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

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| Proceeding | 91244593 |
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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,)
)
 vs.)
)
JH Biotech, Inc.)
)
 Applicant.)
_____)

Opposition No.: 91244593

APPLICANT'S BRIEF

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I. DESCRIPTION OF THE RECORD

The evidence of record consists of the following:

1. The USPTO file of Application No. 87/953,971
2. Opposer’s Notice of Opposition (**1 TTABVUE**)
3. Applicant’s Answer to Notice of Opposition (**4 TTABVUE**)
4. Opposer’s Notice of Reliance (**12 TTABVUE**)
5. Testimony Declaration of Eric Chandler Baughman (**13 TTABVUE**)
6. Cross-Examination Deposition of Eric Chandler Baughman (**19 TTABVUE**)
7. Testimony Declaration of Tasha McDonald (**20 TTABVUE**)
8. Applicant’s First Notice of Reliance re: Opposer’s Interrogatory Responses (**21 TTABVUE**)
9. Applicant’s First Notice of Reliance (Confidential filing) (**22 TTABVUE**)
10. Applicant’s Second Notice of Reliance including third party registrations (**23 TTABVUE**)
11. Applicant’s Third Notice of Reliance including internet documents (**24 TTABVUE**)
12. Opposer’s Rebuttal Notice of Reliance (**25 TTABVUE**)¹

II. OBJECTIONS TO OPPOSER’S EVIDENCE

Motion to Strike Rebuttal Notice of Reliance (**26 TTABVUE**)

A Statement of Objections is attached as an appendix to this brief.

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¹ Subject to Applicant’s Motion to Strike (**26 TTABVUE**).

III. STATEMENT OF THE ISSUES

Opposer alleges in its Notice of Opposition that:

- 1) Applicant's SEEDUP mark is likely to cause confusion, mistake, or deception with Opposer's SEED+ mark;
- 2) SEED+ is famous; and
- 3) Applicant's mark is likely to dilute the famous SEED+ mark by blurring and tarnishment.

Applicant denies these allegations and advances the affirmative defense that Opposer's SEED+ mark is weak and entitled to limited protection.

IV. STATEMENT OF FACTS

Applicant, JH Biotech, Inc. filed an actual-use application June 8, 2018 to register SEEDUP in class 001 for "microbial inoculants for application to seeds used in agriculture." A motion to amend the actual-use application to an intent-to-use application was filed April 30, 2019.

Opposer, Cytozyme Laboratories, Inc., opposes on the ground that confusion will be likely with its SEED+ registration (Reg. No. 4192979), also in class 001, for "plant growth nutrients for treatment of seeds for use in agriculture, horticulture and forestry, plant nutrition preparations for the treatment of seeds."

Opposer's mark SEED+ is a composite of the word "SEED" and the symbol "+" which has the phonetic equivalent "PLUS." This is confirmed by Opposer's reliance on a dictionary definition for the term. The "SEED" portion of Opposer's mark is also a term used in the goods description for Reg. No. 4192979.

The symbol "+" or its phonetic equivalent "PLUS" has various meanings which are

inconsistent with the meaning of the term “UP”. See Exhibit 185, (**24 TTABVUE 9-17**). Opposer has submitted no evidence as to the meaning of the symbol “+” yet objected to the introduction of Exhibit 185 simply because it is a Wikipedia reference. See appendix to Opposer’s main brief (**29 TTABVUE**). Opposer argues the Board should not take judicial notice of dictionary definitions in online dictionaries not available in printed format citing *In re Jimmy Moore, LLC*, 119 USPQ2d 1764, 1768 (TTAB 2016). However, contrary to Opposer’s assertion, the Board has considered Wikipedia evidence “so long as the non-offering party has had an opportunity to rebut that evidence by submitting other evidence that may call into question the accuracy of the particular Wikipedia information.” *In re IP Carrier Consulting Group*, 84 USPQ2d 1028 (TTAB 2007). Support for the Wikipedia information is provided from 27 cited references. Opposer had an opportunity to rebut Exhibit 185 when it filed its Rebuttal Notice of Reliance (**25 TTABVUE**) but chose not to do so. Because the Wikipedia article is the only submission addressing the meaning of the symbol “+” and Opposer elected not to rebut the reference when it had an opportunity to do so, Opposer’s objection to Exhibit 185 should be overruled.

The terms “SEED” and the symbol “+” or its phonetic equivalent “PLUS” are widely used in class 001 active registrations. See (**23 TTABVUE**). The use of common phrases used in other registrations in the same international class of goods is indicative of inherent weakness of the SEED+ mark.

Both SEED and the symbol “+” or its phonetic equivalent “PLUS” are used commercially for sale of similar goods by third parties. See Declaration of Tasha McDonald (**20 TTABVUE**) and Applicant’s Third Notice of Reliance for internet documents (**24 TTABVUE**). This evidence will be used to establish that the SEED+ mark is weak.

More specifically, a third party, Agri Life LLC, has incorporated Opposer’s identical mark

as part of its own mark for commercial sale of a similar product under the mark BIOMANTRA SEED+. *See* Exhibits 105-108 (**20 TTABVUE 30-41**) and Exhibit 123 (**21 TTABVUE 26**).

Opposer's main brief relies on multiple conclusory statements when the facts suggest otherwise. The following are examples of Opposer's embellishment of the facts.

Opposer alleges a first use of the SEED+ mark in 1976 and that sales "have steadily increased and have grown significantly in recent years". (**29 TTABVUE 14**). Yet, Opposer's evidence shows product under the SEED+ mark was not sold in three of the subsequent years following registration, 2014, 2016 and 2017 and sold only \$600.00 worth of product in 2015. *See* Answer to Interrogatory No. 10 (**21 TTABVUE 32**) and Baughman testimony, p. 23:11-18 (**19 TTABVUE 27**).

Opposer alleges it advertises SEED+ products in multiple ways yet only provides an allegation for a single year (2018) advertising expenditure. Opposer does not advertise its SEED+ product in magazines or newspapers in the United States. *See* Answer to Interrogatory No. 9 (**21 TTABVUE 31-32**); nor does Opposer regularly track advertising expenses in the standard course of business. *See* Answer to Interrogatory No. 11 (**21 TTABVUE 32-33**).

During discovery, Applicant propounded interrogatories as to why Opposer did not file a Notice of Opposition against various trademark applications in class 001 including SEED COAT (Ser. No. 88/011,246); SEED RANCH (Ser. No. 87/637,152); SEEDMAXX (Ser. No. 87/528,475); SEEDLINGERS (Ser. No. 87/420,096); SEED BOOSTER (Ser. No. 86/608,898); SEEDNET (Ser. No. 85/896,497); SEEDWORX (Ser. No. 85/799,307); and, SEED COAT (Ser. No. 85/823,274). Opposer stated it was unaware of these applications. *See* Answers to Interrogatory Nos. 12-19 (**21 TTABVUE 33-37**) even though the testimony cross-examination of its Chief Executive Officer, Eric Chandler Baughman revealed that Opposer uses a monitoring

service. *See* Baughman testimony, p. 18:15-25 (**19 TTABVUE 22**). Since becoming aware of these applications, Opposer has provided no evidence that it contacted any of the aforementioned applicants to dispute their mark's use or to initiate even a single enforcement action with the Board against any of the aforementioned applications.

