

ESTTA Tracking number: **ESTTA1110088**

Filing date: **01/25/2021**

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

Proceeding	91244593
Party	Plaintiff Cytosyme Laboratories, Inc.
Correspondence Address	PETER M DE JONGE THORPE NORTH & WESTERN LLP 175 S MAIN STREET, SUITE 900 SALT LAKE CITY, UT 84111 UNITED STATES Primary Email: dejonge@tnw.com Secondary Email(s): jillaine.chaston@tnw.com, kaelynn.moultrie@tnw.com, aimee.kaderabek@tnw.com, litigation@tnw.com 801-566-6633
Submission	Brief on Merits for Plaintiff
Filer's Name	Peter M. de Jonge
Filer's email	dejonge@tnw.com, catherine.maness@tnw.com, kaelynn.moultrie@tnw.com, joshua.gray@tnw.com, litigation@tnw.com
Signature	/s/ Peter M. de Jonge/
Date	01/25/2021
Attachments	01.25.21 FINAL - Cytosyme Main Brief .pdf(337383 bytes)

Peter M. de Jonge
THORPE NORTH & WESTERN, LLP
175 South Main Street, Suite 900
Salt Lake City, UT 84111
Telephone: (801) 566-6633
Facsimile: (801) 566-0750

Attorney for Cytozyme Laboratories, Inc.
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
MAIN BRIEF ON THE CASE**

Opposition No. 91244593

TABLE OF CONTENTS

I. PRELIMINARY STATEMENT OF THE CASE..... 1

II. DESCRIPTION OF THE RECORD..... 1

 A. Pleadings..... 1

 B. Opposer’s Testimony and Evidence 1

 C. Applicant’s Testimony and Evidence 2

 D. Opposer’s Rebuttal Evidence..... 4

III. STATEMENT OF THE ISSUES..... 5

IV. STATEMENT OF FACTS 5

 A. Opposer’s Federal Trademark Registration for SEED+ Mark 5

 B. Applicant’s Attempted Registration of the SEEDUP Mark 6

 C. Opposer’s Use and Advertising of the SEED+ Mark 7

 D. Channels of Trade and Advertising for Products Increasing Seed Growth..... 8

 E. Consumers for Seed Growth Products..... 9

 F. Conditions of Sales for Seed Growth Increasing Products 9

V. ARGUMENT..... 9

 A. Opposer Has Established Standing and Priority 9

 B. Applicant’s SEEDUP Mark is Likely to Cause Confusion 10

 1. The SEED+ and SEEDUP Marks are Confusingly Similar..... 12

 2. The Goods as Listed in the Application and Registration are Highly Related 14

 3. Neither the Application nor the Registration Contain any Restrictions on the
Channels of Trade or Class of Purchasers 16

 4. The Conditions of Sales to Consumers May Lead to Confusion..... 17

5. Opposer's Mark is Strong	18
IV. CONCLUSION.....	21

TABLE OF AUTHORITIES

Cases

<i>Bell's Brewery, Inc. v. Innovation Brewing</i> , 125 USPQ2d 1340 (TTAB 2017)	18
<i>Bridgestone Ams. Tire Operations LLC v. Fed. Corp.</i> , 102 USPQ2d 1061 (Fed. Cir. 2012).....	12
<i>Century 21 Real Estate Corp. v. Century Life of Am.</i> , 23 USPQ2d 1698 (Fed. Cir. 1992).....	13
<i>Cunningham v. Laser Golf Corp.</i> , 55 USPQ2d 1842 (Fed. Cir. 2000).....	10, 11, 16
<i>Federated Foods, Inc. v. Fort Howard Paper Co.</i> , 192 USPQ 24 (CCPA 1976)	11
<i>Geigy Chem. Corp. v. Atlas Chem. Indus.</i> , 169 USPQ 39 (CCPA 1971)	12
<i>Genesco Inc. v. Martz</i> , 66 USPQ2d 1260 (TTAB 2003)	16
<i>Giant Food, Inc. v. Nation's Foodservice, Inc.</i> , 218 USPQ 390 (Fed. Cir. 1983).....	18
<i>Han Beauty Inc. v. Alberto Culver Co.</i> , 57 USPQ2d 1557 (Fed. Cir. 2001).....	11
<i>Hewlett-Packard Co. v. Packard Press, Inc.</i> , 62 USPQ2d 1001 (Fed. Cir. 2002).....	15
<i>In re Bay State Brewing Co.</i> , 117 USPQ2d 1958 (TTAB 2016)	12, 14
<i>In re Chamber of Commerce of the United States</i> , 675 F.3d 1297 (Fed. Cir. 2012).....	19
<i>In re Coors Brewing Co.</i> , 343 F.3d 1340 (Fed. Cir. 2003).....	18
<i>In re E.I. du Pont de Nemours & Co.</i> , 177 USPQ 563 (CCPA 1973)	11
<i>In re Fat Boys Water Sports LLC</i> , 118 USPQ2d 1511 (TTAB 2016)	19
<i>In re Gina Davia</i> , 110 USPQ2D 1810 (Fed. Cir. 1984).....	17
<i>In re Hyper Shoppes (Ohio), Inc.</i> , 837 F.2d 463 (Fed. Cir. 1988).....	12
<i>In re Iolo Techs., LLC</i> , 95 USPQ2d 1498 (TTAB 2010)	15
<i>In re Jimmy Moore LLC</i> , 119 USPQ2d 1764 (TTAB 2016)	App. ii
<i>In re Mighty Leaf Tea</i> , 94 USPQ2d 1257 (Fed. Cir. 2010).....	11

