

How Does the Cookie Crumbl? A Look into Crumbl's Lawsuit Against Local Competitors Crave Cookies and Dirty Dough

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ABSTRACT

Crumbl Cookies prides itself on its gourmet cookies and quirky personal brand expressed through its vibrant storefronts and advertising. In recent years, two competitors have entered the market, Crave and Dirty Dough, seeking to build a following and a distinct brand for themselves. Unfortunately, both companies entered the market in Crumbl's "home turf" of Utah threatening Crumbl's trade dress and protected branding. Crumbl brought two separate suits against Crave and Dirty Dough for trademark infringement regarding the competitors' branding, marketing style, packaging, and overall appearance of the cookies themselves. The question at hand revolves around the line between trademark infringements and best business practices of packaging and the exact appearance of cookies. Trade dress and trademark infringement consider multiple factors with no singular factor outweighing the others. There is a fine line between best business practices in particular industries and intentional copying branding.

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I. INTRODUCTION

In five short years, Crumbl Cookies grew rapidly from a dorm room in Logan, Utah, at Utah State University to over 400 franchised locations in 44 states,² with 28 locations in Utah alone.³ Founders and cousins, Jason McGowan and Sawyer Hemsley, opened their first store in Logan while offering one item, a chocolate chip cookie.⁴ By December of 2018, the company implemented its weekly rotating menu which is still in use today and offers additional products, including ice cream.⁵ Crumbl’s “famous pink box” holds cookies in either single, 4-pack, or 12-pack options when ordered,⁶ with the 4-pack described as a “unique, oblonged-shaped box” and the “first of its kind.”⁷

Ironically enough, Dirty Dough was founded by Bennett Maxwell in a dorm room at Arizona State University in Tempe, Arizona, in November of 2018 as a delivery-only service.⁸ After successfully selling out almost nightly, the first storefront opened in March of 2020.⁹ Since its creation, Dirty Dough has become franchised with 98 locations in 13 states, primarily in the western part of the United States.¹⁰ Dirty Dough offers cookies in single, 4-pack, and 12-pack boxes with the addition of ice cream.¹¹

² Complaint at 4, Crumbl LLC v. Crave Cookies, LLC, No. 2:22-cv-0318-DBP (D. Utah May 10, 2022), ECF No. 2.

³ Palak Jayswal, *Crumbl CEO Doubles Down, as Utah Cookie War Continues*, THE SALT LAKE TRIB. (July 22, 2022), <https://www.sltrib.com/artsliving/2022/07/22/crumbl-ceo-doubles-down-utah>.

⁴ *Our Story*, CRUMBL, <https://crumblcookies.com/history> (last visited Nov. 10, 2022).

⁵ Jayswal, *supra* note 3.

⁶ *Our Story*, CRUMBL, <https://crumblcookies.com/history> (last visited Nov. 10, 2022).

⁷ *Id.*

⁸ Team Subkit, *Time to Get Dirty! – Dirty Dough Cookies*, GO SOLO, <https://gosolo.subkit.com/dirty-dough-cookies> (last visited Nov. 12, 2022).

⁹ *Id.*

¹⁰ Alexandra Dimitropoulou, *Your New Favorite Cookies Hail From Dirty Dough Cookies, But it is What Founder Bennett Maxwell is Doing for Mental Health That Will Make You Stick Around*, CEO SPOTLIGHT (July 19, 2022), <https://ceoworld.biz/2022/07/19/your-new-favorite-cookies-hail-from-dirty-dough-cookies-but-it-is-what-founder-bennett-maxwell-is-doing-for-mental-health-that-will-make-you-stick-around>.

¹¹ *Ready to Get Dirty?*, DIRTY DOUGH, <https://dirtydoughcookies.com> (last visited Nov. 1, 2022).

Lastly, Crave Cookies began in Utah in 2019 and has since grown to seven locations, with six in Utah and one location in Florida.¹² The franchised company offers cookie orders of singles, 4-packs, or 12-packs with the addition of “loaded sodas.”¹³ Crave also operates a weekly rotation of cookies, featuring a permanent chocolate chip cookie.¹⁴

With similar products, branding, and marketing techniques, problems among cookie competitors seem inevitable. Crumbl Cookie takes pride in its innovative and unique idea and quickly took action against the two smaller and fairly local companies, Crave and Dirty Dough.¹⁵ The question lies in whether Dirty Dough and Crave infringed on Crumbl’s trademarks and trade dress, or whether Crumbl is crumbling with the competition as others enter the growing and highly demanded market of gourmet cookies. Specifically, are oblonged-pink boxes unique and distinct enough for protection, or simply fall into best business practices? At what point do marketing and social media endeavors create too much confusion among consumers?

All three companies utilize many of the same practices, from products to packaging to marketing. Crumbl and Crave stem from Utah, while Dirty Dough hails from the neighboring state of Arizona but has locations in Utah.¹⁶ The western part of the United States has become saturated with the gourmet cookies, and the geographical location of all companies heightens Crumbl’s concerns for their own branding.¹⁷ The three companies feature the 4-pack rectangle box as their main form of packaging and promote their product through lively videos and

¹² *Skip The Wait Order Online*, CRAVE COOKIES, <https://www.cravecookies.com/order-online> (last visited Nov. 1, 2022).

