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IN-N-OUT BURGERS
14

15 IN THE UNITED STATES DISTRICT COURT
16 FOR THE CENTRAL DISTRICT OF CALIFORNIA

17 IN-N-OUT BURGERS,
18 a California corporation,

19 Plaintiff,

20 v.

21 PUMA NORTH AMERICA, INC.,
22 a Delaware corporation; and
MIKE CHERMAN, an individual,

23 Defendant.
24
25
26
27
28

) Civil Action No. 8:19-cv-00413

)
) **COMPLAINT FOR: (1) FEDERAL**
) **TRADEMARK INFRINGEMENT [15**
) **U.S.C. § 1114]; (2) FEDERAL**
) **TRADEMARK AND TRADE DRESS**
) **INFRINGEMENT AND UNFAIR**
) **COMPETITION [15 U.S.C. § 1125(a)];**
) **(3) CALIFORNIA STATUTORY**
) **TRADEMARK INFRINGEMENT**
) **[Cal. Bus. & Prof. Code § 14245)];**
) **(4) COMMON LAW UNFAIR**
) **COMPETITION; AND**
) **(5) CALIFORNIA STATUTORY**
) **UNFAIR COMPETITION [Cal. Bus.**
) **& Prof. Code §§ 17200 et seq.]**

) **DEMAND FOR JURY TRIAL**
)

1 Plaintiff In-N-Out Burgers (“In-N-Out”) hereby complains of Defendants
 2 Puma North America (“Puma”) and Mike Cherman and alleges as follows:

3 INTRODUCTION

4 1. For more than 70 years, In-N-Out has been operating high quality
 5 quick service restaurants serving primarily hamburgers. Today, In-N-Out is
 6 one of the nation’s top restaurant chains with over 340 locations.

7 2. For at least 28 years, In-N-Out has consistently used a distinctive
 8 and non-functional trade dress consisting of a predominantly white background,
 9 red capital block lettering, one or more red stripes and other red accents, and a
 10 yellow arrow (the “In-N-Out Trade Dress”) embodied in its restaurant décor.
 11 During that same time, In-N-Out has also used its federally registered



16 (“Red and Yellow In-N-Out”) trademarks in connection with its restaurant
 17 services.

18 3. In addition to offering restaurant services, In-N-Out sells apparel
 19 and related accessories in connection with its distinctive In-N-Out Trade Dress
 20 and federally registered Palm Tree and Red and Yellow In-N-Out marks
 21 (collectively “Trademarks and Trade Dress”).

22 4. Puma began selling shoes in February 2019 that were designed in
 23 collaboration with Cherman and bear marks essentially identical to In-N-Out’s
 24 federally registered Palm Tree mark and use design elements confusingly
 25 similar to In-N-Out’s federally registered Red and Yellow In-N-Out mark and
 26 In-N-Out Trade Dress. On February 18 and 20, 2019, In-N-Out wrote to Puma
 27 and demanded that Puma stop its infringement. Puma has thus far been
 28 unwilling to discontinue all of its infringing activities.

5. Puma’s and Cherman’s unauthorized and intentional use of In-N-
 Out’s Trademarks and Trade Dress has already caused confusion in the

1 marketplace, misled the consuming public, and injured In-N-Out by causing
2 consumers to incorrectly believe Puma's products are associated with or
3 authorized by In-N-Out. Moreover, Puma's and Cherman's use of In-N-Out's
4 Trademarks and Trade Dress significantly undermines In-N-Out's longstanding
5 practice of protecting its Trademarks and Trade Dress and limiting their use by
6 third parties. Puma's and Cherman's acts have created a widespread public
7 impression that In-N-Out's Trademarks and Trade Dress are available for use,
8 thus opening the door for other acts of infringement and severely setting back
9 In-N-Out's efforts to protect its brand and goodwill.

10 **JURISDICTION AND VENUE**

11 6. This is a civil action seeking disgorgement of profits, punitive
12 damages, and injunctive relief under federal and California law based upon
13 Puma's and Cherman's willful acts of trademark and trade dress infringement,
14 false designation of origin, and unfair competition.

15 7. This Court has original subject matter jurisdiction over the claims
16 that relate to trademark and trade dress infringement and false designation of
17 origin under 15 U.S.C. §§ 1116 and/or 1121(a) and also pursuant to 28 U.S.C.
18 §§ 1331 and 1338(a) as these claims arise under the laws of the United States.
19 The Court has supplemental jurisdiction over the claims in this Complaint that
20 arise under state statutory and common law pursuant to 28 U.S.C. §§ 1338(b)
21 and 1367(a) because those claims are so related to In-N-Out's federal claims
22 within the Court's original jurisdiction that they form part of the same case or
23 controversy and derive from a common nucleus of operative facts.

24 8. This Court has personal jurisdiction over Puma because Puma has
25 a continuous, systematic, and substantial presence within this Judicial District
26 and within California. Puma operates retail stores throughout California,
27 including in this Judicial District. In addition, by committing acts of trademark
28 and trade dress infringement, false designation of origin, and unfair competition

1 in this Judicial District, including, but not limited to, by using infringing marks
2 and design elements in connection with the advertisement, marketing,
3 promotion, sale, and offer for sale of goods to customers in this Judicial
4 District, Puma's acts form a substantial part of the events or omissions giving
5 rise to In-N-Out's claims.

6 9. This Court has personal jurisdiction over Cherman because
7 Cherman lives within this Judicial District. In addition, by committing acts of
8 trademark and trade dress infringement, false designation of origin, and unfair
9 competition in this Judicial District, including, but not limited to, by using
10 infringing marks and design elements in connection with the design of goods in
11 this Judicial District, Cherman's acts form a substantial part of the events or
12 omissions giving rise to In-N-Out's claims.

13 10. Venue is proper in the Central District of California pursuant to 28
14 U.S.C. § 1391(b) and (c) at least because Cherman is domiciled in this Judicial
15 District, Puma resides in this Judicial District by virtue of being subject to
16 personal jurisdiction within this Judicial District, a substantial portion of the
17 events complained of herein took place in this Judicial District, and the effects
18 of Puma's and Cherman's infringing acts have been felt in this Judicial District,
19 where In-N-Out is located.