<i>In re Nett Designs Inc.</i> , 57 USPQ2d 1564 (Fed. Cir. 2001).....	20
<i>In re Shell Oil Co.</i> , 26 USPQ2d 1687 (Fed. Cir. 1993).....	12
<i>In re Viterra, Inc.</i> , 101 USPQ2d 1905 (Fed. Cir. 2012).....	11
<i>In re Well Living Lab Inc.</i> , 122 USPQ2d 1777 (TTAB 2017)	14
<i>In re White Swan, Ltd.</i> , 8 USPQ2D 1534 (TTAB 1988)	12
<i>King Candy Co. v. Eunice King’s Kitchen</i> , 496 F.2d 1400 (CCPA 1974)	10
<i>Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.</i> , 107 USPQ2d 1167 (Fed. Cir. 2013).....	17
<i>Octocom Sys. v. Houston Computer Servs.</i> , 16 USPQ2d 1783 (Fed. Cir. 1990).....	14
<i>Palm Bay Imps, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772</i> , 73 USPQ2d 1689 (Fed. Cir. 2005).....	12
<i>Pele IP Ownership, LLC v. Michael C. Silver</i> , Opp. No. 91220395 (PTAB Nov. 30, 2018).....	App. ii
<i>Ritchie v. Simpson</i> , 50 USPQ2d 1023 (Fed. Cir. 1999).....	9, 10
<i>Saxlehner v. Eisner & Mendelson Co.</i> , 179 U.S. 19 (1900).....	12
<i>Sealed Air Corp. v. Scott Paper Co.</i> , 190 USPQ 106 (TTAB 1975)	12
<i>Smith Bros. Mfg. Co. v. Stone Mfg. Co.</i> , 177 USPQ 462 (CCPA 1973)	20
<i>Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.</i> , 748 F.2d 669 (Fed. Cir. 1984).....	17
<i>Stoncor Goup, Inc. v. Specialty Coatings, Inc.</i> , 759 F.3d 1327 (Fed. Cir. 2014).....	19
<i>Stone Lion Capital Partners, L.P. v. Lion Capital LLP</i> , 110 USPQ2d 1157 (Fed. Cir. 2014);	15
<i>The Toro Co. v. ToroHead Inc.</i> , 61 USPQ2d 1164 (TTAB 2001)	10
Statutes	
15 U.S.C. § 1052(d)	5
15 U.S.C. § 1057(b)	23
Other Authorities	
TMEP § 1207.01(a)(i).....	20

I. PRELIMINARY STATEMENT OF THE CASE

Cytozyme Laboratories, Inc. (“Opposer”) is the owner of U.S. Trademark Registration No. 4192979 (the “Registration”) for the SEED+ standard character mark for use in connection with “[p]lant growth nutrients for treatment of seeds for use in agriculture, horticulture and forestry, plant nutrition preparations for the treatment of seeds” in International Class 001. Opposer opposes the registration of the mark SEEDUP in U.S. Application Serial No. 87953971 (the “Application”) filed by JH Biotech, Inc. (“Applicant”) for “[m]icrobial inoculants for application to seeds used in agriculture” in International Class 001 based on likelihood of confusion under Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d) (“Section 2(d)”).

II. DESCRIPTION OF THE RECORD

A. Pleadings

The operative pleadings consist of Opposer’s Opposition (1 TTABVUE) and Applicant’s Answer (4 TTABVUE).

B. Opposer’s Testimony and Evidence

Opposer introduced the following evidence during its opening testimony period:

1. **Opposer’s Notice of Reliance** (12 TTABVUE) attaching Exhibits 1-13.
 - i. Exhibits 1 and 2: Opposer’s Seed+ trademark registration, Reg. No. 4192979, documents.
 - ii. Exhibits 3-6: photos and documents showing Applicant’s use of the opposed mark, SEEDUP.
 - iii. Exhibits 7-10: TESS printouts of third party registrations for SEEDNET, MAX SEED SOLUTIONS, LIGNISEED and DLF INTERNATIONAL SEEDS SEEDS & SCIENCE.

- iv. Exhibit 11: Applicant's First Amended Response to Opposer's First Set of Interrogatories and Requests for Production.
 - v. Exhibits 12 and 13: printouts from the Merriam-Webster online dictionary of the terms "plus" and "up."
2. **Declaration of Eric Chandler Baughman** (13 TTABVUE) attaching Exhibits 1-9.
- i. Exhibits 1-6: copies of product promotional materials, webpages, and labels for Opposer's SEED+ products
 - ii. Exhibits 7 and 8: copies of Applicant's promotional materials for its products, including products bearing the SEEDUP mark.
 - iii. Exhibit 9: a printout of the Organic Material Review Institute for Applicant's products.

C. Applicant's Testimony and Evidence

Applicant introduced the following evidence during its testimony period:

- 1. **Cross-Examination Deposition Transcript of Eric Chandler Baughman** (19 TTABVUE).
- 2. **Declaration of Tasha McDonald** (20 TTABVUE) attaching Exhibits 100-122.
 - i. Exhibits 100-103: proof of purchase and pictures of the Seedlingers product.
 - ii. Exhibits 104-108: proof of purchase and pictures of the Biomantra Seed+ product.

