

19-1880

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

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TODD C. BANK

*Appellant,*

v.

AL JOHNSON'S SWEDISH RESTAURANT & BUTIK, INC.,

*Appellee.*

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*Appeal from the United States Patent and Trademark Office,  
Trademark Trial and Appeal Board in Cancellation No. 92069777*

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**APPELLEE'S APPLICATION FOR COSTS UNDER FEDERAL RULE  
OF APPELLATE PROCEDURE 39 AND FOR ATTORNEY FEES  
UNDER FEDERAL CIRCUIT RULE 47.7**

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Katrina G. Hull, Esq.  
MARKERY LAW LLC  
1200 G St, N.W., Suite 800  
Washington, D.C. 20005  
(202) 888-2047

*Attorneys for Appellee*  
December 19, 2019

Appellee Al Johnson's Swedish Restaurant and Butik, Inc. ("Al Johnson's Restaurant"), by its undersigned attorneys, hereby submits its bill of costs under Federal Rule of Appellate Procedure 39 and applies for its attorney fees under Federal Circuit Rule 47.7. Al Johnson's Restaurant respectfully requests that the Clerk of Court issue a mandate that requires Appellant Todd C. Bank's ("Bank") to pay Al Johnson's Restaurant's costs and fees as set forth herein and in the supporting documents filed herewith.

With respect to costs, Al Johnson's Restaurant has completed and herewith submits Federal Circuit Form 24 for its bill of costs and requests that the mandate reflect costs in the amount of \$714.14. The bill of costs is being submitted within 14 days after the entry of judgment on December 9, 2019 (Doc. 43) and is thus timely under Federal Rule of Appellate Procedure 39.

With respect to attorney fees, Al Johnson's respectfully submits that the Clerk of Court has authority to include attorney fees in the mandate because the Federal Circuit decision (Doc. 42) dismissing Bank's appeal also awarded Al Johnson's Restaurant its costs and fees pursuant to Al Johnson's Restaurant's motion against Bank under Federal Rule of Appellate Procedure 38 for filing and arguing a frivolous appeal. Specifically, the Court's decision stated, "we grant Swedish Restaurant's motion for costs and attorney fees, including the costs and attorney fees incurred in relation to the parties'

sanctions motions, and deny Mr. Bank’s motion for sanctions.” Doc. 42 at 9.

This application for fees is also timely because it is being submitted within 14 days after the entry of judgment on December 9, 2019.

In further support of its application for attorney fees, Al Johnson’s Restaurant submits the Declaration of Katrina Hull (“Hull Declaration”) that specifies “(A) the nature of each service rendered; (B) the amount of time expended rendering each type of service; and (C) the customary charge for each type of service rendered.” *See* Federal Circuit Rule 47.7(b)(2)(A)-(C).

As set forth in the Hull Declaration, Al Johnson’s Restaurant respectfully requests that the Clerk of Court issue a mandate that reflects attorney fees in the amount of \$28,523.00 for the legal services rendered to Al Johnson’s Restaurant in this appeal.

Dated: December 19, 2019      Respectfully submitted

/s/ Katrina G. Hull  
Katrina G. Hull, Esq.  
MARKERY LAW LLC  
1200 G St, N.W., Suite 800  
Washington, D.C. 20005  
(202) 888-2047  
katrinahull@markerylaw.com

*Counsel for Appellee Al Johnson’s Swedish  
Restaurant and Butik, Inc.*

Reset Fields

Docket No(s): A. 19-1880 Caption: B. Bank v. Al Johnson's Swedish Rest.