20 **THE PARTIES**

21 11. In-N-Out is a California corporation having its principal place of
22 business at 4199 Campus Drive, Irvine, California 92612.

23 12. Puma North America, Inc. is a Delaware corporation, having a
24 principal place of business at 10 Lyberty Way, Westford, Massachusetts 01886.

25 13. Mike Cherman is an individual domiciled in Los Angeles,
26 California.

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IN-N-OUT'S BUSINESS, TRADEMARKS, AND TRADE DRESS

14. Since 1948, In-N-Out has been operating a successful chain of quick-service restaurants specializing in hamburger and cheeseburger sandwiches and other products and services. In-N-Out's first restaurant opened in 1948 and was located in the Los Angeles area. By 1988, In-N-Out had opened 50 restaurants. Now, In-N-Out operates more than 340 restaurants in the United States. Almost all of In-N-Out's restaurants feature a drive thru where customers can order and receive food without leaving their car.

15. Since opening its first restaurant in 1948, In-N-Out has been using a red and white color pattern in connection with its restaurants. In 1954, In-N-Out updated its In-N-Out logo to include a yellow arrow and has been consistently using its red and white color pattern with a yellow arrow since that time. Its restaurants also consistently use yellow letters to emphasize and highlight the yellow arrow component of its logo. In 1986, In-N-Out began using a red palm tree design against a white background in connection with its restaurants and has consistently been using this red palm tree design since then.

16. For 28 years, In-N-Out has consistently used its Trademarks and Trade Dress in connection with its products and services. In-N-Out has consistently used its Trademarks and/or Trade Dress on its storefronts, dining room interior, takeout bags, drink cups, employee uniforms, and French fry trays as shown in the photos below:









17. The In-N-Out Trade Dress is non-functional. The design features embodied by the In-N-Out Trade Dress are not essential to In-N-Out's restaurant services or product packaging, do not make the restaurant services or product packaging cheaper or the product packaging easier to manufacture, and do not affect the quality of In-N-Out's restaurant services or product packaging. The design features of the In-N-Out Trade Dress are not a competitive necessity. The design features of the In-N-Out Trade Dress serve no purpose other than an assurance that In-N-Out is the source of the products and services.

18. Long before Puma's and Cherman's acts complained of herein, In-N-Out has used its Trademarks and Trade Dress on apparel and other items,

1 including, but not limited to, socks, t-shirts, jackets, and mugs. True and
2 correct examples of In-N-Out's apparel and other items bearing its Trademarks
3 or Trade Dress are shown below:






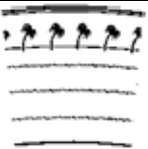
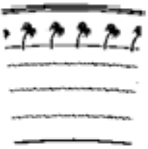
19. In-N-Out has continuously used its Palm Tree mark in connection with apparel, including, for example, socks, t-shirts, jackets, and hats since at

1 least as early as 2015. In-N-Out has continuously used its In-N-Out Trade
 2 Dress and Red and Yellow In-N-Out mark in connection with apparel since at
 3 least as early as 1992. Since 1992, In-N-Out has sold millions of articles of
 4 clothing.

5 20. Clothing items bearing In-N-Out's Trademarks and Trade Dress
 6 are sold through its restaurants, company merchandise store, and its website.


7 21. Although there is a high demand for apparel bearing In-N-Out's
 8 Trademarks and Trade Dress, In-N-Out has not licensed its Trademarks or
 9 Trade Dress for use on third-party apparel.



10 22. Through its widespread use and promotion, In-N-Out has achieved
 11 extensive common law rights in its Palm Tree mark in connection with a wide
 12 variety of goods and services, including apparel. In addition, In-N-Out owns
 13 numerous U.S. Trademark Registrations for its Palm Tree mark in connection
 14 with food products and restaurant services, including the following U.S.
 15 Trademark Registrations:

16 Mark	Reg. No.	Reg. Date	Goods/Services
17  18 Palm tree 19 design	1,935,301	Nov. 14, 1995	Class 29: French fried potatoes for consumption on and off the premises
20  21 Palm tree 22 design	1,507,389	Oct. 4, 1988	Class 30: Milkshakes sold for consumption on or off the premises
23  24 Palm tree 25 design	1,514,036	Nov. 22, 1988	Class 42: Restaurant services

23. Attached hereto as Exhibit A-C are true and correct copies of In-N-Out's trademark and service mark registrations identified in Paragraph 22 of this Complaint, which are incorporated by reference.

24. Through its widespread use and promotion, In-N-Out has achieved extensive common law rights in its Red and Yellow In-N-Out mark in connection with a wide variety of goods and services, including apparel. In addition to its common law rights, In-N-Out owns numerous U.S. Trademark Registrations for its Red and Yellow In-N-Out mark in connection with food products and restaurant services, including the following U.S. Trademark Registrations:

Mark	Reg. No.	Reg. Date	Goods/Services
 (Claiming the colors red and yellow)	1,525,982	Feb. 21, 1989	Class 29: Milk and French fried potatoes for consumption on or off the premises Class 30: Hamburger sandwiches and cheeseburger sandwiches, hot coffee, and milkshakes for consumption on or off the premises Class 32: Lemonade and soft drinks for consumption on or off the premises Class 42: Restaurant services and carry-out restaurant services

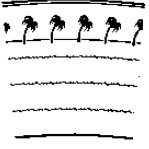
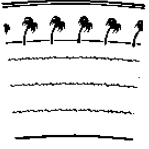
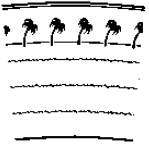
Mark	Reg. No.	Reg. Date	Goods/Services
 (Claiming the colors red and yellow)	1,528,455	Mar. 7, 1989	Class 29: Milk and French fried potatoes for consumption on or off the premises Class 30: Hamburger sandwiches and cheeseburger sandwiches, hot coffee, and milkshakes for consumption on or off the premises Class 32: Lemonade and soft drinks for consumption on or off the premises Class 42: Restaurant services and carry-out restaurant services
 (Claiming the colors red and yellow)	1,516,560	Dec. 13, 1988	Class 29: Milk and French fried potatoes for consumption on or off the premises Class 30: Hamburger sandwiches and cheeseburger sandwiches, hot coffee, and milkshakes for consumption on or off the premises Class 32: Lemonade and soft drinks for consumption on or off the premises Class 42: Restaurant services and carry-out restaurant services

25. Attached hereto as Exhibits D-F are true and correct copies of In-N-Out's trademark registrations identified in Paragraph 24 of this Complaint, which are hereby incorporated by reference.

