

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN**

**IN-N-OUT Burgers v. DOLL N BURGERS LLC, DOLL N BURGERS TECUMSEH LLC,
DOLL N BURGERS JACKSON, LLC, VERITAS VINEYARD, LLC,
and JUSTIN DALENBERG**

The Purpose of this Report:

I have been retained by WARNER NORCROSS+JUDD LLP to determine whether the trade dress of IN-N-OUT restaurants has acquired secondary meaning among U.S. consumers who are customers or potential customers of quick-service restaurants. In order to do so, I have designed and implemented a survey relevant to this issue. This report contains a description of the survey, an analysis of the data collected through the survey, and my conclusions and expert opinion on the question of whether the IN-N-OUT trade dress has acquired secondary meaning among customers and potential customers of quick-service restaurants.

Trade Dress Distinctiveness and Secondary Meaning:

Marketing scholars often define a brand as a name, a trademark, a logo, or any other symbol. According to David Aaker, a brand is “a distinguishing name and/or symbol (such as a logo, trademark, or package design) intended to identify the goods or services of either one seller or a group of sellers, and to differentiate those goods or services from those of competitors.”¹ The Lanham Act defines a trademark as: “any word, name, symbol or device or any combination thereof adopted and used by a manufacturer or merchant to identify its goods and distinguish

¹ Aaker, D.A., Managing Brand Equity: Capitalizing on the Value of a Brand Name, 1991, p.7.

them from those manufactured or sold by others.”²

For centuries companies and brands have distinguished themselves from competitors and have sought to be identified by customers and prospective customers using trademarks and trade dress. The objective of trademarks and trade dress is to convey information about the company and/or its products and services, and for the purpose of indicating their origin or source. According to Jacoby: “A unique brand name and cohesive brand identity is probably the single most powerful piece of information for the consumer”.³

Kotler defined atmospherics as: “The effort to design buying environments to produce a specific emotional effect in the buyer that enhance its purchase probability.”⁴ Elements like store layout, lighting, and furnishing are all potential elements of a store atmospherics. Kotler adds that “atmospheres may become the chief form of competition”.⁵

Extensive research has been conducted by marketing scholars to assess just how atmospherics can affect consumers’ behavior. ⁶ Researchers agree that the distinctive environment of a retail outlet not only may affect consumers’ behavior, but it may also serve to identify particular characteristics of a store with their perception of a company. So, marketers’ use of atmospherics differentiate a store or company from its competitors and it may play a significant role in retaining customers.⁷ It is not surprising that the atmosphere (or trade dress) of a restaurant be considered an important factor in attracting and retaining its clientele. The

² Lanham Act, 45, 15, USCS, 1127.

³ Jacoby, J.: The Psychological Foundations of Trademark Law: Secondary Meaning, acquired Distinctiveness, Genericism, Fame, Confusion and Dilution, Based on a *Presentation at The Gottlieb, Rackman & Riesman Seminar in Intellectual Property, School of Law, New York University*, November 3, 1998, p.17.

⁴ Kotler, P. Atmospherics as a Marketing Tool, *Journal of Retailing*, 49 (4) p 50, 1973.

⁵ Kotler, *ibid.* p.61

⁶ Kopp, S.W. and Langenderfer, J, Protecting Appearance and Atmospherics: Trade Dress as a Component of Retail Strategy, *Journal of Public Policy and Marketing*, Vol. 33,(1), Spring 2014, p. 35.

⁷ Kopp, S.W. and Langenderfer, J., *ibid.* P. 35

protection of restaurant trade dress from copycat competitors has been considered by the Courts.⁸

Bitner stated that: "...that human behavior is influenced by the physical setting in which it occurs is essentially a truism."⁹ Research by Wall and Berry indicates that the ambience of a restaurant greatly influences a consumer's evaluation of that restaurant.¹⁰ Heap mentions research studies that show how ambience affects how much and how fast customers eat, how long they stay in a restaurant, if they decide to return, and how much they spend.¹¹ It is important that restaurants and other service, retail, or business organizations would want to protect their trade dress from imitation by competitors.

