

2019-1880

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

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**BRIEF AND SUPPLEMENTAL APPENDIX  
FOR APPELLEE**

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SEPTEMBER 20, 2019

## 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 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: September 20, 2019

/s/ Katrina G. Hull

Katrina G. Hull

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## **STATEMENT OF RELATED CASES**

Pursuant to Federal Circuit Rule 47.5, Appellee certifies that there have been no previous appeals in this case. Appellee is unaware of any case that will directly affect or be directly affected by the Court's decision in this case.

## **I. COUNTERSTATEMENT OF THE ISSUES**

Appellee Al Johnson’s Swedish Restaurant and Butiks, Inc. (“Al Johnson’s Restaurant”) disagrees with Appellant Todd C. Bank’s (“Bank”) statement of the issues. Pursuant to Federal Circuit Rule 28(b), Al Johnson’s Restaurant submits that the following issues are on appeal:

Whether the Trademark Trial and Appeal Board (the “Board”) properly dismissed Bank’s petition to cancel U.S. Trademark Registration No. 2,007,624 (the “Goats on the Roof Restaurant Décor Registration”) for failure to plead standing?

Whether the Board properly dismissed Bank’s petition to cancel the Goats on the Roof Restaurant Décor Registration for failure to plead the building décor trade dress is functional?

## **II. COUNTERSTATEMENT STATEMENT OF THE CASE**

Trade dress refers to the image or appearance of a business, including the exterior décor of a restaurant, that identifies and distinguishes the source of services. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 764 n.1 (1992); *see also Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 209 (2000) (explaining that trade dress constitutes a “symbol” or “device” under Section 45 of the Lanham Act, 15 U.S.C. § 1127 that may be registered as a trademark). Al



Johnson's Restaurant owns a federal registration for its unique building décor trade dress for its restaurant services. SAppx002-007.

Al Johnson's Restaurant owns U.S. Trademark Registration No. 2,007,624 for a trade dress mark that "consists of goats on grass roof," as shown below, for "restaurant services" in International Class 42 ("Goats on the Roof Restaurant Décor Registration" refers to the federal registration and "Goats on the Roof Restaurant Décor" refers to the underlying restaurant décor trade dress):



Appx2, SAppx002-003.<sup>1</sup> The description of the mark also explains that the "dotted lines in the drawing are intended to indicate the location of the mark and are not a feature of the mark." Appx3, SAppx002. The Goats on the Roof Restaurant Décor Registration issued on October 15, 1996 and alleges June 1, 1973 as the date of first use in commerce for the trade dress. Appx2, SAppx002-003.

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<sup>1</sup> Bank did not include a copy of Reg. No. 2,007,624 for the Goats on the Roof Restaurant Décor Registration in his Appendix as required by Federal Circuit Rule 30(a)(3)(C). A copy of Reg. No. 2,007,624, and a copy of the Trademark Status & Document Retrieval (TSDR) record and select portions of the prosecution history for this registration are included in the Supplemental Appendix to provide this Court with a full record. SAppx002-015, Appx024-25.

The Goats on the Roof Restaurant Décor in use by Al Johnson's Restaurant as submitted to the USPTO in connection with the renewal of the Goats on the Roof Restaurant Décor Registration filed on October 12, 2016 is shown here:



SAppx011-013, Appx25.

This is the third petition that Bank has filed with the Board to cancel the Goats on the Roof Restaurant Décor Registration. In 2011 and again in 2012, Bank filed petitions with the Board on behalf of Robert Doyle, a photographer alleging his desire to photograph goats on grass roofs. SAppx016-033.<sup>2</sup> In a precedential decision dismissing the 2011 petition, the Board found that Bank's client Doyle failed to plead standing and failed to plead the Goats on the Roof Restaurant Décor Registration is functional. *Doyle v. Al Johnson's Swedish Restaurant and Butik, Inc.*, No. 92054059, 2012 WL 695211, at \*4 (T.T.A.B. Feb. 10, 2012).<sup>3</sup> The Board

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<sup>2</sup> The 2011 and 2012 pleadings were attached as Exhibit A to Al Johnson's Restaurant's Motion to Dismiss filed on November 28, 2018. Appx23.

<sup>3</sup> The 2012 precedential Board decision applied to the Goats on the Roof Restaurant Décor Registration, No. 2,007,624, and the Goats on the Roof Retail Store Décor Registration, No. 3,942,832.

granted Bank leave to amend in *Doyle*, and Bank filed a second petition to cancel the Goats on the Roof Restaurant Décor Registration on March 1, 2012.

SAppx025-033. The Board dismissed the 2012 petition with prejudice on July 12, 2012 for failure to plead standing but did not address the claim of functionality.

SAppx034-042.

Then, on October 12, 2018, Bank as attorney and client, filed a third petition (the “Petition”) with the Board to cancel the Goats on the Roof Restaurant Décor Registration, No. 2,007,624.<sup>4</sup> Appx14-16, SAppx001. In the March 27, 2019 order on appeal before this Court, the Board found that Bank failed to plead his standing and dismissed his Petition to cancel the Goats on the Roof Restaurant Décor

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<sup>4</sup> The electronic “cover sheet” of Bank’s 2018 Petition identified only Reg. No. 2,007,624. SAppx001. Parties are required to file cancellations online with the Board and complete an online form that generates a cover sheet for the filing. *See* TBMP § 309.02. The information identified in the cover sheet controls the scope of the proceeding. *See* TBMP §§ 308.01(a), 308(02)(b). Bank also failed to include the cover sheet for his 2018 Petition in the Appendix. Appx14-16. The Board’s order dismissing Bank’s 2018 Petition identifies only Reg. No. 2,007,624. Appx2-3. The text of Bank’s 2018 Petition, however, listed a second registration, Reg. No. 3,942,832, also owned by Al Johnson’s Restaurant, for the same Goats on the Roof Décor trade dress. Appx14-16. Reg. No. 3,942,832 is for “retail store and online retail store services featuring gifts, food, clothing, toys, linens, dolls, books and music” (the “Goats on the Roof Retail Store Décor Registration”). Appx17-18. Because Bank did not identify Reg. No. 3,942,832 (the Goats on the Roof Retail Store Décor Registration) in the cover sheet of his filing with the Board, the Board did not address the Goats on the Roof Retail Store Décor Registration in the order on appeal before this Court. SAppx001, Appx2.

Registration under Federal Rule of Civil Procedure 12(b)(6). Appx8. The first four paragraphs in the Petition relate to Bank's alleged standing:

1. Bank believes that the granting to, or possession by, a person (here, and with respect to all other references to persons, "person" is used as defined in 15 U.S.C. § 1127) of a trademark, including a service mark (each, a "mark"), that applies to the activity of an animal (as opposed to a trademark that is merely a representation of such activity) is demeaning to the type of animal that is the subject of such mark.

2. The demeaning of animals in the manner set forth in the previous paragraph is offensive to Bank and denigrates the value he places on the respect, dignity, and worth of animals.

3. Numerous persons believe that the granting to, or possession by, a person of a mark that applies to the activity of an animal is demeaning to the type of animal that is the subject of such mark.

4. The demeaning of animals in the manner set forth above is offensive to numerous persons and denigrates the value they place on the respect, dignity, and worth of animals.

Appx15.

The Board's second ground for dismissing Bank's 2018 Petition was that Bank failed to allege the Goats on the Roof Restaurant Décor Registration is functional<sup>5</sup>. Appx10. Paragraphs 5 through 10 of Bank's 2018 Petition relate to the alleged functionality of the Goat's on the Roof Restaurant Décor Registration:

5. The primary use of the Marks is as a form of entertainment that increases, to customers, the appeal of Registrant's place of

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<sup>5</sup> As the Board noted in its 2019 decision, Bank acknowledged that "functionality is the only asserted ground for cancellation in the petition to cancel." Appx3.

business, which is Al Johnson's Swedish Restaurant & Butik (the "Establishment").

6. To whatever extent the Marks serve as identification with respect to the Establishment, such service is not the primary effect of the Marks, and such service pales in comparison to the provision, by the Marks, of entertainment that increases, to customers, the appeal of the Establishment.

7. The use of the Marks as a form of entertainment that increases, to customers, the appeal of the Establishment is unique.

8. The use of the Marks as a form of entertainment that increases, to customers, the appeal of the Establishment is functional.

9. The use of the Marks as a form of entertainment that increases, to customers, the appeal of the Establishment is superior to other methods.

10. The placement of goats on a grass roof negates or ameliorates, due to the goats' grazing, the need to cut the grass, and is thus economically advantageous and, therefore, functional.

Appx15-16.

The Board's March 27, 2019 order allowed Bank to "file and serve an amended petition to cancel that properly pleads his standing and states a valid claim for relief, if Petitioner has a sound basis for doing so pursuant to Fed. R. Civ. P. 11, failing which the petition to cancel will be denied with prejudice." Appx11. Bank did not file an amended pleading. Accordingly, the Board dismissed Bank's Petition with prejudice in an order dated May 2, 2019. Appx1. Bank now appeals the Board's 2019 order that dismissed the third cancellation Petition filed by Bank against the Goats on the Roof Restaurant Décor Registration.

### III. SUMMARY OF THE ARGUMENTS

The Board correctly dismissed Bank’s pleading to cancel the Goats on the Roof Restaurant Décor Registration. A pleading before the Board to cancel a federal trademark registration must allege facts that support (1) standing and (2) a valid ground for cancelling a trademark registration. *Young v. AGB Corp.*, 152 F.3d 1377, 1379-1380 (Fed. Cir. 1998).

The Board’s dismissal should be affirmed by this Court because Bank’s Petition to cancel the Goats on the Roof Restaurant Décor Registration did not “contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), *quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (stating that plausible claims require more than “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements”).

With respect to standing, Banks seems to argue that his standing to bring his claim to cancel the Goats on the Roof Restaurant Décor Registration is an entirely unrelated to the merits of his grounds for the cancellation, and, therefore, the Board erred in dismissing his claim for lack of standing. However, Bank fails to recognize that in actions brought under the Lanham Act, a claimant’s standing is necessarily related to his “real interest” in the outcome of the cancellation.

The Lanham Act provides that only a person who is or will be damaged by the registration of the mark may bring a petition to cancel the registration. 15 U.S.C. § 1064. There must be specificity in a petition that the person seeking cancellation has a “real interest” in the proceedings and a “reasonable basis in fact” for his belief of damage. *See Ritchie v. Simpson*, 170 F.3d 1092, 1095 (Fed. Cir. 1999) (describing the judicially-created elements for pleading standing before the Board to challenge the registration of a mark).

In the proceeding below, Bank failed to allege either a “real interest” or a “reasonable basis” in fact for his belief he is damaged by the Goats on the Roof Restaurant Décor Registration. The Board correctly found that Bank’s alleged harm, i.e. his allegation that the Goats on the Roof Restaurant Décor Registration is demeaning to the goats, does not establish that Bank has a “direct and personal stake” in the outcome of a Board action to cancel the Goats on The Roof Restaurant Décor Registration. *Id.*

The Board also correctly found that Bank lacked a reasonable basis in fact to support his belief in his damages. In reaching these conclusions regarding Bank’s lack of standing, the Board did not decide on the merits of Bank’s claim of functionality, contrary to Bank’s argument that the Board confused the standing and merits determinations. Applying *Ritchie*, the Board correctly found Bank to be

a “mere intermeddler” and dismissed Bank’s cancellation Petition for failing to plead a valid basis for standing. Appx4-8.

With respect to Bank’s claim the Goats on the Roof Restaurant Décor Registration is functional, the Board correctly found that Bank failed, for a second time, to allege that goats on a grass roof are “essential to the use or purpose” or “affect the cost or quality” of restaurant services. *See Inwood Labs, Inc. v. Ives Labs, Inc.*, 456 U.S. 844, 851 (1982); *Doyle*, 2012 WL 695211, at \*2. This mirrors the Board’s 2012 decision that also found that Bank failed to allege a claim the Goats on the Roof Restaurant Décor Registration is functional. Further, in 2012 Bank was warned that if he chose to file an amended petition to try to appropriately allege a functionality claim that he should “carefully review Fed. R. Civ. P. 11” and “be aware of the extreme difficulties he would face in ultimately providing that [Al Johnson’s Restaurant’s] mark is functional.” *Doyle*, 2012 WL 695211, at \*4.

In the 2018 Petition, Bank repeated his 2011 pleading failures and ignored the Board’s Rule 11 warning.<sup>6</sup> Once again, Bank’s allegations of functionality are unrelated to the restaurant services identified in the Goats on the Roof Restaurant

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<sup>6</sup> The Board has given Bank Rule 11 warnings when dismissing his pleadings in the 2012 decision (*Doyle*, 2012 WL 695211, at \*4) and in the 2019 decision subject to this appeal (Appx11). Further, Federal Courts have the inherent power to sanction parties that abuse the judicial process. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 50-51 (1991) (finding no abuse of discretion when the Court of Appeals sanctioned a party for filing a frivolous appeal).



Décor Registration, and thus Bank fails to adequately plead the claim that the trade dress is functional. *Doyle*, 2012 WL 695211, at \*3.

#### **IV. ARGUMENT**

##### **A. The Board Properly Dismissed Bank’s Petition for Failure to Allege Standing.**

The “starting point” for determining standing before an administrative agency like the Board is not the “case or controversy” clause in Article III of the Constitution. *Ritchie*, 170 F.3d at 1094; *see also Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1376 (Fed. Cir. 2012) (stating the “case” and “controversy” restrictions do not apply to matters before the Board”). Instead, the starting point is the statute that confers standing before the Board to challenge the registration of a mark. *Id.* Here, Section 14 of the Lanham Act provides that “[a] petition to cancel a registration of a mark . . . may be filed . . . by any person who believes that he is or will be damaged by registration of the mark on the Principal Register.” 15 U.S.C. § 1064.

