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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

MEMORY LANE, INC.,

Plaintiff,

v.

CLASSMATES INTERNATIONAL, INC.,
et al.

Defendants.

CASE NO. SACV 11-00940-JLS (RNBx)

**ORDER DENYING DEFENDANTS'
MOTION FOR ATTORNEYS' FEES
AND NON-TAXABLE COSTS
(Doc. 217)**

1 **I. INTRODUCTION**

2 Before the Court is a Motion for Attorneys’ Fees and Non-Taxable
3 Costs filed by Defendants Classmates, Inc. and United Online, Inc. (Mot.,
4 Doc. 217.) Plaintiff Memory Lane, Inc. opposed, and Defendants replied.
5 (Opp’n, Doc. 224; Reply, Doc. 226.) The Court finds this matter
6 appropriate for decision without oral argument. Fed. R. Civ. P. 78(b); C.D.
7 Cal. R. 7-15. Accordingly, the hearing set for May 9, 2014 at 2:30 p.m. is
8 VACATED. Having considered the parties’ briefing, the Court DENIES
9 Defendants’ Motion.

10
11 **II. BACKGROUND**

12 Plaintiff Memory Lane, Inc. filed this action on June 23, 2011 against
13 Defendant Classmates International, Inc. and Defendant Memory Lane, Inc.,
14 asserting claims for false designation of origin under the Lanham Act;
15 violation of California Business & Professions Code section 17200; and
16 common law unfair competition. (Compl., Doc. 1.)¹ Plaintiff’s claims were
17 premised on Defendants’ use of its trademark, “MEMORY LANE.” (*See*,
18 *e.g.*, FAC ¶ 32.)

19 Defendants did not move for summary judgment. Instead, they filed
20 several motions in limine, some of which the Court granted at the Final
21 Pretrial Conference. (*See* Reply at 2; Doc. 150.) Defendants disclosed for
22 the first time at the Final Pretrial Conference that they had stopped using the
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26 ¹ Plaintiff subsequently dismissed Classmates International and filed a First
27 Amended Complaint adding United Online. (Doc. 18; First Am. Compl.
28 (“FAC”), Doc. 30.) As discussed below, Defendant Memory Lane, Inc. changed
its name to Classmates, Inc. shortly before trial.

1 “MEMORY LANE” mark. (Final Pretrial Conference Tr., 3:24-4:2, Doc.
2 148.)²

3 Following a five-day trial, the jury found that MEMORY LANE was
4 a valid protectable mark in which Plaintiff owned rights, but that Plaintiff
5 had not shown a likelihood of confusion among an appreciable number of
6 consumers due to Defendants’ use of the mark. (Doc. 196.) As a result, the
7 jury found in favor of Defendants on all three claims. During the trial,
8 Defendants moved for judgment as a matter of law on the grounds that
9 Plaintiff had failed to prove a likelihood of confusion and that no reasonable
10 jury could award damages. (Doc. 178.) The Court denied the motion.
11 (Doc. 191.)

12 On March 11, 2014, Defendants filed the present Motion, seeking
13 approximately \$2.5 million in attorneys’ fees and non-taxable costs. (Mot.;
14 Robinson Decl. ¶¶ 41-42, Doc. 217-1.) Many of the arguments made in
15 Defendants’ Motion are similar to those made in Defendants’ motion for
16 judgment as a matter of law. (Mot.)

17
18 **III. LEGAL STANDARD**

19 Section 35(a) of the Lanham Act provides that “[t]he court in
20 exceptional cases may award reasonable attorney fees to the prevailing
21 party.” 15 U.S.C. § 1117(a). “[A]ttorney’s fees under the Lanham Act may
22 also include reasonable costs that the party cannot recover as the ‘prevailing
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25 ² According to Plaintiff’s counsel, this disclosure was “the first time that [he] heard about
26 any of these changes” and “was giv[en] no notice from [Defendants’ counsel] as to any
27 of these changes.” (*Id.* at 9:1-5.) It was also the first time the Court learned of the
28 changes. (*See id.* at 4:15-20.)