26. Pursuant to 15 U.S.C. § 1065, In-N-Out's U.S. Trademark Registration Nos. 1,935,301, 1,507,389, 1,514,036, 1,525,982, 1,528,455, and 1,516,560 are incontestable.

27. In-N-Out also owns California trademark and service mark registrations for the Palm Tree mark registered with the California Secretary of

State, including the following California state trademark registrations (“California State Trademark Registrations”):

Mark	CA Reg. No.	Reg. Date	Goods/Services
 Palm tree design	82804	Sept. 26, 1986	Milk shakes
 Palm tree design	28300	Sept. 26, 1986	Restaurant services
 Palm tree design	88825	Nov. 8, 1988	Soft drinks

28. Attached hereto as Exhibits G-I are true and correct copies of In-N-Out’s California state trademark registrations identified in Paragraph 27 of this Complaint, which are hereby incorporated by reference.

29. In-N-Out’s Trademarks and Trade Dress are the subject of substantial and continuous marketing and promotion by In-N-Out. In-N-Out has invested millions of dollars in developing, advertising, and otherwise promoting its Trademarks and Trade Dress.

///

1 30. In-N-Out has amassed tremendous consumer goodwill over the
2 decades. It is an iconic brand, and its products and services have acquired
3 renown and a fiercely devoted fan base throughout the country, including, but
4 not limited to, in its home state of California.

5 31. In-N-Out and its products and services have received significant
6 exposure in national publications. In 2015, Zagat users rated In-N-Out as the
7 favorite chain restaurant in Los Angeles. Also, in 2015, In-N-Out earned the
8 top ranking from consumers for the third year in a row in the Limited-Service
9 category in Nation's Restaurant News' annual Consumer Picks report.

10 32. In 2014, the National Restaurant Association ranked In-N-Out as
11 the nation's top hamburger spot, "head and shoulders above the rest." Also in
12 2014, OC Metro magazine named In-N-Out as the most trustworthy brand in
13 Orange County for the second consecutive year, based on a consumer survey.
14 In 2013, the Quick Service Restaurant (QSR) Benchmark Study rated In-N-Out
15 as "America's Favorite Burger Brand."

16 33. In 2011, Zagat's fast food survey lauded In-N-Out as the number
17 one large quick service chain in the "Top Food" category. In 2010, Consumer
18 Reports ranked In-N-Out as the nation's top burger sandwich chain.

19 34. As a result of the care and skill exercised by In-N-Out in the conduct of
20 its business, the high quality of its products and services offered under its
21 Trademarks and Trade Dress, and the extensive advertising, sale and promotion
22 of In-N-Out's products and services in connection with In-N-Out's Trademarks
23 and Trade Dress, its Trademarks and Trade Dress have acquired great value as
24 designating that In-N-Out is the source of its goods and services. Customers in
25 this Judicial District and elsewhere readily recognize In-N-Out's Trademarks
26 and Trade Dress as distinctive designations of origin of In-N-Out and its
27 products and services. The Trademarks and Trade Dress are intellectual

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1 property assets of enormous value as symbols of In-N-Out and its high quality
2 products, services, reputation and goodwill.

3 **PUMA’S AND CHERMAN’S INFRINGING ACTS**

4 35. Puma sells shoes, shirts, and other apparel in the United States.

5 36. Without permission or consent from In-N-Out, in February 2019,
6 Puma launched two new shoe products called the Cali-0 Drive Thru and
7 California Drive Thru (collectively, “Drive Thru Shoes”) as shown below:



17 **Cali-0 Drive Thru**



27 **California Drive Thru**

1 37. The Cali-0 Drive Thru shoes use marks essentially identical to In-
2 N-Out's federally registered Palm Tree mark and design elements confusingly
3 similar to the Red and Yellow In-N-Out mark and In-N-Out Trade Dress.

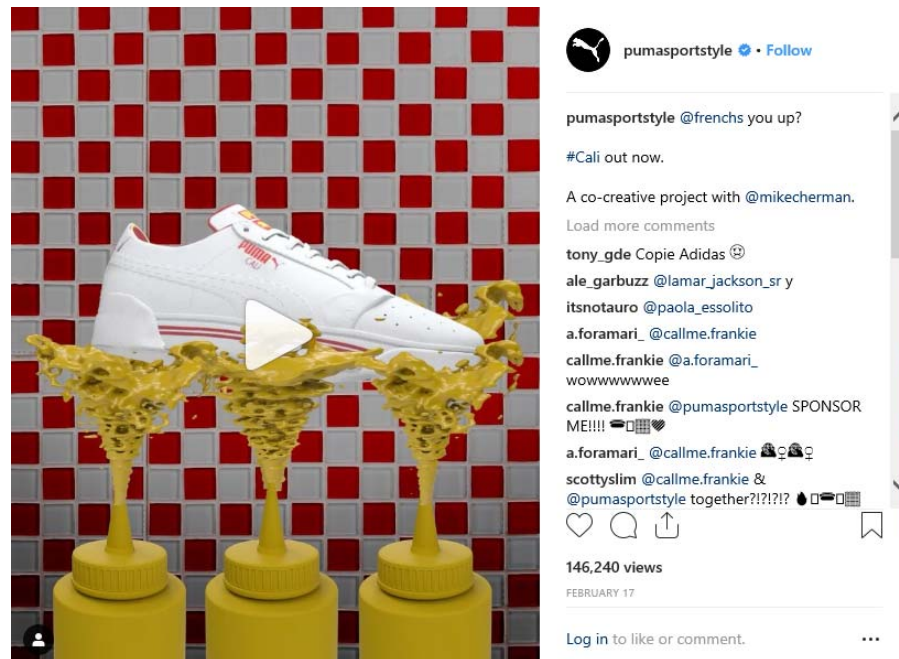


19
20 38. The California Drive Thru shoes use design elements confusingly
21 similar to the Red and Yellow In-N-Out mark and In-N-Out Trade Dress.

