

2020-1196

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United States Court of Appeals  
for the Federal Circuit

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

*Appellants,*

v.

SCHIEDMAYER CELESTA GMBH,

*Appellee,*

ANDREW HIRSHFELD, Performing the Functions and Duties of the Under  
Secretary of Commerce for Intellectual Property and Director of the United States  
Patent and Trademark Office,

*Intervenor.*

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

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**SUPPLEMENTAL BRIEF OF APPELLANTS PIANO FACTORY  
GROUP, INC. and SWEET 16 MUSICAL PROPERTIES, INC.**

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July 7, 2021

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**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** Piano Factory Group, Inc. and Sweet 16 Musical Properties, Inc.

**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: 07/07/2021Signature: /s/ Adam StephensonName: Adam R. Stephenson

<p><b>1. Represented Entities.</b> Fed. Cir. R. 47.4(a)(1).</p>	<p><b>2. Real Party in Interest.</b> Fed. Cir. R. 47.4(a)(2).</p>	<p><b>3. Parent Corporations and Stockholders.</b> 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>Piano Factory Group, Inc.</p>	<p>Sweet 16 Musical Properties, Inc.</p>	
<p>Sweet 16 Musical Properties, Inc.</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

Soler-Somohano v. Coca-Cola Company, Nos. 19-2414, 20-1406, 20-1688, 20-1245 (Fed Cir. 2020)		

**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


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## INTRODUCTION

By order on 6/23/21 this Court requested that Appellants explain “...how they believe their case[] should proceed in light of [*U.S. v. Arthrex*, 594 U.S. \_\_\_\_ (2021), Nos. 19-1434, 19-1452, 19-1458]...” The Appellants’ in this brief deal only with the implications of *Arthrex*, in the present case, and therefore do not consider the merits of the non-constitutional issues in this appeal. Accordingly, none of the recommendations in this brief should be construed as being an admission regarding the merits of any of the non-constitutional issues in Appellants’ Appeal or Reply Briefs in this matter nor should any adverse inferences be drawn from the arguments presented herein.

## ARGUMENT

Intervenor’s Brief on the constitutional issues in this case presented the following issues:

1. Whether the Appellant forfeited its constitutional challenge to the appointment of the administrative trademark judges of the TTAB by failing to present that challenge to the Board panel in the proceedings below;
2. Whether administrative trademark judges are inferior officers of the United States under the Appointments Clause, rather than principal officers, and therefore may constitutionally be appointed by the Secretary of Commerce.

*Intervenor’s Brief, p. 1-2.*



## **1. The forfeiture issue is *stare decisis***

With respect to Issue 1, certiorari was not granted with respect to this question by the Supreme Court. While the Supreme Court in *Arthrex* vacated this Court's decision in *Arthrex, Inc. v. Smith & Nephew, Inc., et al.*, 941 F.3d 1320 (Fed. Cir. 2019), the granting of cert without taking up Question 3,<sup>1</sup> presented in the Government's cert petition from this Court's decision indicates that the Supreme Court did not believe that Arthrex's failure to raise the Appointments Clause before the Patent Trial and Appeal Board (PTAB) rendered its appeal moot. Rather, the Supreme Court's specifically NOT taking up this issue in the appeal indicates that this Court's previous finding in its *Arthrex* decision was appropriate.

Here, the Appointments Clause issue was likewise not raised before the TTAB but was before this Court in a manner identical to *Arthrex*. Given the Supreme Court left this Court's determination that this manner of raising the constitutional defect in the PTAB's decision undisturbed, this Court should find for Appellants on this issue. In view of the Supreme Court's *Arthrex* actions and its decision, Issue 1 is now *stare decisis* and the issue was timely raised to this Court in this present appeal.

## **2. The statutory scheme for rehearing (and lack thereof) in cancellation proceedings before the USPTO dooms the constitutionality of the appointments of ATJs.**

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<sup>1</sup> 592 U.S. \_\_\_\_ at p. 1-2 (October 13, 2020).

