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

Proceeding	91214193
Party	Plaintiff 24 Hour Fitness USA, Inc.
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Submission	Motion to Compel Discovery
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Attachments	2014.07.11_24 Hour Fitness' Motion to Compel (for filing).pdf(134233 bytes) 2014.07.11_24 Hour Fitness' Motion to Compel - Exh A.pdf(296211 bytes) 2014.07.11_24 Hour Fitness' Motion to Compel - Exh B.pdf(5931921 bytes) 2014.07.11_24 Hour Fitness' Motion to Compel - Exh C-D.pdf(1478708 bytes)

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

In the matter of Application Serial No. 85/954,555
Published in the *Official Gazette* on August 27, 2013
Mark: 24 7 & Design



24 Hour Fitness USA, Inc.,

Opposer,

v.

Workout Anytime Franchising Systems, LLC dba
Workout Anytime,

Applicant.

Opposition No. 91214193

24 HOUR FITNESS USA, INC.'S MOTION TO COMPEL

Pursuant to Rules 26 and 37 of the Federal Rules of Civil Procedure and Rule 2.120 of the Trademark Rules of Practice, Opposer 24 Hour Fitness USA, Inc. (“**24 Hour Fitness**”) respectfully moves the Board for an order compelling Applicant Workout Anytime Franchising Systems, LLC dba Workout Anytime (“**Applicant**”) to serve its Initial Disclosures pursuant to Trademark Trial and Appeal Board Manual of Procedure (“**TBMP**”) § 401.02. 24 Hour Fitness further moves the Board for an order compelling Applicant to respond to 24 Hour Fitness’ First Set of Interrogatories (“**Rogs**”), First Set of Requests for Production of Documents (“**RPDs**”),

and First Set of Requests for Admission (“**RFAs**”). (Collectively, 24 Hour Fitness’ Rogs, RPDs, and RFAs are referred to herein as the “**Discovery Requests.**”) In addition, 24 Hour Fitness requests that the Board order Applicant to appear for deposition pursuant to the Opposer’s Notice of Deposition Pursuant to Fed. R. Civ. P. 30(b)(6) and TBMP § 404.05 (the “**Deposition Notice**”).

Such an order is appropriate because Applicant has refused to respond to 24 Hour Fitness’ Discovery Requests, without which 24 Hour Fitness cannot adequately prepare and present its case. Counsel for 24 Hour Fitness has made a good faith attempt to resolve the issues with Applicant but, to date, such efforts have been unsuccessful.

I. BACKGROUND

On December 24, 2013, 24 Hour Fitness filed a Notice of Opposition against Application No. 85/954,555 for the 24 7 & Design mark for “health club services, namely, providing instruction and equipment in the field of physical exercise” in Class 41. 24 Hour Fitness is the owner in the United States of the famous 24 HOUR FITNESS marks, including, without limitation, 24 HOUR FITNESS and 24 7 FITNESS for health club services and providing fitness and exercise facilities (the “**24 HOUR FITNESS Marks**”). 24 Hour Fitness has extensively used and promoted the 24 HOUR FITNESS Marks in the United States since at least as early as 1996, well prior to the filing date of Applicant’s application. (Not. Of Opp. ¶¶ 3, 6–11.) As grounds for opposition, 24 Hour Fitness alleges priority of use and likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), and dilution under Section 43(c) of the Trademark Act, 15 U.S.C. § 1125(c)(2)(A). (Not. of Opp. ¶¶ 1–20.)

On December 24, 2013, the Board instituted this proceeding and set discovery to open on March 4, 2014, and set April 3, 2014 as the deadline for the parties to exchange Initial Disclosures. On February 3, 2014, Applicant filed an answer denying the essential allegations in

the Notice of Opposition. On April 4, 2014, 24 Hour Fitness served Applicant with Opposer's Initial Disclosures. To date, 24 Hour Fitness has not received Applicant's Initial Disclosures. Accordingly, on May 13, 2014, counsel for 24 Hour Fitness sent a letter to Applicant's attorney requesting that Applicant serve a copy of its Initial Disclosures. A copy of the May 13, 2014 letter is attached as **Exhibit A**.

On May 13, 2014, and in connection with its letter to Applicant's attorney, 24 Hour Fitness timely served Applicant with Opposer's First Set of Requests for the Production of Documents, Opposer's First Set of Interrogatories, Opposer's First Set of Requests for Admission, and Opposer's Notice of Deposition Pursuant to Fed. R. Civ. P. 30(b)(6) and TBMP § 404.05. Copies of 24 Hour Fitness' Discovery Requests are attached as **Exhibit B**; 24 Hour Fitness' Deposition Notice is attached as **Exhibit C**. Pursuant to Trademark Rule 2.120(a)(3), Applicant's responses to the Discovery Requests were due on June 12, 2014. *See also* Fed. R. Civ. P. 33(b)(2), 34(b)(2)(A), and 36(a)(3). As of the date of this motion, Applicant has not served *any* responses to the Discovery Requests, nor has it served its Initial Disclosures.

24 Hour Fitness has made a good faith effort to resolve with Applicant the issues presented in this motion, pursuant to Trademark Rule 2.120(e) and TBMP §§ 523 and 524. As noted above, 24 Hour Fitness sent a letter to Applicant's attorney on May 13, 2014 requesting that Applicant serve its Initial Disclosures by no later than May 19, 2014. On June 18, 2014, 24 Hour Fitness sent another letter to Applicant's attorney renewing its request that Applicant serve its Initial Disclosures, and requesting that Applicant respond to the Discovery Requests and provide an alternate date for deposition by no later than June 25, 2014. A copy of the June 18, 2014 letter is attached as **Exhibit D**. To date, 24 Hour Fitness has not received a response from Applicant with respect to either letter.

II. ARGUMENT

The Board may order an applicant to make mandatory disclosures and to provide complete responses to the Discovery Requests. TBMP §§ 411 and 523; 37 CFR § 1.120(e). Accordingly, 24 Hour Fitness respectfully requests that the Board order Applicant to immediately serve its Initial Disclosures, and to fully respond to 24 Hour Fitness's Discovery Requests within twenty (20) days from the mailing date of the Board's order on this motion.

A. Applicant Should Be Compelled to Serve Mandatory Initial Disclosures

Pursuant to TBMP § 401.02, “[e]ach party involved in an *inter partes* proceeding is obligated to make initial disclosures to every other party, by the deadline set in the Board's institution order. . . .” (emphasis added); *see* 37 C.F.R. § 2.120(a). Initial Disclosures are intended to “prompt routine disclosure of names of potential witnesses and basic information about documents and things that a party may use to support a claim or defense,” and are “treated like responses to discovery requests insofar as they may be used in support of or in opposition to a motion for summary judgment and may, at trial, be introduced by notice of reliance.” *Id.* (internal quotations omitted). For that reason, a party failing to make such disclosures may be subject to a motion to compel and a motion for discovery sanctions. *Id.*

Here, Applicant did not serve its Initial Disclosures by the April 3, 2014 deadline, and has still not served its Initial Disclosures to date, despite being put on notice by counsel for 24 Hour Fitness that it was entitled to such disclosures. Accordingly, 24 Hour Fitness requests that the Board grant the instant Motion to Compel, and order Applicant to promptly serve its Initial Disclosures.

