

This Opinion is Not a  
Precedent of the TTAB

Mailed: May 18, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

*In re Falicie E. Dirosier*

Serial No. 90074262

Sherria D. Williams of S Williams Law, PLLC for Falicie E. Dirosier.

Roger T. McDorman, Trademark Examining Attorney, Law Office 109,  
Michael Kazazian, Managing Attorney.

Before Cataldo, Larkin, and Johnson,  
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

Falicie E. Dirosier (“Applicant”) seeks registration on the Principal Register of the  
mark shown below

**mood swings**  
shifting the mood.

for “Bar soap” in International Class 3.<sup>1</sup>

<sup>1</sup> Application Serial No. 90074262 was filed on July 26, 2020 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s allegation of a bona fide intention to use the mark in commerce. Applicant describes the mark as follows: “The mark consists of

The Trademark Examining Attorney has refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark so resembles the standard-character mark MOOD SWING, registered on the Principal Register for "Hair styling preparations" in International Class 3,<sup>2</sup> as to be likely, when used in connection with the goods identified in the application, to cause confusion, to cause mistake, or to deceive.

When the Examining Attorney made the refusal final, Applicant appealed and requested reconsideration, which was denied. Applicant and the Examining Attorney have filed briefs.<sup>3</sup> We affirm the refusal to register.

#### **I. Record on Appeal<sup>4</sup>**

The record includes:

- USPTO electronic records of the cited registration;<sup>5</sup>

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the wording 'MOOD SWINGS' in stylized type with the second 'O' slightly raised and canted to the right, and the 'G' slightly lower, positioned above the wording 'SHIFTING THE MOOD.' in stylized type." The application originally contained additional goods, but those goods were divided out into a separate application during prosecution and are not before us on appeal.

<sup>2</sup> The cited Registration No. 5909991 issued on November 12, 2019.

<sup>3</sup> Citations in this opinion to the briefs refer to TTABVUE, the Board's online docketing system. *See New Era Cap Co. v. Pro Era, LLC*, 2020 USPQ2d 10596, at \*2 n.1 (TTAB 2020). The number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear. Applicant's brief appears at 6 TTABVUE and the Examining Attorney's brief appears at 8 TTABVUE.

<sup>4</sup> Citations in this opinion to the application record are to pages in the Trademark Status & Document Retrieval ("TSDR") database of the United States Patent and Trademark Office ("USPTO").

<sup>5</sup> November 16, 2020 Office Action at TSDR 4-5.

- Pages from third-party websites of sellers of the involved goods;<sup>6</sup>
- Pages from what appears to be Applicant's website at [mymoodswings.com](http://mymoodswings.com);<sup>7</sup>
- Pages from the website of the owner of the cited registration;<sup>8</sup>
- Dictionary definitions of the words "mood" and "shift;"<sup>9</sup>
- The results of various searches using the Google search engine;<sup>10</sup>
- A LinkedIn page of the apparent founder of the owner of the cited registration;<sup>11</sup>
- Pages from the websites of Walgreens, Walmart, and CVS;<sup>12</sup>
- USPTO electronic records of third-party registrations of marks for the goods identified in the application and cited registration;<sup>13</sup>
- Certificates of registration of third-party marks containing either the word "SWING" or the word "MOOD" for various goods in Class 3;<sup>14</sup>
- Photographs of store shelf displays of hair care products and soaps;<sup>15</sup>
- Certificates of registration for other marks owned by the owner of the cited registration and photographs of products bearing the registered marks;<sup>16</sup> and

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<sup>6</sup> *Id.* at TSDR 6-22; February 11, 2021 Response to Office Action at TSDR 54-70; September 16, 2022 Denial of Request for Reconsideration at TSDR 2-15.

<sup>7</sup> February 11, 2021 Response to Office Action at TSDR 24-26; January 28, 2022 Response to Office Action at TSDR 71-72.

<sup>8</sup> February 11, 2021 Response to Office Action at TSDR 27-28; 45-47, 49-50; January 28, 2022 Response to Office Action at TSDR 75-76.