Trade dress has acquired secondary meaning when customers associate it with a single source. The primary element of secondary meaning, according to McCarthy, is "a mental association in the buyers' mind between the alleged mark and a single source of the product."¹² Secondary meaning is measured by determining the extent of the association of a trademark with the products of one producer; therefore, secondary meaning is established if single source identification is the "primary" association in the buyers' mind.¹³

⁸ See: *Two Pesos, Inc., v. Taco Cabana, Inc.*, 505 U.S. 763, 767 (<https://supreme.justia.com/cases/federal/us/505/763/#767>) (1992).; *Freddie Fuddrucker's, Inc., v. Ridgeline, Inc.*, US District Court, N.D., Texas, Dallas Division, No CA-3-83-1128-D; also see: Krizman, L. K., Trademark Protection for Restaurant Owners: Having Your Cake and Trademarking It, Too. *The Trademark Reporter*, TMR, Vol 99, No 4, July-August 2009, pp.1004-1012.

⁹ Bitner, MJ; *Servicescapes: The Impact of Physical Surroundings on Customers and Employees*; *Journal of Marketing*, 56 (2). P. 57, 1992

¹⁰ Wall, E A and Berry, LL; The Combined Effects of the Physical Environment and Employee Behavior on Customer Perception of Restaurant Service Quality, *Cornell Hotel and Restaurant Administration Quarterly*, 48, p.59.

¹¹ Heap, D. How Restaurant Ambiance Affects the Bottom Line, <https://www.signs.com/blog/author/dusty>.

¹² McCarthy, J.T., Trademarks and Unfair Competition, 2nd edition, *The Lawyers Co-Operative Publishing Co.*, 1984, Vol. 1, p. 152.

¹³ Palladino, V.N., Secondary Meaning Surveys in Light of Lund, *The Trademark Reporter*, Vol 91, p. 585

The acquired secondary meaning by a trade dress or a trademark may be established in many ways, including through consumer surveys. Consumer surveys must show that the trademark has established the necessary connection between the product and its source.¹⁴ Market survey data is the most effective way of proving secondary meaning. The survey must show that in the mind of consumers, the “primary significance of a...term is to identify the source of the product rather than the product itself.”¹⁵ To provide evidence of secondary meaning, the survey must be conducted according to accepted research principles and statistical methods.¹⁶

According to Cynthia Clarke Weber: “In *Two Pesos* the Supreme Court said not only that restaurant décor may be protected as trade dress, but also that restaurant-and other trade dresses-may be inherently distinctive and protectable from the moment of adoption.”¹⁷ The importance of distinctiveness of a trade dress is underscored by McCarthy who states that in order to seek federal registration, an applicant must show that the trademark or trade dress has acquired distinctiveness.¹⁸ Therefore, a trade dress may still be protected if it has **either** secondary meaning or inherent distinctiveness.¹⁹ According to Gaske:”The Fifth Circuit departed from the

¹⁴ Caslowitz, C. Trade Dress and Section 43(A) of the Lanham Act: Protection for “Total Image” of the Visual Displays of Software Applications, *The Journal of Law and Technology*, 1993, p.187; Slamowitz, C.L.I., Adjusting the Dress Code: Implementing Trade Dress reform to Burgeon User experience (UX) Protections, *Columbia Journal of Law and the Arts*, 2017, 99, pp. 99-123;Misterovich,E., Secondary Meaning of Trade Dress, *Revision/Legal*; <https://revisionlegal.com/trademark-law/secondary-meaning-of-trade-dress/>.

¹⁵ *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 851n 11 (1982), citing *Kellogg Co. v. National Biscuit Co.*, 305 US 111, 118, 39 USPQ 296, 299 (1938).

¹⁶ Gaske, W.F., Trade Dress protection: Inherent Distinctiveness as an Alternative to Secondary Meaning, *Fordham Law Review*, 1989, 57, 6, p 1135.

¹⁷ Weber, C.C, <http://www.sughrue.com/files/Publication/a5e682a6-09e8-4fb4-8d52-f3ba796ee215/Presentation/PublicationAttachment/28d42aa1-f2c4-4516-9a6c-f84323a0b1a7/tradedress.htm>

¹⁸ McCarthy, J.T. as cited by Berger and Halligan, Secondary Meaning Issues, *Trademark Surveys: A Litigator’s Guide*, Oxford University Press, 2012, p. 113.,

¹⁹ Gaske, W.F., Trade Dress Protection: Inherent Distinctiveness as an Alternative to Secondary Meaning, *Fordham Law Review*, Vol. 57, (6), 1989, p.1124.

accepted approach of trade dress protection by holding that proof of secondary meaning is not necessary for an “inherently distinctive” trade dress.²⁰

