

NATIONAL SPORTS LAW

NEGOTIATION COMPETITION 2023

FINAL ROUND

“As the Wind Blows”

GENERAL FACTS FOR BOTH TEAMS

Sometimes a little bit of creativity is needed to make an impression in a crowded sports landscape.

The July 2021 opening of a commercial market for college athlete name, image, and likeness (NIL) use has proved to be not only a boon for the athletes themselves, but for businesses at all levels looking for new options in sport sponsorship. Prior to July 2021, there were few opportunities for brands looking to align their brands with college sports properties. Official team or school sponsorships are often expensive, and the sale by these entities of exclusive sponsorship rights in various product categories can make it difficult for businesses—especially local businesses—to find an opportunity to break through the noise created by competing brands or even secure those often-enviable sponsorship packages in the first place.

With NIL, however, brands can forego official team sponsorships in favor of simply aligning themselves with a team’s top player instead. There are a number of advantages to this approach even beyond simply saving money or getting a foothold into a sponsorship category that might not have been available in the past. First, NIL deals can allow for a greater level of creativity and brand influence, as sponsorships are now not only reflected only through use of the logo; appearances by popular local athletes can bring a crowd in real life and having a recognized name and voice attached to a sales pitch is always a helpful tool to marketers. Second, at this still-new stage of NIL there is quite a bit of goodwill attached with signing an NIL deal with an athlete, especially if it can show fans that you are investing in a team and helping them be able to recruit additional talent. Finally, while schools have expressed consternation as to advertising revenue being spread across more advertising revenues and have shown concern with the impacts that ambush marketing may have on their own sponsorship

sales, more and more schools are seeing it as a competitive disadvantage to block their athletes from entering into profitable NIL deals, and are even lending the rights to their branding to athletes to help them secure this NIL money.

All of the benefits to NIL for brands are amplified when working in smaller markets, particularly the many small college towns and smaller cities that may have an immensely popular university athletic brand with little to no professional sports teams competing for the local populace's fandom and attention. In these areas, a local brand aligning themselves with the university can be in a lot of ways almost essential to curry favor with the local populace. And with NIL, brands who cannot secure official university sponsorships no longer have to rely on subtle ambush marketing tactics to create this connection; simply aligning with an athlete can go a long way towards establishing a connection with the school whether the official school logo is attached or not.

The city of Wichita, Kansas, is one of these areas. Located in the southeastern part of Kansas and boasting a population of around 650,000, Wichita's claim to fame lies not necessarily with sports but with the city being the birthplace of famous restaurants like White Castle and Pizza Hut and hosting the headquarters of the two largest privately-held companies in the United States: Koch Industries and Cargill. Still, however, Wichita's population loves sports; while the three-plus hour drive to Kansas City makes Chiefs and Royals challenging at times, the city's location nearly equidistant in between college sports blue bloods the University of Kansas, Kansas State University, the University of Oklahoma, and Oklahoma State University gives the city a population filled with sports fans wearing all sorts of different team colors.

Of course, Wichita itself hosts its own hometown sports teams. The athletic program for Wichita State University (WSU)—the third largest university in the state of Kansas—has established itself as a major player in college basketball even in the midst of its other local competitors. Without a football team, the school has been free to invest significantly into basketball, and this investment has paid off at various times throughout the past few decades. The Shockers' men's basketball team has played in the NCAA tournament 16 times since 1954 and saw immense success in the mid-2010s in particular, reaching the Final Four in 2013, the Sweet Sixteen in 2015, and was a number one seed in the tournament bracket in 2014. The team also seems to be returning back to some level of prominence—flush with new resources from a move from the Division I-AAA Missouri Valley Conference to the High Major American

Athletic Conference (AAC) in 2017, the Shockers returned to the NCAA tournament in 2021. The school and city expect great things from the team in the 2023-24 season under new coach Paul Mills—a coach hired away from Oral Roberts after he led the Golden Eagles to the Sweet Sixteen in 2021 and a stellar 30-5 record (including an 18-0 conference record) in 2022-23.

Recently, Wichita also gained a new professional sports franchise, specifically a minor league baseball team. The Wichita Wind Surge began play in 2021 as the Double-A affiliate of the Minnesota Twins and have seen some competitive success in their short history, capturing Texas League division titles in both 2021 and 2022. Despite this competitive success, however—and their brand new, \$75 million riverfront ballpark—the Wind Surge have initially struggled to ingrain themselves into the local sports community and fill their 10,025 seat (6,000 fixed seats) ballpark. The Wind Surge drew a respectable 4,021 fans per game on average in their inaugural 2021 season, but that number fell to just 3,219 fans per game in 2022. The team has surged back to an average of 4,675 per game in 2023, but the team still sees a lot of room for growth.