- iii. Exhibits 109-112: proof of purchase and pictures of the Pennington Smart Seed product.
 - iv. Exhibits 113-116: proof of purchase and pictures of the Scotts EZ Seed product.
 - v. Exhibit 117: printout of the Soil Moist website offering the Seed Coat product for sale.
 - vi. Exhibit 118,119 and 122: proof of purchase and pictures of DeltAg's Seed Coat product.
 - vii. Exhibits 120 and 121: proof of purchase and pictures of AgriGro's SeedMaxx product.
3. **Applicant's First Notice of Reliance** (21 TTABVUE) attaching exhibits 123-125.
- i. Exhibit 123-125: Responses and requests relating to Applicant's First and Second sets of Interrogatories to Opposer
4. **Confidential Interrogatory Response** (22 TTABVUE) containing pricing information for Opposer's Seed+ products.
5. **Applicant's Second Notice of Reliance** (23 TTABVUE) attaching exhibits 126-183.
- i. Exhibits 126-128, 130-132: TESS printouts of third party trademark registrations containing the term "SEED".
 - ii. Exhibits 134, 136, 138-154, 156-163, 165-177, 179-183: TESS printouts of third party trademark registrations containing the word "PLUS" or the symbol "+".

6. **Applicant's Third Notice of Reliance** (24 TTABVUE) attaching exhibits 185-191, 200-213 and 220-233.
 - i. Exhibit 185: printout of Wikipedia's definition and history of plus and minus signs.
 - ii. Exhibits 186-189, 208-209: printouts of webpages offering products with "SEED" in the name.
 - iii. Exhibits 190-191: printouts of webpages for Biomantra SEED+.
 - iv. Exhibits 200-207, 220, 222-223, 226-229, 231-233: printouts of various webpages containing the word "PLUS" or the symbol "+."
 - v. Exhibits 210-213: printouts of the OMRI (Organic Materials Review Institute) website describing what OMRI does and displaying OMRI certifications for Opposer.
7. As detailed in the Appendix to this brief, Opposer objects to Exhibit 185 attached to Applicants Third Notice of Reliance. Opposer submits that this evidence should not be considered by the Board.

D. Opposer's Rebuttal Evidence

Opposer introduced its Second and Rebuttal Notice of Reliance (25 TTABVUE) during its rebuttal testimony period, which included exhibits 14-82:

1. Exhibits 14-16: printouts of websites, advertisements and documents for the Biomantra SEED product.
2. Exhibits 17-82: printouts from the Merriam-Webster online dictionary for a variety of terms including "seed," "all-purpose," "bloom," "bio," "boron," "broadleaf," "builder," "cal," "carbon," "clay," "cm," "coat,"

“control,” “copper,” “delta,” “EC,” “EZ,” “easy,” “farmer,” “zinc,” “fish,”
“full,” “gyp,” “H2O,” “hunter,” “hydrate,” “lawn,” “lig,” “linger,” “link,”
“mad,” “mag,” “magnesium,” “manganese,” “turf,” “micro,”
“micronutrient,” “mn,” “nature,” “work,” “nf,” “nickel,” “nitrate,” “nu,”
“triple,” “trans,” “organic,” “performance,” “ph,” “timing,” “potassium,”
“prospect,” “protein,” “quality,” “quantity,” “ranch,” “rheo,” “rheology,”
“science,” “smart,” “soil,” “success,” “super,” “sync,” “tec,” and “time.”

3. On October 23, 2020, Applicant filed a motion to strike Opposer’s Rebuttal Notice of Reliance (26 TTABVUE). On November 12, 2020, Opposer filed a response to Applicant’s motion to strike (27 TTABVUE). On December 9, 2020, the Board issued an Order deferring consideration of the motion to strike until consideration of the final trial briefing (28 TTABVUE at *2).

III. STATEMENT OF THE ISSUES

Whether Applicant’s SEEDUP mark should be refused registration under Section 2(d) because it so resembles Opposer’s registered SEED+ mark as to be likely, when used on or in connection with Applicant’s recited goods, to cause confusion, mistake, or deception as to the source, sponsorship, or affiliation.

IV. STATEMENT OF FACTS

A. Opposer’s Federal Trademark Registration for SEED+ Mark

Cytozyme is a biotechnology agricultural solutions company founded in 1975. 13 TTABVUE ¶ 2. Cytozyme has used the SEED+ mark in commerce since at least as early as June, 1976. *Id.* ¶ 3. In addition, Opposer is the owner of the Registration for the SEED+ mark

for use in connection with “[p]lant growth nutrients for treatment of seeds for use in agriculture, horticulture and forestry, plant nutrition preparations for the treatment of seeds” in International Class 001. 12 TTABVUE, Exs. 1-2. The Registration issued on August 21, 2012. *Id.* Ex. 1 at *1. The underlying application for the SEED+ mark was filed on June 16, 2011. *Id.* The Registration is valid, subsisting, and has achieved incontestable status pursuant to 15 U.S.C. § 1065. *Id.* Exs. 1-2.

As noted by Cytozyme’s CEO, the goods in the Registration for “[p]lant growth nutrients for treatment of seeds for use in agriculture, horticulture and forestry” refers to a broad range of substances and formulations which provide essential nutrients to growing plants and are used to promote plant growth and improve crop yields. 13 TTABVUE ¶¶ 5-6. These goods identified in the Registration can be applied to broad range of crops. *Id.* ¶ 7. The goods in the Registration have no limitation on their use, including no limitations on channels of trade, class of customer, etc.

B. Applicant’s Attempted Registration of the SEEDUP Mark

On June 8, 2018, Applicant filed the Application to register the SEEDUP mark in connection with “[m]icrobial inoculants for application to seeds used in agriculture” in International Class 001 on the basis of actual use. *See* 1 TTABVUE ¶ 3; 4 TTABVUE ¶ 3. On April 30, 2019, Applicant filed a motion in this proceeding to amend the Application seeking to change the filing status for the SEEDUP mark from actual use § 1(a) to intent-to-use § 1(b). *See* 6 TTABVUE at *1. The Board has not ruled on the motion. Thus, the Application remains an application based on actual use.