Although Section 14 broadly establishes standing, the Federal Circuit requires party challenging a registration before the Board to have a “real interest” in the proceedings and a “reasonable basis in fact” for his belief of damage. *See Ritchie*, 170 F.3d at 1095; *Coach*, at 668 F.3d at 1376. To have a “real interest” Bank must have a “legitimate personal interest” or a “stake” in the outcome of the

cancellation pleading. *Ritchie*, 170 F.3d at 1095. The “real interest” requirement “stems from a policy of preventing ‘mere intermeddlers’ who do not raise a real controversy from bringing oppositions or cancellation proceedings in the PTO.” *Id.*

**1. Bank failed to plead a real interest in the outcome of the cancellation pleading; he is an intermeddler.**

Bank is an intermeddler. The Board correctly explains that while *Ritchie* describes the standard for pleading a “real interest” in challenging the registration of marks as *scandalous* under Section 2(a) of the Lanham Act, 15 U.S.C. §1052(a), Section 2(a) is not the basis for Bank’s claim. Appx3, Appx6.

*Ritchie* does not establish that an individual’s personal offense to a mark is sufficient to plead standing to assert a claim of functionality. Thus, [Bank] may not rely upon allegations that the involved mark is personally offensive to him to plead his standing to assert a claim that the involved mark is functional.

Appx6. As such, Bank’s reliance on *Ritchie* for the proposition that a petitioner does not need to be a competitor or have any other “real interest” to allege functionality as the basis to cancel a registration is misplaced. Bank’s Br. at 7-8; Doc. 21 at 16-17.

Further, Bank’s interpretation of *AS Holdings Inc. v H & C Milcor, Inc.*, No. 91182064, 2013 WL 4397045 (T.T.A.B. Aug. 6, 2013) (precedential), is also misplaced. *See* Bank’s Br. at 8; Doc. 21 at 17. In *AS Holdings*, the Board found that the opposer alleging functionality had a “real interest” and a “reasonable

belief” in its damages because the opposer demonstrated it was in the commercial roofing business and manufactured products similar to those in the opposed application. 2013 WL 4397045, at \*\*3-4.

In contrast to the party alleging functionality in *AS Holdings*, Bank’s allegations do not include any facts that support a “real interest” or a “direct and personal stake” in cancelling a registration as functional. To have a real interest to challenge a registration as functional, a party must plead a “present or prospective right to use” the trade dress. *Poly-America, L.P. v. Illinois Tool Works Inc.*, No. 92056833, 2017 WL 4687981, at \*4 (T.T.A.B. Oct. 18, 2017) (precedential). Bank could also establish his standing to challenge the Goats on the Roof Restaurant Décor Registration if he was competitor, or if he could otherwise establish “a direct commercial interest” in using the registered restaurant décor trade dress. *Id.*, quoting *Cunningham v. Laster Golf Corp.*, 222 F.3d 943, 945 (Fed. Cir. 2000).

Without the intent to enter the restaurant services market or any other pleaded commercial interest, Bank is a “mere interloper.” *Poly-America*, 2017 WL 4687981, at \*5. In *Poly-America*, the Board explained that the petitioner established standing because the continued registration of trade dress for reclosable food storage bags harmed petitioner’s ability to enter the reclosable food storage bag market. *Id.* In contrast, the Board appropriately found no standing to cancel a registration when the petitioner alleged he “had an idea for a product, which may

or may not ever be brought to market.” *See Nobelle.com, LLC v. Qwest Commc’n Int’l, Inc.*, No. 92030454, 2003 WL 1789052, at \*3 (T.T.A.B. Feb. 4. 2003) (precedential) (dismissing a cancellation petition alleging a registration was generic or abandoned because the petitioner lacked standing). Bank, like the petitioner in *Nobelle.com*, is not “engaged in any business at all which would give [him] a real interest in the outcome of the proceeding.” *See id.* (“In short, although the threshold for determining standing is generally quite low, we find the petitioner has failed to clear it in this case.”).

Bank pleads no facts to establish any commercial interest whatsoever in opening a restaurant with goats on the roof, or any other business that gives him a real interest in the outcome of the proceeding. Bank cites no authority for his claim that his personal offense provides a basis to assert a functionality claim against the Goats on the Roof Restaurant Décor Registration.

Bank is like the petitioner in *NSM Resources Corp. v. Microsoft Corp.* in that his alleged harm is in no way tied to the trademark registration. No. 92057932, 2014 WL 7206403 (T.T.A.B. Nov. 25, 2014) (precedential). The petitioner in *NSM Resources* sought to cancel Microsoft’s XBOX360 registration because the XBOX360 product manual included the word “Huck” in the manual, and petitioner asserted it owned rights in HUCK marks. *Id.* at \*2. The Board found that even if petitioner does suffer the pleaded harm from the HUCK mark appearing in the

XBOX360 manual, he could not show that the continued registration of the XBOX360 mark is causing the harm.

Like the petitioner in *NSM Resources*, “the perceived damage” to Bank “is plainly not due to the registration of” Al Johnson’s Restaurant’s service mark, but instead by the “activity of an animal”<sup>7</sup> that Bank alleges demeans the animal. *Id. at* \*4. Thus, even if Bank suffers the alleged harm because the activity of goats grazing on a grass roof “denigrates the value he places on the respect, dignity, and worth of animals,” cancelling the Goats on the Roof Restaurant Décor Registration does not address that harm. Appx15. Indeed, Bank does not articulate what activity of the goats is causing him harm or explain how the Goats on the Roof Restaurant Décor Registration is denigrating his values.

Bank does not articulate the basis for his harm because Bank’s alleged damage “has nothing to do with” the Goats on the Roof Restaurant Décor Registration. *See* 2014 WL 7206403 at \*4. The Board’s analysis in *NSM* applies to Bank:

Because the petition and [Bank’s] arguments show that it is not the continued registration of [Al Johnson’s Restaurant’s Goats on the Roof Restaurant Décor] that is harming [Bank] (and that, as a consequence, the mark’s cancellation cannot help), [Bank] has no

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<sup>7</sup> Al Johnson’s Restaurant interprets Bank’s pleading to mean that he finds the “activity of the animal,” i.e. the goats grazing on a grass roof, to be demeaning to goats. Appx15. The USPTO’s act of granting a registration has absolutely no impact on the activity of the goats in question.

personal stake in this proceeding to cancel the [Goats on the Roof Restaurant Décor Registration.]

*Id.*

Similarly, Bank's previous client, Robert Doyle, also lacked a "personal stake" to challenge the Goats on the Roof Restaurant Décor as functional based on Doyle's pleaded desire to take photographs of goats on a grass roof. *Doyle*, 2012 WL 695211 \*2. As the Board explained in 2012, "there is no allegation that respondent's mark somehow prevents petitioner from placing goats on a grass roof and taking their picture," such that Doyle (represented by Bank) did not have a real interest to cancel the Goats on the Roof Restaurant Décor Registration because the alleged impairment was not related to Al Johnson's Restaurant's service mark registrations. *Id.*

Bank cites no authority to support that his alleged personal offense can be addressed by cancelling the Goats on the Roof Restaurant Décor Registration. Bank's failure to cite any legal authority establishes the frivolity of Bank's pleading. The Board correctly notes that Bank's "pleading therefore appears to allege, in general, that a trademark registration for any mark involving the use of animals in connection with any services is 'demeaning.'" Appx7.<sup>8</sup>

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<sup>8</sup> Bank also relies on *Ritchie* for the proposition that standing exists even if the number of potential marks he could find offensive is limitless (Bank's Br. at 9-10; Doc. 21 at 18-19); however, as explained, Bank's reliance on *Ritchie* is misplaced when the claim was based on offensiveness rather than functionality.

If Bank has standing to cancel the Goats on the Roof Restaurant Décor Registration based on an underlying activity that offends him, then there's no end to the parties that could assert standing to challenge trademark registrations. The "direct and personal stake" requirement is designed to stop intermeddlers like Bank from harassing small businesses owners like Al Johnson's Restaurant by filing baseless claims to challenge trademark registration. The Board applied the Federal Circuit's *Ritchie* standard correctly. Bank fails to adequately plead a "real interest" in cancelling the Goats on the Roof Restaurant Décor Registration.

**2. Bank failed to plead a reasonable basis in fact for his alleged harm; he is an intermeddler.**

*Ritchie* requires more than a direct and personal stake in the outcome of a cancellation proceeding to establish standing. Even if Bank's personal offense could constitute a legitimate personal interest in cancelling the Goats on the Roof Restaurant Décor Registration, *Ritchie* also requires that Bank allege a reasonable basis in fact to support his belief in his damages. 170 F.3d at 1097-98.

Ritchie sought to stop Orenthal James Simpson, from registering O.J. SIMSPON, O.J. and THE JUICE—marks Ritchie alleged were "synonymous with wife-beater and wife-murder"—for a broad range of goods because Ritchie asserted the marks were scandalous and immoral under Section 2(a) of the Lanham

Act, i.e. registering O.J. SIMPSON was the same as registering “Wife Beater” and thus disparaged Ritchie’s values as a Christian, family man. *Id.* at 1097-1098.

The Federal Circuit explained that Ritchie could plead facts that, if true, would support the reasonableness of his belief in two different ways. First, he could “allege he possesses a trait or characteristic that is clearly and directly implicated in the proposed mark.” *Id.* at 1098. Second, he could “allege other facts establishing that his belief is other than subjective,” i.e. that “he is not alone in his belief.” *Id.*

Here, Bank’s pleading does not include facts that support the reasonableness of his belief in his damages, as required by *Ritchie*. Bank does not plead that he possesses an immutable trait or characteristic “clearly and directly implicated” by the Goats on the Roof Restaurant Décor Registration.

Instead, Bank is like Michael McDermott, a man that challenged registration of the DYKES ON BIKES mark as disparaging to his values. *See McDermott v. San Francisco Women’s Motorcycle Contingent*, No. 91169211, 2006 WL 2682345 (T.T.A.B. Sept. 13, 2006) (precedential), *affirmed by McDermott v. San Francisco Women’s Motorcycle Contingent*, 240 Fed. Appx. 865 (Fed. Cir. 2007). The Board found that McDermott “failed to allege that he possessed a trait or characteristic implicated by applicant’s applied-for mark—that is, that he is a



‘lesbian’ or ‘dyke.’” 2006 WL 2682345 at \*6. Similarly, here, Bank does not plead that he is a goat or possesses the traits or characteristics of goat.

The Federal Circuit affirmed the Board’s dismissal for failure to allege standing because McDermott’s pleadings “contain no allegations that his belief is shared by others and no reference to supporting evidence demonstrating such a shared belief” such as “surveys, petitions or affidavits from public interest groups.” 240 Fed. Appx. at 867.

Bank, like McDermott, also does not plead the existence of any other evidence, in the forms of surveys, petitions or affidavits, to establish that others share in his belief in his harm. In contrast, Ritchie alleged that he “obtained petitions signed by people from all over the United States” who agreed with Ritchie’s belief the OJ SIMPSON marks were scandalous, denigrated their values, encouraged spousal abuse and minimized the problem of domestic violence. *See* 170 F.3d at 1098 (finding the alleged existence of the signed petitions sufficient at the pleading stage to support the reasonableness of Ritchie’s belief).

Bank pleads conclusions about what “numerous people believe” but does not plead facts to support that others share in his belief. Bank’s pleading is insufficient under *Ritchie* and *McDermott* and insufficient under *Iqbal* and *Twombly*, which require Bank to allege a factual basis—and not a mere conclusion—to support the reasonableness of Bank’s belief in his damage. Like his previous client Doyle,

Bank's "alleged belief he would be damaged by the [Goats on the Roof Restaurant Décor Registration] is not reasonable." *Doyle*, 2012 WL 695211, at \*3.

Finally, we note that while *Ritchie* sets forth the analysis for determining standing to challenge a registration in a Board proceeding, *Ritchie* is also clear that personal offense is only a basis to challenge registration for as long as Section 2(a) of the Lanham Act allows for cancellation of offensive marks:

The dissent fails to understand that the denial of federal registration of a mark does not prohibit the use of that mark. Although the mark holder who is denied federal registration will not receive the benefits conferred on a federal trademark registrant, the mark holder may and can continue to use the mark.

Be that as it may, the Constitutional issue has not been raised or considered below, nor has it been briefed or argued before this court. Congress has chosen to draw a line making certain offensive trademarks non-registrable under federal law. Until such time as the constitutionality of these Lanham Act provisions is challenged and found wanting, our job is to apply the law as it is written.

170 F.3d at 1099 (emphasis added). Indeed, the Supreme Court found the disparagement clause in Section 2(a) of the Lanham Act unconstitutional in *Matal v. Tam*, 137 S. Ct. 1744 (2017). Thus, the section of the Lanham Act that allowed Ritchie to allege harm based on his personal offense is no longer constitutional. Not only does Bank fail to plead the required "real interest" and "reasonable basis in fact," the Lanham Act also no longer addresses Bank's pleaded harm at all.

**3. Bank's arguments are nonsensical and unsupported by the law.**

Bank's argument that he has standing makes no sense. He argues the Board conflated the question of standing with the merits, and that the "Board's misunderstanding of the basic doctrine of functionality is shocking." Bank's Br. at 3-7; Doc. 21 at 12-16. To make this argument, he is claiming the alleged harm (his personal offense) does not have to be related to the pleaded cause of action (cancellation of the trade dress as functional). *Id.* He is wrong, and it is Bank that is mistaken in his application of the relevant law and his understanding of the Board's order. The Board absolutely does not confuse a determination on the merits with a determination of Bank's standing.

