IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

IN-N-OUT BURGERS, Plaintiff, v. DOLL N BURGERS LLC, DOLL N BURGERS TECUMSEH LLC, DOLL N BURGERS JACKSON, LLC, VERITAS VINEYARD, LLC and JUSTIN DALENBERG, Defendants.	Civil Action No.: 5:20-cv-11911 (RHC) (APP)

REBUTTAL EXPERT REPORT OF JEFFERY A. STEC, Ph.D.

June 1st, 2021

BRG

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I. Purpose

I have been retained by counsel on behalf of Doll N Burgers LLC, Doll N Burgers Tecumseh LLC, Doll N Burgers Jackson, LLC, and Veritas Vineyards, LLC (collectively, "DNB" or "Defendants"), Defendants in the above-captioned litigation. I understand that In-N-Out Burgers ("INO" or "Plaintiff") accuses DNB of trademark infringement under 15 U.S.C. § 1114(1); for unfair competition and common law trade dress infringement in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a); for unfair competitions under Michigan common law; for violation of the Michigan Consumer Protection Act, M.C.L. §445.903; and for unjust enrichment under Michigan common law.[1]

In support of its claims, INO has put forth two surveys conducted by Dr. Isabella Cunningham and a corresponding expert report for each survey. In the first report, Dr. Cunningham claims to "determine whether the trade dress of DOLL N BURGERS causes a likelihood of confusion with the trade dress of IN-N-OUT restaurants."[2] Dr. Cunningham filed this report on May 3, 2021 ("Cunningham LOC Report").[3] In the second report, Dr. Cunningham claims to "determine whether the trade dress of IN-N-OUT restaurants has acquired secondary meaning."[4] Dr. Cunningham filed this report on May 3, 2021 ("Cunningham SM Report").[5] I have been asked by DNB's counsel to review and respond to the opinions and analyses set forth in both of Dr. Cunningham's reports.

DNB's counsel also asked me to conduct a likelihood confusion survey and a secondary meaning survey in response to Dr. Cunningham's surveys, with each of my surveys designed to correct for some of the flaws that I have identified with each of Dr. Cunningham's surveys.

The following report summarizes my current conclusions. To form my conclusions, I reviewed and/or relied on the documents listed in Exhibit 3.0 or referenced in the text and footnotes of this report. I also relied on my education, professional judgment, and expertise

[1] Second Amended Complaint in Civil Action No. 3:20-cv-11911 ("Second Amended Complaint"), dated February 26, 2021, pp. 29-34.
[2] Cunningham LOC Report, p. 1 (INO006261).
[3] Cunningham LOC Report, p. 40 (INO006300).
[4] Cunningham SM Report, p. 1 (INO006144).
[5] Cunningham SM Report, p. 21 (INO006164).

gathered from many years of evaluating likelihood of confusion and secondary meaning in trademark and trade dress matters. The information, analyses, and conclusions set forth in this report are based upon the information currently available to me. To the extent additional information becomes available, I reserve the right to supplement, update, or amend this report, if warranted.

Additionally, to aid me in testimony at trial, I may prepare or assist in preparing graphical or illustrative exhibits and demonstratives, including charts, diagrams, or animations based on the documents and information relied upon and my analysis of those documents and information.

II. Professional and Educational Background

I am a Managing Director with Berkeley Research Group, LLC ("BRG"). I am also leader of its Intellectual Property practice and co-leader of its Economics and Damages community. BRG is a leading global strategic advisory and expert consulting firm that provides independent advice, data analytics, valuation, authoritative studies, expert testimony, investigations, transaction advisory, restructuring services, and regulatory and dispute consulting to Fortune 500 corporations, financial institutions, government agencies, major law firms, and regulatory bodies around the world.

I have served as a consultant to a wide variety of clients on matters involving economic, financial, and survey and statistical analysis and modeling for the purpose of interpreting and projecting data and evaluating the impact of business decisions, transactions, and economic events. I have also served as an expert witness or consultant in a wide range of litigation matters, including patent, copyright, trademark infringement, trade secret misappropriation, and false advertising litigation. While the issues have varied from case to case, most included an analysis and evaluation of company-specific as well as industry-wide data for the purpose of determining the impact of allegedly wrongful actions and events on one or more companies.

I specialize in the application of survey research to the valuation of various forms of intellectual property, as well as, the perceptions and understanding consumers have of various forms of intellectual property. My experience includes serving as an expert witness or consulting with clients on survey research and survey methodological issues, including designing and

conducting surveys for clients, evaluating the survey work done by others, and researching and recommending best practices.

Prior to entering economic and survey research consulting, I was a senior research associate at the Ohio State University Center for Survey Research. In that role, I designed numerous telephone, internet, and mail surveys for various clients. My responsibilities included everything from sample and questionnaire design to data collection methods and statistical analyses of survey data.

I also have written and presented papers and presentations dealing with various survey research topics and survey methodological issues. These presentations have included meetings of the American Statistical Association, the American Association of Public Opinion Research ("AAPOR"), the Midwest Association of Public Opinion Research, and the New York and Chicago Bar Associations, among others. Some of these papers were published in the American Statistical Association's Proceedings of the Section on Survey Research Methods, Proceedings of the Section on Government Statistics and Section on Social Statistics, Public Opinion Quarterly, and various other publications.

In addition, I have served on the Sage Publications' Editorial Board as an advisory board member for the compilation of the Encyclopedia of Survey Research Methods. I have acted as a referee in the review of a number of articles for publication in survey research journals. I also have served on various AAPOR-based task force committees convened to address, discuss, and put forth recommendations on various survey-related issues and on the Intellectual Property Owners Association's Damages and Injunctions Committee. I also have published a chapter in the Litigation Services Handbook on Survey Research in Litigation.

I received Ph.D. and Master's degrees in Economics from the Ohio State University. I received Bachelor of Arts degrees in Philosophy and Psychology from Cornell University and in Economics with a Math Minor from the University of Illinois-Chicago. I am a member of various professional organizations including the American Economic Association, the Intellectual Property Owners' Association, the Licensing Executives Society, and the American Association for Public Opinion Research, among others.

My curriculum vitae, which includes the publications and presentations I have authored,

is attached hereto as Exhibit 1. A list of the cases in which I have testified is attached hereto as Exhibit 2. BRG is being compensated on a rate times hours basis for the work my staff and I perform. My current rate is $695 per hour. BRG's compensation does not depend in any way on the outcome of this litigation.

III. Summary of Opinions

Based on my review of Dr. Cunningham's Expert Reports and the surveys conducted by Dr. Cunningham, I have determined that her studies suffer from numerous and severe flaws. The flaws in each of these surveys are discussed in-turn below.

A. Likelihood of Confusion Survey

The flaws in Dr. Cunningham's likelihood of confusion study include:

- Dr. Cunningham failed to utilize a proper survey design.
- Dr. Cunningham improperly removed indicators of source from the stimuli she tested.
- Dr. Cunningham failed to test for forward confusion and instead tested for both forward and reverse confusion and failed to distinguish one from the other.
- Dr. Cunningham failed to utilize a proper control.
- Dr. Cunningham misspecified the target population.

Due to these flaws, the conclusion that Dr. Cunningham draws from the results of this survey are unsupported and unreliable. Dr. Cunningham's likelihood of confusion survey provides no reliable basis to conclude either of the following:

- "Almost half (49.3%) of consumers who are exposed or will be exposed to both IN-N-OUT restaurants and the DOLL N BURGER RESTAURANTS are likely to be confused into believing that both restaurants are owned by the same company or are owned by companies that are affiliated or connected."[6]

[6] Cunningham LOC Report, p. 38 (INO006298).

- "[T]here is substantial likelihood of confusion among customers and potential customers of the DOLL N BURGER restaurants with the IN-N-OUT restaurants, as evidenced by the similarities of each company restaurants' trade dress."[7]

Based on the rebuttal survey I conducted, which corrected Dr. Cunningham's likelihood of confusion survey for the flaws identified above, the total net confusion she found of 49.3% was reduced to 0.0%.[8] My results demonstrate that Dr. Cunningham's survey is fatally flawed and that DNB has not used the INO Trade Dress in a manner that is likely to cause confusion, mistake, or deception among customers and/or potential customers as to the source, sponsorship or approval, or affiliation or connection of the Doll n' Burgers restaurant.

B. Secondary Meaning Survey

The flaws in Dr. Cunningham's secondary meaning study include:

- Dr. Cunningham failed to articulate any specific trade dress or identify the design elements of any trade dress that she was testing.
- Dr. Cunningham failed to utilize a proper control.
- Dr. Cunningham failed to remove indicators of source from the stimuli she tested.
- Dr. Cunningham misspecified the target population.
- Dr. Cunningham implemented a flawed survey design which was inappropriate and leading

Due to these flaws, the conclusions that Dr. Cunningham draws from the results of this survey are unsupported and unreliable. Dr. Cunningham's secondary meaning survey provides no reliable basis to conclude either of the following:

- "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."[9]
- "[T]he IN-N-OUT trade dress has acquired secondary meaning."[10]

[7] Cunningham LOC Report, pp. 38-39 (INO006298-299).
[8] *See* Exhibit 5.0.
[9] Cunningham SM Report, p. 19 (INO006162).
[10] Cunningham SM Report, p. 20 (INO006163).

Based on the rebuttal survey I conducted, which corrected Dr. Cunningham's secondary meaning survey for the flaws identified above, the net secondary meaning she found of 61% was reduced to 15.0%, which does not support a finding of secondary meaning.[11] My results demonstrate that Dr. Cunningham's survey is fatally flawed and that INO Trade Dress has not gained secondary meaning among customers and/or potential customers of quick-service restaurants that serve hamburgers/cheeseburgers in the United States.

IV. Background

A. Parties

1. In-N-Out Burgers ("INO" or "Plaintiff")

In-N-Out Burgers is a California corporation with its principal place of business in Irvine, California.[12] Founded by in 1948, In-N-Out Burger has more than 300 stores and operates in Arizona, California, Colorado, Nevada, Oregon, Texas, and Utah [13]

2. Doll N Burgers LLC ("DNB" or "Defendants")

Doll N Burgers LLC is a Michigan limited liability company with a principal place of business in Saline, Michigan.[14]

3. Doll N Burgers Tecumseh LLC ("DNB Tecumseh" or "Defendants")

Doll N Burgers Tecumseh LLC is a Michigan limited liability company with a principal place of business in Jackson, Michigan.[15] DNB Tecumseh owns and operates the Doll N Burgers quick-service restaurant in Tecumseh, Michigan, which includes "all-natural, house-ground, black angus beef patties, Kennebec fries handcut and twice-cooked, fresh locally sourced produce, milk buns baked from scratch, and premium cheese curds from our friends at Cambridge Cheese Co. in Onsted, MI."[16]

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[11] *See* Exhibit 12.0.
[12] Second Amended Complaint, p. 2.
[13] *See* https://www.in-n-out.com/history.
[14] Answer to Second Amended Complaint, Affirmative Defenses, First Amended Counterclaims and Restated Jury Demand ("Answer to Second Amended Complaint"), filed March 12, 2021, p. 2. *See also*, Second Amended Complaint, p. 2.
[15] Answer to Second Amended Complaint, p. 2.
[16] *See* https://www.dollnburgers.com/.

4. Doll N Burgers Jackson, LLC ("DNB Jackson" or "Defendants")

Doll N Burgers Jackson, LLC is a Michigan limited liability company with a principal place of business in Jackson, Michigan.[17] DNB Jackson owns and operates the Doll N Burgers quick-service restaurant in Jackson, Michigan, which includes "all-natural, house-ground, black angus beef patties, Kennebec fries handcut and twice-cooked, fresh locally sourced produce, milk buns baked from scratch, and premium cheese curds from our friends at Cambridge Cheese Co. in Onsted, MI."[18]

5. Veritas Vineyard, LLC D/B/A Grand River Brewery ("Veritas Vineyard" or "Grand River Brewery" or "Defendants")

Veritas Vineyard, LLC is a Michigan limited liability company with its registered address in Jackson, Michigan.[19] Veritas Vineyard, LLC does business as Grand River Brewery and it operates two tap rooms, one in in Jackson, Michigan, and the other in Marshall, Michigan.[20]

6. Justin Dalenberg ("Defendants")

Justin Dalenberg is a resident of the judicial district and is a founder of DNB.[21]

B. Asserted INO Trade Dress

It is my understanding that the asserted INO Trade Dress is made up of both the INO Common Law Trade Dress and the INO Registered Trade Dress.[22]

[17] Answer to Second Amended Complaint, p. 2. *See also*, Second Amended Complaint, p. 2.
[18] *See* https://www.dollnburgers.com/.
[19] Answer to Second Amended Complaint, p. 2. *See also*, Second Amended Complaint, p. 2.
[20] *See* https://www.dnb.com/business-directory/company-profiles.veritas_vineyard_llc.3c9990f51572bb4efa52932d3c780f6f.html. *See also,* https://www.grandriverbrewery.com/.
[21] Answer to Second Amended Complaint, p. 2. *See also*, Second Amended Complaint, p. 2.
[22] Second Amended Complaint, p. 7.

1. The INO Common Law Trade Dress

According to INO, it uses a combination of design elements in its restaurants and product packaging for the appearance of its goods and services.[23] In this action, In-N-Out asserts the elements of this trade dress are as follows:

1) a color scheme consisting of red and white with accents of yellow or gold;

2) a primarily white exterior with a low red stripe and red awnings;

3) red and white interior décor, including a white counter featuring a stripe in red with a grey countertop, red cushioned chairs and white table tops with one or two red stripes, walls colored red and/or white, and grey and white floor tiles;

4) a menu with a red and white color scheme and layout including a horizontal line of boxes at the top featuring combo meals with no sizing options;

5) white cups with red graphics featuring a line of palm trees near the top of the cup;

6) employee uniforms featuring white collared shirts, red aprons, and red and white hats (both baseball caps and paper hats);

7) using open-ended burger wrappers;

8) the use of the single letter "N" in the name; and

9) Décor and photos emphasizing a classic car theme.[24]

The "INO Common Law Trade Dress" described above is not registered with the U.S. Patent and Trademark Office.[25]

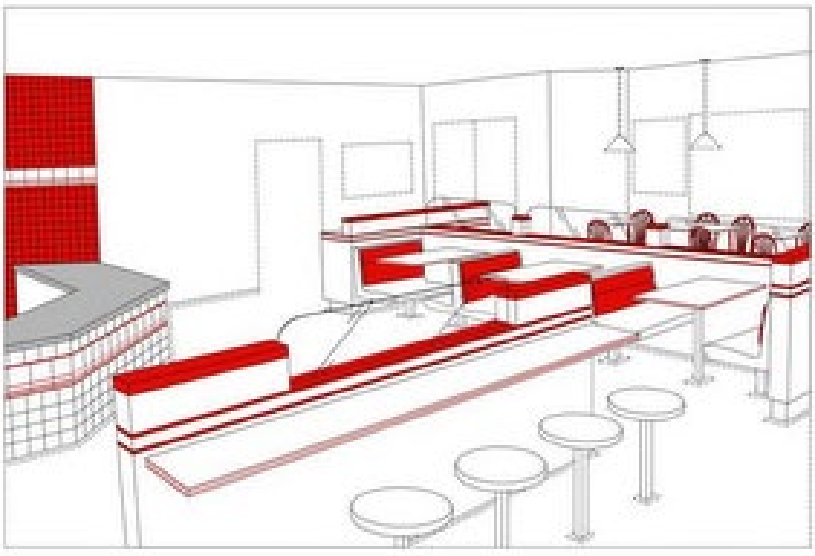
[23] Second Amended Complaint, p. 5. DNB's counsel has advised me that in legal actions against other defendants, INO has alleged that its common law trade dress comprises various other combinations and/or additional elements.
[24] Second Amended Complaint, pp. 5-6.
[25] Second Amended Complaint, p. 6.

2. The INO Registered Trade Dress

The In-N-Out Registered Trade Dress was initially filed for on January 8, 2014.[26] Then on October 27, 2015, USPTO Registration No. 4839216 was registered as a Service Mark for design.[27] The elements of the trade dress are as follows:

1) the color(s) red, white and silver is/are claimed as a feature of the mark;
2) the mark consists of a three-dimensional trade dress depicting the interior of a restaurant;
3) the interior includes white sectional dividing walls having horizontal rows of red stripes;
4) the interior also includes clear glass panels positioned above parts of the dividing walls;
5) the interior also includes a customer seating area with booths, barstools and chairs, wherein the chairs are red, the barstools are white, and the booths have red upholstery, and white countertops and tabletops; and
6) the interior further includes a customer ordering area with sections of red tile walls and white tile walls around the customer ordering area and a silver counter.[28]

The restaurant rendering image below incorporates these elements.[29]



[26] *See* https://tmsearch.uspto.gov/bin/showfield?f=doc&state=4805:j9ltdt.3.1.
[27] *See* https://tmsearch.uspto.gov/bin/showfield?f=doc&state=4805:j9ltdt.3.1.
[28] *See* https://tmsearch.uspto.gov/bin/showfield?f=doc&state=4805:j9ltdt.3.1.
[29] *See* https://tmsearch.uspto.gov/bin/showfield?f=doc&state=4805:j9ltdt.3.1.

V. Rebuttal of Dr. Cunningham's Likelihood of Confusion Survey and Report

A. Summary of Dr. Cunningham's Likelihood of Confusion Survey and Report

Dr. Cunningham was retained to "determine whether the trade dress of DOLL N BURGERS causes a likelihood of confusion with the trade dress of IN-N-OUT restaurants."[30] To address this research topic, Dr. Cunningham designed and implemented a survey, which is discussed below.[31]

1. Survey Methodology

Dr. Cunningham determined that the relevant target population for her likelihood of confusion survey was adults who live in "Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, and Wisconsin"[32] who "had eaten inside a quick service restaurant in the previous 12 months or were planning on eating inside a quick service restaurant in the following 6 months."[33] To reach these self-reported customers and potential customers, Dr. Cunningham enlisted Dynata,[34] a third party organization that provides panel samples for academic and business survey research,[35] to identify and recruit potential survey respondents. Additionally, Dr. Cunningham contracted T Fin & Associates,[36] a marketing research company, to conduct her survey.[37] T Fin & Associates used the Qualtrics platform to program and collect data from the survey, and they also analyzed Dr. Cunningham's survey results.[38]

To reach the target population in her likelihood of confusion study, Dr. Cunningham identified respondents that met the following criteria:

- 18 years or older;

[30] Cunningham LOC Report, p. 1 (INO006261).
[31] Cunningham LOC Report, p. 1 (INO006261).
[32] Cunningham LOC Report, p. 7 (INO006267).
[33] Cunningham LOC Report, p. 10 (INO006270).
[34] Cunningham LOC Report, p. 6 (INO006266).
[35] Cunningham LOC Report, p. 6 (INO006266).
[36] Cunningham LOC Report, p. 8 (INO006268).
[37] Cunningham LOC Report, p. 8 (INO006268).
[38] Cunningham LOC Report, p. 9 (INO006269).

- Residents of the United States who live in Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, or Wisconsin;
- Are not employed or anyone in their households are not employed by an advertising agency or market research company;
- Have not purchased both Shoxon water filters and Ginkya chips in the last year;
- Have purchased in the last 12 months food from a restaurant, including hamburgers, seafood, fried chicken, sushi or Mexican food or plan to purchase in the next six months food from a restaurant, including hamburgers, seafood, fried chicken, sushi or Mexican food;
- Have eaten inside a quick service restaurant in the previous 12 months or plan to eat inside a quick service restaurant in the next 6 months; and
- Were able to identify a wheelbarrow that was presented to them.[39]

Dr. Cunningham fielded the likelihood of confusion survey described in her Likelihood of Confusion Report between April 12th and April 16th, 2021.[40] Dr. Cunningham reported 1,137 respondents entered the study and 415 respondents completed the survey.[41]

Upon qualifying for the survey, respondents in the likelihood of confusion study were provided with the following introduction:

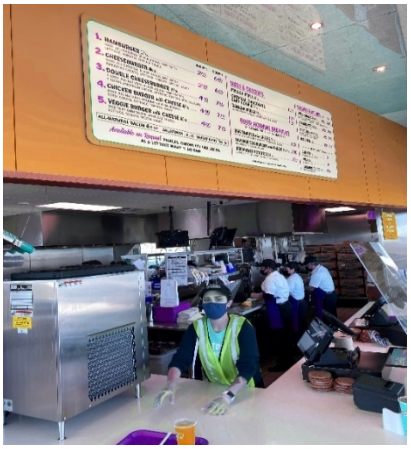
> On the next screen you will see some pictures of a quick-service restaurant. Please scroll up and down to see all four pictures. Please take your time looking at the pictures.
>
> Please look at the pictures as though you are thinking about whether to eat in the restaurant.
>
> When you are ready to view the pictures, click the "Next" button below and to the right.[42]

With this scenario and instruction, respondents in the survey described in Dr. Cunningham's Likelihood of Confusion Report were presented with one of three possible image sets, with each set containing four pictures. Of the three possible image sets, the first contained the Plaintiff's image set (images 1, 2, 3, 4), the second contained the Defendant's image set (images 5, 6, 7, 8),

[39] Cunningham LOC Report, Appendix 1, pp. 1-5 (INO006303-307)
[40] Cunningham LOC Report, p. 8 (INO006268).
[41] Cunningham LOC Report, p. 34 (INO006294).
[42] Cunningham LOC Report, Appendix 1, p. 6 (INO006308).

and the third contained the Control image set (images 9, 10, 11, 12).[43] Each of the image sets are presented in the figure below.