<sup>9</sup> February 11, 2021 Response to Office Action at TSDR 30-40.

<sup>10</sup> *Id.* at TSDR 42-43; January 28, 2022 Response to Office Action at TSDR 74.

<sup>11</sup> February 11, 2021 Response to Office Action at TSDR 52.

<sup>12</sup> *Id.* at TSDR 72-76.

<sup>13</sup> October 23, 2021 Office Action at TSDR 2-60.

<sup>14</sup> January 28, 2022 Response to Office Action at TSDR 13-68.

<sup>15</sup> *Id.* at TSDR 78-86.

<sup>16</sup> August 14, 2022 Request for Reconsideration at TSDR 9-17.

- Pages from the USPTO’s Trademark Electronic Search System (“TESS”) database regarding registrations of, and applications to register, marks owned by the owner of the cited registration.<sup>17</sup>

## II. Analysis of Section 2(d) Refusal

“The Trademark Act prohibits registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion [or] mistake, or to deceive.” *In re Charger Ventures LLC*, 64 F.4th 1375, 2023 USPQ2d 451, at \*2 (Fed. Cir. 2023) (cleaned up). Our determination of the likelihood of confusion under Section 2(d) of the Trademark Act is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”). *Charger Ventures*, 2023 USPQ2d 451, at \*4. We consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

“In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services.” *Chutter, Inc. v. Great Mgmt. Grp., LLC*, 2021 USPQ2d 1001, at \*29 (TTAB 2021), *appeal docketed*, No. 22-1212 (Fed. Cir. 2021) (citing *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976)).

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<sup>17</sup> *Id.* at TSDR 19-22.

Applicant argues that “[i]n some cases, a determination that there is no likelihood of confusion may be appropriate, even where the marks share common terms and the goods/services relate to a common industry” because “these factors are outweighed by other factors, such as differences in the relevant trade channels of the goods/services, the presence in the marketplace of a significant number of similar marks in use on similar goods/services, or another established fact probative of the effect of use.” 6 TTABVue 12. Applicant focuses, however, on the first two key *DuPont* factors, *id.* at 12-22, and does not offer argument and probative evidence regarding other factors.

#### **A. Similarity or Dissimilarity of the Marks**

“Under the first *DuPont* factor, we consider ‘the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.’” *In re Embiid*, 2021 USPQ2d 577, at \*11 (TTAB 2021) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005)). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *Id.* (quoting *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019) (quoting *In re Davia*, 110 USPQ2d 1801, 1812 (TTAB 2014))).

“The proper test regarding similarity ‘is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.’” *Id.* (quoting *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (internal quotation omitted)).

“The proper perspective on which the analysis must focus is on the recollection of the average customer, who retains a general rather than a specific impression of marks.” *Id.* (quoting *In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1630 (TTAB 2018)). The average customers here are purchasers of bar soaps and hair styling preparations, personal care products that are purchased by ordinary consumers.

The marks are MOOD SWING in standard characters and Applicant’s mark shown again below:



Applicant acknowledges that the marks “both contain the terms ‘Mood Swing,’” but argues that the cited mark “is visually distinctive . . . in a side-by-side comparison of the marks which shows the clear [sic] in the appearance,” 6 TTABVUE 13, displayed in Applicant’s brief as follows:

<b>Applicant’s Mark</b>	<b>Cited Registered Mark</b>
MOOD SWINGS SHIFTING THE MOOD.	MOOD SWING

*Id.*

Applicant further argues that “[i]n reviewing the specimen provided, there is ‘no way’ consumers would associate the products of the Cited Mark with the Applicant’s products.” *Id.*<sup>18</sup> Applicant concludes regarding appearance that “[v]isually, the

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<sup>18</sup> The phrase “specimen provided” appears to refer to evidence of use of the involved marks made of record by Applicant. Applicant’s application is based on her intention to use her mark for bar soap, and although she has begun such use, she did not file an amendment to allege use, and thus there is no specimen of use in the file history of the application. The specimen

appearances are different and does not in ‘plain sight’ does not [sic] create a confusion as to the source of the goods and/or services [sic].” *Id.*

Applicant argues that the marks differ in sound because her mark “is a five word, seven syllable mark whereas the Cited Registered mark is ‘MOOD SWING is [sic] a two word, two syllable mark.” *Id.* She concludes that the “marks differ in sound and although the marks share some similarity due to the common words MOOD SWING, the sound of the marks in their entirety are [sic] dissimilar.” *Id.* at 14.

