



2     *Marketing Displays, Inc.*     Nos. 97-1148/2096/2097  
      *v. Traffix Devices, Inc.*



Before: BOGGS and DAUGHTREY, Circuit Judges; and  
MCKINLEY, District Judge.

VI

---

**COUNSEL**

**ARGUED:** Jeanne-Marie Marshall, REISING, ETHINGTON, BARNES, KISSELLE, LEARMAN & McCULLOCK, Troy, Michigan, Irwin Alterman, KEMP, KLEIN, UMPHREY & ENDELMAN, Troy, Michigan, for Appellant. John A. Artz, LYON & ARTZ, Southfield, Michigan, for Appellee. **ON BRIEF:** Jeanne-Marie Marshall, Richard W. Hoffmann, REISING, ETHINGTON, BARNES, KISSELLE, LEARMAN & McCULLOCK, Troy, Michigan, Irwin Alterman, KEMP, KLEIN, UMPHREY & ENDELMAN, Troy, Michigan, for Appellant. John A. Artz, John S. Artz, LYON & ARTZ, Southfield, Michigan, for Appellee.

---

**OPINION**

---

BOGGS, Circuit Judge. This consolidated appeal concerns three related but distinct disputes between the parties. Marketing Devices, Inc. (owner of the WindMaster trademark) claims that Traffix Displays, Inc. (owner of the WindBuster trademark) has infringed its trademark, infringed its trade dress, and violated federal unfair competition laws in the process. Traffix denies these charges, and counterclaims that MDI, by aggressively pursuing sham litigation to extend its patent, has violated § 2 of the Sherman Antitrust Act, which prohibits attempts to monopolize. MDI's unfair competition claim turns on the same evidence as its trademark

Summary judgment was an infringement claim since Traffix of material fact. However, because approval for its mark, it cannot intentionally infringe MDI's judgment on this issue is affirmed determine damages for the infringement motions for summary judgment competition claims, it should not party. MDI established a genuine secondary meaning, and the decision erroneous on the functionality question summary judgment to Traffix actions pursued by MDI were therefore the law, no antitrust violation abuse of discretion not to allow MDI's market power. Accordingly judgment of the district court is REMAND the case for further this opinion.

---

\* The Honorable Joseph H. McKinley, Jr., United States District Judge for the Western District of Kentucky, sitting by designation.

As the district court noted, courts do allow parties to pursue trade dress rights in the face of an expired patent. See *Kohler Co. v. Moen, Inc.*, 12 F.3d 632, 638 (7th Cir. 1993). Traffix argues that trade dress rights may be pursued after design patents expire, but not after utility patents expire. Traffix points to no authority for this proposition, and there does not appear to be a per se rule to this effect, as discussed, *supra* at 17-18 (noting the weight of authority from other circuits against any such per se rule). Thus, Traffix cannot argue that MDI had a baseless suit merely because its patent had expired.

Nor does Traffix provide any reason to believe that a utility patent and trade dress protection must be mutually exclusive. The consensus on this question is that patent and trademark law protect different interests, and that “a product’s different qualities can be protected simultaneously, or successively, by more than one of the statutory means for protection of intellectual property.” *Kohler*, 12 F.3d at 638-39 (collecting sources). If protectable at all, the trade dress of MDI’s WindMaster signs is protectable separately from its patents. Moreover, as seen from the earlier discussion, MDI’s claim of trademark and trade dress infringement is not so outlandish as to appear to be brought only to burden a competitor with litigation. This is especially true given the heretofore unsettled character of trade dress protection for product configurations in this circuit. Nor has Traffix provided an ounce of evidence suggesting an improper motive on MDI’s part. For these reasons, the district court properly held that MDI’s trade dress claim was not an unlawful attempt to monopolize in violation of § 2.

