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## Small Company Suing Nike Told to Pay \$12,332 for Slow Discovery

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A Cooperstown company embroiled in a trademark infringement case against Nike must pay the apparel giant \$12,332 in costs and attorney fees for allegedly dragging its feet in complying with Nike's discovery requests, a magistrate judge ruled.

Northern District Magistrate Judge David Peebles ([See Profile](#)) ruled from Syracuse that despite both his "formal and informal" attempts to intervene, discovery in [Legends are Forever v. Nike](#), 3:12-cv-01495, has "progressed at a disturbingly slow pace" since Legends initiated the action in September 2012.

The Cooperstown company said it registered its "Legends are Forever Inc." mark with the U.S. Patent and Trademark Office in 2009. The company said it has marketed sports apparel and related merchandise, such as toys and memorabilia, since 2001.

Most of the items have a baseball-related theme.

It argues that Nike commenced a marketing campaign for Nike products after the "Legends are Forever" mark had been registered and that Nike refused to either discontinue its use of the mark or to reach a licensing agreement with the Legends.

The Nike advertising campaign featured "Black Mamba" apparel endorsed by Los Angeles Laker star Kobe Bryant.

In a Nov. 18 ruling, Peebles fixed the costs and attorney fees due Nike which he had determined in a Sept. 12 order that also ordered Legends to produce information and documents as well as witnesses for deposition.

The magistrate judge's latest decision concerned how to fairly fix the fees and costs that Nike should be paid for delays in discovery.

Peebles wrote that the Nike attorneys who are defending the company should be paid according to rates that are somewhat higher than those prevailing in the Northern District, but lower than what they asked for.

For example, he determined that while attorney Jennifer Furey, a partner in Goulston & Storres in Boston, asked for \$450 an hour for her work on disputed discovery issues, she should get \$350 an hour. Peebles noted that is above the \$210 an hour customarily awarded to experienced attorneys by the Northern District, which he said the Second Circuit has characterized as "perhaps lag[ging] behind the market" in its ruling in [Bergerson v. New York State Office of Mental Health, Cent. New York Psychiatric Center](#), 652 F.3d 277 (2011).

Peebles wrote that a fee departing from the customary maximum in the Northern District is warranted after taking into account other variables such as the Nike lawyers' experience and the complexity of the litigation.

The magistrate judge also set \$275 as the hourly fee for Furey's colleague at Goulston & Storres, Matthew Horvitz, and \$250 an hour for Christian Casini, a partner at Osborn, Reed & Burke in Rochester, the local counsel for Nike.

He also reduced the Nike lawyers' overall request for fees and costs of \$25,186 by cutting the number of hours for which they should be compensated and finding duplicative the presence of both Furey and Casini for a hearing in federal court in Syracuse on Sept. 11, 2013.

Legends had argued through its attorney, Timothy Benedict of Rome, that Peebles should not award any attorney fees or, if he did, allow Nike to recover only a minimal amount. Legends are Forever is a small company that does not have the resources to apply to litigation or extensive discovery, Benedict argued.

Benedict declined comment on Peebles' ruling Thursday.

Nike's summary judgment motion is before Peebles.

Nike argues in seeking dismissal that the "Legends are Forever" trademark is a "weak" one associated with items related to the Baseball Hall of Fame in Cooperstown. There is little chance of it being confused with the use of the phrase in Nike's advertising featuring the basketball star Bryant, the company maintains.

Nike also argued that the "legends are forever" phrase appeared on one T-shirt related to the "Black Mamba" campaign and that it did not use the phrase elsewhere.

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