22 39. The Drive Thru Shoes also both feature an illustration of a burger
23 inside the shoes as shown below:
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40. Puma has advertised its Drive Thru Shoes on its website, us.puma.com, and its social media accounts, including for example, instagram.com/pumasportstyle. In Puma's description of the California Drive Thru shoe on its website, Puma states that "The California Drive Thru pays homage to this classic style and an essential part of the Cali lifestyle: its burger diners." Puma also attributed the features of the Cali-0 Drive Thru shoes as being related to California's burger diners. Also, when Puma launched the Drive Thru Shoes, it released three burger-themed short videos on its Instagram account to promote the shoes. The following image from Puma's Instagram page shows the California Drive Thru shoes being sprayed with mustard, a common burger condiment:



A true and correct screenshot of Puma's webpage is attached hereto as Exhibit J. A true and correct screenshot of Puma's Instagram page is attached hereto as Exhibit K.

41. On its website, Puma recently provided notice to consumers that the Cali-0 Drive Thru shoes were sold out. A true and correct screenshot of Puma's webpage is attached hereto as Exhibit L.

1 42. Puma is deliberately attempting to associate itself and its products
2 with In-N-Out. Puma has used marks essentially identical to In-N-Out's Palm
3 Tree mark on its Cali-0 Drive Thru shoes and design elements confusingly
4 similar to the In-N-Out Trade Dress and Red and Yellow In-N-Out mark on
5 both the Cali-0 Drive Thru and California Drive Thru shoes.

6 43. Further, almost all of In-N-Out's restaurants feature a drive thru,
7 and Puma named its shoes "Cali-0 Drive Thru" and "California Drive Thru."
8 In-N-Out also started its restaurant chain in California, its highest concentration
9 of its restaurants is in California, and it is widely associated with California
10 culture.

11 44. Also, Puma has marketed and promoted its Drive Thru Shoes in
12 connection with burgers and other items associated with burgers, which is the
13 food product primarily served at In-N-Out's restaurants. The Drive Thru Shoes
14 even feature an image of a burger on the inside of the shoes. Puma has
15 promoted its Drive Thru Shoes as a tribute to "the Cali lifestyle: its burger
16 diners."

17 45. The Cali-0 Drive Thru shoes were designed through a
18 collaboration and partnership between Puma and Cherman, a streetwear
19 designer. Cherman regularly uses elements of other parties' brands, likenesses,
20 and designs in products that he designs. For example, in a recent article,
21 Cherman discussed a past project, where he printed the name of musical artist
22 Frank Ocean above and below Nike's swoosh mark, without either party's
23 permission, on merchandise after the release of Frank Ocean's song "Nike's."
24 In discussing this project, Cherman stated "this is how I can approach design.
25 it can be reactionary. It can be stuff that's out there in the sphere. I can put it
26 together, put it onto a shirt, market it, and we can sell it immediately." A true
27 and correct copy of the article from *Smiles & Cries: Inside the World of*
28 *Chinatown Market*, is attached as Exhibit M. According to the article attached

1 as Exhibit M, Frank Ocean sent a cease and desist letter to Cherman regarding
2 his unauthorized use of the musician's name. Cherman's prior experience with
3 third party intellectual property indicates he has knowledge of such rights, while
4 he still proceeded to design the Drive Thru Shoes to infringe In-N-Out's
5 Trademarks and Trade Dress.

6 46. Puma and Cherman deliberately intended to trade off the popular
7 and positive goodwill associated with In-N-Out and its Trademarks and Trade
8 Dress by displaying features on the Drive Thru Shoes nearly identical to or
9 including the same elements as In-N-Out's Trademarks and Trade Dress.

10 47. In-N-Out is not affiliated in any way with Puma, Cherman, or their
11 Drive Thru Shoes.

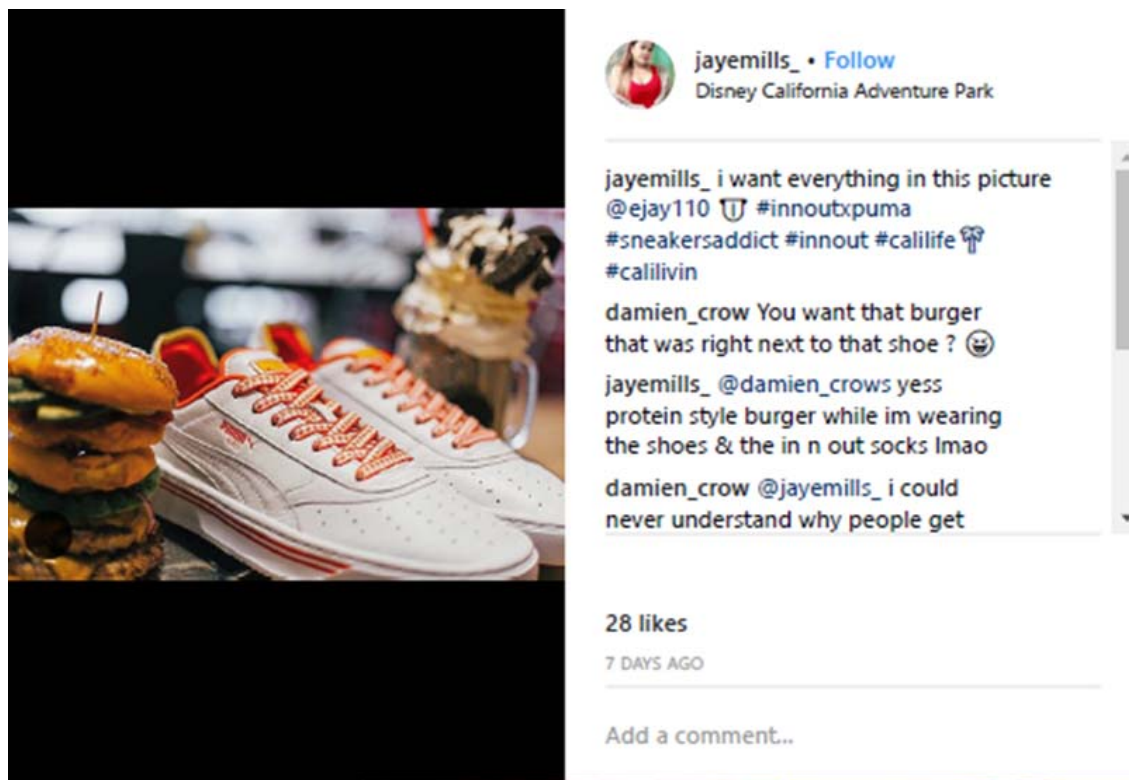
12 48. Without permission, authorization, or consent from In-N-Out,
13 Puma and Cherman have infringed the In-N-Out Trademarks and Trade Dress
14 by designing, making, using, promoting, advertising, selling, and/or offering to
15 sell goods using marks essentially identical to the Palm Tree mark and design
16 elements confusingly similar to the In-N-Out Trade Dress and Red and Yellow
17 In-N-Out mark.