The Clerk is requested to tax the following costs against: C. Todd Bank, Appellant

ITEM	Number of Copies	Number of pages	Actual Cost	Allowable Cost	Total Billed	Total Taxed
Docketing Fee (if paid in this court)			D.			
Table of Designated Materials (original)		E.	F.	6.00		
Table of Compilation of Designated Materials (copying and collating)	G.	H.		0.08		
Brief (original)		E.87	4.99	6.00	434.14	
Brief (cover and binding)	G.10		5.25	2.00	20.00	
Brief (copying and collating)	G.	H.		0.08		
Appendix (original - table of contents)		E.		6.00		
Appendix (covers and binding)	G.			2.00		
Appendix (copying and collating)	G.	H.		0.08		
Reply Brief (original)		E.		6.00		
Reply Brief (covers and binding)	G.			2.00		
Reply Brief (copying and collating)	G.	H.		0.08		
Other (describe): PDF Copy	I.	J.	140.00		140.00	
Color Copies			120.00		120.00	
<b>GRAND TOTALS</b>					714.14	

City/County of MILWAUKEE/MILWAUKEE District/State of WISCONSIN SS \_\_\_\_\_

I, K.: Katrina G. Hull, swear under penalty of perjury that the services for which costs are taxed were

necessarily performed. Itemized statements of the costs incurred or invoices are attached. Copies of this bill were served on all parties. The certificate of service is attached.

Signature: /s/ Katrina G. Hull

Date: December 19, 2019

Attorney for: L.: Al Johnson's Swedish Rest., Appellee

Case: 19-1880 CASE PARTICIPANTS ONLY Document: 44 Page: 4 Filed: 12/19/2019

# Invoice

**Counsel Press Inc.**

PO Box 65019  
 Baltimore, Maryland 21264-5019  
 Phone: (800) 427-7325

Invoice Number: 0009105093

Date: 10/01/2019

Fed. Tax ID: 47-3380949

Terms: ON RECEIPT

**Sold To**

Markery Law, LLC  
 1200 G Street, N.W.  
 Suite 800  
 Washington, DC 20005 USA

Attention: Katrina G. Hull, Esq.

File No.: 290561

Court: USCOA - FC

Case Name: Bank v. Al Johnson's Swedish Restaurant

**Amount**

APPELLEE'S BRIEF AND SUPPLEMENTAL APPENDIX

1.00	Cover(s) - 1st Side	@	\$115.00	\$115.00
3.00	Page(s) Table of Citations	@	\$130.00	\$390.00
87.00	Publishing Per Orginal Pages(s)	@	\$4.99	\$434.13
132.00	Color Photos/Pages - (11 x 12)	@	\$1.00	\$132.00
11.00	Volumes Bound	@	\$5.25	\$57.75
1.00	Docket Tracking	@	\$150.00	\$150.00
1.00	Electronic File Production and Review	@	\$140.00	\$140.00
1.00	Electronic Filing	@	\$45.00	\$45.00
1.00	Filing & 1 Service(s)	@	\$110.00	\$110.00
1.00	Shipping & Handling	@	\$125.00	\$125.00

As a courtesy to client, a \$150.00 discount has been granted on the brief and

03-JK

This Invoice is Due Upon Receipt. Please Show Invoice Number on Check When Submitting Payment.

Subtotal	\$1,698.88
Sales Tax	\$92.93
	\$150.00
Payment/Credit	\$0.00
<b>Balance</b>	<b>\$1,641.81</b>

**DECLARATION OF KATRINA G. HULL**

1. I am an attorney duly admitted to practice law in the State of Wisconsin and I am of counsel with Markery Law, LLC, counsel to the Appellee Al Johnson's Swedish Restaurant and Butiks, Inc. ("Al Johnson's Restaurant").
2. I have personal knowledge of the facts set forth in this declaration.
3. I respectfully submit this declaration in support of Appellee's Application for Attorney Fees under Federal Circuit Rule 47.7.
4. On December 9, 2019, the Federal Circuit granted Al Johnson's Restaurant's Motion for Sanctions Under Rule 38 of the Federal Rules of Appellate Procedure and ordered Appellant Todd C. Bank ("Bank") to pay Al Johnson's Restaurant's costs and fees associated with the appeal and with filing and responding to the motions for sanctions.
5. Markery Law is a trademark boutique based in Washington D.C. Markery Law handles trademark prosecution matters before the U.S. Patent and Trademark ("USPTO") and the USPTO's Trademark Trial and Appeal Board. The attorneys at Markery Law have more than 55 years of combined experience in handling U.S. trademark matters.
6. My practice has focused on trademarks for more than 12 years. Before joining Markery Law, I was a shareholder at an AmLaw 200 law firm and lead the firm's trademark practice group.

