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**THIS DECISION IS NOT
CITABLE AS PRECEDENT
OF THE TTAB**

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Jamison Bedding, Inc.
v.
The Spring Air Company

Opposition No. 91156741
to Application Serial No. 78162148
filed on 09/09/2002

Margaret A. Lawson of Taft, Stettinius & Hollister LLP for
Jamison Bedding, Inc.

Clay A. Tillack & Adam S. Weiss of Schiff Hardin LLP for The
Spring Air Company.

Before Bucher, Rogers and Walsh Administrative Trademark
Judges.

Opinion by Walsh, Administrative Trademark Judge:

Jamison Bedding, Inc. (opposer) has opposed the intent-
to-use application of The Spring Air Company (applicant),
filed September 9, 2002, to register TOTAL BALANCE in
standard character form on the Principal Register for
"mattresses and box springs" in International Class 20.
Opposer asserts as the ground for the opposition likelihood
of confusion under Section 2(d) of the Trademark Act, 15

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U.S.C. § 1052(d), based on its prior registration and use of its TRUE BALANCE mark for mattresses and box springs.¹

Opposer relies on its ownership of current U.S. Registration No. 2,059,066, issued May 6, 1997, on the Principal Register for the mark TRUE BALANCE in standard character form for "furniture, namely, beds, mattresses and box springs" in International Class 20. The United States Patent & Trademark Office accepted the Section 8 affidavit and acknowledged the Section 15 affidavit for opposer's registration on May 15, 2003.

In its answer applicant has denied the essential allegations in the notice of opposition.

The record in this proceeding consists of the pleadings, certain responses to interrogatories and requests for admissions submitted under notices of reliance by both parties, a status and title copy of opposer's registration, and three affidavits, two by George Faudree on behalf of opposer and one by Todd Zimmerman on behalf of applicant, submitted by mutual consent of the parties in lieu of testimonial depositions.

The only issue in this proceeding is likelihood of confusion. There is no dispute regarding priority. King

¹ Opposer also refers to "dilution of Opposer's mark" in its notice of opposition, but opposer has not presented any evidence or argument in support of a dilution claim. Therefore, we conclude that opposer has abandoned any dilution claim.

Candy Co. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). Applicant has not asserted priority. Moreover, opposer has priority on the basis of its TRUE BALANCE registration which issued on May 6, 1997 resulting from an application filed on April 2, 1996, well prior to the filing date of applicant's TOTAL BALANCE application, September 9, 2002, and well prior to any claim of use of the TOTAL BALANCE mark by applicant. Applicant claims it began to use TOTAL BALANCE in "late 2002."² Sections 7(b)&(c) of the Trademark Act, 15 U.S.C. § 1057(b)&(c).

ANALYSIS

The opinion in In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1977) sets forth the factors we may consider in determining likelihood of confusion. We must determine the issue of likelihood of confusion case by case according to these factors recognizing that one factor may play a dominant role in a particular case. In re Majestic Distilling Co., 315 F.3rd 1301, 65 USPQ2d 1201, 1203-04 (Fed. Cir. 2003). We discuss below the factors relevant here.

Comparison of the Goods

The goods of both opposer and applicant include "mattresses and box springs." Applicant argues, "Although Opposer and Applicant sell mattresses and box springs,

² Zimmerman Affidavit at ¶ 11.

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Opposer has offered no evidence to suggest that they do so in connection with similarly priced or quality products. Therefore, this factor favors Applicant." Applicant's Brief at 16. Applicant offers no legal or factual support for this argument.

As noted above, both the TOTAL BALANCE application and the TRUE BALANCE registration include "mattresses and box springs" among the identified goods without any limitations. To be generous, applicant's suggestion that opposer must establish some parity between the goods of the parties based on price and quality is baseless. Applicant's implied argument proceeding from this assertion--that the goods of the parties are somehow different--is also baseless. The simple fact is that the goods, as identified in the application and registration, are identical for the purposes of our analysis of likelihood of confusion.

