

MAY/JUNE 2022

VOLUME 28 NUMBER 3

DEVOTED TO
INTELLECTUAL
PROPERTY
LITIGATION &
ENFORCEMENT

*Edited by Gregory J. Battersby
and Charles W. Grimes*

IP *Litigator*®

In-N-Out Burger Trade Dress Dispute: A Supersized Lesson in Consumer Survey Evidence

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A burger brouhaha involving the Lanham Act is well underway in the Wolverine state in the US District Court for the Eastern District of Michigan. Plaintiff In-N-Out Burgers operates hundreds of fast food joints in the West. Defendant Doll n' Burger recently opened two locations in Michigan. In-N-Out filed suit in Michigan alleging that Doll n' Burger is infringing In-N-Out's registered and unregistered trade dress. Both sides retained consumer survey experts, both sides lobbed multiple critiques at their opponent's surveys, and both sides sought to "Daubert" the other side's expert. Doll n' Burger requested a jury "for all jury-triable claims," and so the Court might be expected to take a close look at the alleged flaws in the respective surveys to avoid admitting evidence that is irrelevant to the issues at hand or that could be more prejudicial to the jury than the purported relevance.

Instead, US District Court Judge Robert Cleland criticized the approach taken in the competing exclusion motions, saying he viewed "both sides' scattershot approach to discrediting the opposing expert with a "degree of suspicion." Reminding the parties that there is no such thing as a "perfect" survey and that most methodological flaws in a survey bear on the weight rather than the admissibility of the survey, Judge Cleland considered the "legion" of reasons raised by the parties for keeping the experts out, and found that these reasons amounted to a mere nothing burger. While neither side's expert was shown the door, the myriad issues raised by the parties are worthy of a deeper dive here. This article first discusses In-N-Out Burger's secondary meaning survey. We then turn our attention to Doll n' Burger's secondary meaning survey. Finally, we turn back to In-N-Out

Burger's likelihood of confusion survey and its attempt to "Squirt" its way to success.

A. Doll n' Burger's Critique of Secondary Meaning Survey: Mostly a Nothing Burger, Says the Court

We start with some of the major critiques leveled at In-N-Out's secondary meaning survey and how the court addressed those alleged flaws.

1. Not Testing Every Trade Dress Element. Doll n' Burger challenged In-N-Out's expert's decision to include in the survey stimuli images of the trade dress that did not include all 9 elements of the Plaintiff's trade dress. The Court rejected this claim because "Defendants cite no case law supporting their implicit proposition that a *survey* cannot test the 'overall appearance' of a retail establishment unless every possible element of the trade dress is visible in the test images."
2. Including Other "Indicator of Source" Elements. When testing for secondary meaning of trade dress, it is customary to obscure the "brand and company name and other source-identifying indicia" so that the expert can isolate the trade dress at issue and measure consumer reactions. Doll n' Burger alleged Plaintiff violated this rule when she failed to remove certain elements in her test stimuli (such as the In-N-Out "Palm Trees") that also act as an indicator of source. While the Court agreed with the criticism, it determined this methodological flaw would go to the "weight" of the survey and not its "admissibility."
3. A Close Call on Survey Universe. The composition of a survey's universe is "one of the most important factors in assessing the validity of a survey as well as the weight it should receive." Plaintiff's expert limited the survey universe to respondents situated in the seven western states where In-N-Out Burger

Plaintiff's Expert's "test" stimulus that included palm trees—a source identifier that arguably should have been removed from the stimulus before testing.



operates. But the crinkle here is that Plaintiff alleged claims for both registered *and* unregistered trade dress. Thus, Defendant argued, Plaintiff's expert could not opine on secondary meaning when the survey respondents were only located in the western part of the United States. The Court ultimately rejected that claim and concluded that: "Plaintiff has two routes to establishing an enforceable, common law trade dress based on acquired secondary meaning. Plaintiff can demonstrate that the look of In-N-Out's restaurants has 'acquired secondary meaning among some substantial portion of *consumers* nationally' or it can use a narrower *survey* to help establish secondary meaning in a more limited geographic region and still pursue a claim for infringement if it can show Defendants (1) had 'knowledge of' the trade dress and (2) 'intentionally copied it.'"

While none of these alleged flaws were beefy enough to keep Plaintiff's consumer survey expert on the outside looking in, the Court's discussion nonetheless provides valuable insight and analysis on some of the key issues that should be considered when it comes to developing secondary meaning survey evidence in trade dress disputes.

B. Trial Court's Reaction to In-N-Out Burger's Critique of Doll n' Burger's Secondary Meaning Survey: Where's the Beef?

In this section, we stay in the universe of secondary meaning surveys and discuss In-N-Out Burger's broadside on Doll n' Burger's secondary meaning survey; specifically, Doll n' Burger's survey that attempted to show that In-N-Out Burger's trade dress lacks secondary meaning. We discuss some of the major issues raised and how the Court disposed of them.

1. No Trade Dress Secondary Meaning Experience. Plaintiff first alleged the Court should bounce Defendant's expert because he only had experience designing surveys in trademark disputes, *not* trade dress disputes. The Court quickly (and correctly) rejected this claim because "[w]hile trade dress involves some unique factors, the legal standards utilized are closely aligned, and the consumer survey

methodology used for trademark and trade dress are largely interchangeable.”