Since the activity that MDI has undertaken has not been deemed anticompetitive, there is no reason to have allowed discovery on the market definition issue. The district court did not abuse its discretion in granting summary judgment before allowing discovery.

and trade dress claims, so the t consideration are 1) infringe trademark, 2) infringement of t and, should those claims prov MDI’s alleged attempt to monop Traffix appeals the district cou judgment against Traffix and e trademark, as well as the counterclaim. MDI cross-appea summary judgment to Traffix federal unfair competition claim

We find no reason to distu permanently enjoining use of However, because we believe th issues of material fact on i competition claims, we reverse judgment on those issues. In affirm summary judgment f counterclaim brought by Traffi

I

MDI manufactures a number to the highway construction indu a popular, wind-resistant, mobil brand name WindMaster, whic 1977. The WindMaster sign’s patents for a dual-spring base th conditions. MDI’s president Ro patented sign stand in the mid-patent expired on May 16, 198 issuance. Traffix also sells tr highway construction industry. protected by a patent becomes av patent expires, Traffix owner an MDI sign to Korea to be reverse could sell in competition wit Traffix, Kulp had distributed



or the quality or the objective (nonreputational) desirability of competitors' products negatively enough, then the trade dress element may be deemed legally functional. Having any effect on cost or quality is not enough. Exclusive use of a feature must "put competitors at a *significant* non-reputation-related disadvantage" before trade dress protection is denied on functionality grounds. *Qualitex*, 514 U.S. at 165 (emphasis added).

MDI points to its numerous competitors and their equivalent products as proof that MDI's trade dress is not a competitive necessity. The district court stated that those competitors' designs are themselves patented and therefore unavailable to Traffix. That is beside the point. Traffix does not get to copy the trade dress of its competitor whose patent has expired just because other design options are still under patent. Traffix could come up with its own design, or license one of the outstanding patents, or use the dual-spring design in a way that does not infringe MDI's trade dress. As with intellectual property and competition law generally, the proper question is the overall effect on competition if a particular trade dress claim receives protection, not the prospects of any particular competitor when that protection is granted. *Cf. Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993) (noting the policy of the Sherman Act to protect the public's interest in competition, not private concerns of competitors).

The same facts can support both trademark (and/or trade dress) infringement and unfair competition under § 43(a) of the Lanham Act. *See Frisch's Restaurants*, 849 F.2d at 1015. The unfair competition claim thus must be remanded for further proceedings along with the trade dress claim.

## V

The parties agree and the district court noted that "before reaching the merits of an antitrust claim, it is necessary to identify the relevant markets." *Potters Med. Ctr. v. City*

district court certified all liability  
September 11, 1997.

## II

This court reviews *de novo* summary judgment as to trad issuance of a permanent injun *Music Stores, Inc. v. Big Dadd* F.3d 275, 280 (6th Cir. 1997). granted summary judgment rath this issue, a *de novo* standard of appeal of the trademark and tr 279-80. Summary judgment on likewise reviewed *de novo*, but t discretion the district court's de on the antitrust counterclaim. *S Blue Cross and Blue Shield of M* (6th Cir. 1984).

## III

As noted by the district cour summary judgment in its Lanham claim, MDI must prove that the is "likely to cause confusion" minds. 15 U.S.C. § 1114; *See W* F.2d 1183, 1186 (6th Cir. 198 *Group, Inc. v. Home Mktg. Spe* 1107 (6th Cir. 1991) (identifiy "whether relevant consumers a products or services offered by some way"); *Daddy's Junky Mu* the key question "whether the de mark is likely to cause confusion the origin of the goods offered b trademark confusion can be a qu determination on a motion for su

*Inc. v. Tennessee Sales Co.*, 709 F.2d 1084, 1086 (6th Cir. 1983).

The Sixth Circuit has identified eight factors as informing the likelihood of confusion inquiry:

1. strength of the plaintiff's mark;
2. relatedness of the goods;
3. similarity of the marks;
4. evidence of actual confusion;
5. marketing channels used;
6. likely degree of purchaser care;
7. defendant's intent in selecting the mark; [and]
8. likelihood of expansion of the product lines.

*Frisch's Restaurants, Inc. v. Elby's Big Boy*, 670 F.2d 642, 648 (6th Cir. 1982), quoting *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348 (9th Cir. 1979). None of these factors is a *sine qua non* for the plaintiff's case, so the defendant does not necessarily establish a genuine issue of material fact merely by disproving the existence of any one—or even a majority of—the factors. See *Wynn Oil*, 839 F.2d at 1186. Rather, summary judgment for the plaintiff is appropriate if, upon consideration of all factors, the district court determines that no reasonable jury could fail to find that confusion of the marks would be likely.

