

1 Larry W. McFarland (Bar No. 129668)
 E-Mail: lmcfarland@kmwlaw.com
 2 Dennis Wilson (Bar No. 155407)
 E-Mail: dwilson@kmwlaw.com
 3 David K. Caplan (Bar No. 181174)
 E-Mail: dcaplan@kmwlaw.com
 4 Tara D. Rose (Bar No. 256079)
 E-Mail: trose@kmwlaw.com
 5 KEATS McFARLAND & WILSON LLP
 9720 Wilshire Boulevard
 6 Penthouse Suite
 Beverly Hills, California 90212
 7 Telephone: (310) 248-3830
 Facsimile: (310) 860-0363
 8
 Attorneys for Plaintiff
 9 ZYNGA INC.

10 UNITED STATES DISTRICT COURT
 11 NORTHERN DISTRICT OF CALIFORNIA
 12
 13 SAN JOSE DIVISION

14 ZYNGA GAME NETWORK INC., a Delaware
 Corporation,
 15
 16 Plaintiff,
 17 v.
 18 JASON WILLIAMS, an individual, LUNA
 MARTINI, an individual, WAN-WEN KUO, an
 19 individual, and JOHN DOES 4-5 D/B/A MW
 GROUP
 20 Defendants.
 21
 22
 23
 24
 25
 26
 27
 28

CASE NO. CV-10:01022 JF (PSGx)

MOTION FOR ATTORNEYS' FEES; AND

MEMORANDUM OF POINTS AND
AUTHORITIES

Noted For Hearing:
DATE: June 24, 2011
TIME: 9:00 a.m.
PLACE: Courtroom 3, 5th Floor

1 **NOTICE OF MOTION AND MOTION**

2 TO ALL PARTIES: Please take notice that on June 24, 2011 at 9:00 a.m., in Courtroom 3,
3 Fifth Floor of the United States Federal District Courthouse, San Jose Courthouse, 280 South 1st
4 Street, San Jose, California 95113, Plaintiff Zynga Inc. (“Zynga”) will move the Court pursuant to
5 15 U.S.C. § 1117(a), Federal Rule of Civil Procedure 54(d) and Civil Local Rule 54-5 for an award
6 of attorneys’ fees jointly and severally against defendants Jason Williams, Luna Martini and Wan-
7 Wen Kuo (“Defendants”). Zynga’s Motion is based on this Notice of Motion and Motion, the
8 supporting Memorandum of Points and Authorities, the Declaration of David K. Caplan, the
9 Proposed Order submitted herewith, all pleadings on file in this action, and any other matter that
10 may be submitted in support of this Motion.

11 **ISSUE TO BE DECIDED**

12 Whether the Court should grant Zynga an award of attorneys’ fees in the amount of
13 \$22,419.00 jointly and severally against the Defendants.

14 **MEMORANDUM OF POINTS AND AUTHORITIES**

15 **I. INTRODUCTION AND RELEVANT FACTS**

16 Zynga filed its original complaint in this action on March 10, 2010. (Dkt. No. 1.) Zynga filed
17 its First Amended Complaint on September 7, 2010. (Dkt. No. 22.) On March 25, 2011, the Court
18 authorized Zynga to serve Defendants with process by electronic mail. (Dkt. No. 35.) Zynga served
19 Defendants with process on March 28, 2011. (Dkt. No. 36.) Zynga filed its request for entry of
20 default by the Clerk against Defendants on April 22, 2011. (Dkt. No. 39.) The Clerk entered
21 Defendants’ default on May 2, 2011. (Dkt. No. 42.) Zynga filed its motion for default judgment
22 against Defendants on May 6, 2011. (Dkt. No. 43.)

23 **II. ARGUMENT AND AUTHORITY**

24 **A. Zynga Is Entitled its Requested Award of Attorneys’ Fees**

25 The Lanham Act authorizes awards of attorneys’ fees in “exceptional cases.” 15 U.S.C. §
26 1117(a). A case is exceptional for purposes of the Lanham Act where, as here, “the infringement is
27 malicious, fraudulent, deliberate or willful.” Gracie v. Gracie, 217 F.3d 1060, 1068 (9th Cir. 2000).
28 Furthermore, a case is also exceptional for purposes of the Lanham Act when, as here, the defendant

1 fails to participate in the case. See Philip Morris U.S.A. Inc. v. Castworld Prod's, 219 F.R.D. 494,
2 502 (C.D. Cal. 2003) (citing Taylor Made Golf Co. v. Carsten Sports, 175 F.R.D. 658, 663 (S.D.
3 Cal. 1997)). Accordingly, Zynga is entitled to an award of attorneys' fees for Defendants' violations
4 of Zynga's trademark rights.

