

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION**

NATIONAL COLLEGIATE ATHLETIC  
ASSOCIATION,

Plaintiff,

v.

KIZZANG LLC and ROBERT  
ALEXANDER,

Defendants.

Case No. 1:17-cv-712-JMS-MPB

**NCAA’S MEMORANDUM OF LAW IN SUPPORT OF  
ITS MOTION FOR ATTORNEYS’ FEES**

**I. SUMMARY OF ARGUMENT**

The Court’s January 18, 2018 Order granting Plaintiff National Collegiate Athletic Association’s (“NCAA”) motions for default judgment and permanent injunction found this matter an exceptional case under 15 U.S.C. § 1117(a), “which entitles the NCAA to an award of its attorneys’ fees.” Dkt. No. 87 at 19. Accordingly, the Court ordered the NCAA to submit this motion supporting the amount of that award, by February 23, 2018. *Id.* at 21.

The concurrently filed declarations of the NCAA’s counsel, which include counsels’ respective time entries, detail the reasonable attorneys’ fees expended by the NCAA in prosecuting this matter. Although the case was concluded as a matter of default, the litigation lasted nearly eleven months due largely to Defendants Kizzang LLC (“Kizzang”) and Robert Alexander’s (“Alexander”) various motions attempting to delay entry of default judgment, which considerably increased the fees incurred by the NCAA in reaching this result.

Accordingly, the NCAA respectfully requests recovery of its reasonable attorneys' fees in the amount of \$242,213.55, which includes a discount insofar as the amount does not include the fees and costs incurred in preparing this Motion for Attorneys' Fees.

## II. STATEMENT OF FACTS

### A. The Court Ordered that the NCAA is Entitled to Recovery of its Reasonable Attorneys' Fees

As described in the Court's Order granting the NCAA's motions for default judgment and permanent injunction (Dkt. No. 87, the "Default Judgment Order"):

[T]his case falls within the category of 'exceptional cases' that warrant the award of attorneys' fees under the Lanham Act. Defendants' marks are obviously similar to the NCAA's marks, and Defendants planned to use the marks in connection with contests and events related to NCAA basketball games. [See Filing No. 1 at 5-7.] This indicates willful infringement. Additionally, while Defendants readily agreed to the Stipulated Order in which they agreed not to use the FINAL 3 or APRIL MADNESS marks, the agreement lasted only through the end of 2017. In the meantime, Defendants ignored the litigation and missed their deadline to answer or otherwise plead. All the while, Defendants have not set forth any substantive defenses to the NCAA's claims. Indeed, their only argument related to the similarity of their marks to the NCAA's marks is that a Google search of their marks does not yield any results related to the NCAA. This argument is unavailing. The NCAA's Motion for Default Judgment, [Filing No. 76], is granted to the extent that **the Court finds this is an "exceptional case" which entitles the NCAA to an award of its attorneys' fees.**

Default Judgement Order at 19 (emphasis added).

Accordingly, the Court ordered the NCAA to file its motion for attorneys' fees by February 23, 2018. *Id.* at 21.

### B. NCAA Accrued \$242,213.55 in Reasonable Attorneys' Fees in Litigating this Exceptional Case.

As the Court is aware, the complaint in this case was filed on March 8, 2017, followed by the NCAA's motion for preliminary injunction the next day. Doc. Nos. 1, 5, 6. That motion for

preliminary injunction, and arguably this entire litigation, was necessitated by Defendant's testimony in October 2016 that Defendants intended to use the infringing FINAL 3 mark in connection with the then-upcoming 2017 NCAA Men's Division I Basketball Tournament. Until that point, the parties had been litigating before the Trademark Trial and Appeal Board ("TTAB") regarding whether the offending marks could be registered by Kizzang, and Defendants had refrained from using the marks during the TTAB proceeding. Masters Decl., ¶ 2. In other words, Defendants' decision to actively infringe on the NCAA's intellectual property rights in early 2017 necessitated both this litigation and the preliminary injunction motion.

After filing suit, the parties negotiated a stipulation providing the NCAA with injunctive relief through the end of 2017, obviating the need for a hearing on the NCAA's Motion for Preliminary Injunction. Doc. No. 20. That stipulation permitted Defendants until June 15, 2017, to answer the NCAA's Complaint. *Id.* Between March and July 2017, the case was relatively quiet. The NCAA filed an unopposed motion for a one month extension of Defendants' time to respond to the complaint, and a Motion for Pretrial Conference. Doc. Nos. 27, 29.

When Defendants' deadline to respond to the complaint passed without a response, the NCAA filed its motion for clerk's entry of default on July 21, 2017. Doc. No. 30. That motion was opposed, and the NCAA prepared and filed its reply brief on August 17, 2017. Doc. Nos. 45-46. NCAA then filed a motion to continue the pretrial conference at the end of the month. Doc. No. 48.