TrafFix argues that summary judgment is not appropriate whenever “there is a dispute regarding the underlying factors.” That argument misconstrues the holding in *Homeowners*, where this court stated:

To resist summary judgment in a case where the likelihood of confusion is the dispositive issue, a nonmoving party must establish, through pleadings, depositions, answers to interrogatories, admissions and affidavits in the record, that there are genuine factual disputes concerning those of the *Frisch's* factors which may be material in the context of the specific case.

the trade dress unencumbered by the ordinary burden of proof ass

The district court next found WindMaster's promotion of performance rather than its appearance has not specifically promoted springs because its trade dress is. Rather, the entire look of its WindMaster has been promoted through the miniature stand used at trade shows. The district court contended that the lower court was evaluating an individual component rather than its entirety. See *Merriam House, Inc.*, 35 F.3d 65, 71-72. *Co. v. Western Trimming Corp.*, WL 777556, at \*3 (6th Cir. Sept. 10, 1997). *House, Ltd. v. Hallmark Cards* (10th Cir. 1988). The district court found that the dual-spring design because it says uses the other elements of a spring extending out at angles, and a sign that all of the other competitors that they avoid emulating the trademark of TrafFix or another competitor could design, then it will have to find a design apart to avoid infringing the WindMaster the combination of all the elements argues, could confuse the public.

Finally, the district court found that the trade dress asserted by MDI would be a disadvantage beyond the mere fact that the dual-spring design is one of a number of designs, the lower court found it to be a functional one. Presumably even if a competitor can do a similar design, an appropriate question is whether the configuration is a competitive n

patent disclosure does not prevent trade dress protection. See *Sunbeam Prods., Inc. v. West Bend Co.*, 123 F.3d 246, 256 (5th Cir. 1997) (“[T]he fact that the American Classic Mixmaster® incorporates functional features named in utility patents does not compel the conclusion that the product configuration is legally functional”); *Thomas & Betts II*, 138 F.3d at 288 (reversing the district court’s misstatement of the law and holding that “there is no per se prohibition against features disclosed in a patent receiving trademark protection after the patent has expired”); *Midwest Indus., Inc., v. Karavan Trailers, Inc.*, 175 F.3d 1356, 1362 (Fed. Cir. 1999) (“[S]tatements in a patent may provide evidence that the asserted trade dress is functional, and thus not entitled to legal protection. But the fact that a patent has been acquired does not convert what otherwise would have been protected trade dress into nonprotected matter” (citations omitted)). Only the Tenth Circuit, in an opinion that preceded the contrary rulings of the other three circuits, has held that “[w]here a product configuration is a significant inventive component of an invention covered by a utility patent . . . it cannot receive trade dress protection under section 43(a).” *Vornado Air Circulation Sys., Inc., v. Duracraft Corp.*, 58 F.3d 1498, 1500 (10th Cir. 1995).

The Tenth Circuit argued that a per se rule is necessary to effect the public policy underlying patent law of releasing protected designs after a period of time. But those functional designs may be separated from the appearance here. So long as it is possible to protect the appearance without protecting the design, a per se rule is not necessary. Here that might be possible, as MDI suggests, by not extending trade dress protection “to vertically arranged coil springs with other leg members (U-shaped, parallel, etc.) and/or with other uprights (twin poles, A-shaped, etc.) [that] may create an entirely different look altogether.” It takes little imagination to conceive of a hidden dual-spring mechanism or a tri or quad-spring mechanism that might also avoid infringing WindMaster’s trade dress. The best way to decide the feasibility of such alternatives is to do a functional analysis of

*Homeowners*, 931 F.2d at 110 indicate that any disputed factor standing alone may not be court is apt to find, as it did h favors the nonmoving party. Si overall finding of likelihood o favor, it would be illogical for preclude summary judgment. understood to mean that the non identify a disputed factor or set would necessarily be disposi confusion issue.

Without regard to the *Frisch*’ own registered mark earns infringement by virtue of the PT trademark. It cites no case la proposition. It cites an 1894 Sup where the question of priority of doubtful, the decision of the pat *Morgan v. Daniels*, 153 U.S. 120 expressly states that the paten overcome by testimony “suff conviction that [it] made a mis case cited by Traffix says that t validity is a statutory presumpti (notwithstanding the presumptio a patent’s invalidity by clear evi is due a PTO decision with resp not consider. See *American Ho Sons*, 725 F.2d 1350, 1360 (Fe helps Traffix. Traffix argues f (or at least a reasonable inferenc trademark examining attorney a the WindMaster mark and foun did not infringe it. But, as the di evidence that the PTO considere the PTO might have made a mis

A brief review of the lower court findings on each of the *Frisch's* factors will demonstrate the validity of its legal conclusion that there is sufficient likelihood of confusion to warrant a permanent injunction against the WindBuster mark.