Figure 1: Dr. Cunningham's Image Sets

Dr. Cunningham's (Images 1-4)	Dr. Cunningham's (Images 5-8)	Dr. Cunningham's (Images 9-12)
		
		
		

[43] Cunningham LOC Report, Appendix 1, pp. 6-25 (INO006308-327).

Dr. Cunningham's (Images 1-4)	Dr. Cunningham's (Images 5-8)	Dr. Cunningham's (Images 9-12)
		

On the same screen as the displayed image set, Dr. Cunningham presented respondents with the following instructions:[44]

> 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 this screen.[45]

After this screen, respondents saw the following question:

> During the last 12 months did you stay at any of the following hotels? Please select all that apply.
>
> - Holiday Inn
> - Embassy Suites
> - Best Western
> - La Quinta Inns and Suites
> - Other
> - Have not stayed in a motel during the last 12 months
> - Don't remember/not sure[46]

Following this question respondents in the survey were then presented with the following instructions:[47]

> On the next screens you will see some pictures of another quick-service restaurant. Please scroll up and down to see all four pictures of this other restaurant. Please take your time looking at the pictures.

[44] Cunningham LOC Report, Appendix 1, pp. 6-8 (INO006308-310).
[45] Cunningham LOC Report, Appendix 1, pp. 6-8 (INO006308-310).
[46] Cunningham LOC Report, Appendix 1, p. 8 (INO006310).
[47] Cunningham LOC Report, Appendix 1, pp. 10 (INO006312).

> Please look at the pictures as though you are thinking about whether to eat in the restaurant.
>
> When you are ready to view the pictures, click the "Next" button below and to the right.[48]

Following the instructions above, respondents in the survey were then presented with another one of the three possible image sets, again, with each set containing four images. On the screen with the second displayed image set, the respondents saw the following instructions:

> 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 this screen.[49]

The survey was designed to split respondents into four cells based on the combination of image sets seen; the "Test #1" cell was first shown the Plaintiff's image set (images 1, 2, 3, 4) then shown the Defendant's image set (images 5, 6, 7, 8); the "Test #2" cell was first shown the Defendant's image set (images 5, 6, 7, 8) then shown the Plaintiff's image set (images 1, 2, 3, 4); the "Control #1" cell was first shown the Plaintiff's image set (images 1, 2, 3, 4) then shown the Control image set (images 9, 10, 11, 12); the "Control #2" cell was first shown the Control image set (images 9, 10, 11, 12) then shown the Plaintiff's image set (images 1, 2, 3, 4). In aggregate, half of the respondents saw the Defendant's image set (images 5, 6, 7, and 8) and the other half of the respondents saw the control image set (images 9, 10, 11, and 12).[50] Once respondents viewed the two image sets and answered the distractor questions, respondents were shown the following questions:

> From what you know, do you think that the restaurant that you saw first and the restaurant that you saw second are owned by different companies, by the same company, or don't you know?
>
> - The two restaurants are owned by the same company
> - The two restaurants are owned by different companies
> - I don't know / I have no opinion[51]

If the respondent answered that the restaurants are owned by the "same company" or "different companies" the respondent viewed the following question on the same screen:[52]

[48] Cunningham LOC Report, Appendix 1, pp. 8 (INO006310).
[49] Cunningham LOC Report, Appendix 1, pp. 10 (INO006312).
[50] Cunningham LOC Report, Appendix 1, pp. 6-25 (INO006308-327).
[51] Cunningham LOC Report, Appendix 1, p. 26 (INO006328).
[52] Cunningham LOC Report, Appendix 1, p. 26 (INO006328).

Why do you say *(response from Q1)?*

- Specify
- I don't know / I have no opinion[53]

If the respondent specified an answer, they were then presented with an additional question on the same screen:[54]

Anything else?

- Specify[55]

After this question, respondents who answered "same company" had completed the survey and the remaining respondents continued to Question 3: [56]

From what you know, which of the following statements best describes your opinion about the company that owns the restaurant you saw first and the company that owns the restaurant you saw second?

- The companies that own the restaurants <u>are</u> affiliated or associated or connected
- The companies that own the restaurants <u>are not</u> affiliated or associated or connected
- I don't know / I have no opinion[57]

If the respondent answered that the companies that own the restaurants "are affiliated or associated or connected" or "are not affiliated or associated or connected" the respondent viewed the following question on the same screen:[58]

Why do you say *[response from Q3]?*

- Specify
- I don't know / I have no opinion[59]

If the respondent specified an answer, they were then presented with an additional question on the same screen:[60]

[53] Cunningham LOC Report, Appendix 1, p. 26 (INO006328).
[54] Cunningham LOC Report, Appendix 1, p. 26 (INO006328).
[55] Cunningham LOC Report, Appendix 1, p. 26 (INO006328).
[56] Cunningham LOC Report, Appendix 1, p. 26 (INO006328).
[57] Cunningham LOC Report, Appendix 1, p. 26 (INO006328).
[58] Cunningham LOC Report, Appendix 1, p. 26 (INO006328).
[59] Cunningham LOC Report, Appendix 1, p. 27 (INO006329).
[60] Cunningham LOC Report, Appendix 1, p. 27 (INO006329).

Anything else?

- Specify[61]

After this question, Dr. Cunningham concluded the study by asking respondents to verify the following:

- They had not opened any other windows or tabs on their electronic device;
- They had not looked at or used any other electronic devices during the survey;
- They did not view any written material or consult or talk with any person during the survey;
- They did not use any search engine during the survey;
- Other than the survey they just completed, that they had not participated in a survey concerning quick-service restaurants within the past 3 months.[62]

2. Dr. Cunningham's Survey Findings

Using the methodology described above, Dr. Cunningham calculated sample statistics based on her survey for the four different survey stimuli she tested in her likelihood of confusion survey. Those sample statistics are presented in the tables below.

Table 1: Likelihood of Confusion Survey Results for Question 1: Test Cell - Source Confusion[63]

Q1 Do you think that the restaurant that you saw first and the restaurant that you saw second are owned by the same company, by different companies, or don't you know?[a]

		Frequency	Percent
Valid	The two restaurants are owned by the same company	116	56.0
	The two restaurants are owned by different companies	56	27.1
	I don't know / I have no opinion	35	16.9
	Total	207	100.0

a. Stimulus = Test

[61] Cunningham LOC Report, Appendix 1, p. 27 (INO006329).
[62] Cunningham LOC Report, Appendix 1, p. 27 (INO006329).
[63] Cunningham LOC Report, Appendix 3, p. 1 (INO006363).

Table 2: Likelihood of Confusion Survey Results for Question 1: Control Cell - Source Confusion[64]

Q1 Do you think that the restaurant that you saw first and the restaurant that you saw second are owned by the same company, by different companies, or don't you know?[a]

		Frequency	Percent
Valid	The two restaurants are owned by the same company	17	8.2
	The two restaurants are owned by different companies	143	68.8
	I don't know / I have no opinion	48	23.1
	Total	208	100.0

a. Stimulus = Control

Table 3: Likelihood of Confusion Survey Results for Question 3: Test Cell – Affiliation, Association, or Connection Confusion[65]

Q3 From what you know, which of the following statements best describes your opinion about the company that owns the restaurant you saw first and the company that owns the restaurant you saw second?[a]

		Frequency	Percent
Valid	They are affiliated or associated or connected	22	10.6
	They are not affiliated or associated or connected	30	14.5
	I don't know / I have no opinion	39	18.8
	Total	91	44.0
Missing	(Response "The two restaurants are owned by the same company" in Q1)	116	56.0
Total		207	100.0

a. Stimulus = Test

Table 4: Likelihood of Confusion Survey Results for Question 3: Control Cell - Affiliation, Association, or Connection Confusion[66]

Q3 From what you know, which of the following statements best describes your opinion about the company that owns the restaurant you saw first and the company that owns the restaurant you saw second?[a]

		Frequency	Percent
Valid	They are affiliated or associated or connected	19	9.1
	They are not affiliated or associated or connected	113	54.3
	I don't know / I have no opinion	59	28.4
	Total	191	91.8
Missing	(Response "The two restaurants are owned by the same company" in Q1)	17	8.2
Total		208	100.0

a. Stimulus = Control

From these results, Dr. Cunningham added the 56% of respondents that thought INO and DNB were owned by same company to the 10.6% that thought they were affiliated, associated,

[64] Cunningham LOC Report, Appendix 3, p. 1 (INO006363).
[65] Cunningham LOC Report, Appendix 3, p. 1 (INO006363).
[66] Cunningham LOC Report, Appendix 3, p. 1 (INO006363).

or connected to come up with what she considered the "gross confusion" of 66.6%.[67] She then adds the "noise" as to the source (8.2%) to the "noise" as to affiliation, for a total "noise" of 17.3%.[68] Dr. Cunningham takes the "gross confusion" of 66.6% and subtracts the total "noise" of 17.3% to arrive at a net confusion of 49.3%.[69]

Based on these results, Dr. Cunningham concluded that "[t]his is a clear indication that there is a high likelihood of confusion between the Plaintiff's and Defendant's restaurants trade dress."[70] Dr. Cunningham further concluded that "[f]or all those reasons and based on the results of my survey, it is my expert opinion that there is substantial likelihood of confusion among customers and potential customers of the DOLL N BURGER restaurants with the IN-N-OUT restaurants, as evidenced by the similarities of each company restaurants' trade dress."[71]

B. Flaws in Dr. Cunningham's Likelihood of Confusion Survey

Based on my review of Dr. Cunningham's likelihood of confusion report, survey, and the analyses on which she based her opinions, I have determined that there are significant flaws in the survey, her analyses, and her stated conclusions and opinions. Consequently, Dr. Cunningham's survey estimates of the likelihood of confusion between INO and DNB are flawed and unreliable for at least the reasons below.

1. Dr. Cunningham Failed to Utilize a Proper Survey Design.

In order to ostensibly test the likelihood of confusion in the market due to DNB's alleged use of INO's trade dress, Dr. Cunningham chose to use what she described as a variant of the Squirt format which she called a "modified Squirt."[72] Although Dr. Cunningham provides a description of the Squirt format and an example of its use, she fails to provide any explanation of why she chose to use the Squirt format or why this format is appropriate in this matter.

Dr. Cunningham cites Swann in stating that "the Squirt protocol provides: 'an external review of the marks at issue that flows from their side-by-side or sequential exposure inherent in

[67] Cunningham LOC Report, p. 35 (INO006295).
[68] Cunningham LOC Report, p. 35 (INO006295).
[69] Cunningham LOC Report, p. 35 (INO006295).
[70] Cunningham LOC Report, p. 35 (INO006295).
[71] Cunningham LOC Report, pp. 38-39 (INO006298-299).
[72] Cunningham LOC Report, p. 5 (INO006265).

the administration of a Squirt survey,'" but fails to provide any evidence that the "side-by-side or sequential exposure" of the marks actually occurs in the market.[73] In the next sentence from the Swann article she cites, which Dr. Cunningham did not quote, Swann goes on to explain that the Squirt design "should not be used […] where the brands at issue do not proximately appear or otherwise overlap in the market."[74]

However, Dr. Cunningham failed to provide any evidence that the INO and DNB marks appear proximately or otherwise overlap in the market. In fact, Dr. Cunningham implicitly indicates that the two marks do **not** appear proximately in the market. Specifically, Dr. Cunningham defines the target population for her likelihood of confusion to be residents from nine Midwestern states.[75] For her secondary meaning survey, which is described later in this report, she defines the target population to be residents from seven Western/Southwestern states. Moreover, the Defendants restaurants only appear in Michigan[76] while, according to INO's website, the closest INO quick service restaurant to DNB's restaurants are in Dallas, TX, over 1,000 miles away.[77] According to Swann, the use the Squirt design "should be the subject of proof, and not pure postulation."[78] Dr. Cunningham has not only failed to provide any proof that the Squirt design is appropriate in this matter, but she has also failed to recognize that more than 1,000 miles exist between the Defendants' restaurants and the nearest INO restaurant. By using the Squirt design for two products that do not appear proximately, Dr. Cunningham is failing to resemble, much less replicate, the marketplace to DNB's customers or potential customers because she creates an unrealistic situation where INO and DNB restaurants are shown together when they do not appear that way in the marketplace. This is a fatal flaw of Dr. Cunningham's likelihood of confusion survey; and, therefore, any conclusions drawn from her survey are unsupported and unreliable.

[73] Cunningham LOC Report, p. 6 (INO006266).
[74] Cunningham LOC Report, p. 6 (INO006266). *See also,* Swann, Jerre B. "Likelihood of Confusion." Trademark and Deceptive Advertising Surveys: Law, Science, and Design. Edited by Shari Seidman Diamond and Jerre B. Swann. ABA Section of Intellectual Property Law. American Bar Association. 2012. p. 70.
[75] Cunningham LOC Report, pp. 7-8 (INO006267-268).
[76] *See* https://www.dollnburgers.com/.
[77] *See* https://www.in-n-out.com/history.
[78] Swann, Jerre B. "Likelihood of Confusion." Trademark and Deceptive Advertising Surveys: Law, Science, and Design. Edited by Shari Seidman Diamond and Jerre B. Swann. ABA Section of Intellectual Property Law. American Bar Association. 2012. p. 71.

2. Dr. Cunningham Improperly Removed Indicators of Source from the Stimuli

As discussed above, Dr. Cunningham was asked to "determine whether the trade dress of DOLL N BURGERS causes a likelihood of confusion with the trade dress of IN-N-OUT restaurants."[79] When designing a survey to test the likelihood of confusion between two marks it is important to make every reasonable effort to ensure the survey replicates the marketplace conditions under which customers would encounter the tested marks.[80] Dr. Cunningham's survey tests the exterior of DNB's Tecumseh location, the interior of that restaurant, the interior menu and counter, the burger, fry cup, and drink cup. When presenting respondents with the exterior of DNB's Tecumseh location, Dr. Cunningham removed the large sign above the door which identifies the restaurant as a DNB restaurant. The figure below compares the image that Dr. Cunningham presented to respondents to the images that customers would see if they were looking at the restaurant.

Figure 2: Exterior of DNB's Tecumseh Restaurant

Dr. Cunningham's Survey Image	Marketplace Appearance
	

Dr. Cunningham also removed any reference to DNB when presenting the interior counter and menu. The Figure below compares the menu Dr. Cunningham presented to

[79] Cunningham LOC Report, p. 1 (INO006261).
[80] Edwards, G. Kip. "The Daubert Revolution and Lanham Act Surveys." *Trademark and Deceptive Advertising Surveys: Law, Science, and Design*. Edited by Shari Seidman Diamond and Jerre B. Swann. ABA Section of Intellectual Property Law. American Bar Association. 2012. p. 346.

respondents to the actual menu that DNB customers would have seen if they were ordering at the counter in the restaurant.

Figure 3: DNB's Tecumseh Restaurant Interior Menu

Dr. Cunningham's Survey Image

Marketplace Appearance

As the images above show, Dr. Cunningham cropped the "Doll n' Burger" in the middle of the menu and then removed the "Doll n'" from each of the names of the burgers on the menu. The image that Dr. Cunningham used for the fry cup and the drink cup also obscures the "Doll n' Burgers" that is wrapped around each of the cups. Dr. Cunningham failed to provide any explanation of why she chose to remove all of the DNB branding from the image she tested. Regardless of what her explanation might be, it was inappropriate to remove the brand identifiers from the stimuli Dr. Cunningham showed survey respondents. By removing the DNB branding, Dr. Cunningham has completely failed to replicate the market and intentionally biased her results towards a finding of a likelihood of confusion.

According to Swann, when conducting a likelihood of confusion study "Blurring or overemphasizing the source indicia is ground for rejection [of the survey]."[81] Dr. Cunningham went one step further from blurring the source indicia, and instead removed or obscured it every time it appeared. By doing so, she removed indicators about what company produced and sold the products in the restaurant she showed survey respondents. By removing these source indicators, she failed to allow survey respondents to see what they would be able to see in the actual marketplace. She also made it impossible for respondents to associate the DNB brand with the products it sells and the restaurant in which it sells them as they likely would when they see both in the actual marketplace. This is another fatal flaw of Dr. Cunningham's likelihood of confusion survey, which makes any conclusions drawn from her survey unsupported and unreliable.

3. Dr. Cunningham Failed to Assess the Alleged Confusion

Dr. Cunningham acknowledges that forward confusion is the type of "confusion that occurs as a result of the use of a senior trade dress by a junior user [which] is likely to lead consumers to believe that the junior user's products or services originate from or are associated with the senior user."[82] Although Dr. Cunningham recognizes this, she failed to design a survey that would, in fact, test whether respondents believe the junior user's products or services originate from or are associated with the senior user. Instead, Dr. Cunningham has designed a survey that identifies whether respondents believe the junior user's products and the senior user's product originate from the same company or are associated with the same company. In other words, Dr. Cunningham confounds the concepts of forward confusion and reverse confusion in her survey design which leads to her survey being unable to give any insight into either type of confusion, much less the forward confusion she claims to be testing.

In her survey, Dr. Cunningham randomly presents the respondents with either INO's trade dress images first and DNB's trade dress images second or with DNB's trade dress images first and INO's trade dress images second and then asks, "From what you know, do you think

[81] Swann, Jerre B. "Likelihood of Confusion." Trademark and Deceptive Advertising Surveys: Law, Science, and Design. Edited by Shari Seidman Diamond and Jerre B. Swann. ABA Section of Intellectual Property Law. American Bar Association. 2012. p. 77.
[82] Cunningham LOC Report, p. 5 (INO006265).

that the restaurant that you saw first and the restaurant that you saw second are owned by the same company, by different companies, or don't you know." By randomizing the order in which she presents the images as well as asking whether respondents associate the restaurants collectively as coming from the same or different company, her survey is unable to determine the ostensible direction of the confusion. Instead, Dr. Cunningham attempts to identify whether the two restaurants are from the same source or are associated with the same source with no indication whether the supposed association is due to the junior user being associated with the senior user or vice versa.

In fact, INO has claimed that "upon viewing the Infringing Dress, purchasers and consumers are likely to believe the Defendant's goods and services originate with or are sponsored or approved by INO."[83] By failing to identify if respondents believe the junior user's products or services originate from or are associated with the senior user, Dr. Cunningham has failed to provide any evidence that there is supposed forward confusion between INO's asserted marks and DNB's allegedly infringing ones. This fatal flaw undermines Dr. Cunningham's conclusions drawn from her improperly designed likelihood of confusion survey.

4. Dr. Cunningham's Used a Flawed Control by Failing to Hold the Non-Asserted Elements Unchanged

Although Dr. Cunningham was tasked with "determine[ing] whether the trade dress of DOLL N BURGERS causes a likelihood of confusion with the trade dress of IN-N-OUT restaurants," she failed to identify the trade dress she chose to test in her survey.[84] Nonetheless, Dr. Cunningham stated that the control images she used "did not have any of the infringing elements of the DOLL N BURGER trade dress."[85] However, the control images used by Dr. Cunningham not only removed the alleged infringing elements of the DNB trade dress, they also removed all the other elements of the DNB's appearance and design that are not alleged to be infringed. This is a severe flaw. Dr. Cunningham's failure to use control images that only differed from the design elements that are alleged to be infringing hopelessly confounds her survey results. Consequently, there is no way to determine from Dr. Cunningham's survey

[83] Second Amended Complaint, p. 18.
[84] Cunningham LOC Report, p. 1 (INO006261).
[85] Cunningham LOC Report, p. 8 (INO006268).

results whether respondents gave answers based on the asserted trade dress or other non-asserted design elements.

In general, control groups are used in likelihood of confusion surveys to take into account and control for factors that do not involve the asserted trademark and/or trade dress.[86] In a properly designed experiment, the control group is the group to which the experimental, or test, group is compared; the control stimulus does not have the design elements that are part of the test stimulus that is under investigation.[87] Dr. Cunningham recognized that "[i]n designing a survey-experiment, the expert should select a stimulus for the control group that shares as many characteristics as possible with the experimental stimulus as possible, with the key exception of the characteristics whose influence [] is being assessed."[88] The images below show the treatment image Dr. Cunningham used for the allegedly infringing DNB traded dress and the images she used as a control.

