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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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Mister Softee Inc.; Mister Softee Franchise)
9 LLC,

CV 11-01632-PHX-FJM

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Plaintiffs,

ORDER

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12 vs.

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14 Nidal Awawda dba Mister Frosty,

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16 Defendant.

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20 The court has before it plaintiffs' motion for default judgment, permanent injunction,
21 and attorney's fees (doc. 11).

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25 Plaintiffs are family owned businesses established in 1956. They offer franchisees
26 the right to use their specially designed ice cream trucks to sell soft-serve ice cream, hard ice
27 cream, frozen desserts, and other products. These trucks alert their customers that they are
28 in the area by playing Mister Softee's musical jingle, which is registered as a sonic mark with
the United States Patent and Trademark Office at Registration no. 2218017 (the "Mister
Softee Sonic Mark").¹ Defendant operates an ice cream truck in Phoenix, Arizona that plays
the Mister Softee Sonic Mark without permission. Plaintiffs filed this action on August 19,

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¹The jingle can be heard on Mister Softee's website at
<http://www.mistersoftee.com/softee-funzone>.

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1 2011. After defendant failed to answer or otherwise appear, plaintiffs sought entry of
2 default, which was entered by the Clerk on September 15, 2011 (doc. 10). Defendant has not
3 moved to set aside default and has not otherwise appeared.

4 II

5 The general rule concerning default judgments is that well-pled allegations in a
6 complaint are taken as true. Fair Hous. of Marin v. Combs, 285 F.3d 899, 906 (9th Cir.
7 2002). We are not required to issue detailed findings of fact. Id. The complaint (doc. 1)
8 contains well-pled facts concerning defendant's infringing use of the Mister Softee Sonic
9 Mark, and we accept these allegations as true.

10 A party is entitled to permanent injunctive relief if it can show (1) an irreparable
11 injury; (2) an inadequate remedy at law to compensate the injury; (3) that an injunction is
12 warranted after balancing the hardships between the parties; and (4) the public interest would
13 not be harmed by granting the injunction. eBay Inc. v. MercExchange, LLC, 547 U.S. 388,
14 391, 126 S. Ct. 1837, 1839 (2006). We conclude that all four requirements for permanent
15 injunctive relief are met. First, once a plaintiff establishes a likelihood of confusion in a
16 trademark infringement action, it is "ordinarily presumed" that irreparable harm will result
17 in the absence of injunctive relief. Vision Sports, Inc. v. Melville Corp., 888 F.2d 609, 612
18 n.3 (9th Cir. 1989). Of all the factors considered in assessing likelihood of confusion, the
19 Ninth Circuit has noted that the "strength of [the] marks, [] intentional and exact copying of
20 the marks, and the direct competition for a specific and limited consumer group" weighed
21 heavily in the court's finding that a likelihood of confusion existed. Au-Tomotive Gold, Inc.
22 v. Volkswagen of Am., Inc., 457 F.3d 1062, 1078 (9th Cir. 2006). Here, defendant is selling
23 ice cream using a jingle that is identical to the Sonic Mark of a company in business over 50
24 years. This is intentional and exact use of a trademarked song that markets a similar product,
25 ice cream, to consumers.

26 Second, plaintiffs have no adequate remedy at law. There is no indication that
27 defendant, who has failed to appear at all in this action, has any intention of stopping his
28 infringement. It would be impossible for plaintiffs to follow defendant's ice cream truck

1 v. Rio Int'l Interlink, 284 F.3d 1007, 1023 (9th Cir. 2002). Here, plaintiffs alleged that
2 defendant knowingly used the Mister Softee Sonic Mark without permission and "willfully
3 intended" to dilute plaintiffs' marks. Compl. at 5. Because the complaint's allegations are
4 deemed true, Fair Housing, 285 F.3d at 906, defendant's default establishes his willful and
5 deliberate infringement of plaintiffs' mark. An award of attorney's fees is therefore
6 appropriate. See Derek Andrew, Inc. v. Poof Apparel Corp., 528 F.3d 696, 702 (9th Cir.
7 2008) (holding that fee award was justified under the Lanham Act when the defendant
8 defaulted and the complaint alleged willful infringement).

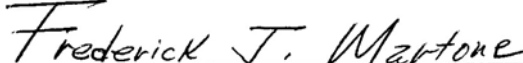
9 **IV**

10 **IT IS ORDERED GRANTING** plaintiffs' motion for default judgment and for
11 permanent injunction (doc. 11). Nidal Awawda and his agents, employees and any person
12 or entity acting in concert with him are permanently enjoined from using the Mister Softee
13 Sonic Mark (United States Patent and Trademark Office Registration No. 2218017).

14 **IT IS ALSO ORDERED GRANTING** plaintiffs' motion for attorney's fees (doc.
15 11). Plaintiffs will have seven (7) days from the date of this order to submit an itemization
16 of attorney's fees along with any supporting documentation. Defendant will then have seven
17 (7) days to file any objections to the reasonableness of the fees.

18 The Clerk shall enter judgment.

19 DATED this 28th day of December, 2011.

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23 Frederick J. Martone
24 United States District Judge
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