To protect trade dress under the secondary meaning doctrine the courts ask whether in the minds of the public, “the primary significance of the product feature or term is to identify the source of the product rather than the product itself.”²¹

The Survey:

To verify whether the trade dress of the IN-N-OUT restaurants has acquired secondary meaning among U.S. customers and prospective customers of quick service restaurants, I designed a double-blind survey with one test stimulus and one control stimulus.²² Double-blind surveys are developed to ensure that neither the respondents nor the interviewers are aware of the purpose of the survey or its sponsor.²³ The participants in the survey were recruited from a panel maintained by Dynata.²⁴

Dynata is a highly reputable provider of samples for academic and business survey researchers. The panel company was asked to provide a representative sample of people residing in the in the following states: Arizona, California, Colorado, Nevada, Oregon, Texas, and Utah, who are older than 18 years of age. The panel company was not informed of the purpose of the survey and, since the panel company was not informed of the purpose of the

²⁰ Gaske, *ibid.* p. 1127.

²¹ Wal-Mart Stores v. Samara Bros., Inc., 529 U.S. 205, 211 (2000)

²² Shashank Upadhye, Trademark Surveys: Identifying the Relevant Universe of Confused Consumers, *Fordham Intellectual Property, Media and Entertainment Law Journal*, Vol. VIII, Book 2, p. 559, 1997.

²³ Keller, B.P., Survey Evidence in False Advertising Cases, **Trademarks and Deceptive Advertising Surveys Law, Science and Design**, Shari Seidman Diamond and Jerre B. Swann eds., ABA, 2012, p.181.

²⁴ Dynata is a new company resulting from the merger of two other companies: Survey Sampling International (SSI) and Research Now. In the past I have used panels from both these former companies for my research because of their reliability and the quality of their panels. For further information see: www.dynata.com

survey, no survey participant was pre-screened by the panel company for any criteria. All screening was done through qualifying and screening questions built into the survey itself.²⁵

The proper universe of a survey, when measuring secondary meaning, should include a sample of customers and prospective customers of the Plaintiff's services.²⁶ The survey I designed was administered interactively over the Internet to a sample of customers and prospective customers of IN-N-OUT restaurants. The use of Internet surveys is a recognized and accepted practice when assessing the existence of secondary meaning of trademarks or trade dress.²⁷ The survey was conducted by T Fin & Associates, a marketing research company. The survey data was collected from April 12, 2021 to April 16, 2021.

The test and control questionnaires were identical. Only the stimuli used in each of the two surveys were different. The test stimulus showed a collage of images of an IN-N-OUT restaurant and an image of the interior of an IN-N-OUT restaurant.

The control stimulus showed a collage of images of a quick service restaurant and an image of the interior of a quick service restaurant. The control images did not have any of the infringing elements of the IN-N-OUT trade dress.

Neither the test nor the control stimuli had any reference to the restaurant brand name. As Shari Diamond recommends: "In designing a survey-experiment, the expert should select a stimulus for the control group that shares as many characteristics with the experimental stimulus as

²⁵ Updhye S. Trademark Surveys: Identifying the Relevant Universe of Confused Consumers, *Fordham Intellectual Property, Media and Entertainment Law Journal* VIII (2), 1997, p.559.

²⁶ Barber, W.G. The Universe, in *Trademarks and Deceptive Advertising Surveys – Law, Science and Design*, Shari Seidman Diamond and Jerre B. Swann editors, ABA, 2012, p.29.

²⁷ McCarthy, J.T., *McCarthy on Trademarks and Unfair Competition*, 4thed., Thomson Reuters West, 2011, 32.165.25; and Thornburg, R.H.: Trademark Surveys: Development of Computer-Based Survey Methods, 4 *J Marshall Rev. Intell. Prop. L.* 91, 2005, p. 119

possible, with the key exception of the characteristics whose influence is being assessed.”²⁸ The purpose of the control stimulus was to ensure that the test results were reliable and valid.

Appendix 1 shows a hard copy of the questionnaire used in this survey with the images of the test and control stimuli. The subjects who answered the surveys were randomly assigned to each of the survey versions.

The purpose of using controls is to eliminate “noise” or guessing from the results of the survey.

Rappoport states: “To get a credible prediction of real-world behavior, we need to be able to separate out the survey artifacts from the real-world behavior. Thus, for a survey to be useful it is necessary to get a reliable estimate of the contribution of the “survey artifacts” to the results.