B. Applicant Should Be Compelled to Respond to the Discovery Requests and Appear for Deposition

The parties to *inter partes* proceedings are required “to cooperate with one another in the discovery process. . . .” TBMP § 408.01. This duty to cooperate necessarily includes, without limitation, an obligation to respond to written discovery, to produce responsive documents, and to appear for deposition. *Id.* Accordingly, an order compelling discovery responses is appropriate where, as here, a party disregards its discovery obligations. TBMP § 523.01 (“[A] motion to compel is available in the event of a failure to provide required disclosures or discovery requested by means of discovery depositions, interrogatories, and requests for production of documents and things.”); 37 C.F.R. § 2.120(e).

Here, Applicant has wholly dispensed with its discovery obligations by failing to respond to 24 Hour Fitness’ Discovery Requests. Applicant has not offered any explanation for its discovery failures, nor has it indicated that discovery responses will be produced. Accordingly, 24 Hour Fitness requests that the Board grant the instant Motion to Compel, and order Applicant to respond fully to the Discovery Requests within twenty (20) days from the mailing date of the Board’s ruling on the motion. 24 Hour Fitness further requests that Applicant be ordered to appear for deposition within ten (10) days after the responses to the Discovery Requests are served.

C. All Objections to the Discovery Requests Should Be Deemed Forfeited

In addition to the foregoing, 24 Hour Fitness requests the Board to order that Applicant has waived its right to object to the Discovery Requests on their merits. The TBMP provides that “A party which fails to respond to a request for discovery (except for a request for admission) during the time allowed therefor, and which is unable to show that its failure was the result of excusable neglect, may be found, upon motion to compel filed by the propounding

party, to have forfeited its right to object to the discovery request on its merits.” TBMP § 527.01(c); *see No Fear Inc. v. Rule*, 54 U.S.P.Q.2d 1551, 1554 (TTAB 2000) (noting that “In practice, when the Board grants a motion to compel that is uncontested, . . . or which is contested but the non-movant cannot show that its neglect of discovery obligations was excusable, the Board generally will order discovery responses to be provided without objection.”).

Here, Applicant has not offered any explanation—excusable or not—for its neglect of its discovery obligations. Instead, Applicant simply elected not to respond to the Discovery Requests. Accordingly, 24 Hour Fitness requests that Applicant be ordered to respond to the Discovery Requests without objections.

D. All Requests for Admission Should Be Deemed Admitted

Finally, 24 Hour Fitness requests the Board to order that all RFAs are deemed admitted. Rule 36(a)(3) of the Federal Rules of Civil Procedure provide that “A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney.” *See also* TBMP § 407.03(a). Indeed, where “a party on which requests for admission have been served fails to timely respond thereto, the requests will stand admitted by operation of law . . .” TBMP § 407.03(a) (emphasis added) (citing *Fram Trak Industs. v. Wiretracks LLC*, 77 U.S.P.Q.2d 2000, 2005 (TTAB 2006) (requests for admissions deemed admitted by respondent’s failure to respond to petitioner’s requests for admissions)). By virtue of Applicant’s failure to respond to the RFAs, the requests are “deemed admitted by operation of Fed. R. Civ. P. 36(a).” TBMP § 407.03. Accordingly, 24 Hour Fitness requests that the Board issue an order in line with the foregoing, indicating that the RFAs are deemed admitted.

III. CONCLUSION

For the reasons stated above, 24 Hour Fitness respectfully requests that the Board grant 24 Hour Fitness' motion to compel and order that: (1) Applicant must serve its Initial Disclosures within ten (10) days from the mailing date of the Board's ruling on the motion; (2) Applicant must respond to 24 Hour Fitness' Discovery Requests within twenty (20) days from the mailing date of the Board's ruling on the motion; (3) Applicant must appear for deposition within ten (10) days after complete responses to Discovery Requests are served; (4) any and all objections based on the merits of the Discovery Requests are waived; and (5) all Requests for Admission are deemed admitted.

So that 24 Hour Fitness has an opportunity to fully evaluate the discovery responses, and have sufficient opportunity to confer with one or more potential experts regarding the same, 24 Hour Fitness further requests that the Board extend all deadlines herein including, without limitation, the deadline for expert disclosures, by six (6) months.

Respectfully submitted,

Dated: July 11, 2014



Susan E. Hollander

Sharoni S. Finkelstein
K&L Gates LLP
4 Embarcadero, Suite 1200
San Francisco, CA 94111

Attorneys for Opposer
24 Hour Fitness USA, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2014, I sent via electronic mail (with consent) a true and complete copy of the foregoing **24 HOUR FITNESS USA, INC.'S MOTION TO COMPEL** to the following counsel of record:

PAUL S. SUDA
LAW OFFICES OF PAUL S. SUDA
sudalaw@bellsouth.net



Riza Florencio

EXHIBIT A

May 13, 2014

Sharoni S. Finkelstein
D 415.882.8042
F 415.882.8220
sharoni.finkelstein@klgates.com

**VIA CERTIFIED MAIL/RETURN RECEIPT REQUESTED AND
E-MAIL (SUDALAW@BELLSOUTH.NET)**

Paul S. Suda
Law Offices of Paul S. Suda
1362 Salem Drive
Alpharetta, GA 30009

**CONFIDENTIAL SETTLEMENT COMMUNICATIONS
FEDERAL RULE OF EVIDENCE 408**

**Re: 24 Hour Fitness USA, Inc. v. Workout Anytime Franchising Systems, LLC
TTAB Opposition No. 91214193**

Dear Mr. Suda:

This letter is in follow up to our letter to you of April 18, 2014 regarding the above matter. We still have not received your response to our letter, in which we addressed the possibility of settling this matter. Despite your earlier representation that your client desires to resolve this matter amicably, we are concerned by your failure to respond to our correspondence and your client's failure to cooperate in the Board discovery process.

Pursuant to the Trademark Trial and Appeal Board Manual of Procedure ("TBMP") § 401.02, "[e]ach party involved in an inter partes proceeding is obligated to make initial disclosures to every other party, by the deadline set in the Board's institution order" 37 C.F.R. § 2.120(a). According to the Board's institution order, your client's initial disclosures were due on April 3, 2014; yet, we have not received these disclosures. Please consider this letter to be our meet and confer effort concerning your client's failure to make the requisite disclosures. So that we can avoid filing a motion to compel, please immediately serve a copy of your client's initial disclosures. If we do not receive your client's disclosures by May 19, 2014, we will have no choice but to bring a motion to compel. TBMP §§ 411.01 and 523.

In addition to the foregoing, please find enclosed 24 Hour Fitness' First Set of Interrogatories, First Set of Requests for Production of Documents, First Set of Requests for Admission, and Notice of Deposition Pursuant to Fed. R. Civ. P. 30(b)(6). Further, in order to facilitate the discovery process, we are again enclosing a copy of the Standard Protective Order for your review and signature.

K&L GATES

Paul S. Suda
Law Offices of Paul S. Suda
May 13, 2014
Page 2

We look forward to hearing from you by **May 19, 2014**. This letter is without prejudice to any rights 24 Hour Fitness may have, each of which is reserved.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Sharoni S. Finkelstein".

Sharoni S. Finkelstein

Encls.

cc: 24 Hour Fitness USA, Inc.