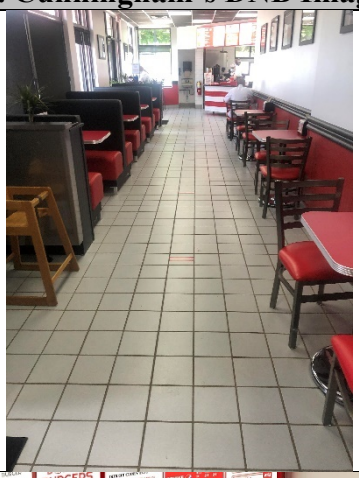
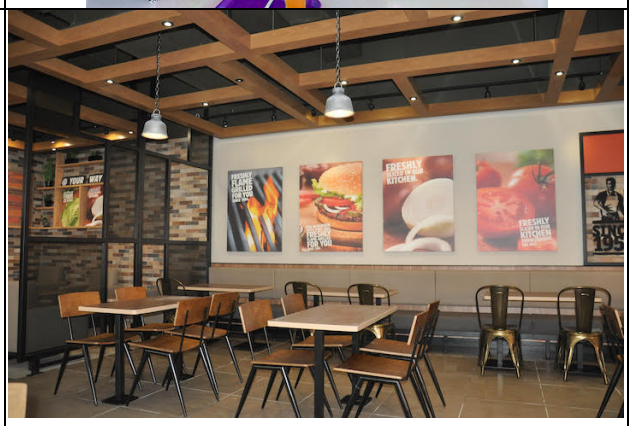
Figure 4: Dr. Cunningham's Treatment and Control Images

Dr. Cunningham's DNB Images	Dr. Cunningham's Control Image
	

[86] In Novartis Consumer Health, Inc. v. Johnson & Johnson Merck Consumer Pharms Co., the court found that a control group functions as "a baseline and provides a measure of the degree to which respondents are likely to give an answer … not as a result of the [product at issue], but because of other factors, such as the survey's questions, the survey's procedures … or some other potential influence on a respondent's answer such as pre-existing beliefs." (*See* Novartis Consumer Health, Inc. v. Johnson & Johnson Merck Consumer Pharms Co., 129 F. Supp. 2d 351, 365 n. 10 (D.N.J. 2000)).

[87] *See* Peng, Chao-Ying Joanne and Ziskin, Mary B. "Control Group", *Encyclopedia of Survey Research Methods*, Paul J. Lavrakas, Editor, SAGE Publications, Inc., Thousand Oaks, CA, 2008, pp. 146-147.

[88] Cunningham LOC Report, p. 9 (INO006269).

Dr. Cunningham's DNB Images	Dr. Cunningham's Control Image
	
	
	

As the images above show, the control images Dr. Cunningham chose to use changed many design elements present in the DNB images that are not accused of infringement. For example, Dr. Cunningham changes the style of the furniture by including different shaped and backless chairs in the control even though that is not asserted as protected. Dr. Cunningham's control for the drink cup removes all the white coloring even though that is not asserted as protected. Dr. Cunningham changes the shape of the fries packaging so that it is no longer a round cup even though that is not asserted as protected. These differences, as well as others, between the treatment and control images means that Dr. Cunningham is not following her own statement that "the expert should select a stimulus for the control group that shares as many characteristics as possible with the experimental stimulus as possible, with the key exception of the characteristics whose influence [] is being assessed."[89]

Dr. Cunningham even went as far as to change all the red that appeared in the control image with the menu and counter to the color purple.[90] By changing all of the red elements in the image, Dr. Cunningham's control image suggests that any use of red, even on a government-regulated exit sign, in a quick service restaurant would be infringing INO's trade dress. Clearly, Dr. Cunningham did not select control stimuli that held all of the non-asserted design elements of DNB' accused trade dress the same. This failure to use control images that only differed for the design elements that are alleged to be infringing hopelessly confounds Dr. Cunningham's results. Because her control images do not hold constant any non-asserted design elements, there is no way to determine from Dr. Cunningham's survey results whether respondents gave answers based on the asserted trade dress or other non-asserted design elements. Since many of the design elements between the DNB images and the control images differ, it is inappropriate to conclude that any observed differences between the test group and control group are attributable to the asserted trade dress.

As the images above show, Dr. Cunningham also chose to use a set of control images that are from more than one quick service restaurant. Dr. Cunningham appears to use images from at least four different restaurants. The exterior image appears to be an altered version of DNB's

[89] Cunningham LOC Report, p. 9 (INO006269).
[90] From the appearance of the images it appears that all of the red in this image was replaced with purple. The change is most apparent on the exit sign in the image.

exterior, the first interior picture is from the Baker Street location of Honest Burger in London,[91] the picture of the counter is from a P.Terry's Burger Stand in Texas,[92] and the second interior image is from a Burger King restaurant.[93] Dr. Cunningham failed to provide any explanation of why she chose to use images from these four different restaurants, or how the images from these four different restaurants appropriately control for the INO trade dress asserted in this matter.

The effect of using images from different restaurants for the control likely leads to an underreporting of the reported confusion between the INO images and the control images. Dr. Cunningham asks respondents that were shown the control images: "Do you think that the restaurant that you saw first and the restaurant that you saw second are owned by different companies, by the same company, or don't you know?" Because there are images in the control that are coming from four different restaurants, it is more likely that respondents are going to say "different companies" just by virtue of the fact that these control images are coming from four different companies. Since Dr. Cunningham subtracts the percentage of respondents who say "same company" in the control group from the percentage of respondents who say "same company" in the treatment group, any bias that artificially lowers the percentage of respondents who say "same company" in the control group will raise the "net" confusion that Dr. Cunningham attempts to measure. By making it more likely for respondents to say "different companies" to the control by showing images from four different restaurants, Dr. Cunningham is reducing the percentage of respondents from the control group who say "same company;" and, thereby increasing the purported net confusion. Dr. Cunningham's failure to use proper control images introduces a bias into her survey that causes her estimate of net confusion to be significantly overstated. As a result, her conclusions based on this net confusion estimate are flawed and unreliable.

[91] *See* https://www.honestburgers.co.uk/locations/.
[92] *See* https://pterrys.com/locations.
[93] *See* https://www.designweek.co.uk/issues/12-18-october-2015/burger-king-launches-new-interior-designs/.

5. Dr. Cunningham Misspecified the Target Population and Failed to Survey Appropriately from It.

Dr. Cunningham correctly identified the appropriate target population for a survey testing forward confusion as the junior user's customers and potential customers.[94] Therefore, the appropriate target population for Dr. Cunningham's survey is current and prospective customers of DNB's Tecumseh restaurant.[95] To ostensibly reach this target population, Dr. Cunningham targeted respondents with the following criteria:

- 18 years old or older;
- Currently reside in Illinois, Indiana, Iowa, Kansas. Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, or Wisconsin;
- Entered the survey on a on a desktop computer, laptop computer, or tablet;
- Did not work for an advertising agency or marketing research firm;
- Purchased in the last twelve months or planned to purchase in the next six months food from a restaurant, including hamburgers, seafood, fried chicken, sushi or Mexican food; and,
- Had in the last twelve months or expected to in the next six months eat inside a quick-service restaurant.[96]

There are several reasons that this set of criteria fails to identify current and prospective customers of DNB's restaurant. Dr. Cunningham's criteria of identifying the target population fails to account for the fact that DNB currently only operates two restaurants that are twenty miles from each other in the southern part of Michigan and does not operate restaurants in Illinois, Indiana, Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, or Wisconsin.[97] Dr. Cunningham included these eleven other states, because she was "informed by counsel that the company planned to expand its footprint to the Midwest of the United States."[98] It is my understanding that DNB does not expect to open up a new restaurant in

[94] Cunningham LOC Report, p. 7 (INO006267).
[95] The images presented by Dr. Cunningham only include images of the Tecumseh restaurant; it is my understanding that DNB's Jackson restaurant has substantially fewer allegedly common elements with INO's asserted trade dress.
[96] Cunningham LOC Report, Appendix 1, pp. 1-4 (INO006302-306).
[97] *See* https://www.dollnburgers.com/.
[98] Cunningham LOC Report, pp. 7-8 (INO006267-268).

any of these states in the next six months, which is the period tested by Dr. Cunningham.[99] By defining the target population to include states in which DNB does not operate and has no plans to operate in the next six months, Dr. Cunningham inappropriately surveys the wrong population.[100]

Dr. Cunningham sampled respondents that purchased food in the last twelve months or planned to purchase in the next six months food from a restaurant without regard to the type of food they purchased or would purchase. Dr. Cunningham failed to explain why purchasers and potential purchasers of seafood, fried chicken, sushi, or Mexican food are purchasers and potential purchasers of food from DNB's restaurants.[101] It is my understanding that DNB's main meals include hamburgers, hot dogs, and salad.[102] DNB does not sell seafood, fried chicken, sushi or Mexican food. Therefore, purchasers and potential purchasers of these types of food, without also determining that they purchase the type of food that DNB serves, should not be included in the target population.

Dr. Cunningham also misspecified the target population by failing to identify if the respondents to her survey purchased hamburgers or hot dogs at a quick-service restaurant. If respondents in her survey did not meet this qualification, then they should not have been allowed to complete the survey. Because Dr. Cunningham failed to screen for purchasers and potential purchasers of hamburgers and hot dogs from a quick-service restaurant focused on the appropriate geographic location, Dr. Cunningham's survey results do not give insight into the likelihood of confusion for the relevant target population.

It also appears that Dr. Cunningham unnecessarily restricted survey respondents to those who took the survey on a desktop computer, laptop computer, or tablet.[103] Dr. Cunningham did not allow respondents who entered the survey using a smartphone to complete the survey by directing them to take the survey on a permitted electronic device.[104] Instead, Dr. Cunningham

[99] Cunningham LOC Report, p. 10 (confining sample universe to those eating at quick service restaurant in the next six months).
[100] Dr. Cunningham only collected data from 65 respondents from the state of Michigan. Thirty-two respondents were in her treatment group and thirty-three respondents were in her control group. (*See* Cunningham LOC Report, Appendix 2 – Demographics (INO006360) and INO006404).
[101] Cunningham LOC Report, Appendix 1, pp. 2-3 (INO006304-305).
[102] *See* https://www.dollnburgers.com/menu.
[103] Cunningham LOC Report, Appendix 1, p. 1 (INO006303).
[104] Cunningham LOC Report, Appendix 1, p. 1 (INO006303).

terminated any respondent that attempted to take the survey on a smartphone or other electronic device.[105]

According to Dynata, the panel provider used by Dr. Cunningham, in the first quarter of 2019, 34% of surveys globally were taken on smartphones, 8% on tablets, and 58% on desktop/laptop computers.[106] This means that 34% of all surveys taken by the research organization used by Dr. Cunningham are conducted on smartphone. With such a large portion of online surveys being completed by respondents using a smartphone, Dr. Cunningham likely excluded a large portion of the relevant target population from her study. Because Dr. Cunningham failed to include respondents taking the survey on a smartphone, Dr. Cunningham's survey results likely leave out a substantial portion of the populations that accessing surveys on their smartphones.

C. Conclusions

Due to the severe flaws described above, Dr. Cunningham's conclusions from the results of this likelihood of confusion survey are unsupported and unreliable. Dr. Cunningham's likelihood of confusion survey provides no reliable basis to conclude that "there is substantial likelihood of confusion among customers and potential customers of the DOLL N BURGER restaurants with the IN-N-OUT restaurants, as evidenced by the similarities of each company restaurants' trade dress."[107]

VI. Rebuttal Likelihood of Confusion Survey Correcting for Flaws in Dr. Cunningham's Survey

A. Survey Methodology

To show the impact of the severe flaws detailed above on Dr. Cunningham's survey results, I have been asked by counsel to field a survey correcting Dr. Cunningham's likelihood of confusion survey for these flaws. I conducted an Eveready study testing for forward confusion with a target population of U.S. residents in Indiana, Michigan, or Ohio that are customers and potential customers of quick-service restaurants that serve hamburgers/cheeseburgers and/or

[105] Cunningham LOC Report, Appendix 1, p. 1 (INO006303).
[106] "The Dynata Global Trends Report." Dynata.com. 2019 Survey Sampling International, LLC, p. 9.
[107] Cunningham LOC Report, pp. 38-39 (INO006298-299).

hotdogs. I also provided respondents with images of the DNB restaurant that did not improperly exclude the DNB brand and images of a proper control that only altered the asserted trade dress.

1. Sample Design

The appropriate target population for measuring likelihood of confusion is customers and potential customers of the type of product or service sold by junior user.[108] It is my understanding that Doll n' Burgers operates two restaurant locations in the southern part of Michigan.[109] Therefore, the appropriate target population is U.S. residents in Indiana, Michigan, or Ohio[110] that are customers and potential customers of hamburgers/cheeseburgers and/or hotdogs at quick-service restaurants.[111] Sample members were qualified to participate in the research study if they indicated that:

- They were 18 years old or older;
- They live in Indiana, Michigan, or Ohio within the United States;
- In the last 12 months, they personally had purchased a hamburger/cheeseburger and/or a hotdog from a quick-service restaurant, and/or, in the next 6 months, they plan to purchase a hamburger/cheeseburger and/or a hotdog from a quick-service restaurant; and
- They had not participated in any other surveys about quick-service restaurants in the past 60 days.

Internet interviews were completed, and the data was collected by Dynata at my direction and supervision. That data collection process occurred from May 21, 2021, through May 28, 2021.[112] In all, 488 surveys were completed.

[108] *See* McCarthy, J. Thomas, Proper Survey Methods: *Relevant "universe" surveyed—Defining the universe,* 6 McCarthy on Trademarks and Unfair Competition § 32:159 (5th ed. Nov. 2018).
[109] *See, e.g.* https://www.dollnburgers.com/.
[110] Because Indiana and Ohio are the two states closest to Tecumseh and Jackson, Michigan (no other state is within 200 driving miles of either restaurant) residents from those states were included as part of the target population for this survey.
[111] *See* Exhibit 16.0 for the screener questionnaire. A pretest was conducted which indicated that there were no data collection procedures or questionnaire design issues to address. Therefore, the surveys completed as part of the pretest were incorporated into the overall sample.
[112] Over this time, 1,334 respondents entered the survey and 488 completed the survey. *See* Exhibit 11.0 for the respondents' final dispositions.

2. Survey Design

As discussed above, the Squirt survey format is not the appropriate survey format in this matter. Based on my knowledge and experience, the Eveready survey format is the appropriate survey format in this matter.[113] Both the Eveready and the Squirt survey formats can test all three types of confusion. The primary difference between these two formats is the information that is provided to the respondents. In the Eveready format, the respondent is provided with the allegedly infringing product and is asked to identify the company they believe puts out, sponsors, or is affiliated with the product.[114] In the Squirt format the respondent is first provided with the senior mark and is then presented with the allegedly infringing product along with a lineup of additional products.[115] After this occurs the respondent is asked about the source, sponsorship, and and/or affiliation of the allegedly infringing mark.

Because of the presentation of the senior mark in the Squirt format, it "should not be used […] where the brands at issue do not proximately appear or otherwise overlap in the market."[116] The Eveready design does not have the same requirement; and, therefore it is appropriate to use when the brands do not appear proximately in the market.[117] In addition, the Eveready format is appropriate when the senior mark is strong and widely recognized.[118] In this case, according to In-N-Out, its mark is strong and distinctive and "INO Trade Dress has, for many years, enjoyed strong secondary meaning in the marketplace across the United States, including in Michigan."[119]

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[113] *See Union Carbide Corp. v. Ever-Ready, Inc.,* 531 F.2D 366 (7th Cir. 1976), *cert. denied*, 429 U.S. 830 (1976).
[114] Swann, Jerre B. "Likelihood of Confusion." Trademark and Deceptive Advertising Surveys: Law, Science, and Design. Edited by Shari Seidman Diamond and Jerre B. Swann. ABA Section of Intellectual Property Law. American Bar Association. 2012. pp. 56-64.
[115] Swann, Jerre B. "Likelihood of Confusion." Trademark and Deceptive Advertising Surveys: Law, Science, and Design. Edited by Shari Seidman Diamond and Jerre B. Swann. ABA Section of Intellectual Property Law. American Bar Association. 2012. pp. 64-71.
[116] Cunningham LOC Report, p. 6 (INO006266). *See also,* Swann, Jerre B. "Likelihood of Confusion." Trademark and Deceptive Advertising Surveys: Law, Science, and Design. Edited by Shari Seidman Diamond and Jerre B. Swann. ABA Section of Intellectual Property Law. American Bar Association. 2012. p. 70.
[117] Swann, Jerre B. "Likelihood of Confusion." Trademark and Deceptive Advertising Surveys: Law, Science, and Design. Edited by Shari Seidman Diamond and Jerre B. Swann. ABA Section of Intellectual Property Law. American Bar Association. 2012. p. 70.
[118] *See* McCarthy, J. Thomas, Survey Evidence: *Survey Formats—Two commonly used formats to test confusion,* 6 McCarthy on Trademarks and Unfair Competition § 32:173.50 (5th ed. Oct. 2018).
[119] Second Amended Complaint, p. 8.

3. Survey Questionnaire

Once sample members were qualified to participate in this research study, each respondent was randomly assigned to one of two groups – a treatment group[120] or a control group.[121] For the treatment group, a set of images of a Doll n' Burgers restaurant was used. For the control group, the same set of images of a Doll n' Burgers restaurant was used, but the accused trade dress was removed. To do this, every instance of "Doll n' Burgers" was changed to "Doll & Burgers", the red awnings, stripes, and umbrellas in the exterior photo were changed to grey, and the red stripes on the counter were removed. This was done so that the control group stimulus would share as many characteristics with the treatment group stimulus as possible, with the key exception of the characteristics whose influence were being assessed.[122] This properly accounts for only the trade dress that is being asserted, unlike the images for different restaurants used by Dr. Cunningham. The random assignment to one of these two groups determined the questionnaire that was administered to the respondent.

Respondents in each of these groups were first shown the following instruction:[123]

> Now you will be shown pictures of a quick-service restaurant that serves hamburgers and/or hot dogs. Please look at this quick-service restaurant as you would if you were considering purchasing food from this restaurant. Once you have reviewed these images, you will be asked to answer the questions that follow.
>
> As you answer these survey questions, please do not refer to or rely on any materials or other people to help you answer the survey questions.
>
> If you do not know the answer to a particular question, please just indicate "Don't Know" as the answer to that question.

For respondents in the treatment group, respondents were next shown a set of images of a Doll n' Burgers restaurant as follows:[124]

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[120] In an experimental design paradigm, the treatment group is the respondents that are exposed to a set of images of a Doll n' Burgers restaurant using the elements of the accused Trade Dress.
[121] The control group is the respondents that are exposed to the modified set of images of a Doll n' Burgers restaurant with the elements In-N-Out Burger Trade Dress removed from the images.
[122] Diamond, Shari Seidman. Reference Guide on Survey Research, *Reference Manual on Scientific Evidence, Third Edition*. Committee on the Development of the Third Edition of the Reference Manual on Scientific Evidence, Federal Judicial Center, National Research Council, p. 399.
[123] *See* Exhibit 17.0 for the main survey questionnaire. *See* Exhibit 18.0 for screen shots of the survey.
[124] *See* Exhibit 17.0 for the main survey questionnaire. *See* Exhibit 18.0 for screen shots of the survey.

Figure 5: Doll n' Burgers Restaurant Treatment Image Set[125]

Take as much time as you need to view these pictures of a quick-service restaurant that serves hamburgers and/or hot dogs as you would if you were considering purchasing food from this restaurant:

[125] *See* Exhibit 17.0 for the main survey questionnaire. *See* Exhibit 18.0 for screen shots of the survey.


KIDS 5
DOLL n' BURGER DELUXE
DOLL n' BURGER
DOLL n' BURGER BACON DELUXE
DOLL n' BURGERS
FRESH NORTHERN BEEF
POUTINE
DETROIT CONEY DOG
PLAIN DOG
TRAVERSE CITY SALAD
SIDES
DRINKS
SHAKES MALTS


CE COOKED
NEBEC P
LL n' BU
DOLL n' BURGERS

As these images show, the references to "Doll n' Burger" were included in the images. Respondents were required to view this set of images for at least five seconds before moving forward in the survey.