During discovery, Applicant propounded interrogatories as to why Opposer has not taken legal action against Agri Life, LLC, which sells the BIOMANTRA SEED+ product. Opposer's response was "if Cytozyme sees fit, it will enforce its rights to protect the SEED+ mark to the fullest extent of the law." *See* Answers to Interrogatory Nos. 20-21 (**21 TTABVUE 38-39**). No evidence has been provided by Opposer that it has enforced its rights against the BIOMANTRA SEED+ mark or to even contact AgriLife, LLC to provide notice of its alleged infringing activity. The BIOMANTRA SEED+ product has been in use since at least as early as 2016 as evidenced by its listing on the OMRI (Organic Materials Review Institute) register. *See* Exhibit 190 (**24 TTABVUE 34-35**).

Opposer has provided no testimony or evidence that it aggressively protects the SEED+ mark through enforcement actions even though it claims to have used the SEED+ mark for more than 40 years. The lack of any enforcement evidence will be used to establish that the SEED+ mark is weak.

No evidence has been provided by Opposer of retail sale of a SEED+ product.

Opposer claims to sell the SEED+ product in container sizes of 11.3 kg buckets, 1.6 and 2.5 gallon jugs and 30 gallon drums. *See* Answer to Interrogatory No. 26 (**21 TTABVUE 45-46**).

The unit price of SEED+ product was deemed trade secret-commercially sensitive by Opposer and Opposer's response has been provided as a confidential submission to the Board. *See* Answer to Interrogatory No. 28 (**22 TTABVUE**).

In response to an interrogatory request asking whether SEED+ products are available in retail stores, Opposer avoided a direct response, instead answering that "...Cytozyme products bearing the SEED+ mark are available directly from Cytozyme and through Cytozyme's partners." *See Answer to Interrogatory No. 29 (21 TTABVUE 47-48).*

Opposer has provided no evidence showing that SEED+ has been used to identify the company's goods prior to 2018 other than the SEED+ registration file. *See Exhibits 1-2 (12 TTABVUE 6-59).* This lack of evidence will be used to establish that the SEED+ mark is not famous.

A. Cross-Examination of Opposer's Testimony Witness Eric Baughman

The testimony declaration of Eric Baughman provides a significant portion of Opposer's evidence. Applicant has numerous evidentiary objections to Mr. Baughman's declaration which are presented in the Statement of Objections attached to this brief.

Mr. Baughman is the Chief Executive Officer of the Opposer, Cytozyme Laboratories, Inc. During cross examination, Mr. Baughman stated:

- a prospective customer would have to first speak with a sales representative before placing an order and that Opposer's websites do not allow for direct ordering of the product. *See Baughman testimony pp. 6:17-7:1 (19 TTABVUE 10-11).*
- his testimony declaration does not include documentary evidence that a SEED+ product can be purchased with a credit card. *See pp. 11:17 -12:4 (19 TTABVUE 15-16).*
- the smallest liquid size sold, the 1.6 gallon container would treat 150-200 acres. *See p.15:1-21 (19 TTABVUE 19) & (19 TTABVUE 33).*
- SEED+ product is available in "hundreds of retail locations," but did not identify any

documentation to support his claim. pp. 15:22-16:22 (**19 TTABVUE 15-16**). Mr. Baughman’s testimony regarding sales in “hundreds of retail locations” is without foundation and hearsay; and is contradicted by the answer provided for Interrogatory No. 29 when it failed to affirmatively answer a question whether the product was sold in retail stores. (**21 TTABVUE 47-48**).

- the SEED+ brand was not used in 2014, 2016 and 2017. See pp. 23:11-24:8 (**19 TTABVUE 27-28**).
- technical understanding of the product would be provided to a prospective customer prior to the prospective customer purchasing the product. See p. 26:11-24 (**19 TTABVUE 30**).
- it is unlikely customers would purchase SEED+ product for their home and garden use. See p. 29:1-17 (**19 TTABVUE 33**).

Opposer has not provided evidence of actual confusion among the purchasing public. In borderline cases where evidence of actual confusion is not available or is not overwhelming, the gap should best be filled by a properly conducted survey of the relevant class of prospective customers of the goods or services at issue. *J Thomas McCarthy, McCarthy on Trademarks and Unfair Competition*, (5th Ed. 2020), §23.17. There is also no evidence of customers having returned goods either to Applicant or Opposer because they were confused between the marks.

The veracity of Mr. Baughman’s testimony declaration should be of concern to the Board.²

During cross-examination Mr. Baughman testified: a) that he signed the declaration of use and incontestability for the SEED+ registration; and, b) declared under penalty of perjury that SEED+ has been in continuous use for five consecutive years since the SEED+ issue date of

² Federal Rules of Evidence Rule 608(b)

August 21, 2012. The evidence establishes SEED+ was not used to sell a product for at least three of the five years. *See* Baughman testimony pp. 22: 13- 25:21 (19 TTABVUE 26-29).

The relevant portion of Mr. Baughman's cross-examination is provided below:

12 give you a detailed response.

13 Q. Well, let's take it one year at a time.

14 For calendar year 2014, did you sell SEED+
15 product for forestry use?

16 MR. DE JONGE: I'll just object. Asked and
17 answered.

18 But go ahead.

19 THE WITNESS: No, we did not. And if I were
20 to conjecture a guess, it would have been in '18 or
21 '19. But, again, I'm not certain of the details.

22 BY MR. CHABOT:

23 Q. Did you sell SEED+ product for forestry use
24 in 2016?

25 MR. DE JONGE: Same objection.

1 THE WITNESS: No.

2 BY MR. CHABOT:

3 Q. Did you sell SEED+ product for forestry use
4 in calendar year 2017?

5 MR. DE JONGE: Same objection.

6 THE WITNESS: No.

7 BY MR. CHABOT:

8 Q. And for the calendar years 2014, 2016, and
9 2017, would it be true that you had no sales of
10 agribusiness -- or sale of -- strike that.

11 Would you agree that there were no SEED+
12 product sales to agribusiness for years 2014, 2016,
13 and 2017?

14 A. For the SEED+ brand?

15 Q. Any SEED+ product.

16 A. We did sell probably quite significant
17 quantities of SEED+ product, just not under SEED+
18 brand.

19 Q. Well, I'm talking about product bearing the
20 SEED+ mark which is at issue in this opposition.

21 So, again, my question is --

22 A. Then -- then -- yeah, when you say
23 "product," I was mistaking that for the product
24 itself. And, again, we have a branded business and
25 a non-branded business.

1 And for the -- for the purpose of clarifying
2 SEED+ branded product, no, we did not sell in those
3 years.

4 Q. And I noticed that in 2015 there was only
5 \$600 reported in your interrogatory response -- or
6 response to Interrogatory Number 10.

