



against the defendants. On March 13, 2007, Judge Aspen adopted my Report and Recommendation of December 13, 2006, granting Lorillard a permanent injunction. Having finally prevailed in this matter, Lorillard now seeks an award of the reasonable attorneys' fees and costs it has incurred.

The defendants were given until July 23, 2007, to respond to Lorillard's fee petition. They have filed no response and have not sought an extension of time.

**I.  
ATTORNEYS' FEES UNDER THE LANHAM ACT**

**A.  
Lorillard Is Entitled To Fees In This "Exceptional Case"**

Under 15 U.S.C. § 1117(a), the prevailing party in a Lanham Act case is entitled to an award of reasonable attorneys' fees "in exceptional cases." *JCW Investments, Inc. v. Novelty, Inc.*, 482 F.3d 910, 919 (7<sup>th</sup> Cir. 2007). Both willful infringement, and vexatious litigation conduct, have been found adequate to render a case exceptional and justify award of fees to prevailing defendants under § 1117(a). *TE-TA-MA Truth Foundation-Family of URI, Inc. v. World Church of the Creator*, 392 F.3d 248, 263 (7<sup>th</sup> Cir. 2004). Here, Judge Aspen's entry of a default judgment against the defendant was precipitated by the defendants' pattern of willful and contumacious conduct throughout discovery, conduct that easily qualifies as vexatious. That alone qualifies this case as exceptional.

In addition, the default judgment means that the well-pleaded allegations of Lorillard's complaint are now taken as true. *Cass County Music Co. v. Muedini*, 55 F.3d 263, 265-66 (7<sup>th</sup> Cir. 1995); *Black v. Lane*, 22 F.3d 1395, 1398 (7<sup>th</sup> Cir. 1994); *FMC Corp. v. Varonos*, 892 F.2d 1308, 1310 (7<sup>th</sup> Cir.1990). Here, Lorillard alleged that the "defendants offered for sale and sold counterfeit products bearing the Lorillard Marks, with the intent to confuse and mislead the public into believing that their products are genuine Lorillard products . . . ." (*Second Amended Complaint*, ¶ 20). It

further alleged that the defendants “intended to exploit the goodwill and reputation associated with the Lorillard Marks and to take a competitive advantage without the expenditure of resources by a strategy of willful infringement.” (*Second Amended Complaint*, ¶ 55). Taking those allegations as true, defendants’ conduct must be deemed willful, making this an “exceptional case” appropriate for an award of fees. *Rio Properties, Inc. v. Rio Intern. Interlink*, 284 F.3d 1007, 1023 (9<sup>th</sup> Cir. 2002)(award of fees appropriate where defendant defaulted, and plaintiff’s allegations that defendant acted “knowingly, maliciously, and oppressively, and with an intent to ... injure” were deemed admitted); *Microsoft Corp. v. T & S International Corp.*, 2004 WL 407008, \*1 (N.D.Ill. 2004)(awarding attorneys’ fees where defendant defaulted and plaintiff’s allegations relating to willfulness were deemed admitted).

**B.**  
**Lorillard Has Failed To Adequately Support Its Entitlement To  
The Full Amount Of Fees It Seeks**

Lorillard seeks an award of \$918,434.22 in fees. The amount of a fee award is determined by calculating a lodestar after looking to “the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.” *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *JCW Investments, Inc. v. Novelty, Inc.*, 482 F.3d 910, 920 (7<sup>th</sup> Cir. 2007)(use of *Hensley*-lodestar method in Lanham Act case). As the fee applicant, Lorillard bears the burden of establishing the hours spent and the appropriate rate. *Hensley*, 461 U.S. at 437. After a review of the materials Lorillard has submitted in support of its fee request, it must be concluded that Lorillard has failed to meet that burden as to the full amount, and a reduction in the fees it requests is necessary.

1.

