

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

TODD C. BANK,

*Petitioner-Appellant,*

v.

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

*Registrant-Appellee.*

Docket No. 19-1880

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**DEC 02 2019**

United States Court of Appeals  
For The Federal Circuit

**APPELLANT'S REPLY IN SUPPORT OF MOTION FOR  
ORAL ARGUMENT ON THE APPEAL AND, IF ADVISABLE,  
ON THE PARTIES' MOTIONS FOR SANCTIONS**

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By: Todd C. Bank

*Counsel to Petitioner-Appellant*

## **INTRODUCTION**

Appellant, Todd C. Bank (“Bank”), submits this reply in support of his motion (Doc. 36) for the scheduling of oral argument on the appeal and, if advisable, on the parties’ motions for sanctions.

## **ARGUMENT**

### **POINT I**

#### **THE IMPORTANCE OF THE ISSUES BEFORE THIS COURT WARRANTS ORAL ARGUMENT**

Appellee, Al Johnson’s Swedish Restaurant & Butik, Inc. (the “Restaurant”), notes, in its opposition (“Rest. Opp.,” Doc. 37), that the Notice of Submission without Oral Argument (Doc. 30) “provided the parties until November 4, 2019 to submit memorandums in lieu of oral arguments or a motion to request an oral argument.” Rest. Opp. at 3. Bank’s oversight of that date was inadvertent (as Bank had read the email’s text without clicking the link to the notice), and respectfully requests that the Court consider the significance of the issues that this appeal concerns: (i) whether the lack of a right to assert, for the *merits* of a challenge to a trademark, a particular basis, *i.e.*, offensiveness in this case, precludes that basis from being the grounds for the challenger’s *standing*; (ii) whether a mark, if otherwise functional, ceases to be functional if its functionality also applies to goods or services of industries other than the industry of the markholder, *i.e.*, here, the restaurant and/or gift-shop industry; (iii) whether, in order to challenge a mark on the basis that the mark is functional, the

challenger must be a competitor of the markholder or a would-be user of the mark, or have a current or prospective right or interest in using the mark; and (iv) whether a form of entertainment that, as its primary effect, increases customers' enjoyment of a business's goods or services, as opposed to identifying the source of those goods or services, may be trademarked as a "mere aesthetic feature."

**POINT II**

**APPELLANT REQUESTS, IF DEEMED ADVISABLE BY THE COURT,  
ORAL ARGUMENT ON THE PARTIES' MOTIONS FOR SANCTIONS**

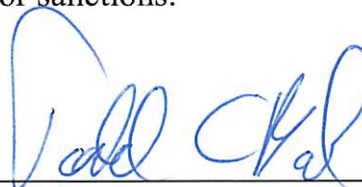
With respect to the Restaurant's motion for sanctions (Doc. 31), Bank has explained, in his opposition (Doc. 32) and his motion for sanctions (Doc. 33), that the Restaurant's motion is frivolous and vexatious. Accordingly, Bank requests oral argument on the motions if Bank's opposition/motion has not, in the Court's views, sufficiently addressed the bases of the Restaurant's and/or Bank's motions.

**[continued on next page]**

**CONCLUSION**

Appellant respectfully requests that the Court schedule oral argument on the appeal and, if advisable, on the parties' motions for sanctions.

Dated: November 29, 2019



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*Counsel to Petitioner-Appellant*

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Bank v. Al Johnson's Swednsh Rest.

Case No. 19-1880

**CERTIFICATE OF INTEREST**

Counsel for the:

(petitioner)  (appellant)  (respondent)  (appellee)  (amicus)  (name of party)

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
Todd C. Bank	Todd C. Bank	N/A

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (and who have not or will not enter an appearance in this case) are:

Todd C. Bank  
Todd C. Bank, Attorney at Law, P.C.

FORM 9. Certificate of Interest

Form 9  
Rev. 10/17

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. *See Fed. Cir. R. 47. 4(a)(5) and 47.5(b).* (The parties should attach continuation pages as necessary).

N/A

11/29/2019

Date



Signature of counsel

Todd C. Bank

Printed name of counsel

Please Note: All questions must be answered

cc: \_\_\_\_\_

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 29, 2019, a true and accurate copy of the foregoing was served, by the overnight delivery service of Federal Express, on the following:

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Markery Law, LLC  
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Dated: November 29, 2019

  
\_\_\_\_\_  
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November 29, 2019

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Docket No. 19-1880**

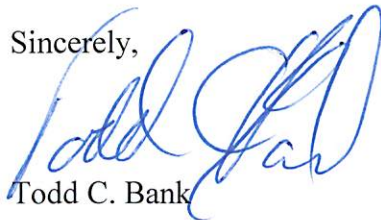
Dear Sir or Madam:

I am the appellant in the above-referenced appeal. Enclosed are the following:

1. Appellant's reply in support of Appellant's motion for sanctions; and
2. Appellant's reply in support of Appellant's motion for oral argument.

Thank you.

Sincerely,



Todd C. Bank

Enclosures

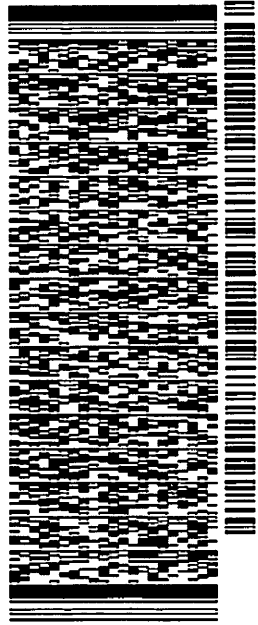


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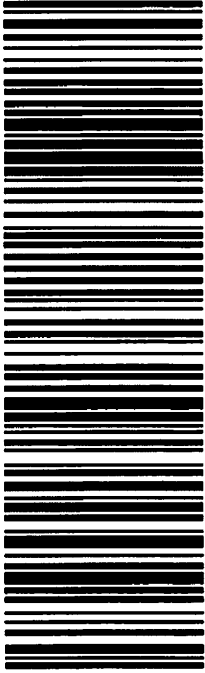
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