¹³ *Home*, CRAVE COOKIES, <https://www.cravecookies.com> (last visited Nov. 1, 2022).

¹⁴ *Id.*

¹⁵ Jordan Hart, *Utah’s Cookie War: Cult favorite Crumbl Sues Two Other Cookie Companies, including Dirty Dough, Over Packaging and Branding, Saying They Are ‘Confusingly Similar*, BUS. INSIDER (July 21, 2022), <https://www.businessinsider.com/crumbl-files-federal-lawsuit-against-cookie-competitors-2022-7>.

¹⁶ Andrea Day & Chris DiLella, *Utah’s Cookie War Heats Up in Court - and On Social Media*, CNBC (Oct. 15, 2022), <https://www.cnbc.com/2022/10/15/utah-cookie-war-crumbl-dirty-dough-crave.html>.

¹⁷ *Id.*

graphics of their specialty cookies with the intricate ingredients on all social media platforms, including Instagram and their personal websites as the main form of marketing.¹⁸ Furthermore, the various cookie flavors come and go for all companies through their weekly rotating menu of four to five cookie flavors.¹⁹ While Crumbl and Crave feature their chocolate chip cookie each week, Dirty Dough includes four consistent flavors in addition to their rotating menu.²⁰

Due to the various similarities, Crumbl filed complaints against Crave and Dirty Dough in two separate suits with multiple allegations, including trade dress and trademark infringement, with hopes of the competitors to cease the similar branding to protect its brand and company image as a whole.²¹

A. LAWSUIT

On May 10th, 2022, Crumbl filed suit in the United States District Court in Utah against Crave Cookies and Dirty Dough seeking an injunction and monetary compensation,²² on grounds the two competitors' products are "confusingly similar to [its] established and successful trade dress and brand identity."²³ Crumbl brings the suit under the United States Trademark Act of 1946, specifically 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331 and 1338.²⁴ Crumbl has six claims for relief against Crave: Trademark Infringement under § 32 of the Lanham Act, Trademark

¹⁸ Crumbl Cookies (@crumblcookies), INSTAGRAM (Aug. 21, 2022), https://www.instagram.com/p/ChindSApNeR/?utm_source=ig_web_copy_link; Crave (@thecravecookies), INSTAGRAM (July 28, 2022), https://www.instagram.com/tv/CgkdFWmD_qq/?utm_source=ig_web_copy_link; Dirty Dough (@dirty_dough), INSTAGRAM (Jan. 7, 2022), https://www.instagram.com/reel/CYbzdfUoYIL/?utm_source=ig_web_copy_link.

¹⁹ *Skip The Wait Order Online*, CRAVE COOKIES, <https://www.cravecookies.com/order-online> (last visited Nov. 6, 2022); CRUMBL COOKIES, <https://crumblcookies.com> (last visited Nov. 6, 2022); *Ready to Get Dirty?*, DIRTY DOUGH, <https://dirtydoughcookies.com> (last visited Nov. 6, 2022).

²⁰ *Id.*

²¹ See generally Complaint, *supra* note 2, at 2; Complaint at 2, Crumbl et al. v. Dirty Dough, No. 2:22-CV-00318 (D. Utah May 10, 2022), ECF No. 2.

²² Ashtyn Asay, *Crumbl Stands by Decision to Sue Cookie Competitors*, DAILY HERALD (July 22, 2022), <https://www.heraldextra.com/news/local/2022/jul/22/crumbl-stands-by-decision-to-sue-cookie-competitors/>.

²³ Jayswal, *supra* note 3.

²⁴ Complaint, *supra* note 2, at 2.

Infringement, Unfair Competition, and False Designation of Origin under § 43, Trade Dress Infringement under § 43, Utah Deceptive Trade Practices, Utah Unfair Competition Act, and Unjust Enrichment.²⁵ Against Dirty Dough, Crumbl brings the same claims for relief except for Trademark Infringement under § 32 of the Lanham Act and Trade Dress Infringement under § 43.²⁶ Crumbl claims the company achieved tremendous success “based on its unique business model, valuable intellectual property, and substantial investment in time, resources, and incredibly hard work poured into the Crumbl business by its founders.”²⁷ Specifically, Crumbl claims the smaller companies’ packing and logos mimic Crumbl’s “bubble-gum pink boxes and chef doodle logo.”²⁸

In the complaint against Crave, Crumbl claims Crave’s unauthorized use of Crumbl’s trade dress “is an effort to ride the coattails of the valuable goodwill, reputation, and brand identity associated with Crumbl.”²⁹ Trade dress consists of the “design and shape of the materials in which a product is packaged” and may include the product itself.³⁰ On grounds of distinctiveness, “Crumbl packages its cookies, still warm, in its unique oblong pink boxes, the

²⁵ Complaint, *supra* note 2, at 18–25.