With respect to meaning, Applicant argues that the Examining Attorney “downplays the fact that the Applicant’s mark contains the words/phrase ‘Shifting The Mood.’ claiming the focus is on the first part of the marks,” and that “[a]ccording to Dictionary.com, ‘**Shift**’ is defined as ‘to move from one place, position, direction, etc., to another’” while “Dictionary.com also defines ‘**Mood**’ as ‘a state or quality of feeling at a particular time; a distinctive emotional quality or character.’” *Id.* (emphasis supplied by Applicant; citation omitted). Applicant argues that the “overall connotation is indeed different,” and that the Examining Attorney “argues that the words ‘Mood Swing’ are related, but has not properly evaluated the addition of ‘Shifting The Mood’ to the Applicant’s mark.” *Id.*

Applicant also cites 28 third-party registrations that she claims show that the elements of the cited mark are “commonly used,” such that “the public will look at

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of used submitted by the registrant to obtain the cited registration is similarly not in the record.

other elements to distinguish the source of goods or services.” *Id.* at 18 (citing TRADEMARK MANUAL OF EXAMINING PROCEDURE (“TMEP”) Section 1207.01(d)(iii)).

Applicant concludes by arguing that the commercial impressions of the involved marks differ because they are used with different goods. *Id.* at 18-20.

The Examining Attorney argues that the “marks are similar in sound, appearance, and connotation because of the dominant wording ‘MOOD SWING(S)’ common to both marks.” 8 TTABVue 5. According to the Examining Attorney, the “additional wording ‘SHIFTING THE MOOD’ in the applied-for mark, which is absent from the cited mark, is not sufficient to distinguish the marks or avoid a likelihood of confusion,” and that “[a]dding a term to a registered mark generally does not obviate the similarity between the compared marks, as in the present case, nor does it overcome a likelihood of confusion under Section 2(d).” *Id.*

The Examining Attorney also argues that “Applicant’s assertions that the additional wording ‘SHIFTING THE MOOD’ in the applied-for mark distinguishes it from the cited mark in sound, appearance, and connotation, and that in discounting this element, the examining attorney is not properly comparing the mark in its entirety, lacks [sic] persuasive merit.” *Id.* at 6-7. The Examining Attorney rejects “Applicant’s arguments that consumers would be drawn more to ‘SHIFTING’ than ‘MOOD SWINGS,’” and that “the latter is not the dominant feature of the mark,” because of “the stylization of the applied-for mark, which presents this wording in a larger and bolder typeface compared to the additional wording ‘SHIFTING THE MOOD.’” *Id.* at 7. He argues that the wording MOOD SWINGS is “the more



dominant, source-identifying element of the applied-for mark,” *id.*, and that the “addition of ‘SHIFTING THE MOOD’ in the applied-for mark does not change the connotation of the dominant wording ‘MOOD SWINGS’” and “may be seen as reinforcing the similarities between it and the cited mark; that is, the dominant features of the marks differ only in that the applied for-mark presents the cited mark, ‘MOOD SWING,’ in its plural form, i.e., ‘MOOD SWINGS.’” *Id.*

The Examining Attorney rejects Applicant’s third-party registration evidence because “none of the third-party registrations applicant cites are for marks that are sufficiently similar to those at issue here to support finding a crowded field of ‘MOOD SWING(S)’ marks used with soaps and/or hair-care products.” *Id.* at 9.

The involved marks must be considered in their entirety, but “in articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entirety.” *Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, at \*30-31 (TTAB 2021) (quoting *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018) (quoting *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985)). The Examining Attorney argues that the phrase MOOD SWINGS is the dominant portion of Applicant’s mark, 8 TTABVue 7, while Applicant claims that the marks contain “different dominant portions,” 6 TTABVue 22, so we will begin by determining the dominant portion of Applicant’s mark.