**Lorillard Has Failed To Establish That The Rates And Hours Billed of Many  
Of The Individuals Who Worked On This Case Were Reasonable**

In support of its fee petition, Lorillard has filed billing records for “Professional Services Rendered” that cover work performed by almost two dozen individuals – Jeffrey Mote, Cameron Nelson, John Pacocha, Herbert Finn, Thomas Williams, Angela Ocasio, Paul Haskins, Susan Braverman, Gladys Negron-Munoz, Michael Ambrose, Kenneth Anderson, Sherri Morisette, Daniel Fahner, Matthew Gensburg, Kerry Carlson, Yolanda Powell, Dustin Calkins, Lindsay Lefteroff, Howard Jeruchimowitz, Kari Johnson, Kendell Kelly, Sonal Desai, Andrew White – over the nearly four-year history of the litigation.

However, Lorillard has provided a declaration attesting to just four attorneys’ billing rates, submitting that the rates were customary for handling Lanham Act cases in the Chicago area. He makes no mention of Ms. Ocasio, Mr. Williams, Mr. Haskins, Mr. Ambrose, Mr. Anderson, Ms. Braverman, Ms. Negron-Munoz, Ms. Morisette, Mr. Gensburg, Mr. Carlson, Ms. Powell, Mr. Fahner, Mr. Calkins, Ms. Lefteroff, Mr. Kelly, Ms. Johnson, Mr. White, S. Desai, or Mr. Jeruchimowitz. Some, no doubt, are partners, some are associates, and some are paralegals, but there is no distinction made among them in the supporting declaration. They are, instead, merely lumped in as “attorneys or paralegals either employed by Greenberg Traurig LLP or retained as independent contractors in this matter.”

As for the four attorneys discussed in the supporting declaration, there is no discussion of any of their experience in Lanham Act cases, or even how many years they have been in practice, as would ordinarily be expected from a declaration in support of a fee petition. The supporting

declaration does say that his rate ranged from \$290/hour in July 2003, to \$395/hour by 2006. Mr. Nelson's rate was \$250/hour in 2003, and increased to \$266/hour by 2006. Mr. Pacocha's rate went from \$375/hour in 2003 to \$387/hour in 2005. Finally, Mr. Finn's rate increased from \$362/hour in 2003 to \$450/hour in 2005. (*Plaintiff's Petition for Fees and Costs Associated with Entire Counterfeiting Lawsuit Against Montrase Defendants, Ex. A, Declaration of Jeffrey G. Mote*).

More is required than an attorney's unsupported declaration to demonstrate that rates charged and hours worked are reasonable. "The burden is on the fee applicant to produce satisfactory evidence-in addition to the attorney's own affidavits-that the requested rates are in line with those prevailing in the community." *Blum v. Stenson*, 465 U.S. 886, 895 n. 11 (1984). *Accord Connolly v. National School Bus Service, Inc.*, 177 F.3d 593, 596 (7<sup>th</sup> Cir. 1999); *Stark v. PPM America, Inc.*, 354 F.3d 666, 675 (7<sup>th</sup> Cir. 2004)(affidavit from defendant-companies as to what they paid their attorneys established market rate). On the other hand, an attorney's affidavit has been found to suffice on occasion, *Gautreaux v. Chicago Housing Authority*, 2007 WL 1814632, \*10 (7<sup>th</sup> Cir. 2007)(requiring proof by affidavit of attorney's market rate). As such, I find it adequate here, *see Miller v. Artistic Cleaners*, 153 F.3d 781, 784 (7<sup>th</sup> Cir. 1998)(district court's reliance on its firsthand observations attorney's performance and work product appropriate), but only as to the individuals specifically mentioned : Messrs. Finn, Mote, Nelson, and Pacocha.

As for the rest, fees cannot be allowed for attorneys – or other individuals – whose rates and hours worked are unsupported by any affidavit, declaration, or even mere mention. Some of the attorneys whom the supporting declaration does not mention are billing at rates commensurate with or exceeding the upper reaches of those allowed in Lanham Act and similar intellectual property cases in Chicago – *see, e.g., Microsoft Corp. v. T & S Intl. Corp.*, 2004 WL 407008, \*1 (N.D.Ill.