Despite the pendency of the NCAA's motion for entry of default, Defendants filed a Motion to Dismiss Plaintiff's Complaint, or to have the case transferred to the District of Nevada, on August 31. Doc. No. 50. That Motion, of course, was opposed by the NCAA, (Doc. Nos. 54, 55), with briefing continuing through October.

On October 20, despite the pendency of both the NCAA's motion for entry of default and Defendants' motion to dismiss or transfer the case, Defendants filed a motion for evidentiary hearing related to their motion to dismiss, seeking to present live testimony at the hearing for its motion. Doc. No. 62. The NCAA opposed this motion as well. Doc. Nos. 69, 70.

In November 2017, after the Court granted the NCAA's motion for entry of default, the NCAA moved for default judgment and permanent injunction, (Doc. Nos. 76-79), which motions were also opposed and required reply briefing. Doc. Nos. 83-86. While those motions were pending, the NCAA attempted to reach an agreement with Defendants to extend the stipulated injunction (which expired at the end of 2017), such that Defendants would not use the infringing marks in connection with the NCAA's 2018 tournament. Unfortunately, Defendants would not agree to extend the injunction even for the duration of the 2018 tournament, and as a result, the NCAA was forced to prepare a second motion for preliminary injunction to protect its rights.

However, the NCAA's motions for default judgment and permanent injunction were granted on January 18, 2018, Doc. No. 87, and the NCAA's second motion for preliminary injunction was not filed.

### **III. ARGUMENT**

As often described by the Seventh Circuit, the amount of an attorneys' fee award is reached by multiplying the reasonable hourly fee for counsel's time, by the number of hours reasonably expended on the litigation. *See, e.g., People Who Care v. Rockford Bd. of Educ.*, 90 F.3d 1307, 1310 (7th Cir. 1996). The district court may then increase or decrease that amount based on a number of factors, including the degree of success in the litigation. *Id.* at 1314.

An attorney's reasonable hourly rate is "based on market rates for services rendered," and in determining market rates, "[t]he attorney's actual billing rate for comparable work is 'presumptively appropriate.'" *Id.* at 1310 (citing *Missouri v. Jenkins*, 491 U.S. 274, 283 (1989));

*Pressley v. Haeger*, 977 F.2d 295, 299 (7th Cir. 1992); *Gusman v. Unisys Corp.*, 986 F.2d 1146, 1150 (7th Cir. 1993)). Similarly, a paralegal's hourly rate is reasonable if "the work was sufficiently complex to justify the efforts of a paralegal." *People Who Care*, 90 F.3d at 1315. In other words, the rates that are charged to the client are presumptively reasonable, as they represent the actual market rate for the attorney. *See id.* at 1311 (counsel "must present evidence to establish that the requested rate is his actual billing rate"); *Marcum v. Graphic Packaging Int'l, Inc.*, No. 1:13-CV-158, 2013 U.S. Dist. LEXIS 137290, at \*6-7 (N.D. Ind. Sept. 25, 2013) ("The best measure of the cost of an attorney's time is what the attorney could earn from paying clients.") (quoting *Gusman*, 986 F.2d at 1150).

With respect to whether the hours expended on litigation are reasonable, the Court should consider, *inter alia*, the result obtained, whether any time was "inefficient or duplicitous," or if the attorney's hours were not adequately documented. *People Who Care*, 90 F.3d at 1314. As with the reasonableness of counsel's rates, the Court should conclude that counsel's decisions on how to spend time litigating a matter were reasonable in the absence of particularized evidence to the contrary. *Id.*

Throughout this litigation, Douglas N. Masters, Managing Partner of Loeb & Loeb LLP's ("Loeb") Chicago office, has been lead counsel for the NCAA. Mr. Masters spent 98.0 hours between January 12, 2017, and January 31, 2018, litigating this case, averaging around 7 hours per month. Mr. Masters spent this time directing the other attorneys and paralegals who worked on this matter, participating in various conferences with the Court, and conferring and corresponding with opposing counsel (or Defendant Alexander individually). Mr. Masters's rate was \$700 per hour in 2017 and 2018 (typical of the market rate for a Chicago attorney of my experience, particularly in trademark litigation), resulting in total fees of \$61,740.00 for this

case.<sup>1</sup> As can be seen from his sparse hours, Mr. Masters was able to delegate the majority of the tasks in this case. Moreover, Mr. Masters has been representing the NCAA as litigation counsel since 2000, nearly twenty years ago, and has developed efficiencies in his practice due to his familiarity with the NCAA's intellectual property rights, as well as his relationships with the NCAA's in-house counsel and other key personnel. Masters Decl., ¶ 3.

Likewise, the attorney with the most time spent in this matter, Edward K. Lee, has been an attorney with Loeb, and working with Mr. Masters in trademark litigation, for nearly ten years. Moreover, Mr. Lee has been working with Mr. Masters in representing the NCAA in trademark litigation since at least 2012, and has been engaged in litigation regarding these marks (FINAL 3 and APRIL MADNESS) against Kizzang and Mr. Alexander, since at least February 2015, before the Trademark Trial and Appeal Board. Thus, in the same way that the NCAA benefits from its experience with Mr. Masters, Mr. Masters has developed efficiencies working with Mr. Lee, particularly in trademark litigation matters. Masters Decl., ¶ 4.

