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

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| Proceeding | 92066320 |
| Party | Defendant Research Sports Nutrition, LLC and Nutrition Distribution, LLC |
| Correspondence Address | MARIA CRIMINI SPETH JABURG & WILK PC 3200 N CENTRAL AVENUE, 20TH FLOOR PHOENIX, AZ 85012 UNITED STATES mcs@jaburgwilk.com no phone number provided |
| Submission | Other Motions/Papers |
| Filer's Name | Maria Crimi Speth |
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| Signature | /Maria Crimi Speth/ |
| Date | 04/24/2020 |
| Attachments | Registrants Motion to Amend Response to RFA No 11.pdf(415849 bytes) |

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

In the matter of Trademark Registration No.: 4,286,987

Date of Issue: February 5, 2013

Trademark: GERMAN CREATINE

Owner: Research Sports Nutrition, LLC

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| <p>Fitness Labs Nutrition Corporation, a California Corporation,</p> <p>Petitioner,</p> <p>v.</p> <p>Research Sports Nutrition, LLC, an Arizona Limited Liability Company</p> <p>Registrant.</p> | <p>Cancellation No.: 92066320</p> |
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**REGISTRANT'S MOTION TO AMEND RESPONSE TO REQUEST FOR
ADMISSION NO. 11 AND MEMORANUM OF POINTS IN SUPPORT THEROF**

INTRODUCTORY STATEMENT

Under Rule 36(b) of the Federal Rules of Civil Procedure, Registrant Research Sports Nutrition, LLC (“Registrant”) moves the Board for an order to amend *one* previously admitted response to Petitioner’s First Requests for Admission. (the “RFAs”). As fully distilled below, good cause exists to grant Registrant’s motion. First, denial of the motion will promote Registrant’s presentation its case on the merits. Second, Petitioner will not be prejudiced by the amendment. Accordingly, Registrant respectfully requests the Court grant its motion to amend the request for admission.

RELEVANT FACUAL AND PROCEDURAL BACKGROUND

On May 2, 2018, Registrant—through its previous counsel—provided responses in connection to certain RFAs propounded by Petitioner. *See* Registrant’s Response to First Set of Requests for Admission, attached as Exhibit A. In their RFAs, Petitioner included a line of requests for admission regarding its ownership of common law trademark rights in the GERMANE CREATINE mark (the “Mark”). As germane to this Motion, Registrant answered as follows:

REQUEST FOR ADMISSION NO. 10

Admit that Petitioner has common law trademark rights in the GERMAN CREATINE mark.

RESPONSE TO REQUEST FOR ADMISSION 10

Deny.

REQUEST FOR ADMISSION NO. 11

Admit that Petitioner’s common law trademark rights in the GERMAN CREATINE mark are not geographically limited.

RESPONSE TO REQUEST FOR ADMISSION NO. 11

Admit.

See Exhibit A. A review of Exhibit A also shows Registrant denied any other request asserting Petitioner's ownership of any trademark rights in the Mark.

Despite unequivocally denying that Petitioner has common law trademark rights in the Mark in its response to RFA No. 10, Petitioner has used Registrant's response to RFA No. 11 to argue it has conclusively established its common law trademark rights as to the Mark. Petitioner misconstrues Registrant's response.

LEGAL ARGUMENT

Generally, any matter admitted in response to a request for admission is conclusively established unless the Board permits withdrawal or amendment of the admission. Section 525 of the Trademark Trial and Appeal Board Manual of Procedure grants the Board authority to permit amendment of an admission if doing so (1) "would promote the presentation of the merits of the action"; and (2) "if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits." See also Fed. R. Civ. P. 36(b); see also *Hadley v. United States*, 45 F.3d 1345, 1348 (9th Cir. 2007). This two-part test "emphasizes the importance of having the action resolved on the merits, while at the same time assuring each party that justified reliance on an admission in preparation for trial will not operate to his prejudice." See Fed. R. Civ. P. 36(b) advisory committee's note to 1970 amendment.