Seeking a stronger foothold in the Wichita community, the Wind Surge have reached out to the star player on the 2023-24 Wichita State men’s basketball team—a sophomore point guard named Jerrard Kader.¹ Kader broke onto the scene last season as a true freshman, leading his team with 15.2 points per game. Analysts have projected Kader to break out in his sophomore year—especially under the tutelage and coaching of the Coach Mills and the rest of the Shockers’ new coaching staff—and while few expect the Shockers to compete for a conference title against the heavyweight Houston Cougars, many analysts see the Shockers as having an outside chance to compete for an at-large bid even with other conference heavyweights Memphis and Tulane expected to improve as well.

With mutual interest between the parties in a potential NIL arrangement, representatives for the Wind Surge and Kader have agreed to meet today to discuss what the contours of such an agreement might look like. Both parties have given their representatives full authorization to be creative and—if possible—craft a mutually beneficial agreement to advance each side’s interests.

¹ The player represented here is entirely fictional and is not intended to represent any real-life person.

CONFIDENTIAL FACTS FOR WICHITA WIND SURGE

The Wichita Wind Surge are a newer minor league baseball team and the Double-A affiliate of the Minnesota Twins. The Wind Surge are perhaps victims of some terrible timing; the original plan was for the Wind Surge—after having moved from New Orleans in 2019—to start off at the Triple-A level as an affiliate of the Miami Marlins, but for reasons that should now be obvious to most, their planned inaugural season of 2020 just did not happen. As a result of this false start—and the hesitation of many to come to games in the first few, usually formulative years of the franchise—the Wind Surge have had a lot of trouble getting traction and support within the local Wichita community.

All of this is despite immense on-field success. In their three years of existence so far the Wind Surge have won Texas League North Division titles twice and finished just two games away from a clean three-for-three sweep the most recent 2023 season. The Twins farm system is considered one of the better ones in Major League Baseball, so there is a lot of optimism among the franchise about the potential of a fourth straight exciting year in 2024, both in terms of wins and in terms of bringing exciting young talent to Wichita in one of their last stops before reaching the big leagues.

Yet this success has not resonated with fans. As the Wind Surge marketing team has learned, Wichita is much more of a basketball and football town than a baseball town, with teams like Kansas men's basketball, Oklahoma football, and the Kansas City Chiefs dominating an exorbitant share of the sports pages in the area.

Of course, Wichita State men's basketball has also been a big deal in the city, and given the much higher prices (and fewer local ties) of athletes at Kansas, Kansas State, Oklahoma, and Oklahoma State, some sort of partnership with Wichita State (WSU) is a dream scenario for the Wind Surge. While WSU itself has not been receptive to such a partnership at a cost that the Wind Surge can afford, an NIL deal with Jerrard Kader—the undisputed star of the WSU men's basketball team—could accomplish a similar effect.

As a minor league baseball team, the Wind Surge does not have a ton of money to play with. They have set aside a budget of \$30,000 for this marketing idea, but that budget includes any giveaway promotions that the team might do in order to support a Kader NIL deal. The marketing team's plan is to use \$25,000 of their budget to purchase 5,000 bobbleheads (with

Kader wearing a Wind Surge jersey) as an entry giveaway to a particular game, but that would only leave \$5,000 left over to pay Kader. The team can also do 5,000 giveaway “shirseys” for \$15,000, but the marketing team’s pitch for that is a co-branded Wind Surge/WSU design. The team feels that Kader’s name and number alone on the back of a standard Wind Surge jersey would not have quite enough of an effect to make it worthwhile. Regardless, each of these ideas depends on what intellectual property rights the Wind Surge are able to secure—and, of course, what Kader (and/or WSU) is looking to be compensated on his own for those rights.

To make up any potential difference in cash payments, the Wind Surge would be happy to provide Kader with pretty much as much in-kind compensation in the form of merchandise he wants. A few jerseys (including with his name and number on the back) and hats are certainly available to him, and he would of course get several copies of whatever promotional giveaway featuring his NIL is created. The Wind Surge would also be happy to host Kader and his friends, teammates, family, etc. at games—they can provide Kader and five of his friends grandstand seats for up to ten games as part of the deal. If Kader is interested, the Wind Surge can also grant him access to a ballpark suite for a game or two to host his entire team, entire family, or both; they’d just ask for a few months’ heads up to ensure that they can accommodate him in that regard, especially if he’s looking to use a suite during the August playoff race. Having Kader come to other games and wear Wind Surge jersey serves a dual purpose for the Wind Surge, if Kader is receptive to receiving those benefits; not only can it possibly lessen some of the financial burden of the deal from the Wind Surge, but having a popular player like Kader wear Wind Surge merchandise and show his face at games (especially if he can bring teammates!) would do wonders for the Wind Surge’s local appeal.

