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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91244593
Party	Defendant JH Biotech, Inc.
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Submission	Motion to Strike
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Date	10/23/2020
Attachments	Motion To Strike Rebuttal NOR.pdf(187867 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of:

Mark: SEEDUP
Serial No. 87/953,971
Date of Filing: 06-08-2018

Cytozyme Laboratories, Inc.)	
)	
Opposer,)	Opposition No.: 91244593
)	
vs.)	
)	
JH Biotech, Inc.)	
)	
Applicant.)	
_____)	

**MOTION TO STRIKE OPPOSER CYTOZYME LABORATORIES, INC.’S
SECOND AND REBUTTAL NOTICE OF RELIANCE**

Applicant, JH Biotech, Inc., through its undersigned attorney, hereby objects to Opposer’s Second and Rebuttal Notice of Reliance and the exhibits attached thereto in its entirety.

The notice of reliance fails to explain, deny, or refute applicant’s testimony; rather, it describes the exhibits as “relevant to the strength of Opposer’s SEED+ mark, the likelihood of consumer confusion, and Opposer’s enforcement efforts for protecting its SEED+ mark”. (see **25 TTABVUE, page 2**) (emphasis added).

Rebuttal is “improper” if it constitutes evidence that should have been submitted during plaintiff’s main testimony period because it supports plaintiff’s case-in-chief, as differentiated from evidence that corrects, clarifies or counters defendant’s submissions. *Visual Info. Inst., Inc. v. Vicon*

Indus. Inc., 209 USPQ 179, 182–83 (TTAB 1980); *Finance Co. of Am. v. BankAmerica Corp.*, 205 USPQ 1016, 1022 (TTAB 1980); *Hyde Park Footwear Co. v. Hampshire-Designers, Inc.*, 197 USPQ 639, 641 (TTAB 1977).

Opposer’s statement establishes that the exhibits constitute evidence that should have been submitted during plaintiff’s main testimony period because strength of the SEED+ mark, likelihood of confusion, and enforcement efforts support plaintiff’s case-in-chief, as differentiated from evidence that corrects, clarifies or counters defendant’s submissions. *Life Zone Inc. v. Middleman Group Inc.*, 87 USPQ2d 1953, 1958 (TTAB 2008) (“It is axiomatic that rebuttal testimony may be used only to rebut evidence offered by the defendant.”); *Gen. Elec. Co. v. Graham Magnetics Inc.*, 197 USPQ 690, 692 n.5 (TTAB 1977) (“Evidence which should constitute part of opposer’s case-in-chief but which is made of record during the rebuttal testimony period is not considered if applicant objects.”); *Hester Indus. Inc. v. Tyson Foods Inc.*, 2 USPQ2d 1645, 1647 (TTAB 1987) (“To the extent that any evidence offered by opposer during its rebuttal testimony period served to support its case-in-chief, it constituted improper rebuttal and cannot be considered.”).

WHEREFORE, Applicant JH Biotech, Inc. requests the Board to grant this Motion to Strike OPPOSER’S SECOND AND REBUTTAL NOTICE OF RELIANCE (**25 TTABVUE**) in its entirety.

Respectfully submitted,

/s/ Ralph D. Chabot
Ralph D. Chabot
Attorney for Applicant
JH Biotech, Inc.

Date: October 23, 2020

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing
**MOTION TO STRIKE OPPOSER CYTOZYME LABORATORIES, INC.'S SECOND
AND REBUTTAL NOTICE OF RELIANCE**

has been served on Peter M. de Jonge of Thorpe North & Western, LLP, counsel for Opposer, by forwarding said copy on October 23, 2020 via email to: dejonge@tnw.com; jillaine.chaston@tnw.com; kaelynn.moultrie@tnw.com; aimee.kaderabek@tnw.com; litigation@tnw.com.

/s/ Ralph D. Chabot

Ralph D. Chabot
Attorney for Applicant
JH Biotech, Inc.

Date: October 23, 2020