The Application was published on October 9, 2018. Opposer timely opposed the Application. Opposer filed the opposition as its CEO believes “Applicant’s Goods fall within the scope of Opposer’s Goods” (*Id.* ¶ 14) and because

Opposer’s Goods and the Applicant’s Goods are highly related because (1) they have the same end goal, which is to improve plant growth and crop yield, (2) they are intended to be applied to the same types of seeds, including, seeds for crops, (3) they can be manufactured in the same powdered form, (4) Applicant’s Goods are intended to be used in conjunction with plant growth nutrients, and (5) Opposer’s Goods and Applicant’s Goods are marketed and sold to the same end consumers to achieve the same purpose.

Id. ¶ 15. Opposer’s CEO was also concerned that the “marks have similar meanings as both the ‘+’ symbol and the word ‘up’ both denote an increase in something” and that the marks would have the same meaning, “which is an increase in seed growth.” *Id.* ¶ 16.

C. Opposer’s Use and Advertising of the SEED+ Mark

Opposer first used the SEED+ mark in 1976. 12 TTABVUE, Ex. 1 at *1. Since its first use of the SEED+ mark in 1976, Opposer’s SEED+ mark has become well-known with customers. Opposer’s sales of products bearing the SEED+ mark have steadily increased and have grown significantly in recent years due to a strategic marketing agreement with a third party to promote products bearing the SEED+ trademark. 13 TTABVUE ¶¶ 20-21; 21 TTABVUE, Ex. 124 at *9.

Opposer advertises products bearing the SEED+ mark in multiple ways, including through “direct sales, []catalogs, online, at trade shows, through distributors and third parties, brick and mortar retail stores, home improvement stores, and plant nurseries”. 13 TTABVUE ¶ 18, Exs. 1-3, 6; 21 TTABVUE, Ex. 124 at *7-9. In total, Opposer’s advertising expenditures in the United States in 2018 totaled more than \$450,000 and continue to steadily increase in recent years in tandem with sales of products bearing the SEED+ mark. 21 TTABVUE, Ex. 124 at *10; 13 TTABVUE ¶¶ 20-21.

D. Channels of Trade and Advertising for Products Increasing Seed Growth

Neither the Registration nor the Application restricts the goods to specific channels of trade or methods of advertising. 13 TTABVUE ¶ 17 (“I understand that Opposer’s SEED+ registration does not limit, or even mention, how or where the goods listed in Opposer’s registration may be sold. This was intentional on the part of Opposer as we wanted to keep all channels open to accommodate the future growth of our business.”). The normal channels of trade for products increasing seed growth may include, but are not limited to, sales online, sales in brick and mortar retail stores, through catalogs, and at trade shows. *Id.* ¶ 18.

Moreover, Opposer and Applicant advertise products bearing the SEED+ and SEEDUP marks, respectively, in the same or similar channels of trade, including through distributors. *See* 12 TTABVUE, Ex. 11, Response to ROG No. 9, at *15; 13 TTABVUE ¶¶ 18, 22. *See also* 12 TTABVUE, Ex. 11, Response to ROG No. 9, at *15 (Applicant states that “[a]s the SEEDUP mark has been used for less than one year, it is possible that the channels of trade may expand.”).

Applicant advertises its products bearing the SEEDUP mark as a “microbial inoculant containing . . . plant growth promoting [organisms] . . . specially formulated for seed treatment”. 12 TTABVUE, Ex. 4 at *1. Applicant further claims that the SEEDUP product “build[s] up and dominate[s] the rhizosphere, creating a supportive environment filled with available **nutrients** for active plant growth.” *Id.* (emphasis added). Applicant further claims that the SEEDUP product “can increase **nutrient** availability in the rhizosphere and enhance root and shoot growth” which “maintains crop’s high yield potential”. *Id.* at *2 (emphasis added). Applicant’s publicly available Safety Data Sheet for the SEEDUP product states it is for “use as [a] microbial inoculant on crop seeds to promote growth”. *Id.* Ex. 5 at *1.

Similarly, Opposer claims via advertisements that its products “increase[] crop yield by supporting seedling growth and vigor.” 13 TTABVUE, Ex. 1 at *1. It further claims that

“SEED+ is a nutritional seed treatment designed to support seedling vigor” which ultimately helps “improve yield and quality of crops.” *Id.* Ex. 2 at *1.

E. Consumers for Seed Growth Products

Neither the goods as listed in the Registration nor in the Application are restricted to be sold to any specific classes of consumers. However, both the Registration and the Application do specifically note that the goods can be used in the field of agriculture. Nevertheless, the potential class of consumer for products bearing these marks is broad and could include consumers working in both a large and small scale agriculture. *See* 13 TTABVUE ¶ 19 (“The types of consumers for the goods listed in Opposer’s SEED+ registration may include anyone who plants and grow seeds, including home gardeners, landscape professionals, crop growers, farmers, agricultural operations and the like.”).

F. Conditions of Sales for Seed Growth Increasing Products

Seed growth promoting products can be a relatively inexpensive products and can be purchased online or via mass merchandise retailers under conditions in which consumers will not take great care in making their purchases. *See*, for example, 20 TTABVUE ¶¶ 16, 18, Ex. 110 (listing Pennington® Smart Seed® Sun & Shade as offered for sale from the Home Depot for \$18.21).

