

**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 31 2019

United States Court of Appeals
For The Federal Circuit

**APPELLANT'S MOTION FOR AN ORDER DIRECTING
THE CLERK NOT TO ACT UPON THE REQUEST,
IN APPELLEE'S APPLICATION FOR COSTS AND
ATTORNEY FEES, TO INCLUDE, IN THE MANDATE,
THE AMOUNT OF ATTORNEY FEES THAT APPELLEE
IS SEEKING; AND, CONFIRMING THAT APPELLANT'S
TIME TO RESPOND TO THE APPLICATION FOR
ATTORNEY FEES SHALL BE DETERMINED BY THE
COURT PURSUANT TO FEDERAL CIRCUIT RULE 47.7(a)(3)**

TODD C. BANK,
ATTORNEY AT LAW, P.C.
119-40 Union Turnpike
Fourth Floor
Kew Gardens, New York 11415
(718) 520-7125
tbank@toddbanklaw.com
By: Todd C. Bank

Counsel to Appellant

INTRODUCTION

Appellant, Todd C. Bank (“Bank”), moves for an order: (i) directing the Clerk not to act upon the request, in Appellee’s application for costs and attorney fees, to include, in the mandate, the amount of attorney fees that Appellee is seeking; and (ii) confirming that Bank’s time to respond to the application for attorney fees shall be determined by the Court pursuant to Federal Circuit Rule 47.7(a)(3).

ARGUMENT

POINT I

THE COURT, NOT THE CLERK, HAS THE AUTHORITY TO DETERMINE THE AMOUNT OF ATTORNEY FEES TO BE INCLUDED IN THE MANDATE

On December 19, 2019, Appellee, Al Johnson’s Swedish Restaurant & Butik, Inc. (the “Restaurant”), filed “Appellee’s Application for Costs under Federal Rule of Appellate Procedure 39 and for Attorney Fees under Federal Circuit Rule 47.7” (the “Restaurant’s Application”; Doc. 44), wherein the Restaurant “requests that the *Clerk of Court issue a mandate that requires Appellant . . . to pay [the] Restaurant’s costs and fees as set forth herein and in the supporting documents filed herewith.*” Restaurant’s Application at 2 (emphases added).

The Restaurant further states:

With respect to attorney fees, [the Restaurant] 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 [the Restaurant] its *costs and fees* pursuant to [the] 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 [the] 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.

Id. at 2-3 (emphases added).

The Restaurant further states: "[a]s set forth in the Hull Declaration [(i.e., the Declaration of Katrina G. Hull, counsel to the Restaurant)], [the] 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 [the] Restaurant in this appeal.*" Restaurant's Application at 3 (emphases added).

First, it is axiomatic that costs are distinct from attorney fees. Indeed, the Court, in awarding sanctions, repeatedly described those sanctions as costs *and* attorney fees. *See* order granting sanctions dated December 9, 2019 (Doc. 42), at 8 ("[the] Restaurant moves for its costs *and* attorney fees under Federal Rule of Appellate Procedure 38") (emphasis added)); *id.* at 9 ("we grant [the] Restaurant's motion for costs *and* attorney fees, including the costs *and* fees incurred in relation to the parties' sanctions motions") (emphases added)); *id.* ("[c]osts *and* attorney fees to [the] Restaurant") (emphasis added)).

Second, the amount of attorney fees that are awarded pursuant to Rule 38 must be "reasonable," *Nasatka v. Delta Scientific Corp.*, 58 F.3d 1578, 1582 (Fed. Cir.

1995), and, as such, must be decided by the Court, not the Clerk. *See Blanchard v. Bergeron*, 489 U.S. 87, 96 (1989) (observing, with respect to the award of fees under 28 U.S.C. § 1988: “[f]ee awards are to be reasonable, reasonable as to billing rates and reasonable as to the number of hours spent in advancing the successful claims. Accordingly, fee awards, properly calculated, by definition will represent the reasonable worth of the services rendered It is *central* to the awarding of attorney’s fees under § 1988 that the . . . *court* . . . , in [its] good *judgment*, make the assessment of what is a *reasonable fee under the circumstances of the case*” (emphases added)).

POINT II

APPELLANT’S OPPORTUNITY TO RESPOND TO APPELLEE’S APPLICATION FOR ATTORNEY FEES, THE TIMING OF WHICH IS TO BE DECIDED BY THE COURT, IS A CONDITION OF THE AWARD OF ANY SUCH FEES

Whereas the Restaurant’s motion for sanctions (Doc. 31), and this Court’s granting of that motion, were pursuant to Rule 38 of the Federal Rules of Appellate Procedure, the Restaurant’s Application, insofar as it seeks attorney fees, is governed by Federal Circuit Rule 47.7, as contrasted with that portion of the Restaurant’s Application that seeks costs, which is governed by Rule 39 of the Federal Rules of Appellate Procedure and Federal Circuit Rule 39. Indeed, the Restaurant’s Application reflects this distinction in stating that, “[the] Restaurant . . . 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*,” Restaurant’s Application at 2 (emphases added), and in complying with Rule 47.4(b)(2), which governs all applications for attorney fees other than those that are made under the Equal Access to Justice Act (which are governed by Rule 47.4(b)(1)).

