

In-N-Out Trade Dress Dispute: Court Finds Alleged Flaws in Survey Evidence a “Nothing Burger”

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by J. Michael Keyes

A burger brouhaha involving the Lanham Act is well underway in the Wolverine state. Plaintiff In-N-Out Burgers operates hundreds of fast food joints in the West. Defendant Doll n’ Burger recently opened two locations in Michigan. In-N-Out filed suit in Michigan alleging that Doll n’ Burger is infringing In-N-Out’s registered and unregistered trade dress.

Both sides retained consumer survey experts, both sides lobbed multiple critiques at their opponent’s surveys, and both sides sought to “*Daubert*” the other side’s expert. Doll n’ Burger requested a jury “for all jury-triable claims,” and so the Court might be expected to take a close look at alleged flaws in the respective surveys to avoid admitting evidence that is irrelevant to the issues at hand or that could be more prejudicial to the jury than the purported relevance.

Instead, U.S. District Court Judge Robert Cleland criticized the approach taken in the competing exclusion motions, saying he viewed “both sides’ scattershot approach to discrediting the opposing expert with a degree of suspicion.” Reminding the parties that there is no such thing as a “perfect” survey and that most methodological flaws in a survey bear on the weight rather than the admissibility of the survey, Judge Cleland considered the “legion” of reasons raised by the parties for keeping the experts out, and found that these reasons amounted to a mere nothing burger. While neither side’s expert was shown the door, the myriad issues raised by the parties are worthy of a deeper dive. In this multi-part series, we discuss some of the more salient issues associated with both parties’ survey experts. We start with some of the major critiques leveled at In-N-Out’s secondary meaning survey.

1. Not Testing Every Trade Dress Element. Doll n’ Burger challenged In-N-Out’s expert’s decision to include in the survey stimuli images of the trade dress that did not include all 9 elements of the Plaintiff’s trade dress. The Court rejected this claim because “Defendants cite no case law supporting their implicit proposition that a survey cannot test the ‘overall appearance’ of a retail establishment unless every possible element of the trade dress is visible in the test images.”

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2. Including Other “Indicator of Source” Elements. When testing for secondary meaning of trade dress, it is customary to obscure the “brand and company name and other source-identifying indicia” so that the expert can isolate the trade dress at issue and measure consumer reactions. Doll n’ Burger alleged Plaintiff violated this rule when she failed to remove certain elements in her test stimuli (such as the In-N-Out “Palm Trees”) that also act as an indicator of source. While the Court agreed with the criticism, it determined this methodological flaw would go to the “weight” of the survey and not its “admissibility.”