Bank wrongly argues that absolutely any type of harm, no matter how unrelated it may be to the right to own a trademark registration, would provide him with standing to challenge a trademark registration. In making this argument, Bank fails to recognize that in actions brought under the Lanham Act, as opposed to Article III courts, a claimant's standing is necessarily related to his "real interest" in the outcome of the cancellation.<sup>9</sup> Therefore, a discussion of Bank's standing necessarily involves a discussion of the type of harm that Bank must plead to have standing to challenge a registration as functional.

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<sup>9</sup> In an Article III court, standing requires a nexus between the pleaded injury and the statute that addresses the injury. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-561(1992) (requiring the injury to be traceable and addressable under the law.)

Bank fails cite a single Federal Circuit case that provides an example of when the Board confused a merits determination with a standing determination. Several examples are available, such as *Jewelers Vigilance Committee, Inc. v. Ullenberg Corp.*, 823 F.2d 490 (Fed. Cir 1987). In *Jewelers*, the Federal Circuit explains that the merits of a case before the Board is the right of a party to own a federal trademark registration. *See id.* at 494 (“[T]he Board in this case confused a merits determination (whether Ullenberg is entitled to registration of its mark) with a standing determination (whether JVC has a right to bring the opposition); *see also Selva & Sons, Inc. v. Nina Footwear, Inc.*, 705 F.2d 1316, 1325 (Fed. Cir. 1983) (explaining that while the merits of the Board cancellation action involved determining whether a registration could be cancelled for fraud, the standing inquiry required under Section 14 of the Lanham Act is the “real interest” test that weeds out mere intermeddlers).

In the Board’s standing discussion there is absolutely no discussion of the merits of Bank’s pleaded claim to cancel the Goats on the Roof Restaurant Décor Registration as functional. The Board appropriately applies the “real interest” test described in *Jewelers*, *Selva* and *Ritchie* to determine that Bank fails to plead facts that support his standing to bring a claim to cancel the Goats on the Roof Restaurant Décor Registration as functional.

The cases Bank relies on involve standing in Article III courts in matters that have no relationship to Bank's standing before the Board under the Lanham Act to cancel a trademark registration. For example, Bank's cited standing cases include a case finding that a death row inmate lacked standing to challenge another inmate's death sentence (*Whitmore v. Arkansas*, 495 U.S. 149 (1990)) and that organizations and taxpayers in Rochester, New York lacked standing to challenge a zoning ordinance because they failed to allege facts demonstrating they were the proper parties to challenge the ordinance (*Warth v. Seldin*, 422 U.S. 490 (1975)). While the Federal Circuit does rely on *Warth* to explain that a party in a Board proceeding may have standing to seek relief on behalf of others, it is limited to when the person pleads sufficient facts to show a personal interest in the outcome of the case beyond that of the general public. *Jewelers*, 823 F.2d at 493. In short, the few cases that Bank cites do not support his argument.

Moreover, Bank's hypothetical examples also do not support his argument. They are irrelevant and inapplicable to Bank's standing before the Board, and Bank does not cite a single case to establish that standing would exist in any of his hypotheticals. Bank's Br. at 5-6; Doc. 21 at 14-15.<sup>10</sup> In the only hypothetical that

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<sup>10</sup> In Bank's example of the person offended by the content of a Klansman protest, the time-place-statute authorizes a private cause of action for a violation of the law, and merely pleading offense, without pleading a cause of action that can be addressed under the law, would not establish standing. *See Lujan*, 504 U.S. at 560-561 (1992) (requiring the injury to be traceable and addressable under the law).

deals with standing to cancel a federal registration, Bank argues that an injury to a person's eyes by a bright neon light provides standing to cancel a neon-light logo as a deceptive mark. However, a physical injury does not provide standing to cancel a registration as deceptive. *See, e.g., Corporation Habanos, S.A. v Empresa Cubana del Tabaco*, No. 92052146, 2011 WL 3871952 (T.T.A.B. Aug. 1, 2011) (precedential) (finding standing to challenge a registration as deceptive based on petitioner's promotion of similar goods).

Like Bank, the person blinded by the neon light does not have a real interest in the outcome of a trademark cancellation action before the Board because cancelling a registration for a neon-light logo does not stop the neon light from hurting the person's eyes. *See, e.g., NSM Resources*, 2014 WL 7206403, at \*4 (finding no standing and "no reasonable basis" in fact for an injury that cannot be addressed by denying a trademark registration). A person bothered or hurt by a bright light may have a claim in nuisance or tort law, but not under the Lanham Act. Similarly, Bank's personal offense that Al Johnson's Restaurant displays a unique trade dress of goats grazing on grass roof cannot be addressed by the

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In this case, the Lanham Act does not authorize a cause of action to cancel a registration based on personal offense. As Bank has only pleaded offense as his injury, he has not pleaded an injury addressable under the Lanham Act.

Lanham Act. Bank is a nuisance and has wasted the Board's resources and those of this Court in pursuit of a frivolous claim.

The Board applied the correct standing test, and the Federal Circuit should affirm the Board's order dismissing Bank's Petition for failure to plead standing. Bank is an intermeddler and the precedents of this Court require dismissal of nuisance claims brought by attorneys like Bank without any legitimate personal interest in cancelling a federal trademark registration.

**B. The Board Properly Dismissed Bank's Petition for Failure to Plead a Plausible Claim the Goats on the Roof Restaurant Décor is Functional.**

On appeal is the sufficiency of Bank's second try to plead a claim before the Board that the Goats on the Roof Restaurant Décor is functional. The Board has twice dismissed the functionality claims filed by Bank under Federal Rule of Civil Procedure 12(b)(6). Appx10; *Doyle*, 2012 WL 695211. In *Doyle*, the Board even directed Bank's attention to the type of facts he would need to allege to support a claim. 2012 WL 695211 at \*4. As explained below, Bank ignores the Board's guidance, disregards cases from the Supreme Court and Federal Circuit, and repeats his pleading errors.

To be clear, the validity of the Goats on the Roof Restaurant Décor Registration is not on appeal. Moreover, restaurant décor is a well-recognized category of trade dress. *See Two Pesos*, 505 U.S. at 765-66 (finding the festive

eating atmosphere of a restaurant decorated with artifacts, bright colors, painting and murals to be inherently distinctive trade dress).

The Board could not and did not consider the merits of the underlying cancellation action when granting Al Johnson’s Restaurant’s Rule 12(b)(6) motion. *See Appx3 quoting Libertyville Saddle Shop Inc. v. E Jeffries & Sons, Ltd.*, 22 U.S.P.Q.2d 1594, 1497 (T.T.A.B. 1992) (“A motion to dismiss does not involve a determination of the merits of the case . . .”). Bank incorrectly states that the validity of the Goats on the Roof Restaurant Décor is on appeal and spends nearly two pages of his brief (Bank’s Br. at 10-13; Doc. 21 at 19-21) blocking quoting a law review article that criticizes unique trade dress registrations. While Al Johnson’s Restaurant disagrees with the premise of the block-quoted law review article, the soundness of the reasoning<sup>11</sup> in that law review article is not on appeal.

Furthermore, the second law review article Bank cites does not criticize the Goats on the Roof Restaurant Décor Registration. *See Bank’s Br. at 12; Doc. 21 at 21.* Quite the opposite. The article refers to the Goats on Roof Restaurant Décor as “[s]heer genius” and states that “brilliant marks like goats on the roof, will emerge

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<sup>11</sup> For example, in the quoted section of the law review article, the author compares the Goats on the Roof Restaurant Décor Registration with a pool hall that serves Chinese food. Bank’s Br. at 11; Doc. 21 at 20. The analogy fails because the Goats on the Roof Restaurant Décor Registration does not grant an exclusive right to serve a type of food. The registration is for building décor trade dress, and not for a type of food served by a business.



in limited numbers, but they definitely will emerge” because these nontraditional marks “first and foremost” designate the source. *See* Anne Gilson LaLonde & Jerome Gilson, *Getting Real with Nontraditional Trademarks: What’s Next After Red Oven Knobs, the Sound of Burning Methamphetamine, and Goats on A Grass Roof?*, 101 Trademark Rep. 186, 210, 218 (2011).

While legal scholars may have differing opinions about unique trade dress, those opinions are not on appeal before this Court. The soundness of Bank’s second failed attempt to plead functionality is the only issue on appeal. Missing from Bank’s appeal brief is an acknowledgment that he must comply with the Supreme Court’s guidance on pleading plausible claims. Bank’s obligation “to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions, and a formalistic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 678. “Factual allegations must be enough to raise the right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact).” *Id.* at 555. A complaint, or in this case a petition to cancel, does not assert a claim “if it tenders ‘naked assertion[s]’ devoid of further factual enhancement.” *Iqbal*, 556 U.S. at 678, *quoting Twombly*, 550 U.S. at 557.

The Board correctly applied the *Iqbal* and *Twombly* “plausibility” analysis to Bank’s Petition to cancel the Goats on the Roof Restaurant Décor Registration.

This Court should affirm the Board’s dismissal of Bank’s Petition under Rule 12(b)(6). “The purpose of the rule is to allow the court to eliminate actions that are fatally flawed in their legal premises and destined to fail, and thus to spare litigants the burdens of unnecessary pretrial and trial activity.” *Advanced Cardiovascular Sys., Inc. v. Scimed Life Sys., Inc.*, 988 F.2d 1157, 1160 (Fed. Cir. 1993).

**1. Functionality must be assessed for the services identified in the registration.**

Whether Bank’s Petition states a plausible claim of relief is a context-specific inquiry that requires the Board to draw on its “experience and common sense” to determine if the alleged facts “infer more than a mere possibility” the Goats on the Roof Restaurant Décor is functional; the Petition must show the claims are plausible and not just conceivable. *See Iqbal*, 556 U.S. at 679.

Accordingly, the inquiry starts with the definition of when trade dress is functional:

‘[I]n general terms, a product feature is functional,’ and cannot serve as a trademark, ‘if it is essential to the use or purpose of the article or if it affects the cost or quality of the article,’ that is, if exclusive use of the feature would put competitors at a significant non-reputation-related disadvantage.

*Qualitex Co. v. Jacobson Prod. Co.*, 514 U.S. 159, 165 (1995), quoting *Inwood Labs.*, 456 U.S. at 850. The purpose of the functionality doctrine is to prevent the use of trademark law to “inhibit legitimate competition by allowing a producer to control a useful product feature.” *Qualitex*, 514 U.S. at 165. To that end,

“functionality must be assessed in connection with the goods or services at issue.”

*Doyle*, 2012 WL 695211 at \*3.

It is clear from *Qualitex* that the analysis of the functionality of trade dress cannot be separated from the services to which the trade dress is applied.

Allegations of how the Goats on the Roof Restaurant Décor is functional with respect to the restaurant services identified in the registration are entirely absent from Bank’s Petition.

Bank makes two assertions regarding functionality: (1) that “the placement of goats on a grass roof negates or ameliorates, due to the goats’ grazing, the need to cut the grass, and is thus economically advantageous and, therefore function” and (2) that the trade dress is “entertainment” or a “form of entertainment.”

Appx15-16. Neither allegation states a plausible claim the Goats on the Roof Restaurant Décor is functional.

The Board correctly found that Bank failed to plead his claim because he left out basic factual allegations:

Petitioner has pleaded that placing goats on a grass roof is ‘economically advantageous’ because it reduces the need to cut grass on a grass roof; however, [Bank] does not allege that goats on grass roofs are essential to the use or purpose of affect the cost or quality of **restaurant services**.

Appx10. This should not have been a surprise to Bank because the Board previously informed him of the same standard for alleging functionality: “And

while petitioner alleges that respondent's goats and sod roof affect respondent's costs, by reducing respondent's energy and mowing expenses, this allegation is not specific, and is in fact completely unrelated, to **restaurant or gift shop services.**" *Doyle*, 2012 WL 695211, at \*3 (emphasis in original).

Bank's conclusory allegations the Goats on the Roof Restaurant Décor is a superior form of entertainment also fail to state a claim. The Board correctly found that Bank "has again failed to plead a nexus between the alleged aesthetic superiority of the design and [Al Johnson's Restaurant's] services." Appx11. *See also M-5 Steel Mfg Inc. v. O'Hagin's Inc.*, No. 109470, 2001 WL 1167788, at \*13 (T.T.A.B. Feb. 26, 2001) (precedential) ("[F]unctionality hinges on whether the registration of a particular feature hinders competition and not on whether the feature contributes to the product's commercial success."); *In re Hudson News Co.*, 39 U.S.P.Q.2d 1915, 1923 (T.T.A.B. 1996), *affirmed* 114 F.3d 1207 (Fed Cir. 2007) ("There is no prohibition against a trade dress mark both functioning to indicate source and being aesthetically pleasing.")

The Board was correct in its conclusion that Bank "has failed to allege that the involved registration is functional, as opposed to merely pleasing." Appx10. No facts in Bank's Petition show other restaurants are placed at a significant non-reputation-related disadvantage because goats on a grass roof are the only (or one of a handful of ways) to make restaurants attractive and entertaining. *See, e.g.*,

*Hudson News*, 39 U.S.P.Q.2d 915 (requiring evidence that a blue interior for a retail store was the best or one of a few superior designs to support a finding retail store décor was functional). No facts in Bank's Petition show that the Goats on the Roof Restaurant Décor is essential to the use or purpose of providing restaurant services. *See, e.g., Best Cellars, Inc. v. Wine Made Simple, Inc.*, 320 F. Supp. 2d 60, 71 (S.D.N.Y. 2003) (finding that a retail wine shop must establish that elements of the wine shop's décor are essential to competition in the marketplace to support a claim of functionality).

While Bank does not have to prove the facts at the pleading stage, he is required to allege their existence to plead a plausible claim. The Board correctly dismissed his Petition.

