

2020-1196

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

PIANO FACTORY GROUP, INC.
SWEET 16 PROPERTIES, INC.,

Appellants,

– v. –

SCHIEDMAYER CELESTA GMBH,

Appellee.

*On Appeal from the United States Patent and Trademark Office,
Trademark Trial and Appeal Board in No. 92061215*

SUPPLEMENTAL BRIEF OF APPELLEE

MICHAEL J. STRIKER
COLLARD & ROE, P.C.
1077 Northern Boulevard
Roslyn, New York 11576
(516) 365-9802
striker@collardroe.com

Counsel for Appellee

JULY 19, 2021

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

CERTIFICATE OF INTEREST

Case Number 2020-1196

Short Case Caption Piano Factory Group, Inc. v. Schiedmayer Celesta GmbH

Filing Party/Entity Schiedmayer Celesta GmbH (appellee)

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box.** Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 07/19/2021

Signature: /s/ Michael J. Striker

Name: Michael J. Striker

<p>1. Represented Entities. Fed. Cir. R. 47.4(a)(1).</p>	<p>2. Real Party in Interest. Fed. Cir. R. 47.4(a)(2).</p>	<p>3. Parent Corporations and Stockholders. Fed. Cir. R. 47.4(a)(3).</p>
<p>Provide the full names of all entities represented by undersigned counsel in this case.</p>	<p>Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.</p> <p><input type="checkbox"/> None/Not Applicable</p>	<p>Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.</p> <p><input checked="" type="checkbox"/> None/Not Applicable</p>
<p>Schiedmayer Celesta GmbH</p>	<p>Schiedmayer Celesta GmbH</p>	

Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

None/Not Applicable Additional pages attached

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

None/Not Applicable Additional pages attached

Alberto Soler-Somohano v. The Coca-Cola Company, Inc. 2020-1245 (Fed. Cir.)		

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

None/Not Applicable Additional pages attached

TABLE OF CONTENTS

Certificate of Interest.....i

Table of Contents.....iv

Table of Authorities.....v

Introduction..... 1

Argument.....2

Conclusion..... 5

Certificate of Compliance.....6

Certificate of Filing..... 7

TABLE OF AUTHORITIES

Cases	Pages
--------------	--------------

<i>U.S.v.Arthrex</i> 594 U.S. ____ (2021)	1, 2
---	------

Statutes/Rules

Lanham Act	1
Trademark Rule 37 C.F.R 2.129(c)	1
TBMP 518	1
Trademark Modernization Act	1, 2, 3

Other Authorities

Retroactive Legislation: A Primer for Congress R. Lampe. Congressional Research Service (August 15, 2019)	3
---	---

Web v. Den, 58 U.S. 576 (U.S.1854)	3
---------------------------------------	---

INTRODUCTION

By order of this Court dated June 23, 2021, it was requested that the parties explain how they believe their case should proceed in light of the SCOTUS decision recently rendered at *U.S. v. Arthrex*, 594 (2021) No's. 19-1434, 19-1452 and 19-1458. (*Arthrex*)

It is noted that Appellant has filed a Supplemental Brief in which it is argued:

1. The forfeiture issue is stare decisis.
2. The Lanham Act's language prior to the TMA (Trademark Modernization Act) provides no statutory right to rehearing- by the Director or the TTAB

Appellee does not contest what the Appellant has described as a 'forfeiture issue' that is, Appellee is in agreement that there was no waiver in *Arthrex* failing to raise the Constitutional issue before the U.S.P.T.O. It is not believed that in any event this issue was raised in *Arthrex* and therefore is not germane here. As to Appellant's argument that "...the Lanham Act's language prior to the TMA provides no statutory right to rehearing- by the Director or the TTAB." This

appears to be incorrect. Trademark Rule 37 C.F.R. 2.129(c) clearly provides for a Motion for Reconsideration of a Final Decision. See also TBMP 518.