This estimate can then be subtracted from the survey results.” And: “The primary purpose of controls is to provide such an estimate of the survey artifacts so that they can be accounted for in the analysis.”²⁹

The survey was programmed using the Qualtrics platform and the data were collected and by T Fin & Associates, a market research company. T Fin & Associates staff also conducted the statistical analysis of the survey data at my request. Appendix 1 shows the screenshots of the programmed test and control surveys as they would be have been seen by the participants.

To ensure that the survey participants understand the substantive questions, an introductory set of explanations were added to the questionnaire. These explanations were like the process used in

²⁸ Seidman Diamond, S., Reference Guide on Survey Research, in **Reference Manual of Scientific Evidence**, Third Edition, The National Academies Press, p. 400, 2011.

²⁹ Rappoport, M. “Design Issues for Controls” in: Diamond, S.S. and Swann, J.B. *Trademarks and Deceptive Advertising Surveys: Law, Science and Design*, ABA Publishing, 2012, p. 221.

genericism surveys that follow the Teflon protocol. A description of the introductory questions is as follows:

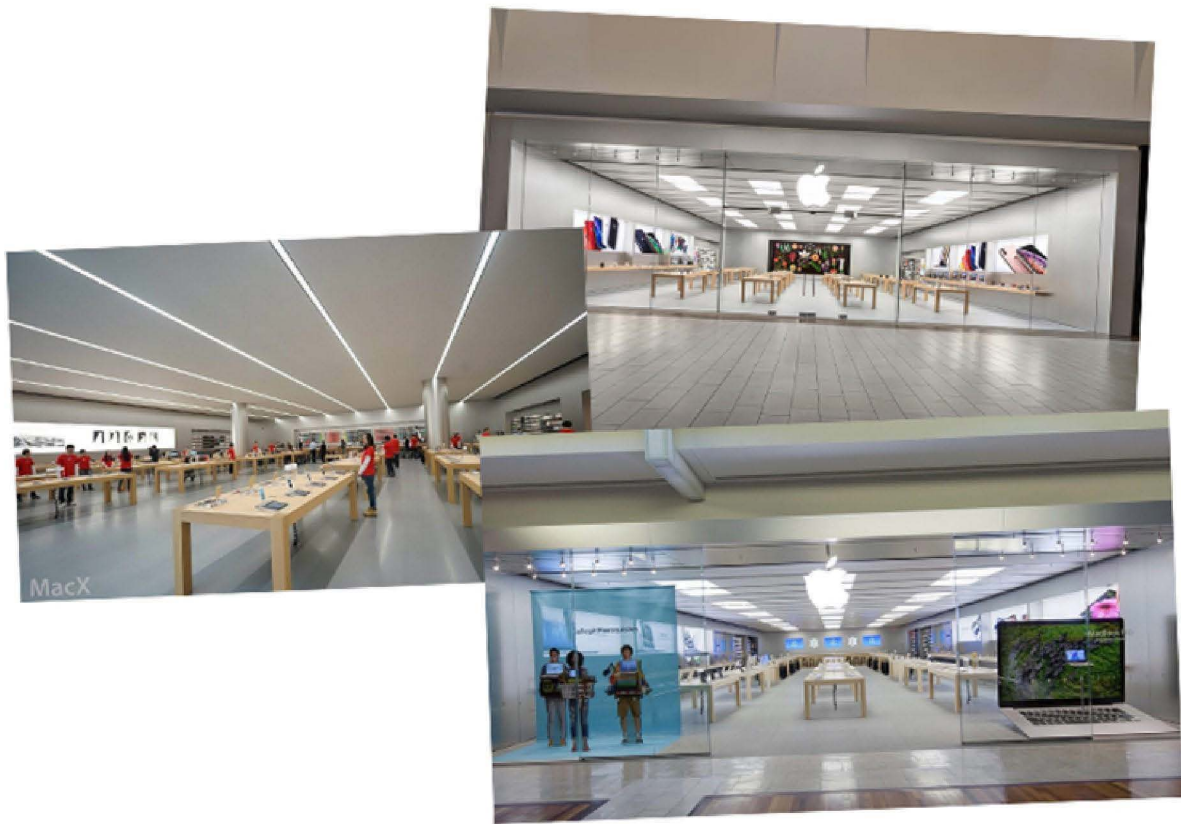
II. As you may know, some companies own or operate stores with a distinctive appearance / design. A distinctive appearance / design helps consumers identify the company that owns or operates that store. On the other hand, there are companies that own or operate stores that do not have a distinctive appearance / design and, therefore, might or might not be identified by consumers as being owned or operated by one company.