**2. Bank misreads and misapplies the law regarding trademarks and functionality.**

Bank misunderstands fundamental trademark law: rights do not exist in the United States apart from the goods or services for which a mark is used. More than 100 years ago, the Supreme Court explained this principle of U.S. trademark law:

He has no property in that mark *per se*, any more than in any other fanciful denomination he may assume for his own private use, otherwise than with reference to his trade. If he does not carry on a trade in iron, but carries on a trade in linen, and stamps a lion on his linen, another person may stamp a lion on iron; but when he has appropriated a mark to a particular species of goods, and caused his goods to circulate with this mark upon them, the court has said that no one shall be at liberty to defraud that man by using that mark, and

passing off goods of his manufacture as being the goods of the owner of that mark.

In short, the trademark is treated as merely a protection for the good will, and not the subject of property except in connection with an existing business.

*Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 414 (1916) (internal quotations omitted). Because trademark rights do not exist in a mark *per se*, the assessment of functionality is limited to those goods or services for which a mark is used.

Bank takes issue with the Board’s statement in *Doyle* that “it is well settled that functionality must be assessed in connection with the goods or services at issue, in this case restaurant and gift shop services.” 2012 WL 695211, at \*3, citing *Two Pesos*, 505 U.S. 763, and *Duramax Marine, LLC v. R.W. Fernstrum & Co.*, No. 91119899, 2006 WL 2263820 (T.T.A.B. July 12, 2005) (precedential). Bank claims that “neither *Two Pesos* nor *Duramax Marine* even suggest that functionality exists only when it pertains *solely or specifically* to the *particular goods or services* to which a mark applies.” Appx13.

It is difficult to follow Bank’s argument, especially after reading *Two Pesos* and *Duramax Marine*. *Two Pesos* affirms that restaurant décor trade dress is capable of being inherently distinctive, while noting that distinctive trade dress must also be non-functional to be protect free competition—an inquiry that requires assessing if “equally efficient options [are] available to competitors.” *See* 505 U.S. at 774-75. Assessing functionality with respect to its impact *on*

*competition* is assessing functionality in connection with the specific restaurant services at issue in *Two Pesos*.

*Duramax Marine* is analogous because it involves a proceeding before the Board to challenge as functional the registration of trade dress for services, specifically the product design of a heat exchanger for custom manufacturing services. 2006 WL 2263820, at 1. In that context of challenging the right to own a trade dress registration in product design for services, the Board states that it cannot “ignore the identification of services in applicant’s application.” *Id.* at \*13, 24. (dismissing opposer’s claim the proposed mark was functional for applicant’s identified services). Similarly, in this case, the Board must assess Bank’s allegations of functionality in connection with the restaurant services identified in the Goats on the Roof Restaurant Décor Registration.<sup>12</sup>

Bank’s brief lists several irrelevant hypotheticals—none of which involve building décor trade dress analogous to the Goats on the Roof Restaurant Décor.

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<sup>12</sup> Bank inexplicably claims that under *Doyle* “a grocery store’s plastic bags are *non-functional* because plastic bags are used by *many* types of business.” Bank’s Br. at 13; Doc. 21 at 22. Applying *Doyle* to Bank’s hypothetical does not result in a finding that plastic bags are non-functional because *Doyle* is about analyzing building décor trade dress for restaurant services, and not about assessing the functionality of a useful item like a plastic bag. Like the Goats on the Roof Restaurant Décor, distinctive and non-functional aspects of the plastic bag’s design could be registered for grocery store services. Similarly, distinctive and non-functional aspects of a bank’s bullet proof glass (Bank’s Br. at 13; Doc. 21 at 22), such as a design etched into the glass, could also be registered for those banking services offered in a building with the distinctively designed glass.

Bank Br. at 14; Doc. 21 at 23.<sup>13</sup> The Goats on the Roof Restaurant Décor Registration is for restaurant services offered in a building with a grass roof and goats that graze on that grass roof. The Board correctly dismissed Bank’s Petition for not alleging facts that support that the trade dress is functional for the restaurant services at issue.

Finally, Bank claims the “Board completely misreads not only *Qualitex* but *M-5 Steel*.” Bank’s Br. at 15; Doc. 21 at 24. However, it is Bank that misreads these cases. In *Qualitex*, and the color trade dress cases discussed therein, functionality of the color is assessed with respect to the goods to which the color is applied. As discussed above, *Qualitex* requires assessing if a feature is “essential to the use or purpose” or “affects the cost or quality”—the very factual allegations the Board found to be missing from Bank’s Petition. 514 U.S. at 165. After applying this analysis in *Qualitex*, the Court found that the green gold color for dry cleaning pads could serve as a trademark because the color was not essential to the use or purpose and did not impact cost or quality of the dry cleaning pads. *Id.* at 173. Similarly, Al Johnson’s Restaurant’s goats on the roof are neither essential to offering restaurant services nor do the goats on the roof impact the cost or quality of the restaurant services.

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<sup>13</sup> For example, a convenience store owner that brings his dog to work is not creating building décor trade dress. A restaurant that offers singing or ice skating as entertainment is also not creating a distinctive restaurant décor trade dress.



In *M-5 Steel*, a case that considers whether the design of roofing tiles is aesthetically functional, the Board explains that trade dress features are not functional merely because they “contribute to the product’s commercial success.” 2001 WL 1167788 at \*13. To be functional, and to allege a claim for functionality, instead “hinges on whether registration of a particular feature hinders competition.” *Id.* This is why the Board correctly finds that Bank’s pleading is deficient:

[Bank] has failed to allege that the alleged superior design hinders competition or ‘provide[s]’ a competitive advantage.’ In other words, [Bank] has failed to allege that the involved registration is functional, as opposed to merely aesthetically pleasing.

Appx11 (internal citations omitted).

Indeed, each of Bank’s allegations relate to the entertaining appeal of the Goats on the Roof Restaurant Décor trade dress, but not to any alleged competitive advantage this provides Al Johnson’s Restaurant. As a matter of law, restaurant décor that is entertaining and attractive cannot be functional merely because it is entertaining and attractive. Bank pleads no facts to suggest that the display of goats on a grass roof is competitively necessary for restaurants.

The Board correctly found that Bank fails to allege a plausible claim the Goats on the Roof Décor is functional. Bank’s misunderstanding and misapplication of the law does not support a reversal of the Board’s order dismissing Bank’s claims.

## V. CONCLUSION

For the foregoing reasons, Bank's appeal should be dismissed and the Board's order should be affirmed.

Dated: September 20, 2019

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## SUPPLEMENTAL APPENDIX

**SUPPLEMENTAL APPENDIX**  
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May 27, 2011 Petition to Cancel	SAppx016-024
March 1, 2012 Petition to Cancel	SAppx025-033
Board Order dated July 12, 2012	SAppx034-042

Trademark Trial and Appeal Board Electronic Filing System. <http://estta.uspto.gov>ESTTA Tracking number: **ESTTA928062**Filing date: **10/12/2018**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**Petition for Cancellation**

Notice is hereby given that the following party has filed a petition to cancel the registration indicated below.

**Petitioner Information**

Name	Todd C Bank		
Entity	Individual	Citizenship	United States
Address	119-40 Union Turnpike Fourth Floor Kew Gardens, NY 11415 UNITED STATES		

Correspondence information	Todd C Bank 119-40 Union Turnpike Fourth Floor Kew Gardens, NY 11415 UNITED STATES tbank@toddbanklaw.com 718-520-7125		
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**Registration Subject to Cancellation**

Registration No.	2007624	Registration date	10/15/1996
Registrant	Al Johnson's Swedish Restaurant and Butiks, Inc. 10698 N. Bay Shore Drive Sister Bay, WI 54234 UNITED STATES		

**Goods/Services Subject to Cancellation**

Class 042. First Use: 1973/06/01 First Use In Commerce: 1973/06/01 All goods and services in the class are subject to cancellation, namely: restaurant services
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**Grounds for Cancellation**

The mark comprises matter that, as a whole, is functional	Trademark Act Sections 14(1) and 2(e)(5), or Section 23 if on Supplemental Register
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Attachments	petition.pdf(144087 bytes )
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Signature	/ Todd C. Bank /
Name	Todd C. Bank
Date	10/12/2018

Int. Cl.: 42

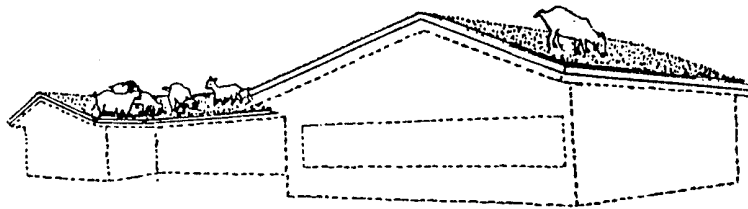
Prior U.S. Cls.: 100 and 101

Reg. No. 2,007,624

**United States Patent and Trademark Office** Registered Oct. 15, 1996

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**SERVICE MARK  
PRINCIPAL REGISTER**



AL JOHNSON'S SWEDISH RESTAURANT AND  
BUTIK (WISCONSIN CORPORATION)  
702 BAY SHORE DRIVE  
SISTER BAY, WI 54234

THE MARK CONSISTS OF GOATS ON A  
ROOF OF GRASS. THE DOTTED LINES IN  
THE DRAWING ARE INTENDED TO INDI-  
CATE THE LOCATION OF THE MARK AND  
ARE NOT A FEATURE OF THE MARK.

FOR: RESTAURANT SERVICES, IN CLASS  
100 AND 101

SER. NO. 74-646,306, FILED 2-27-1995.

42 (U.S. CLS. 100 AND 101).

FIRST USE 6-1-1973; IN COMMERCE RICHARD A. STRASER, EXAMINING ATTOR-  
6-1-1973. NEY

**Generated on:** This page was generated by TSDR on 2019-09-18 16:01:44 EDT

**Mark:**



**US Serial Number:** 74646306

**Application Filing Date:** Feb. 27, 1995

**US Registration Number:** 2007624

**Registration Date:** Oct. 15, 1996

**Register:** Principal

**Mark Type:** Service Mark

**TM5 Common Status Descriptor:**



LIVE/REGISTRATION/Cancellation/Invalidation Pending

This trademark application has been registered with the Office, but it is currently undergoing a challenge which may result in its removal from the registry.

**Status:** A cancellation proceeding is pending at the Trademark Trial and Appeal Board. For further information, see TTABVue on the Trademark Trial and Appeal Board web page.

**Status Date:** Jun. 19, 2019

**Publication Date:** Jul. 23, 1996

## Mark Information

**Mark Literal Elements:** None

**Standard Character Claim:** No

**Mark Drawing Type:** 2 - AN ILLUSTRATION DRAWING WITHOUT ANY WORDS(S)/ LETTER(S)/NUMBER(S)

**Description of Mark:** The mark consists of goats on a roof of grass. The dotted lines in the drawing are intended to indicate the location of the mark and are not a feature of the mark.

**Design Search Code(s):** 03.07.10 - Goats; Rams; Lambs; Goats, sheep, rams; Sheep  
05.13.03 - Grasses  
07.03.04 - Stables; Silos; Barns

## Goods and Services

**Note:**

The following symbols indicate that the registrant/owner has amended the goods/services:

- Brackets [...] indicate deleted goods/services;
- Double parenthesis ((.)) identify any goods/services not claimed in a Section 15 affidavit of incontestability; and
- Asterisks \*..\* identify additional (new) wording in the goods/services.

**For:** restaurant services

**International Class(es):** 042 - Primary Class

**U.S Class(es):** 100, 101

**Class Status:** ACTIVE

**Basis:** 1(a)

**First Use:** Jun. 01, 1973

**Use in Commerce:** Jun. 01, 1973

## Basis Information (Case Level)

**Filed Use:** Yes

**Currently Use:** Yes

**Filed ITU:** No

**Currently ITU:** No

**Filed 44D:** No

**Currently 44E:** No

**Filed 44E:** No

**Currently 66A:** No

**Filed 66A:** No

**Currently No Basis:** No



Filed No Basis: No

## Current Owner(s) Information

**Owner Name:** Al Johnson's Swedish Restaurant and Butiks, Inc.**Owner Address:** 10698 N. Bay Shore Drive  
Sister Bay, WISCONSIN UNITED STATES 54234**Legal Entity Type:** CORPORATION**State or Country** WISCONSIN  
**Where Organized:**

## Attorney/Correspondence Information

### Attorney of Record

**Attorney Name:** Katrina G. Hull**Attorney Primary** [docket@markerylaw.com](mailto:docket@markerylaw.com)  
**Email Address:****Attorney Email** Yes  
**Authorized:**

### Correspondent

**Correspondent** KATRINA G HULL  
**Name/Address:** MARLERY LAW LLC  
PO BOX 84150  
GAITHERSBURG, MARYLAND UNITED STATES 20883-4150**Phone:** (202) 888-2047**Fax:** (202) 803-7953**Correspondent e-** [docket@markerylaw.com](mailto:docket@markerylaw.com) [katrinahull@markerylaw.com](mailto:katrinahull@markerylaw.com)  
**mail:** [.com taratoth@markerylaw.com](mailto:.com taratoth@markerylaw.com)**Correspondent e-** Yes  
**mail Authorized:**