V. ARGUMENT

A. Opposer Has Established Standing and Priority

The Federal Circuit applies a liberal standard for determining standing in a Board proceeding. *See Ritchie v. Simpson*, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999). Opposer first used the SEED+ mark in 1976 and has continued to use the mark in commerce. *See supra* at *7. Opposer is also the owner of a valid, subsisting, and incontestable registration for the SEED+

mark for “[p]lant growth nutrients for treatment of seeds for use in agriculture, horticulture and forestry, plant nutrition preparations for the treatment of seeds.” *Id.* The Registration issued approximately six years before Applicant filed the application for the SEEDUP mark. *Id.* Applicant does not claim any actual use of the SEEDUP mark that predates Opposer’s first use of the SEED+ mark in commerce in 1976 or the filing or registration dates for the Registration. *Id.*

Due to the similarity between Opposer’s SEED+ mark and Applicant’s SEEDUP mark and as both marks are used in connection with similar goods that promote seed growth, Opposer has shown it has a real, legitimate interest in this dispute and a reasonable basis for believing it would be damaged if the Application registers. Thus, Opposer has established standing to oppose the registration of the SEEDUP mark. *See Cunningham v. Laser Golf Corp.*, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *Ritchie*, 50 USPQ2d at 1025-26. Moreover, as Opposer’s Registration has been properly submitted as part of the record, priority is not at issue. *See The Toro Co. v. ToroHead Inc.*, 61 USPQ2d 1164, 1167 (TTAB 2001) (citing *King Candy Co. v. Eunice King’s Kitchen*, 496 F.2d 1400 (CCPA 1974)).

B. Applicant’s SEEDUP Mark is Likely to Cause Confusion with Opposer’s SEED+ Mark

The Board determines if there is a likelihood of confusion between two marks based on an analysis of the facts in evidence as they relate to the factors¹ identified in the seminal case *In*

¹ These factors include:

- (1) The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.
- (2) The similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use.
- (3) The similarity or dissimilarity of established, likely-to-continue trade channels.

re E.I. du Pont de Nemours & Co., 177 USPQ 563, 567 (CCPA 1973). No single factor is determinative, every factor will not be relevant to every case, and all factors need not be considered in each case. *See id.*; *In re Viterra, Inc.*, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Mighty Leaf Tea*, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010). While the Board must consider factors for which the Parties have submitted evidence, the Board may focus its analysis on the “dispositive factors” of similarity of the marks and the relatedness of the goods. *See Han Beauty Inc. v. Alberto Culver Co.*, 57 USPQ2d 1557, 1559 (Fed. Cir. 2001); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”). Opposer bears the burden of proving its arguments by a preponderance of the evidence. *Cunningham*, 55 USPQ2d at 1848.

Opposer submits that the “dispositive” and “fundamental” *Du Pont* factors of similarity of the marks and relatedness of the goods weigh in favor of a likelihood of confusion as well as the channels of trade, identity of consumers, conditions of sales, and strength of the mark factors. The remaining factors are either neutral or absent based on evidence in the record. To the extent

-
- (4) The conditions under which and buyers to whom sales are made, i.e. "impulse" vs. careful, sophisticated purchasing.
 - (5) The fame of the prior mark (sales, advertising, length of use).
 - (6) The number and nature of similar marks in use on similar goods.
 - (7) The nature and extent of any actual confusion.
 - (8) The length of time during and conditions under which there has been concurrent use without evidence of actual confusion.
 - (9) The variety of goods on which a mark is or is not used (house mark, "family" mark, product mark).
 - (10) The market interface between applicant and the owner of a prior mark
 - (11) The extent to which applicant has a right to exclude others from use of its mark on its goods.
 - (12) The extent of potential confusion, i.e., whether de minimis or substantial.
 - (13) Any other established fact probative of the effect of use.

In re Du Pont, 177 USPQ at 567.

any of the factors leave any doubt as to whether a likelihood of confusion exists, any such doubts should be resolved in favor of Opposer. *In re Shell Oil Co.*, 26 USPQ2d 1687, 1691 (Fed. Cir. 1993) (citing *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 464-65 (Fed. Cir. 1988) (“Doubt is resolved against the newcomer . . . for the newcomer has the opportunity of avoiding confusion, and is charged with the obligation to do so.”)).

1. The SEED+ and SEEDUP Marks are Confusingly Similar

When evaluating whether trademarks are similar, a comparison of the marks in their entireties, including in terms of sound, appearance, meaning, and commercial impression, is appropriate. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005). The examined marks need not be exactly identical to generate confusion. *See Bridgestone Ams. Tire Operations LLC v. Fed. Corp.*, 102 USPQ2d 1061, 1064 (Fed. Cir. 2012) (citing *Saxlehner v. Eisner & Mendelson Co.*, 179 U.S. 19, 33 (1900)).

A side-by-side comparison of the marks is not required. Instead, the Board must determine whether the marks so resemble one another as to be likely to cause confusion or mistake which, also, requires consideration of the fallibility of memory of consumers over time. *See Geigy Chem. Corp. v. Atlas Chem. Indus.*, 169 USPQ 39, 40 (CCPA 1971). Thus, the focus is on the general recollection of the average purchaser of the goods bearing the trademarks as the average purchaser normally retains a general, not specific, impression of trademarks. *See Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975) (citing *Geigy*, 169 USPQ at *40); *In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1960 (TTAB 2016). Moreover, the Board has previously held that similarity in any of the identified elements of sound, appearance, and meaning may be sufficient to indicate a likelihood of confusion. *See In re White Swan, Ltd.*, 8 USPQ2D 1534, 1535 (TTAB 1988).