The words “mood swings” in Applicant’s mark, shown again below for ease of reference in following our analysis,

**mood swings**  
shifting the mood.

are “[d]isplayed in a large bold typeface,” “comprise[ ] the largest literal portion of the mark in terms of size, position, and emphasis,” and are “the first term in the mark, further establishing [their] prominence.” *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1184-85 (TTAB 2018). The prominence of the words “mood swings” is even more starkly illustrated in photographs of bar soap bearing the mark that appear on webpages made of record by Applicant, one of which photographs is reproduced below:



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We find that “because of the position, size and bolding of the term [mood swings], this single term dominates the commercial impression of Applicant’s mark.” *Id.* at 1185. We turn now to the required comparison of the marks in their entirety, giving

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<sup>19</sup> January 28, 2022 Response to Office Action at 71.

greater weight in that comparison to the words “mood swings” in Applicant’s mark than to the words “shifting the mood.”

With respect to appearance, the cited mark MOOD SWING is in standard characters, and “[w]e must consider that the literal elements of the mark (the words and letters) may be presented in any font style, size or color, including the same font, size and color as the literal portions of Applicant’s mark” because “the rights associated with a standard character mark reside in the wording per se and not in any particular font style, size, or color.” *Id.* at 1186 (citing *Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011)). We thus must assume that the owner of the cited registration could present the words MOOD SWING in the same bold lower case stylized font in which the words “mood swings” appear in Applicant’s mark, that is (as Applicant describes her mark), with the words MOOD SWING appearing “in stylized type with the second ‘O’ slightly raised and canted to the right, and the ‘G’ slightly lower . . . .”<sup>20</sup>

If “mood swings” in Applicant’s mark is perceived to be a plural form of MOOD SWING, the distinction is not sufficient to prevent a likelihood of confusion. *Wilson v. Delaunay*, 245 F.2d 877, 114 USPQ 339, 341 (CCPA 1957); *In re Pix of Am., Inc.*, 225 USPQ 691, 692 (TTAB 1985); *In re Sarjanian*, 136 USPQ 307, 308 (TTAB 1962). If “mood swings” is perceived by some consumers as a possessive form of MOOD SWING, that too is not a sufficient distinction. *In re Binion*, 93 USPQ2d 1531, 1534

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<sup>20</sup> February 11, 2021 Response to Office Action at TSDR 1.

(TTAB 2009); *In re Curtice-Burns, Inc.*, 231 USPQ 990, 992 (TTAB 1986); *Winn's Stores, Inc. v. Hi-Lo, Inc.*, 203 USPQ 140, 143 (TTAB 1979).

Consumers with a general rather than specific recollection of the appearance of the cited MOOD SWING mark in their mind's eye displayed in the manner discussed above, who separately encounter Applicant's mark, are not likely to distinguish the marks in appearance due to the presence of the much smaller words "shifting the mood" in Applicant's mark. Given the strong similarity in appearance of the words "mood swing" in the cited mark to "mood swings," the dominant portion of Applicant's mark (particularly when the words "mood swing" and "mood swings" are displayed in the same stylized font), consumers seeing Applicant's mark who notice the words "shifting the mood" could readily believe that those words reflect a line extension of the MOOD SWING mark from hair styling preparations into bar soaps. Although there are some visual differences between the marks, we find that they are more similar than dissimilar in appearance.

With respect to sound, the cited mark will be verbalized as "mood swing." Applicant's mark, however verbalized, begins with the virtually phonetically identical words "mood swings." Applicant's argument that the marks differ in sound because her mark "is a five word, seven syllable mark whereas the Cited Registered mark is 'MOOD SWING is [sic] a two word, two syllable mark," 6 TTABVUE 13, is unpersuasive for two reasons. First, Applicant's argument assumes that her mark will be verbalized as "mood swings shifting the mood," which is a mouthful, and it also ignores the "penchant of consumers to shorten marks," *Sabhnani*, 2021 USPQ2d

1241, at \*36 (quoting *In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1961 (TTAB 2016)), reflecting the “universal habit of shortening full names — from haste or laziness or just economy of words.” *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 219 (CCPA 1978) (Rich, J., concurring). It is more likely that Applicant’s mark will be verbalized simply as “mood swings,” which appears to be Applicant’s primary branding,<sup>21</sup> than as “mood swings shifting the mood,” which combines that primary branding with the tagline or slogan “shifting the mood.”