2004) (\$450/hour); *Tony Jones Apparel, Inc. v. Indigo USA LLC*, 2005 WL 3115234, \*2 (N.D.Ill. 2005)(\$275/hour); *Bretford Mfg., Inc. v. Smith System Mfg. Co.*, 421 F.Supp.2d 1117, 1122 (N.D.Ill. 2006)(\$200/hour) – and other large metropolitan areas. *See, e.g., Johnson v. Connolly*, 2007 WL 1151004, \*4 (N.D.Cal. 2007)(\$350/hour for partner in San Francisco); *Levi Strauss & Co. v. Fox Hollow Apparel Group, LLC*, 2007 WL 1140648, \*5 (N.D.Cal. 2007)(\$440/hour for partner in San Francisco); *Sanitec Industries, Inc. v. Micro-Waste Corp.*, 2007 WL 677300, \*3 (S.D.Tex. 2007)(\$495/hour for partner in Houston); *Pannonia Farms, Inc. v. USA Cable*, 2006 WL 2872566, \*3 (S.D.N.Y. 2006)(\$400 for partner in New York). Mr. Gensburg, for example, billed at \$510-545/hour for work that Lorillard characterizes as “assist[ing] Mr. Mote.” (*Plaintiff’s Petition for Fees and Costs*, at 4). This is a steep fee for unspecified assistance, especially without any support for that rate in the supporting declaration.

The suspicion is that some of the unmentioned individuals are paralegals – the supporting declaration does not differentiate – but the requirements for supporting a fee petition for paralegals is no different than one for attorneys. *Spegon v. Catholic Bishop of Chicago*, 175 F.3d 544, 553, 555-563 (7<sup>th</sup> Cir. 1999). The supporting declaration makes no distinction between attorneys and paralegals, and, as a result, it is impossible to determine whether some of the individuals listed in the billing statements are rather expensive paralegals who might properly have their fees reduced, *Medline Industries, Inc. v. Medline Products Co.*, 2004 WL 1921020, \*3 (N.D.Ill. 2004)(\$150/hour for Chicago paralegal called “excessive”); *Tony Jones Apparel, Inc. v. Indigo USA LLC*, 2005 WL 3115234, \*1 (N.D.Ill. 2005)(\$100/hour allowed for paralegal in Chicago); *Johnson v. Connolly*, 2007 WL 1151004, \*4 (N.D.Cal. 2007)(\$85/hour allowed for paralegal in San Francisco); *National Distillers Products Co., LLC v. Refreshment Brands, Inc.*, 2002 WL 1766548, \*2 (S.D.N.Y.

2002)(\$170/hour allowed for New York paralegal), or reasonably priced young associates whose fees would be allowed. This manner of supporting a fee petition essentially precludes the required, meaningful review. Because Lorillard, has failed to properly support the fees claimed for Ms. Ocasio, Mr. Williams, Mr. Haskins, Mr. Ambrose, Mr. Anderson, Ms. Braverman, Ms. Negron-Munoz, Ms. Morisette, Mr. Gensburg, Mr. Carlson, Ms. Powell, Mr. Fahner, Mr. Calkins, Ms. Leftcroff, Mr. Kelly, Ms. Johnson, Mr. White, S. Desai, or Mr. Jeruchimowitz, those fees shall be disallowed. The resulting reduction comes to \$74,564.75:

Ms. Ocasio (\$10,402.40): 7/22/03 – \$140; 7/25/03 – \$140; 7/28/03 – \$280; 7/29/03 – \$420; 7/30/03 – \$490; 7/31/03 – \$14; 6/9/05 – \$144; 7/12/05 – \$648; 8/2/05 – \$432; 8/10/05 – \$1008; 9/8/05 – \$432; 9/12/05 – \$1080; 9/16/05 – \$792; 9/19/05 – \$792; 9/21/05 – \$432; 9/27/05 – \$288; 10/25/05 – \$216; 10/26/05 – \$576; 10/27/05 – \$288; 11/21/05 – \$720; 11/22/05 – \$360; 1/23/06 – \$710.40;

Mr. Williams (\$56.25): 7/14/03 – \$56.25;

