

**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 RESPONSE TO PETITIONER'S MOTION FOR SUMMARY
JUDGMENT**

Respondent Piano Factory Group, Inc. ("Respondent") hereby makes its response to Petitioner's Motion for Summary Judgment filed July 22, 2016.

FACTS

The relevant supporting facts for this Response are set forth in the Affidavit of Glenn Treibitz and Exhibits A and B thereto.

ARGUMENT

In its motion, Petitioner argues strenuously that the Board should summarily dispense of this proceeding and strike all of Respondent's motions and responses, including the answer because Respondent is allegedly a suspended corporation, suspended by the Franchise Tax Board of the State of California, and therefore not permitted to defend itself. This is a very drastic remedy, particularly at this stage in the proceeding.

Firstly, as Petitioner fails to discuss in its motion, the Board is not bound by the laws of State of California when deciding whether Respondent has the ability to defend

itself and its property in this federal legal proceeding. Secondly, contrary to Petitioner's assertion in its motion, the property of a suspended corporation is not automatically divested upon suspension. If so, who or what would then hold legal title to assets of the corporation upon suspension? What would then happen to the assets if the corporation cured the breach and was reinstated by the Franchise Tax Board? Petitioner's arguments make no legal sense—they essentially suggest that a suspended corporation loses all its property at the time of suspension and that property then sits in legal limbo permanently thereafter. Such results run counter to public policy favoring the free transfer of property and, at worst, would represent an unconstitutional taking of personal property by the state. Accordingly, Petitioner's arguments regarding the property ownership consequences to a corporation for upon suspension by the Franchise Tax Board of the State of California are not legally or logically well founded.

In any event, Petitioner's entire motion and arguments are totally **legally moot**. As set forth in paragraphs 3 and 4 of the Treibitz Affidavit, in August of 2006, all of the assets of Piano Factory Group, Inc. was assigned for the benefit of creditors to Equitable Transitions, Inc. Sweet 16 Musical Properties, Inc. then purchased those assets from Equitable Transitions, Inc. Exhibits A and B to the Treibitz Affidavit are copies of the relevant documents which are as complete as Respondent currently has been able to locate them in its records.

Accordingly, the legal Respondent in this matter has, at all times, been Sweet 16 Musical Properties, Inc. (Sweet 16) doing business as (DBA) under the fictitious name PIANO FACTORY GROUP. The suspended Piano Factory Group, Inc. currently on the records of the California Secretary of State is simply a left over, undissolved corporation

that holds no assets, including the registration at issue in this case. Because the assignment for benefit of creditors took place before any suspension of the corporation by the Franchise Tax Board, Piano Factory Group, Inc. was perfectly legally able to assign its assets. As indicated by Exhibit C, which is a copy of the current output from the California Secretary of State's website retrieved by the undersigned today, Sweet 16 is not suspended by the California Franchise Tax Board and is listed as an Active corporation. The undersigned is happy, if the Board so requires, to obtain additional certification of this information from the California Secretary of State's office, but it appears to be unnecessary given that Petitioner has relied on the same type of website evidence in its motion. Accordingly, Respondent is producing evidence of the same type and character.

In view of the foregoing, the Board does not need to consider any of the separation of powers issues raised in the Petitioner's motion regarding whether a suspended California corporation has the right to defend itself in a federal administrative proceeding before the Trademark Trial and Appeal Board. The Board should decline to do so in this case and deny Petitioner's motion as being legally moot and/or because substantial questions of fact remain as to the assertions made in Petitioner's motion.

The above information should not come as a surprise to Petitioner. In the Affidavit of Glenn Treibitz filed July 14, 2015 in this proceeding, Mr. Treibitz indicated that he controlled "Piano Factory Group, Inc. ("PFG") the respondent, through its owner Sweet 16 Musical Properties, Inc." 7/14/2015 Treibitz Affidavit, Paragraph 1. This statement should have prompted Petitioner's counsel to make some minimum inquiry from Respondent before filing its Motion for Summary Judgment. Petitioner, however,

did not make any inquiry or take any discovery from Respondent on any of the factual matters underpinning its motion. Had Petitioner's counsel done so, or even simply picked up the phone to ask Respondent's counsel for information regarding the relationship between Piano Factory Group, Inc. and Sweet 16, the Board could have been spared the time considering this legal nullity. The discovery period has not even closed in this matter, so there is still ample time for this to take place. However, Petitioner's approach is consistent with the ambush litigation approach its present counsel has pursued from the beginning in this matter. Unfortunately for Petitioner, this failure to make reasonable inquiry from Respondent has caused Petitioner to needlessly incur legal fees and costs associated with the filing of this futile motion.

Petitioner has filed to record both the assignment to Equitable Transitions, Inc. and the bill of sale to Sweet 16 Musical Properties, Inc. with the USPTO so that the ownership information of the registration at issue can be updated. When the notices of recordation of the documents have been received, Petitioner will file a motion to Change the Name of Respondent in this matter.

Respondent proceeded in this matter under its fictitious business name merely for convenience and not for any fraudulent purpose, as set forth in the Treibitz Affidavit filed herewith. As set forth in TBMP § 512.02, it is actually not required for Respondent to change its name in this proceeding as such a change is permissive and "the proceeding may be continued in the party's old name."

In view of the foregoing, Respondent requests that Petitioner's Motion be summarily denied as being legally moot and/or that Respondent's response raises substantial questions of fact regarding the assertions made Petitioner's Motion.

Dated: August 27, 2016

Respectfully submitted,
/s/ Adam R. Stephenson
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CERTIFICATE OF SERVICE

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

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Dated: August 27, 2015

/s/ Adam Stephenson_____