EXHIBIT B

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

In the matter of Application Serial No. 85/954,555
Published in the *Official Gazette* on August 27, 2013
Mark: 24 7 & Design



24 Hour Fitness USA, Inc.,

Opposer,

v.

Workout Anytime Franchising Systems, LLC dba
Workout Anytime,

Applicant.

Opposition No. 91214193

**OPPOSER'S FIRST SET OF
INTERROGATORIES**

Pursuant to 37 C.F.R. § 2.120 and Rule 33 of the Federal Rules of Civil Procedure, Opposer 24 Hour Fitness USA, Inc. ("24 Hour Fitness") hereby requests that applicant Workout Anytime Franchising Systems, LLC dba Workout Anytime ("Applicant") provide answers to the following interrogatories fully, in writing, and under oath to the undersigned counsel within thirty (30) days of service hereof.

DEFINITIONS AND INSTRUCTIONS

1. "Applicant," "you," or "your" means Applicant herein, Workout Anytime Franchising Systems, LLC dba Workout Anytime, and any person acting or purporting to act on

Applicant's behalf, including but not limited to any and all parents or predecessors, subsidiaries, related groups and divisions, as well as all officers, directors, employees, agents, distributors, jobbers, salespersons, sales representatives, licensees, and attorneys.

2. "Applicant's Mark" means the 24 7 & Design mark covered by Application Serial No. 85/954,555.

3. "24 Hour Fitness" means opposer herein, 24 Hour Fitness USA, Inc., and each of 24 Hour Fitness' predecessors and successors, parent organizations, related groups and divisions, as well as all directors, officers, employees, agents, distributors, jobbers, salespersons, sales representatives, licensees, attorneys and all other persons acting or purporting to act on 24 Hour Fitness' behalf or under 24 Hour Fitness' control.

4. The "24 HOUR FITNESS Marks" means 24 Hour Fitness family of 24 HOUR FITNESS and 24 7 FITNESS trademarks, including but not limited to the trademarks listed on Exhibit A.

5. "Opposition" means Opposition No. 91214193 entitled 24 Hour Fitness USA, Inc. v. Workout Anytime Franchising Systems, LLC dba Workout Anytime.

6. "Person," as well as pronouns referring thereto, includes juristic persons as well as natural persons.

7. "Identify," when used herein with respect to a person, means to supply the following information separately as to each person:

If a natural person:

- (a) the person's full name;
- (b) the business position/title of such person at the relevant time;
- (c) the employer of such person at the relevant time;
- (d) the business address of such person at the relevant time;

- (e) the present or last known business position/title of such person;
- (f) the last known or present employer of such person;
- (g) the last known or present business address, telephone number and email address of such person; and
- (h) the last known or present home address and telephone number of such person

If a juristic person:

- (i) the person's full name;
- (j) the state, territory, or country in which the person was organized and/or under whose laws it was formed or exists;
- (k) the nature of the business entity (*i.e.*, form);
- (l) the business address at the relevant time; and
- (m) the last known or present business address and telephone number.

8. "List" or "identify," with respect to documents, means to supply the following information separately as to each document:

- (a) the type of document (*e.g.*, letter, notebook, etc.) and the number of pages of which it consists;
- (b) the date of the document, if any; if no date appears, the answer shall so state and you shall supply the date or approximate date that such document was prepared;
- (c) the date on which the document came into Applicant's possession or control;

- (d) the name(s) and title(s) of the person(s) who signed the document; if not signed, the answer shall so state and supply the name(s) and title(s) of the person(s) who prepared the document, if known, or, if not known, the answer shall so state;
- (e) the name(s) and title(s) of the person(s) to whom the document is addressed and to whom copies were furnished (whether specifically named therein or not);
- (f) the business entity or entities with which each person was associated and the date the document was prepared;
- (g) the present whereabouts of the document and the name and address of the custodian thereof; and
- (h) a brief summary of the subject matter of the document.

9. "Document" or "documents" shall have the full meaning ascribed to it in Rule 34 of the Federal Rules of Civil Procedure, and refers to all handwritten, typed, printed, or otherwise visually, mechanically, or electronically reproduced materials, whether copies or originals, in the possession, custody, or control of Applicant or its officers, agents, employees, consultants or attorneys, including but not limited to labels, letters, cables, memoranda, intracorporate communications, reports, notes, minutes, bulletins, circulars, instructions, work assignments, invoices, recordings, sketches, drawings, charts, photographs, prints, artwork, designs, drafts, work sheets, printouts, information stored in computers or other information retrieval systems, other non-paper information storage means such as tape or film, agreements, published material of any kind, annual reports, and advertising or promotional literature. Where

a copy of a document contains any marking not appearing on the original or is altered from the original, then such item shall be considered to be a separate original document.

10. "Communication" includes documents and any and all vocal communications between persons including, but not limited to, face-to-face conversations, discussions, and telephone conversations.

11. If a claim of privilege is made as to any information or document responsive to a request herein, identify such information or document in your response to such request, and for each such item, identify, as applicable, (i) the type of document; (ii) its date; (iii) its author(s), addressee(s) and recipient(s); (iv) person(s) now in possession of the item; (v) basis as to the claim of privilege as to each item; and (vi) state the subject matter and provide a summary of the information or document for which a privilege is claimed, and produce those portions of the information or document not subject to the claimed privilege.

12. If any information responsive to an interrogatory herein was a document, which at one time was in existence, but has been lost, destroyed, discarded or otherwise disposed of, identify such document as completely as possible, providing as much of the following information as possible: (i) the type of document; (ii) the date it was created or, if you did not create it, the date you received it; (iii) its author(s), addressee(s) and recipient(s); (iv) the subject matter of the document; (v) the approximate date of disposal; (vi) the reasons for disposing of or discarding the document; (vii) the person authorizing the disposal; (viii) the person disposing of the document or other physical evidence; and (ix) the identity of any person with knowledge of the contents thereof.

13. If you cannot answer an interrogatory in full after exercising due diligence to secure the information, so state and answer to the extent possible, specifying your inability to

answer the remainder and stating whatever information or knowledge Applicant has concerning the unanswered portions. The fact that a full answer cannot be given is not a basis for you to fail to provide such information as is available to you at the time of your response to these interrogatories.

14. These interrogatories are continuing and impose upon Applicant the obligations stated in Rule 26(e) of the Federal Rules of Civil Procedure.

INTERROGATORIES

INTERROGATORY NO. 1

Describe Applicant's business and identify the corporate structure of Applicant, including the identity of any of its shareholders, officers, or board members, and any former names used by Applicant.

INTERROGATORY NO. 2

Identify all goods and/or services that have been advertised, distributed, offered, or licensed for sale by Applicant under Applicant's Mark, and state the dates during which each such item was advertised, distributed, offered, or licensed for sale.

INTERROGATORY NO. 3

Identify all goods and/or services that you intend to advertise, distribute, offer, or license for sale under Applicant's Mark.

INTERROGATORY NO. 4

Describe the geographic scope of the actual or intended distribution for all the goods and/or services identified in response to Interrogatory No. 2, including each and every state in the United States in which Applicant has made sales of goods and/or services bearing Applicant's Mark.

INTERROGATORY NO. 5

Identify and describe the geographic location of all past, current and intended future users of Applicant's Mark authorized by Applicant, including all agents, licensees, or other persons or entities that have used or may in the future be using Applicant's Mark with Applicant's authorization, permission, or knowledge.