2. Excluding Other “Indicator of Source” Elements. As discussed above, when testing for secondary meaning of trade dress, it is customary to obscure the “brand and company name and other source-identifying indicia” so that the expert can isolate the trade dress at issue and measure consumer reactions to it. Accordingly, Defendant’s expert used various pictures of In-N-Out joints, but removed the “source-identifying indicia” from them, including the trademarked palm trees, the In-N-Out logo, and the fluorescent yellow sign. The Court was not persuaded that this was a fundamental flaw (or even a flaw of any kind). It indicated that this design choice was a “judgment call” and that Plaintiff was free to criticize this approach at trial if it desired to do so.
3. Control Images Were Not “Blatantly Improper.” Plaintiff also took aim at Defendant’s expert’s decision regarding the control stimulus. For the control design, Defendant’s expert simply used the same test stimulus images, but swapped in a “blue and grey” color scheme instead of the red and white color scheme of Plaintiff’s alleged trade dress. The Plaintiff argued that the expert’s control images were “so distinctive” that it pushed survey respondents in

a totally different direction towards a rival burger joint altogether, White Castle. While the Court questioned whether Defendant’s expert used a control that would “lean towards” Defendant’s desired outcome, it ultimately concluded that the expert’s decision was not “blatantly improper.”

4. No “Freeloader” Phenomenon in the Survey Universe. Lastly, Plaintiff claimed Defendant’s expert’s survey universe was faulty. In defining who qualified for the survey, Defendant’s expert required respondents to be adults who had recently “personally purchased” a burger from a fast-food restaurant. Plaintiff claimed this universe was too narrow because it excluded “freeloaders” (the Court’s word) who would have dined at a burger joint but on someone else’s dime. In rejecting this argument, the Court observed that it was “highly skeptical that the inclusion of the word ‘personally’ caused any material change in the survey’s population or led to bias in its results.”

All in all, none of these alleged flaws were sufficient to keep Defendant’s expert out. But as with the discussion of In-N-Out Burger’s secondary meaning, these alleged deficiencies are food for thought for those designing (or critiquing) secondary meaning survey evidence.

One of Defendant’s Expert’s “test” stimuli photos that excluded palm trees (from the cup and the fries holder) because they were other “source-identifying indicia.”



Two of Defendant's Expert's "control" stimuli photos that used a "blue and grey" color scheme. While expressing some skepticism over this design choice, the Court noted the decision was not "blatantly improper."



C. A Key Question Raised in this Burger Imbrolio: To Squirt or Not to Squirt?

Lastly, we now turn back to In-N-Out Burger and its proffered likelihood of confusion study. It provides the perfect opportunity to discuss a decision that trial counsel and their consumer survey experts routinely grapple with: To Squirt, or Not to Squirt, that is the question.

Before discussing that question in the context of this dispute, a slight detour is in order. Broadly speaking, there are two types of generally accepted consumer survey formats when testing for "likelihood of confusion" in trade dress and trademark cases. There is the "Eveready" format, and the "Squirt" format.

The Eveready format has been referred to as the "gold standard" when the senior user's trade dress or trademark is a commercially strong mark. In an Eveready survey design, the senior user's mark or trade dress is not shown to survey respondents as part of the survey and is assumed to be known to most of the relevant consumers and thus already in mind. Instead, respondents are just shown the (allegedly) offending trademark or trade dress and asked a series of questions regarding who they believe makes or puts out the product or service at issue or who the product or service might be affiliated with. By contrast, the Squirt design shows both parties' trademarks (either juxtaposed together at once or separately seriatim) and asks a series of questions as to whether the survey respondents believe there is an affiliation or connection between the products or the companies that put them out.

Neither format is necessarily a panacea in all cases. Some courts criticize the use of the Eveready format in cases where the senior user's mark is not commercially strong because it artificially deflates confusion on the theory that not enough respondents are familiar with the senior user's mark to draw a connection with the junior user's mark. *See e.g., Vineyard House, LLC v. Constellation Brands United States Operations, Inc.*, 515 F. Supp. 3d 1061, 1072 (N.D. Cal. 2021) (noting the “[w] here the query concerns marks for everyday products, used by vast majority of consumers, such as Apple, Coca-Cola, or EverReady, the short simple survey can provide some insights. That is not, and never was, this case.”); *but see* Hal Poret's study in the Trademark Reporter where he concludes that “the research described herein empirically demonstrates that Eveready surveys may be appropriate for senior marks that are not top-of-mind.”

The Squirt format can create “demand effects” by suggesting to consumers that there must be a connection between the two companies whose products they have just been shown. A number of courts have suggested that unless the two products are actually sold or marketed in close proximity in the marketplace, a Squirt design should not be used. *See e.g., Down the Hatch: Jägermeister Douses Impaired Survey Evidence in Trademark Victory.*

In the present case, In-N-Out's expert used the Squirt design in which images of the In-N-Out and Doll N' Burger restaurants were shown seriatim, and her survey took a bit of a grilling from the opposing party for doing so. The primary argument advanced by Doll N' Burger's

expert (who used an Eveready format for his own defensive likelihood of confusion survey) is that the parties' goods are not sold in the same geographic markets. Thus, because consumers are not likely to encounter them in close proximity in the marketplace, the Squirt design should not be used, or so went the argument.

Notwithstanding these and other alleged deficiencies, the Court ultimately ruled that Plaintiff's expert's decision to use Squirt was a “judgment call” and that the wisdom of that call is for the fact finder. Also, the Court observed that Doll N' Burger's expert had used a similar Squirt design in a recent case where the two companies “d[id] not serve the same geographic regions.” In non-judicial parlance, what's good for the goose is good for the gander.

D. Some Final Food For Thought

The Court's decision is a whopper of a *Daubert* order. The discussion of the parties' survey evidence was over 30 pages. We did not cover all of the issues set forth in the decision, but we covered those that we believe are most salient and recurring for trial counsel faced with developing and critiquing survey evidence. If you are dealing with survey evidence in a trade dress dispute, you should spend a bit of time devouring this decision along with this article. We hope it will leave you satisfied!

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