With respect to Issue 2, because the reasoning of the Supreme Court differs from that used by this Court in its original *Arthrex* decision, a *de novo* review of the statutory scheme governing cancellations of trademark registrations on the Principal and Supplemental Registers is required. Much of the argument presented in Intervenor’s Brief and Appellee’s brief on Issue 2 is also now irrelevant. Furthermore, two other intervening events have occurred since the last briefing in this case: 1) the passage of Section 8 of the Trademark Modernization Act of 2020<sup>2</sup> and 2) the USPTO’s interim actions in response to the *Arthrex* decision posted on its website.<sup>3</sup>

Initially, Section 8 of the Trademark Modernization Act of 2020 (TMA) does not contain a specific reference to an implementation date, unlike several other sections of the Act. Section 8 does not explicitly state that the TMA has a retroactive effect either. It would be apparent in view of current case law that for the TMA to apply retroactively to this dispute, a clear statement of congressional intent that the changes to the statutes were intended to be retroactive, and for how long, is required.<sup>4</sup> Accordingly, the Appellant believes the Court should find that the changes to the TMA do not apply retroactively to resolve this dispute.

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<sup>2</sup> Pub. L. 116–260. The TMA was signed into law on 12/27/2020.

<sup>3</sup> <https://www.uspto.gov/patents/patent-trial-and-appeal-board/procedures/arthrex-qas>

<sup>4</sup> See *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), “Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly.” See also Joanna

Furthermore, the explicit language of the statutes that apply to cancellation proceedings for marks on the **Principal Register**, 15 U.S.C. § 1067 must be considered (changes introduced by the TMA in bold, emphasis added):

In such proceedings the Director may refuse to register the opposed mark, may cancel the registration, in whole or in part, may modify the application or registration by limiting the goods or services specified therein, may otherwise restrict or rectify with respect to the register the registration of a registered mark, may refuse to register any or all of several interfering marks, or may register the mark or marks for the person or persons entitled thereto, as the rights of the parties under this chapter may be established in the proceedings. **The authority of the Director under this section includes the authority to reconsider, and modify or set aside, a decision of the Trademark Trial and Appeal Board:** *Provided*, That in the case of the registration of any mark based on concurrent use, the Director shall determine and fix the conditions and limitations provided for in subsection (d) of section 1052 of this title. However, no final judgment shall be entered in favor of an applicant under section 1051(b) of this title before the mark is registered, if such applicant cannot prevail without establishing constructive use pursuant to section 1057(c) of this title. Pub. L. 116–260.

For cancellation proceedings for marks on the **Supplemental Register**, 15 U.S.C. § 1092 states (changes introduced by the TMA in bold, emphasis added):

Marks for the supplemental register shall not be published for or be subject to opposition, but shall be published on registration in the Official Gazette of the Patent and Trademark Office. Whenever any person believes that such person is or will be damaged by the registration of a mark on the supplemental register-

- (1) for which the effective filing date is after the date on which such person's mark became famous and which would be likely to cause dilution by blurring or dilution by tarnishment under section 1125(c) of this title; or
- (2) on grounds other than dilution by blurring or dilution by tarnishment,

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R. Lampe, “Retroactive Legislation: A Primer for Congress,” *Congressional Research Service*, (August 15, 2019) available at <https://fas.org/sgp/crs/misc/IF11293.pdf>, last accessed 7/7/21.

such person may at any time, upon payment of the prescribed fee and the filing of a petition stating the ground therefor, apply to the Director to cancel such registration. The Director shall refer such application to the Trademark Trial and Appeal Board which shall give notice thereof to the registrant. If it is found after a hearing before the Board that the registrant is not entitled to registration, or that the mark has been abandoned, the registration shall be canceled by the Director, unless the Director reconsiders the decision of the Board, and modifies or sets aside, such decision. However, no final judgment shall be entered in favor of an applicant under section 1051(b) of this title before the mark is registered, if such applicant cannot prevail without establishing constructive use pursuant to section 1057(c) of this title. Pub. L. 116–260.