For respondents in the treatment group, they were asked the following questions after viewing the images above:

> **Q1**. Without guessing and without using any other outside materials to help you, do you have an opinion about what company puts out the products from this quick-service restaurant? If you don't know, please just indicate that.
>
> <1> Yes
> <2> No
> <3> Don't know

For those respondents that answered, "Yes," they were asked the following question:

> **Q2**. What company do you think puts out the products from this quick-service restaurant?[126]
>
> <1> SPECIFY
> <2> Don't Know

For those respondents that specified the name of a company in Q2, they were asked the following question:

> **Q3**. What specifically makes you say the company you just named puts out the products from this quick-service restaurant?[127]
>
> <1> SPECIFY
> <2> Don't Know

For these respondents, as well as those respondents that indicated "No" or "Don't Know" in Q1 or "Don't Know" in Q2, they were asked:

[126] This was an open-ended question in which respondents were allowed to formulate and provide their response in their own words. *See* Ballou, Janice. "Open-Ended Question," *Encyclopedia of Survey Research Methods*, Paul J. Lavrakas, Editor, SAGE Publications, Inc., Thousand Oaks, CA, 2008, pp. 547-549 at 547.
[127] This was an open-ended question in which respondents were allowed to formulate and provide their response in their own words. *See* Ballou, Janice. "Open-Ended Question," *Encyclopedia of Survey Research Methods*, Paul J. Lavrakas, Editor, SAGE Publications, Inc., Thousand Oaks, CA, 2008, pp. 547-549 at 547.

Q4. Do you think the company that puts out the products from this quick-service restaurant is sponsored or approved to do so by another company?

<1> Yes
<2> No
<3> Don't know

For those respondents that answered, "Yes," they were asked the following question:

Q5. What company do you think sponsors or approves this other company to put out the products from this quick-service restaurant?[128]

<1> SPECIFY
<2> Don't Know

For those respondents that specified the name of a company in Q5, they were asked the following question:

Q6. What specifically makes you say the company you just named sponsors or approves this other company to put out the products from this quick-service restaurant?[129]

<1> SPECIFY
<2> Don't Know

For those respondents that answered, "No" or "Don't Know" to Q4 as well as the respondents that answered "Don't Know" in Q5, they were asked:

Q7. Do you think the company that puts out the products from this quick-service restaurant has a business affiliation or connection to another company?

<1> Yes
<2> No
<3> Don't know

For those respondents that answered "No" or "Don't Know" the survey was completed, but for respondents that answered "Yes," they were asked the following question:

[128] This was an open-ended question in which respondents were allowed to formulate and provide their response in their own words. *See* Ballou, Janice. "Open-Ended Question," *Encyclopedia of Survey Research Methods*, Paul J. Lavrakas, Editor, SAGE Publications, Inc., Thousand Oaks, CA, 2008, pp. 547-549 at 547.
[129] This was an open-ended question in which respondents were allowed to formulate and provide their response in their own words. *See* Ballou, Janice. "Open-Ended Question," *Encyclopedia of Survey Research Methods*, Paul J. Lavrakas, Editor, SAGE Publications, Inc., Thousand Oaks, CA, 2008, pp. 547-549 at 547.

Q8. What is the other company that has a business affiliation or connection to the company that puts out the products from this quick-service restaurant?[130]

<1> SPECIFY
<2> Don't Know

For those respondents that answered "Don't Know" the survey was completed, but for respondents that specified the name of a company in Q8, they were asked the following question:

Q9. What specifically makes you say the company you just named has a business affiliation or connection with the company that puts out the products from this quick-service restaurant?[131]

<1> SPECIFY

<2> Don't Know

Respondents in the control group were asked these same questions.[132] However, control group respondents were not shown the set of images of a Doll n' Burgers restaurant as it normally appears. Instead, they were shown modified versions of the images of a Doll n' Burgers restaurant, which removed each instance of the allegedly infringing elements of the INO Trade Dress.[133] The control images are presented in the figure below.

[130] This was an open-ended question in which respondents were allowed to formulate and provide their response in their own words. *See* Ballou, Janice. "Open-Ended Question," *Encyclopedia of Survey Research Methods*, Paul J. Lavrakas, Editor, SAGE Publications, Inc., Thousand Oaks, CA, 2008, pp. 547-549 at 547.
[131] This was an open-ended question in which respondents were allowed to formulate and provide their response in their own words. *See* Ballou, Janice. "Open-Ended Question," *Encyclopedia of Survey Research Methods*, Paul J. Lavrakas, Editor, SAGE Publications, Inc., Thousand Oaks, CA, 2008, pp. 547-549 at 547.
[132] *See* Exhibit 17.0 for the main survey questionnaire. *See* Exhibit 18.0 for screen shots of the survey.
[133] "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 possible, with the key exception of the characteristic whose influence is being assessed." *See* Diamond, Shari Seidman. Reference Guide on Survey Research, *Reference Manual on Scientific Evidence, Third Edition*. Committee on the Development of the Third Edition of the Reference Manual on Scientific Evidence, Federal Judicial Center, National Research Council, p. 399.

Figure 6: Doll n' Burgers Restaurant Control Image Set [134]

Take as much time as you need to view these pictures of a quick-service restaurant that serves hamburgers and/or hot dogs as you would if you were considering purchasing food from this restaurant.

[134] *See* Exhibit 17.0 for the main survey questionnaire. *See* Exhibit 18.0 for screen shots of the survey.


KIDS 5
DOLL & BURGER DELUXE
DOLL & BURGER
DOLL & BURGER BACON DELUXE
DOLL & BURGERS
FRESH MIDWESTERN BEEF
POUTINE
DETROIT CONEY DOG
PLAIN DOG
TRAVERSE CITY SALAD
SIDES
DRINKS
SHAKES MALTS
DOUBLE BACON DELUXE COMBO
DOUBLE COMBO

A control was used to address the research question while attempting to remove pre-existing beliefs, guesses, and other background noise that respondents may bring to the survey.

To the extent respondents to this survey brought pre-existing beliefs, guesses, or other background noise that inappropriately shaped their responses, the use of a control group directly addresses and accounts for this issue.[135]

4. Survey Results

As described above, there were 488 completed interviews; 243 respondents were assigned to the treatment group, and 245 were assigned to the control group. Examining the survey data, respondents from the treatment group and control group answered the survey questions as summarized below.[136]

> **Q1**. Without guessing and without using any other outside materials to help you, do you have an opinion about what company puts out the products from this quick-service restaurant? If you don't know, please just indicate that?

Table 1: Respondents Shown Doll n' Burgers Set of Images (Treatment Group)[137]

	Number of Respondents	Percentage
Yes	80	32.9%
No	78	32.1%
Don't Know	85	35.0%
Total	**243**	**100.0%**

Table 2: Respondents Shown the Modified Doll n' Burgers Set of Images (Control Group)[138]

	Number of Respondents	Percentage
Yes	73	29.8%
No	74	30.2%
Don't Know	98	40.0%
Total	**245**	**100.0%**

[135] *See* Diamond, Shari Seidman. Reference Guide on Survey Research, *Reference Manual on Scientific Evidence, Third Edition*. Committee on the Development of the Third Edition of the Reference Manual on Scientific Evidence, Federal Judicial Center, National Research Council, pp. 397-401.
[136] A summary of the responses to the screener questions can be found in Exhibit 9.0.
[137] *See* Exhibit 6.0.
[138] *See* Exhibit 6.0.

Q2. What company do you think puts out the products from this quick-service restaurant?

Table 3: Respondents Shown Doll n' Burgers Set of Images (Treatment Group)[139]

	Number of Respondents	Percentage[140]
In-N-Out Burger	2	0.8%
Doll n' Burger	15	6.2%
Checkers	3	1.2%
Chik-Fil-A	5	2.1%
Five Guys	3	1.2%
McDonald's	3	1.2%
Steak n' Shake	8	3.3%
Other	17	7.0%
Don't Know	25	10.3%
Total[141]	**243**	**100.0%**

Table 4: Respondents Shown the Modified Doll n' Burgers Set of Images (Control Group)[142]

	Number of Respondents	Percentage[143]
In-N-Out Burger	4	1.6%
Doll n' Burger	21	8.6%
Checkers	0	0.0%
Chik-Fil-A	3	1.2%
Five Guys	5	2.0%
McDonald's	1	0.4%
Steak n' Shake	8	3.3%

[139] *See* Exhibit 6.1.
[140] The percentages are calculated based on the total number of respondents in the treatment group.
[141] This is the total number of respondents in the treatment group.
[142] *See* Exhibit 6.1.
[143] The percentages are calculated based on the total number of respondents in the control group.

	Number of Respondents	Percentage[143]
Other	18	7.3%
Don't Know	13	5.3%
Total[144]	**245**	**100.0%**

Q3. What specifically makes you say the company you just named puts out the products from this quick-service restaurant?

Table 5: Respondents Shown Doll n' Burgers Set of Images (Treatment Group)[145]

	Number of Respondents	Percentage
Name / Logo / Signage	10	18.2%
Décor / Furniture	7	12.7%
Product Packaging	9	16.4%
Building / Layout	5	9.1%
Design	5	9.1%
Colors	12	21.8%
Menu / Food Items	8	14.5%
Same / Familiar	3	5.5%
Other	8	14.5%
Don't Know	5	9.1%
Total[146]	**55**	**100.0%**

Table 6: Respondents Shown the Modified Doll n' Burgers Set of Images (Control Group)[147]

	Number of Respondents	Percentage
Name / Logo / Signage	20	32.8%
Décor / Furniture	8	13.1%

[144] This is the total number of respondents in the control group.
[145] *See* Exhibit 6.2.
[146] This is the total number of treatment respondents that answered this question.
[147] *See* Exhibit 6.2.

	Number of Respondents	Percentage
Product Packaging	6	9.8%
Building / Layout	5	8.2%
Design	5	8.2%
Colors	8	13.1%
Menu / Food Items	9	14.8%
Same / Familiar	8	13.1%
Other	6	9.8%
Don't Know	8	13.1%
Total[148]	**61**	**100.0%**

Q3. Do you think the company that puts out the products from this quick-service restaurant is sponsored or approved to do so by another company?

Table 7: Respondents Shown Doll n' Burgers Set of Images (Treatment Group)[149]

	Number of Respondents	Percentage
Yes	56	23.0%
No	43	17.7%
Don't Know	144	59.3%
Total	**243**	**100.0%**

Table 8: Respondents Shown the Modified Doll n' Burgers Set of Images (Control Group)[150]

	Number of Respondents	Percentage
Yes	60	24.5%
No	41	16.7%
Don't Know	144	58.8%
Total	**245**	**100.0%**

[148] This is the total number of control respondents that answered this question.
[149] *See* Exhibit 7.0.
[150] *See* Exhibit 7.0.

Q5. What company do you think sponsors or approves this other company to put out the products from this quick-service restaurant?

Table 9: Respondents Shown Doll n' Burgers Set of Images (Treatment Group)[151]

	Number of Respondents	Percentage[152]
In-N-Out Burger	0	0.0%
Doll n' Burger	0	0.0%
Checkers	4	1.6%
Chik-Fil-A	5	2.1%
Five Guys	3	1.2%
McDonald's	1	0.4%
Steak n' Shake	3	1.2%
Other	5	2.1%
Don't Know	36	14.8%
Total[153]	**243**	**100.0%**

Table 10: Respondents Shown the Modified Doll n' Burgers Set of Images (Control Group)[154]

	Number of Respondents	Percentage[155]
In-N-Out Burger	1	0.4%
Doll n' Burger	2	0.8%
Checkers	0	0.0%
Chik-Fil-A	4	1.6%
Five Guys	5	2.0%
McDonald's	0	0.0%
Steak n' Shake	5	2.0%

[151] *See* Exhibit 7.1.
[152] The percentages are calculated based on the total number of respondents in the treatment group.
[153] This is the total number of respondents in the treatment group.
[154] *See* Exhibit 7.1.
[155] The percentages are calculated based on the total number of respondents in the control group.

	Number of Respondents	Percentage[155]
Other	8	3.3%
Don't Know	35	14.3%
Total[156]	**245**	**100.0%**

Q6. What specifically makes you say the company you just named sponsors or approves this other company to put out the products from this quick-service restaurant?

Table 11: Respondents Shown Doll n' Burgers Set of Images (Treatment Group)[157]

	Number of Respondents	Percentage
Name / Logo/ Signage	2	10.0%
Décor / Furniture	1	5.0%
Product Packaging	0	0.0%
Building / Layout	2	10.0%
Design	4	20.0%
Colors	8	40.0%
Menu / Food Items	2	10.0%
Same / Familiar	2	10.0%
Other	2	10.0%
Don't Know	2	10.0%
Total[158]	**20**	**100.0%**

Table 12: Respondents Shown the Modified Doll n' Burgers Set of Images (Control Group)[159]

	Number of Respondents	Percentage
Name / Logo/ Signage	5	20.0%
Décor / Furniture	2	8.0%

[156] This is the total number of respondents in the control group.
[157] *See* Exhibit 7.2.
[158] This is the total number of treatment respondents that answered this question.
[159] *See* Exhibit 7.2.

	Number of Respondents	Percentage
Product Packaging	1	4.0%
Building / Layout	2	8.0%
Design	5	20.0%
Colors	3	12.0%
Menu / Food Items	3	12.0%
Same / Familiar	8	32.0%
Other	6	24.0%
Don't Know	1	4.0%
Total[160]	**25**	**100.0%**

Q7. Do you think the company that puts out the products from this quick-service restaurant has a business affiliation or connection to another company?

Table 13: Respondents Shown Doll n' Burgers Set of Images (Treatment Group)[161]

	Number of Respondents	Percentage
Yes	46	18.9%
No	52	21.4%
Don't Know	145	59.7%
Total	**243**	**100.0%**

Table 14: Respondents Shown the Modified Doll n' Burgers Set of Images (Control Group)[162]

	Number of Respondents	Percentage
Yes	53	21.6%
No	41	16.7%
Don't Know	151	61.6%
Total	**245**	**100.0%**

[160] This is the total number of control respondents that answered this question.
[161] *See* Exhibit 8.0.
[162] *See* Exhibit 8.0.

Q8. What is the other company that has a business affiliation or connection to the company that puts out the products from this quick-service restaurant?

Table 15: Respondents Shown Doll n' Burgers Set of Images (Treatment Group)[163]

	Number of Respondents	Percentage[164]
In-N-Out Burger	1	0.4%
Doll n' Burger	0	0.0%
Checkers	2	0.8%
Chik-Fil-A	3	1.2%
Five Guys	1	0.4%
McDonald's	1	0.4%
Steak n' Shake	1	0.4%
Other	5	2.1%
Don't Know	34	14.0%
Total[165]	**243**	**100.0%**

Table 16: Respondents Shown the Modified Doll n' Burgers Set of Images (Control Group)[166]

	Number of Respondents	Percentage[167]
In-N-Out Burger	1	0.4%
Doll n' Burger	1	0.4%
Checkers	2	0.8%
Chik-Fil-A	2	0.8%
Five Guys	2	0.8%
McDonald's	3	1.2%
Steak n' Shake	3	1.2%

[163] *See* Exhibit 8.1.
[164] The percentages are calculated based on the total number of respondents in the treatment group.
[165] This is the total number of respondents in the treatment group.
[166] *See* Exhibit 8.1.
[167] The percentages are calculated based on the total number of respondents in the control group.

	Number of Respondents	Percentage[167]
Other	8	3.3%
Don't Know	31	12.7%
Total[168]	**245**	**100.0%**

Q9. What specifically makes you say the company you just named has a business affiliation or connection with the company that puts out the products from this quick-service restaurant?

Table 17: Respondents Shown Doll n' Burgers Set of Images (Treatment Group)[169]

	Number of Respondents	Percentage
Name / Logo / Signage	1	8.3%
Décor / Furniture	1	8.3%
Product Packaging	1	8.3%
Building / Layout	0	0.0%
Design	2	16.7%
Colors	3	25.0%
Menu / Food Items	1	8.3%
Same / Familiar	2	16.7%
Other	0	0.0%
Don't Know	2	16.7%
Total[170]	**12**	**100.0%**

Table 18: Respondents Shown the Modified Doll n' Burgers Set of Images (Control Group)[171]

	Number of Respondents	Percentage
Name / Logo / Signage	1	4.5%

[168] This is the total number of respondents in the control group.
[169] *See* Exhibit 8.2.
[170] This is the total number of treatment respondents that answered this question.
[171] *See* Exhibit 8.2.

	Number of Respondents	Percentage
Décor / Furniture	2	9.1%
Product Packaging	2	9.1%
Building / Layout	0	0.0%
Design	3	13.6%
Colors	2	9.1%
Menu / Food Items	5	22.7%
Same / Familiar	4	18.2%
Other	6	27.3%
Don't Know	1	4.5%
Total[172]	**22**	**100.0%**

5. Analyses

The Lanham Act identifies likelihood of confusion as to "cause confusion, or cause mistake, or to deceive as to the affiliation, connection, or association" between Plaintiffs and Defendants "or as to the origin, sponsorship, or approval of [Defendants'] goods...by another person."[173] The survey I designed and conducted tested for the three types of confusion ascribed under the Lanham Act, which included source confusion, sponsorship or approval confusion, and affiliation or connection confusion. As I describe below, the survey I conducted found that DNB has not used the INO Trade Dress in a manner that is likely to cause confusion, mistake, or deception among customers and/or potential customers as to the source, sponsorship or approval, or affiliation or connection of the Doll n' Burgers restaurant.

a. Examination of Source Confusion

When respondents from the treatment group were presented with the set of Doll n' Burgers' restaurant images, 80 of the 243 respondents (32.9%) indicated they had an opinion

[172] This is the total number of control respondents that answered this question.
[173] 15 U.S.C. § 1125(a).

about what company or brand puts out the Doll n' Burgers' restaurant,[174] but only 2 respondents (0.8%) named In-N-Out Burger as the company or brand.[175] When respondents from the control group were presented with the set of modified Doll n' Burgers restaurant images, 73 out of 245 respondents (29.8%) indicated they had an opinion about what company or brand puts out the modified Doll n' Burgers restaurant.[176] Of these respondents, 4 (1.6%) named In-N-Out Burger as the company or brand that puts out the modified Doll n' Burgers restaurant.[177] Accordingly, after controlling for pre-existing beliefs, guesses, and other background noise, this net result of -0.8% is evidence that DNB has not used the INO Trade Dress in a manner that is likely to cause confusion, mistake, or deception among customers and/or potential customers as to the source or origin of the Doll n' Burgers restaurant.

b. Examination of Sponsorship or Approval Confusion

When respondents from the treatment group were presented with the set of Doll n' Burgers' restaurant images, 56 of the 243 respondents (23.0%) indicated they believe the company that put out the Doll n' Burgers' restaurant is sponsored or approved by another company or brand,[178] but 0 respondents (0.0%) named In-N-Out Burger as the company or brand.[179] Sixty out of 245 respondents (24.5%) in the control group indicated they believe the company that put out the modified Doll n' Burgers' restaurant is sponsored or approved by another company or brand.[180] Only 1 respondent (0.4%) in the control group named In-N-Out Burger as the company or brand that sponsored or approved the modified Doll n' Burgers restaurant.[181] Thus, after controlling for pre-existing beliefs, guesses, and other background noise, this net result of -0.4% is evidence that DNB has not used the INO Trade Dress in a manner that is likely to cause confusion, mistake, or deception among customers and/or potential customers as to the sponsorship or approval of the Doll n' Burgers restaurant.

[174] *See* Exhibit 6.0 and Table 1.
[175] *See* Exhibit 6.1 and Table 3.
[176] *See* Exhibit 6.0 and Table 2.
[177] *See* Exhibit 6.1 and Table 4.
[178] *See* Exhibit 7.0 and Table 7.
[179] *See* Exhibit 7.1 and Table 9.
[180] *See* Exhibit 7.0 and Table 8.
[181] *See* Exhibit 7.1 and Table 10.

c. Examination of Affiliation or Connection Confusion

When respondents from the treatment group were presented with the Doll n' Burgers restaurant, 46 of the 243 respondents (18.9%) indicated they believe the company that put out the Doll n' Burgers restaurant has business affiliation or connection to another company or brand,[182] but only 1 respondent (0.4%) named In-N-Out Burger as the company or brand.[183] Fifty-three of the 245 respondents (21.6%) in the control group indicated they believe the company that put out the modified Doll n' Burgers restaurant has a business affiliation or connection to another company or brand.[184] Only 1 respondent (0.4%) in the control group named In-N-Out Burger as the company or brand that has business affiliation or connection to the modified Doll n' Burgers restaurant.[185] Thus, after controlling for pre-existing beliefs, guesses, and other background noise, this net result of 0.0% is evidence that DNB has not used the INO Trade Dress in a manner that is likely to cause confusion, mistake, or deception among customers and/or potential customers as to the affiliation or connection of the Doll n' Burgers restaurant.

d. Examination of All Three Types of Confusion

Across all three types of confusion, a net of -0.4% of respondents identified Doll n' Burgers restaurant as being put out by, sponsored or approved by, and/or affiliated or connected to INO.[186] By correcting Dr. Cunningham's survey for the flaws that I have identified, the total net confusion she found of 49.3% is reduced to -0.4%.[187] This change in results, demonstrates that Dr. Cunningham's survey is fatally flawed and that DNB has not used the INO Trade Dress in a manner that is likely to cause confusion, mistake, or deception among customers and/or potential customers as to the source, sponsorship or approval, or affiliation or connection of the Doll n' Burgers restaurant.