Mr. Lee spent 139.7 hours on this case between February 28, 2017, and January 18, 2018, averaging a little over 12 hours per month. Mr. Lee's rate was \$615 per hour in 2017 and 2018 (typical for a Los Angeles litigation attorney with Mr. Lee's experience, at a firm comparable to Loeb), resulting in total fees of \$77,323.95, for this case. Mr. Lee spent the majority of his time preparing the memoranda of law in support of the NCAA's motions related to default judgment (all of which were successful), and opposing Defendants' multiple futile motions to delay resolution of this case (all of which were defeated), and managing the other attorneys who worked on this matter. Mr. Lee also expended significant effort preparing the NCAA's second

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<sup>1</sup> The NCAA's fees for all of Loeb's attorneys and paralegals are reduced by 10% after multiplying the hours spent by the hourly rate, due to Mr. Masters's longstanding relationship with the NCAA as litigation counsel.

motion for preliminary injunction, which was ultimately never filed, but became necessary because of Defendants' senseless refusal to extend the 2017 stipulated injunction entered into at the beginning of this case to 2018, which would have allowed the parties to avoid further legal expense while the Court considered the fully briefed motion for default judgment. *Id.*, ¶ 5.

In addition to Mr. Lee, three other Loeb associates from the Los Angeles office (Crystal Law, Kyle Petersen, and Lisa Rubin) assisted in this matter in more limited capacities, primarily performing legal research and some drafting of memoranda for various motions. Crystal Law has been a litigation attorney since 2014, and performed legal research in support of the NCAA's motions for entry of clerk's default, and for entry of default judgment. She spent 47.9 hours working on this matter, at an hourly rate of \$415 per hour, for a total of \$17,890.65 in fees. *Id.*, ¶ 6. Kyle Petersen has been a litigation attorney since 2015, and performed legal research and drafted memoranda in support of the NCAA's motions for entry of clerk's default and for entry of default judgment, and in opposition to Defendants' motions to dismiss and for evidentiary hearing. He spent 50.4 hours working on this matter, at an hourly rate of \$425 per hour (competitive with the market for an attorney of his experience working at a comparable firm on similar matters), for a total of \$19,278.00 in fees. *Id.*, ¶ 7. Lisa Rubin has been a litigation attorney since 2017, and performed legal research in support of the NCAA's motions for permanent injunction and default judgment, and in opposition to Defendants' motion to dismiss. She spent 65.9 hours working on this matter, at an hourly rate of \$425 per hour (competitive with the market for an attorney of her experience working at a comparable firm on similar matters), for a total of \$25, 206.75 in fees. *Id.*, ¶ 8.

To aid the NCAA with litigating in this Court, the NCAA also retained local counsel, with the law firm of Faegre Baker Daniels LLP ("FaegreBD"), led by Daniel Pulliam.

FaegreBD's attorneys fees (totaling \$28,018.50) are detailed in the concurrently filed Declaration of Daniel E. Pulliam, and are reasonable.

In addition to the counsel described above, Loeb had three paralegals (Sarah Kunzendorf, Linda Pettigrew, and Barbara Fellas) perform various support tasks throughout the litigation. Their rates, \$270, \$320, and \$330 per hour, respectively, are competitive with the market for paralegals of their experience, and they performed 46.1 hours of work in this matter, for a total of \$12,755.70 in fees. *Id.*, ¶ 9.

Finally, the NCAA is not requesting any of the time spent preparing this motion for attorneys' fees by either Mr. Lee or Mr. Pulliam. These amounts are significant, as hundreds of time entries had to be marshalled and reviewed, before this memorandum had to be researched, written, and prepared for filing.

Although the NCAA prevailed in this litigation as a matter of default, it required, *inter alia*, preparing two motions for preliminary injunction (both solely due to Defendants' intent to infringe on the NCAA's intellectual property rights), a motion for entry of default, a motion for entry of default judgment, and a motion for permanent injunction. The NCAA also had to oppose (successfully) Defendants' motion to dismiss and motion for evidentiary hearing, both of which were needlessly filed after entry of default. As such, all of the NCAA's fees expended in obtaining its total success in this case were reasonable and should be awarded to the NCAA.

#### **IV. CONCLUSION**

For all of the foregoing reasons, the NCAA's motion for attorneys' fees should be granted in its entirety, and the NCAA should be awarded \$242,213.55.

Respectfully Submitted,

Dated: February 23, 2018

By: /s/ Douglas N. Masters

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 23, 2018, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system. Parties may access this filing through the court's system.

*/s/ Douglas N. Masters* \_\_\_\_\_