The first prong of the test is met when "upholding the admissions would practically eliminate any presentation of the merits of the case." This factor strongly favors

amendment of the RFA. Petitioner has used Petitioner's response to RFA No. 11 to argue it has conclusively established its "common law trademark rights in the [Mark] that are not geographically limited. By doing so, Petitioner ignores RFA No. 10 where Registrant unequivocally denies Petitioner has common law trademark rights in the Mark. Petitioner also ignores the remaining denials as to any assertion of Petitioner's right to any common law trademark right.

Registrant, through its current counsel, suspects that the admission was intended to merely indicate an admission that Petitioner did not have geographically restricted common law rights because it had no common law rights. Current counsel is speculating though as the admission may have merely been an error. While the response to RFA No. 11 is ambiguous, the response to RFA No. 10 was clear and unequivocal. The Court should allow amendment to reflect a denial rather than permit Petitioner's continued reliance on this particular response despite Registrant's denial of the previous RFA.

The second prong requires Petitioner to demonstrate amendment will be prejudicial to his interests. Under Rule 36(b), prejudice is:

not simply that the party who obtained the admission will now have to convince the factfinder of its truth. Rather, it relates to the difficulty a party may face in proving its case, e.g., caused by the unavailability of key witnesses, because of the sudden need to obtain evidence with respect to the questions previously deemed admitted.

See Hadley, 45 F. 3d at 1348, *quoting Brook Village N. Assoc. v. General Elec. Co.*, 686 F. 2d 66, 70 (1st Cir. 1982).

Here, amendment or withdrawal will in no way prejudice Petitioner. Petitioner would not have delayed in gathering evidence regarding RFA No. 11 because it is the same

evidence that Petitioner would already have been gathering to refute Registrant's denial of RFA No. 10.

Accordingly, the Board should allow Registrant to withdraw and amend its response to RFA No. 11.

CONCLUSION

Based on the foregoing, Registrant requests the Board grant its motion to allow withdrawal and amendment of RFA No, 11.

Respectfully Submitted,

/s/ Maria Crimi Speth

Date: 04/24/2020

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **REGISTRANT'S MOTION TO AMEND RESPONSE TO REQUEST FOR ADMISSION NO. 11 AND MEMORANUM OF POINTS IN SUPPORT THEROF** has been served via email this 24th day of April, 2020 upon the following:

R. Glenn Schroeder
Schroeder Law PC
110 Cooper St. #605
Babylon, NY 11702

gschroeder@schroederlawpc.com

/s/ Joy Brown

EXHIBIT A

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

In the matter of Trademark Registration No.: 4,286,987

Date of Issue: February 5, 2013

Trademark: GERMAN CREATINEE

Owner: Research Sports Nutrition, LLC

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|---|----------------------------|
| Fitness Labs Nutrition Corporation, a California Corporation, Petitioner, v. Research Sports Nutrition, LLC, an Arizona Limited Liability Company Registrant. | Cancellation No.: 92066320 |
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REGISTRANT’S RESPONSE TO FIRST SET OF REQUESTS FOR ADMISSION

Registrant Research Sports Nutrition, LLC (“Registrant”) hereby response as follows to the First Set of Interrogatories of Petitioner Fitness Labs Nutrition Corporation (“Petitioner”).

PRELIMINARY STATEMENT

1. The following responses are based only upon information presently available and specifically known by Registrant. Facts and evidence now known may be imperfectly understood. Accordingly, each of the following responses and objections is given without prejudice to Registrant’s right to produce documents or any subsequently discovered facts about which Registrant may later gain knowledge. The information contained herein is given in a good faith effort to supply as much responsive information as possible, and in no way prejudices Registrant’s right to make new contentions or provide additional facts derived from further discovery, investigation and analysis.

2. Discovery is continuing in this matter, and Registrant reserves the right to modify or amend these responses on the basis of subsequently acquired knowledge, information or understanding. These responses reflect the information that is presently available to Registrant as derived from such investigation as was possible prior to the date of this response. Registrant expressly reserves the right to amend, add to, delete from, or otherwise modify or supplement each response set forth herein and to make such claims and contentions as may be appropriate when Registrant has concluded all discovery and has ascertained all relevant facts.