INTERROGATORY NO. 6

Identify the earliest date that Applicant used Applicant's Mark on any goods and/or services, including the date of first use by any person anywhere, and the date of first use in a commercial transaction in the United States, and identify the person most knowledgeable of such use.

INTERROGATORY NO. 7

Describe the intended classes of consumers and geographic location of consumers of each good and/or service identified in response to Interrogatory No. 2.

INTERROGATORY NO. 8

Identify and describe the geographic location of all persons with whom Applicant has had contracts for goods and/or services offered under Applicant's Mark.

INTERROGATORY NO. 9

Identify each and every use of Applicant's Mark on any goods and/or services by Applicant inside the United States.

INTERROGATORY NO. 10

Identify each and every office of Applicant that is located in the United States.

INTERROGATORY NO. 11

Identify each and every employee, sales representative, reseller, and/or agent of Applicant who resides in the United States.

INTERROGATORY NO. 12

State whether Applicant has any intention to expand its use of Applicant's Mark to include the sale of goods and/or services beyond those goods and/or services identified in answer to Interrogatory No. 2, and if so, identify all such goods and/or services.

INTERROGATORY NO. 13

Describe the process by which Applicant chose Applicant's Mark.

INTERROGATORY NO. 14

Identify all persons involved in selection of Applicant's Mark, including the person who first conceived of and authorized Applicant's use of Applicant's Mark as a trademark, and the person most knowledgeable of this process.

INTERROGATORY NO. 15

Describe fully any and all known or intended meanings or significance of Applicant's Mark at any time.

INTERROGATORY NO. 16

Describe all versions and variations of Applicant's Mark ever used by Applicant or intended to be used by Applicant, including without limitation any other marks that incorporate "24/7," and for each such version or variation, set forth the time period for which it was used or is intended to be used, and the reasons for any change made to Applicant's Mark.

INTERROGATORY NO. 17

Identify any search or investigation of any records such as, but not limited to, the United States Patent and Trademark Office ("USPTO") records, state trademark records, trademark or trade publications, business directories, or the records of any trademark service organization conducted by Applicant or on Applicant's behalf prior to its use of and application for

Applicant's Mark in order to ascertain whether Applicant's use of Applicant's Mark might infringe the trademark or service mark or trade name rights of others.

INTERROGATORY NO. 18

Describe how and when Applicant first learned of 24 Hour Fitness and of 24 Hour Fitness' rights in and to the 24 HOUR FITNESS Marks, and identify the person most knowledgeable thereof.

INTERROGATORY NO. 19

Identify and describe all communications which refer or relate to Applicant's first knowledge of 24 Hour Fitness' rights in and to the 24 HOUR FITNESS Marks.

INTERROGATORY NO. 20

Identify and describe all communications between Applicant and 24 Hour Fitness.

INTERROGATORY NO. 21

Describe the reaction of the average purchaser of Applicant's goods and/or services to Applicant's Mark as the purchaser encounters the goods and services in the marketplace.

INTERROGATORY NO. 22

Identify any survey, study, or public opinion poll of which Applicant is aware concerning the use of either Applicant's Mark by Applicant or the 24 HOUR FITNESS Marks by 24 Hour Fitness or both, including those comparing goods and/or services offered by Applicant under or in connection with Applicant's Mark to those of any of Applicant's competitors and/or 24 Hour Fitness.

INTERROGATORY NO. 23

Describe all instances in which a person has been confused, mistaken, or deceived as to source or origin between goods and/or services sold by Applicant under Applicant's Mark and goods and/or services sold by 24 Hour Fitness under the 24 HOUR FITNESS Marks. For each

such instance, identify the person and good and/or service involved, the date, and how Applicant became aware of each instance.

INTERROGATORY NO. 24

Identify any application ever made by Applicant or on Applicant's behalf to register Applicant's Mark or any variation thereon in any jurisdiction.

INTERROGATORY NO. 25

Identify each of the forms of advertising (*e.g.*, radio, television, print, internet, etc.) used to advertise the goods and/or services identified in response to Interrogatory No. 2, including the dates and media on and through which each such advertising occurred, and including the geographic scope of each.

INTERROGATORY NO. 26

Identify all websites operated by Applicant or on Applicant's behalf which advertise or promote Applicant's Mark.

INTERROGATORY NO. 27

For each website identified in Interrogatory No. 26, state the URL of that website, the date the website was created, and the person in charge of managing the website.

INTERROGATORY NO. 28

State the typical price for each good and/or service identified in response to Interrogatory No. 2.

INTERROGATORY NO. 29

State, to the nearest hundred of dollars, the sales revenue for each of the goods and/or services identified in response to Interrogatory No. 2 for each year since the introduction of each such good and/or service.

INTERROGATORY NO. 30

State the number of units sold for each of the goods and/or services identified in response to Interrogatory No. 2 for each year since the introduction of each such goods and/or services.

INTERROGATORY NO. 31

State, to the nearest hundred of dollars, the amount of money spent by or on behalf of Applicant for advertising, promotion and marketing of each good and/or service identified in response to Interrogatory No. 2 for each year since the introduction of each such good and/or service.

INTERROGATORY NO. 32

Identify the person most knowledgeable with respect to the marketing, promoting, and advertising of Applicant's Mark or the goods and/or services sold under Applicant's Mark.

INTERROGATORY NO. 33

Identify all instances of unsolicited publicity (not arranged for by Applicant or on Applicant's behalf), positive or negative, for any good and/or service identified in response to Interrogatory No. 2, and identify the date of each such instance, the form of such publicity, the person or entity providing the publicity, and the geographic location of the person or entity providing the publicity.

INTERROGATORY NO. 34

Describe with particularity the channels of trade through which the goods and/or services identified in response to Interrogatory No. 2 were, are or are intended to be distributed or offered for sale.

INTERROGATORY NO. 35

Identify all facts and bases upon which Applicant denies, in Paragraph 11 of Applicant's Answer, the allegations contained in Paragraph 11 of 24 Hour Fitness' Notice of Opposition "so far as such involves the claim of there being no priority and that Applicant's first use of the mark at issue was on December 1, 2012."

INTERROGATORY NO. 36

Identify all facts and bases upon which Applicant denies, in Paragraph 12 of Applicant's Answer, that "Applicant's proposed 24 7 & Design mark is confusingly similar to Opposer's 24 HOUR FITNESS Marks because it is similar in appearance, meaning, and overall impression pursuant to 15 U.S.C. § 1052(d)."

INTERROGATORY NO. 37

Identify all facts and bases upon which Applicant denies, in Paragraph 13 of Applicant's Answer, that "the services offered by Applicant and Opposer are identical," and that "Applicant uses its 24 7 & Design mark in connection with 'health club services, namely, providing instruction and equipment in the field of physical exercise' in International Class 41."

INTERROGATORY NO. 38

Identify all facts and bases upon which Applicant denies, in Paragraph 14 of Applicant's Answer, that "Applicant's services would also be marketed and advertised through overlapping channels as Opposer's services."

INTERROGATORY NO. 39

Identify any expert Applicant expects to engage on its behalf on any matter pertaining to this Opposition proceeding, including the expert's name and address, field of specialization, and the substance of all facts and opinions as to which the expert is expected to testify and a summary of the grounds for each opinion.