Further, the extent and degree of similarity of the marks necessary to find a likelihood of confusion exists is lessened where the goods as listed in the relevant Application and Registration, channels of trade, and prospective customers are overlapping or closely similar as established below. *See infra* at *16-19; *see also Century 21 Real Estate Corp. v. Century Life of Am.*, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992).

In the context of the above guidance, the similarities in the sound, appearance, and meaning of the SEED+ and SEEDUP marks demonstrated a likelihood of confusion. Both the SEED+ and SEEDUP marks begin with the same term “SEED”. Both marks are also unitary marks with no spaces or other symbols splitting the marks. Thus, the only difference in the marks is that Opposer’s mark ends in “+” and Applicant’s mark ends in “UP”. This limited distinction in the latter portion of each mark is insufficient, for the reasons outlined below, to negate a likelihood of confusion between the Applicant’s SEEDUP mark from Opposer’s SEED+ mark.

Merriam-Webster dictionary defines the term “plus” to mean “increased by” and to be a synonym of “increase”. 12 TTABVUE, Ex. 12 at *2. Merriam-Webster defines the term “up” to mean “to advance to a higher level: increase” and to be a synonym of “increased”. *Id.* Ex. 13 at *3. Thus, when considering the terms “+” and “UP” as defined, the SEED+ and SEEDUP marks convey identical meanings, namely, to increase seed growth.

Assumedly to counter these widely available dictionary definitions, Applicant submitted its own dictionary evidence from the website Wikipedia. For the reasons outlined in the attached appendix, the Board should not admit the Wikipedia evidence because it does not meet the requirements for dictionary definitions outlined in the USPTO’s rules. Nevertheless, if the Board is inclined to consider Applicant’s Wikipedia evidence, the Board should consider all of

the submitted definitions and focus its analysis on the definitions as a whole. The submitted, traditional dictionary evidence from Merriam-Webster includes the definitions of “plus” as used in common language. In contrast, Applicant submits evidence from Wikipedia of a mathematical definition of the term “plus” that is not associated with seed growth promoting products. *See, e.g., In re Well Living Lab Inc.*, 122 USPQ2d 1777, 1781 (TTAB 2017) (finding modern-day usage of “well-living” more significant than an unrelated dictionary definition).

Here, there is a commonality in appearance, sound, and meaning of the SEED+ and SEEDUP marks as both marks begin with the same word “SEED”, are approximately the same length, have the same first sound “SEED”, have two syllables, are unitary, and have the same meanings for the “+” and “UP” portions of the marks as detailed above. These similarities are especially important in light of the limits of the average purchaser’s memory as the average purchaser normally retains only a general, as opposed to specific, impression of trademarks. *See In re Bay State Brewing*, 117 USPQ2d at 1960; *Sealed Air*, 190 USPQ at 108. As such, this factor weighs strongly in favor of a likelihood of confusion.

2. The Goods as Listed in the Application and Registration are Highly Related

When determining if goods or services are related, the Board must look solely to the goods or services as identified and listed in the application and registration. *See Octocom Sys. v. Houston Computer Servs.*, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (“The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s goods, the particular channels of trade or the class of purchasers to which sales of the goods are directed.”); *Stone Lion Capital Partners, L.P. v. Lion*

Capital LLP, 110 USPQ2d 1157, 1161-62 (Fed. Cir. 2014); *Hewlett-Packard Co. v. Packard Press, Inc.*, 62 USPQ2d 1001, 1004-05 (Fed. Cir. 2002).

Here, there is no genuine dispute as to whether the goods are related. As an initial matter, it appears Applicant failed to provide any testimony or other evidence during its testimony period that the goods identified in its Application differ or are not sufficiently similar to the goods identified in Opposer's Registration. In contrast, Opposer provided testimony from its CEO regarding the similarity of the goods identified in the Application and Registration. 13 TTABVUE ¶¶ 12, 14-15. In fact, Opposer's CEO believes that "[b]ased upon [his] knowledge and experience, and Applicant's promotional materials, it is [his] conclusion that Applicant's Goods fall within the scope of Opposer's Goods." *Id.* ¶ 14.

Additionally, it is clear that if the Parties' goods as set forth in the respective Registration and Application are not identical, the goods are highly similar and closely related. It is well established that goods need not be identical or even competitive in order for the Board to find there is a likelihood of confusion. *See In re Iolo Techs., LLC*, 95 USPQ2d 1498, 1499 (TTAB 2010). Instead, the Board asks whether the goods as listed in the Application and Registration "are related in some manner or that the conditions surrounding their marketing are such that they are likely to be encountered by the same persons under circumstances that, because of the marks used in connection therewith, would lead to the mistaken belief that they originate from the same source." TMEP § 1207.01(a)(i) (citing numerous supporting cases).

As listed, Opposer's "plant growth nutrients" and Applicant's "microbial inoculants" are closely related because they are intended to achieve the same results, namely, improve plant growth as shown by the testimony of Opposer's CEO and the Parties' own respective marketing materials. *See supra* at 8-10. This evidence further establishes that the Parties' goods are related

because they are intended to perform the same function, namely, to help crops increase growth. *See id.*

Moreover, the goods identified in the respective Registration and Application are both intended to be applied to seeds in agriculture. The identification of goods in the Registration includes “Plant growth nutrients for treatment of seeds for use in agriculture . . .” while the goods of the Application explicitly states “Microbial inoculants application to seeds used in agriculture.” *See supra* at *7. Thus, both products bearing the SEED+ and the SEEDUP marks are likely to be encountered by the same customers seeking to increase growth of their crops. Accordingly, this factor weighs highly in favor of finding a likelihood of confusion.