5 As outlined in Zynga's First Amended Complaint, without Zynga's authorization or
6 approval, Defendants established and operated websites (the "Infringing Websites") at the Internet
7 domain names MWBLACKMARKET.COM, MAFIAWARSDIRECT.COM and
8 MWFEXPRESS.COM through which they "sell" (or previously "sold") "Virtual Goods" that users,
9 playing the Game through the Zynga's providers' websites and/or applications, can use to compete
10 with other players who obtained their "Virtual Goods" directly from Zynga. (See First Amended
11 Complaint ("Dkt. No. 22") ¶¶ 27, 28.)

12 **B. Governing Law to Determine Reasonableness of a Fee Application**

13 The Ninth Circuit uses the "lodestar" method to determine the reasonableness of a fee
14 application. Intel Corp. v. Terabyte Int'l, Inc., 6 F.3d 614, 622 (9th Cir. 1993) (affirming award of
15 attorneys' fees and remanding for re-calculation). The lodestar amount is obtained by multiplying
16 the number of hours reasonably expended by a reasonable hourly billing rate. Id. Once the lodestar
17 is determined, the Court may adjust that figure upward or downward. See Kerr v. Screen Extras
18 Guild, Inc., 526 F.2d 67, 69-70 (9th Cir. 1975) (listing factors).¹ The Supreme Court has "established
19 a 'strong presumption' that the lodestar represents the 'reasonable' fee." City of Burlington v.
20 Dague, 505 U.S., 557, 562, 112 S.Ct. 2638, 120 L. Ed. 2d 449 (1992); accord D'Emanuele v.
21 Montgomery Ward & Co., 904 F.2d 1379, 1383 (9th Cir. 1990) ("the lodestar amount is presumed to
22 constitute a reasonable fee"); Watkins v. Fordice, 7 F.3d 453, 457 (5th Cir. 1993) (holding the
23 lodestar "is presumptively reasonable and should be modified only in exceptional cases").
24

25 ¹ The factors are: (1) the time and labor required; (2) the novelty and difficulty of the question; (3)
26 the skill required to perform the legal service properly; (4) the preclusion of other employment by
27 the attorney due to acceptance of the case; (5) the customary fee; (6) the contingent or fixed nature
28 of the fee; (7) limitations imposed by the client or the case; (8) the amount involved and the results
obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the
case; (11) the nature of the professional relationship with the client; and (12) awards in similar cases.

1 The appropriate lodestar figure in this case is \$22,419.00, which corresponds to the number
2 of hours worked and actually billed to Zynga for work in obtaining the default judgment against the
3 Defendants, multiplied by each timekeeper’s hourly billing rate. Application of the two-part test
4 establishes that his calculation is reasonable.

5 **1. The Hourly Billing Rate Is Reasonable**

6 In intellectual property cases, courts in this Circuit and elsewhere frequently use the survey
7 of the American Intellectual Property Law Association (AIPLA) in determining a reasonable rate.
8 See Ulead Sys., Inc. v. Lex Computer & Mgmt. Corp., 151 F. Supp. 2d 1192, 1211-12 (C.D. Cal.
9 2001), *rev’d on other grounds*, 351 F.3d 1139 (2003), (rates reasonable in light of AIPLA survey).
10 The AIPLA Survey is a leading authority on the prevailing rates charged by IP counsel. See
11 Monsanto Co. v. Bayer Cropscience, N.V., No. CV:00-01915, 2007 U.S. Dist. LEXIS 27156, at *27
12 (E.D. Mo. Apr. 12, 2007), *aff’d sub nom.*, Monsanto Co. v. Bayer Bioscience N.V., 275 F. App’x.
13 992 (Fed Cir. 2008) (AIPLA survey “helpful in determining a reasonable fee”).

14 The rates charged by Zynga’s attorneys are consistent with the rates reported in the most
15 recent AIPLA survey and reflect the specialized nature of intellectual property law. (See
16 Declaration of David K. Caplan in Support of Zynga’s Motion for Attorneys’ Fees (“Caplan Decl.”),
17 ¶¶ 2-6, Ex. 1.)

18 Zynga’s attorneys at Keats McFarland & Wilson LLP specialize in trademark litigation.
19 Dennis Wilson has over eighteen years of trademark litigation experience. (Caplan Decl. ¶ 6.)
20 David Caplan has more than fourteen years of trademark litigation experience. (Id. ¶ 4.). Tara Rose
21 has approximately three years of trademark litigation experience. (Id. ¶ 5.) The substantial and
22 focused expertise of Zynga’s attorneys in this case fully supports the hourly rates they charge. See
23 Clairol v. Save-Way Indus., 211 U.S.P.Q. 223, 225 (S.D. Fla. 1980) (“Trademark litigation is a
24 particularly difficult field of specialization and is recognized as meriting greater than average rate of
25 pay”); Dunkin’ Donuts v. Mercantile Ventures, 32 U.S.P.Q.2d 1460, 1463 (W.D. Tex. 1994) (same).