### Domestic Representative - Not Found

## Prosecution History

Date	Description	Proceeding Number
May 02, 2019	TTAB RELEASE CASE TO TRADEMARKS	69777
May 02, 2019	CANCELLATION TERMINATED NO. 999999	69777
May 02, 2019	CANCELLATION DENIED NO. 999999	69777
Apr. 22, 2019	ATTORNEY/DOM.REP.REVOKED AND/OR APPOINTED	
Apr. 22, 2019	TEAS REVOKE/APP/CHANGE ADDR OF ATTY/DOM REP RECEIVED	
Oct. 22, 2018	CANCELLATION INSTITUTED NO. 999999	69777
Jan. 19, 2017	NOTICE OF ACCEPTANCE OF SEC. 8 & 9 - E-MAILED	
Jan. 19, 2017	REGISTERED AND RENEWED (SECOND RENEWAL - 10 YRS)	67657
Jan. 19, 2017	REGISTERED - SEC. 8 (10-YR) ACCEPTED/SEC. 9 GRANTED	67657
Jan. 19, 2017	CERTIFICATE OF CORRECTION ISSUED	67657
Jan. 18, 2017	TEAS RESPONSE TO OFFICE ACTION-POST REG RECEIVED	
Jan. 04, 2017	POST REGISTRATION ACTION MAILED - SEC. 7	67657
Jan. 03, 2017	CASE ASSIGNED TO POST REGISTRATION PARALEGAL	67657
Dec. 21, 2016	CASE ASSIGNED TO POST REGISTRATION PARALEGAL	71359
Oct. 12, 2016	TEAS SECTION 8 & 9 RECEIVED	
Oct. 11, 2016	TEAS SECTION 7 REQUEST RECEIVED	
Oct. 15, 2015	COURTESY REMINDER - SEC. 8 (10-YR)/SEC. 9 E-MAILED	
Jul. 12, 2012	TTAB RELEASE CASE TO TRADEMARKS	54059
Jul. 12, 2012	CANCELLATION TERMINATED NO. 999999	54059
Jul. 12, 2012	CANCELLATION DENIED NO. 999999	54059
May 31, 2011	CANCELLATION INSTITUTED NO. 999999	54059
Dec. 30, 2008	NOTICE OF DESIGN SEARCH CODE MAILED	
Jun. 29, 2006	CASE FILE IN TICRS	
Jan. 18, 2006	REGISTERED AND RENEWED (FIRST RENEWAL - 10 YRS)	69934
Jan. 18, 2006	REGISTERED - SEC. 8 (10-YR) ACCEPTED/SEC. 9 GRANTED	
Oct. 20, 2005	REGISTERED - COMBINED SECTION 8 (10-YR) & SEC. 9 FILED	
Oct. 20, 2005	TEAS SECTION 8 & 9 RECEIVED	
Oct. 03, 2002	REGISTERED - SEC. 8 (6-YR) ACCEPTED & SEC. 15 ACK.	

Aug. 26, 2002 REGISTERED - SEC. 8 (6-YR) & SEC. 15 FILED  
 Aug. 26, 2002 PAPER RECEIVED  
 Oct. 15, 1996 REGISTERED-PRINCIPAL REGISTER  
 Jul. 23, 1996 PUBLISHED FOR OPPOSITION  
 Jun. 21, 1996 NOTICE OF PUBLICATION  
 May 16, 1996 APPROVED FOR PUB - PRINCIPAL REGISTER  
 Sep. 28, 1995 FINAL REFUSAL MAILED  
 Aug. 14, 1995 NON-FINAL ACTION MAILED  
 Aug. 04, 1995 ASSIGNED TO EXAMINER

61700

## TM Staff and Location Information

### TM Staff Information - None

#### File Location

**Current Location:** GENERIC WEB UPDATE

**Date in Location:** Jan. 19, 2017

## Proceedings

### Summary

**Number of Proceedings:** 2

### Type of Proceeding: Cancellation

**Proceeding Number:** [92069777](#)

**Filing Date:** Oct 12, 2018

**Status:** Pending Court Appeal

**Status Date:** Jun 19, 2019

**Interlocutory Attorney:** MARY B MYLES

#### Defendant

**Name:** Al Johnson's Swedish Restaurant and Butiks, Inc.

**Correspondent Address:** KATRINA G HULL

MARLERY LAW LLC  
 PO BOX 84150  
 GAITHERSBURG MD UNITED STATES , 20883-4150

**Correspondent e-mail:** [docket@markerylaw.com](mailto:docket@markerylaw.com) , [katrinahull@markerylaw.com](mailto:katrinahull@markerylaw.com) , [taratoth@markerylaw.com](mailto:taratoth@markerylaw.com)

### Associated marks

Mark	Application Status	Serial Number	Registration Number
	Cancellation Pending	<a href="#">74646306</a>	<a href="#">2007624</a>

#### Plaintiff(s)

**Name:** Todd C. Bank

**Correspondent Address:** TODD C BANK

119 40 UNION TURNPIKE , FOURTH FLOOR  
 KEW GARDENS NY UNITED STATES , 11415

**Correspondent e-mail:** [tbank@toddbanklaw.com](mailto:tbank@toddbanklaw.com)

### Prosecution History

Entry Number	History Text	Date	Due Date
1	FILED AND FEE	Oct 12, 2018	
2	NOTICE AND TRIAL DATES SENT; ANSWER DUE:	Oct 22, 2018	Dec 01, 2018
3	INSTITUTED	Oct 22, 2018	
4	D MOT TO DISMISS: FRCP 12(B)	Nov 28, 2018	
5	SUSP PEND DISP OF OUTSTNDNG MOT	Nov 29, 2018	
6	P OPP/RESP TO MOTION	Nov 30, 2018	
7	PROCEEDINGS RESUMED; TRIAL DATES RESET	Mar 27, 2019	
8	D APPEARANCE / POWER OF ATTORNEY	Apr 18, 2019	
9	D CHANGE OF CORRESP ADDRESS	Apr 18, 2019	

10 BD DECISION: CAN DENIED W/PREJ May 02, 2019  
 11 TERMINATED May 02, 2019  
 12 APPEAL TO CAFC May 13, 2019

**Type of Proceeding: Cancellation**

**Proceeding Number:** [92054059](#) **Filing Date:** May 27, 2011  
**Status:** Terminated **Status Date:** Jul 12, 2012  
**Interlocutory Attorney:** MICHAEL B ADLIN

**Defendant**

**Name:** Al Johnson's Swedish Restaurant & Butik, Inc.  
**Correspondent Address:** LORI S MEDDINGS  
 MICHAEL BEST FRIEDRICH LLP  
 100 EAST WISCONSIN AVENUE, SUITE 3300  
 MILWAUKEE WI UNITED STATES , 53202  
**Correspondent e-mail:** [egjdickey@michaelbest.com](mailto:egjdickey@michaelbest.com)

**Associated marks**

Mark	Application Status	Serial Number	Registration Number
	Section 8 and 15 - Accepted and Acknowledged	<a href="#">77936651</a>	<a href="#">3942832</a>
	Cancellation Pending	<a href="#">74646306</a>	<a href="#">2007624</a>

**Plaintiff(s)**

**Name:** Robert Doyle  
**Correspondent Address:** TODD C BANK  
 119 40 UNION TURNPIKE, FOURTH FLOOR  
 KEW GARDENS NY UNITED STATES , 11415  
**Correspondent e-mail:** [TBLaw101@aol.com](mailto:TBLaw101@aol.com) , [TBLaw101@yahoo.com](mailto:TBLaw101@yahoo.com)

**Prosecution History**

Entry Number	History Text	Date	Due Date
1	FILED AND FEE	May 27, 2011	
2	NOTICE AND TRIAL DATES SENT; ANSWER DUE:	May 31, 2011	Jul 10, 2011
3	PENDING, INSTITUTED	May 31, 2011	
4	P'S CERTIFCATE OF SERVICE ON D'S	Jun 01, 2011	
5	D'S MOTION TO DISMISS - RULE 12(B)	Jun 10, 2011	
6	P'S OPPOSITION/RESPONSE TO MOTION	Jun 17, 2011	
7	SUSPENDED PENDING DISP OF OUTSTNDNG MOT	Jun 28, 2011	
8	SUSPENDED PENDING DISP OF OUTSTNDNG MOT	Jun 28, 2011	
9	DEFENDENTS MOTION TO DISMISS GRANTED	Feb 10, 2012	
10	P'S MOTION TO AMEND PLEADING/AMENDED PLEADING	Mar 01, 2012	
11	P'S CERTIFICATE OF SERVICE	Mar 01, 2012	
12	D'S MOTION TO DISMISS - RULE 12(B)	Apr 02, 2012	
13	D'S MOTION FOR SANCTIONS	Apr 02, 2012	
14	SUSPENDED PENDING DISP OF OUTSTNDNG MOT	Apr 17, 2012	
15	P'S OPPOSITION/RESPONSE TO MOTION	Apr 20, 2012	
16	P'S OPPOSITION/RESPONSE TO MOTION	Apr 20, 2012	
17	P'S CERTIFICATE OF SERVICE	Apr 20, 2012	
18	P'S CERTIFICATE OF SERVICE	Apr 20, 2012	
19	BOARD'S DECISION: DISMISSED W/ PREJUDICE	Jul 12, 2012	
20	TERMINATED	Jul 12, 2012	

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PTO Form 1963 (Rev 05/2006)

OMB No. 0651-0055 (Exp 07/31/2018)

## Combined Declaration of Use and/or Excusable Nonuse/Application for Renewal of Registration of a Mark under Sections 8 & 9

The table below presents the data as entered.

Input Field	Entered
<b>REGISTRATION NUMBER</b>	2007624
<b>REGISTRATION DATE</b>	10/15/1996
<b>SERIAL NUMBER</b>	74646306
<b>MARK SECTION</b>	
<b>MARK</b>	Miscellaneous Mark (stylized and/or with design)
<b>ATTORNEY SECTION (current)</b>	
<b>NAME</b>	Judith L. Grubner
<b>FIRM NAME</b>	MICHAEL BEST FRIEDRICH LLP
<b>INTERNAL ADDRESS</b>	SUITE 3300
<b>STREET</b>	100 EAST WISCONSIN AVENUE
<b>CITY</b>	MILWAUKEE
<b>STATE</b>	Wisconsin
<b>POSTAL CODE</b>	53202
<b>COUNTRY</b>	United States
<b>PHONE</b>	(414) 271-6560
<b>FAX</b>	(414) 277-0656
<b>EMAIL</b>	mkeipdocket@michaelbest.com
<b>AUTHORIZED TO COMMUNICATE VIA E-MAIL</b>	Yes
<b>ATTORNEY SECTION (proposed)</b>	
<b>NAME</b>	Katrina G. Hull
<b>FIRM NAME</b>	MICHAEL BEST & FRIEDRICH LLP
<b>INTERNAL ADDRESS</b>	SUITE 3300
<b>STREET</b>	100 EAST WISCONSIN AVENUE
<b>CITY</b>	MILWAUKEE
<b>STATE</b>	Wisconsin
<b>POSTAL CODE</b>	53202
<b>COUNTRY</b>	United States
<b>PHONE</b>	(414) 271-6560
<b>FAX</b>	(414) 277-0656
<b>EMAIL</b>	mkeipdocket@michaelbest.com

AUTHORIZED TO COMMUNICATE VIA E-MAIL	Yes
DOCKET/REFERENCE NUMBER	011206-9001
OTHER APPOINTED ATTORNEY	Billie Jean Smith, Lori S. Meddings, Laura M. Konkel, Michelle E. Kouba
<b>CORRESPONDENCE SECTION (current)</b>	
NAME	LORI S MEDDINGS
FIRM NAME	MICHAEL BEST FRIEDRICH LLP
INTERNAL ADDRESS	SUITE 3300
STREET	100 EAST WISCONSIN AVENUE
CITY	MILWAUKEE
STATE	Wisconsin
POSTAL CODE	53202
COUNTRY	United States
PHONE	(414) 271-6560
FAX	(414) 277-0656
EMAIL	mkeipdocket@michaelbest.com
AUTHORIZED TO COMMUNICATE VIA E-MAIL	Yes
<b>CORRESPONDENCE SECTION (proposed)</b>	
NAME	Katrina G. Hull
FIRM NAME	MICHAEL BEST & FRIEDRICH LLP
INTERNAL ADDRESS	SUITE 3300
STREET	100 EAST WISCONSIN AVENUE
CITY	MILWAUKEE
STATE	Wisconsin
POSTAL CODE	53202
COUNTRY	United States
PHONE	(414) 271-6560
FAX	(414) 277-0656
EMAIL	mkeipdocket@michaelbest.com
AUTHORIZED TO COMMUNICATE VIA E-MAIL	Yes
DOCKET/REFERENCE NUMBER	011206-9001
<b>GOODS AND/OR SERVICES SECTION</b>	
INTERNATIONAL CLASS	042
GOODS OR SERVICES	restaurant services
SPECIMEN FILE NAME(S)	<a href="#">\\TICRS\EXPORT17\IMAGEOUT 17\746\463\74646306.xml2\S890002.JPG</a>
	<a href="#">\\TICRS\EXPORT17\IMAGEOUT 17\746\463\74646306.xml2\S890003.JPG</a>
	<a href="#">\\TICRS\EXPORT17\IMAGEOUT 17\746\463\74646306.xml2\S890004.JPG</a>