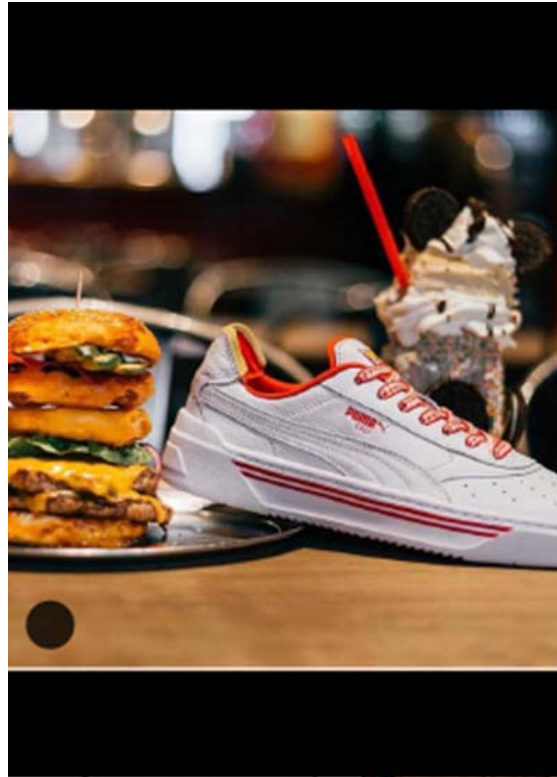
18 49. Indeed, Puma and Cherman have a duty to avoid confusion with
19 In-N-Out and In-N-Out's Trademarks and Trade Dress because Puma entered
20 the market with its Drive Thru Shoes long after In-N-Out. Nevertheless, Puma
21 and Cherman have purposely designed, sold, promoted, marketed, distributed
22 and/or offered their goods in a manner that causes a likelihood of confusion
23 with In-N-Out and its Trademarks and Trade Dress.

24 50. Puma's and Cherman's unauthorized use of In-N-Out's
25 Trademarks and Trade Dress in connection with the design, sale, marketing, and
26 advertising of their Drive Thru Shoes has created actual confusion in the
27 marketplace. Several publications have wrongly reported that In-N-Out
28 collaborated with Puma on the Drive Thru Shoes. For example, *UPROXX*

1 published an article titled “Represent In-N-Out in the Fast Food Wars With This
2 PUMA Collaboration.” In the article, the authors write that “these kicks make
3 use of In-N-Out’s yellow, red, and white color scheme and iconography for a
4 pair of sneakers that is surprisingly subtle, as far as big brand collaborations
5 go.” The article also states that “[t]he shoes are laced up in flat wide white
6 laces and also ship with a special In-N-Out palm tree patterned pair of laces, to
7 really rep your love of the burger chain. In our eyes, the tree-laces really make
8 these a little too brand-thirsty – the colorway screams ‘In-N-Out’ enough
9 already.” This article was also published on *USA News Hub*. *Hollywood*
10 *Unlocked* posted an article titled “PUMA Releases In-N-Out Themed Sneakers
11 & They’re Already Sold Out.” The article describes the shoes as “piping hot
12 In-N-Out inspired kicks.” True and correct copies of articles with such
13 statements are provided in Exhibit N.

14 51. In addition, many consumers have mistakenly believed there is a
15 connection between In-N-Out and the Puma Drive Thru Shoes, when there is
16 not. Examples of instances of actual consumer confusion on social media are
17 shown below:
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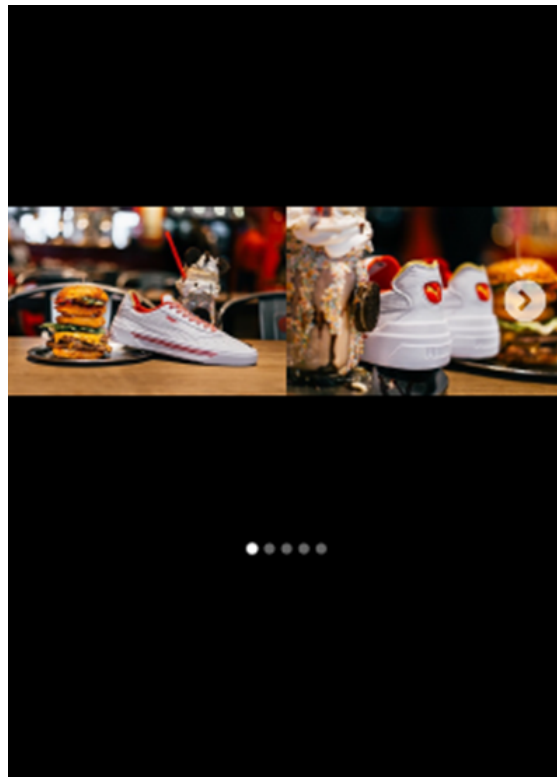
currentscoop • Follow

currentscoop Ummm In-N-Out has a sneaker collab with puma.... and it features the signature red and yellow color combo with palm tree print laces 🌴
I love me some In-N-Out Burger, but is a sneaker collab necessary?? I guess only a fanatic would know 🤔 The white sneaker def goes with that LA vibe tho
<https://www.eater.com/2019/2/18/18229239/in-n-out-sneakers-puma-shoes>
currentscoop #foodie #sneakerhead #innout #lafoodie #currentscoop

9 likes

7 DAYS AGO

Add a comment...



urbbeast • Follow
New York, New York

urbbeast In-N-Out x PUMA Collab.