26 **2. The Hours Expended Were Reasonable**

27 The time spent by Zynga’s counsel was reasonably necessary to the successful prosecution of
28 its claims in this case. Hours are “reasonably expended” when the attorneys exercise “billing

1 judgment” by, *inter alia*, efficiently staffing matters and “writing off unproductive, excessive, or
2 redundant hours.” Green v. Admins. of Tulane Educ. Fund, 284 F.3d 642, 662 (5th Cir. 2002).

3 Many of the tasks involved in this litigation – which has lasted for over a year – require
4 significant investments of time and effort. (Caplan Decl. ¶ 7.) As Zynga documented in the motions
5 it has filed in this case, Defendants concealed their identity and location, which required Zynga to
6 conduct significant third party discovery to determine what name and contact information they
7 provided to third parties with whom they contracted for services related to their unauthorized sale
8 and advertisement of “Virtual Goods” that customers can purportedly use to progress their way
9 through Zynga’s games. (Id.) This created a substantial amount of work, including drafting motions
10 for third party discovery; preparing and serving third party subpoenas; analyzing the information
11 contained in the documents and electronic records produced in response to the subpoenas; preparing
12 the motion to serve defendants by electronic mail once the available sources of information about
13 Defendants’ true location had been exhausted; and finally, preparing and filing the motion for
14 default judgment. (Id.) Zynga’s counsel also analyzed publicly available information about the
15 Defendants in order to identify potential third party witnesses, and to confirm the extent of
16 Defendants’ “Virtual Goods” selling activity. (Id. ¶ 8.) This analysis was necessary to identify third
17 parties likely to have information about Defendants’ identities and locations, and to confirm the
18 extent of the Defendants’ “Virtual Goods” selling activities. (Id.) Ultimately, despite its reasonable
19 and necessary efforts to confirm Defendants’ identities and locations, Zynga was still forced to seek
20 leave to serve Defendants by electronic mail. (See Dkt. No. 26.)

21 To the maximum extent possible in light of the substantial amount of work required to
22 assemble and present Zynga’s case to the Court, Zynga’s counsel staffed this case so as to achieve
23 maximum efficiency, including by diligently delegating work to less expensive time keepers and not
24 billing Zynga for some time actually worked. (Caplan Decl. ¶ 9; see also id., ¶¶ 2-7.)

25 Excluding fees associated with the preparation of this Motion, attorney David Caplan spent
26 15.3 hours in obtaining the default judgment against the Defendants, for which Zynga was billed
27 \$7,146.50; attorney Tara Rose spent 59.2 hours in obtaining the default judgment against the
28 Defendants, for which Zynga was billed \$14,067.00; and attorney Dennis Wilson spent 2.4 hours in

1 obtaining the default judgment against the Defendants, for which Zynga was billed \$1,205.50.
2 (Caplan Decl., ¶¶ 11-13.)

3 Pursuant to Civil Local Rule 54-5(b)(2), Zynga is prepared to submit its contemporaneous
4 time records for the Court's *in camera* inspection, should the Court so request. (Caplan Decl. ¶ 15.)

5 **3. The Kerr Factors Justify Full Recovery**

6 Although the Court may adjust the lodestar upward or downward in light of the factors set
7 forth in Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 69-70 (9th Cir. 1975), *cert. denied*, 425 U.S.
8 951, 96 S. Ct. 1726, 48 L. Ed. 2d (1976) (citing Johnson v. Ga. Highway Express, Inc., 488 F.2d 714
9 (5th Cir. 1974)), there is a strong presumption that the lodestar is reasonable. Ferland v. Conrad
10 Credit Corp., 244 F.3d 1145, 1149 (9th Cir. 2001) (holding that remand was necessary so the district
11 court could give a “concise but clear explanation of its reasons” for departing from the Lodestar
12 amount); see also Aris Isotoner, Inc. v. Dong Jin Trading Co., Inc., 17 U.S.P.Q.2d 1017, 1024
13 (S.D.N.Y. 1989) (noting that in a trademark case, “courts generally focus on the amount billed to the
14 client, decreasing this amount only if the hours spent or the billing rates seem unreasonable”).
15 Consistent with this presumption, Zynga respectfully requests that the Court award it the fees it
16 reasonably incurred, with no enhancement or deduction.

17 **III. CONCLUSION**

18 For the foregoing reasons, Zynga respectfully requests that the Court order the Defendants
19 jointly and severally to pay to Zynga \$22,419.00 in attorneys' fees that Zynga has incurred in
20 bringing this action.

21
22
23 Dated: May 20, 2011

24 By: _____ /s/
25 David K. Caplan
26 Keats McFarland & Wilson LLP
27 Attorneys for Plaintiff
28 ZYNGA INC.