Second, even if Applicant’s mark is verbalized as “mood swings shifting the mood,” consumers are not likely to process minutia such as the number of words and syllables in the involved marks in forming general rather than specific impressions of them. *See In re John Scarne Games, Inc.*, 120 USPQ2d 315, 316 (TTAB 1959) (“Purchasers of game boards do not engage in trademark syllable counting[;] they are governed by general impressions made by appearance or sound, or both.”).

Just as marks are not viewed side-by-side when comparing them in appearance, they are not pronounced sequentially when comparing them for aural similarity or dissimilarity. Consumers with a general recollection of the sound of the cited mark “mood swing” who separately hear Applicant’s mark verbalized as “mood swings” are likely to believe that they are one and the same mark, and even if Applicant’s mark is verbalized as “mood swings shifting the mood,” consumers are not likely to distinguish those marks in sound due to the presence of the tagline or slogan “shifting

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<sup>21</sup> In what appears to be her domain name, “mymoodswings.com,” Applicant identifies her company by reference to “mood swings,” not “mood swings shifting the mood.” January 28, 2022 Response to Office Action at TSDR 70-72.

the mood.” Although there are differences between the marks in sound if all of the words in Applicant’s mark are verbalized, we find that the marks are more similar than dissimilar in sound.

Finally, with respect to meaning, we reject Applicant’s suggestion that the presence of the words “shifting the mood” make the overall connotation of her mark “indeed different.” 6 TTABVUE 14. The word “shifting” in the phrase “shifting the mood” connotes a mood “swing,” as the verb “shift” means “to transfer from one place, position, person, etc. to another,”<sup>22</sup> and the noun “swing” means “an often periodic shift from one condition, form, position, or objection of attention or favor to another.”<sup>23</sup> The wording “shifting the mood” thus reinforces and refers back to “mood swings” in Applicant’s mark.

Applicant argues that the marks have different commercial impressions because they are used in connection with bar soap and hair styling preparations, citing *In re Sydel Lingerie Co.*, 197 USPQ 629 (TTAB 1977), *In re Sears, Roebuck & Co.*, 2 USPQ2d 1312 (TTAB 1987), and *In re British Bulldog, Ltd.*, 224 USPQ 854 (TTAB 1984). 6 TTABVUE 20. “Unlike in those cases, there is no evidence here, or other reason to find, that [MOOD SWING(S)] has one meaning when used with [bar soap], and a second and different meaning when used with [hair styling preparations], based on the nature of the respective goods.” *Embiid*, 2021 USPQ2d 577, at \*21 (citing

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<sup>22</sup> February 13, 2021 Response to Office Action at TSDR 35 (dictionary.com).

<sup>23</sup> MERRIAM-WEBSTER DICTIONARY (merriam-webster.com, last accessed on May 15, 2023). The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions. *Monster Energy Co. v. Lo*, 2023 USPQ2d 87, at \*20 n.41 (TTAB 2023).

*Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir 2012) (“Opposer’s COACH mark, when applied to fashion accessories, is clearly either arbitrary or suggestive of carriage or travel accommodations (e.g., stagecoach, train, motor coach, etc.), thereby engendering the commercial impression of a traveling bag (e.g., a coach or carriage bag). On the other hand, applicant’s COACH marks call to mind a tutor who prepares a student for an examination.”)). Both marks here connote mood swings, and they are quite similar in meaning.