<b>SPECIMEN DESCRIPTION</b>	Photograph of the roof of the restaurant; screenshots of website for restaurant showing goats on the roof
<b>MISCELLANEOUS STATEMENT</b>	A Section 7 Amendment is being filed in conjunction with this Renewal Application in order to appropriately update the owner of record.
<b>OWNER SECTION (current)</b>	
<b>NAME</b>	Al Johnson's Swedish Restaurant and Butik
<b>STREET</b>	702 Bay Shore Drive
<b>CITY</b>	Sister Bay
<b>STATE</b>	Wisconsin
<b>ZIP/POSTAL CODE</b>	54234
<b>COUNTRY</b>	United States
<b>OWNER SECTION (proposed)</b>	
<b>NAME</b>	Al Johnson's Swedish Restaurant and Butiks, Inc.
<b>STREET</b>	10698 N. Bay Shore Drive
<b>CITY</b>	Sister Bay
<b>STATE</b>	Wisconsin
<b>ZIP/POSTAL CODE</b>	54234
<b>COUNTRY</b>	United States
<b>LEGAL ENTITY SECTION (current)</b>	
<b>TYPE</b>	corporation
<b>STATE/COUNTRY OF INCORPORATION</b>	Wisconsin
<b>PAYMENT SECTION</b>	
<b>NUMBER OF CLASSES</b>	1
<b>NUMBER OF CLASSES PAID</b>	1
<b>SUBTOTAL AMOUNT</b>	400
<b>TOTAL FEE PAID</b>	400
<b>SIGNATURE SECTION</b>	
<b>SIGNATURE</b>	/Christopher Butz/
<b>SIGNATORY'S NAME</b>	Christopher Butz
<b>SIGNATORY'S POSITION</b>	Sales and Marketing
<b>DATE SIGNED</b>	10/12/2016
<b>PAYMENT METHOD</b>	CC
<b>FILING INFORMATION</b>	
<b>SUBMIT DATE</b>	Wed Oct 12 18:20:07 EDT 2016
<b>TEAS STAMP</b>	USPTO/S08N09-XX.XX.XXX.XX X-20161012182007149763-20 07624-57022d615c8ba4ba86a 5c0d819fbd26ebaa48df8cd03 737c29273a1d05ddb7d9-CC-5 276-20161011155440907577

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PTO Form 1963 (Rev 05/2006)

OMB No. 0651-0055 (Exp 07/31/2018)

## **Combined Declaration of Use and/or Excusable Nonuse/Application for Renewal of Registration of a Mark under Sections 8 & 9**

**To the Commissioner for Trademarks:**

**REGISTRATION NUMBER:** 2007624

**REGISTRATION DATE:** 10/15/1996

**MARK:** (Stylized and/or with Design, Miscellaneous Mark (see, [mark](#)))

The owner, Al Johnson's Swedish Restaurant and Butiks, Inc., a corporation of Wisconsin, having an address of  
10698 N. Bay Shore Drive  
Sister Bay, Wisconsin 54234  
United States

is filing a Combined Declaration of Use and/or Excusable Nonuse/Application for Renewal of Registration of a Mark under Sections 8 & 9.

For International Class 042, the mark is in use in commerce on or in connection with **all** goods/services, or to indicate membership in the collective membership organization, listed in the existing registration for this specific class: restaurant services ; or, the owner is making the listed excusable nonuse claim.

The owner is submitting one(or more) specimen(s) showing the mark as used in commerce on or in connection with any item in this class, consisting of a(n) Photograph of the roof of the restaurant; screenshots of website for restaurant showing goats on the roof.

[Specimen File1](#)

[Specimen File2](#)

[Specimen File3](#)

### **MISCELLANEOUS STATEMENTS**

A Section 7 Amendment is being filed in conjunction with this Renewal Application in order to appropriately update the owner of record.

The registrant's current Attorney Information: Judith L. Grubner of MICHAEL BEST FRIEDRICH LLP  
SUITE 3300  
100 EAST WISCONSIN AVENUE  
MILWAUKEE, Wisconsin 53202  
United States

The registrant's proposed Attorney Information: Katrina G. Hull of MICHAEL BEST & FRIEDRICH LLP  
SUITE 3300  
100 EAST WISCONSIN AVENUE  
MILWAUKEE, Wisconsin 53202  
United States

The docket/reference number is 011206-9001.

The Other Appointed Attorney(s): Billie Jean Smith, Lori S. Meddings, Laura M. Konkel, Michelle E. Kouba.

The phone number is (414) 271-6560.

The fax number is (414) 277-0656.

The email address is mkeipdocket@michaelbest.com.

The registrant's current Correspondence Information: LORI S MEDDINGS of MICHAEL BEST FRIEDRICH LLP  
SUITE 3300  
100 EAST WISCONSIN AVENUE  
MILWAUKEE, Wisconsin 53202  
United States

The registrant's proposed Correspondence Information: Katrina G. Hull of MICHAEL BEST & FRIEDRICH LLP  
SUITE 3300  
100 EAST WISCONSIN AVENUE  
MILWAUKEE, Wisconsin 53202  
United States

The docket/reference number is 011206-9001.

The phone number is (414) 271-6560.

The fax number is (414) 277-0656.

The email address is mkeipdocket@michaelbest.com.

A fee payment in the amount of \$400 will be submitted with the form, representing payment for 1 class(es), plus any additional grace period fee, if necessary.

### Declaration

#### Section 8: Declaration of Use and/or Excusable Nonuse in Commerce

*Unless the owner has specifically claimed excusable nonuse, the mark is in use in commerce on or in connection with the goods/services, or to indicate membership in the collective membership organization identified above, as evidenced by the attached specimen(s) showing the mark as used in commerce.*

The signatory being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001, and that such willful false statements and the like may jeopardize the validity of this submission, declares that all statements made of his/her own knowledge are true and all statements made on information and belief are believed to be true.

#### Section 9: Application for Renewal

*The registrant requests that the registration be renewed for the goods/services/collective organization identified above.*

Signature: /Christopher Butz/ Date: 10/12/2016  
Signatory's Name: Christopher Butz  
Signatory's Position: Sales and Marketing

Mailing Address (**current**):  
MICHAEL BEST FRIEDRICH LLP  
100 EAST WISCONSIN AVENUE  
MILWAUKEE, Wisconsin 53202

Mailing Address (**proposed**):  
MICHAEL BEST & FRIEDRICH LLP  
100 EAST WISCONSIN AVENUE  
MILWAUKEE, Wisconsin 53202

Serial Number: 74646306  
Internet Transmission Date: Wed Oct 12 18:20:07 EDT 2016  
TEAS Stamp: USPTO/S08N09-XX.XX.XXX.XXX-2016101218200  
7149763-2007624-57022d615c8ba4ba86a5c0d8  
19fbd26ebaa48df8cd03737c29273a1d05ddb7d9  
-CC-5276-20161011155440907577





The screenshot shows a web browser window displaying the website for Al Johnson's Swedish Restaurant & Butik. The browser's address bar shows the URL <http://www.aljohnsons.com/our-story/>. The website header features the Al Johnson's logo, which includes a crown and the text "Al Johnson's Swedish Restaurant & Butik". Below the logo is a yellow banner with the text "Hours 6am-8pm". To the right of the logo is a photograph of a goat. A navigation menu is located below the header, with links for MENU, OUR STORY, NEWS, SHOP, CONTACT, GOAT CAM, JOBS, and LODGING. The main content area is titled "About Al Johnson's" and features a large photograph of the restaurant staff standing in front of a building with a grassy roof. Below the photograph, there is a paragraph of text describing the restaurant as an authentic Swedish family-owned establishment. The text reads: "Al Johnson's is an authentic Swedish family owned restaurant where you can find goats grazing the sod roof. It's quite a sight, and it's made this place one of the most famous restaurants in Door County. Inside the casual, carpeted dining room, young ladies in Scandinavian garb dish out limpa bread and Swedish meatballs. The menu consists of a variety of Swedish fare, from pancakes with lingonberries to Swedish meatballs, whitefish, sandwiches, salads, and a variety of hot and cold plates." Below this text is a section titled "History". The browser's status bar at the bottom right shows "100%".

http://www.aljohnsons.com/our-story/


Our Story - Al Johnson's

File Edit View Favorites Tools Help

Suggested Sites Webview TEAS TESS USPTO Madrid Search PAIR-EFS TSDR Assignments TM Assignments Assn. Search ID Manual WIPO Kluwer Quantify IP Certified Copies WDFI TMOG


920.854.2626 10698 N. Bay Shore Drive, Sister Bay, WI 54234 | Directions

Goat Cam Sunset Cam Purchase a gift certificate


 **Al Johnson's**  
Swedish Restaurant & Butik

Hours 6am-8pm

MENU OUR STORY NEWS SHOP CONTACT GOAT CAM JOBS LODGING



### About Al Johnson's



Al Johnson's is an authentic Swedish family owned restaurant where you can find goats grazing the sod roof. It's quite a sight, and it's made this place one of the most famous restaurants in Door County. Inside the casual, carpeted dining room, young ladies in Scandinavian garb dish out limpa bread and Swedish meatballs.

The menu consists of a variety of Swedish fare, from pancakes with lingonberries to Swedish meatballs, whitefish, sandwiches, salads, and a variety of hot and cold plates.

### History

100%

http://www.aljohnsons.com/news/al-johnsons-launches-goat-cam/


Al Johnson's Launches "Goat Cam" x

File Edit View Favorites Tools Help

Suggested Sites Webview TEAS TESS USPTO Madrid Search PAIR-EFS TSDR Assignments TM Assignments Assn. Search ID Manual WIPO Kluwer Quantify IP Certified Copies WDFI TMOG

920.854.2626 | 10698 N. Bay Shore Drive, Sister Bay, WI 54234 | Directions


Goat Cam | Sunset Cam | Purchase a gift certificate



Hours 6am-8pm

MENU OUR STORY NEWS SHOP CONTACT GOAT CAM JOBS LODGING

## Al Johnson's Launches "Goat Cam"



The story about how goats came to be on the sod roof of Al Johnson's Swedish Restaurant has floated around Door County for decades. Here's how local writer Norbert Blei recounted the tale a few years back:

"Wink Larson was a man who understood tradition. Every year, in celebration of Al Johnson's birthday, he would bring Al a gift. Not an ordinary gift, of course. But something memorable. One year it was a burro, another year a sheep, once a baby pig, and the single gift which would change Al's life, the village of Sister Bay, and the entire history of Door County tourism—the birthday Wink walked into the restaurant with a goat named Oscar, ribbons tied to its horns and a note: HAPPY BIRTHDAY. AL. I was not an eyewitness. But I can see the grin on Wink's face...sense the commotion in the restaurant. And hear Al's laughter. The rest—is history." —Norbert Blei

From the arrival of Oscar the goat, it was a short trip to putting both Oscar himself, and the dozens of later goats onto the roof of the already-famed restaurant, turning

100%

Trademark Trial and Appeal Board Electronic Filing System. <http://estta.uspto.gov>ESTTA Tracking number: **ESTTA411697**Filing date: **05/27/2011**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**Petition for Cancellation**

Notice is hereby given that the following party requests to cancel indicated registration.

**Petitioner Information**

Name	Robert Doyle		
Entity	Individual	Citizenship	UNITED STATES
Address	3984 SW 157 Avenue Miramar, FL 33027 UNITED STATES		

Attorney information	Todd C. Bank 119-40 Union Turnpike Fourth Floor Kew Gardens, NY 11415 UNITED STATES TBLaw101@aol.com, TBLaw101@yahoo.com Phone:718-520-7125		
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**Registrations Subject to Cancellation**

Registration No	3942832	Registration date	04/12/2011
Registrant	Al Johnson's Swedish Restaurant & Butik, Inc. 10698 N. Bay Shore Drive Sister Bay, WI 54234 UNITED STATES		

**Goods/Services Subject to Cancellation**

Class 035. First Use: 1973/06/01 First Use In Commerce: 1973/06/01 All goods and services in the class are cancelled, namely: Retail store and online retail store services featuring gifts, food, clothing, toys, linens, dolls, books and music
--

**Grounds for Cancellation**

The mark comprises matter that, as a whole, is functional	Trademark Act section 2(e)(5)		
Registration No	2007624	Registration date	10/15/1996
Registrant	Al Johnson's Swedish Restaurant and Butik 702 Bay Shore Drive Sister Bay, WI 54234 UNITED STATES		

**Goods/Services Subject to Cancellation**

Class 042. First Use: 1973/06/01 First Use In Commerce: 1973/06/01 All goods and services in the class are cancelled, namely: restaurant services
--

**Grounds for Cancellation**

The mark comprises matter that, as a whole, is functional	Trademark Act section 2(e)(5)		
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Attachments	petition.pdf ( 3 pages )(58443 bytes ) Exh. A - 1.pdf ( 2 pages )(125366 bytes ) Exh. A - 2.pdf ( 3 pages )(539092 bytes )
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### Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/No service was made; see TBMP309.02(c)/
Name	Todd C. Bank
Date	05/27/2011

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

**PETITION TO CANCEL**

In the matter of

Trademark Registration No. 2,007,624  
for the mark Goats on a Grass Roof  
Date registered: October 15, 1996

and

International Trademark Registration No. 3,942,832  
for the mark Building Décor With a Roof Comprised of  
Grass and Bearing Several Goats on the Roof  
Date registered: April 12, 2011

---

ROBERT DOYLE,

*Petitioner,*

v.

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

*Registrant.*

Cancellation No. \_\_\_\_\_

Petitioner, Robert Doyle, an individual and citizen of the United States with an address at 3984 SW 157 Avenue, Miramar, Florida 33027, hereby petitions the Trademark Trial and Appeal Board of the United States Patent and Trademark Office, in accordance with 37 C.F.R. § 2.111, to cancel Trademark Registration No. 2,007,624 and International Trademark Registration No. 3,942,832.

Registrant, Al Johnson's Swedish Restaurant & Butik, Inc., is, and was at all relevant times herein, a corporation organized and existing under the laws of Wisconsin, and maintains its principal

executive office at 695 South Spring Road, Sister Bay, Wisconsin 54234.

As grounds for cancellation, Petitioner alleges the following:

1. Many establishments in the classes to which Registrant's marks apply have, because of Registrant's marks, refrained from placing goats on their grass roofs, as a result of which Petitioner has been, and will continued to be, damaged in that Petitioner has been, and will continue to be, unable to satisfy his desire to take photographs of goats on grass roofs.

2. Registrant's marks primarily serve, and are intended by Registrant to primarily serve, as a form of entertainment and attraction in order to enhance the enjoyment of visiting Registrant's restaurant; and, as such, Registrant's marks are functional.