7. Since 2016, I have taught the Trademarks and Unfair Competition Course as an Adjunct Professor at Marquette University Law School in Milwaukee.
8. In 2000, I received a B.S. in Journalism in 2000 from the University of Kansas School of Journalism. In 2005, I received my J.D. from the University of Kansas School of Law.
9. I am currently admitted in the following state and federal courts: State of Wisconsin (2005); Eastern District of Wisconsin (2005); Western District of Wisconsin (2005); Federal Circuit (2010); Northern District of Illinois (2011).
10. Markery Law founder Jacqueline Patt has 20 years of experience practicing U.S. trademark law, and she was a partner at an AmLaw 100 law firm before starting Markery Law.
11. In 1994, Attorney Patt received a B.S. in Psychology from the University of Maryland College Park. In 1999, Attorney Patt received a J.D. from the University of Maryland School of Law.
12. Attorney Patt is admitted in the State of Maryland (1999), District of Columbia (2000) and the Federal Circuit (2015).
13. I acted as lead counsel for my firm on this appeal. My hourly rate in this matter is \$320. Attorney Patt's hourly rate in this matter is \$335. Markery Law's hourly rates are significantly lower than for partners at AmLaw 100

and AmLaw 200 firms. Thus, the rates charged by Attorney Patt and me are below market rates for attorneys with a similar level of experience and fair and reasonable for handling an appeal before the Federal Circuit.

14. Together, my firm expended 100.9 hours of time from the commencement of this appeal through preparing and filing Appellee's Brief and Supplemental Appendix, preparing the Motion for Sanctions against Bank, and responding to the Motion for Sanctions filed by Bank.

15. As of the date of this declaration, we have billed Al Johnson's Restaurant \$28,523.00 for our legal services in this appeal.

16. Our firm uses RocketMatter, which is electronic billing software, to record our time and invoice our clients. Attached as Exhibit A is a report generated in RocketMatter that includes all time Attorney Patt and I contemporaneously entered into RocketMatter for our services rendered in this appeal as well as detailed descriptions for each time entry.

17. The time that Attorney Patt and I spent working on this appeal was reasonably necessary to address the allegations and arguments filed by Bank as well as file a Motion for Sanctions against Bank and respond to the Motion for Sanctions filed by Bank.

18. For the reasons set forth above, and based on my experience as a trademark attorney, I believe the charges for the services described and rendered in Exhibit A are the customary charges for handling this type of appeal.

19. I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on December 19, 2019

/s/ Katrina G. Hull  
Katrina G. Hull

# **EXHIBIT A**

Description	User	Billing Date	Rate	Hrs	Amount
Analyze and assess sufficiency of the Notice of Appeal filed by T. Bank to challenge dismissal of the cancellation action; research Federal Circuit appeal process, procedure and timeline; correspondence with L. Johnson to report appeal; time entry of 1 hour reflects discount for 2.5 hours of time to review Federal Circuit appeal process and procedure.	Katrina Hull	5/10/2019	\$320	1	\$320.00
Analyze materials designated by T. Bank for inclusion in appendix and identify additional emails for inclusion in the appendix (.5 hours); research Federal Circuit rules and timeline for preparing appendix and create account for electronic filing with the Federal Circuit (2 hours - no charge).	Katrina Hull	5/24/2019	\$320	0.5	\$160.00
Draft and send email correspondence to T. Bank to provide notice of counter designation for materials to be included in the appendix on the appeal (.5 hours); prepare drafts of the Entry of Appearance, Certificate of Service and Docketing Statement (1 hour - no charge).	Katrina Hull	5/27/2019	\$320	0.5	\$160.00
Finalize and file Entry of Appearance, Certificate of Interest and Docketing Statement (1 hour - no charge); correspondence with T. Bank regarding requirements for preparing appendix in appeal and process for serving documents on appeal, and correspondence with L. Johnson to provide an update on status of the appeal (.5 hours).	Katrina Hull	5/28/2019	\$320	0.5	\$160.00
Analyze appendix prepared by T. Bank and correspondence with T. Bank regarding the same.	Katrina Hull	5/30/2019	\$320	0.2	\$64.00
Telephone call to the Federal Circuit court regarding deadline for responding to Bank's brief; read and report Bank's brief to L. Johnson; begin analysis of cases cited in the brief.	Katrina Hull	7/18/2019	\$320	1.5	\$480.00
Analyze law review article cited in Bank's appeal brief and provide summary regarding the same.	Katrina Hull	7/23/2019	\$320	0.5	\$160.00