📷: A few

urbbeast #streetwear #lifestyle #travel #puma #summer #fitness #happy #fashionblogger #ootd #yeezy #gucci #photooftheday #photography #streetstyle #shoes #fashionista #model #picoftheday #love #innout #style #adidas #beauty #cute #art #beautiful #sunreme #nike #fashion



30 likes

7 DAYS AGO

Add a comment...

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52. In addition to the numerous instances of confusion, several publications have commented on the confusing similarity between Puma's and Cherman's Drive Thru Shoes and In-N-Out's Trademarks and Trade Dress. For example, a February 19, 2019 article posted on Food & Wine's website, states "the company appeared to lean heavily on one of California's most iconic fast food chains, In-N-Out" and "the similarities are clear – from the red, yellow, and white color scheme to the row of red palm trees at the base of the laces." The *SF Chronicle* published an article titled "You can now wear In-N-Out on your feet." On February 20, 2019, ABC 7 published an article titled "Puma sneakers appear to be inspired by In-N-Out." True and correct copies of articles with such statements are provided in Exhibit O.

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FIRST CLAIM FOR RELIEF

(Federal Trademark Infringement (15 U.S.C. § 1114))

53. In-N-Out refers to the allegations contained in Paragraphs 1 through 52 above and incorporates them by reference as though fully set forth herein.

54. In-N-Out exclusively owns the federally registered Palm Tree mark and federally registered Red and Yellow In-N-Out mark identified in Paragraphs 22 and 24, which are valid and enforceable.

55. In-N-Out has used the federally registered Palm Tree mark and Red and Yellow In-N-Out mark in interstate commerce in connection with the advertising and promotion of its goods and services.

56. Without authorization or permission, Puma has used in commerce and continues to use in commerce marks and design elements confusingly similar to In-N-Out's Palm Tree and Red and Yellow In-N-Out marks that are the subject of at least In-N-Out's U.S. trademark registrations identified in Paragraphs 22 and 24, in connection with the making, selling, advertising, marketing, and/or promoting of Puma's goods.

57. Puma's unauthorized use of marks and design elements confusingly similar to In-N-Out's federally registered Palm Tree and Red and Yellow In-N-Out marks has caused, and will likely continue to cause, confusion, mistake, or deception in the relevant consumer market.

58. Puma's unauthorized use of marks and design elements confusingly similar to In-N-Out's federally registered Palm Tree and Red and Yellow In-N-Out marks constitutes infringement of federally registered trademarks in violation of 15 U.S.C. § 1114.

59. Puma's acts constitute willful and intentional infringements of In-N-Out's federally registered Palm Tree and Red and Yellow In-N-Out marks, and Puma did so with the intent to trade upon In-N-Out's reputation and

1 goodwill by causing confusion and mistake among customers and the public
2 and to deceive the public into believing that Puma's products are associated
3 with, sponsored by, approved by, and/or originating from In-N-Out, when they
4 are not.

5 60. Puma had actual knowledge of In-N-Out's ownership and prior use
6 of its Palm Tree and Red and Yellow In-N-Out marks, and has willfully
7 violated 15 U.S.C. § 1114.

8 61. Cherman's co-creation of the Drive Thru Shoes materially
9 contributed to Puma's infringing conduct.

10 62. Cherman used marks and design elements in the Drive Thru Shoes
11 confusingly similar to In-N-Out's Palm Tree and Red and Yellow In-N-Out
12 marks.

13 63. Cherman knew that Puma was not authorized to use in commerce
14 marks and design elements confusingly similar to In-N-Out's Palm Tree and
15 Red and Yellow In-N-Out marks in connection with the making, selling,
16 advertising, marketing, and/or promoting of Puma's goods.

17 64. Cherman knew that, based on his design of the Drive Thru shoes,
18 Puma would use in commerce marks and design elements confusingly similar to
19 In-N-Out's Palm Tree and Red and Yellow In-N-Out marks in connection with
20 the making, selling, advertising, marketing, and/or promoting of Puma's goods.

21 65. Cherman's actions constitute contributory infringement.

22 66. In view of Cherman's partnership with Puma, he is vicariously
23 liable for the direct acts of infringement committed by Puma.

24 67. The Defendants have acted in bad faith and/or willfully in using
25 marks and design elements confusingly similar to In-N-Out's Palm Tree and
26 Red and Yellow In-N-Out marks in connection with Puma's products.

27 68. The Defendants' infringing acts have caused and will continue to
28 cause In-N-Out to suffer irreparable injury to its reputation and goodwill. In-N-

1 Out does not have an adequate remedy at law to recover for this harm, and it is
2 therefore entitled to injunctive relief.

3 **SECOND CLAIM FOR RELIEF**

4 **(Trademark Infringement, Trade Dress Infringement, and False**

5 **Designation of Origin (15 U.S.C. § 1125(a))**

6 69. In-N-Out refers to the allegations contained in Paragraphs 1
7 through 68 above and incorporates them by reference as though fully set forth
8 herein.

9 70. As a result of the widespread use and promotion of In-N-Out's
10 Trademarks and Trade Dress, In-N-Out's Trademarks and Trade Dress have
11 acquired strong fame and secondary meaning to consumers and potential
12 consumers, in that consumers and potential consumers have come to associate
13 the Trademarks and Trade Dress with In-N-Out.

14 71. Puma has infringed In-N-Out's Trademarks and Trade Dress, and
15 created a false designation of origin, by using in commerce, without In-N-Out's
16 permission, confusingly similar marks and design elements.

17 72. Puma's unauthorized use of marks and design elements
18 confusingly similar to In-N-Out's Trademarks and Trade Dress in connection
19 with its goods constitutes a false designation of origin, a false or misleading
20 description of fact, and false or misleading representation of fact, and has
21 caused and is likely to cause confusion, mistake, and/or deception as to the
22 affiliation, connection or association of Puma's products with In-N-Out and the
23 origin, sponsorship or approval of Puma's products by In-N-Out.