The pre-TMA text includes what is argued in Intervenor’s Brief (p. 50) to be permissive language for the Director’s action in a Principal Register cancellation proceeding. In stark contrast, the language is **mandatory** and non-discretionary in a Supplemental Register proceeding. On the one hand, if the Intervenor is to be believed, the Director theoretically has statutory absolute discretion regarding whether to act on a decision of the TTAB (even her/his/their own decision) to cancel a Principal Register registration. On the other hand, it is clear by statute that the Director **MUST** enter cancellation of a registration on the Supplemental Register entered by a panel of administrative trademark judges (ATJs). This language in Section 1092 is precisely the constitutional defect that the Supreme Court identifies in *Arthrex* as creating the principal officer problem. *Id.* at 21. The cancellation statutory scheme, then, is at war with itself between matters that involve Principal Register registrations versus Supplemental Register registrations.

However, the admitted exotic administrative exercises described in Intervenor’s Brief (see p. 47-52) outlining how the Director can allegedly substantively review TTAB decisions under § 1068 fails entirely to discuss or resolve the § 1092 issue. Furthermore, these machinations are exactly what the majority in *Arthrex* condemned: “[These machinations are] not the solution. [They are] the problem. The Government proposes...a roadmap for the Director to evade a statutory prohibition on review without having him take responsibility for the ultimate decision...Even if the Director succeeds in procuring his preferred outcome, such machinations blur the lines of accountability demanded by the Appointments Clause.” *Id.* at 12.

Numerous “machinations” are required for the Director to attempt to sidestep the absolute statutory prohibition in § 1092 **and also** to engage in the hypothetical process of having the Director *sua sponte* rehear a proceeding under § 1068. The evidence in Intervenor’s Brief indicates that the Director has historically zero interest in rehearing cancellation decisions from the TTAB, as Intervenor’s Brief admits that the current rules 1) provide that the Director decides only non-substantive petitions (see p. 50) and 2) allow for only a “hail Mary” petition route for any substantive issues via 37 C.F.R. § 2.146(a)(3). **All** of the documentation provided by the TTAB in the Trademark Trial and Appeal Board Manual of Procedure (TBMP) indicates the **only routes** for a dissatisfied party in a cancellation proceeding are to request rehearing by the same panel of ATJs (TBMP

§ 804), directly appeal to this Court, or bring a civil action in a Federal District Court. TBMP § 901.01 even characterizes the latter two options as being **the only statutory options**: “A party to a Board proceeding who is dissatisfied with the decision of the Board is provided, under the Act, with two possible (mutually exclusive remedies.”

This characterization is absolutely correct, because, unlike in the statutory scheme governing the PTAB, **the Lanham Act’s language prior to the TMA (and potentially after the TMA) provides no statutory right to rehearing—by the Director or the TTAB**. The only authorization for a rehearing to the TTAB itself is provided by rule in 37 C.F.R. § 2.129(c), with the filing requirement set 30 days after the issuance of the TTAB decision.

The entire absence of a statutory right to rehearing is problematic from a constitutional perspective in view of *Arthrex* because the remedy of the Supreme Court was to require that the statute that governed the right to rehearing before the PTAB be interpreted by this Court to render the provision that PTAB decisions could not be reviewed by the Director unenforceable, while maintaining the statutory right to rehearing. In view of this “tailored approach” to invalidating the statute, the Supreme Court stated: “The Director accordingly may review final PTAB decisions and, upon review, may issue decisions himself on behalf of the Board. Section 6(c) otherwise remains operative as to the other members of the PTAB.” *Id at 21*.

At the time the present case was decided, there was no statute that explicitly granted authority to the TTAB or the Director to accept rehearing requests from litigants before the TTAB. While such a process may have been granted by the USPTO as a matter of courtesy, litigants have no statutory rights nor perhaps does the USPTO have authority to grant rehearings. What the government grants only by rule, it can, using the procedures of the Administrative Procedure Act, simply take away by proper rule making. This assumes, however, that the government had statutory authority to make the rule in the first place.

Unlike the statutory scheme in *Arthrex*, litigants in cancellation proceedings have less legal protection from the power wielded by the panels of ATJs than litigants before APJs. Because there is no rehearing statute for this Court to modify, it appears, from Appellant's reading of the scheme, that even the constitutionally revealing modifications implemented in the TMA will not entirely ensure that litigants will be able to ask the Director to step in and change the already decided decision of any panel of ATJs at his/her/their sole discretion as demanded by the Appointments Clause. The question remains whether, in the absence of a statute granting the TTAB and/or the Director the right to rehear at all, the Director in the present case has the authority to actually rehear this case even with the current rule in place. The permissive words "may cancel the registration" in Section 1068 say nothing at all about any authority the Director has to allow for or grant rehearings.