More importantly, contrary to applicant's assertion that this factor favors applicant, the fact that the goods are identical favors opposer in that "the degree of similarity [between the marks] necessary to support the conclusion of likely confusion declines" when the goods are identical. Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992), cert. denied, 506 U.S. 1034 (1992).

Trade Channels

In similar fashion applicant argues that the channels of trade for the parties' products are distinct, and again, that this factor favors applicant. Applicant states, "Opposer has offered no evidence that the parties' products are sold at the same particular mattress stores, on the same websites, nor at a similar price point." Applicant's Brief at 16-17. In evaluating the channels of trade, we must consider the goods as described in the application and registration and, in the absence of any restrictions in the channels of trade in either, assume that they travel in all trade channels appropriate for the goods. CBS Inc. v. Morrow, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); In re Melville Corp., 18 USPQ2d 1386, 1388 (TTAB 1991). Because both the TOTAL BALANCE application and the TRUE BALANCE registration include identical goods, mattresses and box springs, and because no trade-channel restrictions are specified in either, we conclude that the channels of trade for the goods of applicant and opposer are identical. This factor favors opposer.

Actual Confusion

Applicant also argues that there has been no actual confusion between the TOTAL BALANCE and TRUE BALANCE marks to advance its broader argument that there is no likelihood of confusion. Applicant's Brief at 8. However, as

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applicant indicates, the two products have only coexisted for approximately two years. Also, the record does not indicate that there has been a true opportunity for actual confusion, for example, as a result of the marketing of products under the marks in the same geographic areas and through the same channels of trade. In fact, applicant points to the lack of evidence that the parties' goods have been sold "at the same particular mattress stores, on the same web sites . . ." Applicant's Brief at 17. The Federal Circuit has taken a skeptical view of self-serving statements asserting the absence of actual confusion, "A showing of actual confusion would of course be highly probative, if not conclusive, of a high likelihood of confusion. The opposite is not true, however. The lack of evidence of actual confusion carries little weight (citation omitted) . . ." Majestic, 65 USPQ2d at 1205; In re Kangaroos U.S.A., 223 USPQ 1025, 1026-27 (TTAB 1984). Accordingly, we conclude that the "actual confusion" factor is neutral in this case.

Comparison of the Marks

Both applicant and opposer devote substantial attention to a comparison of the marks. This attention demonstrates that the degree of similarity between the marks of the parties is a pivotal factor in this case.

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Opposer argues that the marks are similar and points out that each consists of two words with the first word beginning with a "T" and that the second word in both marks is BALANCE. Opposer's Brief at 4. Opposer adds, "Spring Air's mark, taken in its totality compared with Jamison Bedding's mark creates the same commercial impression." Id. at 5.

On the other hand applicant argues that the marks are not similar and disparages opposer's arguments as "merely relying on the coincidence that both marks begin with the letter 'T.'" Applicant's Brief at 11. As to the appearance of the marks, opposer states, "The word TOTAL has five letters and TRUE has four letters—other than the first letter "T" there is not one other letter in common with these words." Id. at 12. Regarding pronunciation, applicant notes the difference in the number of syllables and the sound and argues, "A customer on the telephone would never mistake a product that starts with the mark TRUE, with a product that starts with the mark TOTAL, even if coupled with a second identical term." Id. In an attempt to distinguish the connotations applicant points to differences in certain dictionary definitions for "true" vs. "total" and concludes, "Thus, 'total' connotes quantity or amount while 'true' connotes the quality of genuineness." Id. Applicant also observes that "balance" is a weak term, implying that

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it is not significant in the connotation of the marks. As to commercial impression, applicant observes, "TOTAL BALANCE leaves the impression upon the consumer of a product completely at equilibrium whereas TRUE BALANCE makes the consumer think of a product at equilibrium that is genuine and reliable."³ Applicant's Brief at 14-15.