7 Do you recall if that was a single sale?

8 A. I don't recall.

9 Q. Okay. I'd like to turn now to Cytozyme's
10 notice of reliance, Exhibit 1, page 15, and it is
11 Bates stamped CYTOZYME0040.

12 Let me know when you have it.

13 A. Yes, we're here.

14 Q. Okay. I'd like you to take a moment and
15 review, particularly, the first paragraph.

16 A. Okay.

17 Q. Do you recognize this document?

18 A. Yes, I do.

19 Q. Whose name is listed at the bottom of the
20 document?

21 A. My name, Eric Baughman.

22 Q. Is that your signature?

23 A. Yes, it is.

24 Q. And the date you signed was July 26, 2018?

25 A. Yes.

1 Q. Isn't it true you declared that SEED+ has
2 been in continuous use in interstate commerce for
3 five consecutive years from the August 21st, 2012,
4 issue date?

5 A. Yes.

6 Q. Would you agree the facts you declared in
7 this document to be true are not true?

8 A. True.

9 Q. You're stating that you have had five years
10 of continuous use when there were no sales for three
11 of the five years, 2014, 2016, and 2017?

12 MR. DE JONGE: I'll object as vague and
13 ambiguous question. And asked and answered.

14 BY MR. CHABOT:

15 Q. Would you answer the question, sir?

16 A. Yeah, you know, you're referring to
17 commercial sales of the SEED+ brand. "Use" is a
18 little ambiguous because, again, these products and
19 the quantities that were sold from year to year
20 could have been used in subsequent following years.
21 So the question is ambiguous, in my view.

22 But the company was engaged in development
23 activities and using the mark with an eye towards
24 developing and growing the business. So I don't
25 view those as being at odds with one another.

V. **ARGUMENT**

JH Biotech, Inc. is entitled to register the SEEDUP mark because Opposer can not establish a likelihood of confusion to the SEED+ mark.

A. **CYTOZYME has not met its burden under the DuPont factors.**

CYTOZYME has not met its burden of proving that there is a likelihood of confusion. *West Fla.Seafood v. Jet Rests. Inc.*, 31 U.S.P.Q.2d 1660, 1662 (Fed. Cir. 1994) (opposer must prove likelihood of confusion by a preponderance of the evidence). The evidence Opposer has filed in this proceeding to address likelihood of confusion is scant, at best.

CYTOZYME must prove that there is a likelihood of confusion, not just possible confusion. *Witco Chem. Co. v. Whitefield Chem. Co.*, 164 U.S.P.Q. 43, 44-45 (C.C.P.A. 1969).

The decision in *In re E.I. duPont de Nemours &Co*, 177 U.S.P.Q. 563 (C.C.P.A. 1973), provides a list of evidentiary elements or factors to be considered in analyzing the likelihood of confusion issue when an opposition is based, in whole or in part, on Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d). The evidentiary elements recited in *duPont* are not listed in order of merit, and, in any particular case, one element or group of elements may play a dominant role. *Id.* at 567-68. *Shen Manufacturing Co. v. Ritz Hotel, Ltd.*, 73 U.S.P.Q.2d 1350 (Fed. Cir. 2004) at 1353 (“Neither we nor the board, however, need consider every *duPont* factor”). A single *duPont* factor may be dispositive in certain cases. *Mattel Inc. v. Funline Merchandise Co.*, 81 USPQ2d 1372 (TTAB 2006).

To assess likelihood of confusion, the Board considers the thirteen *duPont* factors. *In re E.I. duPont de Nemours &Co*, 177 U.S.P.Q. 563 (C.C.P.A. 1973).

As explained below, and contrary to CYTOZYME’s unsupported allegations, an

evaluation of the *duPont* factors indicates confusion is unlikely to occur. CYTOZYME has not met its burden of proof by a preponderance of the evidence and this Proceeding should be dismissed.

Factor 1. The Marks Are Dissimilar

Applicant's mark SEEDUP is dissimilar to and not likely to be confused with Opposer's mark SEED+.

Opposer's mark SEED+ and Applicant's mark SEEDUP are both composite marks. "Conflicting composite marks, however, are to be compared by looking at them as a whole, rather than by breaking the marks up into their component parts for comparison." *J Thomas McCarthy, McCarthy on Trademarks and Unfair Competition*, (5th Ed. 2020), §23.41. "This is the "anti-dissection" rule. The rationale for the rule is that the commercial impression of a composite trademark on an ordinary prospective buyer is created by the mark as a whole, not by its component marks." *Id.* "Thus, conflicting marks must be compared in their entireties. A mark should not be dissected or split up into its component parts and each part then compared with corresponding parts of the conflicting mark to determine the likelihood of confusion." *Id.*

Because a mark must be considered as a whole, the mere fact that marks share elements, even dominant elements, does not compel a conclusion of likely confusion. *General Mills, Inc. v. Kellogg Co.*, 3 U.S.P.Q.2d 1442, 1445 (8th Cir. 1987) ("[t]he use of identical, even dominant, words in common does not automatically mean that the two marks are similar."). In fact, the TTAB and the Federal Circuit have repeatedly held there is no likelihood of confusion between marks that share a common first element when the marks as a whole are dissimilar:

- LEAN LIVING allowed to register over LEAN CUISINE in *Stouffer Corp. v. Health*

- Valley Natural Foods Inc.*, 1 U.S.P.Q.2d 1900 (T.T.A.B. 1986);
- QUICK ‘N CRISPY allowed over QUICK ‘N BUTTERY and QUICK ‘N SAUCY in *United Foods Inc. v. J.R. Simplot Co.*, 4 U.S.P.Q.2d 1172 (T.T.A.B. 1987);
 - RED RAVE allowed over RED BULL in *Red Bull GmbH v. Cochran*, Opposition No. 91152588, 2004 WL 2368486 (T.T.A.B. 2004); and
 - SPICE ISLAND allowed over SPICE GARDEN in *Burns Philp Food Inc. v. Modern Prods., Inc.*, 24 U.S.P.Q.2d 1157 (T.T.A.B. 1992).

Thus, while both the SEED+ and SEEDUP marks contain the term “SEED”, the inquiry about the similarity of the marks cannot end there. The additional terms “+” or its phonetic equivalent “PLUS” and “UP” that comprise the respective marks at-issue have trademark and market significance, resulting in two marks that, when taken as a whole, have different appearances, sounds, connotations, and commercial impressions. *Shen Manufacturing Co. v. Ritz Hotel, Ltd.*, 73 U.S.P.Q.2d 1350 (Fed. Cir. 2004) at 1356-57.

With regard to sight, both marks use the prefix SEED, and it is well settled the dominant feature of a mark generally is entitled to greater weight in determining the issue of likelihood of confusion. *Hewlett-Packard Co. v. Packard Press, Inc.*, 62 USPQ2d 1001, 1003 (Fed. Cir. 2002) (recognizing propriety of giving greater weight to dominant features of involved marks). However, where the dominant feature is descriptive, it should be given less weight since the term is widely used in other third-party registrations in class 001. *See (23 TTABVUE)*. Further, SEED is also used in Opposer’s description of goods. “That a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark.” *In re Nat’l Data Corp.*, 224 USPQ 749, 751 (Fed. Cir. 1985).