²⁶ Complaint at 18–22, Crumbl et al. v. Dirty Dough, No. 2:22-CV-00318 (D. Utah May, 10, 2022), ECF No. 2.

²⁷ Complaint, *supra* note 2, at 2.

²⁸ Jayswal, *supra* note 3.

²⁹ Complaint, *supra* note 2, at 2.

³⁰ *Trade Dress*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/trade_dress (last visited Oct. 25, 2022).

trade dress of which is registered...³¹ as a federal trademark and trade dress. Distinctiveness “identifies and distinguishes” goods or services and falls on a spectrum to determine eligibility



for trademark protection.³² Trademarks are only protected if distinctive in the market with “arbitrary” and “fanciful” marks being the most unique and therefore more likely to be protected under trademark law.³³ “Suggestive” and “descriptive” marks tend to be more difficult to protect, unless associated with a secondary meaning enhancing the distinctiveness.³⁴ Both complaints include pictures alongside the elements of trade dress for the “decorative graphics” and the cookie boxes with “no extra space that perfectly fit cookies lying side-by-side.”³⁵ Lastly, Crumbl accuses Crave of copying their “cookie presentation” with the “intent to copy all aspects of Crumbl’s business.”³⁶ All three companies utilize the weekly rotating menu concept that Crumbl ferociously claims Dirty Dough and Crave copied.³⁷ Crumbl’s, Crave’s, and Dirty Dough’s,

³¹ Complaint, *supra* note 2, at 4.

³² *Distinctive Trademark*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/distinctive_trademark (last visited Nov. 1, 2022).

³³ *Id.*

³⁴ *Id.*

³⁵ Complaint, *supra* note 2, at 5; Complaint, *supra* note 26, at 10–15.

³⁶ Complaint, *supra* note 2, at 11.

³⁷ Complaint, *supra* note 2, at 6; Complaint, *supra* note 26, at 15.

weekly menus as displayed on their websites for ordering shown below with Crumbl and Crave on the left, respectfully, and Dirty Dough on the right.³⁸

The Weekly Rotating Menu

Crumbl's rotating menu features 200+ flavors that are inspired by cakes, candies, pies, and desserts of all kinds. These flavors rotate weekly and keep customers coming back every week to try brand new flavors, stock up on returning favorites, or rediscover our classics.

THIS WEEK'S MENU
With over 100+ flavors and growing, we rotate our menu weekly to bring you new and delicious cookies to try on each visit!

The Classics

Stuffed Chocolate Chip
Our specialty chocolate chip cookie is loaded with milk chocolate and semi-sweet chocolate chips

Reverse with Reese's
Fudge filling wrapped with a chocolate cookie then triple wrapped with a peanut butter cookie and topped with chocolate drizzle

Brookie
A perfect combination of fudge inside a chocolate chip cookie inside a brownie cookie topped with caramel sauce.

Raspberry Toaster Tart
Our classic sugar cookie base filled with raspberry jam and topped with icing and sprinkles

Triple Chocolate
Chocolate cookie dough mixed with milk chocolate chips, semi-sweet chocolate chips, and white chocolate chips. Stuffed with a gooey fudge center

Weekly

The Captain
Strawberry sugar cookie cookie dough mixed with Captain Crunch cereal. Filled with a fun red marshmallow cream cheese filling. Topped with white icing and Captain Crunch cereal

Biscoff Oatmeal Cream Pie
Biscoff oatmeal cookie dough filled with cinnamon sweet cream filling. Drizzled with cookie butter and topped with Biscoff cookie crumbs

Sin-a-Roll
Cinnamon roll meets caramel pecan in this epic cookie. Cinnamon and sugar cookie dough mixed with pecans, caramel bits, white chocolate chips, and cinnamon chips. Filled with cheesecake and salted caramel topped with a salted caramel drizzle, cream cheese frosting dollop, and pecan

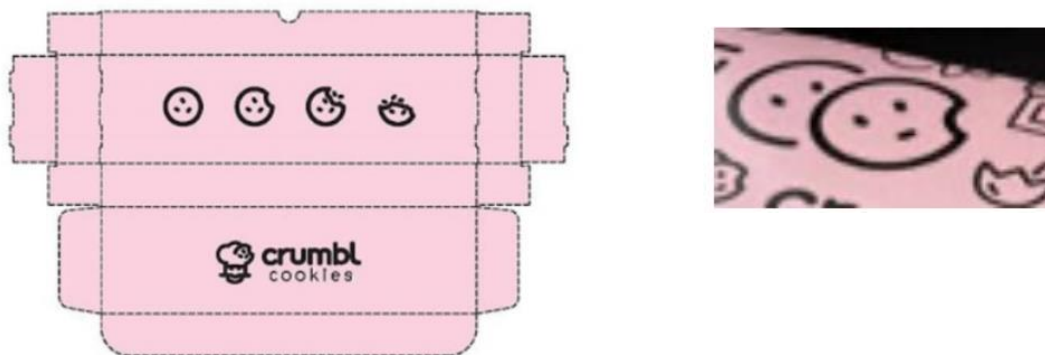
Similar to the suit against Crave, Crumbl filed a trade dress infringement case against Dirty Dough’s unauthorized use of Crumbl’s trade dress, claiming it “is an effort to trade on the valuable goodwill and reputation” of Crumbl and is “likely to cause confusion” among