On the other side of the equation, it should go without saying that the Wind Surge should have the rights to Kader’s NIL for the purposes of marketing his appearance at the game, though the Wind Surge do want to make sure that Kader understands that fact. They would be wholly unwilling to pay any additional money for this additional NIL use; it should come as a natural extension to his actual appearances at games. After all, what would be the point of those appearances if the Wind Surge are unable to promote them to fans? Additionally, the Wind Surge will need to secure Kader’s NIL rights for any kind of marketing giveaway they agree on; his likeness for a bobblehead, for example, and his name for a shirseys.

Additionally, the Wind Surge would expect some performance from Kader in the form of his own promotion of his appearances. The Wind Surge know that Kader isn't a big social media guy; he has public Twitter/X and Instagram accounts, but rarely posts aside from reposts of Wichita State highlights, especially those involving him. Still, Kader has a decent following on both accounts from his days as a high value recruit (when he used to post a lot more) and from Wichita State fans in particular, making some social media promotion of his appearance(s) of value to the Wind Surge. This promotion (both before and during the games) should preferably come as a package deal with the appearances itself; the Wind Surge will already be investing a lot into this relationship, and it seems more than fair to ask Kader to spend a few minutes posting on social media to meet them halfway.

Depending on what the two parties agree on elsewhere in negotiations, the Wind Surge are very interested in determining what rights—if any—they will have to WSU trademarks alongside Kader's individual NIL rights. The Wind Surge have read WSU's NIL policy² and sees that Kader is allowed to identify himself as a member of WSU's men's basketball team but can only use WSU trademarks if he secures those rights from WSU's third-party licensing vendor himself, but the Wind Surge are unclear as to what that means for them. Such a requirement might even just be placed in there with a wink and knowledge that it will never be enforced in order to ensure that high-value players like Kader can receive the full value in NIL deals. But understanding these rights will be essential to determining how much an NIL deal will actually cost, especially if the Wind Surge want to do things like use WSU's logos on promotional materials (including on the stadium videoboard), use highlights of Kader playing basketball for WSU, and/or use WSU logos on any co-branded marketing giveaways. The Wind Surge would certainly be willing to pay for these rights if necessary, but they would come out of their overall budget for the sponsorship deal.

The timing of Kader's appearance is also, of course, an important consideration. While some on the Wind Surge's marketing team want to use Kader to help boost attendance during the mid-summer lull in between the start of the season and the playoff run (i.e., June or early July), most feel that a Kader appearance would be most effective in mid-to-late April. It would be a bit of a gamble depending on the Shockers' ultimate 2023-24 success, but if the Shockers end up

² WICHITA STATE ATHLETICS COMPLIANCE OFFICE, WICHITA STATE UNIVERSITY NAME, IMAGE, LIKENESS POLICY, available at https://goshockers.com/documents/2022/8/24/2022_08_23_NAME_IMAGE_LIKENESS_POLICY_FINAL.pdf.

reaching the tournament and making a bit of a run Wichita State fever will still be extremely high in Wichita by the end of April, potentially leading to a lot of excitement for Kader's appearance. It would also give a chance to the Wind Surge to brand Kader's appearance in a way to celebrate a successful season. A mid-to-late April appearance after the basketball season ends and before finals would likely also work best for Kader's schedule, minimizing the chance that he fails to show up. The best-case scenario, of course would be both; having Kader make an appearance at both the beginning of the season and during that mid-summer lull would be ideal, though the Wind Surge do not have the budget to pay much extra for a second appearance.

The Wind Surge have never done an NIL deal before and are very nervous about placing so much trust in the hands of someone who is ultimately at the end of the day just a college sophomore. As such, the more they invest in Kader's potential appearances, the more protection they want from the potential that Kader simply does not show up, embarrassing the franchise. This protection would preferably come in three forms. First, the Wind Surge want performance of any payments (or at least most) for his appearance and/or NIL rights to come after his performance instead of upfront. Second, the Wind Surge want a liquidated damages clause, where if Kader breaches his obligations under the contract they can get whatever money paid to him plus any money they spend on giveaway merchandise reimbursed. Finally, the Wind Surge want a clause included in the contract that ensures that any performance the Wind Surge still owe Kader after any breach, i.e., any outstanding payments or in-kind performances like game tickets or suites, are terminated. A clause that allows the Wind Surge the option whether to terminate (in case he has a good reason not to show up) is better, but either way the Wind Surge feel that any violation of their trust would lead them to no longer want to work with Kader in any form moving forward.