1 party.” *Secalt S.A. v. Wuxi Shenxi Const. Mach. Co., Ltd.*, 668 F.3d 677,
2 690 (9th Cir. 2012).

3 In the context of the Patent Act, the Supreme Court recently held that
4 “an ‘exceptional’ case is simply one that stands out from others with respect
5 to the substantive strength of a party’s litigating position (considering both
6 the governing law and the facts of the case) or the unreasonable manner in
7 which the case was litigated.” *See Octane Fitness, LLC v. ICON Health &*
8 *Fitness, Inc.*, --- S. Ct. ----, 2014 WL 1672251, at *5 (Apr. 29, 2014).
9 “District courts may determine whether a case is ‘exceptional’ in the case-
10 by-case exercise of their discretion, considering the totality of the
11 circumstances.” *Id.*

12 In the context of the Lanham Act, the Ninth Circuit has noted that the
13 line distinguishing exceptional cases from non-exceptional cases “is
14 especially fuzzy where the *defendant* prevails due to plaintiff’s failure of
15 proof.” *Secalt*, 668 F.3d at 687. However, “[a]n action may be considered
16 exceptional [w]hen a plaintiff’s case is groundless, unreasonable, vexatious,
17 or pursued in bad faith.” *Id.* (quotation marks omitted; second alteration in
18 original). Fee shifting is not limited to such circumstances, however, and a
19 case may also be considered “exceptional” “if the plaintiff has no reasonable
20 or legal basis to believe in success on the merits.” *Id.*; *cf. Octane Fitness*,
21 2014 WL 1672251, at *6 (“[A] case presenting either subjective bad faith or
22 exceptionally meritless claims may sufficiently set itself apart from mine-
23 run cases to warrant a fee award.” (citing *Noxell Corp. v. Firehouse No. 1*
24 *Bar-B-Que Restaurant*, 771 F.2d 521, 526 (D.C. Cir. 1985) (interpreting
25 Lanham Act))).

1 **IV. DISCUSSION**

2 Defendants argue that this case is exceptional because Plaintiff’s
3 theory of liability was “baseless” and Plaintiff lacked any viable theory of
4 relief. (Mot. at 2, 9.) The Court addresses each argument in turn, and finds
5 that under the totality of the circumstances this case is not “exceptional.”
6

7 **A. Plaintiff’s Theory of Liability**

8 Defendants argue this case was exceptional because there could not
9 have been any likelihood of confusion under the *Sleekcraft* factors.³ These
10 factors include “(1) strength of the mark; (2) proximity of the goods;
11 (3) similarity of the marks; (4) evidence of actual confusion; (5) marketing
12 channels used; (6) type of goods and the degree of care likely to be
13 exercised by the purchaser; (7) defendant’s intent in selecting the mark; and
14 (8) likelihood of expansion of the product lines.” *Rearden LLC v. Rearden*
15 *Commerce, Inc.*, 683 F.3d 1190, 1209 (9th Cir. 2012) (citing *AMF Inc. v.*
16 *Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979)). The test “must be
17 applied in a flexible fashion,” and some considerations may be more
18 important than others based on the circumstances. *Id.*

19 The Court briefly discusses each factor, addressing only whether they
20 support finding this case exceptional.
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23 _____
24 ³ Defendants do not argue the case was “exceptional” based on any other
25 prerequisite for finding liability. Before reaching the issue of likelihood of
26 confusion—for which the jury found in Defendants’ favor—the jury found in
27 Plaintiff’s favor with respect to (1) whether MEMORY LANE was a valid
28 protectable trademark; and (2) whether Plaintiff owned trademark rights in the
mark. (Doc. 196.)