ARGUMENT

The Appellee's reaction to the *Arthrex* decision is essentially twofold:

1. Appellee is of the general belief that the rights and responsibilities of the Director of Trademarks differ so substantially from those of the Director of Patents that *Arthrex* cannot reasonably be used a barometer of the supervisory Rights and obligations of the Director of Trademarks.

In this respect, reference is made to the cogent and compelling arguments made by the Intervenor USPTO in its brief filed June 25, 2020, and specifically pages 38-56 thereof. Appellee adopts and includes by reference those arguments in support of its position in this matter. In view thereof, it would be considered an unnecessary duplication of effort to essentially repeat those arguments previously made and adopted herein.

2. Appellee is of the belief that the provisions of the Trademark Modernization Act should be deemed retroactive in nature, which would result in the Director of Trademarks having de facto the right to affirm, reverse or amend a TTAB final decision, which would result in complete compliance with the provisions of the Appointments Clause.

Indeed, at *Arthrex*, the Supreme Court at page 24 specifically endorsed the TMA as legislation which would obviate any further Constitutional issues.

Appellant argues that the TMA should not be given retroactive effect because there is nothing in the TMA which specifically grants it retroactive status. Appellant further argues that no retroactive status should be given since an individual should have an opportunity to know what the law is (see Appellant's footnote 4).

However, these arguments do not hold water.

First, a civil as opposed to criminal retroactive law does not in itself violate the Ex Post Facto clause contained in article 1, Section 9, Clause 3 of the Constitution.

“While the Ex Post Facto Clause on its face might appear to bar all retroactive legislation, Courts have applied the Clause only to penal laws.....Congress has much greater leeway to enact retroactive legislation in the civil sphere...

Statutes that reach back only a year or two generally do not raise Constitutional Concerns.”- R. Lampe “Retroactive Legislation: A Primer for Congress” (Cited with approval by Appellant at page 4 notation. (Here, retroactivity of the TMA for only a matter of a few months would completely resolve the issue.)

“As long as the operative curative statute does not divest vested rights, it’s retrospective operation will not constitute any objection to its validity.”

-Webb v. Den 58 U.S.576 (U.S. 1854)

The question then arises as to whether a retroactive application of the TMA would divest Appellant of any rights. It would not.

Appellant never had a vested right to support a procedure which is at variance with the provisions of the Appointments clause. Application of the TMA on a retroactive basis, for a period of just a few months would have the curative effect of entirely resolving the situation. (The TTAB decision was rendered on September 11, 2019 and the TMA was signed into law on December 27, 2020, barely three months thereafter.)

CONCLUSION

Appellee endorses and adopts as its own the arguments of the Intervenor as set forth in the Intervenor's brief on file herein.

For the reasons given above, Appellee is of the view that the provisions of the TMA may be given retroactive curative application, which in itself would resolve the situation.

Respectfully submitted,

/s/ Michael J. Striker

Michael J. Striker

Attorney for Appellee

Collard & Roe, P.C.

1077 Northern Blvd.

Roslyn, New York 11576

striker@collardroe.com

ofuchs@collardrow.com

law@collardroe.com

Tel. 516 532 5268

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitations of Fed.R.App.P.32(a)(7)(B) because this brief is 5 pages long and contains 745 words, excluding the parts of the brief exempted by Fed.R.App.P.32(a)(7)(B)(iii) and Local Rule 32(b).

2. This brief complies with the typeface and type style requirements of Fed.R.App.P.32(a)(5) and 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word® 2010 in 14-point Times New Roman font.

July 19, 2021

/s/ Michael J. Striker
Attorney for Appellee
Schiedmayer Celesta GmbH

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 19th day of July, 2021 as required by Federal Rules of Appellate Procedure 25(c)(2) and the Courts May 17, 2012 administrative order Regarding Electronic Case Filing, the foregoing Supplemental Brief of Appellee was served upon all counsel of record via the Courts electronic Filing system.

/s/ Michael J. Striker

Michael J. Striker
Collard & Roe, P.C.
1077 Northern Blvd.
Roslyn, New York 11576
striker@collardroe.com
ofuchs@collardroe.com
law@collardroe.com
Tel: 516 532 5268