As a final matter, the Wind Surge wants to ensure that Kader's NIL rights are not unknowingly tied up with any other entity: a collective, for example, or another NIL deal. The Wind Surge have heard of various NIL deals (especially those with collectives) containing exclusive rights clauses, and are completely unclear as to how that might apply to Kader. To account for this, the Wind Surge want to include an indemnification clause in the contract to make Kader bear the burden for any sort of infringement if that is the case. Such a clause only seems reasonable given the uncertainty surrounding this area of NIL.

CONFIDENTIAL FACTS FOR JERRARD KADER

As a former four-star recruit and as the undisputed star of the high-profile Wichita State (WSU) men’s basketball team, Jerrard Kader feels that he should be at the top of the market for NIL deals in Wichita. In most college markets, basketball takes a firm back seat to football, but that is not a problem here in Wichita, as WSU does not have a football team for competition. WSU basketball is a big deal here, and in this new era of athletes getting paid Kader should be the first in line to do so.

However, Kader has not had immense success securing lucrative NIL deals. Wichita is not exactly a hot market for the larger brands with the larger pocketbooks, and Kader has been frustrated to see Kansas, Kansas State, and the Oklahoma schools dominate both the rest of the state and even Wichita itself. Kader has had a chance to do a few local appearances with Cargill and some of the other local firms looking to establish local connections, but those deals have been small, one-off instances where he only was paid around \$1,000 for each appearance. Kader is also signed to a nonexclusive rights contract with WSU’s collective where he gets a few thousand dollars to make a few appearances and social media posts, but other than that he’s been left out of the cold. He has explored transferring, but he would rather stay put: he loves his coach, has enjoyed Wichita so far, and feels strongly that by sticking where he is he can be a “big fish in a small pond” type of figure—as opposed to another team where he would struggled with the spotlight.

Kader was excited when the Wind Surge approached him about a potential NIL deal. While Kader isn’t exactly a big baseball fan, he knows that the Wind Surge have worked really hard to ingrain themselves in the Wichita market—with little success. And despite his own lack of success elsewhere, Kader feels that a partnership with the Wind Surge could (and should) pay far more than what he’s received from other NIL deals. The Wind Surge would likely want a more comprehensive and more public deal than a quick appearance at the ballpark for a few hours, and while Kader is not opposed to that, he should be paid his value for doing so. An appearance where he is tasked with doing more than just showing up for a bit and throwing out the first pitch (i.e., signing autographs and/or spending the whole game in the box) should net him around \$5,000 per appearance, and the use of his NIL for any kind of marketing promotion (beyond just saying that he’s going to be at the game) should earn him another \$5,000 or so.

One issue, of course, is timing. As a college athlete, Kader's time is not exactly unlimited; during the basketball season (October through March) he has little if any time to do anything but practice and schoolwork. There's fortunately no overlap between the college basketball season and the minor league baseball season (which runs from April through early-September) but his summer is not a whole lot better. There's still summer practice, summer classes, and his coach's basketball camps, along with much needed free time that is actually free. While it's obviously hard to predict as far ahead as the summer of 2024, Kader plans on being back home in California for most of the summer break, so any appearance(s) he is going to make at any games should be during April, May, or after he returns to Wichita in late July for summer practice. He will be back for a bit in mid-June for Coach Mills's annual youth summer camp, but he'll be really busy during that time and would prefer not to try to squeeze an NIL appearance into that short timeframe. And regardless, he would very much prefer not to have to be outside for too long during the hot and humid Wichita summer, so dates in June, July and August would be less than ideal. He understands that the Wind Surge will likely want him to boost attendance during the summer lull, but he would rather do something in mid- to late-April right after the basketball season ends (and before finals starts) when the weather will be perfect and his schedule will be at its most open.

Kader understands that this deal will grant the Wind Surge the right to his NIL—that's what the deal is all about, after all. He also knows better than to expect additional compensation for certain uses of his NIL that are natural extensions of his appearances including, for example, promoting his appearance, or using his likeness in a bobblehead or other giveaway item. However, Kader wants to ensure that the Wind Surge's right is limited just to that; the Wind Surge should not have the right to use his likeness in other marketing contexts, and their right to his NIL certainly shouldn't extend beyond his appearance(s). Kader has heard stories of other athletes being duped through misleading and hidden contract clauses to give up broad NIL rights in perpetuity, and he wants to make absolute sure that this deal does not contain any of those clauses.

