

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

Schiedmayer Celesta GmbH,

Cancellation No.: 92/061,215

Petitioner,

Reg. No. 3,340,759

v.

Mark: SCHIEDMAYER

Piano Factory Group, Inc.

Registration Date: November 20, 2007

Respondent.

**RESPONDENT'S REPLY TO PETITIONER'S MOTION TO STRIKE ANSWER
AND FOR DEFAULT JUDGMENT**

Respondent Piano Factory Group, Inc. ("Respondent") hereby submits its reply to Petitioner's Schiedmayer Celesta GmbH ("Petitioner") Motion to Strike Respondent's Answer to Petition and for Default Judgment.

FACTS

Petitioner manufactures celesta and glockenspiel instruments as set forth in the copies of what is believed to be Petitioner's website included as Exhibit 1 to this Reply.

As set forth in Exhibit 1, p. 9, "the Celesta action is completely distinct from an upright-piano action (hammers strike the vertically aligned strings from the side) or a grand-piano action (hammers strike the horizontally aligned strings from below)."

As set forth in Exhibit 1, p. 10 "There are keyboard glockenspiels made by other manufacturers using a piano action (sound plates are struck vertically/from the side) or a grand-piano action (sound plates are struck from below). So it is very misleading to call

these instruments a celesta which unfortunately happens. Schiedmayer does use a full-size grand-piano keyboard but not a grand-piano action.”

As set forth in Exhibit 2, the American Heritage Dictionary defines “piano” as “[a] musical instrument with a manual keyboard actuating hammers that strike wire strings, producing sounds that may be softened or sustained by means of pedals.”

Exhibit 3 contains the American Heritage Dictionary definition of “celesta” as “[a] musical instrument with a keyboard and metal plates struck by hammers that produce bell-like tones.”

Respondent, Piano Factory Group, Inc., does manufacture pianos under the SCHIEDMAYER trademark and sell them to consumers.

As set forth in the Board’s Scheduling Order mailed April 7, 2015, Respondent’s Answer was due May 17, 2015. Respondent filed its answer on May 29, 2015, which was on the 12th day following the due date. The undersigned was retained by Respondent as counsel for this matter on the 27th of May. The Answer was filed two days later.

ARGUMENT

At the outset, the Respondent notes that “[g]ood cause for discharging a default is generally found if (1) the delay in filing is not the result of willful conduct or gross neglect, (2) the delay will not result in substantial prejudice to the opposing party, and (3) the defendant has a meritorious defense.” [Jeffery A. Handelman, *Guide to TTAB Practice* § 14.14 (2015) citing *DeLorme Publishing Co. v. Eartha's Inc.*, 60 USPQ2d 1222, 1223 (TTAB 2001)].

In the present case, it is evident that the Respondent was not willfully refusing to prosecute the present matter or grossly neglecting its responsibilities as Respondent was

working to secure counsel for this proceeding, which occurred on May 27th. Since the answer was filed just two days later it is evident that prompt action was taken following the hiring of counsel. Accordingly, since the delay involved the hiring of counsel for this matter, and the undersigned filed the answer promptly following being retained, these facts establish good cause for the Board to excuse the delay in filing the answer.

Petitioner's motion wholly fails to adduce any facts that would prove, much less suggest, that it was prejudiced in any way by the delay in filing the answer. Petitioner's indignation at the alleged impropriety of such a late filing is not an injury of the kind that can remotely be considered "substantial prejudice."

Respondent has many very meritorious defenses to the cancellation, as set forth in the Answer and in the following discussion. Respondent was very surprised to receive the Petition, as Petitioner does not make pianos. As set forth in Exhibit 2, a piano, or piano-forte, is "[a] musical instrument with a manual keyboard actuating hammers that strike wire strings, producing sounds that may be softened or sustained by means of pedals." This definition indicates that pianos to the purchasing public, are percussion instruments that use keys to move hammers to strike strings to produce the distinctive piano sound. In contrast, a celesta, as set forth in Exhibit 3 is "[a] musical instrument with a keyboard and metal plates struck by hammers that produce bell-like tones." A celesta, when played with hammers striking plates, sounds like a set of bells being rung in order. A celesta is used to play the bell-like tones during Tchaikovsky's "Dance of the Sugar Plum Fairy" from *The Nutcracker*. Because of the bell-like sound of the celesta, no consumer would confuse a piano with a celesta (or a glockenspiel for that matter).

Herein lies Petitioner's major issue with its petition and one of the many grounds supporting Respondent's defenses: Petitioner does not make pianos at all. Exhibit 1 consists of pages from what Respondent believes is Petitioner's website in English which show examples of the celestas and glockenspiels made by Petitioner. Petitioner's website is very careful to teach the purchasing public the difference between a piano (instrument that strikes strings) and the celesta (instrument that strikes metal plates):

Exhibit 1, p. 9, "the Celesta action is completely distinct from an upright-piano action (hammers strike the vertically aligned strings from the side) or a grand-piano action (hammers strike the horizontally aligned strings from below)."

Exhibit 1, p. 10 "There are keyboard glockenspiels made by other manufacturers using a piano action (sound plates are struck vertically/from the side) or a grand-piano action (sound plates are struck from below). So it is very misleading to call these instruments a celesta which unfortunately happens. Schiedmayer does use a full-size grand-piano keyboard but not a grand-piano action."

Given the above, it is evident that Petitioner knows perfectly well that it does not make pianos (piano-fortes) and that it makes only celestas and glockenspiels. Viewed in the most charitable light possible, Petitioner's repeated assertions in the Petition and in its motion to the Board that it manufactures a "Celesta piano" are simply incredibly misleading and disingenuous.

Respondent, then, clearly has meritorious defenses to raise, and, by filing the answer, has indicated its desire to go forward with this proceeding.

Accordingly, Petitioner's motion fails to establish a factual basis sufficient to support the striking of the answer. Respondent has shown the delay in filing the Answer

was due to willful conduct or gross neglect, no substantial prejudice has resulted to Petitioner, and Respondent has numerous meritorious defenses, including that Petitioner does not appear to make pianos at all.

Recognizing that "the law strongly favors determination of cases on their merits" (*DeLorme*, at 1223), the Respondent respectfully requests that Petitioner's Motion to Strike and for Default Judgment be denied.

Dated: June 16, 2015

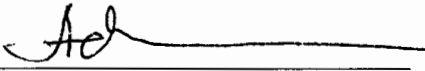
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CERTIFICATE OF SERVICE

It is hereby certified that one (1) copy of the foregoing RESPONDENT'S
RESPONDENT'S REPLY TO PETITIONER'S MOTION TO STRIKE ANSWER AND
FOR DEFAULT JUDGMENT is being sent via U.S. Mail to Petitioner Schiedmayer
Celesta GmbH's attorney of record as follows:

Michael J. Striker
Striker, Striker & Stenby
103 East Neck Road
Huntington, NY 11743

Dated: June 16, 2015



A handwritten signature in cursive script, appearing to read "Michael J. Striker", is written over a horizontal line.