As discussed above, the marks have slight differences in appearance and sound. Applicant argues that these differences, and the claimed differences in meaning, are enough to make confusion unlikely because Applicant’s third-party registration evidence shows that “consumers will look to differences, even slight differences, to distinguish between brands.” *Id.* at 18. We set forth below a table of the cited registrations that appears in Applicant’s brief:

Mark	Serial No.	Relevant Goods/Services	Status	Owner
Ink Mood Drop	6512886	Class 03: Cosmetics	Registered	Clio Cosmetics, Corp
Freemood	6271420	Class 03: Lipsticks	Registered	Binlin Haung and Quanyou Hu
Moodstruck Beloved	6446950	Class 03: Cosmetics	Registered	Younique, LLC
All-Take Mood	6481474	Class 03: Beauty Masks, Blusher, Cosmetic reparations	Registered	Clio Cosmetics
MoodSmooth	6466051	Class 03: Oils for essential oils	Registered	Lune Group Oy
MoodBeam	6159597	Class 03: Aromatic preparations, namely cream, lotion	Registered	Eva Werk
Forest Mood	6056107	Class 03: Scents and fragrances	Registered	Daimler AG
Bold Mood	6047662	Class 03: Mascara	Registered	Karity, LLC
Matcha Mood	5834158	Class 03: Cosmetic preparations	Registered	Jun Choi
MoodFumes	5689622	Class 03: Body Oil and Body Sprays	Registered	Marie Latona and Salvatore Latona
MoodBoost	5587621	Class03: Body Wash	Registered	High Ridge Brands
Mood-ology	5257715	Class 03: Disks containing essential oils	Registered	Origami Owl, LLC
Moodmask	5723503	Class 03: Non medicated skin preparations	Registered	Rare Beauty Brands, Inc.
Rainy Mood	6383134	Class 03: Frangrances	Registered	Plaint Theory, Inc.
Moodstruck Minerals	5328983	Class 03: Cosmetics	Registered	Younique, LLC
Mood Food	5808114	Class 03: Non medicated skin creams	Registered	Linda LaSala

Current Mood	5729271	Class 03: Indoor non-medicated skin tanning	Registered	Australian Gold, LLC
My Mood	5358503	Class 03: Cosmetics	Registered	Nails, Inc.
Mood Oil	5496424	Class 03: Essential Oils	Registered	Essential Rose and Oils
Skin + Mood	5549538	Class 03: Facial Oils	Registered	Woods Wild Botanicals
Mood Blends	5410380	Class 03: Personal and Aromatherapy Care Products	Registered	Zen Spa Enterprises, Inc.
Metallic Moods	5252571	Class 03: Cosmetics	Registered	Beauty Salons, Ltd
Mood Indigo	5228029	Class 03: Cosmetic body scrubs	Registered	Rea Wright
Sports Mood	4330656	Class 03: Perfumery	Registered	Daimler AG Corp.
Swing Lube	5641413	Class 03: Body Lotion	Registered	Burzee Phyliss
Swing Scent	5537380	Class 03: Room Fragrances	Registered	Hard to Earn, Inc.
Backyard Swing	5059154	Class 03: Body and Beauty Care Products	Registered	Janene Duverger
Swing It	4297977	Class 03: Hair Shampoo	Registered	Swing It, Inc



The table contains 24 marks containing “Mood” and four marks containing “Swing.” The registrations suggest that the word “MOOD” may be widely used in connection with various goods in Class 3 (although none of the listed registrations covers either “bar soap” or “hair styling preparations”), and thus may have some conceptual weakness in connection with the listed goods. These third-party marks, however, do not include any marks containing “MOOD SWING(S),” or both the word “MOOD” and the word “SWING(S),” and none of the third-party marks is even remotely as similar to either of the involved marks as the involved marks are to one another. We find that the third-party registrations do not show that consumers of the involved goods are able to distinguish the similar involved marks based on what Applicant calls “differences, even slight differences . . . between [the] brands.” *Id.* at 18.

The marks are more similar than dissimilar in appearance and sound, and quite similar in connotation and overall commercial impression. The first *DuPont* factor supports a conclusion that confusion is likely.