³⁸ Complaint, *supra* note 2, at 6; *Ready to Get Dirty?*, DIRTY DOUGH, <https://dirtydoughcookies.com> (last visited Nov. 8, 2022).

consumers and harm Crumbl.³⁹ Crumbl claims the “intentional attempt to pass off [Dirty Dough] product as Crumbl’s original, high-quality products by deceiving the relevant public and consumers.”⁴⁰

B. REGISTERED TRADEMARKS

Crumbl has three federally registered trademarks and trade dress.⁴¹ The Crumbl Cookies logo, the word “Crumbl,” and design of the packaging were all filed and registered on September 10, 2019, November 12, 2019, and March 30, 2021, respectively.⁴² Also, Crumbl holds common law trademark rights in the phrase “crumbl cookies” and the logo of a double cookie with a bite taken out;⁴³ a logo that Crave uses as their main design associated with their marks.⁴⁴



Crave filed a trademark application with the United States Patent and Trademark Office (“USPTO”) in March of 2021 for their brand logo, described as “two cookies with dots on them representing chocolate chips” and “[o]ne cookie is overlapping the other, both have bite marks on the top right side” next to the word “CRAVE.”⁴⁵ The mark was filed under the Advertising,

³⁹ Complaint, *supra* note 26, at 2.

⁴⁰ *Id.*

⁴¹ Complaint, *supra* note 2, at 7.

⁴² *Id.*

⁴³ Complaint, *supra* note 2, at 8.

⁴⁴ *See* Complaint, *supra* note 2, at 10.

⁴⁵ *CRAVE Trademark*, ALTER, <https://alter.com/trademarks/crave-90553897> (last visited Nov. 12, 2022).

Business, and Retail Services but as of July 25, 2022, the status of the mark stands as “NON-FINAL ACTION – MAILED.”⁴⁶

In the complaint against Crave, Crumbl explicitly states Crave intended to “copy all aspects of Crumbl’s business even extends to how it decorates and photographs its cookies.”⁴⁷ Crumbl noted side-by-side comparisons of the presentation of cookies within the complaint shown below.⁴⁸ With regards to Dirty Dough, Crumbl made similar accusations claiming the competitor “intend[s] to copy all aspects of Crumbl’s business even extends to how it decorates and photographs its cookies[.]” with an emphasis on the marketing of the products.⁴⁹ The images of cookies below show Crumbl’s and Crave’s cookie presentations shown from left to right, respectively.⁵⁰

Crumbl (left column) compared to Crave (right column)⁵¹:



⁴⁶ *Id.*

⁴⁷ Complaint, *supra* note 2, at 11.

⁴⁸ Complaint, *supra* note 2, at 12–13.

⁴⁹ Complaint, *supra* note 26, at 10.

⁵⁰ Complaint, *supra* note 2, at 12–13.

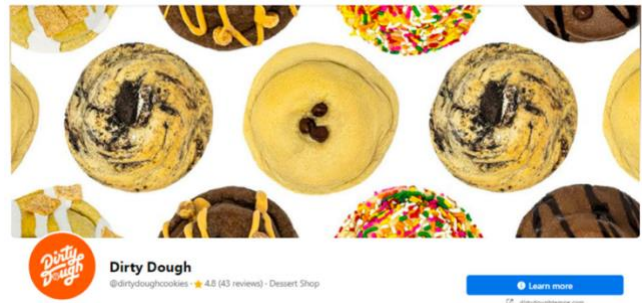
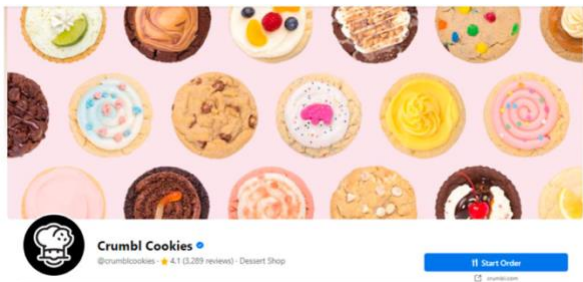
⁵¹ Complaint, *supra* note 2, at 12–13.



Crumbl (left column) compared to Dirty Dough (right column)⁵²:



⁵² See Complaint, *supra* note 26, at 10–13.