Mr. Haskins (\$283.20): 3/26/04 – \$283.20;

Mr. Ambrose (\$180): 4/29/05 – \$180;

Mr. Anderson (\$1740): 6/2/05 – \$240; 6/3/05 – \$250; 6/14/05 – \$300; 6/20/05 – \$300; 6/21/05 – \$450; 6/22/05 – \$200;

Ms. Braverman (\$11,968): 2/24/05 – \$560; 3/1/05 – \$960; 3/2/05 – \$1120; 3/4/05 – \$960; 3/10/05 – \$480; 3/14/05 – \$1136; 3/15/05 – \$1152; 3/16/05 – \$480; 3/17/05 – \$1008; 3/18/05 – 1120; 3/21/05 – \$1152; 4/1/05 – \$480; 4/4/05 – \$400; 4/5/05 – \$560; 4/6/05 – \$400;

Ms. Negron-Munoz (\$5,297.60): 4/29/05 – \$492.80; 5/2/05 – \$616; 5/3/05 – \$668.80; 5/4/05 – \$932.80; 5/9/05 – \$774.40; 5/10/05 – \$352; 5/11/05 – \$492.80; 5/12/05 – \$176; 5/13/05 – \$616; 8/29/05 – \$176;

Ms. Morisette (\$17, 811.40): 6/29/05 – \$375; 9/8/05 – \$750; 9/9/05 – \$562.50; 9/14/05 – \$262.50; 9/15/05 – \$375; 9/18/05 – \$1875; 9/20/05 – \$1425; 9/21/05 – \$712.50; 9/27/05 – \$187.50; 10/11/05 – \$562.50; 10/18/05 – \$1350; 10/19/05 – \$1875; 10/20/05 – \$2100; 10/31/05 – \$712.50; 11/10/05 – \$187.50; 11/30/05 – \$187.50; 12/13/05 – \$375; 1/10/06 – \$193; 1/17/06 – \$386; 1/18/06 – \$1891.40; 1/19/06 – \$1080; 1/26/06 – \$386;

Mr. Gensburg (\$11,810.50): 9/8/05 – \$204; 9/9/05 – \$204; 9/13/05 – \$510; 9/14/05 – \$765; 9/20/05 – \$204; 9/21/05 – \$51; 9/22/05 – \$204; 9/27/05 – \$153; 9/29/05 – \$612; 10/6/05 – \$204; 10/11/05 – \$102; 10/12/05 – \$1836; 10/14/05 – \$663; 10/19/05 – \$867; 10/20/05 – \$408; 10/25/05 – \$357; 10/31/05 – \$663; 11/1/05 – \$1224; 11/3/05 – \$51; 11/8/05 – \$459; 11/9/05 – \$306; 11/10/05 – \$102; 11/15/05 – \$255; 11/30/05 – \$51; 12/13/05 – \$102; 1/3/06 – \$54.50; 1/6/06 – \$218; 1/10/06 – \$163.50; 1/18/06 – \$545; 1/19/06 – \$54.50; 1/24/06 – \$218;

Mr. Carlson (\$179): 9/9/05 – \$179;

Ms. Powell (\$3,500): 9/9/05 – \$472.50; 9/12/05 – 87.50; 9/20/05 – \$997.50; 10/20/05 – \$350; 11/10/05 – \$490; 11/11/05 – \$175; 12/5/05 – \$262.50; 1/9/06 – \$140; 1/10/06 – \$175; 1/13/06 – \$350;

Mr. Fahner (\$165.90): 6/16/05 – \$165.90;

Mr. Calkins (\$2211): 6/7/06 – \$363; 6/8/06 – \$231; 6/9/06 – \$99; 6/13/06 – \$891; 6/14/06 – \$627;

Ms. Lfteroff (\$4817.50): 6/20/06 – \$445.50; 6/21/06 – \$165; 6/23/06 – \$330; 6/26/06 – \$330; 6/27/06 – \$594; 6/28/06 – \$924; 6/29/06 – \$594; 6/30/06 – \$181.50; 7/5/06 – \$66; 7/6/06 – \$643.50; 7/10/06 – \$544.50;

Mr. Kelly (\$2928): 8/7/06 – \$120; 8/29/06 – \$528; 9/5/06 – \$384; 9/6/06 – \$888; 11/22/06 – \$1008;

Ms. Johnson (\$125): 8/9/06 – \$125;

S. Desai (\$540): 9/8/06 – \$60; 9/18/06 – \$180; 9/28/06 – \$156; 10/5/06 – \$60; 10/9/06 – \$84;



Mr. White (\$240): 11/22/06 – \$456;

Mr. Jeruchimowitz (\$309): 2/19/06 – \$30.90.