### **B. Similarity or Dissimilarity of the Goods**

“The second *DuPont* factor ‘considers [t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration . . . .’” *Embiid*, 2021 USPQ2d 577, at \*22 (quoting *Detroit Athletic Co.*, 128 USPQ2d at 1051-52 (quoting *DuPont*, 177 USPQ at 567)). The goods “need not be identical or even competitive to find a likelihood of confusion.” *In re Country Oven, Inc.*, 2019 USPQ2d 443903, at \*4 (TTAB 2019) (citations omitted). “They need only be ‘related in some

manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that [they] emanate from the same source.” *Id.* (quoting *Coach Servs.*, 101 USPQ2d at 1722 (internal quotation omitted)).

“Evidence of relatedness may include news articles or evidence from computer databases showing that the relevant goods are used together or used by the same purchasers; advertisements showing that the relevant goods are advertised together or sold by the same manufacturer or dealer; or copies of prior use-based registrations of the same mark for both applicant’s goods and the goods listed in the cited registration.” *Embiid*, 2021 USPQ2d 577, at \*22-23.

The good identified in the application is “bar soap” and the goods identified in the cited registration are “hair styling preparations.” Applicant argues that these goods “are entirely different and would not create confusion as to the source of the respective goods.” 6 TTABVUE 21. Her argument focuses primarily on the fact that the goods are not typically displayed together or used for the same purpose:

While it is true that some of the goods are offered in the “beauty and health” [sic] the evidence attached shows that the marks are not marketed in a manner in which they would encountered by the same person in situations that would create an incorrect assumption that they originate from the same source. Applicant sells bar soaps while the Cited registered mark sells hair styling solutions. Contrary to the Examining Attorney’s blanket characterization the marks are not related or marketed in such a way that would be encountered by the same persons in situations that would create the incorrect assumption that they originate from the same source. When a consumer goes to look for the narrowly identified “bar soaps” they will not be looking for hair styling preparations. Even in reviewing the products sold by the owner of the Cited mark; none include and [sic] type of soaps.

...

When traveling down the aisle for both hair care and soaps, it is evident that the majority of the brands do not overlap and the brands are different. Therefore, the consumers will not automatically believe that the applicant's and registrant's products emanate from the same owner.

...

The goods in this matter are used for mutually exclusive purposes. Applicant's products are for cleaning the skin, whereas the Cited Marks products are for cleaning the hair. The two products are not functionally related; there is no overlapping in function; they are made from completely different ingredients; they are produced in completely different industries; they are not competitive. There is an obvious competitive distance between the goods.

*Id.* at 21-22 (citations omitted). Applicant does not address the Examining Attorney's third-party use and registration evidence.

The Examining Attorney responds that

bar soaps are closely related to the registrant's hair-styling preparations because the same entity commonly provides the relevant goods and markets the services under the same mark and, at a minimum, the goods at issue are marketed through the same channels of trade to the same classes of consumers who use them for similar or complementary purposes.

8 TTABVUE 10. The Examining Attorney cites six third-party webpages and 20 third-party registrations as supporting evidence. *Id.* at 10-11. He rejects Applicant's arguments under the second *DuPont* factor because "they fail to take into account that whether the goods are the same or whether parties make and sell each other's goods is not the test for determining the likelihood of confusion." *Id.* at 11.

“We begin with the identifications of goods . . . in the registration and application under consideration.” *Country Oven*, 2019 USPQ2d 443903, at \* 5. We must construe the “hair styling preparations” identified in the cited registration as broadly as reasonably possible “to include all goods of the nature and type described therein,” *In re Solid State Design Inc.*, 125 USPQ2d 1409, 1413 (TTAB 2018) (quoting *In re Jump Design LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006)), and we must resolve any ambiguities regarding their coverage in favor of the owner of the cited registration “given the presumptions afforded the registration under Section 7(b)” of the Trademark Act. *In re C.H. Hanson Co.*, 116 USPQ2d 1351, 1355 (TTAB 2015 (citing 15 U.S.C. § 1057(b))).