3. Except for explicit facts admitted herein, no incidental or implied admissions are intended or should be construed hereby. The fact that Registrant provides a response to any Interrogatory should not be taken as an admission that Registrant accepts or admits the existence of any facts set forth or assumed by such Interrogatory, or that such response constitutes admissible evidence. The fact that Registrant provides a response to part or all of any Interrogatory is not intended and shall not be construed to be a waiver by Registrant of all or any part of any objection to any such Interrogatory.

4. Registrant objects to each Interrogatory to the extent that it seeks information protected by the attorney-client privilege or the attorney work product doctrine, or any other statutory or common law privilege. Registrant will not supply or render such information protected from discovery by virtue of such doctrine or privileges. No response herein is, or should be construed to be, a waiver of the protection provided by such doctrine or privileges.

5. Registrant's responses are made without waiver of the following rights, but, on the contrary, are intended to preserve and do preserve the following:

(i) the right to raise all questions of authenticity, foundation, relevancy, materiality, privilege and admissibility as evidence for any purpose of the information identified

in response to the Interrogatories which may arise in any subsequent proceedings in, or trial of, this or any other action;

(ii) the right to object on any ground to the use of said information identified in response to the Interrogatories in any subsequent proceeding in, or trial of, this or any other action;

(iii) the right to object on any ground to the introduction into evidence of said information identified in response to the Interrogatories;

(iv) the right to object on any ground at any time to other discovery involving said information; and

(v) the right to amend or supplement this response in the event that any information is unintentionally omitted. Inadvertent identification or production of privileged documents or information by Registrant is not a waiver of any applicable privilege.

6. This Preliminary Statement is incorporated into each response set forth below.

Requests for Admission

REQUEST FOR ADMISSION NO. 1

Admit that Petitioner used the GERMAN CREATINE mark in interstate commerce prior to RSN actually using the mark in interstate commerce.

RESPONSE TO REQUEST FOR ADMISSTION NO. 1

Admit.

REQUEST FOR ADMISSION NO. 2

Admit that Petitioner used the GERMAN CREATINE mark in interstate commerce prior to RSN's application to register the GERMAN CREATINE mark.

RESPONSE TO REQUEST FOR ADMITTION NO. 2

Admit.

REQUEST FOR ADMISSION NO. 3

Admit that but for the existence of the Registration, as far as YOU are aware, U.S. TM App. No. 87/159178 for GERMAN CREATINE, owned by Petitioner, would be entitled to registration on the Supplemental Register.

RESPONSE TO REQUEST FOR ADMISSION NO. 3

Deny.

REQUEST FOR ADMISSION NO. 4

Admit that Petitioner owned the domain name <www.germancreatine.com> prior to RSN actually using the mark in interstate commerce.

RESPONSE TO REQUEST FOR ADMISSION NO. 4

Admit.

REQUEST FOR ADMISSION NO. 5

Admit that Petitioner owned the domain name <www.germancreatine.com> prior to RSN's application to register the GERMAN CREATINE mark.

RESPONSE TO REUEST FOR ADMISSION NO. 5

To the extent that Petitioner is tacitly requesting Respondent for an admission that Petitioner utilized its domain name to forward users to products containing the GERMAN CREATINE mark prior to Respondent's registration, deny. To the extent that Petition is merely requesting that Respondent admit that Petitioner owned the domain name without regards to whether or not Petitioner utilized the domain name, admit.

REQUEST FOR ADMISSION NO. 6

Admit that Petitioner's annual sales of products bearing the GERMAN CREATINE mark are larger than Registrant's annual sales of products bearing the GERMAN CREATINE mark for every year from 2001 through 2016, inclusive.

RESPONSE TO REQUEST FOR ADMISSION NO. 6

Admit.

REQUEST FOR ADMISSION NO. 7

Admit that due diligence prior to adopting a mark typically includes searching for domain names consisting of that mark.

RESPONSE TO REQUEST FOR ADMISSION NO. 7

Deny.

REQUEST FOR ADMISSION NO. 8

Admit that forwarding from the domain name <www.germancreatine.com> to a webpage where products labeled with the GERMAN CREATINE mark are available for sale constitutes an offer for sale.