Dirty Dough holds one registered trademark with an additional application currently in review.⁵³ Dirty Dough successfully trademarked “DIRTY DOUGH” in January of 2020, owned by Dirty Dough LLC under Staple Food Products, Transportation & Storage Services, and Restaurant & Hotel Services.⁵⁴ In May of 2022, Dirty Dough filed a new application for the mark described as “the words ‘Dirty Dough’ in script font partially covering a cookie with a bite in the upper right corner.”⁵⁵

II. PERSONAL TIES TO CRUMBL

Crumbl goes on to accuse both Dirty Dough and Crave of “unique ties” to their company.⁵⁶ Accusations were made by Crumbl’s co-founder and CEO claiming Dirty Dough stole trade secrets from Crumbl’s internal database.⁵⁷ According to the complaint, Bennett

⁵³ *Dirty Dough Trademark*, ALTER, <https://alter.com/trademarks/dirty-dough-88502514> (last visited Nov. 3, 2022).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Asay, *supra* note 22.

⁵⁷ Jayswal, *supra* note 3.

Maxwell applied to be a franchise salesman and received an interview but was ultimately denied.⁵⁸ Maxwell did get hired by Crumbl as a process engineer from March of 2019 to June of 2019, overlapping with the founding of Dirty Dough in May 2019.⁵⁹ The complaint accuses Dirty Dough of collecting 66 recipes, building schematics, processes, cookie calendars, and other proprietary information.⁶⁰ McGowan posted the accusation via his personal LinkedIn account in August of 2022 claiming proof through voicemails.⁶¹ The lawsuit also claims Crave co-founder, Trent English, applied to be a franchise owner of Crumbl but was denied prompting him to start his own cookie company shortly afterwards, which English denied on multiple occasions.⁶²

A. SOCIAL MEDIA

The lawsuit has remained anything but private. Dirty Dough took to television, billboards, and social media shortly after the lawsuit was filed, quickly implementing the “#Utah Cookie Wars.”⁶³ Dirty Dough used Instagram to respond to the various allegations claiming the company’s “recipes, building schematics and processes are not similar and are clearly different to the public eye.”⁶⁴ Founder, Bennett Maxwell’s Instagram, LinkedIn and Twitter, included a post with images of phrases such as “Let Your Taste Buds Be the Judge,” “Cookies So Good We’re Being Sued!,” and “Our Cookies Don’t Crumble with Competition.”⁶⁵ Other posts address the lawsuit and deny that stolen documents were obtained by a former Dirty Dough employee.⁶⁶

⁵⁸ Complaint, *supra* note 26, at 17.

⁵⁹ *Id.*

⁶⁰ Jayswal, *supra* note 3.

⁶¹ Jason McGowan (jasonmcgowan), LINKEDIN (Aug. 29, 2022), <https://www.linkedin.com/feed/update/urn:li:activity:6970189133201760256>.

⁶² Asay, *supra* note 22.

⁶³ Jayswal, *supra* note 3.

⁶⁴ *Id.*

⁶⁵ Bennett Maxwell (@bennettmaxwell35), INSTAGRAM (July 17, 2022), <https://www.instagram.com/p/CgHVtqHrpvL>.

⁶⁶ Bennett Maxwell (@bennettmaxwell35), INSTAGRAM (Aug. 30, 2022), <https://www.instagram.com/p/Ch5aasTPSBM>.

The posts further state Dirty Dough’s intent to “vigorously defend against and defeat Crumbl’s legal claims.”⁶⁷

Furthermore, Maxwell took to LinkedIn and shared 11 posts encompassing a series of thoughts on the lawsuit and dissecting various parts of all the accusations against Dirty Dough.⁶⁸ It does not stop there, as he also launched a podcast, “Deeper than Dough,” covering various topics to “discuss insights, stories, and helpful tips for finding joy and fulfillment in both business and personal life[,],” but touches on the current lawsuit in a few episodes.⁶⁹

Crave Cookies, specifically co-founders Trent and Carl English, have taken a much more reserved route in responding to the allegations. English and English have “liked” and shared various posts made by Maxwell but have refrained from making any public statements of their own.⁷⁰ Trent English shared a CNBC article via LinkedIn with the comment “[l]et’s all get back to making cookies and move on!”⁷¹

III. PRECEDENT

In *Two Pesos v. Taco Cabana*, Taco Cabana brought suit against Two Pesos for opening their restaurant with a “similar motif.”⁷² Taco Cabana operated six restaurants in the San Antonio, Texas, area while Two Pesos opened their restaurant in Houston.⁷³ Eventually, Taco Cabana entered the Dallas and El Paso, Texas, market where Two Pesos had expanded as well.⁷⁴

⁶⁷ Bennett Maxwell (@bennettmaxwell35), INSTAGRAM (July 21, 2022), <https://www.instagram.com/p/CgS0XOuJWka>.

⁶⁸ Jason McGowan (jasonmcgowan), LINKEDIN (Aug. 29, 2022), <https://www.linkedin.com/in/bennett-maxwell-703717126/recent-activity>.

⁶⁹ Jason McGowan (jasonmcgowan), LINKEDIN (Sept. 1, 2022), https://www.linkedin.com/posts/bennett-maxwell-703717126_deeperthandough-joy-podcast-activity-6985964189139832832-5FdL?utm_source=share&utm_medium=member_desktop.

⁷⁰ See generally Trent English (trentfromcrave), LINKEDIN, <https://www.linkedin.com/in/trentfromcrave>.