On the next screen, you are going to see some pictures of a retail establishment. After you have looked at the pictures of the retail establishment, you will be asked some questions. There are no right or wrong answers. We are only interested in your opinions or beliefs. If you don't understand a question or have no opinion, please so indicate. Please do not guess.

When you are ready to continue to the next screen, click the "Next" button below and to the right.

[P1 Programming Note: Only one of the next 3 questions (T1a, T1b, or T1c) will be presented randomly to each survey participant]

[Image of STORE A remains on the screen for T1]



T1a. From what you know, are retail establishments with this appearance / design likely to be owned or operated by one company, more than one company, no company, or don't you know?

- ☐ One company
☐ More than one company
☐ No company
☐ Don't know / no opinion

T1b. From what you know, are retail establishments with this appearance / design likely to be owned or operated by more than one company, one company, no company, or don't you know?

- ☐ More than one company
☐ One company
☐ No company
☐ Don't know / no opinion

T1c. From what you know, are retail establishments with this appearance / design likely to be owned or operated by no company, one company, more than one company, or don't you know?

- ☐ No company
- ☐ One company
- ☐ More than one company
- ☐ Don't know / no opinion

[Image of STORE A is removed from the screen]

These questions were followed by the substantive questions in the test and control surveys. (Questions Q1 and Q2).

The introductory questions to the substantive questions were designed to investigate whether respondents were able to distinguish between store trade dress that is distinctive and one that is not. To be protected a trade dress must be nonfunctional and distinctive; a generic trade dress is not entitled to protection.³⁰ In addition, trade dress is defined as the “total image” or “total overall appearance” of a product, a package, or the interior of a retail store. The Ninth Circuit agreed that the “restaurant’s décor, menu, layout, and style” was a protectable trade dress in the *Fuddruckers, Inc. v. Doc’s B.R. Others, Inc.* case.³¹ Once respondents to both the test and control surveys answered questions T1 and T2 and it could be asserted that they were able to distinguish between a distinctive and a non-distinctive trade dress, they were allowed to proceed to answer the substantive questions.

A series of questions was also used to screen respondents who worked for an advertising

³⁰Trade Dress: The Forgotten Trademark Right. <https://corporate.findlaw.com/intellectual-property/trade-dress-the-forgotten-trademark-right.html>

³¹ Ibid. Trade Dress: The Forgotten Trademark Right.

agency or a marketing research firm. A “distracter” question was also added to insure that the participants in the survey were paying attention (S6).

The participants in the survey were given a visual test to ensure that they could clearly see the stimuli images and distinguish colors. Finally, subjects that had consulted a search engine or other information while answering the survey or that had previously participated in a survey involving quick service restaurants were excluded.

Qualtrics software is designed to convert a questionnaire to a survey instrument that respondents can access from their own computer. Qualtrics software enables users to do many kinds of online data collection and analysis including market and consumer research. The participants in the survey answered the questions interactively. Respondents were not permitted to review their answers or to return to previous questions once they started the survey.

The subjects in the test group were shown the test stimulus and were then asked the substantive question Q1 (a, b, or c) for which the responses were presented in random order to avoid order bias.³² In addition, the subjects were asked Q2, Q2a, Q3, Q4, and Q4a. The subjects in the control group were asked the same questions but were presented with the control stimulus.

I2. On the next screen, you are going to see some pictures of a restaurant. Please look at the overall appearance / design of this restaurant. After you have looked at the restaurant, you will be asked some questions. There are no right or wrong answers. We are only interested in your opinions or beliefs. If you don't understand a question or have no opinion, please so indicate. Please do not guess.

When you are ready to continue to the next screen, click the “Next” button below and to the right.

³² Palladino, V.N., Secondary Meaning Surveys, in Trademark and Deceptive Advertising Surveys, Law, Science and Design, Shari Seidman Diamond and Jerre B. Swann eds., p. 89, ABA Section of Intellectual Property Law, 2012.

(Programming Note 2: Survey participants will be randomly assigned to view either TEST, the Slide P (Plaintiff's pictures) or CONTROL, the slide C (Control pictures.)