RESPONSE TO REQUEST FOR ADMISSION NO. 8

To the extent that Petitioner tacitly claims that opening the domain name <www.germancreatine.com> forwarded a user to a webpage where products labeled with the GERMAN CREATINE mark are available for sale since Petitioner's claimed registration of the domain name in 2001, deny. In 2011, Registrant conducted a general online search for any products utilizing the term "German Creatine." Registrant did not find any registered marks utilizing "German Creatine," nor did it find any products names with the name "German Creatine" at the time.

REQUEST FOR ADMISSION NO. 9

Admit that offering a product labeled with the GERMAN CREATINE mark for sale through the internet to customers in the United States, without geographic limitation, constitutes use in interstate commerce.

RESPONSE TO REQUEST FOR ADMISSION NO. 9

Admit

REQUEST FOR ADMISSION NO. 10

Admit that Petitioner has common law trademark rights in the GERMAN CREATINE mark.

RESPONSE TO REQUEST FOR ADMISSION 10

Deny.

REQUEST FOR ADMISSION NO. 11

Admit that Petitioner's common law trademark rights in the GERMAN CREATINE mark are not geographically limited.

RESPONSE TO REQUEST FOR ADMISSION NO. 11

Admit.

REQUEST FOR ADMISSION NO. 12

Admit that Petitioner's common law trademark rights in the GERMAN CREATINE mark are not limited to specific channels of trade.

RESPONSE TO REQUEST FOR ADMISSION NO. 12

Deny.

REQUEST FOR ADMISSION NO. 13

Admit that YOU are not aware of any facts controverting Petitioner's claimed common law trademark rights in the GERMAN CREATINE mark.

RESPONSE TO REQUEST FOR ADMISSION NO. 13

Deny.

REQUEST FOR ADMISSION NO. 14

Admit that YOU are not aware of any facts supporting the limitation of any common law rights in the GERMAN CREATINE mark that Petitioner may have to specific geographic areas within the United States.

RESPONSE FOR REQUEST FOR ADMISSION NO. 14

Deny.

REQUEST FOR ADMISSION NO. 15

Admit that YOU are not aware of any facts supporting the limitation of any common law rights in the GERMAN CREATINE mark that Petitioner may have to specific channels of trade.

RESPONSE TO REQUEST FOR ADMISSION NO. 15

Deny.

REQUEST FOR ADMISSION NO. 16

Admit that as far as YOU are aware, Petitioner did not have actual knowledge of the Registration until August of 2016 or later.

RESPONSE TO REQUEST FOR ADMISSION NO 16.

Deny.

REQUEST FOR ADMISSION NO. 17

Admit that YOU are not aware of any facts showing that Petitioner had actual knowledge of the Registration prior to August of 2016.

RESPONSE TO REQUEST FOR ADMISSION NO. 17

Deny.

REQUEST FOR ADMISSION NO. 18

Admit that as far as YOU are aware, Petitioner did not have actual knowledge of RSN's use of the GERMAN CREATINE mark until August of 2016 or later.

RESPONSE TO REQUEST FOR ADMISSION NO. 18

Deny.

REQUEST FOR ADMISSION NO. 19

Admit that YOU are not aware of any facts showing that Petitioner had actual knowledge of RSN's use of the GERMAN CREATIVE mark prior to August of 2016.

RESPONSE TO REQUEST FOR ADMISSION NO. 19:

Deny.

REQUEST FOR ADMISSION NO. 20

Admit that since August of 2016, Petitioner has not unreasonably delayed assertion of its common law trademark rights in the GERMAN CREATIVE mark.

RESPONSE TO REQUEST FOR ADMISSION NO. 20

Deny.

REQUEST FOR ADMISSION NO. 21

Admit that cancellation of the Registration in and of itself would not prevent RSN from advertising, offering for sale, or selling products marked with the GERMAN CREATIVE mark.

RESPONSE TO REQUEST FOR ADMISSION NO. 21

Registrant objects to this request on the basis that it prematurely seeks information that is properly the subject of expert discovery. Subject to Registrant's objection, deny.

REQUEST FOR ADMISSION NO. 22

Admit that registration of U.S. TM App. No. 87/159178 for GERMAN CREATIVE, owned by Petitioner, would not in and of itself prevent RSN from advertising, offering for sale, or selling products marked with the GERMAN CREATIVE mark.