⁷¹ Trent English (trentfromcrave), LINKEDIN (Oct. 15, 2022), https://www.linkedin.com/posts/trentfromcrave_utahs-cookie-war-heats-up-in-court-and-activity-6987069263861735425-pcaP?utm_source=share&utm_medium=member_desktop.

⁷² *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 765 (1992).

⁷³ *Id.* at 765.

⁷⁴ *Id.*

Shortly afterward, Taco Cabana sued Two Pesos for trade dress infringement and for theft of trade secrets.⁷⁵ The case describes the motif in-depth as “a festive eating atmosphere...with bright colors, paintings, and murals[...]” and “exterior of the building is a festive and vivid color scheme using top border paint and neon stripes.”⁷⁶

The Court held that proof of secondary meaning is not required to prevail on a claim of trade dress under the Lanham Act if the trade dress at issue is inherently distinctive.⁷⁷ Here, the Court found denying protection under the Act until a secondary meaning was established would “allow a competitor, which has not adopted a distinctiveness trade dress of its own, to appropriate the originator’s dress in other markets and to deter the originator from expanding into and competing in these areas.”⁷⁸ The Court rationalized a requirement of a secondary meaning for inherently distinctive trade dress would undermine the Lanham Act as a whole.⁷⁹

In *Qualitex Co. v. Jacobson Products Co., Inc.*, the issue at hand dealt with a specific shade of green-gold that the dry cleaning firms used for presses.⁸⁰ Qualitex registered the color of the pads as a trademark after already filing suit against Jacobson Products to add a trademark infringement count.⁸¹ The court discussed the “functionality” doctrine, which prevents trademark law “from instead inhibiting legitimate competition by allowing a producer to control a useful product feature” and consequently leads to the conclusion that if a product feature is functional, it cannot serve as a trademark.⁸² The purpose of the “functionality” doctrine is to “forbid[...] the use of a product’s feature as a trademark where doing so will put a competitor at a significant

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Two Pesos, Inc.*, 505 U.S. at 763.

⁷⁸ *Id.* at 775.

⁷⁹ *Id.* at 763.

⁸⁰ *Qualitex Co. v. Jacobson Products Co., Inc.*, 514 U.S. 159, 161 (1995).

⁸¹ *Id.*

⁸² *Id.* at 164.

disadvantage.”⁸³ With that, a color may satisfy as a trademark as long as it has a secondary meaning.⁸⁴ The Court found the green-gold acts as a symbol and serves no other function and therefore trademark protected.⁸⁵

In this case, the color pink used by Crumbl does not have trademark protection and it can be argued the color does not serve a functional purpose for the product. The company boasts their “famous pink box” as an identifying mark for the company in association with the boxes, specifically the four-pack option.⁸⁶ Neither Crave nor Dirty Dough use even a shade of pink in their marking or products, let alone the specific pink used by Crumbl. Dirty Dough uses a shade similar to turquoise and Crave’s boxes are predominately an orange shade with white and blue doodle images all over.⁸⁷

On the other hand, the box’s functionality may not be protected as it would promote anti-competitive behaviors in the industry. Crumbl’s distinctive trade dress includes their product packaging and décor, described, but not limited to, “cookie boxes with no extra space that perfectly fit cookie lying side-by-side, whimsical, outline-shaped drawings, including a cookie with a bite taken out of it,...a weekly rotating menu,...and the color pink.”⁸⁸ In particular, Crumbl promotes their “famous pink box” as notable and the four pack as “unique, oblonged-shaped box” that is “first of its kind.”⁸⁹ Crumbl’s self-proclamation of their “aesthetic value” placed in the pink boxes is not enough unless Crumbl shows “a significant benefit that cannot be

⁸³ *Id.* at 169.

⁸⁴ *Id.* at 166.

⁸⁵ *Id.*

⁸⁶ *Our Story*, CRUMBL COOKIES, <https://crumblcookies.com/history> (last visited Oct. 27, 2022).

⁸⁷ *See generally Skip The Wait Order Online*, CRAVE COOKIES, <https://www.cravecookies.com/order-online> (last visited Oct. 19, 2022); *see* CRUMBL COOKIES, <https://crumblcookies.com> (last visited Oct 19, 2022); *see Ready to Get Dirty?*, DIRTY DOUGH, <https://dirtydoughcookies.com> (last visited Oct. 20, 2022).

⁸⁸ Complaint, *supra* note 2, at 4–5.

⁸⁹ *Our Story*, *supra* note 4.

practically be duplicated by the use of alternative designs,” which is therefore “functional.”⁹⁰ A best business practice serves a greater function and a trademark protection would significantly harm competitors within the market.