(Slide P pictures) Rotation of pictures 1 and 2

(Slide C pictures) Rotation of pictures 3 and 4

TEST

Note: Pictures 1 and 2 will be presented only to those survey participants exposed to TEST pictures





When you are ready to continue to the next screen, click the "Next" button below and to the right.

Please note that you will not be able to return to these screens.

(Note: Pictures will remain on the screens for a minimum of 10 seconds)

(Pictures 1 and 2)

(Pictures of Plaintiff's restaurant are displayed here)

CONTROL

Note: Pictures 3 and 4 will be presented only to those survey participants exposed to TEST pictures.



When you are ready to continue to the next screen, click the “Next” button below and to the right.

Please note that you will not be able to return to these screens.

(Note: Pictures will remain on the screens for a minimum of 10 seconds)

(Pictures 3 and 4)

(Pictures of Control restaurant are displayed here)

[P3 Programming Note: Only one of the next 3 questions (Q1a, Q1b, or Q1c) will be presented randomly to each survey participant]

Q1a. From what you know, do you think restaurants with this appearance / design are likely to be owned or operated by one company, more than one company, no company, or don't you know?

- ☐ One company [Continue to P4]
- ☐ More than one company [Continue to P4]
- ☐ No company [Skip to I3]
- ☐ Don't know / no opinion [Skip to I3]

Q1b. From what you know, do you think restaurants with this appearance / design are likely to be owned or operated by more than one company, one company, no company, or don't you know?

- ☐ More than one company [Continue to P4]
- ☐ One company [Continue to P4]
- ☐ No company [Skip to I3]
- ☐ Don't know / no opinion [Skip to I3]

Q1c. From what you know, do you think restaurants with this appearance / design are likely to be owned or operated by no company, more than one company, one company, or don't you know?

- ☐ No company [Skip to I3]
- ☐ One company [Continue to P4]
- ☐ More than one company [Continue to P4]
- ☐ Don't know / no opinion [Skip to I3]

[Programming Note 4: Question 2 is presented only if the response to Question 1 is "One company" or "More than one company"]

Q2. Why do you say [response from Q1]?

☐ I don't know / I have no opinion *[Skip to I3]*

[The question wording displayed for Q2 and its response to Q2 remain on the screen while Q2a is presented]

Q2a. Anything else? _____

[Q3 & Q4 are presented only if the response to Q1 is "One company"]

Q3. From what you know, with what company do you associate the overall appearance / design of the restaurant you just saw?

☐ I don't know / I have no opinion *[Skip to I3]*

Q4. What, in particular, makes you think of *[response from Q3]*?

☐ I don't know / I have no opinion *[Skip to I3]*

[The question wording displayed for Q4 and its response to Q4 remain on the screen while Q4a is presented]

Q4a. Anything else? _____
[Continue to I3]

The control survey was administered for the purpose of estimating potential "noise" (for example, guessing and other external factors) that might be included in the results of the overall test survey. By estimating "noise" in the control survey, we assume the same level of "noise" occurs in the test survey. Subtracting the "noise" from the test results allows us to obtain the net "noise-less" results from the test. Subtraction of "noise" is a standard survey procedure used to

arrive at reliable results.³³

The Secondary Meaning Survey Results:

The survey was successfully completed by 404 subjects: 201 test subjects and 203 control subjects. A total of 1,234 subjects were asked to participate in the survey; 14 were excluded because they had duplicate IP addresses, 18 voluntarily terminated the survey, 49 refused to answer and 749 did not qualify or failed one of the screening questions. Thus, a total of 404 surveys were completed and are included in the tabulations. Appendix 2 shows the disposition of the sample and the demographic profile of the respondents.

When asked the “source” question, 92.5% of the subjects in the test group stated that restaurants with the overall appearance of IN-N-OUT were likely owned by one company, while 31.5% of the subjects in the control group stated that restaurants with the appearance of the control restaurant images, they had seen were likely owned by one company. Thus, the **net percentage** of subjects attributing the trade dress of the IN-N-OUT restaurants to one source is 61%. This is a clear indication that the IN-N-OUT trade dress has acquired secondary meaning.

The courts have not always agreed on what percentage of survey evidence is sufficient to establish acquired secondary meaning. With respect to secondary meaning survey results in the 20 percent range, some courts have found secondary meaning survey percentage figures of 22

percent, 23 percent and 28 percent as evidence of acquired trade dress distinctiveness or secondary meaning. A “net percentage” of 61% is therefore a clear indication that the IN-N-OUT restaurants trade dress has acquired secondary meaning among customers and potential customers of quick service restaurants.