INTERROGATORY NO. 40

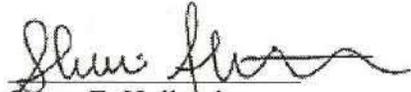
Identify each witness Applicant expects to testify on its behalf and the nature of the testimony to be given by the witness during Applicant's testimony period.

INTERROGATORY NO. 41

Identify all persons who provided information in response to these Interrogatories.

Respectfully submitted,

Dated: May 13, 2014



Susan E. Hollander
Sharoni S. Finkelstein
K&L Gates LLP
4 Embarcadero, Suite 1200
San Francisco, CA 94111

Attorneys for Opposer
24 Hour Fitness USA, Inc.

EXHIBIT A

Mark	Reg. /App. No.	Goods/Services
24 7 FITNESS	4,072,074	Class 41: Health club services, namely, providing fitness and exercise facilities; instruction services, namely, instruction in the field of physical fitness; educational services, namely, instruction and training in the field of fitness; instruction programs in the field of physical fitness, namely, providing exercise classes for groups of individuals.
24 HOUR FITNESS 24 7 FITNESS & Design	3,665,437	Class 41: Health club services, providing fitness and exercise facilities; instruction services, namely, instruction in the field of health and physical fitness; educational services, namely, instruction and training in the fields of fitness and nutrition; instruction programs in the field of health and physical fitness, namely providing exercise classes for groups of individuals.
24 7 FITNESS	85/101,440	Class 44: consulting services in the field of health, namely, instruction in the field of health; counseling services in the fields of health, nutrition, namely, instruction and training in the field of nutrition; counseling services in the fields of health, namely, instruction programs in the field of nutrition
247 FITNESS & DESIGN	4,419,597	Class 41: health club services; instruction services, namely, instruction in the field of health and physical fitness; educational services namely, instruction and training in the fields of fitness and nutrition; instruction programs, namely, providing exercise classes for groups of individuals
24 HOUR FITNESS	2,130,895	Class 18: Gym bags and backpacks; Class 25: Clothing, namely, sweat suits, baggy pants, shorts, sweatshirts, T-shirts, tank tops, sport bras, boxer shorts, socks, hats; Class 41: Health club services.
24HOURFITNESS.COM	2,395,153	Class 42: Providing health and fitness related information over a global information network.
24 HOUR FITNESS & Design	2,395,501	Class 35: Retail outlet services featuring fitness related clothing, sportswear, and accessories; Class 41: Health club services; instruction services, namely, instruction in the field of health and physical exercise.
24 HOUR FITNESS	3,741,704	Class 9: Electronic hardware, namely, electronic device and digital display unit used for measurement of physiological, metabolic, and dietary factors.
24 HOUR FITNESS	4,132,191	Class 42: Temporary use of on-line non-downloadable software for measurement of physiological, metabolic, and dietary factors.
24 HOUR FITNESS & Design	2,477,323	Class 41: Health club services; instruction services, namely, instruction in the field of health and physical exercise.
24 HOUR FITNESS SPORT	2,499,844	Class 41: Health club services.

Mark	Reg. /App. No.	Goods/Services
24 HOUR FITNESS &Design	2,549,894	Class 41: Club services; instruction in the field of health and physical fitness.
24 HOUR FITNESS & Design	2,633,150	Class 16: Nutrition and exercise log books; Class 18: Gym bags; Class 25: Clothing, namely, T-shirts, tank tops, sweatshirts, tights, exercise pants, exercise shorts, bicycle shorts, leggings, jackets, socks, headwear, gloves, and footwear; Class 35: Retail outlet services featuring fitness related clothing, sportswear, and accessories; Class 42: Providing information in the field of health and fitness via a global computer network.
24 HOUR FITNESS ACTIVE	2,684,457	Class 41: Health club services.
24 HOUR FITNESS EXPRESS	2,926,364	Class 41: Providing health club services, namely, providing fitness and exercise facilities.
24 HOUR FITNESS ULTRA SPORT	3,083,119	Class 41: Health club services.
24 HOUR FITNESS	3,806,844	Class 41: Health club services; instruction services, namely, instruction in the field of health and physical fitness; educational services, namely, instruction and training in the fields of fitness and nutrition; instruction programs, namely, providing exercise classes for groups of individuals.
24 HOUR FITNESS	3,971,927	Class 35: Retail outlet services featuring fitness related clothing, sportswear, and accessories.
24 HOUR FITNESS	4,032,527	Class 25: Clothing, namely, T-shirts, tank tops, sweatshirts, tights, exercise pants, exercise shorts, bicycle shorts, jackets, socks, headwear, gloves, and footwear.

CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2014, I sent via electronic mail (with consent) a true and complete copy of the foregoing **OPPOSER'S FIRST SET OF INTERROGATORIES** to the following counsel of record:

PAUL S. SUDA
LAW OFFICES OF PAUL S. SUDA
sudalaw@bellsouth.net



Riza Florencio

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

In the matter of Application Serial No. 85/954,555
Published in the *Official Gazette* on August 27, 2013
Mark: 24 7 & Design



24 Hour Fitness USA, Inc.,

Opposer,

v.

Workout Anytime Franchising Systems, LLC dba
Workout Anytime,

Applicant.

Opposition No. 91214193

**OPPOSER'S FIRST SET OF
REQUESTS FOR PRODUCTION
OF DOCUMENTS**

Pursuant to 37 C.F.R. § 2.120 and Rule 34 of the Federal Rules of Civil Procedure, Opposer 24 Hour Fitness USA, Inc. ("24 Hour Fitness") hereby requests that applicant Workout Anytime Franchising Systems, LLC dba Workout Anytime ("Applicant") produce the requested documents and things to the undersigned counsel within thirty (30) days of service hereof.

DEFINITIONS AND INSTRUCTIONS

1. "Applicant," "you," or "your" means Applicant herein, Workout Anytime Franchising Systems, LLC dba Workout Anytime, and any person acting or purporting to act on Applicant's behalf, including but not limited to any and all parents or predecessors, subsidiaries,

related groups and divisions, as well as all officers, directors, employees, agents, distributors, jobbers, salespersons, sales representatives, licensees, and attorneys.

2. “Applicant’s Mark” means the 24 7 & Design mark covered by Application Serial No. 85/954,555.

3. “24 Hour Fitness” means opposer herein, 24 Hour Fitness USA, Inc., and each of 24 Hour Fitness’ predecessors and successors, parent organizations, related groups and divisions, as well as all directors, officers, employees, agents, distributors, jobbers, salespersons, sales representatives, licensees, attorneys and all other persons acting or purporting to act on 24 Hour Fitness’ behalf or under 24 Hour Fitness’ control.

4. The “24 HOUR FITNESS Marks” means 24 Hour Fitness family of 24 HOUR FITNESS and 24 7 FITNESS trademarks, including but not limited to the trademarks listed on Exhibit A.

5. “Opposition” means Opposition No. 91214193 entitled 24 Hour Fitness USA, Inc. v. Workout Anytime Franchising Systems, LLC dba Workout Anytime.

6. “Person,” as well as pronouns referring thereto, includes juristic persons as well as natural persons.