2.

**Fees For Clerical Tasks Or Excessive Hours Must Be Disallowed**

In addition, a number of the entries for the attorneys whose hours and rates are documented in the supporting declaration appear unreasonable – either because they are excessive or the tasks were easily and properly delegable. Hours spent are not reasonably expended if they are excessive, redundant, or otherwise unnecessary. *Stark v. PPM America, Inc.*, 354 F.3d 666, 674 (7<sup>th</sup> Cir. 2004). Also, a court should not allow hours expended by counsel on tasks that are easily delegable to non-professional assistance. *Spegon*, 175 F.3d at 553. Many entries in Lorillard’s submission reflect attorneys performing essentially clerical work, such as receiving, reviewing, docketing minute orders, updating schedules, or arranging for documents to be picked up. In most cases the minute orders were exceedingly brief and did little more than set a date for a status hearing, but attorneys were spending nearly 20 minutes “reviewing” them – and billing at a rate of nearly \$400/hour were taking care of these tasks.

A few examples are sufficient to illustrate. In one instance, Mr. Pacocha bills a total of \$150 for spending about 25 minutes “receiving, considering, and docketing” Judge Aspen’s two-line minute order of September 30, 2003 – a minute order that did nothing more than set a status hearing date and some deadlines. Similar examples include an entry for 18 minutes spent reviewing and docketing a two-line scheduling order on December 30, 2003, for a total of \$112.50. There are many instances of attorneys “doubling up” on these clerical tasks. Two attorneys billed for “review[ing]”

Magistrate Judge Keys' 50-word, March 21, 2005 minute order reporting the results of a settlement conference the attorneys had just participated in, at a cost of over \$100. Two attorneys also billed 18 minutes each to "review" the following minute order on November 27, 2006, at a cost of \$253: "The status hearing set for November 28, 2006, before Judge Aspen, is reset to 12/28/2006 at 10:30 AM." This is just a limited sampling of such entries.

It may be *de riguer* to submit such bills to clients who "will ordinarily take at face value the assertions made and pay the amount requested, trusting that it is reasonable, . . . [but] it is another thing . . . to submit copies of such invoices in support of a motion to compel payment by the adversary in litigation . . . ." *Bretford Mfg.*, 421 F.Supp.2d at 1122. Making note of scheduling orders is the type of thing easily delegable to support staff. *Spegon*, 175 F.3d at 553 (disallowing all attorney time spent updating schedules and case lists). And if it truly takes 18 minutes for an attorney -- two attorneys, at that -- to read a scheduling order, after just having heard it in open court, support staff are obviously far more efficient and better suited to the task. Accordingly, the following entries will be disallowed,, for a further reduction of \$6,724.70:

Mr. Pachoca (\$1,137.80): 9/21/03 - \$112.50; 9/24/03 - \$75; 10/26/03 - \$75; 10/10/03 - \$75; 12/30/03 - \$112.50; 6/1/04 - \$75.80; 6/4/04 - \$75.80; 6/28/04 - \$75.80; 11/29/04 - \$75.80; 12/17/04 - \$113.70; 1/18/05 - \$116.10; 2/27/05 - \$77.40; 3/25/05 - \$77.40;