1 **1. Strength of the Mark**

2 “The stronger a mark—meaning the more likely it is to be
3 remembered and associated in the public mind with the mark’s owner—the
4 greater the protection it is accorded by the trademark laws.” *Network*
5 *Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1149 (9th
6 Cir. 2011). “Two relevant measurements are conceptual strength and
7 commercial strength.” *Id.*

8 As to conceptual strength, “MEMORY LANE” could be considered
9 suggestive to the extent it “requires a mental leap from the mark to the
10 product.” *Id.* at 1150 (quotation marks omitted). As to commercial
11 strength, Plaintiff provided evidence, among other things, that it (1) had
12 been in business as Memory Lane for over a decade; (2) spent more than \$3
13 million in advertising in recent years; (3) advertised in publications, on the
14 radio, on the Internet, at trade shows, and through various other means; and
15 (4) was repeatedly featured on television and in publications. (*See, e.g.*,
16 Trial Tr. 43:20-21, 59:14-61:19, 63:8-64:8, 65:23-66:15, 67:7-71:6, 71:11-
17 76:23, Trial Exs. 101, 103, 104, 106-09, 111-12, 139, 147, 169, 194).⁴ The
18 evidence demonstrated Plaintiff was not the only company to use “Memory
19 Lane” for sports auctions, but these other companies were relatively small
20 and insignificant. (*See, e.g.*, Trial Tr. 644-658, 722:16-21, 754-755:7,
21 782:1-5.); *cf. Rearden*, 683 F.3d at 1211 (mark not rendered weak where
22 other companies in the same business using the same mark had headquarters
23 in different states, lacked an Internet presence, and employed fewer than
24 five people). In addition, the jury found that the mark was valid and

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26 ⁴ Although this evidence does not always distinguish between the word mark in
27 isolation and the word mark in connection with Plaintiff’s logo, the Court does not
28 find the issue material for purposes of this Order.

1 protectable. (Doc. 196.) Therefore, this factor does not support finding this
2 case exceptional.

3 4 **2. Proximity of Goods and Services**

5 “Related goods are generally more likely than unrelated goods to
6 confuse the public as to the producers of the goods.” *Network Automation*,
7 638 F.3d at 1150 (quotation marks omitted). “The proximity of goods is
8 measured by whether the products are: (1) complementary; (2) sold to the
9 same class of purchasers; and (3) similar in use and function.” *Id.* Courts
10 have taken a “flexible approach” to this factor. *Rearden*, 683 F.3d at 1212
11 (collecting cases). In the context of trademark infringement on the Internet,
12 the proximity of goods factor has been considered “especially important.”
13 *Id.* at 1209.

14 Defendants offered nostalgia content on their “Memory Lane”
15 website, while Plaintiff auctioned sports and other memorabilia through its
16 “Memory Lane” website. (*See, e.g.*, Trial Tr. 36:3-19, 40:12-21, 342:4-7,
17 392:24-395:2.) In several instances, Defendants’ “Memory Lane” site
18 included images of items Plaintiff had sold. (*Id.* 85:9-90:6.) Although the
19 businesses do not offer the same services, and they are not necessarily
20 directed to the same consumers, their services could be considered
21 complementary—one might see an image of memorabilia on Defendants’
22 site and use Plaintiff’s site to purchase the memorabilia. (*Cf.* Trial Tr.
23 285:14-21 (consumer visiting Defendants’ site testified he assumed
24 Defendants were in memorabilia business and that Plaintiff and Defendants
25 were related).) Therefore, this factor does not support finding this case
26 exceptional.

1 **3. Similarity of Marks**

2 “[T]he more similar the marks in terms of appearance, sound, and
3 meaning, the greater the likelihood of confusion.” *Network Automation*,
4 638 F.3d at 1150 (quotation marks omitted). “Similarity of the marks is
5 tested on three levels: sight, sound, and meaning. Each must be considered
6 as they are encountered in the marketplace.” *Id.* (quotation marks omitted).
7 This factor has also been considered “especially important” in the context of
8 trademark infringement on the Internet. *Rearden*, 683 F.3d at 1209.

9 The word marks used by each side are identical, and each side used
10 the mark for essentially the same connotation. Although Plaintiff also used
11 a logo, the use of identical or near-identical word marks can still weigh
12 “significantly” in a plaintiff’s favor despite “the parties’ very different
13 logos.” *Id.* at 1211-12. In addition, the relative strength of the mark may
14 lessen the impact of any differences between the parties’ respective use of
15 the mark. *See id.* at 1212. This factor does not support finding this case
16 exceptional.