[182] *See* Exhibit 8.0 and Table 13.
[183] *See* Exhibit 8.1 and Table 15.
[184] *See* Exhibit 8.0 and Table 14.
[185] *See* Exhibit 8.1 and Table 16.
[186] *See* Exhibit 5.0. Because some respondents indicated more than one type of confusion, this is not a sum of the confusion for each of the subtypes.
[187] *See* Exhibit 5.0.

VII. Rebuttal of Dr. Cunningham's Secondary Meaning Survey and Report

A. Summary of Dr. Cunningham's Secondary Meaning Survey and Report

Dr. Cunningham was retained to determine whether the trade dress of IN-N-OUT restaurants has acquired secondary meaning."[188] To address this research topic, Dr. Cunningham designed and implemented as survey, which is discussed below.[189]

1. Survey Methodology

Dr. Cunningham determined that the relevant target population for her likelihood of confusion survey was adults who live in "Arizona, California, Colorado, Nevada, Oregon, Texas, and Utah"[190] who had eaten inside a quick service restaurant in the previous 12 months or were planning on eating inside a quick service restaurant in the following 6 months.[191] To reach these self-reported customers and potential customers, Dr. Cunningham enlisted Dynata,[192] a third party organization that provides panel samples for academic and business survey research,[193] to identify and recruit potential survey respondents. Additionally, Dr. Cunningham contracted T Fin & Associates,[194] a marketing research company, to conduct her survey.[195] T Fin & Associates used the Qualtrics platform to program and collect data from the survey, and they also analyzed Dr. Cunningham's survey results.[196]

To reach this target population in her secondary meaning study, Dr. Cunningham identified respondents that met the following criteria:

- 18 years or older;
- Residents of the United States within Arizona, California, Colorado, Nevada, Oregon, Texas, and Utah;

[188] Cunningham SM Report, p. 1 (INO006144).
[189] Cunningham SM Report, p. 1 (INO006144).
[190] Cunningham SM Report, p. 5 (INO006148).
[191] Cunningham SM Report, Appendix 1, pp. 2-4 (INO006168-170).
[192] Cunningham SM Report, p. 5 (INO006148).
[193] Cunningham SM Report, p. 5 (INO006148).
[194] Cunningham SM Report, p. 7 (INO006150).
[195] Cunningham SM Report, p. 7 (INO006150).
[196] Cunningham SM Report, p. 7 (INO006150).

- Are not employed or anyone in their households are not employed by an advertising agency or market research company;
- Have not purchased both Shoxon water filters and Ginkya chips in the last year;
- Have eaten inside a quick service restaurant in the previous 12 months or plan to eat inside a quick service restaurant in the next 6 months;
- Were able to identify a wheelbarrow that was presented to them.[197]

Dr. Cunningham fielded the secondary meaning survey described in Dr. Cunningham's Secondary Meaning Report between April 12th and April 16th, 2021.[198] Dr. Cunningham reported 1,234 respondents entered the study and 404 respondents completed the survey.[199]

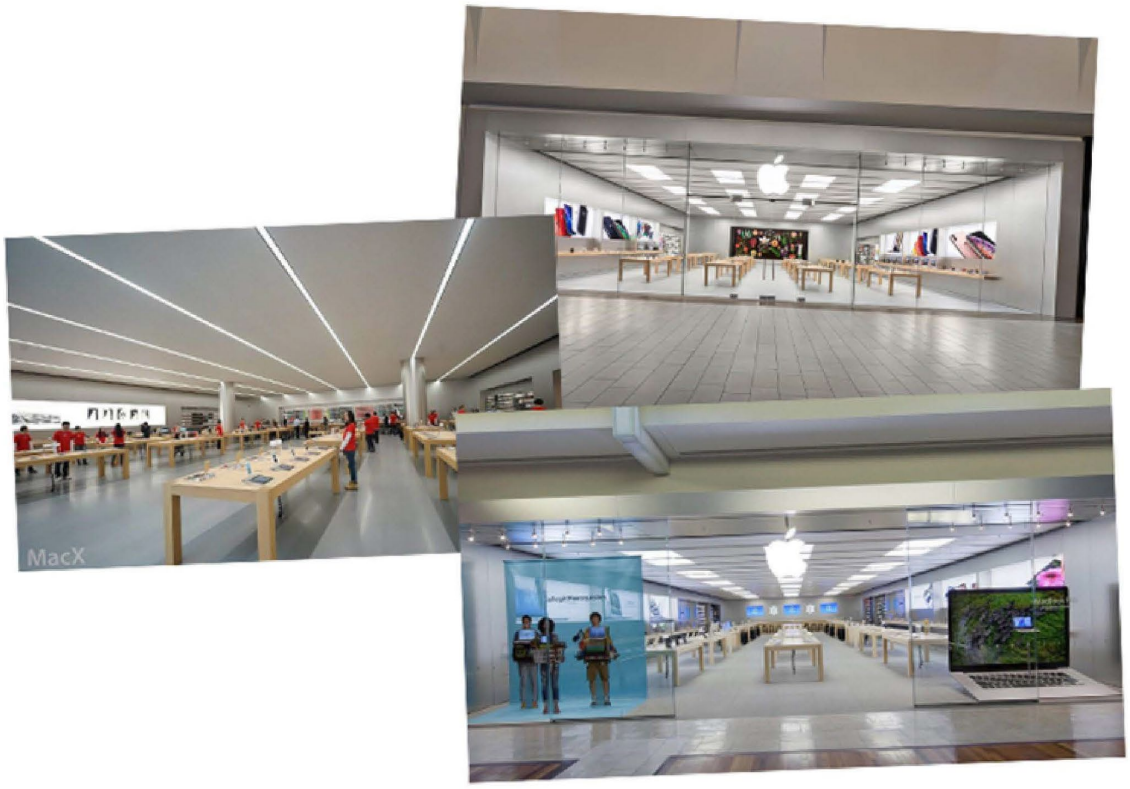
Upon qualifying for the survey, respondents in the secondary meaning study were provided with the following introduction:

> As you may know, some companies own or operate stores with a distinctive appearance I 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 I 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.[200]

With this scenario and instruction, respondents to the survey described in Dr. Cunningham's Secondary Meaning Report were first presented with a collage of three images, which are in the figure below.

[197] Cunningham SM Report, Appendix 1, pp. 1-6 (IN0006167-172). It appears that Dr. Cunningham's survey programming for the screener portion of her survey does match the screenshots she provided. *See* Cunningham SM Report, Appendix 1, pp. 8-15 (IN0006174-181).
[198] Cunningham SM Report, p. 6 (INO006149).
[199] Cunningham SM Report, p. 17 (INO006160).
[200] Cunningham SM Report, p. 8 (INO006151).

Figure 7: Dr. Cunningham's Introductory Image Collage



On the same screen as the images, Dr. Cunningham presented respondents with the following question:[201]

> 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[202]

Respondents who responded that "More than one company", "No company", or "Don't know / no opinion" were terminated and only respondents who identified "One Company" were then shown the following instructions:[203]

[201] Cunningham SM Report, pp. 8-10 (INO006151-153).
[202] Cunningham SM Report, p. 9 (INO006152).
[203] Cunningham SM Report, p. 11 (INO006154).

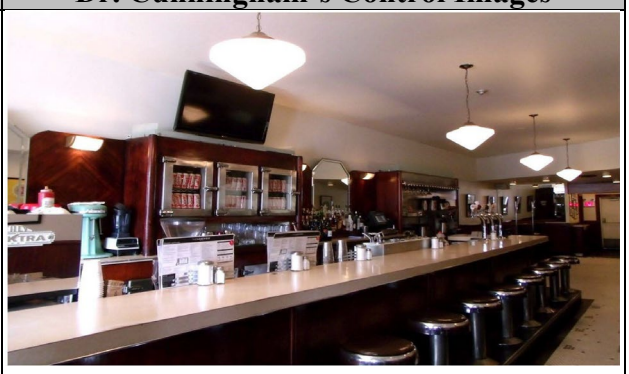
> On the next screen, you are going to see some pictures of a restaurant. Please look at the overall appearance / design of this restaurant. After you have looked at the restaurant, you will be asked some questions. There are no right or wrong answers. We are only interested in your opinions or beliefs. 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.[204]

With this scenario and instruction, respondents in the survey described in Dr. Cunningham's Secondary Meaning Report were presented with a collage of three additional images Dr. Cunningham presented and an additional image of the inside of a restaurant. Half of the respondents saw the Test image set (images 1 and 2) and the other half of the respondents saw the Control image set (images 3 and 4).[205] Each of the image sets are presented in the figure below.

Figure 8: Dr. Cunningham's Treatment and Control Images

Dr. Cunningham's Test Images	Dr. Cunningham's Control Images
	

[204] Cunningham SM Report, p. 11 (INO006154).
[205] Cunningham SM Report, pp. 12-14 (INO006155-157).

Dr. Cunningham's Test Images	Dr. Cunningham's Control Images
	

On the same screen as the images, Dr. Cunningham presented respondents with the following instructions:[206]

> 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.[207]

After respondents viewed the Test or Control images, they proceeded to the next screen and were presented with the following question:[208]

> 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

[206] Cunningham SM Report, pp. 12-14 (INO006155-157).
[207] Cunningham SM Report, pp. 12-14 (INO006155-157).
[208] Cunningham SM Report, p. 15 (INO006158).

- Don't know / no opinion[209]

If the respondent answered "One company" or "More than one company" the respondent viewed the following question on the same screen:[210]

Why do you say *[response from Q1]?*

- Specify
- I don't know / I have no opinion[211]

If the respondent specified an answer, they were then presented with an additional question on the same screen:[212]

Anything else?

- Specify[213]

After this question, respondents who answered "One company" in Question 1 were presented with the following question:

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

- Specify
- I don't know / I have no opinion[214]

If the respondent answered specified an answer the respondent viewed the following question on the same screen:[215]

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

- Specify
- I don't know / I have no opinion[216]

[209] Cunningham SM Report, p. 15 (INO006158).
[210] Cunningham SM Report, p. 15 (INO006158).
[211] Cunningham SM Report, pp. 15-16 (INO006158-159).
[212] Cunningham SM Report, p. 16 (INO006159).
[213] Cunningham SM Report, p. 16 (INO006159).
[214] Cunningham SM Report, p. 16 (INO006159).
[215] Cunningham SM Report, p. 16 (INO006159).
[216] Cunningham SM Report, p. 16 (INO006159).

If the respondent specified an answer, they were then presented with an additional question on the same screen:[217]

Anything else?

- Specify[218]

After this question, Dr. Cunningham concluded the study by asking respondents to verify the following:

- They had not opened any other windows or tabs on their electronic device;
- They had not looked at or used any other electronic devices during the survey;
- They did not view any written material or consultant or talk with any person during the survey;
- They did not use any search engine during the survey;
- Other than the survey they just completed, that they had not participated in a survey concerning quick-service restaurants within the past 3 months.[219]

2. Dr. Cunningham's Survey Findings

Using the methodology described above, Dr. Cunningham calculated sample statistics based on her survey for the two different survey stimuli she tested in her secondary meaning survey. Those sample statistics are presented in the tables below.

[217] Cunningham SM Report, p. 16 (INO006159).
[218] Cunningham SM Report, p. 16 (INO006159).
[219] Cunningham SM Report, Appendix 1, pp. 20-25 (INO006195-199).

Table 19: Secondary Meaning Results for Question 1: Test Cell[220]

Q1 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?[a]

		Frequency	Percent
Valid	One company	186	92.5
	More than one company	8	4.0
	No company	2	1.0
	Don't know / no opinion	5	2.5
	Total	201	100.0

a. STIMULUS = Test

Table 20: Secondary Meaning Survey Results for Question 1: Control Cell[221]

Q1 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?[a]

		Frequency	Percent
Valid	One company	64	31.5
	More than one company	108	53.2
	No company	7	3.4
	Don't know / no opinion	24	11.8
	Total	203	100.0

a. STIMULUS = Control

From these results, Dr. Cunningham takes the 92.5% of respondents that identified the overall appearance of INO as coming from one company and subtracting the 31.5% that identified the restaurants in the control image as coming from one company, to arrive at 61% of respondents attributing the trade dress of the INO restaurant to one source.[222] According to Dr. Cunningham, "[t]his is a clear indication that the IN-N-OUT trade dress has acquired secondary meaning."[223]

B. Flaws in Dr. Cunningham's Secondary Meaning Survey

Based on my review of Dr. Cunningham's secondary meaning report, survey, and the analyses on which she based her opinions, I have determined that there are significant flaws in

[220] Cunningham SM Report, Appendix 3, p. 1 (INO006205).
[221] Cunningham SM Report, Appendix 3, p. 1 (INO006363).
[222] Cunningham SM Report, p. 17 (INO006160).
[223] Cunningham SM Report, p. 17 (INO006160).

the survey, her analyses, and her stated conclusions and opinions. Consequently, Dr. Cunningham's survey estimates of the secondary meaning of INO's trade dress are flawed and unreliable for at least the reasons below.

1. Dr. Cunningham Failed to Identify Any of the Trade Dress Tested

As discussed above, Dr. Cunningham was asked to "determine whether the trade dress of IN-N-OUT restaurants has acquired secondary meaning among U.S. consumers from a certain part of the U.S. who are customers or potential customers of quick-service restaurants."[224] In doing so Dr. Cunningham failed to identify the trade dress she chose to test.[225] From the images Dr. Cunningham chose to use in her survey, she did not show survey respondents, among others things, red chairs, white barstools, employee uniforms, the horizontal line of boxes at the top of the menu featuring combo meals with no sizing options, open-ended burger wrappers, or the classic car theme. Because she did not show images with these design elements present, she did not test these design elements for secondary meaning. Provided that it was Dr. Cunningham's task to determine whether INO's trade dress has acquired secondary meaning, it is incumbent on her to identify the trade dress she chose to test and why she chose to test that trade dress over the other asserted trade dress that she chose to exclude from her survey. Dr. Cunningham's survey results do not give insight into the secondary meaning for all the trade dress that has been asserted in this matter.

2. Dr. Cunningham Failed to Utilize a Proper Control

Dr. Cunningham stated that the control images she used "did not have any of the infringing elements of the IN-N-OUT trade dress."[226] However, the control images used by Dr. Cunningham changed the entire appearance of the interior of the restaurant. Dr. Cunningham did not confine her removals to the design elements of the INO trade dress she was testing.

[224] Cunningham SM Report, p. 1 (INO006144).
[225] Cunningham SM Report, p. 6 (INO006149).
[226] Cunningham SM Report, p. 6 (INO006149).

Control groups are used in secondary meaning surveys to take into account and control for factors that do not involve the asserted trademark and/or trade dress.[227] In a properly designed experiment, the control group is the group to which the experimental, or test, group is compared; the control stimulus does not have the design elements that are part of the test stimulus that is under investigation.[228] Dr. Cunningham noted in her report that "[i]n designing a survey-experiment, the expert should select a stimulus for the control group that shares as many characteristics as possible with the experimental stimulus as possible, with the key exception of the characteristics whose influence [] is being assessed."[229] The images in the figure below show the treatment images Dr. Cunningham used to demonstrate the infringing INO trade dress and the images she used to control for that infringing trade dress.

Figure 9: Dr. Cunningham's Treatment and Control Images

Dr. Cunningham's Treatment Images	Dr. Cunningham's Control Images
	

[227] In Novartis Consumer Health, Inc. v. Johnson & Johnson Merck Consumer Pharms Co., the court found that a control group functions as "a baseline and provides a measure of the degree to which respondents are likely to give an answer … not as a result of the [product at issue], but because of other factors, such as the survey's questions, the survey's procedures … or some other potential influence on a respondent's answer such as pre-existing beliefs." (*See* Novartis Consumer Health, Inc. v. Johnson & Johnson Merck Consumer Pharms Co., 129 F. Supp. 2d 351, 365 n. 10 (D.N.J. 2000)).

[228] *See* Peng, Chao-Ying Joanne and Ziskin, Mary B. "Control Group", *Encyclopedia of Survey Research Methods*, Paul J. Lavrakas, Editor, SAGE Publications, Inc., Thousand Oaks, CA, 2008, pp. 146-147.

[229] Cunningham SM Report, pp. 6-7 (INO006149-150).

Dr. Cunningham's Treatment Images	Dr. Cunningham's Control Images
	

The control images Dr. Cunningham chose to use changed many design elements included in the INO images, many of which are not asserted trade dress. For example, Dr. Cunningham changed the lighting fixtures, the configuration of the customer seating, the materials used on the walls and ceiling, the configuration of the packaging, etc. that was not asserted as trade dress in this case. In other words, Dr. Cunningham did not select control stimuli that held all of the non-asserted design elements of INO' accused trade dress the same. This failure to use control images that only differed for the asserted design elements that are alleged to be infringing confounds Dr. Cunningham's survey results. Because her control images do not hold constant any non-asserted design elements, there is no way to determine from Dr. Cunningham's survey results whether respondents gave their answers based on the asserted trade dress or other non-asserted design elements. Since almost all of the design elements between the INO images and the control images are different, it is inappropriate to conclude that any observed differences between the test group and control group are attributable to the asserted trade dress.

The control images that Dr. Cunningham chose to use also did not present the design elements from one quick-service restaurant, and instead used images from at least three different restaurants. The exterior image appears to be an altered version of DNB's exterior, the interior

picture in the collage of images is from the Baker Street location of Honest Burger in London,[230] and the interior picture is from another, unknown restaurant that appears to be a bar, rather than a quick-service restaurant. Dr. Cunningham failed to provide any explanation of why she chose to use images from these three different restaurants, or how the images from these three different restaurants appropriately control for the INO trade dress asserted in this matter.

Using these images from three different restaurants also likely biased respondents' answers for those in the control group. After viewing these three images from different restaurants, respondents in the control were asked, "From what you know, do you think the 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?"[231] Based on the images of three different restaurants presented to the respondents in the control, respondents could easily have selected that restaurants with this appearance / design are likely to be owned or operated by more than one company, since the images presented to them were, in fact, from more than one company. The open responses from the respondents show that 68 of 108 respondents that said more than one company in the control did so because of the multiple, different restaurants Dr. Cunningham chose to use her control. The table below identifies those respondents.

Table 21: Respondents that Identified the Differences in the Images as Their Reason for Selecting More Than One Company[232]

Resp ID	Why do you say More Than One Company?
1030	becasue their interior design looks different than the other pictures. i am sure there was more than one company
1041	First one looks like in and out burger Second one is just an old fashioned soda fountain
1052	all the venues look too different
1062	Pictures of different furniture, tables and counters.
1069	the inside looks different
1078	The designs of the places are different.
1080	Look differently
1098	Because their concept of the two restaurants are very different. One is a lot more stylish and modern than the other.
1117	There was a diner and fast food place
1131	One was a bar style the other was a opening seating style of establishment.

[230] *See* https://www.honestburgers.co.uk/locations/.
[231] Cunningham SM Report, p. 15 (INO006158).
[232] *See* Exhibit 4.0.

