought to be cancelled herein is the same as Petitioner's previously used name or identity.

12. Petitioner further states that the mark SCHIEDMAYER would be recognized as such, in that it points uniquely and unmistakably to the Petitioner.

13. Petitioner is not connected with the goods allegedly sold or the activities performed by the Respondent under the mark SCHIEDMAYER.

14. Petitioner's trademark SCHIEDMAYER is of sufficient fame and reputation that if and when Respondent's mark is used on its goods or services, a connection with Petitioner will be presumed.

15. All of the factors alleged above also existed at the time of registration of the Trademark Registration sought to be cancelled herein.

16. In view of the false association set forth above, Petitioner is being damaged because its right to exclusive use and registration of a mark which points uniquely to the Petitioner is being put in jeopardy, due to the registration of the mark sought to be cancelled herein.

#### COUNT II – ABANDONMENT

Petitioner herewith repeats and realleges Paragraphs 1-8 above as fully as set forth herein.

17. Upon information and belief, Piano Factory Group, Inc. has not used, sold or offered for sale or transported in commerce any of the products set forth in the trademark registration sought to be cancelled herein under the trademark SCHIEDMAYER for at least the past 10 years.

18. Piano Factory has abandoned the trademark SCHIEDMAYER and in view thereof, the subject trademark registration should be cancelled in all respects.

19. Piano Factory has abandoned the trademark SCHIEDMAYER in view of its non-use, and lack of any sales, offers for sale or transport in commerce of the trademark SCHIEDMAYER upon any of the goods set forth in the trademark registration sought to be cancelled herein, for at least the past 10 years and with no intent to establish use of the mark.

20. Petitioner is damaged by the maintenance of a trademark registration for the mark SCHIEDMAYER, which in fact has become abandoned. Petitioner is further damaged because the said trademark registration is being cited against Petitioner in its pending trademark application for the mark SCHIEDMAYER.

In view of all of the above, favorable consideration of this Petition for Cancellation and cancellation of the subject registration is respectfully requested.

Respectfully submitted,



Michael J. Striker  
Attorney for Petitioner  
Reg. No.: 27233  
103 East Neck Road  
Huntington, NY 11743

CERTIFICATE OF SERVICE

It is hereby certified that a true and complete copy of the attached documents was served upon Counsel for the Respondent at his address of record:

Adam R. Stephenson LTD  
40 Baseline Rd. Ste. 101  
Tempe, AZ 85283

This 13<sup>th</sup> day of June, 2016



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Michael Striker