### A. Strength of the plaintiff's mark

TrafFix concedes the incontestable status of MDI's WindMaster trademark as to the goods listed in the registration certificate. The district court found that the product description in the registration certificate was broad enough to cover MDI's traffic signs, especially given the "virtually identical" language used in the certificate TrafFix received for its WindBuster mark. This factor clearly favors MDI.

### B. Relatedness of the goods

TrafFix does not contest on appeal the district court's finding that the parties' goods are related. Hence, this factor clearly favors MDI.

### C. Similarity of the marks

TrafFix relies on the PTO's registering of its own WindBuster trademark as sufficiently credible evidence of dissimilarity to create a genuine issue of material fact. The district court found that the WindMaster and WindBuster marks connote the same meaning and resemble one another in look and sound, especially given the similar script and capitalization of the fifth letter and the dominance of the "Wind" prefix. Moreover, as the district court held, such a dominant impression receives great weight in determining the likelihood of confusion. *See Kangol v. KangaRoos U.S.A. Inc.*, 974 F.2d 161, 163 (Fed. Cir. 1992). Indeed, it would be difficult for TrafFix to adopt a mark that is closer to WindMaster than is WindBuster. This factor favors MDI.

deems a product feature to be essential to the use or purpose or cost or quality of the article." *quoting Inwood Laboratories, Inc.* 456 U.S. 844, 850 n.10 (1982).

The district court's conclusion trade dress was instead an unpr rested on three main findings. patent disclosed the dual-spring WindMaster is estopped from ar in the trade dress context. Sec that the dual-spring design had b rather than as aesthetic or a Finally, the lower court found th trade dress claim would put com affecting the cost and quality remaining for their use.

In determining that a prio presumption against a trade dr relied heavily on the McCarthy t that a shape is functionally adva utility patent and later assert t functional in order to obta 1 J. THOMAS MCCARTHY ON COMPETITION § 7:89 (4th ed. 19 Sarkisian, MDI's president, cla spring connections . . . prevent tw subsequent successful litigatio contended that closely-space functionally equivalent and co contends that litigation over the of the dual-spring design, whil concerns the appearance of the

A circuit split exists as to whet forecloses trade dress protectio Federal Circuits have held or str

ulterior motive here. *See Esercizio*, 944 F.2d at 1239; *See also DAP Products, Inc. v. Color Tile Mfg., Inc.*, 821 F. Supp. 488, 492 (S.D. Ohio 1993). There is nothing to copy from a design-patented article other than its look, but if form follows function, a similar look might naturally result from copying the protected mechanism in a utility patent. The inference MDI urges does not conclusively show that Traffix sought to take advantage of an extant secondary meaning.

Nevertheless, drawing all reasonable inferences in favor of the nonmoving party, we must conclude that MDI has shown that a genuine issue of material fact exists as to secondary meaning for its sign stand's trade dress. Considering the sign stand as a whole, and not just the dual-spring configuration, a reasonable juror could conclude that the WindMaster sign stand had obtained secondary meaning in the marketplace that Traffix sought to misappropriate.

### **B. Confusing similarity**

After conducting a *Frisch's* factor analysis, as is proper for trade dress as well as trademark confusion cases, the district court was unwilling to hold as a matter of law that the two trade dresses are not confusingly similar. Since the district court thus based its grant of summary judgment for Traffix on the other two requirements, there is no need to consider the *Frisch's* factor analysis in detail here.

### **C. Primarily nonfunctional**

Finally, MDI must show that the trade dress features appropriated from WindMaster were primarily nonfunctional. This requirement ensures that trade dress protection will not be used effectively to extend a patent: "The functionality doctrine prevents trademark law, which seeks to promote competition by protecting a firm's reputation, from instead inhibiting legitimate competition by allowing a producer to control a useful product feature." *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 164 (1995). The Sixth Circuit

### **D. Evidence of actual confu**

Traffix contends that the 1 confusion precludes summary confusion. Because the two part the similar marks for over two ye was briefed, Traffix also arg significant concurrent sales m confusion has existed. Alterna isolated evidence of actual conf length of time during which the m court appropriately refused the in of no actual confusion from the the marks had not competed aga long as marks in prior cases whe drawn. Moreover, because a La proof of potential confusion an factor is not as central as Traffi *Music*, 109 F.3d at 284.