The second portion of each mark is different. Opposer uses the symbol “+” while

Applicant uses the term “UP”.

With regard to sound, the phonetic equivalent of the symbol “+” is PLUS” and this term appears to either describe something additional; or, to praise the product it is associated with. *Estee Lauder Inc. v. The Gap, Inc.*, 108 F.3d 1503, 1509 (2nd Cir. 1997). Opposer’s mark is pronounced SEED PLUS while Applicant’s mark is pronounced SEED UP. Phonetically, the marks are dissimilar. As the Federal Circuit explained, “one *DuPont* factor may be dispositive in a likelihood of confusion analysis, especially when that single factor is the dissimilarity of the marks.” *Champagne Louis Roederer, S.A. v. Delicato Vineyards*, 47 U.S.P.Q.2d 1459, 1460-61 (Fed. Cir. 1998) (affirming dismissal of opposition based on dissimilarity of CRISTAL and CRYSTAL CREEK). The dissimilarity between the marks here is an appropriate factor upon which to rule in Applicant’s favor.

Marks are to be considered in their entirety and how they are used and perceived. *In re Hearst Corp.*, 25 USPQ2d 1238, 1239 (Fed. Cir. 1992), reh’g, en banc, denied, 1993 U.S. App. LEXIS 7705 (Fed. Cir. Apr. 7, 1993). Opposer has failed to show how either SEED+ or SEEDUP are perceived.

The shared term “SEED” is insufficient to create any likelihood of confusion given the differences between the marks in their entirety and the descriptive use of the term in Opposer’s registration.

Any significance of the shared term “SEED” is minimal for the additional reason that “SEED” has been both used and registered by numerous third parties as an element in the same class of goods, class 001. *See* Exhibits 126-183. (**23 TTABVUE**). As a result, the term “SEED” as one element of a trademark is not truly distinctive or source signifying.

The common use of the term certainly can form no rational basis for contending that the

marks as a whole are likely to be viewed as closely similar or as coming from the same or a related source. *See In re Broadway Chicken, Inc.*, 38 U.S.P.Q.2d 1559, 1565-66 (T.T.A.B. 1996) (“Evidence of widespread third-party use, in a particular field, of marks containing a certain shared term is competent to suggest that purchasers have been conditioned to look to the other elements of the marks as a means of distinguishing the source of goods or services in the field”); *See also, In re Bed & Breakfast Registry*, 229 U.S.P.Q. 818, 819 (Fed. Cir. 1989) (“The record shows that a large number of marks embodying the words ‘bed and breakfast’ are used for similar reservation services, a factor that weighs in favor of the conclusion that BED & BREAKFAST REGISTRY and BED & BREAKFAST INTERNATIONAL are not rendered confusingly similar merely because they share the words ‘bed and breakfast.’”).

Opposer submits dictionary exhibits for the terms “PLUS” and “UP” and argues confusion is likely because a synonym for each term is the word “increase”. An inspection of Opposer’s dictionary definition of “PLUS” (12 TTABVue 113-122) includes a highlighted passage in a section having the heading entitled “Kids Definition of *plus*”. It is hard to imagine a “kid” as an average reasonably prudent buyer of Opposer’s product given the nature of the product and its high purchase price and therefore how a “kid” interprets the meaning of “PLUS” as part of Opposer’s mark is not relevant.

Opposer’s use of dictionary terms without taking into account the commercial impression on an ordinary prospective buyer is precisely what the anti-dissection rule teaches against. Opposer is simply comparing the last portion of each mark to one another and equating them to be the same.

In addition to the phonetic comparison, there is also the visual differences between the marks. Opposer has submitted no evidence, survey or otherwise as to the public’s interpretation

of “+” when used in the overall mark. Applicant submits a Wikipedia reference for “+”, which defines “+” as a binary operator which indicates addition, or in chemistry is used to indicate an ion with a positive charge. With regard to Opposer’s earlier argument concerning the synonym “increase”, the Wikipedia reference is presented to show that the term “increase” is not used to describe the symbol “+”³ so no evidence has been offered by Opposer to equate the visual “+” with “UP”. Opposer has submitted no evidence that an average reasonably prudent buyer would be visually confused by the respective marks.

Based on the above, Opposer’s use of dictionary definitions to associate similarity between “UP” and “PLUS” should be rejected by the Board. The marks are dissimilar and weigh in favor of Applicant.

Factor 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

The description of goods in the SEEDUP application is in class 001 “microbial inoculants for application to seeds used in agriculture.”

The description of goods in the SEED+ registration is in class 001 “plant growth nutrients for treatment of seeds for use in agriculture, horticulture and forestry, plant nutrition preparations for the treatment of seeds.”

The goods are similar, and this factor weighs in favor of Opposer.

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³ See Exhibit 185 (24 TTABVUE 9-17)

Factor 3. The Similarity Or Dissimilarity Of Established, Likely-To-Continue Trade Channels

Opposer relies on the declaration of its Chief Executive Officer, Eric Baughman that the SEED+ product “are typically sold through a wide variety of channels, including direct sales, through catalogs, online, at trade shows, through distributors and third parties, brick and mortar retail stores, home improvement stores and plant nurseries”. ¶18 (13 TTABVUE 6). During cross-examination, Mr. Baughman testified that the product is available in “hundreds of retail locations,” but did not identify a single document to support his claim. See pp. 15:22-16:22 (19 TTABVUE 15-16). This portion of Mr. Baughman’s declaration is contrary to the response Opposer provided for Interrogatory No. 29 (21 TTABVUE 47-48).

No evidence has been submitted by Opposer of catalog sales, online sales, trade show sales, brick and mortar retail store sales, home improvement store sales or plant nursery sales. Mr. Baughman’s declaration lacks foundation and is hearsay. Because cross-examination revealed that Mr. Baughman signed a false statement under penalty of perjury⁴, the veracity of his declaration is suspect.

During his cross-examination, Mr. Baughman testified that Opposer sells its SEED+ product through the use of a distributor named Verdesian and that Verdesian utilizes salesmen to interact directly with Agrifarm customers. No evidence has been provided by Opposer to suggest a different channel of trade used for sale of the SEED+ product.

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⁴ See pages 8-11 of this brief.

Factor 4. The Conditions Under Which And The Buyers To Whom Sales Are Made, i.e., “Impulse Purchasing” Versus Careful, Sophisticated Purchasing

The TTAB and the courts have recognized that the sophistication of the consumer is a factor in determining whether customers are impulse purchasers. The SEED+ product is sold through direct-sales marketing. Mr. Baughman testified a prospective customer would have to first speak with a sales representative before placing an order and that Opposer’s websites do not allow for direct ordering of the product. *See* pp. 6:17–7:1 (**19 TTABVUE 10-11**); and (**19 TTABVUE 14-16**)

Mr. Baughman also testified that technical understanding of the product would be provided to a prospective customer prior to the prospective customer purchasing the product. *See* pp. 26:11-24 (**19 TTABVUE 30**).