3. Neither the Application nor the Registration Contain any Restrictions on the Channels of Trade or Class of Purchasers

When neither the application nor the registration at-issue in a dispute contain any restrictions on the channels of trade, the Board must presume that their respective goods move within the same channels of trade. *See Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268-69 (TTAB 2003) (“Given the in-part identical and in-part related nature of the parties’ goods, and the lack of any restrictions in the identifications thereof as to [the] trade channels and purchasers, these [goods] could be offered and sold to the same classes of purchasers through the same channels of trade.”); *Cunningham* 55 USPQ2d at 1846 (when goods are not restricted, the Board “must deem the goods to travel in all appropriate trade channels to all potential purchasers of such goods”). Here, neither the Application nor the Registration provide any restrictions on the channels of trade. Moreover, there are some overlapping trade channels. *See supra* at *9.

Similarly, both the Application and the Registration do not contain restrictions on the class of purchasers. *See* 13 TTABVUE ¶ 19 (“The types of consumers for the goods listed in Opposer’s SEED+ registration may include anyone who plants and grow seeds, including home

gardeners, landscape professionals, crop growers, farmers, agricultural operations and the like.”). As listed, the goods identified in the Application and Registration both relate to seed growth products used in agriculture. However, there are no limitations as to what the use in “agriculture” entails. For example, there are no restrictions as to the size, type, or number of crops of plants to be grown to qualify for use in “agriculture.” Similarly, there is no restriction for use in only organic or non-organic agriculture operations. As such, these factors weigh in favor of a likelihood of confusion.

4. The Conditions of Sales to Consumers May Lead to Confusion

Under the fourth *DuPont* factor, the Board considers the conditions under which and buyers to whom sales are made and, in particular, whether purchases are impulse or are the result of careful, sophisticated purchasing. *See DuPont*, 177 USPQ at 567. As noted above, the identifications of goods for the Registration and the Application are not limited to a particular class of purchaser. *See supra* at *17-18. Moreover, the goods as listed identify nutrients and inoculants that promote seed growth without limitation as to their nature or price. *See supra* at *7; *Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 107 USPQ2d 1167, 1173 (Fed. Cir. 2013). Thus, the Board must presume the goods in the Registration and the Application are not limited by price, and may be relatively inexpensive. *See*, for example, 20 TTABVUE ¶¶ 8, 19, 24 (listing products offered for sale for \$11.99, \$13.98, and \$16.99); *Stone Lion*, 746 F.3d at 1163 (“Board precedent requires the decision to be based on the least sophisticated potential purchasers.”); *In re Gina Davia*, 110 USPQ2D 1810, 1818 (citing *Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.*, 748 F.2d 669 (Fed. Cir. 1984) (“Generally, casual purchasers of low-cost, every-day consumer items exercise less care in their purchasing decisions and are more likely to be confused as to the source of the goods.”)). Thus, the Board should find that purchasers

of the Applicant's and Opposer's goods exercise minimal care in their purchasing decisions and are more likely to be confused as to the source of the goods.

5. Opposer's Mark is Strong

"In determining strength of a mark, we consider both inherent strength, based on the nature of the mark itself, and commercial strength or recognition." *Bell's Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1345 (TTAB 2017). The strength of a mark is determined by a variety of factors, including the nature of the mark, the volume of sales under a mark, amount of time the mark has been in use, and the extent of advertising of the goods with which the mark is used. *See Giant Food, Inc. v. Nation's Foodservice, Inc.*, 218 USPQ 390, 395 (Fed. Cir. 1983). The Board must assess a mark "along a spectrum from very strong to very weak." *In re Coors Brewing Co.*, 343 F.3d 1340, 1345 (Fed. Cir. 2003). A strong mark will receive a wider latitude of legal protection in a likelihood of confusion analysis. *Palm Bay*, 73 USPQ2d at 1694.

Opposer's SEED+ mark is commercially strong. Opposer has been using its SEED+ mark on products promoting seed growth for more than 40 years. *See supra* at *7. Recently, Opposer's revenues from sales of products in the United States bearing the SEED+ mark have soared and will continue to increase significantly over the coming years. *See supra* at *8.

During this timeframe, Opposer has also engaged in extensive advertising of its products bearing the SEED+ mark through multiple advertising channels, including direct sales, catalogs, online, trade shows, distributors and independent contractors, and sales in brick and mortar retail stores, home improvement stores, and plant nurseries. *See supra* at *8-9. Advertising expenditures will also continue to grow significantly over the coming years. *Id.* Thus,

Opposer's mark should be afforded, at least, a moderate level of commercial strength under the relevant *DuPont* analysis and factors.

A determination regarding the strength of an opposer's mark must also consider the mark in its entirety and whether the combination of terms that makes up the opposer's mark is fanciful, arbitrary, suggestive, or descriptive of opposer's listed goods.² A merely descriptive mark immediately conveys information about the goods it is used with. *In re Chamber of Commerce of the United States*, 675 F.3d 1297, 1300 (Fed. Cir. 2012). However, a mark is considered suggestive if even a small amount of imagination or mature thought is required to ascertain the nature of the goods. *See Stoncor Goup, Inc. v. Specialty Coatings, Inc.*, 759 F.3d 1327, 1332 (Fed. Cir. 2014). Here, on its face, and as described above (*supra* at *7), the SEED+ mark is used in connection with goods which increase crop growth. For a consumer to make the connection between the SEED+ mark and the nature of the listed goods, the consumer would need to take an "imaginative" leap. Moreover, the USPTO examiner did not deem the SEED+ mark to be descriptive and the SEED+ mark stayed on the Principal Register without a claim of acquired distinctiveness. 12 TTABVUE Ex. 1 at *1-2.

