

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

Schiedmayer Celesta GmbH,	)	
	)	
Petitioner,	)	
	)	
v	)	Cancellation No. 92/061,215
	)	Reg. No. 3,340,759
Piano Factory Group, Inc. and	)	Mark: SCHIEDMAYER
Sweet 16 Musical Properties, Inc.,	)	Registration Date: 11/20/2007
	)	
Respondents.	)	
_____	)	

**PETITIONER’S REPLY TO RESPONDENTS REPOSE  
TO PETITIONER’S MOTION TO STRIKE  
AND  
PETITIONER’S RESPONSE TO RESPONDENTS CROSS-MOTION  
TO STRIKE THE DECLARATION TESTIMONY OF ELIANNE SCHIEDMAYER**

Petitioner, Schiedmayer Celesta GmbH (Schiedmayer) hereby replies to Respondents Memorandum in Opposition to Petitioner’s Motion to Strike and further hereby responds to Respondents Cross-Motion to Strike the Declaration Testimony of Elianne Schiedmayer as follows:

**FACTS**

On August 30, 2017, Respondents caused to be filed an Amended Notice to Take Testimonial Cross-Examination by Written Questions of Elianne Schiedmayer. Elianne Schiedmayer, is the owner and CEO of Petitioner, and who had previously given Declaration Testimony during Petitioner’s Testimony in Chief term. Elianne Schiedmayer resides in Germany and is a German National.

The Amended Notice to Take Testimonial Cross-Examination by Written Questions by Respondents filed on August 30, 2017, indicated that Elianne Schiedmayer would answer written questions before a German Notary in Stuttgart, Germany.

On September 12, 2017, Petitioner moved to strike the Amended Notice to Take Testimonial Cross-Examination of Elianne Schiedmayer because it was improper and in fact, contrary to German law to hold such a deposition before a German Notary in Stuttgart, Germany.

Petitioner's Motion to Strike indicated that Elianne Schiedmayer was a willing witness, but that depositions, including depositions upon written questions, in Germany must be taken pursuant to the provisions of The Hague Convention on Taking Depositions Abroad and further must comply with specific requirements of the German Ministry of Justice. Any such depositions must be taken in Frankfurt, Germany before a U.S. Consul and only a U.S. Consul may administer the oath.

In response, Respondents, on September 26, 2017, withdrew the Amended Notice to Take Testimonial Cross-Examination. In view of the withdrawal of the Notice to Take Testimonial Cross-Examination, Petitioner's Motion to Strike may be deemed moot and need not be further considered.

#### RESPONDENTS CROSS-MOTION

In Respondents Response to Petitioner's Motion to Strike, Respondents also filed a Cross-Motion to Strike the Testimony in Chief of Elianne Schiedmayer.

The gist of Respondents Motion is that since a cross-examination on written questions may not be taken of Elianne Schiedmayer, her testimony in chief should be stricken.

### ARGUMENT

Respondents Motion to Strike the Declaration Testimony of Elianne Schiedmayer should be denied for two reasons:

First, Elianne Schiedmayer is and always has been a willing witness ready to submit to a voluntary deposition in Germany.

Second, The Hague Convention on Taking Depositions Abroad and the Laws of the Country of Germany clearly permit the taking of a Deposition on Written Questions in Germany.

Accordingly, Respondents should not be heard to complain that cross-examination testimony of Elianne Schiedmayer in Germany is unavailable.

At the outset, it is well to again set forth the provisions of German law relating to the taking of depositions, including depositions on written questions in Germany. The following is a verbatim statement taken from the website of the

Department of State, Division of Consulate Affairs, in the subheading "Taking Voluntary Depositions of Willing Witnesses:"

"Voluntary depositions may be conducted in Germany before a U.S. Consular Officer only at the U.S. Consulate General in Frankfurt.

Bilateral agreements between Germany and the United States require that the German Ministry of Justice pre-approve all requests for depositions.