To determine whether the marks are confusingly similar, we must consider the appearance, sound, connotation and commercial impression of each mark. Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005).

Appearance - While there are differences in appearance between TOTAL BALANCE and TRUE BALANCE, as noted by applicant, we believe that the marks are similar in appearance. The common elements, the beginning "T" and the shared word "BALANCE," outweigh the differences. The applicant's analysis which focuses almost exclusively on TOTAL and TRUE and dissects each to highlight the differences misses the forest for the trees. Applicant essentially urges a side-by-side comparison which is not appropriate. Majestic, 65 USPQ2d at 1203-04. When the marks are viewed overall, as they should be, we conclude

³ Throughout the discussion of the marks, applicant and opposer refer to numerous cases. We have considered those cases, but in general, and in the particular comparison of marks required here, each case is unique and must be judged on its own facts. Majestic, 65 USPQ2d at 1203-04.

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that the mark are similar in appearance. In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985).

Sound - As to sound, here too there are both differences and similarities between the marks. Applicant posits that the two marks could not be mistaken over the phone, without any evidentiary support. However, we find it more reasonable to conclude that the common "T" at the beginning and the common second term "BALANCE" could indeed lead to confusion as to sound. While, in this case, the similarity in sound is not as apparent as the similarity between the marks in other respects, we conclude that the marks are similar in sound.

Connotation - The marks are highly similar in connotation. Both marks convey the suggestion that the goods, mattresses and box springs, provide maximum stability or equilibrium leading to comfort and restful sleep. In its attempt to show that "true" and "total" may have different meanings, applicant disregards the fact that, as used in both marks, both terms modify "balance." In this context, each of the terms combines with "balance" to convey essentially the same meaning. In fact, Merriam-Webster's Collegiate Dictionary (11th ed. 2003), includes definitions for "total" - "2: ABSOLUTE, UTTER <a [total] failure>" and "true" - "3 a: properly so called <[true] love>" which

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illustrate the common sense in which both "total" and "true" modify "balance" in the marks.⁴ Therefore, we conclude that the marks are highly similar in connotation.

Commercial Impression - The marks are also highly similar in their overall commercial impression for essentially the same reasons we conclude they are similar in connotation. Because both marks are in standard character form, there is no element, other than the words, which can contribute to the commercial impression. The goods of the parties are also identical; this precludes any variation in either connotation or commercial impression resulting from differences in the goods. As a result in each of the marks the connotation and commercial impression is essentially the same. And furthermore, in comparing the marks, that connotation and commercial impression engendered by each is highly similar. Accordingly, we conclude that the marks of the parties are similar.

On a related point, applicant argues that it uses its "Spring Air" house mark with its TOTAL BALANCE mark and that opposer uses its "Jamison" house mark with its TRUE BALANCE mark, and that as a result, there is no likelihood of confusion. Applicant's Brief at 4.

⁴ We take judicial notice of these definitions pursuant to the authorities cited in TBMP § 704.12(a)(2nd ed. 2004).

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Opposer points out that if applicant receives the registration it seeks here, "it will not be restricted in using the mark only in conjunction with its house mark." Opposer's Reply Brief at 11.

Opposer is correct. If the registration issued, applicant would be entitled to all of the presumptions Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b), affords, including a presumption of its "exclusive right to use the mark [TOTAL BALANCE] on or in connection with the goods" without regard to any house mark. See In re Rexel Inc., 223 USPQ 830, 832 (TTAB 1984). Therefore, even if we were to assume that applicant is correct, that is, that use of the house marks would preclude confusion, and we are not, the assumption would be contrary to the governing provisions of the Trademark Act as applied to both the application and opposer's registration.

Strength of the Opposer's Mark

Applicant also argues strenuously that opposer's TRUE BALANCE mark is weak, and as such, entitled to only a narrow scope of protection. Applicant's Brief at 5. Applicant argues further that TRUE BALANCE is descriptive. Id. at 6.