Analyze standing arguments and outline response; correspondence with B. Johnson to coordinate research and response on the standing issue on appeal.	Katrina Hull	7/24/2019	\$320	0.5	\$160.00
Analyze and report non-compliance order from the Federal Circuit.	Katrina Hull	7/25/2019	\$320	0.5	No Charge
Analyze cases cited in Bank's brief; draft statement of issues for appeal; begin outlining response.	Katrina Hull	8/5/2019	\$320	2	\$640.00
Research cases on standing to support arguments in brief.	Katrina Hull	8/8/2019	\$320	2.5	\$800.00
Analyze Bank's revised brief and assess status of compliance with deficiency notice; prepare a designate documents for supplemental appendix.	Katrina Hull	8/7/2019	\$320	1	\$320.00
Draft factual summary for brief; draft summary of arguments for brief; outline standing arguments for brief and begin drafting standing section of the brief.	Katrina Hull	8/11/2019	\$320	5	\$1,600.00
Analyze and report deficiency notice from the Federal Circuit; telephone call with Counsel Press regarding assistance with filing and printing brief; correspondence with opposing counsel to request extension of deadline.	Katrina Hull	8/12/2019	\$320	1.5	No Charge
Draft motion for extension of brief deadline and supporting declaration.	Katrina Hull	8/13/2019	\$320	3	\$960.00
Electronically file motion for extension and send service copy to opposing counsel.	Katrina Hull	8/13/2019	\$320	1	No Charge
Compare Bank's final filed brief with previously filed versions of the brief; analyze Bank's arguments and outline response to Bank's functionality arguments.	Katrina Hull	9/13/2019	\$320	2	\$640.00
Draft standing section of the brief and response to Bank's arguments.	Katrina Hull	9/16/2019	\$320	5.5	\$1,760.00

Research case law to support arguments and response for functionality section of the brief; begin drafting functionality arguments and response.	Katrina Hull	9/17/2019	\$320	6	\$1,920.00
Complete drafting functionality section of the brief; revise initial draft of brief and send to client for review; correspondence with Counsel Press to coordinate filing and compliance review.	Katrina Hull	9/18/2019	\$320	6.5	\$2,080.00
Draft certificate of compliance, certificate of interest and certificate of service for the brief; prepare Supplemental Appendix for the brief; draft table of contents for the brief; research federal case law and secondary sources to add additional arguments; draft additional arguments; analyze and revise arguments in the brief.	Katrina Hull	9/19/2019	\$320	6.5	\$2,080.00
Analyze and check cites in the brief; prepare table of contents for the Supplemental Appendix; revise and send final version of the brief and Supplemental Appendix to Counsel Press and coordinate with Counsel Press on filing and service; report filing of the brief.	Katrina Hull	9/20/2019	\$320	2.5	\$800.00
Reviewing draft brief and proposing edits and changes	Jacqueline Patt	9/19/2019	\$335	1.6	\$536.00
Review of final brief; review of correspondence with Ms. Hull regarding motion for damages	Jacqueline Patt	9/20/2019	\$335	0.4	\$134.00
Review of Bank's brief; review of draft response brief and propose edits and changes	Jacqueline Patt	9/18/2019	\$335	3	\$1,005.00
Analyze reply brief filed by Bank; research cases to support filing a motion for a frivolous appeal; report reply brief and option to file for sanctions to Mr. Johnson.	Katrina Hull	9/30/2019	\$320	1	\$320.00
Research cases to support motion for sanctions; outline motion for sanctions; draft summary of cases from the Federal Circuit that grant sanctions for filing a frivolous appeal to use in the argument section of the motion for sanctions.	Katrina Hull	10/10/2019	\$320	3	\$960.00