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18 **4. Actual Confusion**

19 “[A] showing of actual confusion among significant numbers of
20 consumers provides strong support for the likelihood of confusion.”
21 *Network Automation*, 638 F.3d at 1151 (quotation marks omitted).

22 Plaintiff provided evidence that it had received hundreds of emails
23 and phone calls from Defendants’ customers, who were trying to reach
24 Defendants. The Court expressly held that “evidence of the misdirected
25 communications is relevant to whether there’s a likelihood of confusion.”
26 (Final Pretrial Conference Tr. 15:14-16); *see also Rearden*, 683 F.3d at 1217
27 (considering “dozens of misdirected emails actually intended for
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1 [defendant], some of which were sent by [defendant's] own customers" as
2 "evidence of actual consumer confusion"). Plaintiff also provided evidence
3 that several of its customers, as well as several non-customers (such as the
4 California Attorney General), confused Defendants with Plaintiff. (*See*,
5 *e.g.*, Trial Tr. 140:24-141:7, 111:11-113:4, 256:7-257:19, 278:16-279:19,
6 285:14-21.) Defendants argue that Plaintiff's evidence does not
7 demonstrate that any consumer changed their purchasing decisions, (Reply
8 at 8-12), but evidence of actual confusion is not limited to direct evidence of
9 consumers who changed their purchasing decisions. *See Rearden*, 683 F.3d
10 at 1214-19. Defendants also argue that the number of people who were
11 confused was relatively small. (Reply at 8-12.) However, even if Plaintiff
12 failed to show actual confusion among a "significant" number of consumers,
13 this would demonstrate only that the factor does not provide "*strong* support
14 for the likelihood of confusion." *Network Automation*, 638 F.3d at 1151
15 (emphasis added; quotation marks omitted); *see also id.* ("[A]ctual
16 confusion is not necessary to a finding of likelihood of confusion under the
17 Lanham Act.") (quotation marks). Therefore, this factor does not support
18 finding this case exceptional.

19

20 **5. Marketing Channels**

21 "Convergent marketing channels increase the likelihood of
22 confusion." *Id.* (quotation marks omitted). Here, the evidence demonstrates
23 that Defendants advertised online and on television; Plaintiff also advertised
24 online, as well as in print, at trade shows, and on the radio, with a focus on
25 the collectibles market. (Trial Tr. 60:13-69:4, 150:20-151:1, 378:1-7,
26 409:3-11.)

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1 Plaintiff argues that because “[b]oth parties’ business are primarily
2 internet businesses,” “both parties have the same marketing and advertising
3 channels.” (Opp’n at 11.) The Ninth Circuit has pointed to “simultaneous
4 use of Internet advertising” as one of the three factors that are “especially
5 important in cases involving similar domain names.” *Rearden*, 683 F.3d at
6 1209; *see also Network Automation*, 638 F.3d at 1148-49. However, the
7 Ninth Circuit has also recognized that “‘it makes no sense to prioritize the
8 same three factors for every type of potential online or commercial
9 activity.’” *Rearden*, 683 F.3d at 1209. at 1209-10 (quoting *Network*
10 *Automation*, 638 F.3d at 1148-49). As such, in a case involving the use of
11 another’s trademark as a search engine keyword, the Ninth Circuit has found
12 that the fact that both parties advertised online “does not shed much light of
13 the likelihood of consumer confusion.” *Network Automation*, 638 F.3d at
14 1148, 1151 (citing *Playboy Enterps., Inc. v. Netscape Commc’ns Corp.*, 354
15 F.3d 1020, 1028 (9th Cir. 2004) (“Given the broad use of the Internet today,
16 the same could be said for countless companies. Thus, this factor merits
17 little weight.”)).

18 In light of the above facts and law, Plaintiff could reasonably argue
19 this factor weighs in its favor; Defendants likewise could reasonably argue
20 that this factor weighs in *their* favor, or is of little weight. Accordingly, this
21 factor does not support finding this case exceptional.

