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NOV 8 2022

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U.S. COURT OF APPEALS

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

METAMORFOZA D.O.O., DBA Museum of Illusions, Plaintiff-Appellant, v. BIG FUNNY, LLC, DBA Museum of 3D Illusions, DBA Museum of Illusions; et al., Defendants-Appellees.	No. 21-55929 D.C. No. 2:21-cv-02020-JFW-RAO MEMORANDUM*
METAMORFOZA D.O.O., DBA Museum of Illusions, Plaintiff-Appellee, v. BIG FUNNY, LLC, DBA Museum of 3D Illusions, DBA Museum of Illusions; et al., Defendants-Appellants, and ALEXANDER DONSKOY; DOES, XYZ	Nos. 21-56067 21-56067 D.C. No. 2:21-cv-02020-JFW-RAO

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Corporations, 1-10 fictitious entities,

Defendants.

Appeal from the United States District Court
for the Central District of California
John F. Walter, District Judge, Presiding

Argued and Submitted October 17, 2022
Pasadena, California

Before: KLEINFELD, CHRISTEN, and BUMATAY, Circuit Judges.

Metamorfoza D.O.O. appeals the district court's order dismissing its claims against Big Funny, LLC, Big Funny FL, LLC, Big Funny Corporation (collectively "Big Funny") for trademark infringement under the Lanham Act and unfair competition under the Lanham Act, the California Business and Professions Code, and California common law for failure to state a claim. Big Funny cross-appeals the district court's order denying their motion for attorneys' fees under 15 U.S.C. § 1117(a).

We have jurisdiction pursuant to 28 U.S.C. § 1291. We review the district court's dismissal de novo, *Wilson v. Lynch*, 835 F.3d 1083, 1090 (9th Cir. 2016), and its denial of attorneys' fees for abuse of discretion, *Nutrition Distribution LLC*

v. IronMag Labs, LLC, 978 F.3d 1068, 1081 (9th Cir. 2020). We affirm both of the district court's orders.

The district court correctly dismissed Metamorfoza's trademark-infringement claim because it failed to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Reviewing Metamorfoza's Second Amended Complaint (the operative complaint) de novo, we do not see any plausible allegation that there is any similarity between the two marks other than the disclaimed text, and Metamorfoza lacks a protectible interest in the disclaimed text except as part of its composite mark. *See Off. Airline Guides, Inc. v. Goss*, 856 F.2d 85, 87 (9th Cir. 1988).

Most significantly, Metamorfoza has not alleged any actionable similarity between its registered trademark and Big Funny's trademarks that it alleges as infringing. Were we to reach the question of likelihood of confusion, we would compare Big Funny's allegedly infringing marks against Metamorfoza's registered mark as a whole, including the phrase "Museum of Illusions," which is subject to a disclaimer Metamorfoza made at the time of registration. But we do not see any

similarity other than the disclaimed phrase. Because Metamorfoza has disclaimed the exclusive right to use the phrase apart from the registered mark, it cannot allege trademark infringement based solely on Big Funny's use of the same words. *See Off. Airline Guides*, 856 F.2d at 87.

Relying on *Jada Toys, Inc. v. Mattel, Inc.*, 518 F.3d 628, 632–33 (9th Cir. 2008), Metamorfoza argues that the district court erred in only considering the lack of similarity and no other factors under *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348–49 (9th Cir. 1979), *abrogated in part on other grounds by Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792 (9th Cir. 2003). As Metamorfoza itself acknowledges, this Court has opined on several occasions that no likelihood of confusion exists where two marks are completely dissimilar. *See, e.g.*, *Brookfield Commc'ns, Inc. v. W. Coast Ent. Corp.*, 174 F.3d 1036, 1054 (9th Cir. 1999) ("Where the two marks are entirely dissimilar, there is no likelihood of confusion."); *Sleeper Lounge Co. v. Bell Mfg. Co.*, 253 F.2d 720, 723 (9th Cir. 1958) ("[Similarity of the marks] is the one essential feature, without which the others have no probative value."). We do not need to resolve the tension, if any, between the two lines of cases, because the only similarity between the two marks is the disclaimed words, and Metamorfoza lacks a protectible interest in those

words. We thus affirm the district court's dismissal of Metamorfoza's trademark-infringement claim.

For the reasons stated above, we also affirm the district court's dismissal of Metamorfoza's unfair-competition claims under federal and California law, the standards for which are substantially the same as those for the trademark-infringement claim. *See Lodestar Anstalt v. Bacardi & Co. Ltd.*, 31 F.4th 1228, 1245 (9th Cir. 2022) (unfair competition under the Lanham Act); *Applied Underwriters, Inc. v. Lichtenegger*, 913 F.3d 884, 893 n.6 (9th Cir. 2019) (unfair competition under California statutory and common law).

The district court acted within its discretion in denying Big Funny attorneys' fees under 15 U.S.C. § 1117(a). The statute authorizes award of attorneys' fees in "exceptional cases." § 1117(a). In exercising its discretion, a district court may consider the totality of circumstances to decide whether a case "stands out from others with respect to the substantive strength of a party's litigating position . . . or the unreasonable manner in which the case was litigated." *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 554 (2014). The district court did not abuse its discretion in finding that Metamorfoza's case involves debatable legal

questions and hence does not rise to the level of an "exceptional case."

AFFIRMED.