No evidence has been proffered that a SEED+ product can be purchased without contact with a sales representative which further contradicts Mr. Baughman’s declaration of the product being widely available in retail stores, etc. Mr. Baughman testified that the smallest liquid size sold, the 1.6 gallon container would treat 150-200 acres, and it is unlikely it would be purchased by customers for their home and garden use. *See* p.15:1-21 (**19 TTABVUE 19**) & (**19 TTABVUE 33**). The expensive purchase price even for the smallest product size, leads to a conclusion that SEED+ purchasers are larger agricultural operations who are well-informed buyers not likely to be confused by a third party product.

Because of the use of direct-sales marketing, prospective buyers would purchase the SEED+ product from a single source after being provided technical information about the product and will therefore be a knowledgeable purchaser that would associate SEED+ with the distributor

from which the product is purchased.

By contrast, Cytozyme in its main brief argues the Board must presume the goods in the Registration and Application are not limited by price and may be relatively inexpensive. Opp. Br. p. 17 ¶4 (**29 TTABVUE 24**).

In order to properly rebut Cytozyme's inaccurate presumption, the question should turn on the typical purchaser in the agriculture, horticulture and forestry⁵ markets. Even if the Board must consider customers in horticulture and forestry even though there is no evidence of sales in those markets, those customers should be rather sophisticated, given the market segment described in the SEED+ goods description as well as the high cost of even the smallest size SEED+ product. *See* (**22 TTABVUE 6-7**)

Mr. Baughman admitted during his cross-examination, the smallest size of SEED+ product is used to cover 150-200 acres. *See* (**19 TTABVUE 33**). Therefore, the SEED+ product is not directed to typical home and garden consumers. This is consistent with the SEED+ goods description limiting to agriculture, horticulture and forestry. There is no evidence in the record that a typical home and garden consumer has ever purchased a SEED+ product.

After wading through the many inaccurate representations made by Cytozyme, the evidence of record makes clear that the SEED+ product is directly sold to end users by salesmen employed by a distributor; that potential buyers can not purchase product without first consulting with a salesman; that home and garden customers are not likely to purchase the SEED+ product; and that the cost of the SEED+ product is expensive when compared to the cost of plant nutrient products for typical home and garden use. Based on this, the average reasonably prudent buyer is

⁵ See Registrant's description of goods.

an informed, sophisticated Agrifarm customer.

Because Opposer utilizes a third party sales force to provide advice to prospective customers, purchaser confusion is not likely.

This factor weighs heavily in favor of Applicant.

Factor 5. The Fame Of The Prior Mark (Sales, Advertising, Length Of Use)

Opposer alleges use of the SEED+ mark as early as June 1976. However, Opposer has provided no evidence of use prior to Opposer's June 16, 2011 filing date of the SEED+ application. Opposer has submitted no evidence of advertising expenses and only annual sales figures for 2013, 2015, 2018 and 2019. Zero sales were reported for years 2014, 2016-2017 and only \$600.00 in sales for 2015. See (21 TTABVUE 32) and (19 TTABVUE 27-28). Without Opposer providing any evidence to the contrary, the commercial strength of SEED+ is weak. This factor weighs in favor of Applicant.

Factor 6. The Number And Nature Of Similar Marks In Use On Similar Goods

Third party use of the term "SEED" for seed related products precludes "SEED" from having source indicating significance or trademark strength. Evidence of third party use of similar marks on similar goods is admissible and relevant to show that the mark is relatively weak and entitled to only a narrow scope of protection. *J Thomas McCarthy, McCarthy on Trademarks and Unfair Competition*, (5th Ed. 2020), §11:88 citing *Loctite Corp. v. Tubbs Cordage Co.*, 175 USPQ 663 (TTAB 1972). As the Federal Circuit observed: "Evidence of third party use of similar marks on similar goods is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection. *Id.* citing *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee*

En 1772, 73 USPQ2d 1689 (Fed. Cir. 2005).

The use of the term “SEED” is very common and is evidence that the SEED+ mark is inherently weak. Examples are illustrated in the table below and were confirmed by the testimony of Ms. Tasha McDonald, who placed orders and authenticated the photos in her declaration of orders received for various “SEED” products including Seedlingers®, BIOMANTRA SEED+, SMART SEED®, and EZ SEED®. Ms. McDonald provided details for purchasing SEED COAT®, and SEEDMAXX®; however, due to the high cost, did not purchase both products. See Exhibits 100-121 (**20 TTABVUE**). In addition, the search summary performed for Applicant’s SEEDUP application indicated 1832 total live marks having SEED.⁶

The following are examples of products commercially available for purchase:

| Owner/Goods & Services | Registration/Mark | Product |
|--|--------------------------------------|---|
| Big Bucks Enterprises, Inc. DBA Messinas CORPORATION (20 TTABVUE 24) | Reg. No. 5311402 Seedlingers® |  |

⁶ SEEDUP file history, Ser. No. 87953971; XSearch Search Summary, August 30, 2018, row 8

| | | |
|---|---|--|
| <p>AgriLife, LLC</p> <p>(20 TTABVUE 41)</p> | <p>BioMantra SEED+</p> |  |
| <p>Pennington Seed Inc.</p> <p>(20 TTABVUE 58)</p> | <p>Reg. No. 4869805</p> <p>SMART SEED®</p> |  |
| <p>OMS Investments, Inc.</p> <p>(20 TTABVUE 69)</p> | <p>Reg. No. 3803758 Reg. No. 3684031</p> <p>EZSEED®</p> |  |

| | | |
|---|---------------------------------------|--|
| <p>DeltAG (20 TTABVUE 101)</p> | <p>Reg. No. 5684630 SEEDCOAT®</p> |  |
| <p>AgriGro Marketing, Inc. (20 TTABVUE 95)</p> | <p>Reg. No. 5482602 SEEDMAXX®</p> |  |

This factor favors Applicant. In today’s market, “SEED” is a descriptive term and used widely for plant growth products in class 001. As evidenced by the exhibits presented for trademark registrations (**23 TTABVUE**), internet examples (**24 TTABVUE**), and in the declaration of Tasha McDonald (**20 TTABVUE**), many products have been registered and sold commercially which use the term “SEED” for class 001 goods.

Opposer’s brief improperly attempts to minimize Applicant’s BIOMANTRA SEED+ evidentiary submission (**20 TTABVUE 41**) citing Exhibits 14-16 from its Rebuttal Notice of Reliance (**25 TTABVUE 11-21**) and concluding that the “+” was removed; essentially leaving the product brand as BIOMANTRA SEED.⁷ These exhibits are not relevant to prove removal of the “+” portion. The Board “consider[s] internet printouts and other materials properly introduced

⁷ See Opposer’s Main Brief (**29 TTABVUE 27**, footnote 3)

under a notice of reliance without supporting testimony only for what they show on their face rather than for the truth of the matters asserted therein”. *Spiritline Cruises LLC v. Tour Management Services, Inc.*, 2020 USPQ2d 48324 (TTAB 2020). Opposer’s conclusion that the “+” was removed from the BIOMANTRA SEED+ product lacks foundation and assumes facts not in evidence. In contrast, Applicant has introduced into the record a purchase of a product having the mark BIOMANTRA SEED+. All Opposer has done is submit for the record another reference in which a third party is using the dominant portion of the SEED+ mark for advertising of a similar product which is further evidence tending to show the SEED+ mark is inherently weak.