Mr. Mote (\$3,802.50): 6/2/04 - \$87.90; 12/2/04 - \$58.60; 1/19/05 - \$59.80; 1/25/05 - \$59.80; 1/28/05 - \$89.70; 2/8/05 - \$59.80; 3/23/05 - \$89.70; 4/6/05 - \$59.80; 4/12/05 - \$59.80; 4/20/05 - \$59.80; 4/22/05 - \$89.70; 5/2/05 - \$89.70; 5/5/05 - \$149.50; 5/8/05 - \$149.50; 5/9/05 - \$119.60; 5/9/05 - \$29.90; 5/10/05 - \$89.70; 5/16/05 - \$89.70; 5/20/05 - \$89.70; 5/23/05 - \$89.70; 5/31/05 - \$209.30; 7/1/05 - \$119.60; 7/5/05 - \$119.60; 7/15/05 - \$119.60; 8/23/05 - \$59.80; 10/3/05 - \$89.70; 11/1/05 - \$89.70; 11/3/05 - \$29.90; 12/12/05 - \$29.90; 1/30/06 - \$79; 3/6/06 - \$79; 4/5/06 - \$79; 7/26/06 - \$197.50; 8/14/06 - \$79; 8/23/06 - \$79; 9/8/06 - \$79; 9/27/06 - \$79; 9/29/06 - \$118.50; 11/27/06 - \$118.50; 12/04/06 - \$118.50; 12/6/06 - \$79;

12/19/06 – \$79;

Mr. Finn (\$1,784.40): 3/25/05 – \$36.20; 5/4/05 – \$72.40; 5/23/05 – \$144.80; 7/28/05 – \$36.20; 9/1/05 – \$72.40; 11/2/05 – \$72.40; 1/25/06 – \$90; 2/1/06 – \$90; 2/9/06 – \$90; 7/26/06 – \$225; 8/7/06 – \$90; 8/14/06 – \$135; 8/23/06 – \$180; 9/20/06 – \$90; 11/27/06 – \$135; 12/4/06 – \$135; 12/6/06 – \$90.

### 3.

#### **Fees Must Be Disallowed For Tasks That Are Inadequately Described**

Finally, there are also a few entries seeking reimbursement for work that is not described at all, or that is not described in adequate detail to allow a determination of whether the task associated with the fee requested was a reasonable undertaking related to this case. *See Hensley*, 461 U.S. at 437 n.12 (“Plaintiff’s counsel, of course, is not required to record in great detail how each minute of his time was expended. But at least counsel should identify the general subject matter of his time expenditures.”). These entries, too, will be disallowed, for an additional reduction of \$949.70:

Mr. Mote: 5/7/04 – \$175;

Mr. Nelson: 1/27/04 – \$75.90;

Mr. Pachoca: 5/12/04 – \$75.80;

Mr. Finn: 9/15/05 – \$398; 2/9/06 – \$225.

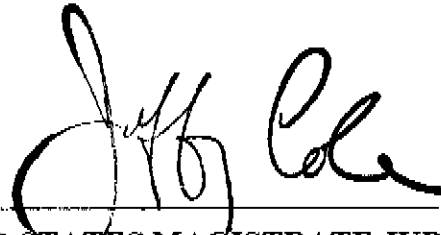
Accordingly, the aggregate reduction in fees sought by Lorillard comes to \$82,239.15, bringing the total allowable award to \$836,195.07.

#### **CONCLUSION**

For the foregoing reasons, it is recommended that the plaintiff’s petition for attorneys’ fees be GRANTED in the amount of \$836,195.07. It is further recommended that the asset freeze be

lifted to allow for the satisfaction of the award.

RESPECTFULLY SUBMITTED: \_\_\_\_\_

A handwritten signature in black ink, appearing to read "Jeffrey Cole". The signature is written in a cursive style with a large initial "J" and "C".

UNITED STATES MAGISTRATE JUDGE

DATE: 7/27/07

Any objections to the Report and Recommendation must be filed with the Clerk of the Court within ten (10) days of receipt of this notice. Failure to file objections within the specified time waives the right to appeal the Magistrate Judge's Report and Recommendation. *See* Fed.R.Civ.P. 72(b); 28 U.S.C. 636(b)(1)(C); *Lorentzen v. Anderson Pest Control*, 64 F.3d 327, 329 (7th Cir.1995).