Moreover, Kader isn't a big social media guy; he has public Twitter/X and Instagram accounts, but rarely posts aside from reposts of Wichita State highlights. In general, he doesn't really like public social media; as a college athlete, he sees it as more of a distraction, risk, and nuisance than anything else. Still, Kader has amassed a pretty decent following on both accounts

from his days as a high value recruit (when he used to post a lot more) and from Wichita State fans in particular, which could make some social media promotion of his appearance(s) of value to the Wind Surge. He would certainly be willing to do some promotion of his appearances both before and during the games, though he would ask for additional compensation to account for this additional performance. He knows that these posts would only be worth \$100 or so each, however.

Of additional concern is his lack of understanding of what the Wind Surge exactly want. For example, Kader hopes that the Wind Surge understand that while he can guarantee his own appearance and the use of his personal NIL, he doesn't have a whole lot of control over WSU's separate intellectual property. Under WSU's NIL policy,³ Kader is allowed to identify himself as a member of WSU's men's basketball team but can only use WSU trademarks if he secures those rights from WSU's third-party licensing vendor himself—a step that he would be willing to take if necessary, but obviously would prefer to avoid if possible. Part of the reason is that Kader quite simply does not know what to expect from this conversation; none of his other NIL deals have gone beyond expecting him to simply identify himself as a WSU athlete.

To prepare for this meeting with the Wind Surge, Kader had a conversation with WSU's NIL staffer and was told only that the cost of securing WSU's institutional marks would vary heavily depending on what the Wind Surge would want to do with them and that the staffer simply could not give an estimate without more information. Kader simply wearing a WSU jersey wouldn't be too bad, but if the Wind Surge wanted to use WSU marks on giveaway items the cost could be pretty substantial. Regardless, Kader feels that this should be a conversation between the Wind Surge and WSU's vendors directly; he can serve as a middleman if needed, but he certainly should not have to bear any of the costs of securing those institutional marks.

Moreover, Kader has heard plenty of stories about brands being less than above-board when it comes to NIL deals, particularly when it comes to unilateral rights to termination. With that in mind, Kader wants to ensure that this deal does not give the Wind Surge the right to cancel his appearance for any reason without allowing him to be paid at least a portion of what is owed. After all, as a Division I basketball player, Kader has a limited amount of time available to him: taking this deal will make him less likely to be able to devote his time to taking other

³ WICHITA STATE ATHLETICS COMPLIANCE OFFICE, WICHITA STATE UNIVERSITY NAME, IMAGE, LIKENESS POLICY, available at https://goshockers.com/documents/2022/8/24/2022_08_23_NAME_IMAGE_LIKENESS_POLICY_FINAL.pdf.

deals, especially if it is anything beyond a “one-and-done” deal with minimal time commitments. And while he feels that he will have no trouble keeping his word to show up, his schedule can sometimes change on a dime. Getting a significant portion of the money owed upfront will certainly help in that regard (so long as there is no clawback provision), especially if something comes up and he needs to cancel last minute.

Regardless, Kader feels that out of sheer fairness any termination rights that the Wind Surge have should be mirrored to allow Kader similar rights in case the Wind Surge suddenly realize they do not need or want him to appear for any reason. This is especially true if Kader gets any kind of indication that the Wind Surge want to align themselves to the team’s success instead of his own image: what happens if the team has a rough year that the Wind Surge feel is no longer worth celebrating?

Again, Kader is not 100 percent sure what the Wind Surge want: if they want to align themselves to his personal brand, that’s great, but if their goal is more to align themselves with WSU as a whole, he is less comfortable with the idea that their desire to have him show up is dependent on his team’s success. He fully expects the team to be good, but their AAC competition is projected to be really tough this year, and he cannot exactly guarantee competitive success. If, for example, the Wind Surge want to use his appearance to celebrate an NCAA tournament appearance, Kader will hope for both of their sakes that he can deliver, but he wants to make sure that the Wind Surge will still want him to show up (or, more importantly, pay him his due) even if his team is unable to reach that pinnacle—especially since they haven’t been able to make a tournament appearance since 2021 (when they were knocked out in the First Four).

Of a final concern, while Kader is willing to take some free game tickets or merchandise, but not as an alternative to money. It may sound cold, but Kader doesn’t really care about the Wind Surge (outside of this deal, of course) and doubts that he ever will. He just has never been a big baseball guy. Moreover, he would be skeptical about the intent behind giving him merchandise or tickets to a future game—would it actually be about compensating him for his performance or would it be able getting him to continue to wear their merchandise and continue showing his face at games even after the contract ends? If anything, he should be paid more to come to future games—he wouldn’t be opposed to that, but he hardly sees it as something that can replace money as actual compensation for an NIL deal.