7. “Identify,” when used herein with respect to a person, means to supply the following information separately as to each person:

If a natural person:

- (a) the person’s full name;
- (b) the business position/title of such person at the relevant time;
- (c) the employer of such person at the relevant time;
- (d) the business address of such person at the relevant time;
- (e) the present or last known business position/title of such person;

- (f) the last known or present employer of such person;
- (g) the last known or present business address, telephone number and email address of such person; and
- (h) the last known or present home address and telephone number of such person

If a juristic person:

- (i) the person's full name;
- (j) the state, territory, or country in which the person was organized and/or under whose laws it was formed or exists;
- (k) the nature of the business entity (*i.e.*, form);
- (l) the business address at the relevant time; and
- (m) the last known or present business address and telephone number.

8. "Document" or "documents" shall have the full meaning ascribed to it in Rule 34 of the Federal Rules of Civil Procedure, and refers to all handwritten, typed, printed, or otherwise visually, mechanically, or electronically reproduced materials, whether copies or originals, in the possession, custody, or control of Applicant or its officers, agents, employees, consultants or attorneys, including but not limited to labels, letters, cables, memoranda, intracorporate communications, reports, notes, minutes, bulletins, circulars, instructions, work assignments, invoices, recordings, sketches, drawings, charts, photographs, prints, artwork, designs, drafts, work sheets, printouts, information stored in computers or other information retrieval systems, other non-paper information storage means such as tape or film, agreements, published material of any kind, annual reports, and advertising or promotional literature. Where

a copy of a document contains any marking not appearing on the original or is altered from the original, then such item shall be considered to be a separate original document.

9. "Communication" includes documents and any and all vocal communications between persons including, but not limited to, face-to-face conversations, discussions, and telephone conversations.

10. If a claim of privilege is made as to any information or document responsive to a request herein, identify such information or document in your response to such request, and for each such item, identify, as applicable, (i) the type of document; (ii) its date; (iii) its author(s), addressee(s) and recipient(s); (iv) person(s) now in possession of the item; (v) basis as to the claim of privilege as to each item; and (vi) state the subject matter and provide a summary of the information or document for which a privilege is claimed, and produce those portions of the information or document not subject to the claimed privilege.

11. If any document responsive to a document request herein, which at one time was in existence, but has been lost, destroyed, discarded or otherwise disposed of, identify such document as completely as possible, providing as much of the following information as possible: (i) the type of document; (ii) the date it was created or, if you did not create it, the date you received it; (iii) its author(s), addressee(s) and recipient(s); (iv) the subject matter of the document; (v) the approximate date of disposal; (vi) the reasons for disposing of or discarding the document; (vii) the person authorizing the disposal; (viii) the person disposing of the document or other physical evidence; and (ix) the identity of any person with knowledge of the contents thereof.

12. In responding to these document requests, please furnish all responsive documents known or available to you, regardless of whether the document is possessed directly

by you or by your agents, employees, representatives, or investigators or by your attorneys or their agents, employees, representatives or investigators.

13. These document requests are continuing and impose upon Applicant the obligations stated in Rule 26(e) of the Federal Rules of Civil Procedure.

REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS

REQUEST NO. 1

All documents identified in response to or relied on in responding to 24 Hour Fitness' First Set of Interrogatories to Applicant.

REQUEST NO. 2

Documents sufficient to identify the address, including website domains, of each location operated by Applicant at or through which goods and/or services bearing Applicant's Mark were, are or are intended to be sold.

REQUEST NO. 3

Documents, including literature and online literature, describing each good or service identified in response to Interrogatory No. 2 in 24 Hour Fitness' First Set of Interrogatories to Applicant.

REQUEST NO. 4

Documents sufficient to show any and all of Applicant's permanent and/or temporary signage bearing Applicant's Mark, whether indoor or outdoor, including but not limited to billboards, banners, marquee signs, posters, fliers, and sandwich boards.

REQUEST NO. 5

Documents sufficient to identify the date of Applicant's first use of Applicant's Mark in connection with the sale or offering of any goods and/or services anywhere.

REQUEST NO. 6

Documents sufficient to identify the date of Applicant's first use of Applicant's Mark in connection with the sale or offering of any goods and/or services in the United States.

REQUEST NO. 7

Documents sufficient to identify all offices, employees, sales representatives, resellers, and/or agents of Applicant within the United States.

REQUEST NO. 8

Documents sufficient to identify all ways in which Applicant has used, currently uses, or intends to use Applicant's Mark in connection with the sale or offering of any goods and/or services.

REQUEST NO. 9

Documents sufficient to identify every sale of goods and/or services by Applicant under Applicant's Mark, including but not limited to invoices, purchase orders, receipts, bills of sale, and sales summaries.

REQUEST NO. 10

Documents sufficient to identify the geographic location of all persons with whom Applicant has had contracts and/or negotiation for contracts for goods and/or services offered under Applicant's Mark.

REQUEST NO. 11

All contracts executed by Applicant's customers inside the United States in the case of sales of goods and/or services under Applicant's Mark.

REQUEST NO. 12

Documents sufficient to identify the intended classes and geographic location of all customers who have purchased goods and/or services from Applicant under Applicant's Mark.

REQUEST NO. 13

Documents sufficient to identify the geographic location of all past, current or intended future users of Applicant's Mark authorized by Applicant, including all agents, licensees, resellers, or other persons or entities that have used or may in the future be using Applicant's Mark with Applicant's authorization, permission, or knowledge.

REQUEST NO. 14

All documents referring or relating to any current intention or plans by Applicant to use Applicant's Mark on goods and/or services other than those goods and/or services identified in response to Interrogatory No. 2 in 24 Hour Fitness' First Set of Interrogatories to Applicant.

REQUEST NO. 15

Documents sufficient to identify each person or outside agency that has assisted Applicant in the advertising, promotion, distribution or sale of any goods and/or services bearing Applicant's Mark, including any such person or outside agency in the United States.

REQUEST NO. 16

One copy of each advertisement and/or commercial created by Applicant or on Applicant's behalf to promote Applicant's Mark, or goods and/or services bearing Applicant's Mark, whether in print, video, audio or electronic format, including but not limited to fliers, brochures, customer newsletters, direct marketing emails, coupons, websites, electronic pop-up advertisements, written copy or storyboards relating to advertising, posters, and point of sale displays.

REQUEST NO. 17

All documents, including but not limited to press releases, public statements, announcements, letters, newswires, radio spots, video releases, fliers, brochures or webpages

prepared by Applicant or on Applicant's behalf relating to Applicant's use of Applicant's Mark for goods and/or services offered under Applicant's Mark.

REQUEST NO. 18

All press, including but not limited to articles from newspapers, magazines, websites, or any other publication, whether distributed in print, broadcast or electronic form, not prepared or solicited by Applicant or on Applicant's behalf, which refer or relate to, discuss, mention or concern Applicant's use of Applicant's Mark or goods and/or services offered under Applicant's Mark.

REQUEST NO. 19

Documents sufficient to show the geographic scope of Applicant's promotional activities using Applicant's Mark.

REQUEST NO. 20

A sample of each catalog, price list, merchandising offer, webpage or other publication where the availability and/or price of any good and/or service identified in response to Interrogatory No. 2 in 24 Hour Fitness' First Set of Interrogatories to Applicant was advertised or made known.

REQUEST NO. 21

A complete printout of each website operated by Applicant or on Applicant's behalf which advertises or promotes Applicant's Mark.