To the extent applicant argues that opposer's registered TRUE BALANCE mark is descriptive we reject those arguments. In re Peebles, 23 USPQ2d 1795, 1797 n.5 (TTAB 1992). This is a thinly veiled attack on opposer's

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registration. Applicant may only attack the validity of a registration through a cancellation proceeding (or in a case such as this through a proper counterclaim). See In re Dixie Restaurants, Inc., 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997). Also, even the individual components "TRUE" and "BALANCE" are no more than suggestive of the goods. In re Melville Corp., 18 USPQ2d at 1389. Even opposer's statements applicant relies upon to establish that TRUE BALANCE is descriptive, in fact, illustrate suggestive use. The Zimmerman affidavit refers to the following statement in opposer's advertising: "For a true balance of comfort, support and durability, Jamison's True Balance Sleep system is the best . . ." Zimmerman Affidavit ¶ 7. As used here and elsewhere in the record, TRUE BALANCE is no more than suggestive.

In support of its position that TRUE BALANCE is a weak mark, applicant relies on selected prior registrations and related testimony. Specifically, the Zimmerman affidavit submitted on behalf of applicant states that "Sealy uses the mark PERFECT BALANCE on mattresses" and indicates that the mark is registered (Reg. No. 2,698,601, issued March 18, 2003). Id. at ¶ 8. Zimmerman also indicates that he knows about the use of POSTURE BALANCE and refers to a registration for that mark (Reg. No. 2,830,207, issued April 6, 2004). Id. Mr. Zimmerman also indicates that he knows

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of use of TOTAL COMFORT on mattresses and he refers to a registration for that mark (Reg. No. 2,057,666, issued April 29, 1997). Lastly, Mr. Zimmerman states that "Simmons Bedding had used the mark TRU-COMFORT on mattresses and owned a federal registration for that mark (Reg. No. 537,027, issued January 30, 1951, now designated "dead"). Id. at ¶ 9. In view of the "dead" status of the TRU-COMNFORT registration and Mr. Zimmerman's statement as to use in the past tense, we will not consider the evidence related to the TRU-COMFORT mark.

First, with respect to the evidence regarding the PERFECT BALANCE and POSTURE BALANCE marks, Mr. Zimmerman claims that the marks are in use, but he does not indicate the extent of that use. While use of a term in third-party marks, even in a suggestive sense, may sometimes show that a term is weak, the existence of two third-party marks with very limited information as to the use, is insufficient to show that "balance" is a weak term as applied to mattresses and box springs.

Through the TOTAL COMFORT and TRU-COMFORT marks applicant intended to show that TOTAL and TRUE combined with a different common term "coexisted" in the mattress field. However, as noted, applicant is unable to assert that TRU-COMFORT is either in use or registered. Furthermore, this argument takes us too far afield from the marks at issue in

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this case. Accordingly, we reject applicant's arguments based on these marks.

In addition, in its brief applicant states, "In addition to the aforementioned registrations and uses of TRUE BALANCE, POSTURE BALALNCE and PERFECT BALANCE marks for beds, other BALALNCE bed marks have been allowed, are currently pending, or were used in the past." Applicant's Brief at 6. Applicant then refers to several applications by serial number which applicant indicates are either pending or abandoned, and to two more "expired" marks without any application serial numbers or registration numbers. Id. at 6-7. Later in the brief applicant states, "Moreover, there are several additional BALANCE marks in connection with related goods (pillows, mattress pads, etc.) in Class 20. Opposer's TRUE BALANCE mark coexists with various other TRU*BALANCE marks, including one registered in connection with adjustable seats, body positioners, body and back support cushions, among others, in connection with wheelchairs." Id. at 20. Opposer has objected to all of this evidence as not properly of record. Applicant has not provided any testimony as to any of these marks, and applicant has not introduced any of the USPTO records related to these marks into evidence in any form through a notice of reliance or otherwise. TBMP § 704.03(b)(1)(B) & 704.03(b)(2)(2nd ed. 2004). In the absence of any

admissible evidence related to these marks, we have not considered these alleged third-party uses of BALANCE marks.