3. With respect to establishments that feature the marks at issue, or would feature such marks if they were not currently protected, such marks primarily serve, or would primarily serve, as a form of entertainment and attraction in order to enhance the enjoyment of visiting such establishments.

4. The functionality of Registrant's marks is made abundantly clear by the website of Registrant's restaurant, throughout which is promoted Registrant's marks as an attractive and entertaining feature of the restaurant experience (copies of pages from the website are annexed hereto as Exhibit "A").

5. The two components of Registrant's marks are themselves functional.

6. Sod roofs last a relatively long time and thus are ultimately cheaper than other types of roofs to maintain.

7. A sod roof helps keep temperatures lower, which, in turn, can lower a building's air-conditioning expenses and make buildings without air conditioners more comfortable and more conducive, and less costly, to conducting business.

8. The placement of goats on a sod roof negates, by virtue of the goats' grazing, the need to cut the grass, a fact that was mentioned on the website of Registrant's restaurant prior to changes having been made to the website in or about April or May, 2011.

**WHEREFORE**, Petitioner requests that Trademark Registration No. 2,007,624 and International Trademark Registration No. 3,942,832 be canceled.

Dated: May 27, 2011

Respectfully submitted,

    / *Todd C. Bank* /  
TODD C. BANK  
119-40 Union Turnpike  
Fourth Floor  
Kew Gardens, New York 11415  
(718) 520-7125

Counsel to Petitioner



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[ABOUT AL JOHNSONS](#)   [HISTORY](#)   [NEWS](#)

## HISTORY



As you top the hill and head down the main street in Sister Bay, one can not help but get excited. For right in the middle of town, you will spot the goats on the roof at Al Johnson's! This grassy roof and those goats have drawn tourists and locals alike. An icon for visitors for over 58 years, Al Johnson's Swedish Restaurant has a rich history in this town and county!

Back in the early days, Al was "chief cook and bottle washer." He did it all. Friends remember a time when he'd serve the breakfast, clean-up the kitchen, and then hang a "Gone Fishin'" sign on the door

and head out for an afternoon break, before reopening for the dinner hour! To many of his local, lifelong buddies, "those were the good old days!" Coffee flowed, the talk was rich, and tall tales abounded. Life in the county was more laid back... it was a different time!

Then, in 1960 Al met who was to be his future wife, Ingert. She was the one who helped change and shape the interior décor of the restaurant. With a flair for style, plus deep roots in Scandinavian heritage and design, she felt it necessary to keep the look of the place very traditional. Ingert's vision included adding a gift shop where people could browse while waiting to be seated. Today, that vision has grown into two very large and welcoming Butiks that have a draw all their own.

Hard work is the key to any business and that rings true for the Johnson Family. It has been and continues to be family run. In earlier years, you could hear Al's booming voice in the dining room, saying "I've got a two-top here!" or "There's a 4-top clear over there!" which meant the hostess was to fill that table quickly from the list of waiting customers! Al cleared tables, bussed trays, and washed dishes. Al set a fast pace for the dining room. A two hour wait was common and turn over was key. Al wanted to get the next people in as quickly as possible, so those dishes would be flying off the tables!



The food is served on dishes from Porsgrund, Norway, the decorative rosemaled painting around the interior was done by renowned Norwegian artist Sigmund Arseth. Many of the foods served are Swedish and Norwegian. Anything from the Swedish pancakes and meatballs served with Swedish lingonberries (a small, red berry much like a cranberry or currant in taste) to the varied Swedish crackers and Limpa bread on the bread tray, to the many specialty cheeses from Sweden, there is much to delight the palate! (For those wanting a more American fare, the menu includes the famed Al's burger, local perch and whitefish plates, traditional ham, turkey, or clubhouse sandwiches, as well as a full array of salads and daily soups.) Breakfast is served all day and is a meal in itself! There is literally something tasty for everyone!

The restaurant was renovated in 1973. The log buildings were assembled in Norway, taken apart and shipped to Sister Bay, where they were put together around the existing building. A special underlayer was put on the roof and it was

### More About Al Johnson

["The Impact of Al Johnson," by Myles Dannhausen Jr., from the June 17, 2010 Peninsula Pulse](#)

[Al Johnson, an excerpt from Norbert Blei's "Door Way" \(published 1981, The Ellis Press\) - By Norbert Blei](#)

[Counter Culture: Wintering at Al's \(From Winter Book/The Quiet Time in Door \(Ellis Press\) - By Norbert Blei](#)

[20 Years Ago: Al's Snowshoe Race](#)

seeded with grass. The restaurant never closed during that time and it was the beginning of the grass on the roof, which was a



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## ABOUT AL JOHNSON'S



Al Johnson's is an authentic Swedish family owned restaurant where you can find goats grazing the sod roof. It's quite a sight, and it's made this place one of the most famous restaurants in Door County. Inside the casual, carpeted dining room, young ladies in Scandinavian garb dish out limpa bread and Swedish meatballs.

The menu consists of a variety of Swedish fare, from pancakes with lingonberries to Swedish meatballs, whitefish, sandwiches, salads, and a variety of hot and cold plates.

### AL JOHNSON'S LAUNCHES "GOAT CAM"

The story about how goats came to be on the sod roof of Al Johnson's Swedish Restaurant has floated around Door County for decades. Here's how local writer Norbert Blei recounted the tale a few years back:

"Wink Larson was a man who understood tradition. Every year, in celebration of Al Johnson's birthday, he would bring Al a gift. Not an ordinary gift, of course. But something memorable. One year it was a burro; another year a sheep; once a baby pig; and the single gift which would change Al's life, the village of Sister Bay, and the entire history of Door County tourism—the birthday Wink walked into the restaurant with a goat named Oscar, ribbons tied to its horns and a note: HAPPY BIRTHDAY, AL. I was not an eyewitness. But I can see the grin on Wink's face...sense the commotion in the restaurant. And hear Al's laughter. The rest—is history." —Norbert Blei



From the arrival of Oscar the goat, it was a short trip to putting both Oscar himself, and the dozens of later goats onto the roof of the already-famed restaurant, turning it into "that place with the goats on the roof," as thousands and thousands of Door County visitors have called it while requesting directions.

In an interview shortly before his death this past June 12, Al Johnson spoke about his goats, laughing heartily the entire time, and what they have meant to his restaurant's world-wide renown: "It doesn't matter where I've been — and Inger and I have traveled the entire world — but everybody knows about those goats. If I mention to someone overseas that I'm from Sister Bay in Door County, Wisconsin, they usually say the same thing: "Oh, you mean that place with the goats on the roof?"

[More About Al Johnson](#)



[Podcast – Writer Norbert Blei Interviews Al Johnson](#)

The intersection of technology with goats was inevitable, says Al's son Lars, who now runs the restaurant with his siblings Rolf and Annika. "Our visitors fall in love with the goats and are always so concerned about them, their health, and their safety," said Lars. "They want to know how they get onto the roof each day (there's a very safe slanted stairway with foot-holds), where the goats go each evening when we take them off the roof and load them onto a pickup truck (to a barn and pasture at Lars' home outside Sister Bay), and whether they can fall off the roof (yes, it's happened a couple of times, but no one was hurt)."



"What Rolf, Annika and I like about having a Goat Cam on the roof," said Lars, "which is actually two web cameras with different perspectives of the entire roof area, is that our visitors and friends can maintain a relationship with the restaurant and the goats throughout the season, no matter where they live the rest of the year."

Al Johnson's goats usually go onto the restaurant's sod roof at the start of each tourism season, in late May. The goats then spend the winter in a barn and pasture from mid-October to the start of the next season.

## AL JOHNSON'S LIFE: A PHOTO GALLERY



Al, 12 years old, Appleport - 1937



Trademark Trial and Appeal Board Electronic Filing System. <http://estta.uspto.gov>ESTTA Tracking number: **ESTTA459380**Filing date: **03/01/2012**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92054059
Party	Plaintiff Robert Doyle
Correspondence Address	TODD C BANK 119 40 UNION TURNPIKE , FOURTH FLOOR KEW GARDENS, NY 11415 UNITED STATES TBLaw101@aol.com, TBLaw101@yahoo.com
Submission	Motion to Amend Pleading/Amended Pleading
Filer's Name	Todd
Filer's e-mail	TBLaw101@aol.com
Signature	/ Todd C. Bank /
Date	03/01/2012
Attachments	amended petition.pdf ( 4 pages )(61551 bytes ) Exh. A - 1.pdf ( 2 pages )(125366 bytes ) Exh. A - 2.pdf ( 3 pages )(539092 bytes )

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

**AMENDED PETITION TO CANCEL**

Cancellation No. 92054059

In the matter of

Trademark Registration No. 2,007,624  
for the mark Goats on a Grass Roof  
Date registered: October 15, 1996

and

International Trademark Registration No. 3,942,832  
for the mark Building Décor With a Roof Comprised of  
Grass and Bearing Several Goats on the Roof  
Date registered: April 12, 2011

---

ROBERT DOYLE,

*Petitioner,*

v.

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

*Registrant.*

Petitioner, Robert Doyle, an individual and citizen of the United States with an address at 3984 SW 157 Avenue, Miramar, Florida 33027, hereby petitions the Trademark Trial and Appeal Board of the United States Patent and Trademark Office, in accordance with 37 C.F.R. § 2.111, to cancel Trademark Registration No. 2,007,624 and International Trademark Registration No. 3,942,832.

Registrant, Al Johnson's Swedish Restaurant & Butik, Inc., is, and was at all relevant times herein, a corporation organized and existing under the laws of Wisconsin, and maintains its principal

executive office at 695 South Spring Road, Sister Bay, Wisconsin 54234.

As grounds for cancellation, Petitioner alleges the following:

1. Establishments in the classes to which Registrant's marks apply ("Covered Establishments") are precluded by Registrant's marks from placing goats on their grass roofs.

2. Petitioner desires to dine and shop in Covered Establishments with a grass roof because Petitioner enjoys the look and smell of grass roofs.

3. Petitioner desires to dine and shop in Covered Establishments with a grass roof because the moderating effects that a grass roof has on the climate of the building that it covers lessens the need for artificial climate controls and therefore makes the dining and/or shopping experience more enjoyable to Petitioner.

4. Petitioner desires to dine and shop in Covered Establishments with goats on a grass roof because Petitioner finds goats on a grass roof to be entertaining.

5. Petitioner desires to interview witnesses to goats on the grass roofs of Covered Establishments, and compare the reactions of such witnesses to the reactions of witnesses to animals, including goats, on the roofs in situations in which Registrant's marks do not apply, *i.e.*, (1) where goats appear on a non-grass roof of a Covered Establishment in; (2) where goats appear on a grass roof of a non-Covered Establishment; and (3) where goats appear on a non-grass roof of a non-Covered Establishment.

6. Petitioner desires to take photographs of goats on the grass roofs of Covered Establishments.

7. Petitioner desires to use, for his personal enjoyment, the aforementioned interviews and photographs.

8. Petitioner desires to report his findings relating to paragraph 5 herein by publishing

and selling a book that features the aforementioned interviews and photographs.

9. Because it is economically advantageous, where there is a grass roof, to keep goats on such roof (as described in paragraphs 16 through 18 herein), fewer Covered Establishments maintain a grass roof than would be the case if Covered Establishments were not precluded by Registrant's marks from keeping goats on such roof.

10. As a result of Registrant's marks, Petitioner has been, and will continue to be, damaged in that Petitioner has been, and will continue to be, unable to satisfy his aforementioned desires.

11. Registrant's marks primarily serve, and are intended by Registrant to primarily serve, as a form of entertainment and attraction in order to enhance the enjoyment of visiting Registrant's restaurant; and, as such, Registrant's marks are functional.

12. Registrant's marks do not primarily serve, and are not intended by Registrant to primarily serve, as a form of identification of Registrant's restaurant and gift shop.

13. With respect to establishments that feature the marks at issue, or would feature such marks if they were not currently protected, such marks primarily serve, or would primarily serve, as a form of entertainment and attraction in order to enhance the enjoyment of visiting such establishments.

14. The functionality of Registrant's marks is made abundantly clear by the website of Registrant's restaurant, throughout which is promoted Registrant's marks as an attractive and entertaining feature of the restaurant experience (copies of pages from the website are annexed hereto as Exhibit "A").

15. Registrant's placement of goats on the grass roof of Registrant's restaurant has been an effective method of attracting customers to Registrant's restaurant and gift shop, and is superior



to other methods.

16. Grass roofs are functional because they last a relatively long time and thus are ultimately cheaper than other types of roofs to maintain.

17. Grass roofs are functional because they help moderate temperatures and therefore can lower a building's artificial climate-control expenses.

18. The placement of goats on a grass roof negates, by virtue of the goats' grazing, the need to cut the grass.

**WHEREFORE**, Petitioner requests that Trademark Registration No. 2,007,624 and International Trademark Registration No. 3,942,832 be canceled.

Dated: February 29, 2012

Respectfully submitted,

          / **Todd C. Bank** /  
TODD C. BANK  
119-40 Union Turnpike  
Fourth Floor  
Kew Gardens, New York 11415  
(718) 520-7125

Counsel to Petitioner

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## HISTORY



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## ABOUT AL JOHNSON'S



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The menu consists of a variety of Swedish fare, from pancakes with lingonberries to Swedish meatballs, whitefish, sandwiches, salads, and a variety of hot and cold plates.

### AL JOHNSON'S LAUNCHES "GOAT CAM"

The story about how goats came to be on the sod roof of Al Johnson's Swedish Restaurant has floated around Door County for decades. Here's how local writer Norbert Blei recounted the tale a few years back:

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From the arrival of Oscar the goat, it was a short trip to putting both Oscar himself, and the dozens of later goats onto the roof of the already-famed restaurant, turning it into "that place with the goats on the roof," as thousands and thousands of Door County visitors have called it while requesting directions.