Resp ID	Why do you say More Than One Company?
1144	The fast food restaurant looked different from the retro looking diner.
1160	Because one of the pictures (the first one) looks like an In And Out (or any fast food semi causal restaurant) and the other one looks pretty formal
1166	because it looks like it has different styles
1168	2 of them looked like fast food and 1 was a buffet
1180	Different looks
1182	Fast food Wine bar
1186	I saw a restaurant that looks like McDonald's and a restaurant that looks like a diner.
1207	The one with the cow on the chalkboard looks different from the bottom pic. The bottom pic looks like a diner. Looks like 2 different companies.
1212	it looks like three different restaurants in the picture
1216	different style furniture
1223	Because the bottom picture looks way different
1280	They both look like different places, a causal burger joint, and a place to sit down, relax and have some wine.
1293	I saw three
1341	the designs didnt seem to follow eachother
1351	Different layouts and designs
1352	there is a couple of establishment
1361	The two locations were very different in appearance. One looked like a fast food style restaurant that servers hamburgers while the other looked like a retro diner that could possibly serve hamburgers and other items.
1364	they look too different
1381	They all look different
1388	I see two buildings that had different design
1399	They look different, one looks like maybe 5 guys, the other is nicer
1420	they look like completely different establishments
1426	The eatery had a different look in each photo
1430	there is no consistent design element
1461	The inside decor is totally different
1715	It has a different layout than some of the other companies one look likes a standard 50's shop and one looked like a typical fast food restaurant
1775	One looked line a fast food restaurant. Another looked like an old fashioned soda counter.
1799	Different colour pallets on walls and indoor decor, suggesting different companies
1800	all have sitting areas, in side, outside. different store types
1811	there seems to be different interiors one as a cafe bar and the other is the interior of a burger place

Resp ID	Why do you say More Than One Company?
1822	because the three images/design are wade too different from each other.
1832	The appearance of the restaurants are different
1840	it looked like mcdonalds up top, but then more like an upscale diner on the bottom photo
1851	The seating looks different inside
1853	They are different interiors
1854	Apparently different interior motiffs
1861	The seating arrangements look different. One setting looks like a burger food joint and the other looks like a bar.
1883	The settings seem to not go together.
1891	because the 2 pictures of the interiors are from different restaurants
1901	they look supoer un coordinated
1937	diffrent era, differant designs
1940	They all have different appearances and some look high end than others. Although this is not always true.
1943	they aren't all alike so I would think that multiple companies would be in each
1946	Decor and structure looked very different in each.
1949	two different interior designs
1968	Appeared to have different appearance on the inside of the buildings and each would cater to a different market.
1973	They overall look quite different
1981	The design of each restaurant is different so I think they are designed separately by separate companies.
2023	One is a bar and the other is a food place
2024	Because all three pictures are very different although there is a small display showing food and drink. Most of my experience in restaurants from the same company shows that they all tend to be more similar than what is shown in the pictures.
2041	The appearance of the restaurants is different on each image
2043	i saw several different sitting areas and know they are different resturants
2068	rooms not the same
2128	Because they look different
2139	They all have very different designs and appearances
2150	Two different concepts
2175	I see two companies
2199	there were different diner settings for each picture

As these response show, the fact that Dr. Cunningham used images from different restaurants in the control version of her survey introduced bias into her survey that hopelessly confounds the results. In order to isolate the percentage of survey respondents who ascribe secondary meaning to INO's trade dress, Dr. Cunningham takes the percentage of respondents

that said "one company" from the control group and subtracts it from the percentage of respondents that said "one company" from the treatment group. However, the photographs of different restaurants with different looking setups and decor in Dr. Cunningham's control group caused many respondents in the control to think that these are different restaurants that they were being shown. This likely led to respondents answering, "different companies" rather than "one company" because they were being shown multiple different restaurants in the control.

This bias leads to an overestimation of the net difference between the treatment group percentage and the control group percentage. This has the effect of overestimating the percentage of respondents, on net, that identify the tested design elements as coming from a single source.[233] As I show in the rebuttal secondary meaning survey that I conducted, the impact of Dr. Cunningham using an improper control causes a significant overstatement of her net secondary meaning estimate. When a proper control is used, along with correcting other severe flaws, there is no evidence that the marks asserted by INO have achieved secondary meaning. Given the errors Dr. Cunningham made in the selection of her control images, the results of her secondary meaning survey are flawed and unreliable and any opinions derived from these results are similarly flawed and unreliable.

3. Dr. Cunningham Failed to Remove Indicators of Source from the Stimuli

In testing INO's trade dress Dr. Cunningham chose to include INO's palm trees in the images she chose to use. Her treatment photographs included silhouetted palm trees on the exterior awnings, food packaging, under the service counter, and on the wall tiles. INO registered its horizontal lines of silhouetted palm trees as a trademark decades ago.[234] When conducting a secondary meaning study, it is imperative to remove any indicators of source from what is being tested that is unrelated to trade dress at issue.[235] By leaving in INO's trademarked palm trees, Dr. Cunningham is unable to identify if the secondary meaning she supposedly established is due to

[233] As discussed in Section V.B.4, Dr. Cunningham similarly biased the control group percentages in her likelihood of confusion survey, which likely inflated her assessment of net likelihood of confusion.
[234] *See, e.g.* USPTO Reg. Nos. 1935301, 1507389, and 1514036 (INO registrations for palm tree silhouettes).
[235] Palladino, Vincent N. "Secondary Meaning Surveys." Trademark and Deceptive Advertising Surveys: Law, Science, and Design. Edited by Shari Seidman Diamond and Jerre B. Swann. ABA Section of Intellectual Property Law. American Bar Association. 2012. p. 84.

the trade dress she chose to test or the trademarked palm trees. This renders Dr. Cunningham's assertion that the trade dress has acquired secondary meaning as flawed and unreliable.

4. Dr. Cunningham Misspecified the Target Population.

According to INO, "[t]he INO Trade Dress has, for many years, enjoyed strong secondary meaning in the marketplace across the United States, including Michigan." Dr. Cunningham did not attempt to confirm this secondary meaning that supposedly exists across the United States or the asserted secondary meaning that supposedly exists in Michigan. Instead, Dr. Cunningham chose to determine if secondary meaning exists only in the states in which INO operates, which included Arizona, California, Colorado, Nevada, Oregon, Texas, and Utah.[236] The results of Dr. Cunningham's survey, therefore, do not provide any indication as to whether secondary meaning, related to the trade dress Dr. Cunningham supposedly tested, exists in Michigan or across the entire United States. This is because Michigan respondents and respondents from 42 other states were not a part of Dr. Cunningham's target population.

It also appears that Dr. Cunningham once again unnecessarily restricted survey respondents to those who took the survey on a desktop computer, laptop computer, or tablet. Dr. Cunningham failed to allow respondents entering the survey on a smartphone to complete the survey by directing them to take the survey on a permitted electronic device. Dr. Cunningham did this by only allowing respondents that accessed the study on desktop computers, laptop/notebook computers, or tablet computers to enter the survey and by terminating any respondent that attempted to take the survey on a smartphone or other electronic device. This likely led to a significant number of qualified respondents to be excluded from Dr. Cunningham's survey.

5. Dr. Cunningham Survey Design Was Inappropriate and Leading

According to Dr. Cunningham: "[t]o ensure that the survey participants understand the substantive questions, an introductory set of explanations were added to the questionnaire."[237] Dr. Cunningham asserts that this process is like the process used in surveys testing the

[236] Cunningham SM Report, p. 5 (INO006148).
[237] Cunningham SM Report, p. 7 (INO006150).

genericness of a mark.[238] In surveys testing the genericness of a mark, respondents are provided with an explanation and examples of the brand-name vs. common-name dichotomy that is going to be used in the survey and respondents are going to need to know to complete the survey. The reason for this is that the terms, "brand name" and "common name," may be unfamiliar to respondents, so educating them and testing them about what is a brand name and what is a common name is justified.

However, the introduction that Dr. Cunningham used in her survey is not appropriate for use in a secondary meaning survey because 1) it assumes that survey respondents do not understand the difference between the term, "one company" and "more than one company," and 2) even if they do not understand that difference, Dr. Cunningham's approach does not define what these terms mean. Instead, Dr. Cunningham simply presents one collage of images to respondents without explaining what one company or more than one company means in the context of the images. In fact, Dr. Cunningham only show images of an Apple store, which comes from one company. She does not give an example of images that come from more than one company. Because she does not define "one company" or "more than one company" in the context of the images she shows respondents and because she only shows images that respondents are supposed to associate with one company, she creates a demand artifact that leads respondents to be more likely to respond "one company" when shown a stimulus. This is exacerbated by the fact that she only allows respondents who say "one company" when shown the Apple store to continue with the survey.

As a result, this leading design of Dr. Cunningham's survey by inappropriately introducing a "single source" stimulus prior to testing the INO images and then excluding respondents who did not give a single source answer introduced a bias into her survey. This bias had the effect of leading to an overestimate of the percentage of respondents that answered "one company" in the treatment group. Couple that with the inappropriate control stimuli that Dr. Cunningham used, which had multiple, different companies as the source of the images that led to an underestimate of the noise associated with "one company." Taken together, both biases had

[238] Cunningham SM Report, pp. 7-8 (INO006150-151).

the effect of enlarging the difference between the percentage of respondents that said "one company" in the treatment groups vs. the control group.

C. Conclusions

Due to the flaws above, the conclusions that Dr. Cunningham draws from the results of this secondary meaning survey are unsupported and unreliable. Dr. Cunningham's secondary meaning survey provides no reliable basis to conclude any of the following:

- The net 61% of the subjects attributing the trade dress of INO to once source is a clear indincation that the INO trade dress has acquired secondary meaning.[239]
- The "overwelming number (46%) of subject whos stated that the restaurant they saw in the test survey [] specifically mentioned IN-N-OUT as that company."[240]
- The survey indicates "that the overall appearance of the registered INO trade dress was the reason why a net 61% of the subjects in the survey thought it had acquired secondary meaning."[241]

VIII. Rebuttal Secondary Meaning Survey Correcting For Flaws in Dr. Cunningham's Survey

A. Survey Methodology

To show the impact of the severe flaws detailed above on Dr. Cunningham's survey results, I have been asked by counsel to field a survey correcting Dr. Cunningham's likelihood of confusion survey for these flaws. To correct Dr. Cunningham's survey, I utilized proper control images, removed any indication of the source outside of the trade dress, expanded the target population to include the entire United States, and removed all leading and inappropriate questions.

[239] Cunningham SM Report, p. 17 (INO006160).
[240] Cunningham SM Report, p. 18 (INO006161).
[241] Cunningham SM Report, p. 20 (INO006163).

1. Sample Design

The appropriate target population for measuring secondary meaning is customers and potential customers to whom the senior user markets its products or services.[242] Therefore, in this case, the appropriate target population is customers and potential customers of quick-service restaurants that serve hamburgers/cheeseburgers.[243] According to INO, "[t]he INO Trade Dress is strong, and commands a great deal of goodwill and secondary meaning with consumers nationwide."[244] Therefore, it is appropriate survey respondents across the United States, rather than only respondents in areas in which INO has a restaurant location.

I developed an internet survey to test whether secondary meaning had accrued to In-N-Out Burger's asserted trade dress. In order to draw a sample from the relevant population, the sample design was chosen to approximate the U.S. population. That sample was provided by Dynata, a leading data collection and survey research firm.[245] Sample members were qualified to participate in the research study if they indicated that:

- They were 18 years old or older;
- In the last 12 months, they personally had purchased a hamburger/cheeseburger from a quick-service restaurant, and/or, in the next 6 months, they plan to purchase a hamburger/cheeseburger from a quick-service restaurant; and
- They had not participated in any other surveys about quick-service restaurants in the past 60 days.

Internet interviews were completed, and the data was collected by Dynata at my direction and supervision. That data collection process occurred from May 21, 2021, through May 28, 2021.[246] In all, 501 surveys were completed.

[242] Barber, William G. "The Universe." Trademark and Deceptive Advertising Surveys: Law, Science, and Design. Edited by Shari Seidman Diamond and Jerre B. Swann. ABA Section of Intellectual Property Law. American Bar Association. 2012. p. 32.
[243] Specifically, the target population is customers 18 years old or older in the United States that are customers and/or potential customers of quick-service restaurants that serve hamburgers/cheeseburgers.
[244] Second Amended Complaint, p. 25.
[245] *See* https://www.dynata.com/company/about-us/.
[246] Over this time, 1,649 respondents entered the survey and 501 completed the survey. *See* Exhibit 15.0 for the respondents' final dispositions.

2. Survey Questionnaire

Once sample members were qualified to participate in the research study, each respondent was randomly assigned to one of two groups – a treatment group[247] or a control group.[248] For the treatment group, respondents were shown images of the In-N-Out Burger restaurant, which included the alleged INO Trade Dress.[249] For the control group, the same In-N-Out Burger restaurant images were used, but the alleged trade dress was removed. To do this, the images of the In-N-Out Burger restaurant were adjusted so that the images no longer included the alleged trade dress. In the control images, the red color was changed to blue, the white walls were turned grey, the tile floor of grey and white was changed to a single color, the glass dividers were removed, and the tabletops were turned from white to grey. This was done so that the control group stimulus would share as many characteristics with the treatment group stimulus as possible, with the key exception of the characteristics whose influence were being assessed.[250] In both the treatment and control images, the "In-N-Out Burger" logo, the trademarked Palm Tree Design, and the yellow florescent sign were removed from the exterior and interior of the restaurant.[251] The random assignment to one of these two groups determined the questionnaire that was administered to the respondent.

Respondents in each of these groups were first shown the following instruction:[252]

> Now you will be shown pictures of a quick-service restaurant that serves hamburgers. Please look at this quick-service restaurant as you would if you were considering purchasing food from this restaurant. Once you have reviewed these images, you will be asked to answer the questions that follow.

---

[247] In an experimental design paradigm, the treatment group is the respondents that are exposed to In-N-Out Burger's restaurant images.
[248] The control group is the respondents that are exposed to the modified In-N-Out Burger's restaurant images with the alleged trade dress removed.
[249] Cunningham SM Report, p. 20 (INO006163).
[250] Diamond, Shari Seidman. Reference Guide on Survey Research, *Reference Manual on Scientific Evidence, Third Edition*. Committee on the Development of the Third Edition of the Reference Manual on Scientific Evidence, Federal Judicial Center, National Research Council, p. 399.
[251] Palladino, Vincent N. "Secondary Meaning Surveys." Trademark and Deceptive Advertising Surveys: Law, Science, and Design. Edited by Shari Seidman Diamond and Jerre B. Swann. ABA Section of Intellectual Property Law. American Bar Association. 2012. pp. 84-85.
[252] *See* Exhibit 20.0 for the main survey questionnaire. *See* Exhibit 21.0 for screen shots of the survey.

As you answer these survey questions, please do not refer to or rely on any materials or other people to help you answer the survey questions.

If you do not know the answer to a particular question, please just indicate "Don't Know" as the answer to that question.

For respondents in the treatment group, respondents were next shown images of an In-N-Out Burger restaurant as follows:[253]

Figure 10: In-N-Out Burger Treatment Image Set[254]

Take as much time as you need to view these pictures of a quick-service restaurant that serves hamburgers as you would if you were considering purchasing food from this restaurant.

[253] *See* Exhibit 20.0 for the main survey questionnaire. *See* Exhibit 21.0 for screen shots of the survey.
[254] *See* Exhibit 20.0 for the main survey questionnaire. *See* Exhibit 21.0 for screen shots of the survey.


DOUBLE-DOUBLE
CHEESEBURGER
HAMBURGER
FRENCH FRIES
SHAKES

Respondents were required to view these images for at least five seconds before moving forward in the survey.

After viewing the images in Figure 10, respondents in the treatment group were asked the following questions.

Q1. Without guessing and without using any other outside materials to help you, have you ever seen or purchased food from a quick-service restaurant that looks like this? If you don't know, please just indicate that?

Select one.

<1> Yes
<2> No
<3> Don't know

The respondents that answered "No" or "Don't know" to this question the survey was concluded. For respondent that answered "Yes," they were then asked:

Q2. Do you associate quick-service restaurants that look like this with one company or more than one company?

Select one.

<1> One brand/company
<2> More than one brand/company
<3> Don't know

The word order of this question was varied to avoid possible order effects. Specifically, whether respondents saw the "one brand/company" phrase first or the "more than one brand/company" phrase first was randomly determined.[255] For those respondents that indicated "one brand/company," they were asked:

Q3. What company do you associate with quick-service restaurants that look like this?[256]

Please be as specific as possible.

<1> SPECIFY
<2> Don't know

For those respondents that specified an answer, they were asked:

[255] The first two answer choices were randomized independently from the question wording randomization to avoid possible order effects.
[256] This was an open-ended question in which respondents were allowed to formulate and provide their response in their own words. *See* Ballou, Janice. "Open-Ended Question," *Encyclopedia of Survey Research Methods*, Paul J. Lavrakas, Editor, SAGE Publications, Inc., Thousand Oaks, CA, 2008, pp. 547-549 at 547.

Q4. What is it about quick-service restaurants that look like this that has you associate it with the company that you mentioned?[257]

Please be as specific as possible.

<1> SPECIFY
<2> Don't know

For those respondents that answered, "More than one brand/company" or "Don't know" to Q2; "Don't know" to Q3, as well as the respondents that answered Q4, the survey was concluded.

The questions were structured to determine first whether customers or potential customers recognized the In-N-Out Burger restaurant with the INO Trade Dress. Then, establishing recognition of the restaurant with the trade dress, the follow-up questions were asked to determine if these customers or potential customers associated the INO Trade Dress, with one company (or source) or with multiple companies. This directly addresses the research question: whether the INO Trade Dress has acquired a distinctiveness associated with that trade dress to stand for In-N-Out Burger restaurants.

For respondents in the control group, they were asked the same questions above.[258] However, control group respondents were not shown the In-N-Out Burger restaurant images with the INO Trade Dress as it normally appears. Instead, they were shown a modified version of the In-N-Out Burger restaurant images with the INO Trade Dress removed from the restaurant images.[259]

[257] This was an open-ended question in which respondents were allowed to formulate and provide their response in their own words. *See* Ballou, Janice. "Open-Ended Question," *Encyclopedia of Survey Research Methods*, Paul J. Lavrakas, Editor, SAGE Publications, Inc., Thousand Oaks, CA, 2008, pp. 547-549 at 547.
[258] *See* Exhibit 20.0 for the main survey questionnaire. *See* Exhibit 21.0 for screen shots of the survey.
[259] "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 possible, with the key exception of the characteristic whose influence is being assessed." *See* Diamond, Shari Seidman. Reference Guide on Survey Research, *Reference Manual on Scientific Evidence, Third Edition*. Committee on the Development of the Third Edition of the Reference Manual on Scientific Evidence, Federal Judicial Center, National Research Council, p. 399.

Figure 11: In-N-Out Burger Control Image Set[260]

[260] *See* Exhibit 20.0 for the main survey questionnaire. *See* Exhibit 21.0 for screen shots of the survey.


DOUBLE-DOUBLE $3.20
CHEESEBURGER $2.20
HAMBURGER $1.90
FRENCH FRIES $1.50
COKE DIET COKE ROOT BEER LEMONADE ICED TEA SEVEN-UP DR PEPPER
SM MED LG X-LG
$1.35 $1.45 $1.65 $1.85
SHAKES $1.99
Ordering as easy as
Pick-up Here

Once again, the purpose of the control group is to address the research question while attempting to remove pre-existing beliefs, guesses, and other background noise that respondents may bring to the survey. To the extent that respondents to this survey brought pre-existing beliefs, guesses, or other background noise that inappropriately shaped their responses, the use of a control group directly addresses and accounts for this issue.[261]

[261] *See* Diamond, Shari Seidman. Reference Guide on Survey Research, *Reference Manual on Scientific Evidence, Third Edition*. Committee on the Development of the Third Edition of the Reference Manual on Scientific Evidence, Federal Judicial Center, National Research Council, pp. 397-401.

3. Survey Results

As described above, there were 501 completed interviews; 259 respondents were assigned to the treatment group, and 242 were assigned to the control group. Examining the survey data, respondents from the treatment group and control group answered the survey questions as summarized below.[262]

Q1. Without guessing and without using any other outside materials to help you, have you ever seen or purchased food from a quick-service restaurant that looks like this? If you don't know, please just indicate that.

Table 22: Respondents Shown In-N-Out Burger Images (Treatment Group)[263]

	Number of Respondents	Percentage
YES	167	64.5%
NO	55	21.2%
DON'T KNOW	37	14.3%
Total	**259**	**100.0%**

Table 23: Respondents Shown the Modified In-N-Out Burger Images (Control Group)[264]

	Number of Respondents	Percentage
YES	111	45.9%
NO	91	37.6%
DON'T KNOW	40	16.5%
Total	**242**	**100.0%**

[262] A summary of the responses to the screener questions can be found in Exhibit 13.0.
[263] *See* Exhibit 12.0.
[264] *See* Exhibit 12.0.

Q2. Do you associate quick-service restaurants that look like this with one company or more than one company?

Table 24: Respondents Shown In-N-Out Burger Images (Treatment Group)[265]

	Number of Respondents	Percentage
One brand/company	119	45.9%
More than one brand/company	39	15.1%
Don't Know	9	3.5%
Total[266]	**259**	**100.0%**

Table 25: Respondents Shown the Modified In-N-Out Burger Images (Control Group)[267]

	Number of Respondents	Percentage
One brand/company	75	31.0%
More than one brand/company	34	14.0%
Don't Know	2	0.8%
Total[268]	**242**	**100.0%**

Q3. What company do you associate with quick-service restaurants that look like this?