In *Wal-Mart Stores, Inc. v. Samara Brothers, Inc.*, Samara Brothers designed and manufactured children’s clothing with a primary line of one-piece seersucker outfits.⁹¹ Walmart contracted with a supplier and instructed for the designs to be based off of Samara Brothers’ designs.⁹² Samara Brothers filed suit against Walmart for unfair competition and infringement of unregistered trade dress under the Lanham Act.⁹³ The question before the Court was under what circumstances may a product’s design be distinctive enough, and therefore protectable, with regards to an unregistered trade dress.⁹⁴ The Court held an unregistered product design is distinctive and protectable only upon showing a secondary meaning.⁹⁵ The Court rationalized two ways of showing a mark as inherently distinctive.⁹⁶ First, a mark is inherently distinctive if “its intrinsic nature serves to identify a particular source” and secondly, even if not inherently distinctive, a mark that has developed a secondary meaning “in the minds of the public, the primary significance of a mark is to identify the source of the product rather than the product itself.”⁹⁷ Samara Brothers failed to present a secondary meaning of their product design, the seersucker outfits, in the consumer market and, therefore, the court ruled in favor of Walmart.⁹⁸

⁹⁰ *Qualitex Co.*, 514 U.S. at 170 (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 17, Comment c (1995)).

⁹¹ *Wal-Mart Stores, Inc. v. Samara Bro., Inc.*, 529 U.S. 205, 207 (2000).

⁹² *Id.*

⁹³ *Id.* at 208.

⁹⁴ *Id.*

⁹⁵ *Id.* at 211.

⁹⁶ *Id.*

⁹⁷ *Wal-Mart Stores, Inc.*, 529 U.S. at 205–206.

⁹⁸ *Id.* at 211.

Here, Crumbl has three federal trademarks, unlike in *Wal-Mart*, one includes the product design of the four-pack boxes. Although it is in favor of Crumbl that the design is registered, the question of functionality still plays a part, as previously stated. Since the box's product design is federally registered, the secondary meaning requirement is not necessary as it is inherently distinctive.⁹⁹

IV. THE *LAPP* TEST

The *Lapp* test helps determine the likelihood of confusion between two trademarks to establish a claim for trademark infringement.¹⁰⁰ The test is multi-factored but a non-exhaustive list where the factors are weighed depending on the circumstances of the particular case.¹⁰¹ The relevant factors to the two lawsuits include the similarity of the marks, the intent of the defendant in adopting the mark, evidence of actual confusion, the similarity of marketing and advertising channels, and product similarity regarding identity, function, and use.¹⁰² Trade dress deals with the “design and shape of the materials in which a product is packaged.”¹⁰³ Here, the trade dress at issue revolves around the boxes all the cookies are packaged in. The Lanham Act similarly protects trade dress as it does trademark infringement.¹⁰⁴

V. PREDICTION

Based on the nature of the case, the Court is likely going to find Crumbl's marks distinctiveness enough to receive compensation for trademark infringement. The company name



⁹⁹ *Id.*

¹⁰⁰ *Lapp Test*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/lapp_test (last visited Nov. 8, 2022).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Trade Dress*, *supra* note 30.

¹⁰⁴ *Id.*

“Crumbl” may be considered inherently distinctive as it is a fanciful name, meaning “made up” because of the unique spelling.¹⁰⁵ In addition, the logos, particularly the font and doodle-like images, resemble each other, especially between Crave and Crumbl as shown below.¹⁰⁶

The main issue here lies in the risk of consumer confusion as all three companies operate in the western part of the United States, specifically Utah.¹⁰⁷ The saturated market may heighten the risk of confusion in the market when Crave and Dirty Dough post similar ads that will appear in a simple internet search of local customers. With that, the colors and names of the companies are vastly different and there appears to be no evidence of actual confusion in the market. A survey conducted by Crumbl may strengthen its case on the evidence of the “confusing among consumers” factor, but no such research has been conducted publicly yet.¹⁰⁸ On the other hand, the similarity of marketing and advertising channels mirror each other greatly. On various social media platforms, all three companies use similar videography effects when introducing the specialty flavors of the week.¹⁰⁹ The ads include the various ingredients of the specialty cookies being thrown across the screen with the cookie being split in half all with a white backdrop.¹¹⁰ The advertising of the weekly rotating menu, and the menu itself, draws significant similarities

¹⁰⁵ See generally *Distinctive Trademark*, *supra* note 32.

¹⁰⁶ Complaint, *supra* note 2, at 10.

¹⁰⁷ Jordan Hart, *Utah’s Cookie War: Cult Favorite Crumbl Sues Two Other Cookie Companies, Including Dirty Dough, Over Packaging and Branding, Saying They are ‘Confusingly Similar,’* BUS. INSIDER (July 21, 2022), <https://www.businessinsider.com/crumbl-files-federal-lawsuit-against-cookie-competitors-2022-7>.

¹⁰⁸ Craig Proffer, *Cookie Controversy: Dirty Dough, Crave Cookies Respond to Crumbl lawsuit*, ABC4 (July 13, 2022), <https://www.abc4.com/news/local-news/cookie-controversy-dirty-dough-crave-cookies-respond-to-crumbl-lawsuit>.

¹⁰⁹ Crumbl Cookies (@crumblcookies), INSTAGRAM (Aug. 21, 2022), <https://www.instagram.com/p/ChindSApNeR>; Crave (@thecravecookies), INSTAGRAM (July 31, 2022), <https://www.instagram.com/reel/Cgso5GVDmgo>; Dirty Dough (@dirty_dough), INSTAGRAM (Jan. 7, 2022), <https://www.instagram.com/reel/CYbzdfUoYIL>.