The ultimate test of relative strength is the distinctiveness of a mark in the mind and perception of the relevant customer group. But a mark that is hemmed in on all sides by similar marks on similar goods cannot be very "distinctive." *J Thomas McCarthy, McCarthy on Trademarks and Unfair Competition*, (5th Ed. 2020), §11:85. A portion of a mark may be "weak" in the sense that such portion is descriptive, highly suggestive, or is in common use by many other sellers in the market. *Id.*, §23:48.

In a case involving extensive third-party use, where the Board evaluated the registration of NATURE’S PLUS for vitamins, the applicant introduced evidence of multiple third-party registrations for marks containing the term PLUS. *Plus Prods. v. Natural Organics, Inc.*, 204 U.S.P.Q. 773 (T.T.A.B. 1979). The Board drew the following inferences from the co- existence of these registrations: (1) The Trademark Office has historically registered PLUS marks for vitamins to different parties so long as there has been some difference, not necessarily created by a distinctive word, between the marks as a whole, e.g. VITAMINS PLUS and IRON PLUS; (2) a number of different trademark owners have believed, over a long interval of time, that various PLUS marks can be used and registered side-by-side without causing confusion provided there are

minimal differences between the marks. *Id.* at 779.

The rationale of these inferences is further confirmed by prior decisions addressing third party use explaining that third-party registrations “reflect a belief, at least by the registrants, who would be most concerned about avoiding confusion and mistake, that various ‘STAR’ marks can coexist provided that there is a difference.” *Jerrold Elecs. Corp. v. The Magnavox Co.*, 199 U.S.P.Q. 751, 758 (T.T.A.B. 1978).

The use by numerous third parties in a market desensitizes consumers to the use of the term by reducing the individual distinctiveness of similar marks and making confusion unlikely. See *General Mills, Inc. v. Health Valley Foods*, 24 U.S.P.Q.2d 1270, 1277 (T.T.A.B. 1992). Thus, when evaluating breakfast cereals high in fiber, there was no likely confusion between FIBER ONE and FIBER 7 FLAKES, due in part that the field of “FIBER” composite marks for food was crowded, allowing consumers to distinguish between the other composite portions of the marks. *Id.*

Likewise, confusion should not be likely between different “SEED” uses in class 001 because “SEED” is similar to the aforementioned cases involving “PLUS”, “STAR” and “FIBER”.

Also, the second portion of Opposer’s mark, the “+” or the phonetic sound “PLUS”, is also found in multiple applications filed for class 001 goods. See ¶¶9-50 (23 TTABVUE 3-8) & Exhibits 134-183 (23 TTABVUE 28-157). Some of these marks include, but are not limited to the following:

| | | |
|--------------|-----------------|--------------|
| UP TIME PLUS | HYDRATE PLUS NF | TRANSPLUS |
| OPTIMUM PLUS | HUNTER PLUS | PROTIEN PLUS |
| FISHPLUS | CAL-CM+ PLUS | EC+ |

POTASSIUM PLUS

ZINC PLUS

BORON PLUS

SUPERMN+

NUTRI+

Ph+Plus

CYTOZYME cannot minimize the impact of this extensive third-party use for both portions of its mark for class 001 goods. Registrations are widely recognized as evidence that the Trademark Office, by registering multiple marks with a common term, believed that the identical portions of the composite marks were weak and not likely to cause confusion. *J Thomas McCarthy, McCarthy on Trademarks and Unfair Competition*, (5th Ed. 2020), §11:90; *Rocket Trademarks Pty Ltd. v. Phard S.p.A.*, 98 U.S.P.Q.2d 1066, 1075 (T.T.A.B. 2011) (no confusion was likely between senior ELEMENT and junior ZU ELEMENTS for apparel because third party registrations evidenced that “element” was suggestive of clothing).

CYTOZYME’s allegation that confusion is likely given its exclusive use of the SEED+ mark is a weak argument when one considers: a) that many seed related products are sold and registered having SEED as a portion of the mark; b) that SEED is also part of the goods description in Opposer’s registration; c) that many products are registered in class 001 using “+” or the phonetic equivalent “PLUS”; and, d) a third party is using the entirety of Opposer’s mark SEED+ as part of its BIOMANTRA SEED+ mark for the sale of a similar product for which Opposer has neglected to take any steps to curb this activity.

Here, the many third-party registrations incorporating the term “SEED,” as well as the evidence of use of the term in commerce, lead consumers to understand the inference that the term “SEED” has not been exclusively appropriated by any one entity in the field, and that customers distinguish between these marks when other terms are used. *In re Hartz Hotel Servs., Inc.*, 102 U.S.P.Q.2d 1153, 1155 (TTAB 2012).

Thus, the additional terms “+” and “UP”, cause the marks to be distinguishable from one another and are unlikely to lead to confusion.

Factor 7. The Nature And Extent Of Any Actual Confusion

Opposer has not provided evidence of actual confusion among the purchasing public. In borderline cases where evidence of actual confusion is not available or is not overwhelming, the gap should best be filled by a properly conducted survey of the relevant class of prospective customers of the goods or services at issue. *J Thomas McCarthy, McCarthy on Trademarks and Unfair Competition*, (5th Ed. 2020), §23.17. No survey has been introduced into the record by Opposer.

There is also no evidence of any customer having returned goods either to Applicant or Opposer because they were confused between the marks. As a result, there is no reason to believe confusion is likely based merely on Opposer’s allegations.

Factor 12. The Extent Of Potential Confusion, i.e., Whether De Minimis Or Substantial

The extent of potential confusion would be de minimis, at best. Opposer uses a third party, to directly market to prospective customers and provide technical information and advice prior to purchase. This personal contact with potential customers and repeat customers alike negates likelihood of confusion. Buyers are well informed of the product they intend to purchase.

Factor 13. Any Other Established Facts Probative Of The Effect Of Use

The law imposes on trademark owners the duty to be pro-active and to police the relevant market for infringers. *J Thomas McCarthy, McCarthy on Trademarks and Unfair Competition*,

(5th Ed. 2020), §11.91. If the trademark owner is quiescent and tolerates the encroachment of infringers, it will find that its trademark asset has “eroded” and “shrunk” because the strength of its mark as a distinctive and distinguishing symbol has been diminished by the presence of similar marks. *Id.*, §11.94 Author’s comment.