Frankly, it is only the language added by the TMA to Section 1068 that may give the Director the statutory right to step in and use a post-decision review process, like a rehearing, to change a decision by the ATJs. However, that language did not exist at the time the present case was decided. The relevant rule did not provide any explicit right to request a rehearing before the Director. Stated Office policy is that rehearing is before the same ATJs who heard the case, never the Director. Furthermore, the USPTO's initial response to the *Arthrex* decision is damning—the questions and answers on the USPTO's site clearly indicate that rehearing by the Director in *inter partes* patent matters is a new procedure that never was available before.<sup>5</sup>

Why does this matter? This calculated process of empowering the ATJs at the expense of the Director in the current trademark statutory, regulatory, and operational scheme prevents the Director from being able to step in *sua sponte* and fix or change a result. Instead, as with the APJs in *Arthrex* and in the absence of a rehearing statute, the ATJs exercise even greater unfettered discretion. *Arthrex* is clear that the power to remove the ATJs is a wholly inadequate remedy as it

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<sup>5</sup> “As an interim procedure, similar to the current rehearing procedures under 37 C.F.R. 42.71(d) and Standard Operating Procedure 2, parties may request Director review of a final decision by concurrently (1) entering a Request for Rehearing by the Director into PTAB E2E and (2) submitting a notification of the Request for Rehearing by the Director to the Office by email...” Answer 2, “Arthrex Q&As, available at <https://www.uspto.gov/patents/patent-trial-and-appeal-board/procedures/arthrex-qas> last visited 7/7/21.



“...gives the Director no means of countermanding the final decision already on the books. Nor are [ATJs] ‘meaningfully controlled’ by the threat of removal from federal service entirely...because the Secretary can fire them after a decision only ‘for such cause as will promote the efficiency of the service,’ 5 U.S.C. § 7513(a).” *Id.* at 12. Because of this inability for the Director to review the decisions of the ATJs, they are clearly principal officers under the analysis presented in *Arthrex*.

Appellants believe that, notwithstanding the strenuous exertions the Intervenor and Appellee have made and are likely to make to demonstrate ATJs are merely inferior officers, *Arthrex* summarizes Appellant’s situation in this case best: “In all the ways that matter to the parties who appear before the [TTAB], the buck stops with the [ATJs], not with the Secretary or the Director.”

As Appellants have been denied access to review by the Director through an unconstitutional statutory and regulatory scheme, Appellants request that this Court, should it determine the Director has statutory authority to rehear this case, remand this proceeding to the Director. The Appellants respectfully request that this Court indicate in its order remanding the case, that the Director be barred from further intervention in the remaining merits of this case in any subsequent appeal(s) before this Court should the Director refuse rehearing. If the Director chooses to deny rehearing, then the Director should be bound by that decision before this Court going forward.

## CONCLUSION

For the foregoing reasons, the Appellant respectfully requests that the Court 1) find the ATJs who decided the present case were principal officers in violation of the Appointments Clause, 2) find that interpreting Section 1068 consistent with the language of the TMA amendment thereto cures the constitutional defect as to this particular case, 3) and remand this case to the Director for consideration for rehearing with the instruction that no further intervention by the Director will be permitted in any further appeal(s) before this Court should the Director deny rehearing.

July 7, 2021

Respectfully submitted,

/s/ Adam Stephenson

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

1. This corrected brief complies with the type-volume limitations of Fed. R. App. P. 32(a) because this brief contains 2793 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 updated brief has been prepared in proportionally spaced typeface using Microsoft Word® 2016 in 14-point Times New Roman font.

July 7, 2021

/s/ Adam Stephenson

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*Attorney for Appellant Sweet 16 Musical  
Properties, Inc. and Piano Factory Group*

## CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 7th day of July, 2021, as required by Federal Rule of Appellate Procedure 25(c)(2) and the Court's May 17, 2012 Administrative Order Regarding Electronic Case Filing, the foregoing corrected Supplemental Brief of Appellants was served on all counsel of record via the Court's electronic filing system.

/s/ Adam Stephenson

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