The Restaurant, inconsistent with its seeming recognition that applications for attorney fees are governed by Federal Circuit Rule 47.7, also states that: “[t]his *application for fees* is also *timely* because it is being submitted *within 14 days after the entry of judgment* on December 9, 2019.” Restaurant’s Application at 3 (emphases added). On the contrary, whereas Rule 39(d)(1) of the Federal Rules of Appellate Procedure states that, “[a] party who wants *costs* taxed *must—within 14 days after entry of judgment—file with the circuit clerk and serve an itemized and verified bill of costs*” (emphases added), Federal Circuit Rule 47.7(a)(2) addresses the time for filing a request for attorney fees (and does so in a manner very different than does Fed. R. Civ. P. 39 with respect to costs).

The only difference between an application for attorney fees that follows the granting of a *motion* for such fees and an application that follows a *sua sponte* granting of such fees concerns the *other party’s response* to the application. In the event of a *sua sponte* award, “[a]ny objection must be filed *within the time prescribed in Federal Rule of Appellate Procedure 39*,” Fed. Cir. R. 47.7(a)(4) (emphasis added)), whereas, in the event of an award upon a party’s motion, *i.e.*, in the present case, “[n]o response

may be filed to an application for attorney fees and expenses *unless directed by the court*, but *no application will be granted* without the court giving the party an *opportunity to submit a response.*” Fed. Cir. R. 47.7(a)(3) (emphases added).

CONCLUSION

Appellant requests that the Court issue an order: (i) directing the Clerk not to act upon the request, in Appellee’s application for costs and attorney fees, to include, in the mandate, the amount of attorney fees that Appellee is seeking; and (ii) confirming that Appellant’s time to respond to the application for attorney fees shall be determined by the Court pursuant to Federal Circuit Rule 47.7(a)(3).

STATEMENT OF OPPOSITION

On December 30, 2019, Katrina G. Hull, counsel to the Restaurant, informed Bank, by email, that the Restaurant does not consent to the motion, but did not state whether the Restaurant anticipated that it would oppose the motion.

Dated: December 30, 2019



TODD C. BANK,
ATTORNEY AT LAW, P.C.
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Fourth Floor
Kew Gardens, New York 11415
(718) 520-7125
tbank@toddbanklaw.com
By: Todd C. Bank

Counsel to Petitioner-Appellant

FORM 9. Certificate of Interest

Form 9
Rev. 10/17

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

12/30/2019

Date

Signature of counsel

Todd C. Bank

Printed name of counsel

Please Note: All questions must be answered

cc: _____

Reset Fields

DECLARATION OF TODD C. BANK

1. On December 30, 2019, I exchanged emails with Katrina G. Hull (a copy of which is annexed as Exhibit “A” hereto), counsel to the Restaurant, pursuant to Federal Circuit Rule 27(a)(5). Ms. Hull stated, in relevant part, as follows:

I don’t consent to your motion because I believe your motion is unnecessary.

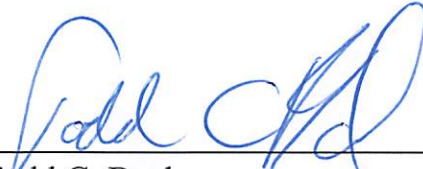
Federal Circuit Rule 47.7 (a)(3) states:

Response. No response may be filed to an application for attorney fees and expenses unless directed by the court, but no application will be granted without the court giving the party an opportunity to submit a response.

You are welcome to file whatever motion you feel is necessary to confirm the application of the rule.

2. Ms. Hull, by quoting Federal Circuit Rule 47.7(a)(3), has apparently taken the position that my right to respond to the Restaurant’s request for attorney fees is to be exercised *after the Clerk includes the requested attorney fees in the mandate*. It is difficult, however, to believe that Ms. Hull has taken this position in good faith, as it is indisputable, and a matter of common knowledge, that the Clerk does not have that authority.

Pursuant to 28 U.S.C. Section 1746, I declare under penalty of perjury that the foregoing is true and correct.



Todd C. Bank
Executed on December 30, 2019

CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2019, a true and accurate copy of the foregoing was served, by the overnight delivery service of Federal Express, on the following:

Katrina. G. Hull
Markery Law, LLC
1200 G St, N.W., Suite 800
Washington, D.C. 20005

Dated: December 30, 2019



Todd C. Bank

12/30/2019 Case: 19-1880 Document# 481 Management# 14ur Labelled: 12/31/2019 (11 of 16)

ORIGIN ID:HTOA (718) 520-7125
TODD C. BANK, ATTORNEY AT LAW, P.C.