Research cases against Attorney Banks where sanctions have been requested.	Katrina Hull	10/11/2019	\$320	1	\$320.00
Research arguments that Attorney Banks has made in other cases when standing has been challenged and decisions in those cases.	Katrina Hull	10/15/2019	\$320	1	\$320.00
Draft background section for Motion for Sanctions; begin drafting argument regarding Attorney Bank's misstatements about the issues on appeal and his failure to argue he pleaded a valid basis for cancellation before the Board.	Katrina Hull	10/16/2019	\$320	2	\$640.00
Complete draft of arguments regarding Attorney Bank's misstatements regarding the issues on appeal; draft argument regarding Attorney Bank's improper reliance on a law ruled unconstitutional; draft argument regarding Attorney Bank's illogical statement he is injured by the issuance of a registration; draft arguments regarding the Board's Rule 11 warnings given to Attorney Bank and the Second Circuit ruling upholding sanctions.	Katrina Hull	10/17/2019	\$320	4.5	\$1,440.00
Draft additional arguments in support of motion for sanctions; add cites to the record on appeal; revise and finalize draft of the motion for sanctions; correspondence with L. Johnson to send draft of motion for sanctions.	Katrina Hull	10/18/2019	\$320	2.3	\$736.00
Analyze notice from the Federal Circuit regarding oral arguments and filing a memorandum in lieu of oral arguments; revise motion for sanctions to account for Federal Circuit notice; correspondence providing an update to L. Johnson on oral arguments and sanctions motion.	Katrina Hull	10/21/2019	\$320	1	\$320.00
Research Federal Circuit's treatment of motion for sanctions and requirements to seek consent of opposing party before filing.	Katrina Hull	10/21/2019	\$320	1.5	No Charge
Email Attorney Bank regarding consent to Motion for Sanctions to comply with Federal Circuit rule; prepare for and participate in hour-long phone discussion with Attorney Bank regarding the motion.	Katrina Hull	11/1/2019	\$320	1.2	\$384.00

Draft and send follow-up correspondence to Attorney Bank regarding discussion and consent for Motion for Sanctions.	Katrina Hull	11/4/2019	\$320	0.5	\$160.00
Draft summary of notes from hour-long call with Attorney Bank; prepare strategy for filing Motion for Sanctions without response from Attorney Bank on whether he will consent under the Federal Circuit rule.	Katrina Hull	11/4/2019	\$320	1.5	No Charge
Draft and respond to two letters from Attorney Bank regarding compliance with the Federal Circuit rule to discuss Motion for Sanctions before filing; prepare for and call into conference call line at time requested by Attorney Bank; follow-up correspondence to Attorney Bank to respond to his third letter and to address Attorney Bank's failure to join the conference call at the time he requested.	Katrina Hull	11/5/2019	\$320	2.5	\$800.00
Draft and send response to fourth letter from Attorney Bank; prepare for and call into conference call line at time requested by Attorney Bank; draft declaration regarding correspondence with Attorney Bank and discussion of Motion for Sanctions; revise and finalize Motion for Sanctions; prepare certificate of interest, certificate of compliance and certificate of service for filing with Motion for Sanctions; report filing to L. Johnson.	Katrina Hull	11/6/2019	\$320	3	\$960.00
Formatting Motion for Sanctions, Declaration and Declaration Exhibits for electronic filing; electronic filing and service of Motion for Sanctions.	Katrina Hull	11/6/2019	\$320	1.5	No Charge
Receive and respond to letter from Attorney Bank requesting a discussion on his intended Motion for Sanctions; prepare for and participate in telephone call with Attorney Bank for 1 hour and 15 minutes; respond to follow-up correspondence from Attorney Bank regarding phone call.	Katrina Hull	11/13/2019	\$320	2	\$640.00
Research motions for sanctions filed by and against Attorney Bank in other cases to prepare for phone call with Bank regarding his intent to file a Motion for Sanctions against Al Johnson's Restaurant.	Katrina Hull	11/13/2019	\$320	2.5	No Charge