Depositions taken without the prior approval of the German Ministry of Justice and/or without the involvement of the United States Mission to Germany are unauthorized and *may lead to criminal penalties against the participants.*

In addition, the German Ministry of Justice requires that all depositions take place on U.S. Consulate grounds and that the oaths be administered by a U.S. Consul."  
( emphasis supplied )

Additionally, it is again emphasized that Elianne Schiedmayer, a German National is a willing witness, willing and looking forward to submitting to a voluntary deposition. Nothing stated in Petitioner's Motion to Strike is contrary thereto. Petitioner did state in its Motion that *if* a witness is unwilling, depositions may still be taken before a German Judge. However, this was only background information as to the requirements of German law. It is amply clear from Petitioner's Motion that Petitioner is willing to submit to a voluntary deposition in Germany, provided the requirements of The Hague Convention and the Germany Ministry of Justice are adhered to:

"If the Respondent seriously wish to take a deposition on written questions of Elianne Schiedmayer, then the Respondent should comply with all of the requirements of The Hague Convention and German law as described above."

-Petitioner's Motion to Strike ,Page 6, penultimate para.

Counsel for the Respondents, Adam Stephenson, states in his Response to Petitioner's Motion that he was "dismayed" to receive Petitioner's Motion to Strike. Stephenson thereafter indicates that he "...does not pretend to be an expert on German Law or The Hague Convention."

The fact is, that hundreds if not thousands of attorneys have utilized the provisions of The Hague Convention to take voluntary depositions in Germany. Whether counsel for Respondents is 'dismayed' or is an expert in The Hague Convention or not is irrelevant. There are any number of professional organizations which will hold counsel's hand through the procedure if necessary. (Planet Depos , Optima Juris, Opus, etc.).

Elianne Schiedmayer is ready, willing and able to voluntarily attend a deposition in Frankfurt, Germany before a U.S. Consul in accordance with the legal requirements of The Hague Convention and the Ministry of Justice of Germany. Indeed, Elianne Schiedmayer is willing to travel the 150 miles from her home to Frankfurt, Germany, at her own expense, to attend such a deposition.

Petitioner will have no objection if Respondents respond to this reply by refiling a correct Notice of Taking Cross-Examination Testimony before the U.S. Consul in Frankfurt, Germany and supplying proof that the notice is being circulated to the required authorities.

Not only is a testimonial deposition in Germany of Elianne Schiedmayer available to Respondents, but also it must be made patently clear that the witness, Elianne Schiedmayer is ready, willing and able to attend any such deposition and looks forward to doing so.

RESPONDENTS MOTION TO STRIKE THE DEPOSITION  
OF ELIANNE SCHIEDMAYER SHOULD BE DENIED BECAUSE RESPONDENT'S  
COME WITH UNCLEAN HANDS

The Doctrine of 'Unclean Hands' may be summarized as follows:

"Unclean hands is a doctrine that prevents one party to a law suit from receiving a particular outcome to a case because that party has also engaged in bad behavior."

-Rottenstein Law Group/Library 2016

"The Unclean Hands Doctrine protects judicial integrity and promotes justice...the defense is available in legal as well as equitable actions. Whether the Doctrine of Unclean Hands applies is a question of fact."

- Kendall-Jackson Winery, Ltd. v. Superior Court (1999), 76 CAL. APB., 4<sup>th</sup> 970,978-79.

Respondents come to Court with unclean hands because on June 14, 2017, counsel for the Petitioner, Michael Striker, notified counsel for the Respondents, Adam Stephenson, via email, that the witness, Elianne Schiedmayer, would be in the U.S. in the month of July of 2017 and that she would be in New York City on July 5, July 6, July 7 and July 8; in Iowa on July 9 and 10, and in St. Louis on July 11, 12, 13, 14 and 15.

Striker invited Stephenson to hold a deposition of Elianne Schiedmayer on any of these dates in either New York City, St. Louis or a city in Iowa to be named.

A copy of the email of June 14, 2017 is attached hereto as Exhibit "A". (The email also shows Petitioner's willingness to produce the witness in Germany . However, at the time of writing the email, counsel for the Petitioner was not aware of the particular requirements involved in taking a German deposition.)

Although it was perfectly clear that Elianne Schiedmayer would be available for a deposition upon any one of 11 days in major cities in the United States, Respondents refused to proceed with her deposition. The timing of any such deposition would have been perfect because the declaration testimony of Elianne Schiedmayer was on the record and was available to Respondents for a period of about one month. Additionally, it is patently obvious, that in making Elianne Schiedmayer available for a deposition, there would be no objection by Petitioner as to whether or not it was actually taken within a given testimony term.