Additionally, despite Applicant's best efforts, it failed to provide sufficient third-party evidence to suggest that the SEED+ mark is weak or only entitled to a limited scope of protection. As part of the evidentiary record, Applicant submitted copies of multiple third-party U.S. trademark registrations for marks containing either the word "SEED" or the word or symbol "PLUS" or "+". *See* 23 TTABVUE, Exs. 126-183. However, case law clearly establishes that third-party registrations alone are not probative of the commercial strength of a mark as a

² The SEED+ mark, taken as a whole, is presumed to be, at least, inherently distinctive because it is registered on the Principal Register. *See* 15 U.S.C. § 1057(b); *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1517 (TTAB 2016).

trademark registration provides no evidence that the marks are in use or that the public is aware of the marks. *See Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 177 USPQ 462, 463 (CCPA 1973) (“the purchasing public is not aware of registrations reposing in the Patent Office . . .”).

Moreover, none of the third-party trademark registrations share more than one of the two parts of the SEED+ mark or has a meaning similar to the other part of the SEED+ mark. For example, the submitted third-party registrations include SEEDLINGERS, SEEDWORX, VEG+ BLOOM, HYDRATE PLUS NF, and HUNTER PLUS.

Additionally, the USPTO’s previous allowance of other marks does not justify the registration of another similar mark if it is confusingly similar to a registered mark. Each case must be decided on its own merits and “[e]ven if some prior registrations had some characteristics similar to [applicant’s] application, the PTO’s allowance of such prior registrations does not bind the Board . . .” *In re Nett Designs Inc.*, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001).

Applicant has also submitted evidence of sales of or offers for sale of products which contain either SEED or PLUS or + in their name. *See* 20 TTABVUE, Exs. 100-122; 24 TTABVUE, Exs. 186-191, 200-207, 220-233. However, with the exception of one product³, none of the identified products share more than one part of the SEED+ mark or convey a meaning or commercial impression that is remotely similar to Opposer’s mark. For example, the submitted exhibits include webpages for products named Scotts EZSEED Patch and Repair Sun and Shade, Seed Coat, Triple 8 Plus 8-8-8, and 4R Plus. *See* 24 TTABVUE, Exs. 186-187, 200-201.

³ Applicant submits a webpage listing a Biomantra SEED+ product. *See* 24 TTABVUE, Ex. 191. However, the “+” has been removed from the updated Biomantra SEED product website. *See* 25 TTABVUE, Exs. 14-16.

For all of the above reasons, this factor also weighs in favor of a likelihood of confusion.

IV. CONCLUSION

Opposer has clearly demonstrated it owns the SEED+ mark for the identified goods and that Opposer's Registration predates both Applicant's filing and first use dates. For the reasons outlined above, Opposer has also demonstrated that Applicant's SEEDUP mark is likely to cause confusion with Opposer's SEED+ mark. As such, Opposer respectfully requests that the Board sustain the Opposition in favor of Opposer and refuse registration of Applicant's Application pursuant to Section 2(d) of the Lanham Act.

DATED this 25th day of January, 2021.

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 BRIEF ON THE CASE was served upon
the following party by the methods indicated below:

Ralph D. Chabot Law Office of
Ralph D. Chabot
3210 E. Ponderosa Dr., Ste. 4
Camarillo, CA 93010
rdc@chabotlaw.com

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

DATED this 25th day of January, 2021.

/s/ Kaelynn Moultrie _____
Kaelynn Moultrie

Peter M. de Jonge
THORPE NORTH & WESTERN, LLP
175 South Main Street, Suite 900
Salt Lake City, UT 84111
Telephone: (801) 566-6633
Facsimile: (801) 566-0750

Attorney for Cytozyme Laboratories, Inc.
Opposed Mark: SEEDUP
U.S. Trademark Application Serial No.: 87953971

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

<p>Cytozyme Laboratories, Inc.</p> <p>Opposer,</p> <p>v.</p> <p>JH Biotech, Inc.</p> <p>Applicant.</p>	<p>APPENDIX TO CYTOZYME LABORATORIES, INC.'S MAIN BRIEF - OBJECTIONS TO EXHIBIT 185 SUBMITTED BY JH BIOTECH, INC.</p> <p>Opposition No. 91244593</p>
--	---

Opposer Cytozyme Laboratories, Inc. (“Opposer”) submits its objection to Exhibit 185 attached to JH Biotech, Inc.’s (“JH Biotech”) Third Notice of Reliance. 24 TTABVUE, Ex. 185.

In Applicant’s Third Notice of Reliance, Applicant attempts to make record a printout of Wikipedia’s definition and history of plus and minus signs. Pursuant to the Trademark Trial and Appeal Board Manual of Procedure, the Board may take judicial notice of dictionary definitions, including online dictionaries which exist in printed format or have regular fixed editions. TMEP § 1208.04. However, in general the Board will not take judicial notice of

dictionary definitions in online dictionaries not available in a printed format. *Id.* This includes definitions from Wikipedia. *See In re Jimmy Moore LLC*, 119 USPQ2d 1764, 1768 (TTAB 2016) (“[W]e deny the request to judicially notice the definitions of ‘baseball’ and ‘strike zone’ taken from Wikipedia because Wikipedia is an Internet source whose contents are continuously subject to change via collaborative user-input.”); *Pele IP Ownership, LLC v. Michael C. Silver*, Opp. No. 91220395 at *4 (PTAB Nov. 30, 2018) (not precedential) (“[W]e do not take judicial notice of Wikipedia entries or hyperlinks”). Accordingly, the Board should not consider Exhibit 185 submitted by Applicant in deciding this Opposition.