The third-party websites in the record show that goods falling within the full scope of the “hair styling preparations” identified in the cited registration, and the “bar soap” identified in the application, are commonly sold under the same mark:

- Lush sells both “Bar Soap” and hair mist, hair cream, and hair dressing;<sup>24</sup>
- The Body Shop sells both bar soap and a variety of goods described as being for “Hair Styling,” including dry oil, hair mask, hair scrub, and hair oil;<sup>25</sup>
- Avon sells both bar soap and hairspray, styling cream gel, and curl cream;<sup>26</sup>
- Ulta sells both bar soap and hair heat protection spray, dry wax spray, hot tool protection spray, and various hair gels, creams, and mousses;<sup>27</sup> and

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<sup>24</sup> November 16, 2020 Office Action at TSDR 6-10. Applicant also made these webpages and others submitted by the Examining Attorney of record. February 13, 2021 Response to Office Action at TSDR 54-67.

<sup>25</sup> November 16, 2020 Office Action at TSDR 11-15.

<sup>26</sup> *Id.* at TSDR 16-19.

<sup>27</sup> September 16, 2022 Denial of Request for Reconsideration at TSDR 6-11.

- Sephora sells both bar soaps and hair creams, sprays, gels, and mousses under the product category heading “Hair Styling Products.”<sup>28</sup>

The Examining Attorney also made of record 13 third-party use-based registrations of marks covering both “bar soap” and “hairstyling preparations,” the exact goods identified in the application and cited registration,<sup>29</sup> and six additional third-party use-based registrations of marks covering both “bar soap” and goods encompassed within the full scope of the “hair styling preparations” identified in the cited registration.<sup>30</sup>

Taken together, the Examining Attorney’s third-party use and third-party registration evidence provides far more than “a reasonable predicate supporting the Examining Attorney’s position on relatedness and shift[s] the burden to Applicant to rebut the evidence with competent evidence of [her] own.” *Country Oven*, 2019 USPQ2d 443903, at \*10 (citing *In re Pacer Tech.*, 338 F.3d 1348, 67 USPQ2d 1629, 1632 (Fed. Cir. 2003)). As discussed above, Applicant provided no such evidence. The

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<sup>28</sup> *Id.* at TSDR 12-15.

<sup>29</sup> October 23, 2021 Office Action at TSDR 5-6 (Registration No. 6131116), 7-9 (Registration No. 6043528), 16-18 (Registration No. 6150830), 19-21 (Registration No. 6161966), 22-24 (Registration No. 6229485), 25-27 (Registration No. 6471689), 28-30 (Registration No. 6087264), 34-36 (Registration No. 6235376), 37-39 (Registration No. 6179715), 43-45 (Registration No. 6277650), 46-48 (Registration No. 6337106), 49-51 (Registration No. 6472713), 58-60 (Registration No. 6515162).

<sup>30</sup> *Id.* at TSDR 2-4 (Registration No. 6091814 covering “hair conditioners,” “hair detangling preparations,” and “hair styling spray”); 10-12 (Registration No. 6009432 covering “hair styling gel”), 13-15 (Registration No. 6296130 covering “hairstyling gel”), 40-42 (Registration No. 6464704 covering “hair styling spray”), 52-54 (Registration No. 6379162 covering “hair styling fixative in the nature of hair wax”), 55-57 (Registration No. 6396638 covering “hair care preparations” and “hair styling gel”).

record shows that “bar soap” and “hair styling preparations” are clearly related and the second *DuPont* factor supports a conclusion that confusion is likely.

### **C. Summary**

The two key *DuPont* factors both support a conclusion that confusion is likely. The cited standard-character mark MOOD SWING and Applicant’s mark consisting of the stylized lowercase words “mood swings shifting the mood.” are similar, and the hair styling preparations and bar soap with which the respective marks are used are related because those goods are commonly offered under the same marks. Applicant did not show, via third-party registrations, that consumers have become accustomed to the use of the words MOOD and SWING together in marks for similar goods, or that consumers will be able to distinguish the involved marks based on the slight differences between them. We conclude that a consumer familiar with the cited mark for hair styling preparations who is exposed to Applicant’s mark for bar soap is likely to believe mistakenly that those goods have a common source or that their sellers are affiliated.

**Decision:** The refusal to register is affirmed.