Overall, we conclude that, on this record, TRUE BALANCE is not a weak mark and is entitled to the degree of protection we would accord to any duly registered mark which is no more than suggestive of the goods.⁵ In re Melville Corp., 18 USPQ2d at 1389. Furthermore, the registration of marks in prior applications does not bind us here. In re Nett Designs, Inc., 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001).

The Purchasers

Applicant states, "Mattress consumers do not make impulse purchases, but rather careful, sophisticated purchases." Applicant's Brief at 17. Opposer states, "Even if the Board agrees that mattress purchasers are sophisticated and thus less likely to make impulse decisions, this does not dictate that consumers will not be confused when confronted with the TRUE BALANCE and TOTAL BALANCE marks for mattresses." Opposer's Reply Brief at 9 (citations omitted). Opposer also notes an admission by applicant that its goods "may be promoted and sold to consumers of varying degrees of sophistication." Opposer's

⁵ Contrary to applicant's argument, opposer is not required to show through a survey or otherwise that its registered mark is strong.

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brief at 7, citing Applicant's Responses to Oppser's First Request for Admissions.

It is certainly true that mattresses and box springs, as common if not absolutely necessary household furnishings, would be sold to consumers of varying degrees of sophistication. Consequently, the critical point for our purposes is that those potential purchasers would be primarily average or ordinary members of the general purchasing public. The goods are of a type which virtually any consumer might purchase. On the other hand, the goods are relatively expensive, that is, more expensive than common groceries, but less expensive than automobiles, for example. The goods are also of a type which would be purchased rather infrequently for long-term and consistent daily (or nightly) use. Therefore, we conclude that the goods would be purchased with a moderate degree of care by ordinary consumers. Cf. Electronic Design & Sales, Inc. v. Electronic Data Systems Corp., 954 F.2d 713, 21 USPQ2d 1388 (Fed. Cir. 1992). More importantly, in the overall analysis in this case, this factor is considerably less important than the comparison of the goods, which are identical, and the marks, which are similar. Furthermore, even sophisticated consumers are not necessarily knowledgeable in the field of trademarks, and as such, not immune from trademark confusion. In re Decombe, 9 USPQ2d 1812, 1814-15

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(TTAB 1988); In re Pellerin Milnor Corp., 221 USPQ 558, 560 (TTAB 1983).

Other Factors

Applicant has argued regarding a number of other factors, generally summarily and consistently concluding that each factor favors applicant. For example, applicant argues that opposer's mark is not famous, and therefore, this factor favors applicant. While we agree that, on this record, opposer has not shown that its mark is famous, this factor does not favor applicant. Majestic, 65 USPQ2d at 1205 (" . . . we decline to establish that the converse rule that likelihood of confusion is precluded by a registered mark's not being famous."). And, as to the other factors applicant addresses in summary fashion, namely, "The Variety of Goods on Which a Mark Is or Is Not Used," "The Extent to Which Applicant Has a Right to Exclude Others from Use of Its Mark on the Goods," and "The Extent of Potential Confusion, Whether de Minimus or Substantial," we conclude that these factors are not significant in this case.

Conclusion

In conclusion, based all of the evidence of record in this case bearing on the du Pont factors, we conclude that there is a likelihood of confusion between TRUE BALANCE and TOTAL BALANCE as applied to mattresses and box springs. The principal factors which dictate this conclusion are the

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similarity of the marks and the fact that the goods, and the channels of trade for those goods, are identical.

Decision: Jamison Bedding, Inc.'s opposition to Application Serial No. 78162148 is sustained.