Thus, instead of proceeding with an economical, uncomplicated, simple deposition of Elianne Schiedmayer before a Court Reporter in the United States, counsel for Respondents chose to move instead to strike the Declaration Testimony of the witness, Elianne Schiedmayer, because, being "dismayed" and not being an expert in The Hague Convention or German Law, Respondents cannot be bothered to comply with the requirements clearly spelled out for the taking of a deposition in Germany.

## SUMMARY

Respondents have withdrawn their Notice of Taking Cross-Examination Testimony on Written Questions and therefore, Petitioner's Motion to Strike such a notice is moot.

Respondents Cross-Motion to Strike the Declaration Testimony of Elianne Schiedmayer should be denied because procedures exist under the terms of The Hague Convention and the laws of the Country of Germany for the taking of a deposition before a U.S. Consul in Frankfurt, Germany of the witness, Elianne Schiedmayer. Counsel for the Respondents should not be heard to complain that he cannot be bothered to learn the requirements relative thereto.

The witness, Elianne Schiedmayer, is willing, ready and able to submit to a deposition of any type in Germany, provided that all of the requirements of the Hague Convention and German and U.S. law are adhered to. It is again noted that the taking of a deposition of any kind in Germany which does not fully comply with the requirements of the Hague Convention and relevant German and U.S. law can result in criminal prosecution against the witness and any other participating person.

Respondents also come to Court with unclean hands and should be barred from seeking relief because Respondents refused to take a simple, economical, efficient deposition while the witness was in the U.S., preferring instead to file a spurious, frivolous motion to strike the essential and critical declaration testimony of the witness.

Respondents Motion should be denied in all respects.

Respectfully submitted,

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

Michael J. Striker  
Attorney for Petitioner  
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Roslyn, New York 11576  
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# EXHIBIT A

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Q All Michael Striker, search your mailbox

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Search Web

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Michael



Search results Archive Move v Delete More v



Michael Striker <striker@strikerlaw.com>

Jun 14 at 1:47 PM

To Adam Stephenson

Adam-

Elianne Schiedmayer will be in the U.S. in the month of July.

Mrs. Schiedmayer will be in NYC arrival July 5 to July 8 and in Iowa July 9 and 10.

She will be in St. Louis from July 11 to July 15.

This is a business trip and Mrs Schiedmayer will be extremely preoccupied . Nevertheless, she will be available for a deposition at some convenient time.

If you wish to take an oral deposition consistent with the above itinerary please advise me without delay.

Please note that under the Rules you will be responsible for Court Reporter expenses, your travel expenses, securing a convenient conference room and any other related expenses. I will need to know immediately if you wish to proceed with an oral deposition, together with a list of alternative available dates. Note that the oral deposition can be taken only in New York City, Iowa or St. Louis within the dates set forth above.

The Iowa venue is a short trip and out of the way, so it would be much better to select a date in New York City or St. Louis.

Again, if you wish to proceed in this manner, I will need some available dates from you immediately, so that we can try to fit this into Mrs. Schiedmayers busy schedule.

If you wish to proceed with written questions, please note the requirement for strict compliance with the provisions of FRCP Rule 28 (b). Again, under the Rules, you are solely responsible for any costs relative to proceeding with written questions. Also please note that Mrs., Schiedmayer does not have suitable room so that a conference room within her area of business would be required.

It is my understanding that a duly appointed Officer will read the questions to Mrs. Schiedmayer and her answers will then be transcribed by a duly authorized court reporter.

Finally, I note that your Notice does not appear to comport with 37 CFR 2.124 as it does not set forth the name or descriptive title of the officer before whom the deposition upon written questions will be taken.

Regards,

Michael

CERTIFICATE OF SERVICE

It is hereby certified that a true and complete copy of the attached document was served upon counsel for the Respondents via email to:

[adam@iptech.law](mailto:adam@iptech.law)

This 10<sup>th</sup> day of October, 2017.

  
\_\_\_\_\_  
Michael Striker