In an interview shortly before his death this past June 12, Al Johnson spoke about his goats, laughing heartily the entire time, and what they have meant to his restaurant's world-wide renown: "It doesn't matter where I've been — and Inger and I have traveled the entire world — but everybody knows about those goats. If I mention to someone overseas that I'm from Sister Bay in Door County, Wisconsin, they usually say the same thing: "Oh, you mean that place with the goats on the roof?"

[More About Al Johnson](#)



[Podcast – Writer Norbert Blei Interviews Al Johnson](#)

The intersection of technology with goats was inevitable, says Al's son Lars, who now runs the restaurant with his siblings Rolf and Annika. "Our visitors fall in love with the goats and are always so concerned about them, their health, and their safety," said Lars. "They want to know how they get onto the roof each day (there's a very safe slanted stairway with foot-holds), where the goats go each evening when we take them off the roof and load them onto a pickup truck (to a barn and pasture at Lars' home outside Sister Bay), and whether they can fall off the roof (yes, it's happened a couple of times, but no one was hurt)."



"What Rolf, Annika and I like about having a Goat Cam on the roof," said Lars, "which is actually two web cameras with different perspectives of the entire roof area, is that our visitors and friends can maintain a relationship with the restaurant and the goats throughout the season, no matter where they live the rest of the year."

Al Johnson's goats usually go onto the restaurant's sod roof at the start of each tourism season, in late May. The goats then spend the winter in a barn and pasture from mid-October to the start of the next season.

## AL JOHNSON'S LIFE: A PHOTO GALLERY



Al, 12 years old, Appleport - 1937



UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451

MBA

Mailed: July 12, 2012

Cancellation No. 92054059

Robert Doyle

v.

Al Johnson's Swedish  
Restaurant & Butik, Inc.

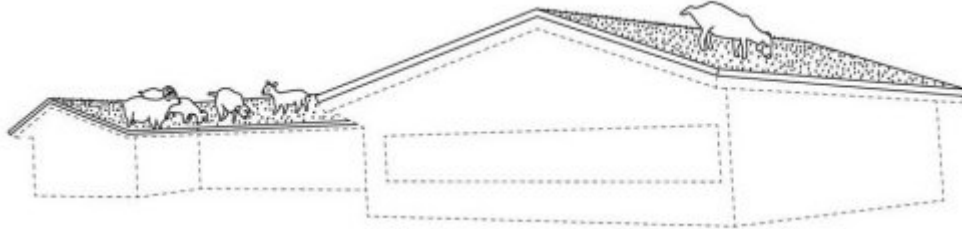
**Before Zervas, Cataldo and Mermelstein, Administrative  
Trademark Judges**

**By the Board:**

This is the second time this case has come up for consideration of whether petitioner has stated a claim upon which relief may be granted. The Board granted respondent's motion to dismiss the original petition for cancellation in its order of February 10, 2012 (the "Prior Order"), but dismissed the petition without prejudice. Doyle v. Al Johnson's Swedish Restaurant & Butik Inc., 101 USPQ2d 1780 (TTAB 2012). Petitioner filed an amended petition for cancellation on March 1, 2012. This case now comes up for consideration of respondent's contested and essentially identical motions to dismiss the amended petition for cancellation and for sanctions, each filed April 2, 2012.

Cancellation No. 92054059

As set forth in the Prior Order, respondent owns two registrations for the mark displayed below



for "restaurant services" and "Retail store and online retail store services featuring gifts, food, clothing ..." (the "Registrations").<sup>1</sup> Both of the Registrations include descriptions of respondent's mark, which are: "[t]he mark consists of goats on a roof of grass" (Registration No. 2007624); and "[t]he mark consists of building décor with a roof comprised of grass and bearing several goats on the roof" (Registration No. 3942832). Although the descriptions differ slightly, we consider them to be essentially identical for these purposes.

In his amended petition to cancel the Registrations, petitioner now alleges that:

- "Establishments in the classes to which [respondent's involved] marks apply ('Covered Establishments') are precluded by [respondent's involved] marks from placing goats on their grass roofs;"

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<sup>1</sup> Registration No. 2007624, issued October 15, 1996, and Registration No. 3942832, issued April 12, 2011, respectively.

Cancellation No. 92054059

- he desires to "dine and shop in Covered Establishments with a grass roof" because: (1) he "enjoys the look and smell of grass roofs;" (2) grass roofs "lesse[n] the need for artificial climate controls" increasing his enjoyment; and (3) he finds "goats on a grass roof to be entertaining;"
- he "desires to interview witnesses to goats on the grass roofs of Covered Establishments, and compare the reactions of such witnesses to the reactions of witnesses to animals, including goats, on the roofs in situations in which [respondent's involved] marks do not apply;"
- he "desires to take photographs of goats on the grass roofs of Covered Establishments" and to use, and publish a book featuring, his interviews and photographs;
- "fewer Covered Establishments maintain a grass roof than would be the case if Covered Establishments were not precluded by [respondent's involved] marks from keeping goats on such roof;" and
- due to respondent's involved marks "petitioner has been, and will continue to be, damaged in that Petitioner has been, and will continue to be, unable to satisfy his aforementioned desires."

Amended Petition for Cancellation ¶¶ 1-10. As grounds for cancellation, petitioner again alleges that the marks in respondent's involved Registrations are functional, or that they are perceived as entertainment, rather than as an indicator of source.



Cancellation No. 92054059

As set forth in the Prior Order, in order to survive respondent's motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), petitioner's complaint must allege facts which would, if proved, establish that: (1) petitioner has standing to maintain the proceeding; and (2) there is a valid ground for cancelling the Registrations. Young v. AGB Corp., 152 F.3d 1377, 47 USPQ2d 1752, 1754 (Fed. Cir. 1998); TBMP § 503.02 (3d ed. rev. 2012). With respect to standing, petitioner must allege facts which, if ultimately proven, would establish that petitioner has a "real interest," i.e., a "personal stake," in the proceeding. Ritchie v. Simpson, 170 F.3d 1092, 50 USPQ2d 1023, 1025-26 (Fed. Cir. 1999); Lipton Industries, Inc. v. Ralston Purina Co., 213 USPQ 185, 189 (TTAB 1982). Furthermore, petitioner's allegation that he would be damaged by the Registrations "must have a 'reasonable basis in fact.'" Ritchie, 50 USPQ2d at 1027 (quoting Universal Oil Prod. Co. v. Rexall Drug & Chem. Co., 463 F.2d 1122, 174 USPQ 458, 459-60 (CCPA 1972)).

Here, petitioner's new allegations, and the amended petition's allegations as a whole, are insufficient to adequately allege petitioner's standing. In fact, petitioner's presumed "real interest" or "personal stake" in

Cancellation No. 92054059

dining and shopping in "Covered Establishments,"<sup>2</sup> interviewing "witnesses to goats on the grass roofs" thereof, comparing the witnesses' "reactions" to those of other witnesses, taking photographs of goats on grass roofs and publishing books featuring his interviews and photographs does not directly relate to respondent's involved mark, except to the extent, if any, that respondent's involved mark allegedly prevents petitioner from engaging in the desired activities in "Covered Establishments" other than those owned by respondent. Petitioner's Opposition to Motion to Dismiss, p. 4. Under current law, petitioner's alleged, and presumed, "real interest" and "personal stake" in dining and shopping in such other restaurants and gift shops with goats on their roofs does not constitute an adequate allegation of standing.

As a fundamental principle of trademark law, the owner of a mark for a particular product or service generally has the right to prevent the use of the same or a similar mark

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<sup>2</sup> "Covered Establishments" are defined by petitioner as "[e]stablishments in the classes to which Registrant's marks apply ...," and we construe "classes" as a reference to International Classes. Amended Petition ¶ 1. This definition necessarily includes direct competitors of respondent in its retail store and restaurant businesses, as well as all other businesses trading in International Classes 35 and 42. Those classes of services are very broad, and it is quite possible that some included services are so unrelated that use of the same mark in connection with them would not be likely to confuse. In such cases, the subject Registrations would not inhibit use of respondent's mark by others.

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to the extent that use by others would be likely to cause confusion.<sup>3</sup> But by petitioner's logic, the very rights which trademark law grants give rise to an "injury" to anyone who would like to purchase infringing goods or services, but is allegedly unable to do so because of those rights. For instance, some consumers who like the cachet of certain brands but are unwilling to purchase the genuine goods may be disappointed that they cannot freely - and legally - purchase products bearing marks like COACH, GUCCI, or LOUIS VUITTON from any vendor. But that is not an injury giving rise to standing before the Board; it is simply a consequence - indeed an *intended* consequence - of trademark law. Purveyors of goods and services have no right to use the trademarks of others if confusion would result, and purchasers desiring goods or services offered under a particular trademark do not have a right to purchase such goods or services except those which originate from the proprietor of the trademark or its licensees.

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<sup>3</sup> Generally speaking, a trademark owner's remedies are limited to prevention of (or damages for) those uses which are likely to cause (or have caused) confusion. See Trademark Act §§ 32(1), 43(a)(1). Whether confusion is likely to occur is a determination based on a variety of factors, including the similarity of the marks and the similarity of the relevant goods or services. See e.g. AMF Inc. v. Sleekcraft Boats, 599 F.2d 341, 204 USPQ 808, 814 (9<sup>th</sup> Cir. 1979). Thus, as we previously noted, Doyle, 101 USPQ2d at 1782-83, respondent's trademarks do not generally impede petitioner (or anyone else) from placing goats on a sod roof *unless* doing so would be likely to cause confusion in light of respondent's prior use and registration.

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While the requirements to establish standing set forth in Ritchie set a low threshold, they are still requirements which must be met. In Ritchie, the Federal Circuit reaffirmed that standing before the Board requires a "real interest," noting that a plaintiff "must show a direct injury to himself." Ritchie, 50 USPQ2d at 1025-26 (emphasis added) (citing Jewelers Vigilance Comm., Inc. v. Ullenberg Corp., 823 F.2d 490, 2 USPQ2d 2021, 2023-24 (Fed. Cir. 1987)). Further, while a petition to cancel may be filed by "any person who believes that he is or will be damaged" by the registration, Trademark Act § 14, the belief at issue is not purely subjective. Rather, the petitioner's belief in damage must be "reasonable." Ritchie, 50 USPQ2d at 1027-28.

Petitioner's interest in this case is at most indirect: petitioner alleges that as a result of respondent's involved Registrations, fewer "Covered Establishments," i.e., respondent's non-party competitors, will "maintain a grass roof," Amended Petition ¶ 9, thus potentially depriving petitioner of his alleged interest in frequenting the restaurants and gift shops of non-parties using respondent's mark in connection with the same or similar services. If this is an injury at all, it is an indirect injury, as petitioner's complaint is that others will be prevented from using respondent's mark. Petitioner's mere speculation that respondent's involved Registrations prevent nonparties from

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operating restaurants or gift shops with grass roofs on which goats graze, in turn potentially impairing petitioner's alleged interest, is not an allegation of the direct stake required for standing. See McDermott v. San Francisco Women's Motorcycle Contingent, 81 USPQ2d 1212, 1214 (TTAB 2006), aff'd, 240 Fed. Appx. 865 (Fed. Cir. 2007) ("The purpose of the standing requirement, which is directed solely to the interest of the plaintiff, is to prevent litigation when there is no real controversy between the parties." ) (emphasis added).

We note again that petitioner does not allege that he is in the restaurant or gift shop business (or any related trade), nor does petitioner allege that he wants to put goats on a sod roof of his own or that respondent's registration is directly preventing him from doing anything. In essence, petitioner's complaint is not that he cannot himself engage in any business or other activity due to respondent's Registrations, but rather that respondent's *competitors* allegedly cannot do so, thus preventing petitioner from patronizing their businesses. But standing requires a direct and personal injury, and does not provide a right of redress to those who may be only tangentially and speculatively affected by a registration.<sup>4</sup> If respondent's

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<sup>4</sup> We recognize that standing does not necessarily require a proprietary right, and that organizations such as trade associations can have a direct interest when they pursue Board

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competitors have a reasonable belief in damage resulting from respondent's Registrations, they can assert such claims themselves. But unless he has a direct and personal stake in the matter, petitioner may not appoint himself as their proxy.

For all of these reasons, respondent's motion to dismiss the amended petition for cancellation is hereby **GRANTED**. Having now failed twice to adequately allege his standing, the amended petition for cancellation is hereby **DISMISSED, WITH PREJUDICE**.<sup>5</sup> With respect to respondent's motion for sanctions, "the Board may enter sanctions ... up to and including the entry of judgment," TBMP § 527.02 (3d ed. rev. 2012), and because we have already entered judgment, there is no need for us to consider respondent's now-moot motion for sanctions.

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litigation relevant to their members. Jewelers Vigilance, 2 USPQ2d at 2024. But unlike a trade association, petitioner is an individual and does not purport to represent "Covered Establishments," and there is no indication in the record that they have authorized him to do so.

<sup>5</sup> Because petitioner lacks standing, we need not address respondent's allegations that the petition for cancellation does not adequately set out substantive grounds for cancellation.

**CERTIFICATE OF SERVICE**

I hereby certify that on September 20, 2019, I filed the foregoing 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:

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I also certify that on September 20, 2019, I sent a copy of this document by U.S. mail to Appellant Todd C. Bank, as follows:

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Dated: September 20, 2019

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because the motion contains **8,604** words, as counted by the Microsoft Word system used to prepare the brief, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 27(d)(2) and Fed. Cir. R. 27(d)

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) because it has been prepared in a proportionally spaced typeface using Microsoft Word in a 14-point Times New Roman font.

Dated: September 20, 2019

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