24 73. The aforesaid acts constitute trademark infringement, trade dress
25 infringement, false designation of origin and unfair competition in violation of
26 15 U.S.C. § 1125(a).

27 74. Puma's acts constitute willful and intentional infringements of In-
28 N-Out's Trademarks and Trade Dress, and Puma did so with the intent to trade

1 upon In-N-Out's reputation and goodwill by causing confusion and mistake
2 among customers and the public and to deceive the public into believing that
3 Puma's products are associated with, sponsored by, approved by, or originating
4 from In-N-Out, when they are not.

5 75. Puma had actual knowledge of In-N-Out's ownership and prior use
6 of In-N-Out's Trademarks and Trade Dress, and without consent of In-N-Out,
7 willfully violated 15 U.S.C. § 1125(a).

8 76. Cherman's co-creation of the Drive Thru Shoes materially
9 contributed to Puma's infringing conduct.

10 77. Cherman used marks and design elements in the design of the
11 Drive Thru Shoes that are confusingly similar to In-N-Out's Trademarks and
12 Trade Dress.

13 78. Cherman knew that Puma was not authorized to use in commerce
14 marks and design elements confusingly similar to In-N-Out's Trademarks and
15 Trade Dress in connection with the making, selling, advertising, marketing,
16 and/or promoting of Puma's goods.

17 79. Cherman knew that based on his design of the Drive Thru shoes,
18 Puma would use in commerce marks and design elements confusingly similar to
19 In-N-Out's Trademarks and Trade Dress in connection with the making, selling,
20 advertising, marketing, and/or promoting of Puma's goods.

21 80. Cherman's actions constitute contributory infringement.

22 81. In view of Cherman's partnership with Puma, he is vicariously
23 liable for the direct acts of infringement committed by Puma.

24 82. The Defendants have acted in bad faith and/or willfully in using
25 marks and design elements confusingly similar to In-N-Out's Trademarks and
26 Trade Dress in connection with Puma's products.

27 83. The Defendants' infringing acts have caused and will continue to
28 cause In-N-Out to suffer irreparable injury to its reputation and goodwill. In-N-

1 Out does not have an adequate remedy at law to recover for this harm, and it is
2 therefore entitled to injunctive relief.

3 **THIRD CLAIM FOR RELIEF**

4 **(Trademark Infringement (Cal. Bus. & Prof. Code § 14245))**

5 84. In-N-Out refers to the allegations contained in Paragraphs 1
6 through 83 above and incorporates them by reference as though fully set forth
7 herein.

8 85. In-N-Out exclusively owns the In-N-Out California State
9 Trademark Registrations, which are valid and enforceable.

10 86. In-N-Out has used the marks shown in the California State
11 Trademark Registrations in California in connection with the advertising and
12 promotion of its goods and services.

13 87. Without consent or authorization, Puma has used and continues to
14 use marks essentially identical to In-N-Out's marks shown in the California
15 State Trademark Registrations in California in connection with its products.

16 88. Puma's unauthorized use of marks essentially identical to In-N-
17 Out's marks shown in the California State Trademark Registrations has caused,
18 and will likely continue to cause, confusion, mistake, or deception in the
19 relevant consumer market.

20 89. Puma's unauthorized use of In-N-Out's marks shown in the
21 California State Trademark Registrations constitutes infringement of state
22 registered trademarks in violation of Cal. Bus. & Prof. Code § 14245.

23 90. Cherman knowingly facilitated, enabled, and assisted Puma to
24 manufacture, use, distribute, display, or sell the Drive Thru Shoes bearing
25 marks essentially identical to In-N-Out's marks shown in the California State
26 Trademark Registrations.

27 91. The Defendants have acted in bad faith and/or willfully in using
28 marks essentially identical to the marks shown in In-N-Out's California State

1 Trademark Registrations in connection with Puma's products.

2 92. The Defendants' infringing acts have caused and will continue to
3 cause In-N-Out to suffer irreparable injury to its reputation and goodwill. In-N-
4 Out does not have an adequate remedy at law to recover for this harm, and is
5 therefore entitled to injunctive relief.

6 **FOURTH CLAIM FOR RELIEF**

7 **(Unfair Competition Under the California Common Law)**

8 93. In-N-Out refers to the allegations contained in Paragraphs 1
9 through 92 above and incorporates them by reference as though fully set forth
10 herein.

11 94. The acts of Puma complained of herein constitute trademark
12 infringement, trade dress infringement, and unfair competition in violation of
13 the common law of the State of California.

14 95. The acts of Cherman complained of herein constitute contributory
15 trademark infringement, contributory trade dress infringement, and unfair
16 competition in violation of the common law of the State of California.

17 96. The Defendants' acts complained of herein have been committed
18 and are being committed with the deliberate purpose and intent of appropriating
19 and trading on In-N-Out's goodwill and reputation, and thereby unfairly
20 competing with In-N-Out in violation of the common law of the State of
21 California.

22 97. The Defendants' actions described herein were taken with
23 substantial certainty that such acts would cause harm to In-N-Out and in
24 conscious disregard for In-N-Out's rights. The Defendants' conduct described
25 herein was done with malice, ill-will and intent to harm In-N-Out, such as to
26 constitute oppression, fraud, malice, and despicable conduct under Cal. Civ.
27 Code § 3294, and thereby entitling In-N-Out to exemplary damages in an
28 amount appropriate to punish and set an example of the Defendants.

1 98. The Defendants have acted in bad faith and/or willfully in using
2 marks and design elements confusingly similar to In-N-Out's Trademarks and
3 Trade Dress in connection with Puma's products.

4 99. The foregoing acts of the Defendants have caused In-N-Out
5 irreparable harm, and, unless enjoined, the Defendants' acts as alleged herein
6 will continue to cause In-N-Out irreparable harm, loss and injury.

7 **FIFTH CLAIM FOR RELIEF**

8 **(Unfair Competition, Cal. Bus. & Prof. Code §§ 17200 *et seq.*)**

9 100. In-N-Out refers to the allegations contained in Paragraphs 1
10 through 99 above and incorporates them by reference as though fully set forth
11 herein.