It is important to note that an overwhelming number (46%) of the subjects who stated that the restaurant they saw in the test survey was owned by one company specifically mentioned IN-N-OUT as that company (verbatim answers to Q2 and Q2a) and many of them stated they recognized the restaurant overall appearance and design. Also, while a few respondents referred to some of the elements of the “INO Common Law Trade Dress” identified in the Plaintiff’s Second Amended Complaint (P.6) such as: the beverage cup, the restaurant exterior, the burger, the décor, over 45% of those subjects that attributed the IN-N-OUT trade dress to one source referred to the restaurant’s distinctive design, the red and white colors, the interior layout and design and overall look (all elements of the IN-N-OUT registered trade dress). Appendix 3 shows the survey results.

Questions Q2, Q2a, Q3 Q4 and Q4a were designed to probe the survey subjects as to the reasons they had indicated they thought the IN-N-OUT trade dress was indicative of one source. A review of some of those answers provides additional insights as to the reasons the subjects thought that the IN-N-OUT trade dress had acquired secondary meaning. Appendix 3 shows some of the test survey subjects’ answers to the probing questions.

The colors, logo, and the overall look and design of the restaurant makes me certain that it is In & Out burger.

The design
Definitely the store design, at least in the DFW metroplex.
The counter and seating.
Overall decoration.
The color and the concept.
The colors and layout.
The coloring and the set up.
The design of the restaurant.
The unique design.
The overall look of the In & Out establishment is about the same.
The design and features.

It is very clear that the reasons why the subjects in the survey attributed the IN-N-OUT trade dress to one source is the overall appearance of the restaurant, its registered trade dress and the additional unique elements the company has been using in its restaurants to complement its registered trade dress.

Conclusions and Expert Opinion:

After reviewing and analyzing the results from the survey described in this report, it is my expert opinion that:

1. An overwhelming net 61% of the subjects in the survey stated that the trade dress of IN-N-OUT restaurants indicates that restaurants with that overall appearance are owned by one company (single source).
2. When asked Q3 “From what you know, with what company do you associate the overall appearance/design of the restaurant you just saw?” 46% of those respondents identified it as an IN-N-OUT restaurant.

3. The answers to the probing questions (Q2, Q3 and Q4) also indicate that the overall appearance of the registered IN-N-OUT trade dress was the reason why a net 61% of the subject in the survey thought it had acquired secondary meaning.

For all the above reasons and based on the results of the survey, it is my expert opinion that the IN-N-OUT trade dress has acquired secondary meaning.

Qualifications, Personal Background and Compensation:

My name is Isabella Cunningham. I hold the Stan Richards Chair in Advertising and Public Relations in the Moody College of Communications at The University of Texas at Austin, in Austin, Texas. I am the past Chair of the Advertising and Public Relations Department in the Moody College of Communication, a position that I held for 20 years. I am the author and co-author of several books and numerous academic articles in marketing and advertising. I have also published several peer-reviewed papers in academic proceedings and have made numerous presentations to both academic and professional audiences.

I am a member of several academic journals' review boards and have served on numerous academic and professional committees as both a member and in leadership positions. I have also served on the Board of Directors of three public and private corporations and am presently the Emeritus member of the Board of Directors of a public corporation and a member of the Board of Directors of a private Texas financial company. I am also a member of the Advisory Board of a privately-owned company and am a member of the board of non-profit organizations.

I have taught marketing and advertising courses at The University of Texas for the past 40 years and have served as Chair of the Department of Advertising from 1978 to 1985 and from 2001 to 2013. Before joining the faculty at The University of Texas, I was an Assistant Professor of Marketing and the Acting Dean of the Business School at St. Edward's University. I have been a marketing and advertising consultant to several businesses and have been retained as an expert witness in several lawsuits. I have offered expert opinions and have been deposed and/or testified in several of them. A list of the cases in which I have testified/served as a witness in the past five years is shown in Appendix 4. A complete professional and academic resume is shown in Appendix 5. A list of all the publications I have authored in the previous ten (10) years is included in Appendix 5.

I am being compensated for my work the rate of \$600.00 per hour. My compensation is not contingent on the outcome of this matter or on the opinion that I express.



May 3, 2021

Isabella Cunningham