SHIP DATE: 30DEC19
ACTWGT: 1.00 LB
CAD: 102449297/INET4160

119-40 UNION TURNPIKE
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KEW GARDENS, NY 11415
UNITED STATES US

BILL SENDER

TO **CLERKS OFFICE**
FEDERAL CIRCUIT COURT OF APPEALS
717 MADISON PLACE NW
ROOM 401
WASHINGTON DC 20439

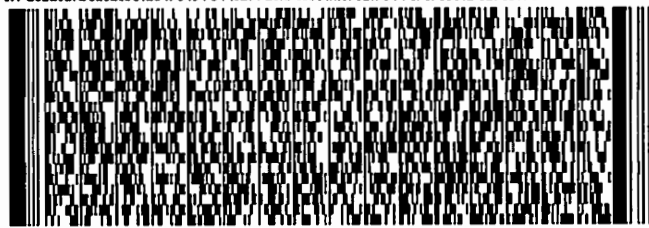
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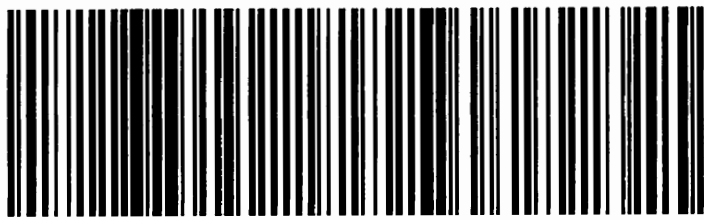
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For The Federal Circuit

EXHIBIT “A”

**Email Exchange Between
Todd C. Bank and Katrina G. Hull**

December 30, 2019

Subject: RE: Bank v. Al Johnson's Swedish Rest.
From: Katrina Hull <katrinahull@markerylaw.com>
Date: 12/30/2019, 3:26 PM
To: "Todd C. Bank" <tbank@toddbanklaw.com>
CC: Jacqueline Patt <jackiepatt@markerylaw.com>

Attorney Bank,

I am not available for discussion today. I don't consent to your motion because I believe your motion is unnecessary.

Federal Circuit Rule 47.7(a)(3) states:

Response. No response may be filed to an application for attorney fees and expenses unless directed by the court, but no application will be granted without the court giving the party an opportunity to submit a response.

You are welcome to file whatever motion you feel is necessary to confirm the application of the rule.

Regards,

Katrina

Katrina G. Hull, Esq.
Markery Law, LLC
t: 202-888-2047 (Direct)
KatrinaHull@MarkeryLaw.com

From: Todd C. Bank <tbank@toddbanklaw.com>
Sent: Monday, December 30, 2019 8:16 AM
To: Katrina Hull <katrinahull@markerylaw.com>
Subject: Bank v. Al Johnson's Swedish Rest.

Ms. Hull:

Please let me know of your availability today to discuss, pursuant to Local Rule 27(a)(5), my anticipated motion for an order directing the clerk not to respond to Appellee's request that the clerk determine the amount of attorney fees to be awarded to Appellee, and confirming that my time to respond to the application for attorney fees shall be determined by the Court.

Because I need to serve the motion today, we will need to speak today.

Sincerely,

Todd C. Bank
Attorney at Law
119-40 Union Turnpike
Fourth Floor
Kew Gardens, New York 11415
Telephone: (718) 520-7125
Facsimile: (856) 997-9193
tbank@toddbanklaw.com

CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2019, a true and accurate copy of the foregoing was served, by the overnight delivery service of Federal Express, on the following:

Katrina. G. Hull
Markery Law, LLC
1200 G St, N.W., Suite 800
Washington, D.C. 20005

Dated: December 30, 2019



Todd C. Bank

TODD C. BANK, ATTORNEY AT LAW, P.C.
119-40 Union Turnpike, Fourth Floor
Kew Gardens, New York 11415
Telephone: (718) 520-7125
Facsimile: (856) 997-9193

www.toddbanklaw.com

tbank@toddbanklaw.com

December 30, 2019

Clerk of Court
United States Court of Appeals
for the Federal Circuit
717 Madison Place NW
Washington, DC 20439
Room 401

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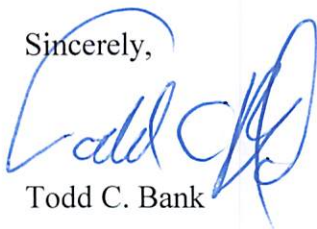
**Re: Todd C. Bank v. Al Johnson's Swedish Restaurant & Butik, Inc.
Docket No. 19-1880**

Dear Sir or Madam:

I am the appellant in the above-referenced appeal. Please add the attached material to the motion that I filed, which is dated December 30, 2019.

Thank you.

Sincerely,



Todd C. Bank

Enclosure

(16 of 16)

Case: 19-1880 Document: 4812 Management: 12/31/2019

12/30/2019

ORIGIN ID:HTOA (718) 520-7125
TODD C. BANK, ATTORNEY AT LAW, P.C.

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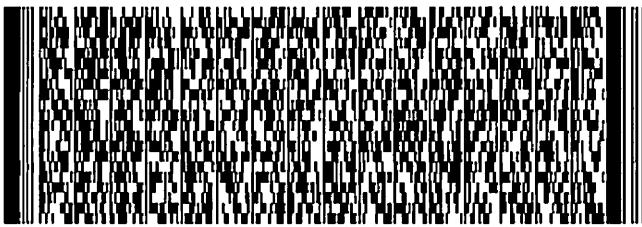
TO **CLERKS OFFICE**
FEDERAL CIRCUIT COURT OF APPEALS
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