The district court deemed as into evidence the declarations o telephone conversations in whi about WindBuster signs. The

---

<sup>1</sup>MDI argues that the declaratio instances of confusion are not hearsay prove the truth of any matter asserted were already purchasing MDI's produ the declarations fall within the state recognized by the Second, Fifth, Seven by the Eighth Circuit and not decide *Damental Too, Ltd. v. Gemmy Ind. Co* 1997); *Armco, Inc. v. Armco Burglar* (5th Cir. 1982); *International Kenne Star, Inc.*, 846 F.2d 1079, 1090-91 (7th *Inc. v. Hogg Wyld, Ltd.*, 828 F.2d 148 *Duluth News-Tribune v. Mesabi Pub.* 1996). Like the district court, we find question since MDI prevails on the trad

from a purchaser stating that he assumed WindBuster was an MDI product, but called the testimony *de minimis* proof. However, even one case of actual confusion can be significant. *See id.* at 284-85. This is true both because it suggests there may be other undiscovered instances of actual confusion, and because it strongly suggests the potential for confusion. The district court found that this factor favors neither party, but we hold that it favors MDI at least slightly.

### **E. Marketing channels used**

TrafFix does not contest on appeal the district court's finding that the parties use similar trade channels. Hence, this factor clearly favors MDI.

### **F. Likely degree of purchaser care**

TrafFix agrees with the district court's finding that professional purchasers comprise the buyer class in this case and points to the affidavit of its expert and this court's previous holding that such buyers will have a low propensity to be confused. *See Homeowners*, 931 F.2d at 1111. MDI contends that the "vast majority of buyers are unskilled contractors and buyers who consider price as the primary factor, and whose decisions are typically based on need, convenience and cost." Significantly, the *de minimis* example of actual confusion produced by MDI came from a professional purchaser. He understood there were two marks, but he assumed erroneously that WindBuster was another item in the WindMaster line. Purchaser care may be higher than average in this case, but some mistakes are still likely. At most, this factor slightly favors TrafFix.

---

evidence.

MDI responds that its promot trade show miniature stands all stand, and that other courts h persuasive. *See Sara Lee Corp. Inc.*, No. 97-C-4158, 1998 WL 4 29, 1998) ("COACH's print a trade dress to the consumer b isolation"); *See also Yamaha I Co.*, 840 F.2d 1572 (Fed. Cir meaning for shape of guitar advertising and promotional lite

### **5. Amount of sales and num**

The district court discounted t could be attributed to a numbe dress. It also noted that MDI's f in annual sales for over 20 yea competitor's numbers to provid the only evidence in the record sales success is the goodwill b trade dress.

### **6. Established place in the**

No market-share information

### **7. Proof of intentional copy**

The district court found that a copied MDI's design, it did not customers. In so finding it rel provided by TrafFix claiming th because it was believed to be in WindMaster patents expired.

MDI responds that intentiona inference of trying to take advan meaning than the lower court all by MDI do not involve a utility

See *Thomas & Betts Corp. v. Panduit Corp.*, 138 F.3d 277, 294 (7th Cir. 1998) (“*Thomas & Betts II*”).

## 2. Consumer surveys

No consumer surveys were provided to the court before the motion for summary judgment was filed. The district court refused to weigh unsworn testimony from 40 purchasers attesting to their association of the WindMaster trade dress with MDI that was submitted in untimely fashion and without leave of the court.

## 3. Exclusivity, length, and manner of use

The district court acknowledged the length of time over which MDI has used its trade dress, but discounted that portion (all but five years) that overlapped with its patents. MDI responds that the patents never covered the trade dress, because the two are separate kinds of intellectual property and that MDI, in any event, enjoyed five years of unique trade dress after the patents expired and before Traffix began using a similar trade dress.