Table 26: Respondents Shown In-N-Out Burger Images (Treatment Group)[269]

	Number of Respondents	Percentage
In-N-Out Burger	64	53.8%
Doll n' Burgers	0	0.0%
Culver's	0	0.0%
Five Guys	8	6.7%
Freddie's Custard	5	4.2%
KFC	4	3.4%
McDonald's	2	1.7%

[265] *See* Exhibit 12.0.
[266] This is the total number of respondents in the treatment group.
[267] *See* Exhibit 12.0.
[268] This is the total number of respondents in the control group.
[269] *See* Exhibit 12.0 and Exhibit 12.1.

	Number of Respondents	Percentage
Steak n' Shake	17	14.3%
White Castle	0	0.0%
Other	14	11.8%
Don't Know	5	4.2%
Total[270]	**119**	**100.0%**

Table 27: Respondents Shown the Modified In-N-Out Burger Images (Control Group)[271]

	Number of Respondents	Percentage
In-N-Out Burger	26	34.7%
Doll n' Burgers	0	0.0%
Culver's	12	16.0%
Five Guys	2	2.7%
Freddie's Custard	0	0.0%
KFC	1	1.3%
McDonald's	4	5.3%
Steak n' Shake	2	2.7%
White Castle	19	25.3%
Other	5	6.7%
Don't Know	4	5.3%
Total[272]	**75**	**100.0%**

[270] This is the number of respondents in the treatment group who saw this question in the survey.
[271] *See* Exhibit 12.0 and Exhibit 12.1.
[272] This is the number of respondents in the control group who saw this question in the survey.

Q4. What is it about quick-service restaurants that look like this that has you associate it with the company that you mentioned?

Table 28: Respondents Shown In-N-Out Burger Images (Treatment Group)[273]

	Number of Respondents	Percentage
Name / Logo / Signage	13	11.4%
Décor / Furniture	21	18.4%
Building / Layout	21	18.4%
Design	31	27.2%
Colors	47	41.2%
Menu / Food Items	11	9.6%
Same / Familiarity	17	14.9%
Other	6	5.3%
Don't Know	8	7.0%
Total[274]	**114**	**100.0%**

Table 29: Respondents Shown the Modified In-N-Out Burger Images (Control Group)[275]

	Number of Respondents	Percentage
Name / Logo / Signage	2	2.8%
Décor / Furniture	8	11.3%
Building / Layout	17	23.9%
Design	17	23.9%
Colors	26	36.6%
Menu / Food Items	10	14.1%
Same / Familiarity	12	16.9%
Other	3	4.2%
Don't Know	4	5.6%
Total[276]	**71**	**100.0%**

[273] *See* Exhibit 12.2.
[274] This is the number of respondents in the treatment group who saw this question in the survey.
[275] *See* Exhibit 12.2.
[276] This is the number of respondents in the control group who saw this question in the survey.

4. Analyses

When respondents from the treatment group were asked about the origin of In-N-Out Burger restaurant with the INO Trade Dress, 45.9% of those respondents associated that quick service restaurant with one company.[277] When respondents from the control group were asked about the origin of the In-N-Out Burger restaurant with the INO Trade Dress removed, 31.0% of those respondents associated that restaurant with one company.[278] The difference between the percentage of treatment group respondents that said "One Company" and the percentage of control group respondents that said "One Company" is the measure of what percentage of U.S. customers and potential customers of hamburgers/cheeseburgers at quick-service restaurants associates the INO Trade Dress with one source. In this case, that percentage is 15.0% after controlling for pre-existing beliefs, guesses, and other background noise.[279]

By correcting Dr. Cunningham's secondary meaning survey for the flaws that I have identified, the net secondary meaning she found of 61% is reduced to 15.0%, which is not considered evidence of secondary meaning.[280] This change in results, demonstrates that Dr. Cunningham's secondary meaning survey is fatally flawed and that there is a large majority of customers and potential customers who purchase hamburgers/cheeseburgers at quick-service restaurants that do not associate the INO Trade Dress with one source.

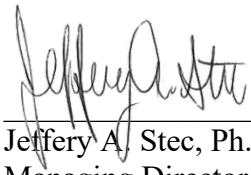
IX. Conclusions

Based on my review of Dr. Cunningham's Expert Reports and the surveys conducted by Dr. Cunningham, I have determined that her studies suffer from numerous and severe flaws, which I have identified throughout this report. Due to these flaws, the conclusions that Dr. Cunningham draws from the results of these surveys are unsupported and unreliable. The rebuttal surveys I conducted indicate the impact these flaws had on Dr. Cunningham's survey results for both the likelihood of confusion survey and the secondary meaning survey.

[277] *See* Exhibit 12.0.
[278] *See* Exhibit 12.0.
[279] 45.946% – 30.992% = 14.954%. *See* Exhibit 12.0.
[280] *See* Exhibit 12.0.

Based on the rebuttal surveys I conducted, which corrected for flaws I identified in Dr. Cunningham's surveys, DNB has not used the INO Trade Dress in a manner that is likely to cause confusion, mistake, or deception among customers and/or potential customers as to the source, sponsorship or approval, or affiliation or connection of the Doll n' Burgers restaurant; and, the INO Trade Dress has not gained secondary meaning among customers and/or potential customers of hamburgers/cheeseburgers in the United States.

Respectfully submitted:



Jeffery A. Stec, Ph.D.
Managing Director
Berkeley Research Group
June 1, 2021

Exhibit 1

JEFFERY A. STEC, Ph.D.
BERKELEY RESEARCH GROUP, LLC
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Direct: **312.429.7970**
jstec@thinkbrg.com

As a Managing Director, leader of Berkeley Research Group's Intellectual Property Practice, and co-leader of its Economics and Damages Community, Dr. Stec has worked extensively over the last 17 years in the areas of antitrust, finance, intellectual property, and survey research, both as a consulting expert and as an expert witness. His engagements typically involve the application of economic, financial, statistical, and survey research theory and methodology to the collection and analysis of data to evaluate the economic impact of decisions made by consumers and firms.

In the area of intellectual property, Dr. Stec has conducted economic and econometric analyses to determine the value of intellectual property as well as the amount of economic damages resulting from patent, trademark, trade secret, or copyright infringement. In his work, he has addressed economic issues such as the appropriate measurement of revenues associated with the use of the infringing IP, the portion of those revenues that can be attributed to the intellectual property, and whether the apportionment can be regarded as reasonable. He has evaluated economic and survey research issues in the context of Section 337 investigations conducted by the U.S. International Trade Commission. In addition, he has also evaluated the effects of anticompetitive conduct as it relates to the use of IP. In the context of trademarks and trade dress, he has evaluated issues of secondary meaning, genericness, dilution, and likelihood of confusion. Dr. Stec has also determined economic damages that have resulted from false advertising and counterfeit claims.

In the area of survey research, Dr. Stec has both created and critically evaluated surveys in the context of antitrust and intellectual property engagements. He has developed complex sample designs, designed survey questionnaires, and collected and analyzed survey data, including the derivation of complex variance estimates using simulation methods. He has conducted surveys that have been used to determine consumers' perceptions and actions in the marketplace, including whether products' names or trade dress are distinctive, confusing, or generic. Dr. Stec has also examined how products are used in the marketplace and how consumers value product features. Dr. Stec has consulted on best survey practices for the design, collection, and analysis of survey data.

In the area of antitrust, Dr. Stec has used economic and econometric analyses to investigate issues related to market definition, determination of market power or market dominance, and the effect of anticompetitive acts on competition. Some of these investigations include the effects of anticompetitive acts in the context of Sherman, Clayton, and Robinson-Patman Act claims dealing with abuse of market power as well as the use of various horizontal and vertical restraints, like price fixing, price discrimination, refusals to deal, exclusive dealing arrangements, and tying, on individual firms or members of a class.

In the area of finance, Dr. Stec has used financial theory and econometrics to conduct analyses to determine asset values and shareholder loss in the context of securities fraud and late trading claims. These analyses have included the use of various loss causation and event study paradigms as well as trading simulation studies. Dr. Stec has examined claims of financial lending discrimination, which included investigations of the likelihood of discrimination and the potential damages caused by that

discrimination. Dr. Stec has also used financial theory to determine damages in commercial contract disputes and product liability litigation.

Engagements Dr. Stec has worked on have dealt with the semiconductor and semiconductor design, computer software and hardware, consumer products, pharmaceuticals, telecommunications, handheld mobile devices, paper products, casino gaming, consumer appliances, automated pharmacy systems, consumer electronics, automobiles, heavy haul truck trailers, textile machine, precious stones, fashion apparel and luxury accessories, outdoor lighting, vehicle parts, medical products, hardware, product packaging, toys, entertainment, food, mass media, plastics, pallet, television ratings, financial securities and loans, alcohol, tobacco, sugar, sweetener, and tradeshow industries, among others.

Prior to joining Berkeley Research Group, Dr. Stec had been engaged as a Vice President in economic and survey research consulting with another economic consulting firm. Prior to that, he has analyzed the credit card industry in detail, including co-authoring monthly state and national surveys to gauge consumers' credit card and overall indebtedness. He also helped to design numerous telephone, mail, and internet surveys for various clients. His responsibilities included everything from sample and questionnaire design to data collection methods and statistical analyses of survey data. He has performed econometric studies and written on various economic and survey research topics such as, optimal forecasting methods using time- series data, the effects of unit nonresponse on survey data, efficient methods for conducting telephone surveys, and methods for gauging the degree of consumer indebtedness using original survey data.

Dr. Stec has presented his research at the annual meetings of the American Statistical Association, the American Association of Public Opinion Research, the Midwest Association of Public Opinion Research, the Ohio Association of Economists and Political Scientists, the Midwest Macroeconomics Association, and the Columbus Association of Business Economists as well as in numerous presentations as a guest lecturer and presenter for CLE courses. He has also published his work in the American Statistical Association's Proceedings of the Section on Survey Research Methods and Proceedings of the Section on Government Statistics and Section on Social Statistics. Dr. Stec also contributed and served as a member of the advisory board for the *Encyclopedia of Survey Research Methods*. He has also written the chapter on the use of surveys in litigation published in the *Litigation Services Handbook*.

EDUCATION

Ph.D., Economics	The Ohio State University, 2000
M.A., Economics	The Ohio State University, 1995
B.A., Economics, Math Minor	The University of Illinois – Chicago, 1994
B.A., Philosophy, Psychology	Cornell University, 1991

PROFESSIONAL EXPERIENCE

2004-2017	*Vice President*, Intellectual Property, Charles River Associates
2000-2004	*Director*, Intellectual Property, InteCap, Inc.

SELECTED EXPERIENCE

Intellectual Property

Developed economic models to determine damages due to infringement of patents held by a large paper products company. Included a determination of the damages due to the plaintiff's loss of distribution for its patented products due to the infringement of the defendant. Developed a lost distribution model to quantify the amount of distribution lost and the value of that distribution in terms of lost sales to the plaintiff. Additionally, it included the development of a lost profits, market share based model that quantified the lost profits due to lost customers' sales.

Provided expert testimony in a patent infringement litigation in the plastic product manufacturing industry. Determined the percentage of accused products that infringed a number of patents by developing and conducting a multi-stage probability sample of the relevant plastic packaged products. Responsibilities included sample design, overseeing data collection, and data analysis using advanced statistical methods.

Developed economic models to determine damages suffered by a manufacturer of pharmaceutical products as a result of infringement of a number of patents. Studied the market for the patented product, evaluated the substitutability of potentially competing products, and determined sales and profits lost by the patent holder. Constructed and queried a large product database to determine which products infringed which of the many patents-in-suit. Developed analyses of a reasonable royalty under a hypothetical licensing agreement and the effect of the infringing product on the price in the marketplace. Evaluated an econometric market expansion theory proposed by the counterparty.

Developed economic models to determine damages suffered by a manufacturer of semiconductor devices as a result of a competitor's infringement of numerous patents. Determined the profits the plaintiff lost due to price erosion and a determination of reasonable royalties on infringing sales. Constructed a sophisticated econometric model using a large dataset of sales, prices, and other variables that estimated the price elasticity of demand for the relevant product and geographic markets.

Provided expert testimony in a trademark infringement litigation in the children's toy industry. Determined whether survey data were appropriately collected and analyzed in the evaluation of secondary meaning to a mark. Evaluated the survey methodology used by the counterparty to determine whether secondary meaning had accrued to the mark.

Constructed and queried a large proprietary database of regional oil and gas prices to determine differences in branded and generic prices for the purposes of determining the value of a gasoline trademark. Included filtering of the database to examine price differences for various grades of gasoline, various regions of operation, and various time periods

Provided expert testimony in a trademark infringement litigation in the wine industry. Determined whether survey data were appropriately collected and analyzed in the context of likelihood of confusion between two marks. Evaluated the survey methodology used by the counterparty to determine whether there was survey evidence of the likelihood of confusion between the marks.

Developed economic models to determine damages suffered by a manufacturer of coronary medical devices as a result of a competitor's infringement of numerous patents. Developed lost profits and reasonable royalty models addressing issues such as market definition, product pricing in the absence of infringement, market size and competitors' market share in the absence of infringement, and

determination of incremental costs. Developed sophisticated econometric models to address these issues.

Provided expert testimony in a theft of trade secrets in the investor relations services and technology industry. Determined expected client longevity in the absence of the theft of trade secrets taking into account client-specific characteristics using multivariate statistical models that also accounted for the censored nature of the underlying data. Developed damages models using the expected client longevity and the actual client longevity to determine the impact of the alleged theft of trade secrets.

Developed economic models to determine damages suffered by a consumer goods manufacturer as a result of counterfeit sales being made by various retailers. Determined the profits the plaintiff lost due to price erosion in the relevant product and geographic markets. Developed econometric models to determine the price elasticity of demand for the impacted consumer goods.

Developed economic models to determine damages suffered by inventors of children's consumer products as a result of infringement of a number of patents. Evaluated the product and geographic markets for the patented product; valued the patented technology, including the determination of the impact of the use of the patented technology on the infringer's sales and profits and the costs to design around the infringed technology; and determined the impact various other factors would have on the royalty rate that might be negotiated by both parties.

Developed economic models to determine damages suffered by a manufacturer of gene sequencing and analysis products as a result of infringement of a number of patents. Studied the markets for the patented product, evaluated the substitutability of potentially competing products made by various manufacturers, and valued the patented technology from both parties' perspectives. Constructed and queried a large product database to determine which products infringed which patents-in-suit and the revenues associated with those products.

Provided expert testimony in a patent infringement matter related to antitrust counterclaims in the centralized hospital pharmacy automation systems market. Conducted analyses to determine the relevant product and geographic markets. Evaluated whether the counterparty had market power in the relevant markets. Examined alleged anticompetitive acts to determine the economic impact of these acts. Determined economic damages these anticompetitive acts had on the claimant.

Provided expert testimony in a trademark infringement litigation in the low-bed, heavy haul trailer industry. Designed sampling approach and survey instrument used to collect data. Analyzed data collected from the survey in the context of whether secondary meaning could be attached to the trademark at issue.

Provided expert testimony in a trademark infringement litigation in the clothing fashion industry. Evaluated the market definition methodology used by the opposing expert and determined the appropriate definition of the relevant market. Evaluated the survey methodology used by the counterparty to determine whether there was survey evidence of the likelihood of confusion between the marks. Determined whether survey data were appropriately collected and analyzed to determine the likelihood of confusion. Evaluated whether damages occurred to the defendant due to the likelihood of reverse confusion.

Developed economic analyses to determine the appropriate royalty rate for a compulsory license which would give the infringing party the ability to continue to make and sell medical devices after a jury found infringement. Examined the patented technology's benefits to the infringer and the maximum it would be willing to pay for its use. Examined the benefits of the patented technology to the infringed party and the minimum it would be willing to accept for its use.

Provided expert testimony in a trademark infringement litigation in the antibiotic ointment industry. Evaluated the survey methodology used by the counterparty to determine whether there was survey evidence that secondary meaning had been established for the trademark. Determined whether survey data were appropriately collected and analyzed to determine secondary meaning. Evaluated the appropriateness of using the survey data collected for the purposes of determining whether dilution to the trademark had occurred.

Developed economic models to determine damages suffered by a manufacturer of outdoor security lighting products as a result of patent infringement. Defined the markets for the patented product and the relevant substitutes for that product. Established the likelihood that lost sales due to the counterparty's infringement of the patent. Determined the value of the patented technology to both parties in generating product sales.

Provided expert testimony in a patent infringement litigation in the handheld mobile computing devices industry for the purposes of a preliminary injunction. Defined the relevant market for the alleged infringing products. Determined the competitive effect that the accused products would have on the counterparty's sales and product prices. Evaluated the likelihood that the plaintiff would be irreparable harmed by the alleged patent infringement. Evaluated the counterparty's opinions as to the effects on its sales and prices of the alleged infringement.

Conducted survey research in a trademark infringement litigation in the student information systems software industry. Designed the survey questionnaire and sampling approach used to collect data. Analyzed data collected from the survey in the context of whether secondary meaning could be attached to the trademark at issue.

Provided expert testimony in a patent infringement litigation in the hydraulic disc bicycle brake industry. Conducted analyses to determine the relevant market. Evaluated claims of lost profits, price erosion, and reasonable royalties. Developed analyses to determine demand for the patented feature of the products as well as economic damages due to patent infringement.

Provided expert testimony in a patent infringement litigation in the medical products industry. Evaluated the product market for the patented product to determine demand for and the value of the patented technology. Determined the costs to design around the infringed technology and determined the impact various other factors would have on the royalty rate that might be negotiated by both parties.

Provided expert testimony in a copyright infringement litigation in the software industry. Determined the relevant market in which the software was used. Developed analyses to determine the foregone profits due to the illegal use of the copyrighted software as well as the unjust enrichment for that use.

Developed economic and survey research analyses to evaluate damages claims associated with alleged violations of the Lanham Act concerning false advertising in clothes dryer industry. Evaluated whether the alleged false advertising had an adverse impact on the sales and prices of the counterparty's clothes dryers. Evaluated whether the alleged false advertising had a favorable impact on the accused party's clothes dryers.

Provided expert testimony in a patent infringement litigation in the farm machinery industry. Oversaw the sampling and collection of data from the use of the alleged infringing machines as well as non-infringing alternatives. Conducted advanced statistical tests to determine whether various configurations of the farm machinery produced statistical different measures of performance. Evaluated the statistical methodology used by the counterparty's expert.

Provided expert testimony in patent infringement matter in the medical products industry. Studied the markets for the patented product and evaluated the substitutability of potentially competing products made by various manufacturers to determine the relevant market. Developed economic models to value the patented technology from both parties' perspectives in order to determine damages suffered by the plaintiff. Evaluated the opposing expert's damages opinions attributed to the counterparty's alleged infringement.

Conducted industry research and developed economic models to determine the value of a portfolio of patents in the gene sequencing industry. Provided information on the possible ways in which the patents could be monetized to provide value to the client.

Provided expert testimony in a patent infringement litigation in the compact digital camera industry. Evaluated the survey methodology used by the counterparty's expert to determine the value of the patented features in the accused products. Determined whether the survey and sampling design were appropriately constructed. Examined whether the survey data were appropriately collected and analyzed to determine the value of the patented features.

Conducted survey research in a copyright infringement litigation in the outdoor wind sculpture industry. Designed the survey questionnaire and sampling approach used to collect data. Analyzed data collected from the survey to evaluate whether the protected work and the accused work were substantially similar from the viewpoint of an ordinary observer.

Provided expert testimony in a patent infringement investigation in the video analytics software industry. Evaluated the counterparty's claims regarding the economic prong of the domestic industry requirement. Determined the amount of the bond associated with the Presidential review period.

Provided expert testimony in a patent infringement investigation in the vehicle windshield wiper blade industry. Analyzed financial and industry information to evaluate whether a domestic industry had been established by the Complainant. Conducted analyses to evaluate the appropriateness of an exclusion order, cease-and-desist order, and the appropriate amount of the bond associated with the Presidential review period. Evaluated the counterparty's claims regarding the economic prong of the domestic industry requirement.

Conducted survey research in a trademark infringement litigation in the retirement home industry. Designed the survey questionnaire and sampling approach used to collect data. Analyzed data collected from the survey in the context of whether there was the likelihood of confusion between the trademarks at issue.

Developed economic analyses to determine whether there was evidence of commercial success for a pharmaceutical product in its relevant market. Examined the financial information for the pharmaceutical product as well as discounted profitability of the product relative to the investments undertaken to bring the product to market. Evaluated the counterparty's claims regarding commercial success.

Conducted survey research in a trademark infringement litigation in the coffee maker industry. Designed sampling approach and survey instrument used to collect data. Analyzed data collected from the survey in the context of whether secondary meaning could be attached to the trademark at issue.

Conducted industry research, evaluated economic models, and developed licensing strategy to assist the valuation and licensing of patented technology and trade secrets in the steel-making industry. Provided information on the possible ways in which the technology could be licensed and provided strategic advice on how to set up the licensing agreement.

