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

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	Reply in Support of Motion
Filer's Name	Maria Crimi Speth
Filer's email	mcs@jaburgwilk.com
Signature	/mariacrimispeth/
Date	05/28/2020
Attachments	Nutrition Distribution - Reply.pdf(51521 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 CREATINEE
Owner: Research Sports Nutrition, LLC

Fitness Labs Nutrition Corporation, a California Corporation, Petitioner, v. Research Sports Nutrition, LLC, an Arizona Limited Liability Company Registrant.	Cancellation No.: 92066320

REGISTRANT'S REPLY IN SUPPORT OF ITS MOTION TO AMEND RESPONSE TO REQUEST FOR ADMISSION NO. 11

INTRODUCTORY STATEMENT

In its response, Petitioner fails to meaningfully address Registrant's position set forth in its underlying motion to amend. Instead, Petitioner presents a barebones, conclusory response that is devoid of factual or legal support. In essence, Petitioner argues this Court should not grant Registrant's underlying motion because Petitioner has relied on this response in preparing its case. Petitioner, however, does not address why its reliance is reasonable considering Registrant's unequivocal denials to near-identical requests for admission. Petitioner's conclusory argument highlights its unreasonable position by failing to show any legitimate prejudice. Moreover, Petitioner's response demonstrates precisely why the court should allow amendment of RFA No. 11. Specifically, amendment will promote presentation of the merits of the action. Accordingly, the court should grant Registrant's motion to amend RFA No. 11.

LEGAL ARGUMENT

In its response, Petitioner first argues the Court should deny Registrant's motion because Registrant has failed to demonstrate that "withdrawal of amendment . . . would promote the presentation of the merits of the action." Petitioner's refusal to acknowledge the context in which the admission was originally made demonstrates why the clarification would, indeed, promote the presentation of the merits of the action. Absent the clarification, Petitioner will continue to divert the Board's attention from the merits by capitalizing on an ambiguity regarding the admission. Petitioner's overly narrow and cursory proffer fails to consider Registrant's responses to other Requests for Admissions. As mentioned in the underlying motion, Registrant unequivocally denied RFA No. 10, which asked Registrant to admit Petitioner possessed common law trademark rights in the GERMAN Creatine mark. Thus, Petitioner wishes to improperly use Registrant's response to RFA No. 11 as conclusory evidence despite Registrant's

responses to RFA Nos. 10 and 12, and Registrant's position in all court filings and communications throughout this litigation.[1]

In *Blow v. Bijora, Inc.*, the plaintiff propounded four nearly identical requests for admissions. *Blow v. Bjora*, 855 F.3d 793, 799 (7th Cir. 2017). The defendant answered the first three by offering identical qualified admissions. *Id.* On the fourth request for admission, the defendant responded with an admission but omitted the qualifying language. *Id.*

In its motion for summary judgment, the plaintiff relied heavily on the sole admission despite three previous almost identical answers that included the qualifying language. *Id.* Realizing for the first time it erroneously left out the qualifying language in the fourth response, the defendant sought to amend the admission. *Id.* The district court allowed the amendment to "bring [the response] in line with its preceding—and otherwise identical responses." *Id.*

On appeal, the plaintiff sought to overrule the district court's decision arguing the defendant's request was untimely and prejudiced the plaintiff because she had relied on the previous admission. *Id.* Applying Rule 36, the court affirmed the district court's decision. *Id.* at 800. Particularly, the circuit court concluded the plaintiff had not suffered any prejudice because none of the parties' communication exchanged during discovery would have supported any such reliance. *Id.* The court further noted proving the elements of one's claim cannot—on its own—constitute prejudice. *Id.*

Here, like the plaintiff in *Blow*, Petitioner propounded a series of near-identical requests for admission. Like the plaintiff in *Blow*, Petitioner has chosen to capitalize on one response despite other clear denials unequivocally denying Petitioner possesses common law trademark

[1] Registrant also denied RFA No. 12, which asked it to "Admit that Petitioner's common law trademark rights in the GERMAN CREATINE mark are not limited to specific channels of trade."

rights in the mark. Like the plaintiff in *Blow*, Petitioner's reliance is unreasonable as it contradicts nearly identical requests for admission. Moreover, the parties' positions, exchanges and communications throughout this litigation fail to support Petitioner's misplaced reliance on RFA No. 11.

Thus, it logically follows withdrawal of this admission would promote the presentation of the action on its merits. It would allow the parties to focus on the substantive claims rather than argue about *one* admission while ignoring the other denials and Registrant's position throughout this litigation.

The second prong, despite Petitioner's argument to the contrary, is likewise met. Petitioner argues allowing Registrant to amend the RFA No. 11 would "without question" cause prejudice because it has "deemed this admission to be of importance." Petitioner's own argument demonstrates its unreasonable reliance on RFA No. 11 by stating Petitioner has failed to gather evidence to support its claim. What's more, Petitioner fails to address that RFA No. 11 is not supported by similar denials.

In making this argument, Petitioner essentially argues prejudice merely by having to offer evidence to prove its claims. Prejudice, however, cannot be based solely on Petitioner's failure to develop its own case. *Blow*, 855 F.3d at 800 ("[prejudice] is not simply that the party who initially obtained the admission will now have to convince the fact finder 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 a sudden need to obtain evidence with respect to the questions previously answered by the admission.") (internal citation and quotations omitted); *Paymaster Corp. v. Cal. Checkwriter Co.*, 1996 U.S. Dist. LEXIS 13943 at *6 (N.D. Ill. Sep. 20, 1996) (allowing pro se defendant to withdraw default admissions and amend responses in response to

plaintiff's motion for summary judgment and concluding "prejudice must be based on the party's detrimental reliance on such admissions"). Petitioner fails to make any attempt to show it will face difficulty in presenting its case.

Finally, throughout their response, Petitioner avers *Hadley* is inapposite because "it involved a case where the defendant failed to respond within the allocated time, and the matters were deemed admitted." Petitioner proffers, however, misses the mark. Registrant's citation to *Hadley* was to illustrate the test required by Rule 36. Rule 36 is unequivocally clear: it deals with matters admitted—whether deemed admitted or otherwise. The rule prescribes the analysis applied when a party seeks to withdraw or amend an admission. Thus, contrary to Petitioner's narrow view, Respondent's request clearly falls under the ambit of Rule 36 and its citation to *Hadley* is not inapposite.

CONCLUSION

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

Respectfully Submitted,

/Maria Crimi Speth/ Date: May 28, 2020

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing REGISTRANT'S REPLY IN SUPPORT OF ITS MOTION TO AMEND RESPONSE TO REQUEST FOR ADMISSION NO. 11 has been served via email this 28th day of May, 2020, upon the following:

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

gschroeder@schroederlawpc.com

/s/Debra Gower