¹¹⁰ Crumbl Cookies (@crumblcookies), INSTAGRAM (Aug. 21, 2022), <https://www.instagram.com/p/ChindSApNeR>; Crave (@thecravecookies), INSTAGRAM (July 31, 2022), <https://www.instagram.com/reel/Cgso5GVDmgo>; Dirty Dough (@dirty_dough), INSTAGRAM (Jan. 7, 2022), <https://www.instagram.com/reel/CYbzdfUoYIL>.

between Crumbl, Dirty Dough, and Crave.¹¹¹ Often, the flavors featured are similar ingredients but shared under different names, like “Caramel Apple Pie” at Dirty Dough and “Apple Pie” at Crumbl the week of Thanksgiving.¹¹²

If Crumbl is to succeed on the merits of the case, the precedent set may be more detrimental to the cookie industry as Crumbl may corner the market, almost creating a monopoly in the western states. The 4-pack may be a unique feature of Crumbl, but due to the cookies’ size, the oblonged box may be a best business practice instead of a protectable trade dress. For example, generally speaking, pizza comes in a few standard sizes ranging between 8 inches and 14 inches.¹¹³ All pizzas come in square boxes, not as a “unique” marketing tool, but as the most efficient and effective manner of delivering pizza.¹¹⁴ The square boxes allow for easy transportation and storage in the freezer aisle.¹¹⁵ In addition, the square boxes are made from a single sheet of cardboard making the process cheaper and easier to construct.¹¹⁶ Crave owner, Trent English, makes a similar argument in response to the lawsuit regarding pizza boxes in comparison to the cookie boxes as the square boxes are “the most economical size to put a round pizza in.”¹¹⁷ On the contrary, Crumbl makes the argument its particular style box is “non-functional,” acquiring distinctiveness that is entitled to protection.¹¹⁸ Unlike pizza boxes, it is unclear the economic benefits of the oblonged boxes and the purpose it serves beyond the

¹¹¹ Crumbl Cookies (@crumblcookies), INSTAGRAM (Aug. 21, 2022), <https://www.instagram.com/p/ChindSApNeR>; Crave (@thecravecookies), INSTAGRAM (July 31, 2022), <https://www.instagram.com/reel/Cgso5GVDmgo>; Dirty Dough (@dirty_dough), INSTAGRAM (Jan. 7, 2022), <https://www.instagram.com/reel/CYbzdfUoYIL>.

¹¹² *Weekly*, DIRTY DOUGH, <https://dirtydoughcookies.com> (last visited Nov. 20, 2022); *Taste Weekly*, CRUMBL, <https://crumblcookies.com> (last visited Nov. 20, 2022).

¹¹³ James Burney, *How Many Inches is a Large Pizza? Your Pizza Size Guide*, BROOKLYN CRAFT PIZZA (Sept. 21, 2022), <https://www.brooklyncraftpizza.com/blog/how-many-inches-is-a-large-pizza>.

¹¹⁴ Grace Elkus, *Most Pizzas are Round. So Why are Pizza Boxes Square?*, REALSIMPLE (June 14, 2022), <https://www.realsimple.com/food-recipes/cooking-tips-techniques/why-pizza-boxes-square>.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Proffer, *supra* note 109.

¹¹⁸ Complaint, *supra* note 26, at 18.

inherent distinction for Crumbl among competitors. It raises concern of Crumbl's hold on the market, but its successful methods of standing apart from competitors is simply good business.

Although the fonts may be similar between Crave and Crumbl, there is no color overlap between any of the three companies.¹¹⁹ All colors are distinctly different as Crumbl utilizes a vibrant pink shade, Dirty Dough uses a bright orange and Crave covers their packaging with black and gold.¹²⁰ The outward appearance of the boxes seems more determinative of copying as opposed to what is in the box. Following the pizza analogy, many pizzas look similar and include almost identical ingredients, but the box itself clearly shows where the pizza comes from, just like the boxes each cookie comes in.

Overall, between Crumbl's registered trademarks and inherently distinct branding of the 4-pack box, geographic location, and elaborate marketing endeavors, the Utah-based gourmet cookie company is likely to come out on top over the crumbling competition of Crave and Dirty Dough.

¹¹⁹ CRUMBL COOKIES, <https://crumblcookies.com> (last visited Nov. 2, 2022); CRAVE COOKIES, <https://www.cravecookies.com> (last visited Nov. 2, 2022); DIRTY DOUGH, <https://dirtydoughcookies.com> (last visited Nov. 2, 2022).

¹²⁰ CRUMBL COOKIES, <https://crumblcookies.com> (last visited Nov. 2, 2022); CRAVE COOKIES, <https://www.cravecookies.com> (last visited Nov. 2, 2022); DIRTY DOUGH, <https://dirtydoughcookies.com> (last visited Nov. 2, 2022).