Opposer lacks an enforcement strategy. During discovery, Opposer was presented with numerous registrations for similar marks and Opposer replied on May 3, 2019 that it was unaware of these marks. See (21 TTABVUE 33-37). When presented with evidence of the Biomantra SEED+ product, Opposer responded “if Cytozyme sees fit, will enforce its rights to protect the SEED+ mark to the fullest extent of the law.” See Answers to Interrogatory Nos. 20-21 (21 TTABVUE 38-39). Yet, nearly two years have passed since being informed of multiple marks for similar products and Opposer failed to provide evidence it initiated even a single inquiry to the alleged infringer or an enforcement action with the Board against any of the aforementioned trademarks discussed earlier.⁸ When asked during his testimony cross examination, Mr. Baughman answered no lawsuit had been filed against Agri Life LLC, the owner of the Biomantra SEED+ mark, and that he did not recall Opposer filing an Opposition proceeding involving its SEED+ registration besides the present matter. See Baughman transcript, p. 18:15-20:7 (19 TTABVUE 22-24).

Although Opposer has allegedly used the SEED+ mark for over 40 years, it has never inquired or challenged any mark involving the widely used SEED until this action. This factor weighs heavily in favor of Applicant.

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⁸ See page 4 of this brief.

CONCLUSION

For the foregoing reasons, JH BIOTECH, INC. respectfully submits Plaintiff has failed to carry its burden of proving the SEED+ mark is famous or that confusion would likely occur with Applicant's use of the SEEDUP mark.

This opposition should be dismissed with prejudice.

/s/ Ralph D. Chabot
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Attorney for Applicant, JH BIOTECH, INC.

Dated: February 24, 2021

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing:

APPLICANT'S BRIEF

has been served on Peter M. de Jonge of Thorpe North & Western, LLP, counsel for Opposer, by forwarding said copy on February 24, 2021 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: February 24, 2021

**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. |) | |
| |) | APPENDIX |
| JH Biotech, Inc. |) | |
| |) | |
| Applicant. |) | |
| _____ |) | |

STATEMENT OF OBJECTIONS

In accordance with TBMP §§ 532 and 707.02, Applicant submits the following objections to the trial evidence of Opposer Cytozyme Laboratories, Inc. (“Cytozyme”).

Applicant renews its Motion to Strike Opposer’s Notice of Reliance (**26 TTABVUE**).

Opposer has only referenced a portion of its evidence in its main brief. Applicant herein provides objections to both the portions used in Opposers Main Brief and those portions which were not.

Footnotes in this statement provide the location in Opposer’s Main Brief of the specific evidence which Applicant finds objectionable.

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I. Declaration of Eric Chandler Baughman

Cytozyme has submitted the testimony declaration of Eric Baughman, CEO of Cytozyme Laboratories, Inc. (13 TTABVUE). Applicant objects to the following:

A. Statements of opinion, improper expert opinion, lacking foundation, speculation, assumes facts not in evidence:

- **Paragraph 5**

“Plant growth nutrients are used to promote plant growth and improve crop yields. Plant growth nutrients may be applied to seeds in various manners, including in liquid formulations and dry powder formulations. Fertilizer is a type of plant growth nutrient”(¶5, 13 TTABVUE 3).

Mr. Baughman has not been disclosed to JHB as an expert witness.

- **Paragraph 6**

“The phrase “plant nutrition preparations for the treatment of seeds” as used in Opposer’s Goods refers to a very broad range of substances that facilitate nutrition for seeds.” (¶6, 13 TTABVUE 3).

- **Paragraph 20**¹

“I have knowledge that Opposer has active product registrations for the SEED+ product in over 40 states within the United States. In August 2018, Opposer entered into a strategic marketing agreement with Verdesian Life Sciences to promote the SEED+

¹ Cited in Opposer’s Main Brief (29 TTABVUE 14)

product.” See Exhibit 6, CYTOZYME0100-0103.” (¶20, 13 TTABVUE 6).

- **Paragraph 21**²

“I have knowledge that Opposer has recently initiated large scale sales through the end of 2019 and into the current pre-planting season of 2020 with several major retailers throughout the Midwest and Southeast regions of the United States. Opposer has significant expectations for the continued growth of the SEED+ product within the agricultural biotechnology industry and marketplace.” (¶21, 13 TTABVUE 6).

- **Paragraph 22**³

“Applicant’s Goods may be sold through the same channels of trade as Opposer’s Goods. For example, I am aware that Applicant’s SEEDUP product is sold online by third parties to consumers on <http://www.arbico-organics.com/product/seedupjhbitech/organic-soil-conditioners>.” (¶22, 13 TTABVUE 6).

- **Paragraph 23**

“Opposer is again concerned that consumers will see Applicant’s SEEDUP product and confuse it as Opposer’s SEED+ product because the products can be sold in the same channels of trade and to the same end consumers.” (¶23, 13 TTABVUE 6).

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2 Cited in Opposer’s Main Brief (29 TTABVUE 14)

3 Cited in Opposer’s Main Brief (29 TTABVUE 15)

B. Improper introduction of documentary evidence, assumes facts not in evidence:

• **Paragraph 10**

“Attached hereto as Exhibit 6 is a true and correct copy of web pages *from Opposer’s website* further describing the products sold under Opposer’s SEED+ trademark.” (Emphasis added). (¶10, 13 TTABVUE 4).

Exhibit 6 are web pages from the URL www.vlsci.com. (13 TTABVUE 20-48). During cross-examination of Mr. Baughman (16 TTABVUE), he was asked the following:

Q. Mr. Baughman, is the website www.cytozyme.com owned by Cytozyme?

A. Yes, it is.

Q. Is the website www.cytozymeag.com owned by Cytozyme?

A. Yes, it is.

Q. Is Verdesian a distributor of SEED+ product?

A. Yes, they are.

Q. Is their website www.vlsci.com?

A. As I recall, that’s correct, yeah. (16 TTABVUE 10, lines 7-16)

From this exchange, it is clear Opposer Cytozyme is not the owner of the website www.vlsci.com.

The Baughman declaration attempts to introduce webpages purported to be from Cytozyme’s website. The web address printed on each page is from the website <https://www.vlsci.com>. (13 TTABVUE 21-48). A closer inspection of this website clearly shows the information is copyrighted from a third party, Verdesian Life Sciences and not Cytozyme.

• **Paragraph 12**

“Pursuant to Applicant’s promotional materials, true and correct copies of which are attached hereto as Exhibits 7 and 8, the intended purpose of applying microbial inoculants to seeds is to enhance seed germination and rooting, promote growth, increase

the yield, and improve crop quality. Microbial inoculants are believed to do this by increasing plant growth nutrient availability to the plant seed and roots.” (¶12, 13 TTABVUE 4).

Paragraph 12 seeks to introduce promotional materials purportedly from Applicant citing Exhibits 7 and 8. (13 TTABVUE 49-56). These exhibits have not been authenticated and there is no accompanying URL or date of publication. Likewise, there is no foundation for Mr. Baughman’s statement regarding the intended purpose of microbial inoculants. As such, the testimony should be stricken as lacking foundation and personal knowledge. See Fed. R. Evid. 602; Coach Services, Inc. v. Triumph Learning LLC, 96 USPQ2d 1600, 1603 (TTAB 2010) (sustaining objection to records to the extent witness lacked personal knowledge), aff’d in part, vacated in part, and remanded, 668 F.3d 1356, 101 USPQ2d 1713 (Fed. Cir. 2012).