MDI also licensed its dual-spring configuration to Eastern Metal company around 1986. The district court found that this undercut identification of that product feature with one source. See *Sassafras*, 915 F. Supp. at 8, citing 1 J. THOMAS MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 8.02[5], (3d ed. 1995). MDI asserts that Eastern Metal paid in part for the use of the trade dress, which should support that it has a secondary meaning worth acquiring.

## 4. Amount and manner of advertising

The district court found that the amount of advertising, while substantial, did not establish much without showing that a link was established in the mind of consumers. Moreover, the court found that MDI’s advertising emphasized no particular aspect of WindMaster’s look, merely pictured the product, and did not identify anything as trade dress.

## G. Defendant’s intent in se

The district court held that the trademark attorney and receiving Office prior to using the WindBuster of improper intent by Traffix. Traffix, sought the advice of co PTO does not disprove that he had and reputation of the WindMaster that he wanted to do so while still in law. Intent in selecting the mark in favor of the owner of an infringing the prior similar mark. See *Kellogg Co.*, 732 F. Supp. 1417. See also *Little Caesar Enters.*, 1 F.2d 568, 572 (6th Cir. 1987).

Kulp formerly distributed WindBuster in the favorable reception of WindBuster marketplace, reverse-engineered to develop his own product, mimicking appearance, and selected a similar mark to believe WindBuster was associated with the idea of a bucking bronco sounding successful manufacturer. A finding of willful and intentional infringement seems improper given that Traffix until it received PTO approval.

If the WindBuster mark was confusing, that alone may be sufficient similarity. See *Homeowners*, 93 *Oil*, 839 F.2d at 1189. There is a suggestion that Traffix misled some relevant facts in rendering the factor may not favor either party innocent here.

## H. Likelihood of expansion of the product lines

The parties agreed that this factor favored neither of them.

Looking at the eight factors together, only purchaser care favors Traffix, and that only slightly. This one factor by itself does not create a genuine issue of material fact as to the likelihood of confusion. The district court found more factors favoring Traffix, which suggests it made every effort to draw inferences in favor of Traffix. Yet the district court nonetheless concluded that WindMaster and WindBuster are confusingly similar marks as a matter of law. The arguments on appeal provide no reason to disturb that decision.

## IV

The Lanham Act's protection of registered trademarks extends also to unregistered trade dress. *See Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 765 n. 2 (1992); *See also Esercizio v. Roberts*, 944 F.2d 1235, 1238 (6th Cir. 1991). To recover for trade dress infringement under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), MDI must prove by a preponderance of the evidence: 1) that its trade dress has obtained "secondary meaning" in the marketplace; 2) that the trade dress of the two competing products is confusingly similar; and 3) that the appropriated features of the trade dress are primarily nonfunctional. *See Esercizio*, 944 F.2d at 1239; *See also Kwik-Site Corp. v. Clear View Mfg. Co. Inc.*, 758 F.2d 167, 178 (6th Cir. 1985). To defeat summary judgment, MDI must show a genuine issue of material fact as to each of these issues.

### A. Secondary meaning

A product's trade dress becomes sufficiently distinctive to qualify for protection under the Lanham Act if it is either inherently distinctive or if it acquires secondary meaning. *See Two Pesos*, 505 U.S. at 769. "To acquire a secondary meaning in the minds of the buying public, an article of merchandise . . . must proclaim its identification with its

source, and not simply stimulate 944 F.2d at 1239, quoting *Wes Stamping Co.*, 222 F.2d 581, 59 *Thomas & Betts Corp. v. Pand* (7th Cir. 1995) ("*Thomas & Bet* desire the product with the p signifies that producer"). To district court applied the seven *Enterprises* trade dress case:

1. direct consumer testimony;
2. consumer surveys;
3. exclusivity, length, and ma
4. amount and manner of adv
5. amount of sales and numbe
6. established place in the ma
7. proof of intentional copyin

*See Sassafras Enters., Inc. v. Ro* (N.D. Ill. 1996). After examin court concluded that no reas determine that MDI had establish trade dress of its WindMaster s was hampered by the district cou whether the dual-spring configu dress in its entirety) identifies WindMaster sign.

### 1. Direct consumer testimo

MDI offered the deposition tes and a former MDI marketing recognize an MDI WindMaster s the highway. The district court reasoning that these deponents points to a Seventh Circuit testimony was admitted to show deponents were distributors rath