Read and analyze Bank's Response to the Motion for Sanctions; read and analyze Bank's Motion for Sanctions filed against Al Johnson's Restaurant.	Katrina Hull	11/20/2019	\$320	1	\$320.00
Review letter from Attorney Bank regarding proposed motion for oral arguments; correspondence with Attorney Bank to respond to his letter.	Katrina Hull	11/21/2019	\$320	0.2	\$64.00
Outline Reply in support of the Motion for Sanctions against Bank; outline Response to Bank's Motion for Sanctions against Al Johnson's Restaurant; begin drafting Reply in Support of Motion for Sanctions against Bank.	Katrina Hull	11/22/2019	\$320	1.5	\$480.00
Analyze case discussed in Bank's Response to the Motion for Sanctions; complete draft of Reply in support of Motion for Sanctions against Bank; research cases for Response to Bank's Motion for Sanctions against Al Johnson's Restaurant; draft Response to Bank's Motion for Sanctions; correspondence to L. Johnson to provide an update and send Bank's briefs and drafts of responsive briefs; correspondence with Attorney Bank to respond to his correspondence regarding oral arguments.	Katrina Hull	11/24/2019	\$320	6	\$1,920.00
Revise and finalize Reply in support of Motion for Sanctions against Bank and Response to Bank's Motion for Sanctions against Al Johnson's Restaurant; draft declaration in support of opposition to Bank's Motion for Sanctions; prepare certificates of service and compliance for filing reply and response.	Katrina Hull	11/25/2019	\$320	1.5	\$480.00
Format, electronically file and serve Reply in support of sanctions against Bank and Response in opposition to Bank's sanction's motion.	Katrina Hull	11/25/2019	\$320	1.5	No Charge
Analyze and draft response to Bank's motion for an oral argument.	Katrina Hull	11/26/2019	\$320	1	\$320.00
Format, electronically file and serve response to Bank's motion for oral arguments.	Katrina Hull	11/26/2019	\$320	0.5	No Charge

TOTAL	100.9 \$ 28,523.00
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## CERTIFICATE OF INTEREST

Counsel for Appellee, Al Johnson's Swedish Restaurant & Butik, Inc., certifies the following:

1. Full name of the party represented by me:

**Al Johnson's Swedish Restaurant & Butiks, Inc.**

2. Name of the real party in interest represented by me is:

**N/A**

3. Parent corporations and publicly held companies that own 10% or more of the stock in the party:

**None**

4. The names of the all law firms and the partners or associates that appeared for the party now represented by me in the agency or are expected to appear in this court are:

**Katrina G. Hull and Emily M. Haas of Michael Best and Friedrich LLP appeared before the agency; Katrina G. Hull and Jacqueline L. Patt of Markery Law, LLC are appearing in this Court.**

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal.

**None**

Dated: December 19, 2019

/s/ Katrina G. Hull

Katrina G. Hull

**CERTIFICATE OF SERVICE**

I hereby certify that on December 19, 2019, I filed this document with the Court's CM/ECF filing system, which delivered notice of this filing to the below email address for Appellant Todd C. Bank:

[tbank@toddbanklaw.com](mailto:tbank@toddbanklaw.com)

[ecf@toddbanklaw.com](mailto:ecf@toddbanklaw.com)

I also certify that on December 19, 2019, I sent a copy of this document by U.S. mail to Appellant Todd C. Bank, as follows:

Todd C. Bank  
119-40 Union Turnpike  
Fourth Floor  
Kew Gardens, New York 11415

/s/ Katrina G. Hull  
Katrina G. Hull