22

23 **6. Type of Goods and Degree of Care**

24 “Low consumer care . . . increases the likelihood of confusion.”
25 *Network Automation*, 638 F.3d at 1152 (quotation marks omitted). Plaintiff
26 “for the most part” sold items between \$500-\$1500, although it also sold
27 items for as low as \$5. (Trial Tr. 40:12-17.) In cases where consumers

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1 exercise varying degrees of care, the Ninth Circuit has noted two possible
2 approaches: (1) use the standard of care of the least sophisticated customer,
3 or (2) use a weighted average of the different levels of purchaser care. *See*
4 *Brookfield Comm's, Inc. v. West Coast Entm't Corp.*, 174 F.3d 1036, 1060
5 (9th Cir. 1999). It is not necessary for the Court to decide which test should
6 apply; the Court merely notes that one test would favor Plaintiff, while the
7 other would favor Defendants. As such, this factor does not warrant finding
8 this case exceptional.

9 10 **7. Defendants' Intent**

11 “When the alleged infringer knowingly adopts a mark similar to
12 another’s, reviewing courts presume that the defendant can accomplish his
13 purpose: that is, that the public will be deceived.” *Network Automation*, 638
14 F.3d at 1153 (quotation marks omitted). This factor is relevant “only insofar
15 as it bolsters a finding that the use of the trademark serves to mislead
16 consumers rather than truthfully inform them of their choice of products.”
17 *Id.*

18 Among other things, Plaintiff provided evidence that (1) its business
19 appeared in Defendants’ trademark search, demonstrating Defendants’
20 awareness of Plaintiff’s prior use of the mark; (2) Defendants’ CEO sent an
21 internal email regarding Plaintiff’s prior use of the mark; (3) two business
22 days after the email was sent Defendants anonymously registered fifteen
23 domain names with the words “memory lane auction[s],”⁵ despite the fact
24 that they were not in the auction business; and (4) Defendants disregarded

25 _____
26 ⁵ For example, “memorylaneauctions.com,” “memorylaneauction.com,”
27 “memory-lane-auctions.com,” “memory-lane-auction.com,” “memorylane-
28 auction.com.” (Trial Ex. 25-001.)

1 Plaintiff's cease and desist letter and a letter Plaintiff sent to Defendants
2 identifying alleged instances of actual confusion. (Trial Tr. 101:22-104:11,
3 318:21-25, 366:19-21, 336:4-17, 364:3-5, 366:12-367:10; Trial Exs. 8, 23,
4 25.) In light of Plaintiff's evidence, this factor does not support finding this
5 case exceptional.

6 7 **8. Likelihood of Expansion**

8 "Inasmuch as a trademark owner is afforded greater protection against
9 competing goods, a 'strong possibility' that either party may expand his
10 business to compete with the other will weigh in favor of finding that the
11 present use is infringing." *Network Automation*, 638 F.3d 1153 (quotation
12 marks omitted).

13 Defendants apparently considered expanding their site to include
14 mass-merchandise or sports memorabilia.⁶ However, Defendants
15 announced for the first time at the Final Pretrial Conference that they had
16 shut down their Memory Lane website. (Final Pretrial Conference Hr'g Tr.
17 3:21-5:3, 9:1-5.) The fact Defendants may have caused this factor to tip in
18 their favor on the eve of trial does not support finding this case exceptional.

19 20 **9. Conclusion as to Plaintiff's Theory of Liability**

21 None of the individual *Sleekcraft* factors support finding this case
22 exceptional. As such, they do not support finding this case exceptional

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24 ⁶ Plaintiff's citations to the record for this point do not support their contention
25 that Defendants considered selling sports memorabilia, (Opp'n at 5, 12), but the
26 point is not directly disputed by Defendants, either. (*See* Reply at 7 ("Thus even
27 if Defendants had sold mass-merchandise as was briefly contemplated . . .").) The
28 Court notes that at trial, Defendants represented they "tried" to sell products other
than yearbooks, which they were already selling. (Trial Tr. 395:5-8.)

