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

Proceeding	91244593
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Opposed Mark: SEEDUP
U.S. Trademark Application Serial No.: 87953971

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

Cytozyme Laboratories, Inc. Opposer, v. JH Biotech, Inc. Applicant.	CYTOZYME LABORATORIES, INC.'S RESPONSE TO APPLICANT'S MOTION TO STRIKE OPPOSER CYTOZYME'S SECOND AND REBUTTAL NOTICE OF RELIANCE Opposition No. 91244593
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Opposer Cytozyme Laboratories, Inc. ("Cytozyme") responds to and opposes Applicant JH Biotech, Inc.'s ("JH Biotech") Motion to Strike Cytozyme's Second and Rebuttal Notice of Reliance.

As noted by JH Biotech, rebuttal evidence may be improper if it includes evidence that should have been submitted during the main testimony period as opposed to evidence that rebuts defendant's submissions. *See Life Zone Inc. v. Middleman Group Inc.*, 87 USPQ2d 1953, 1958 (TTAB 2008). However, despite JH Biotech's efforts, it has failed to provide the Board any evidence that information submitted through Cytozyme's second

and rebuttal notice of reliance should have been submitted during Cytozyme's main testimony period. In fact, as shown below, the evidence submitted in rebuttal by Cytozyme directly rebuts and addresses the evidence submitted by JH Biotech in its multiple notices of reliance.

As an initial matter, JH Biotech's Motion is improper at this stage of the proceedings. The TBMP clearly states that while "[a]n adverse party may object to a notice of reliance on substantive grounds, such as that evidence offered under the notice constitutes . . . improper rebuttal . . ." the manual further states that "[o]bjections of this nature normally should be raised in or with the objecting party's brief on the case or in an appendix or separate statement of objections attached to the brief." TBMP § 707.02(c). *See also* TBMP § 532 ("Objections to a notice of reliance on substantive grounds, such as objections on the grounds that evidence offered under a notice of reliance constitutes hearsay or improper rebuttal . . . normally need not and should not be raised by motion to strike."). Here, JH Biotech claims that the evidence submitted by Cytozyme in its rebuttal notice of reliance is improper rebuttal evidence and requests that the Board strike the notice of reliance in its entirety. Thus, a motion to strike is not the proper method for raising these concerns.

If the Board is inclined to consider JH Biotech's motion to strike at this time, JH Biotech misleads the Board by citing only one sentence explaining why Cytozyme submitted its rebuttal evidence. In full, Cytozyme explained that it "submits the following materials, by this Notice of Reliance, in rebuttal to JH Biotech, Inc.'s ("Applicant") submitted evidence and in support of Opposer's opposition to the registration of Applicant's SEEDUP mark. These materials are relevant to the strength of Opposer's SEED+ mark, the likelihood of consumer confusion, and Opposer's enforcement efforts for

protecting its SEED+ mark.” 25 TTAB VUE at page 2. The introduction of Cytozyme’s rebuttal notice of reliance clearly states that Cytozyme submits the evidence to rebut JH Biotech’s claims.

Moreover, in its own notices of reliance, JH Biotech describes the evidence it submitted as “relevant to the weakness of the SEED+ mark, the lack of a likelihood of consumer confusion, the manner in which the third parties distribute, market, and sell products having similar trademarks to Opposer’s SEED+ mark, and the lack of Opposer’s enforcement efforts for protecting its SEED+ mark.” 24 TTAB VUE at page 2. The stated relevance of the rebuttal evidence by Cytozyme is a direct response to JH Biotech’s evidence. For example, Cytozyme provided evidence supporting the strength of Cytozyme’s mark to rebut evidence JH Biotech submitted allegedly showing the weakness of Cytozyme’s mark. It is clear from a comparison that the rebuttal evidence submitted by Cytozyme is offered directly to refute JH Biotech’s claims.

Further still, an examination of the evidence submitted by Cytozyme clearly shows that each piece of evidence is directly related to evidence submitted by JH Biotech in its own notices of reliance. For example, JH Biotech submitted evidence regarding a product titled Biomantra SEED+. *See* 24 TTAB VUE ¶ 7. Exhibits 14-15 of Cytozyme’s rebuttal notice of reliance address this same product. *See* 25 TTAB VUE ¶¶ 1-3.

Similarly, JH Biotech submitted evidence of third-party products sold or third-party registrations bearing either the term SEED or PLUS. For example, JH Biotech submitted evidence of webpages for products titled TRIPLE 8 PLUS 8-8-8 and Turf Plus. *See* 24 TTAB VUE ¶¶ 8, 10. In rebuttal, Cytozyme submitted evidence of dictionary definitions for the terms “triple” and “turf”. *See* 25 TTAB VUE ¶¶ 38, 48. Each piece of evidence

submitted by Cytozyme in its rebuttal evidence relates directly to product pages or registrations submitted by JH Biotech in its own notices of reliance.

The evidence submitted by Cytozyme in its rebuttal notice of reliance is clearly and directly related to and rebuts the evidence JH Biotech submitted in its own notices of reliance. Accordingly, and for all the reasons cited above, Cytozyme requests the Board deny JH Biotech's Motion to Strike.

DATED this 12th day of November, 2020.

THORPE NORTH & WESTERN, LLP

/s/ Peter M. de Jonge

Peter M. de Jonge

Attorney for Opposer, Cytozyme Laboratories, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing
**CYTOZYME LABORATORIES INC.'S RESPONSE TO APPLICANT'S
MOTION TO STRIKE CYTOZYME'S SECOND AND REBUTTAL NOTICE
OF RELIANCE** was served upon the following party by the methods indicated
below:

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- Electronic Mail
- United States Mail, First Class
- Overnight Delivery
- USPTO Filing

DATED this 12th day of November,
2020.

/s/ Kaelynn Moultrie
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