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

Proceeding	92066320
Party	Plaintiff Fitness Labs Nutrition Corporation and 2575 TCA, LLC
Correspondence Address	R GLENN SCHROEDER SCHROEDER LAW PC 110 COOPER ST #605 BABYLON, NY 11702 UNITED STATES gschroeder@schroederlawpc.com, docket@schroederlawpc.com 631-649-6109
Submission	Opposition/Response to Motion
Filer's Name	R. Glenn Schroeder
Filer's email	docket@schroederlawpc.com
Signature	/r. glenn schroeder/
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re Registration No. 4,286,987
Issued: February 5, 2013
Trademark: GERMAN CREATINE

Fitness Labs Nutrition Corporation and 2575 TCA, LLC, Petitioners, v. RESEARCH SPORTS NUTRITION, LLC and NUTRITION DISTRIBUTION, LLC, Registrants.	:	Cancellation No. 92066320

PETITIONERS' OPPOSITION TO REGISTRANTS' MOTION TO AMEND RESPONSE TO REQUEST FOR ADMISSION NO. 11

PRELIMINARY STATEMENT

On May 2, 2018, Registrants prepared and served their responses to Petitioners' First Set of Requests for Admission. Now, almost two years later and on the eve of trial, Registrants have decided that they no longer like their previous answer to RFA 11, and have filed the present motion seeking permission to withdraw and amend such answer. For the reasons and arguments set forth hereinbelow, Petitioners respectfully request that this motion be denied.

ARGUMENT

Fed. R. Civ. P. 36(b) provides that "a matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended." Further, the Rule provides that "the court may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits." *See also* TBMP § 525.

Accordingly, Registrants must first demonstrate that "withdrawal or amendment … would promote the presentation of the merits of the action." In this regard, Registrants attempt to create ambiguity regarding their answer to RFA No. 11 by suggesting alternative interpretations of their clear and unequivocal admission to such Request. There is simply no ambiguity about the word "Admit." Moreover, Registrants have not provided any satisfactory explanation as to why the amendment of their answer to RFA No. 11 "would promote the presentation of the merits of the action." Instead, Registrants have cited *Hadley v. United States*, 45 F.3d 1345, 1348 (9th Cir. 2007), arguing that the "first prong of the test is met when 'upholding the admission would practically eliminate any presentation of the merits of the

case.'" This argument is not understood for several reasons.

First, Registrants have not provided any evidence that they would be unable to present their case in the absence of withdrawal/amendment of their response to RFA No. 11, let alone that such presentation would be practically eliminated in view of their response to RFA No. 11. Second, Registrants' reliance on the *Hadley* decision is inapposite inasmuch as such decision involved a case where the defendant failed to respond within the allocated time, and the matters were deemed admitted. Here, not only has two years passed since the preparation and serving of the response to RFA No. 11, this response was specifically quoted and discussed at page 12 of Petitioners' Summary Judgment Motion filed September 17, 2018. Registrants never addressed this point in either its opposition brief filed October 16, 2018, or in its reply brief to its cross-motion filed December 4, 2018, nor have they pursued any action to withdraw/amend their answer since that time. Registrants should not now be permitted to argue that the response to RFA No. 11 was made in error – when their actions to date suggest exactly otherwise. Accordingly, Registrants have failed to satisfy the first prong of the test set forth in Rule 36(b).

Next, with respect to the second prong of the test set forth in Rule 36(b) regarding prejudice to Petitioners, Registrants again cite the inapposite decision of *Hadley,* arguing that amendment or withdrawal will in no way prejudice Petitioner because "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." This explanation of lack of prejudice is not understood. Why would Petitioners be gathering evidence regarding RFA No. 11 when Registrants had already served their admission to such request. More to the point, it is clear that Petitioners have deemed this admission to be of

importance, as demonstrated by its citation in the Summary Judgment motion filed September 17, 2018. Allowing the withdrawal/amendment of Registrants' response to RFA No. 11 on the eve of trial would, without question, be prejudicial to Petitioners.

Conclusion

For the foregoing reasons, it is respectfully requested that Registrants' Motion to Amend Response to Request For Admission No. 11 be denied.

Respectfully submitted,

FITNESS LABS NUTRITION CORPORATION
and
2575 TCA, LLC

Dated: 14 May 2020

By: /s/ R. Glenn Schroeder

R. Glenn Schroeder
Schroeder Law PC
110 Cooper Street #605
Babylon, New York 11702
Telephone: (631) 649-6109
Facsimile: (631) 649-8126
gschroeder@schroederlawpc.com

Attorney for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing PETITIONERS' OPPOSITION TO REGISTRANTS' MOTION TO AMEND RESPONSE TO REQUEST FOR ADMISSION NO. 11 has been served via e-mail this 14th day of May 2020 upon the following:

Maria Crimi Speth, Esq.
Jaburg & Wilk, P.C.
3200 N. Central Avenue, 20th Floor
Phoenix, AZ 85012
mcs@jaburgwilk.com

/s/ R. Glenn Schroeder
R. Glenn Schroeder