RESPONSE TO REQUEST FOR ADMISSION NO. 22

Registrant objects to this request on the basis that it prematurely seeks information that is properly the subject of expert discovery. Subject to Registrant's objection, deny.

REQUEST FOR ADMISSION NO. 23

Admit that the only losses to RSN should the Registration be cancelled would be the value of the Registration itself and the monetary investment by RSN in the Registration.

RESPONSE TO REQUEST FOR ADMISSION NO. 23

Registrant objects to this request on the basis that it prematurely seeks information that is properly the subject of expert discovery. Subject to Registrant's objection, deny.

REQUEST FOR ADMISSION NO. 24

Admit that the losses to RSN should the Registration be cancelled via the present proceeding would be the same as the losses to RSN had the Registration been cancelled via a proceeding filed the day after the Registration was registered.

RESPONSE TO REQUEST FOR ADMISSION NO. 24

Registrant objects to this request on the basis that it prematurely seeks information that is properly the subject of expert discovery. Subject to Registrant's objection, deny

REQUEST FOR ADMISSION NO. 25

Admit that consumer confusion with regard to the source of the Goods is a threat to consumer safety.

RESPONSE TO REQUEST FOR ADMISSION NO. 25

Deny.

REQUEST FOR ADMISSION NO. 26

Admit that consumption of the Goods can, in certain instances, endanger the consumer of the Goods.

RESPONSE TO REQUEST FOR ADMISSION NO. 26

Registrant objects to the request as vague, ambiguous and unintelligible with regards to the term "certain instances." To the extent that Petitioner defines "certain instances" to constitute use of the Goods within the dosage identified on Respondent's labeling, deny.

REQUEST FOR ADMISSION NO. 27

Admit that consumption of the Goods can, in certain instances, be harmful to any one of the heart, kidneys, and liver.

RESPONSE TO REQUEST FOR ADMISSION NO. 27

Registrant objects to the request as vague, ambiguous and unintelligible with regards to the term "certain instances." To the extent that Petitioner defines "certain instances" to constitute use of the Goods within the dosage identified on the Respondent's labeling, deny.

REQUEST FOR ADMISSION NO. 28

Admit that the Goods should not be taken in combination with certain other drugs, even though independent consumption of the Goods or those certain other drugs is safe.

RESPONSE TO REQUEST FOR ADMISSION NO. 28

Deny.

REQUEST FOR ADMISSION NO. 29

Admit that consumption of the Goods in an amount over the recommended dosage can be dangerous.

RESPONSE TO REQUEST FOR ADMISSION NO. 29

Deny.

REQUEST FOR ADMISSION NO. 30

Admit that consumption of the Goods can cause any one of stomach pain, nausea, diarrhea, and muscle cramping.

RESPONSE TO REQUEST FOR ADMISSION NO. 30

Deny.

REQUEST FOR ADMISSION NO. 31

Admit that consumption of the Goods can cause dehydration.

RESPONSE TO REQUESTS FOR ADMISSION NO. 31

Deny.

REQUEST FOR ADMISSION NO. 32

Admit that the effects of consumption of the Goods on pregnant women is not fully known.

RESPONSE TO REQUEST FOR ADMISSION NO. 33

Admit.

REQUEST FOR ADMISSION NO. 33

Admit that current medical knowledge on whether or not the Goods are harmful to certain classes of consumers is incomplete.

RESPONSE TO REQUEST FOR ADMISSION NO. 33

Registrant objects to the request as vague, ambiguous and unintelligible with regards to the term "certain classes." Without any identification of the "certain classes," Registrant is unable to admit or deny the matter stated in the request.

Respectfully Submitted,



Date: May 2, 2018

Robert Tauler, Esq.
Cal. Bar No. [241964]
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310-590-3927

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing REGISTRANT'S RESPONSE TO FIRST SET OF REQUESTS FOR ADMISSION has been served on KOPPEL PATRICK HEYBL & PHILPOTT, counsel for Petitioner Fitness Labs Nutrition Corp., by email on May 2, 2018, to:

cdonaldson@koppelip.com
mvoog@koppelip.com
kkooker@koppelip.com

/Robert Tauler, Esq./
Robert Tauler, Esq.