Developed economic analyses to determine whether there was evidence of commercial success for a pharmaceutical product in its relevant market. Determined the relevant market for the product. Examined the financial information for the pharmaceutical product as well as the market presence of the product. Accounted for relevant macroeconomic, industry, and company-specific factors in examining the pharmaceutical product's performance.

Provided expert testimony in a patent infringement litigation in the commercial bakery tray industry. Conducted analyses to determine the relevant market. Determined economic damages due to lost profits on lost sales, price erosion, and reasonable royalties.

Provided expert testimony in a patent infringement investigation in the smartphone, tablet, and other wireless devices industries. Analyzed the relevant markets to evaluate whether harm to public interest was likely to occur if the Commission was to grant the Complainant an exclusion order. Evaluated the counterparties' claims regarding potential harm to public interest under the proposed exclusion order.

Provided expert testimony in a trademark infringement litigation in the tool industry. Evaluated the survey methodology used by the counterparty to determine whether there was survey evidence of secondary meaning related to the trade dress of the tools. Also evaluated whether there was a likelihood of confusion in the marketplace between the asserted trade dress and the accused trade dress.

Conducted survey research in a trademark and trade dress infringement litigation in the office supplies industry. Designed sampling approach and survey instrument used to collect data. Analyzed data collected from the survey in the context of whether there was a likelihood of confusion in the marketplace between the protected trademark and trade dress and the accused trademark and trade dress.

Provided expert testimony in patent infringement litigations in the software industry. Designed sampling approach and survey instrument used to collect data. Analyzed data collected from the survey in the context of the usage, importance, and purchasing drivers of various software features. Evaluated the counterparty's claims regarding various software features.

Provided expert testimony in a trademark infringement litigation in the vegetable produce industry. Evaluated the survey methodology used by the counterparty to determine whether there was survey evidence of a likelihood of confusion between the asserted trademark and the accused trademark. Determined whether survey data were appropriately collected and analyzed to determine likelihood of confusion.

Conducted survey research in a patent infringement litigation in the smartphone, tablet, MP3 player, and computer industries. Designed sampling approach, experimental design, and survey instrument used to collect data. Analyzed data collected from the survey in the context of the usage, importance, and willingness to pay for various product features.

Provided expert testimony in a patent infringement litigation in the medical products industry for the purposes of a preliminary injunction. Defined the relevant market for the alleged infringing products. Determined the competitive effect that the accused products would have on the counterparty's sales and product prices. Evaluated potential damages claims and the defendant's ability to pay these claims. Evaluated the likelihood that the plaintiff would be irreparable harmed by the alleged patent infringement. Evaluated the counterparty's opinions as to the effects on its sales and prices of the alleged infringement.

Provided expert testimony in a patent infringement litigation in the smartphone industry. Evaluated the survey methodology used by the counterparty to determine the usage of, importance of, and willingness to pay for the alleged patented smartphone features.

Conducted survey research and econometric analyses in a patent infringement litigation in the digital content management industry. Evaluated the counterparty's survey research in the context of the willingness to pay for various product features.

Provided expert testimony in a patent infringement arbitration in the smartphone industry. Conducted economic analyses to determine the appropriate balancing royalty payment for a cross license to each party's respective patent portfolios, which included patents, divested patents, and standard essential patents. Evaluated the counterparty's opinions as to balancing royalty payment.

Conducted survey research in a trade dress matter in the clothing industry. Designed sampling approach and survey instrument used to collect data. Analyzed data collected from the survey in the context of whether there was secondary meaning associated with the asserted trade dress.

Conducted survey research in a trade dress matter in the baked goods industry. Designed sampling approach and survey instrument used to collect data. Analyzed data collected from the survey in the context of whether there was likelihood of confusion between the asserted trade dress and the allegedly infringing trade dress.

Provided expert testimony in patent infringement matter in the automotive industry. Evaluated the markets for the patented product as well as licensing practices in the industry. Developed economic models to value the patented technology from both parties' perspectives in order to determine damages suffered by the plaintiff. Evaluated the opposing expert's damages opinions attributed to the counterparty's alleged infringement.

Provided expert testimony in a patent infringement litigation in the disposable training pants industry. Evaluated the counterparty's survey research in the context of the usage, importance, and willingness to pay for various product features. Evaluated the counterparty's damages claim as it related to the use of the counterparty's survey evidence.

Provided expert testimony in a Lanham Act matter concerning false advertising in the mattress industry. Developed financial and econometric models to determine to what extent, if any, the alleged false advertising had on the plaintiff's sales and profits. Incorporated these models into a determination of the appropriate damages due to the alleged false advertising.

Provided expert testimony in a trademark infringement investigation in the shoe industry. Evaluated the survey methodology used by the counterparty to determine whether there was a likelihood of confusion in the marketplace between the asserted trade dress and the accused trade dress.

Provided expert testimony in a patent infringement litigation in the server software industry. Evaluated the counterparty's survey research in the context of the usage of various product features. Evaluated the counterparty's damages claim as it related to the use of the counterparty's survey evidence to apportion the royalty base and set the royalty rate.

Provided expert testimony in a patent infringement litigation in the camera industry. Designed sampling approach and survey instrument used to collect data. Analyzed data collected from the survey in the context of the usage and relative importance of various camera features. Evaluated the counterparty's claims regarding various software features.

Conducted survey research and developed economic analyses to evaluate claims associated with alleged false advertising in food industry. Evaluated whether the alleged false advertising had an adverse impact on the demand for the relevant food product.

Provided expert testimony in a trademark infringement investigation in the digital media content software industry. Evaluated the survey methodology used by the counterparty to determine whether there was a likelihood of confusion in the marketplace between the asserted trade dress and the accused trade dress.

Conducted survey research to evaluate claims associated with alleged false advertising in healthcare industry. Designed sampling approach and survey instrument used to collect data. Analyzed data collected from the survey to determine whether there was an impact to the false advertising.

Provided expert testimony in a patent infringement litigation in the telematics devices industry. Designed sampling approach and survey instrument used to collect data. Analyzed data collected from the survey in the context of the usage and relative importance of various telematics devices features.

Provided expert testimony in a trademark infringement litigation in the consumer lighting products industry. Conducted survey research to determine whether there was a likelihood of confusion in the marketplace between the asserted trademarks and trade dress and the accused trademarks and trade dress.

Provided expert testimony in a false advertising litigation in the pharmaceutical industry. Conducted econometric analyses that were used to determine whether the plaintiff incurred damages due to the alleged false advertising. Evaluated the counterparty's counterclaims regarding false advertising damages.

Provided expert testimony in a patent infringement matter in the automobile industry. Determined the value that could be associated with the alleged use of the patented technology in one component of a multicomponent product and the damages associated with that alleged use. Evaluated the counterparty's damages claims regarding patent infringement damages.

Provided expert testimony in a trademark infringement litigation in the video and audio editing software industry. Evaluated the survey methodology used by the counterparty to determine whether there was a likelihood of confusion in the marketplace between the asserted trademark and trade dress and the accused trademark and trade dress.

Provided expert testimony in multiple litigation related to alleged misrepresentations made in violation of the Lanham Act in the security services industry. Evaluated the surveys conducted by the counterparty's survey expert regarding the impact of the alleged misrepresentations on current consumers' decisions of which security services to retain. Evaluated counterparty's damages claims and methodology regarding the number of customers lost due to the alleged misrepresentations and the value of those customers' accounts.

Provided expert testimony in a patent infringement litigation in the home video game industry. Evaluated the counterparty's survey research in the context of the usage and value of various product features. Evaluated the counterparty's damages claim as it related to the use of the counterparty's survey evidence to apportion the royalty base and set the royalty rate.

Provided expert testimony in multiple patent infringement litigation dealing with an Abbreviated New Drug Application. Developed economic analyses to determine whether there was evidence of commercial success for a pharmaceutical product in its relevant market. Determined the relevant market for the product. Examined the financial information for the pharmaceutical product as well as the market presence of the product. Accounted for relevant macroeconomic, industry, and company-specific factors in examining the pharmaceutical product's performance.

Provided expert testimony in a trademark and copyright litigation in the entertainment industry. Conducted analyses to determine the value of the asserted intellectual property and the likely structure of a hypothetical license. Evaluated the counterparty's claims regarding trademark and copyright damages.

Provided expert testimony in a trademark infringement litigation in the automotive tire industry. Conducted survey research to determine whether there was secondary meaning associated with the asserted trade dress as well as whether there was a likelihood of confusion in the marketplace between the asserted trade dress and the accused trade dress.

Provided expert testimony in a trademark infringement litigation in the sporting goods industry. Conducted survey research to determine whether there was a likelihood of confusion in the marketplace between the asserted trademark and the accused trademark.

Provided expert testimony in a copyright royalty matter involving the distribution of a royalty pool amongst various claimants. Conducted economic analyses to determine the appropriate methodology to employ to allocate royalty payments to the claimants.

Antitrust

Developed economic analyses addressing liability and damage issues in a litigation involving claims of Robinson-Patman antitrust violations. Analyzed the economic impact of alleged price discrimination on the sales of the plaintiff using a very large database of sales transactions on a weekly basis for every cigarette retailer in the continental U.S. over a seven-year period. Developed sophisticated econometric models to quantify the amount of the economic impact. Reviewed financial and sales records to assess the impact on profits of alleged lost sales due to pricing decisions based on the higher costs.

Prepared economics analyses pertaining to the market structure, conduct, and performance for the rapid prototyping machine market. Conducted an economic analysis to determine the appropriate antitrust market. Determined the amount of market power that certain market participants had in the marketplace. Determined the effects to competition in the defined market of anticompetitive acts committed by the counterparty.

Provided expert testimony relating to the processed sugar industry which addressed whether events in that industry could have led to lost business opportunities for a firm in that industry. Conducted economic analyses to determine the appropriate market for the products at issue. Examined events in the industry and conducted industry research to determine the effects of industry events on business opportunities for that firm.

Developed economic analyses and conducted economic research to determine whether a large semiconductor manufacturer had a position of dominance in the relevant market for microprocessors. Analyzed the demand-side and supply-side substitution possibilities in the context of the determination of the relevant market. Analyzed innovation and competition in the industry to address the issue of dominance.

Developed analyses to address issues of class certification in a litigation dealing with claims of anticompetitive conduct in the wooden pallet industry. Addressed plaintiffs' proposed survey research, used to estimate damages, by examining their survey methodology using a total survey error approach.

Developed economic and econometric analyses and conducted economic research to determine whether collusive behavior took place among a group of large manufacturers against a class of downstream customers in the containerboard market. Analyzed the economics underlying the business and financial decision made in the operations of the manufacturing business.

Conducted survey research to determine what products and services are likely part of the relevant market for the purposes of determining substitutes for the products and services of two firms intending to merge their businesses into one firm.

General Consulting and Litigation

Evaluated the damages suffered by a domestic manufacturer of orthopedic products as a result of a breach of best efforts clause by one of its foreign distributors. Reviewed financial and market data to gauge the performance of the distributor. Determined the revenues and profits lost by the manufacturer due to the distributor's failure to use its best efforts. Included an analysis of the value of returned inventory by the distributor to the manufacturer.

Evaluated the damages suffered by a domestic manufacturer of orthopedic products as a result of a breach of its contract with one of its domestic distributors. Reviewed financial and market data to gauge the performance of the distributor. Evaluated the use of mortality tables in the context of the plaintiff's expert report. Developed sophisticated NPV models that determined the revenues and profits lost by the distributor due to the breach of contract.

Provided consulting expertise to assist a large data collection and media ratings company in best practices improvements regarding its telephone survey operations. Conducted research into its current methods for conducting telephone surveys, including analyses of large databases of calling records and outcomes. Developed multivariate statistical models to better forecast calling outcomes and researched improved calling rules to enhance performance.

Provided expert testimony in a breach of contract litigation in which economic analyses were used to determine the loss of members and members' purchases suffered by a large hardware cooperative due to the breach of contract by a large accounting firm. Using large data sets provided by the coop, developed econometric analyses that gauged the economic impact of a large financial loss suffered by the cooperative due to the breach of contract while accounting for unrelated events surrounding the announcement of the loss.

Provided expert testimony in a breach of contract litigation related to software usage and the payment of royalties. Developed analyses that determined the number of licenses for which a software company was not paid a royalty for the use of the licenses. Evaluated the survey data and survey methodology used by the counterparty to determine the extent to which an embedded software program included in a larger software package was invoked.

Provided expert testimony in a breach of contract litigation related to product failure and the loss of business in the auto parts industry. Developed economic analyses to define properly the relevant market, estimate market size, and determine other factors that impacted the plaintiff's business. Evaluated the counterparty's use of product diffusion models to quantify damages due to lost business.

Provided consulting expertise to assist a large data collection and media ratings company in best practices improvements regarding its telephone survey operations. Conducted research of large databases of calling records and outcomes. Developed cost analyses to identify the direct and indirect costs of certain outcomes. Recommended alternative data collection methods and other best practices suggestions to minimize the costs of undesirable outcomes without compromising data quality.

Developed economic analyses to determine damages resulting from a breach of a license agreement between companies in the flat screen television industry. Evaluated counterparty's damages claims of foregone royalties and loss of enterprise value due to the breach.

Provided expert testimony in a litigation related to violations of ballot secrecy in the election of union officials. Developed statistical models to examine voting patterns and voter turnout from the contested elections to evaluate claims that the violation of ballot secrecy impacted election results. Evaluated counterparty's vote reallocation models to determine their reasonableness.

Evaluated the survey conducted by the counterparty's survey expert regarding the product characteristics and specifications that were factors in consumers' purchasing decisions of large, high-end computer servers. Conducted analyses of survey data to determine the importance of certain purchase drivers in the context of consumers' overall decision-making process.

Developed a multi-stage stratified sampling design used to draw samples from a large wholesaler of precious stones for the purposes of valuing the wholesaler's precious stones inventory. Derived formulae for the sample estimates and variances of the sample estimates. Consulted on appropriate sample sizes to obtain desired level of precision for the sample estimates. Programmed the sample design and calculation of sample estimates and variances using statistical software.

Developed economic analyses using multiple, large databases to evaluate competitive relationships between certain trade shows in the trade show industry. Determined whether certain trade shows detracted from the commercial success of other trade shows. Developed a survey and sampling methodology to collect relevant economic data. Developed approaches to determine the amount and degree of competitive overlap across various trade shows.

Provided expert testimony in a litigation related to the alleged devaluation of class members Rewards points due to a change in the customer rewards program. Developed analyses to quantify the economic impact of the program change on class members' points. Evaluated the counterparty's damages claims of economic harm due to the breach of the program agreement.

Provided expert testimony in a litigation related to product liability in an automobile accident. Determined the diminished earning capacity of the injured party using economic and financial models to gauge potential lost earnings and benefits. Evaluated counterparty's damages claims and methodology to determine their reasonableness.

Developed economic analyses based on proprietary data, third-party research, and survey data to determine the amount of economic damages attributable to a larger product failure and product recall in the refrigerator industry. Evaluated the counterparty's analyses and damages claims of the economic harm due to the product failure and recall.

Conducted survey research to evaluate movie theater attendance patterns, reasons for going to movie theaters, the relative importance of these reasons in attending movies, and pricing information for movie theater products. Designed the survey questionnaire and sampling approach. Oversaw the data collection of both internet and in-person surveys. Conducted various statistical survey analyses.

Provided expert testimony in a litigation related to an alleged breach of contract in the commercial parking garage industry. Using advanced statistical models, determined the amount of lost garage parkers due to the alleged breach of contract. Evaluated counterparty's lost garage parker claims and methodology to determine their reasonableness.

Evaluated the survey conducted by a large survey research firm regarding farming methods and subsistence in third world countries in the context of a professional malpractice claim. Conducted analyses of survey methodology and survey data to determine whether the survey conformed to survey best practices and whether the survey likely suffered from bias.

Provided expert testimony in a product liability litigation in the fruit industry. Developed a multi-stage stratified sampling design used to select at random samples of fruit trees from the target population. Oversaw and led the collection of samples to be used by technical experts in their analyses. Derived formulae for the sample estimates and variances of the sample estimates. Consulted on appropriate sample sizes to obtain desired level of precision for the sample estimates.

Finance

Reverse engineered and analyzed an expert's 10(b)-5 damages model surrounding the quantification of financial losses by a class of the company's shareholders. Proposed possible adjustments to the model that would provide a more reliable estimate of damages. Developed a large database and the modeled daily stock prices and trader activity for a five-year period.

Conducted financial analyses of a trader's trading activity where it was alleged the trader late traded into and out of various mutual funds over approximately a three-year period. Constructed a large data base of every S&P futures transaction for approximately a six-year period and a large database of all of the trader's trades. Analyzed the trading activity of the trader using these databases. Developed econometric models based on this analysis to determine to what extent, if any, the trader late traded. Evaluated the econometric models provide by the counterparty alleging late trading.

Conducted and consulted on analyses of traders' and mutual employees trading activities in which simulation of trading activity was done following pre-specified trading rules to determine the total next-day net NAV return and the amount of dilution for trading within a given mutual fund. Analyzed and consulted on the comparison of simulation based on these pre-specified trading rules to litigants' trading activities as well as to baseline simulations where next-day net NAV return and the amount of dilution was determined from trading done on randomly determined trade days.

Provided expert testimony in a malpractice litigation concerning issues related to a company's reorganization of its debts. Conducted and evaluated various analyses, including event studies, to determine the effect information in the proxy statement for a bond offering, as well as other information available at that time, had on the litigant's bond prices.

Provided expert testimony in a bankruptcy litigation involving the valuation of PCS licenses in the wireless telephone industry. Evaluated econometric models used to value the PCS licenses by the counterparty's expert. Examined factors that impacted license value and determined appropriateness of the valuation models.

Conducted economic analyses to determine the likelihood of lending discrimination by a large finance company in the market for consumer automobile loans. Examined and developed large databases that included financing transactions between the large lender and individual borrowers. Developed sophisticated econometric models to determine whether evidence suggested lending decisions were made on the basis of inappropriate consumer characteristics.

Conducted economic analyses of various reasons for the magnitude and change in personal bankruptcy filings used for credit risk management and marketing analytics in the credit card industry. Developed statistical models based on various economic variables to explain and forecast personal bankruptcy filings. Developed forecasts of underlying primitive variables in the overall forecasting models.

Conducted survey research in a litigation in the private equity fund industry. Designed the survey questionnaire and sampling approach used to collect data. Analyzed data collected from the survey to examine investors' decision-making processes and which characteristics of private equity funds influence investors' decisions.

Evaluated the financial models developed by the counterparty's expert to value nuclear power plants and the potential synergies realized by fleet management of nuclear power plants.

PUBLICATIONS AND SPEECHES

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"Apportionment in the Determination of Reasonable Royalties." American Intellectual Property Law Association, Patent Litigation Committee, October 2020.

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"Survey Research in Trademark Cases." Pattishall, McAuliffe, Newbury, Hilliard & Geraldson LLP, March 2016.

"The Use of Surveys in Patent Litigations." Intellectual Property Organization, Damages and Injunctions Committee, December 2015.

"Current Knowledge and Considerations Regarding Survey Refusals: Executive Summary of the AAPOR Task Force Report on Survey Refusals" with David Dutwin, John D. Loft, Jill E. Darling, Allyson L. Holbrook, Timothy P. Johnson, Ronald E. Langley, Paul J. Lavrakas, Kristen Olson, Emilia Peytcheva, Timothy Triplett, and Andrew Zukerberg. *Public Opinion Quarterly*, Volume 79, Number 2, Summer 2015, pp. 411-419.

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"Gaining Efficiencies in Scheduling Callbacks in Large RDD National Surveys" with Paul J. Lavrakas, Charles W. Shuttles, Gail Daily, Tracie Yancey, and Ralph Watkins.

- 2007 American Association of Public Opinion Research Conference, Anaheim, CA, May 2007.
- 2006 Telephone Survey Methodology Conference II, Miami, FL, January 2006.
- 2005 American Association for Public Opinion Research Annual Meeting, Miami, FL, May 2005.
- 2004 American Statistical Association Annual Meeting, Toronto, Ontario, August 2004.

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PROFESSIONAL AFFILIATIONS

American Economic Association	American Finance Association
International Trademark Association	American Association of Public Opinion Research
Intellectual Property Owners Association	Licensing Executives Society

Exhibit 2

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PREVIOUS TESTIMONY

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Lucky Brand Dungarees, Inc. and Liz Claiborne, Inc. v Ally Apparel Resources LLC d/b/a Get Lucky, Key Apparel Resources, Ltd., Marcel Fashion Group, Inc. and Ezra Mizrachi. Civil Action No. 05 CV 6757-LTS. United States District Court – Southern District of New York, Rebuttal Expert Report, Deposition Testimony.

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