1 when considered together, either. Moreover, as noted above, the jury found
2 Plaintiff owned a valid protectable mark. As such, Plaintiff’s theory of
3 liability does not support finding this case exceptional.

4
5 **B. Plaintiff’s Claims for Relief**

6 Defendants also argue that Plaintiff had no basis for the relief it
7 requested, and therefore this case is exceptional. (Mot. at 9-20.) The relief
8 sought by Plaintiff included an injunction, corrective advertising costs,
9 Defendants’ profits, and a reasonable royalty. Considered as a whole,
10 Plaintiff’s claims for relief do not support finding this case exceptional.

11 Defendants argue that it was unreasonable for Plaintiff to seek an
12 injunction after it learned that Defendants’ “Memory Lane” website was not
13 profitable, and after Defendants “formally told” Plaintiff for the first time at
14 the Final Pretrial Conference that they had “completely eliminated [their
15 Memory Lane] website” and changed their name from Memory Lane, Inc.
16 to Classmates Inc.⁷ (Mot. at 10.) The fact that Plaintiff continued to pursue
17 an injunction in light of these disclosures does not support finding this case
18 exceptional. *See Polo Fashions, Inc. v. Dick Bruhn, Inc.*, 793 F.2d 1132,
19 1135 (9th Cir. 1986) (reversing district court’s refusal to grant permanent
20 injunctive relief where defendant claimed to have stopped infringing);
21 *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th
22 Cir. 1984) (affirming grant of preliminary injunction in trademark case
23 despite the fact that “[defendant] had voluntarily stopped using the disputed
24 term”).

25 _____
26 ⁷ As of the date of Plaintiff’s Opposition, Defendants’ applications to register
27 “MEMORY LANE” and “MEMORYLANE.COM” with the U.S. Patent &
28 Trademark Office remained pending. (Keith Wesley Decl. Exs. C-F, Doc. 225.)

1 With respect to disgorgement of profits, Defendants particularly take
2 issue with Plaintiff seeking Defendants' total profits, as opposed to any
3 specifically related to Defendants' "Memory Lane" nostalgia website.
4 (Mot. at 18; Reply at 14-17.) "The plaintiff has only the burden of
5 establishing the defendant's gross profits from the infringing activity *with*
6 *reasonable certainty.*" *Lindy Pen Co., Inc. v. Bic Pen Corp.*, 982 F.2d 1400,
7 1408 (9th Cir. 1993) (emphasis added). "The defendant thereafter bears the
8 burden of showing which, if any, of its total sales are not attributable to the
9 infringing activity" *Id.*; see also *Nintendo of Am., Inc. v. Dragon Pac.*
10 *Int'l*, 40 F.3d 1007, 1012 (9th Cir. 1994) ("[T]he burden is upon [defendant]
11 to prove that sales were demonstrably not attributable to the infringing
12 mark.") (alterations in original; quotation marks omitted); 5 MCCARTHY ON
13 TRADEMARKS AND UNFAIR COMPETITION § 30:65 (4th ed.). Moreover,
14 "where infringing and noninfringing elements of a work cannot be readily
15 separated, all of a defendant's profits should be awarded to a plaintiff."
16 *Nintendo*, 40 F.3d at 1012. Here, Plaintiff put forth evidence that (1)
17 Defendants' "Classmates" web pages used the MEMORY LANE mark; (2)
18 Classmates' corporate name was changed to Memory Lane, Inc.; (3)
19 Defendants publicized that "Classmates is now part of Memory Lane;" and
20 (4) following the introduction of Defendants' "Memory Lane" website and
21 related advertising, traffic increased to Defendants' sites and Defendants'
22 net subscriber loss slowed. (Trial Tr. 327:13-15, 378:11-379:9, 614:24-
23 617:5, 612:4-17; Trial Exs. 33, 48-004, 48-005, 67-004, 67-001, 67-013.)
24 Based on this evidence and precedent, it was not unreasonable for Plaintiff
25 to seek the profits that it did, based either on the grounds that such profits
26 could be attributed with reasonable certainty to allegedly infringing activity,
27 or because allegedly infringing and non-infringing activity could not be
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1 readily separated. Defendants argue that they demonstrated that the profits
2 Plaintiff sought were not attributable to Defendants' use of the mark, as was
3 their burden. (Mot. at 19.) The fact that Plaintiff did not do so for
4 Defendants does not make this case exceptional.