12 101. By virtue of the acts complained of herein, Puma has intentionally
13 caused a likelihood of confusion among consumers and the public and has
14 unfairly competed in violation of Cal. Bus. & Prof. Code §§ 17200, *et seq.*

15 102. Puma's acts complained of herein constitute trademark
16 infringement, trade dress infringement, unfair competition, and unlawful,
17 unfair, malicious, or fraudulent business practices, which have injured In-N-
18 Out.

19 103. Cherman's acts complained of herein constitute contributory
20 trademark infringement, contributory trade dress infringement, unfair
21 competition, and unlawful, unfair, malicious, or fraudulent business practices,
22 which have injured In-N-Out.

23 104. The Defendants have acted in bad faith and/or willfully in using
24 marks and design elements confusingly similar to In-N-Out's Trademarks and
25 Trade Dress in connection with Puma's products.

26 105. The Defendants' unfair and unlawful business practices in
27 violation of Cal. Bus. & Prof. Code §§ 17200 *et seq.* have caused substantial
28 injury to In-N-Out and are continuing to cause substantial injury. In-N-Out has

1 no adequate remedy at law for these injuries. Unless the Defendants are
2 restrained by this Court from continuing their unfair and unlawful business
3 practices in violation of Cal. Bus. & Prof. Code §§ 17200 *et seq.*, these injuries
4 will continue to accrue. Pursuant to Cal. Bus. & Prof. Code § 17204, In-N-Out
5 is entitled to preliminary and permanent injunctive relief against the
6 Defendants' unfair and unlawful business practices constituting statutory unfair
7 competition in violation of Cal. Bus. & Prof. Code §§ 17200 *et seq.*

8
9 **WHEREFORE**, In-N-Out requests judgment in its favor and against the
10 Defendants as follows:

11 1. That the Court render final judgment in favor of In-N-Out and
12 against the Defendants on all claims of relief alleged herein;

13 2. That the Court render a final judgment that the Defendants have
14 violated the provisions of 15 U.S.C. § 1114 by willfully infringing In-N-Out's
15 trademark rights in the marks that are the subject of U.S. Trademark
16 Registrations identified in Paragraphs 22 and 24;

17 3. That the Court render a final judgment that the Defendants have
18 violated the provisions of 15 U.S.C. § 1125(a) by willfully infringing In-N-
19 Out's Trademarks and Trade Dress;

20 4. That the Court render a final judgment that the Defendants have
21 violated the provisions of California Business & Professions Code § 14245 by
22 willfully infringing In-N-Out's marks shown in its California State Trademark
23 Registrations;

24 5. That the Court render a final judgment that the Defendants have
25 violated California common law by unfairly competing with In-N-Out;

26 6. That the Court render a final judgment that the Defendants have
27 violated California Business & Professions Code §§ 17200, *et seq.* by

28 ///

1 committing trademark infringement, trade dress infringement, and unfairly
2 competing with In-N-Out;

3 7. That the Defendants, their agents, servants, employees, successors,
4 assigns and attorneys and any related companies, and all persons in active
5 concert or participation with one or more of them be preliminarily and
6 permanently enjoined and restrained from:

7 i. unlawfully using the Palm Tree mark, the Red and Yellow
8 In-N-Out mark, and/or In-N-Out's Trade Dress, or any other mark or
9 trade dress that is essentially identical to, a colorable imitation of, or
10 confusingly similar to the Palm Tree mark, the Red and Yellow In-N-Out
11 mark, or In-N-Out's Trade Dress;

12 ii. filing any applications for registration of any trademarks or
13 trade dress confusingly similar to In-N-Out's Palm Tree mark, Red and
14 Yellow In-N-Out mark, or In-N-Out's Trade Dress;

15 iii. unfairly competing with In-N-Out in any manner; and

16 iv. causing a likelihood of confusion or injury to In-N-Out's
17 business reputation.

18 8. That the Defendants be directed to file with this Court and serve on
19 In-N-Out within thirty (30) days after the service of the injunction, a report, in
20 writing, under oath, setting forth in detail the manner and form in which they
21 have complied with the injunction pursuant to 15 U.S.C. § 1116;

22 9. That the Defendants be required to account to In-N-Out for any and
23 all profits derived by the Defendants by virtue of the Defendants' acts
24 complained of herein;

25 10. That this case be deemed exceptional and the amount of profits be
26 increased by as many times as the Court deems appropriate, pursuant to 15
27 U.S.C. § 1117;

28 ///

1 11. That In-N-Out be awarded exemplary damages from the
2 Defendants pursuant to Cal. Civ. Code § 3294;

3 12. That the Court award In-N-Out its reasonable costs, expenses, and
4 attorneys' fees pursuant to at least 15 U.S.C. § 1117;

5 13. That the Defendants' actions be deemed willful;

6 14. That the Defendants be required to deliver and destroy all goods,
7 advertising, and other unauthorized materials bearing marks and trade dress that
8 are essentially identical to, colorable imitations of, or confusingly similar to In-
9 N-Out's Palm Tree mark, Red and Yellow In-N-Out mark, or In-N-Out's Trade
10 Dress, pursuant to 15 U.S.C. § 1118;

11 15. That In-N-Out be awarded restitution and disgorgement; and

12 16. That In-N-Out be awarded any such other relief that the
13 circumstances may require and that the Court deems just and proper.

14
15 Respectfully submitted,

16 KNOBBE, MARTENS, OLSON & BEAR, LLP

17
18 Dated: March 1, 2019

19 By: /s/ John B. Sganga, Jr.

20 John B. Sganga, Jr.

21 Brian C. Horne

22 Nicole R. Townes

23 Jacob R. Rosenbaum

24 Attorneys for Plaintiff
25 IN-N-OUT BURGERS
26
27
28

DEMAND FOR JURY TRIAL

Plaintiff In-N-Out Burgers hereby demands a jury trial, as provided by Rule 38 of the Federal Rules of Civil Procedure, on all claims that are triable to a jury.

Respectfully submitted,

KNOBBE, MARTENS, OLSON & BEAR, LLP

Dated: March 1, 2019

By: /s/ John B. Sganga, Jr.

John B. Sganga, Jr.

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