- **Paragraph 13**

“Applicant’s products are classified by the Organic Materials Review Institute as “crop fertilizers and soil amendments.” See Exhibit 9, JHP 0046”. (¶13, 13 TTABVUE 4 and 57-61).

Paragraph 13 seeks to introduce a printout from the Organic Materials Review Institute regarding Applicant’s product. However, no foundation, authentication or other basis is provided for introduction into evidence. As such, this testimony and Exhibit 9 should be stricken as lacking foundation and lacking authentication.

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- **Paragraph 14**

“Based upon my knowledge and experience, and Applicant’s promotional materials, it is my conclusion that Applicant’s Goods fall within the scope of Opposer’s Goods.” (¶14, 13 TTABVUE 5).

Mr. Baughman is not testifying as a fact witness and but rather as a non-qualified expert providing a conclusion. Such testimony should be stricken. *See Alcatraz Media Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d 1750, 1755 (TTAB 2013) (“we have disregarded any opinion testimony regarding the ultimate disposition of the claims asserted herein”).

- **Paragraph 15**

“In addition, both the 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. (¶15, 13 TTABVUE 5).

Paragraph 15 seeks to introduce opinion rather than introducing facts for the Board to consider. The declarant is not testifying as a fact witness, but rather as an expert providing a conclusion. Such testimony also should be stricken. *See Alcatraz Media Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d 1750, 1755 (TTAB 2013) (“we have disregarded any opinion testimony regarding the ultimate disposition of the claims asserted herein”).

- **Paragraph 16**

“Further, based on my knowledge and experience within the biotechnology agricultural industry, my conclusion is that the SEED+ mark and the SEEDUP marks have similar meanings as both the “+” symbol and the word “up” both denote an increase in something. Thus, both SEED+ and SEEDUP have the same meaning, which is an increase in seed growth” (¶16, 13 TTABVUE 5).

Mr. Baughman’s statement is not the testimony of a fact witness, but rather an expert providing a conclusion. Such testimony also should be stricken. *See Alcatraz Media Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d 1750, 1755 (TTAB 2013) (“we have disregarded any opinion testimony regarding the ultimate disposition of the claims asserted herein”).

- **Paragraph 17**⁴

“While in my positions as Opposer’s Sales Manager and as CEO, I have gained first-hand knowledge of the typical channels of trade for the types of goods listed in Opposer’s SEED+ registration. 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.” (¶17, 13 TTABVUE 5).

Opposer attempts to introduce a definition for the term “channels of trade” through the Baughman declaration. However, when Opposer was asked to identify all channels of trade during discovery, the response was evasive:

⁴ Cited in Opposer’s Main Brief (29 TTABVUE 15)

INTERROGATORY NO. 7:

Identify all channels of trade used by CYTOZYME LABORATORIES, INC. To sell products having the SEED+ mark.

RESPONSE:

In addition to the general objections noted above, incorporated herein by reference, Cytozyme objects to the Interrogatory to the extent it calls for the disclosure of attorney-client communications or other privileged communications. Cytozyme further objects to the extent the request is overbroad and unduly burdensome. Cytozyme objects to the Interrogatory to the extent the term “channels of trade” is vague and undefined. Subject to, and without waiving any of said objections, Cytozyme states products bearing the SEED+ mark are advertised on the internet, through partnerships with other companies, and are directly sold to customers through contact with Cytozyme or one of these partnership companies. (21 TTABVUE 30-31)

No attempt was made by Cytozyme to supplement this response. It is improper for Opposer to introduce into the record an expanded scope for the term “channels of trade”. Paragraph 17 should be precluded under the estoppel or preclusion sanction.

- **Paragraph 18**⁵

“Opposer’s Goods are typically sold through a wide variety of channels, including direct sales, through catalogs, online, at trade shows, through distributors and third parties, brick and mortar retail stores, home improvement stores, and plant nurseries”.

(¶18, 13 TTABVUE 6).

However, in Cytozyme’s response to Interrogatory No. 29, Cytozyme provided:

INTERROGATORY NO. 29: Is SEED+ products available in retail stores?

RESPONSE:

⁵ Cited in Opposer’s Main Brief (29 TTABVUE 14, 15)

In addition to the general objections noted above, incorporated herein by reference, Cytozyme objects to the Interrogatory to the extent it calls for the disclosure of attorney-client communications or other privileged communications. Cytozyme further objects to the extent the terms “available” and “retail stores” are vague and undefined. Additionally, Cytozyme objects to the Interrogatory as it is not designed to lead to relevant information to this dispute. Subject to, and without waiving any of said objections, *Cytozyme states that Cytozyme products bearing the SEED+ mark are available directly from Cytozyme and through Cytozyme’s partners.* (Emphasis added) (21 TTABVUE 47-48).

No attempt was made by Cytozyme to supplement this response. It is improper for Opposer to use the Baughman testimony declaration to introduce into the record an expanded scope for the term “channels of trade” that includes “retail stores” when Opposer failed to answer Interrogatory No. 29 in the affirmative. Paragraph 18 should be precluded under the estoppel or preclusion sanction.

- **Paragraph 19**⁶

“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”. (¶19, 13 TTABVUE 6).

The statement lacks foundation and Mr. Baughman is not testifying as a fact witness, but rather as an expert.

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⁶ Cited in Opposer’s Main Brief (29 TTABVUE 16, 23)

II. Notice of Reliance Objections

Cytozyme has submitted a Notice of Reliance (**12 TTABVUE**). Applicant objects to the following:

Exhibit 3 (12 TTABVUE 60-61) is an unauthenticated photograph;

Exhibit 4 (12 TTABVUE 62-64) is an unauthenticated document;⁷

Exhibit 5 (12 TTABVUE 65-68) is a document produced by Applicant as part of a document request during discovery which has not been authenticated⁸; and,

Exhibit 6 (12 TTABVUE 69-79) of Opposer's Notice of Reliance contains some pages having Bates numbers (**12 TTABVUE 70-75**) and pages which do not and that appear to be concerning a different document and more specifically, web pages not having a date or URL (**12 TTABVUE 76-79**).

All pages of Exhibit 6 have not been authenticated and thus do not comply with the procedural requirements of TBMP § 704.08. In relation to "*Internet evidence and other materials that are not self-authenticating*", Section 704.08 provides:

Materials that do not fall within 37 CFR § 2.122(e), that is, materials that are not self-authenticating in nature and thus not admissible by notice of reliance, may nevertheless be introduced into evidence through the *testimony of a person who can clearly and properly authenticate and identify the materials, including identifying the nature, source and date of the materials*. Even if properly made of record, however, such materials, including Internet printouts, would only be probative of what they show on their face, not for the truth of the matters contained therein, unless a competent witness has testified to the truth of such matters.(Emphasis supplied.) (Citations omitted.)

⁷ Cited in Opposer's Main Brief (**29 TTABVUE 15**)

⁸ Cited in Opposer's Main Brief (**29 TTABVUE 15**)

The Internet evidence submitted by Opposer is not self-authenticating regardless of whether the material is available to the public as noted by Opposer. Since Opposer's Internet evidence is not properly authenticated, Opposer's submission is in contravention of the rules and should be stricken from the record.