5 With respect to a reasonable royalty, Defendants argue that it was
6 improper for Plaintiff to seek such a royalty without any prior licensing
7 history. (Mot. at 12-15.) Some courts, however, have allowed a reasonable
8 royalty even without prior licensing. *See, e.g., QS Wholesale, Inc. v. World*
9 *Marketing, Inc.*, No. SA 12-cv-0451 (RNBx), 2013 WL 1953719, at *4
10 (C.D. Cal. May 9, 2013) (collecting cases). In addition, Defendants' own
11 expert testified that Plaintiff may be entitled to a reasonable royalty if
12 Defendants were found liable. (Trial Tr. 869:21-25.) Further, while
13 Defendants argue that Plaintiff's proposed 4% royalty rate used was
14 unsupported, (Mot. 15), Defendants fail to address all of the evidence put
15 forth by Plaintiff, including testimony that the royalty rate for Defendants'
16 CLASSMATES mark⁸ was 4%, based on Defendants' own valuations. (*See*
17 *Trial Tr. at 500:19-502:20.*) Finally, Defendants argue that Plaintiff's use of
18 their total profits as a royalty base was "grossly improper." (*See Reply at*
19 *17-18.*) For the reasons stated above, this does not support finding this case
20 exceptional.

21 With respect to corrective advertising, Defendants argue that Plaintiff
22 either had no evidence of harm, or that its evidence of harm did not justify
23 the amount of the award it sought. (Mot. 10- 13; Reply at 18-19.) The
24 Ninth Circuit has upheld an award of damages based in part on corrective
25 _____

26 ⁸ As noted above, the Classmates service operated under the name Memory Lane
27 for a period of time. (Trial Tr. 327:13-15; *see also* Trial Exs. 33, 67-004, 67-011,
28 67-013.)

1 advertising where the plaintiff provided evidence of (1) its expenditures on
2 advertising and building its reputation; (2) the “widespread harm” to its
3 reputation, based on “multiple declarations and witness testimony proving
4 that customers were very angry with, and blamed [plaintiff] for, problems
5 caused by [defendant];” and (3) the need for corrective advertising. *Skydive*
6 *Arizona, Inc. v. Quattrocchi*, 673 F.3d 1105, 1112-13 (9th Cir. 2012). Here,
7 Plaintiff presented evidence how much it spent on advertising, how much
8 Defendants spent advertising the launch of their Memory Lane service, and
9 how much Defendants spent on “online acquisition and other marketing” for
10 “the entirety of the Classmates/Memory Lane business.” (Trial Tr. 515:11-
11 23, 517:9-518:2, 519:2-16.) Plaintiff then asked the jury to come up with a
12 damages figure, which was not an unreasonable request. *See Skydive*
13 *Arizona*, 673 F.3d at 1112. Plaintiff also put forth evidence that it received
14 hundreds of misdirected consumer complaints intended for Defendants.
15 Whether or not such evidence persuasively demonstrated harm, it does not
16 warrant finding this case exceptional.

17

18 **V. CONCLUSION**

19 Under the totality of the circumstances, neither Plaintiff’s theory of
20 liability nor its claims for relief “stand out” for their lack of merit, and there
21 was nothing “unreasonable” about the manner in which Plaintiff litigated the
22 case. As such, the Court does not find this case “exceptional” under section
23 35(a) of the Lanham Act, and Defendants’ Motion is DENIED.

24

25 **SO ORDERED:**

26 DATED: May 8, 2014

JOSEPHINE L. STATON _____
HONORABLE JOSEPHINE L. STATON
UNITED STATES DISTRICT JUDGE

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