REQUEST NO. 22

All documents which refer or relate to Applicant's conception, selection process, and/or adoption of Applicant's Mark as a trademark.

REQUEST NO. 23

All documents which refer or relate to any version or variation of Applicant's Mark, including without limitation any other marks that incorporate "24/7," that Applicant has used or is contemplating using in connection with the goods and/or services identified in response to Interrogatory No. 2 in 24 Hour Fitness' First Set of Interrogatories to Applicant.

REQUEST NO. 24

All documents that refer or relate to any records related to Applicant's Mark and/or the 24 HOUR FITNESS Marks—including without limitation United States Patent and Trademark Office ("USPTO") records, state trademark records, trademark or trade publications, business directories, or the records of any trademark service organization—that were obtained by Applicant or on Applicant's behalf as a result of a search or investigation conducted by Applicant or on Applicant's behalf.

REQUEST NO. 25

All documents that refer or relate to any opinions as to the availability for use and registration of Applicant's Mark as a trade name or trademark.

REQUEST NO. 26

All documents which refer or relate to Applicant's first knowledge of 24 Hour Fitness' rights in and to the 24 HOUR FITNESS Marks.

REQUEST NO. 27

All documents which refer or relate to Applicant's knowledge of 24 Hour Fitness' rights in and to the 24 HOUR FITNESS Marks prior to Applicant's filing of any trademark applications for Applicant's Mark.

REQUEST NO. 28

All communications between Applicant and 24 Hour Fitness.

REQUEST NO. 29

All communications between Applicant and any third party relating to Applicant's Mark.

REQUEST NO. 30

All documents that refer or relate to any survey, study, or public opinion poll conducted by Applicant or on Applicant's behalf concerning Applicant's mark as used by Applicant, or the 24 HOUR FITNESS Marks as used by 24 Hour Fitness or both.

REQUEST NO. 31

All documents that refer or relate to any instance of confusion, mistake or deception as to source or origin of goods and/or services sold by Applicant under Applicant's Mark and goods and/or services sold by 24 Hour Fitness under the 24 HOUR FITNESS Marks, or as to association or affiliation of goods and/or services sold by Applicant under Applicant's Mark with those sold by 24 Hour Fitness under the 24 HOUR FITNESS Marks.

REQUEST NO. 32

All documents which refer or relate to any attempts by Applicant or on Applicant's behalf to register Applicant's Mark or any variations thereof in any jurisdiction, including without limitation any other marks that incorporate both "24/7" and "FITNESS."

REQUEST NO. 33

All documents relating to U.S. Application No. 85/954,555, including, but not limited to, the USPTO file history for this application.

REQUEST NO. 34

All documents which refer or relate to any negotiations by Applicant to license Applicant's Mark.

REQUEST NO. 35

All documents which refer or relate to any agreement in which Applicant grants a third party the right to use or to continue to use Applicant's Mark.

REQUEST NO. 36

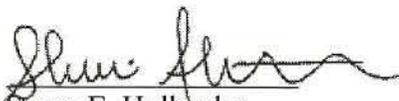
All documents which refer or relate to the qualifications, field of specialization and expected testimony of any expert Applicant intends to call as a testifying witness in connection with this Opposition.

REQUEST NO. 37

All documents and things Applicant intends to rely on at trial in this proceeding.

Respectfully submitted,

Dated: May 13, 2014



Susan E. Hollander
Sharoni S. Finkelstein
K&L Gates LLP
4 Embarcadero, Suite 1200
San Francisco, CA 94111

Attorneys for Opposer
24 Hour Fitness USA, Inc.

EXHIBIT A

Mark	Reg. /App. No.	Goods/Services
24 7 FITNESS	4,072,074	Class 41: Health club services, namely, providing fitness and exercise facilities; instruction services, namely, instruction in the field of physical fitness; educational services, namely, instruction and training in the field of fitness; instruction programs in the field of physical fitness, namely, providing exercise classes for groups of individuals.
24 HOUR FITNESS 24 7 FITNESS & Design	3,665,437	Class 41: Health club services, providing fitness and exercise facilities; instruction services, namely, instruction in the field of health and physical fitness; educational services, namely, instruction and training in the fields of fitness and nutrition; instruction programs in the field of health and physical fitness, namely providing exercise classes for groups of individuals.
24 7 FITNESS	85/101,440	Class 44: consulting services in the field of health, namely, instruction in the field of health; counseling services in the fields of health, nutrition, namely, instruction and training in the field of nutrition; counseling services in the fields of health, namely, instruction programs in the field of nutrition
247 FITNESS & DESIGN	4,419,597	Class 41: health club services; instruction services, namely, instruction in the field of health and physical fitness; educational services namely, instruction and training in the fields of fitness and nutrition; instruction programs, namely, providing exercise classes for groups of individuals
24 HOUR FITNESS	2,130,895	Class 18: Gym bags and backpacks; Class 25: Clothing, namely, sweat suits, baggy pants, shorts, sweatshirts, T-shirts, tank tops, sport bras, boxer shorts, socks, hats; Class 41: Health club services.
24HOURFITNESS.COM	2,395,153	Class 42: Providing health and fitness related information over a global information network.
24 HOUR FITNESS & Design	2,395,501	Class 35: Retail outlet services featuring fitness related clothing, sportswear, and accessories; Class 41: Health club services; instruction services, namely, instruction in the field of health and physical exercise.
24 HOUR FITNESS	3,741,704	Class 9: Electronic hardware, namely, electronic device and digital display unit used for measurement of physiological, metabolic, and dietary factors.
24 HOUR FITNESS	4,132,191	Class 42: Temporary use of on-line non-downloadable software for measurement of physiological, metabolic, and dietary factors.
24 HOUR FITNESS & Design	2,477,323	Class 41: Health club services; instruction services, namely, instruction in the field of health and physical exercise.
24 HOUR FITNESS SPORT	2,499,844	Class 41: Health club services.

Mark	Reg. /App. No.	Goods/Services
24 HOUR FITNESS & Design	2,549,894	Class 41: Club services; instruction in the field of health and physical fitness.
24 HOUR FITNESS & Design	2,633,150	Class 16: Nutrition and exercise log books; Class 18: Gym bags; Class 25: Clothing, namely, T-shirts, tank tops, sweatshirts, tights, exercise pants, exercise shorts, bicycle shorts, leggings, jackets, socks, headwear, gloves, and footwear; Class 35: Retail outlet services featuring fitness related clothing, sportswear, and accessories; Class 42: Providing information in the field of health and fitness via a global computer network.
24 HOUR FITNESS ACTIVE	2,684,457	Class 41: Health club services.
24 HOUR FITNESS EXPRESS	2,926,364	Class 41: Providing health club services, namely, providing fitness and exercise facilities.
24 HOUR FITNESS ULTRA SPORT	3,083,119	Class 41: Health club services.
24 HOUR FITNESS	3,806,844	Class 41: Health club services; instruction services, namely, instruction in the field of health and physical fitness; educational services, namely, instruction and training in the fields of fitness and nutrition; instruction programs, namely, providing exercise classes for groups of individuals.
24 HOUR FITNESS	3,971,927	Class 35: Retail outlet services featuring fitness related clothing, sportswear, and accessories.
24 HOUR FITNESS	4,032,527	Class 25: Clothing, namely, T-shirts, tank tops, sweatshirts, tights, exercise pants, exercise shorts, bicycle shorts, jackets, socks, headwear, gloves, and footwear.

CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2014, I sent via electronic mail (with consent) a true and complete copy of the foregoing **OPPOSER'S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS** to the following counsel of record:

PAUL S. SUDA
LAW OFFICES OF PAUL S. SUDA
sudalaw@bellsouth.net



Riza Florencio

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

In the matter of Application Serial No. 85/954,555
Published in the *Official Gazette* on August 27, 2013
Mark: 24 7 & Design



24 Hour Fitness USA, Inc.,

Opposer,

v.

Workout Anytime Franchising Systems, LLC dba
Workout Anytime,

Applicant.

Opposition No. 91214193

**OPPOSER'S FIRST SET OF
REQUESTS FOR ADMISSION**

Pursuant to 37 C.F.R. § 2.120 and Rule 36 of the Federal Rules of Civil Procedure, Opposer 24 Hour Fitness USA, Inc. ("24 Hour Fitness") hereby requests that applicant Workout Anytime Franchising Systems, LLC dba Workout Anytime ("Applicant") provide answers to the following Requests for Admission fully, in writing, and under oath to the undersigned counsel within thirty (30) days of service hereof.

DEFINITIONS AND INSTRUCTIONS

1. "Applicant," "you," or "your" means Applicant herein, Workout Anytime Franchising Systems, LLC dba Workout Anytime, and any person acting or purporting to act on

Applicant's behalf, including but not limited to any and all parents or predecessors, subsidiaries, related groups and divisions, as well as all officers, directors, employees, agents, distributors, jobbers, salespersons, sales representatives, licensees, and attorneys.

2. "Applicant's Mark" means the 24 7 & Design mark covered by Application Serial No. 85/954,555.

3. "24 Hour Fitness" means opposer herein, 24 Hour Fitness USA, Inc., and each of 24 Hour Fitness' predecessors and successors, parent organizations, related groups and divisions, as well as all directors, officers, employees, agents, distributors, jobbers, salespersons, sales representatives, licensees, attorneys and all other persons acting or purporting to act on 24 Hour Fitness' behalf or under 24 Hour Fitness' control.

4. The "24 HOUR FITNESS Marks" means 24 Hour Fitness family of 24 HOUR FITNESS and 24 7 FITNESS trademarks, including but not limited to the trademarks listed on Exhibit A.

5. "Opposition" means Opposition No. 91214193 entitled 24 Hour Fitness USA, Inc. v. Workout Anytime Franchising Systems, LLC dba Workout Anytime.

6. "Person," as well as pronouns referring thereto, includes juristic persons as well as natural persons.

7. If you cannot truthfully admit or deny a request, you must set forth in detail the reason why. If you claim "lack of information or knowledge" as the reason for failure to admit or deny, you must also state that you have made reasonable inquiry and that the information known or readily obtainable is insufficient to enable you to admit or deny the request.

8. These requests for admission are continuing and impose upon Applicant the obligations stated in Rule 26(e) of the Federal Rules of Civil Procedure.

REQUESTS FOR ADMISSION

REQUEST NO. 1

Admit that the description of services under Application No. 85/954,555 is “health club services, namely, providing instruction and equipment in the field of physical exercise.”

REQUEST NO. 2

Admit that you did not use Applicant’s Mark in commerce in the United States in connection with fitness and exercise facilities prior to December 1, 2012.

REQUEST NO. 3

Admit that you were aware of 24 Hour Fitness prior to your first use of Applicant’s Mark in connection with fitness and exercise facilities.

REQUEST NO. 4

Admit that, prior to your first use of Applicant’s Mark in connection with health club services, you were aware that 24 Hour Fitness offered, among other things, health club services under the 24 HOUR FITNESS Marks.

REQUEST NO. 5

Admit that you have no evidence to dispute 24 Hour Fitness’ claim that, since at least as early as 1996, 24 Hour Fitness has continuously and pervasively used its famous 24 HOUR FITNESS mark in connection with a wide range of health and fitness related products and services.

REQUEST NO. 6

Admit that you have no evidence to dispute 24 Hour Fitness’ claim that, since at least as early as 2008, 24 Hour Fitness has continuously and pervasively used its famous 24 7 FITNESS mark in connection with health and fitness services.

REQUEST NO. 7

Admit that 24 Hour Fitness used the 24 HOUR FITNESS Marks prior to your first use of the Applicant's Mark for health club services.

REQUEST NO. 8

Admit that the goods and/or services identified in response to Interrogatory No. 2 in Opposer's First Set of Interrogatories to Applicant may be offered and/or sold through a website.

REQUEST NO. 9

Admit that the goods and/or services identified in response to Interrogatory No. 2 in Opposer's First Set of Interrogatories to Applicant may be advertised, marketed, and/or promoted through a website.

REQUEST NO. 10

Admit that the goods and/or services identified in response to Interrogatory No. 2 in Opposer's First Set of Interrogatories to Applicant may be sold through the same channels of trade as the goods and/or services offered under 24 Hour Fitness' 24 HOUR FITNESS Marks.

REQUEST NO. 11

Admit that you have no evidence that Applicant's Mark could not be confused by a consumer as a derivative of the 24 HOUR FITNESS Marks.

Respectfully submitted,

Dated: May 13, 2014


Susan E. Hollander
Sharoni S. Finkelstein
K&L Gates LLP
4 Embarcadero, Suite 1200
San Francisco, CA 94111

Attorneys for Opposer
24 Hour Fitness USA, Inc.

EXHIBIT A

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24 7 FITNESS	85/101,440	Class 44: consulting services in the field of health, namely, instruction in the field of health; counseling services in the fields of health, nutrition, namely, instruction and training in the field of nutrition; counseling services in the fields of health, namely, instruction programs in the field of nutrition
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24 HOUR FITNESS & Design	2,395,501	Class 35: Retail outlet services featuring fitness related clothing, sportswear, and accessories; Class 41: Health club services; instruction services, namely, instruction in the field of health and physical exercise.
24 HOUR FITNESS	3,741,704	Class 9: Electronic hardware, namely, electronic device and digital display unit used for measurement of physiological, metabolic, and dietary factors.
24 HOUR FITNESS	4,132,191	Class 42: Temporary use of on-line non-downloadable software for measurement of physiological, metabolic, and dietary factors.
24 HOUR FITNESS & Design	2,477,323	Class 41: Health club services; instruction services, namely, instruction in the field of health and physical exercise.
24 HOUR FITNESS SPORT	2,499,844	Class 41: Health club services.

Mark	Reg. /App. No.	Goods/Services
24 HOUR FITNESS &Design	2,549,894	Class 41: Club services; instruction in the field of health and physical fitness.
24 HOUR FITNESS & Design	2,633,150	Class 16: Nutrition and exercise log books; Class 18: Gym bags; Class 25: Clothing, namely, T-shirts, tank tops, sweatshirts, tights, exercise pants, exercise shorts, bicycle shorts, leggings, jackets, socks, headwear, gloves, and footwear; Class 35: Retail outlet services featuring fitness related clothing, sportswear, and accessories; Class 42: Providing information in the field of health and fitness via a global computer network.
24 HOUR FITNESS ACTIVE	2,684,457	Class 41: Health club services.
24 HOUR FITNESS EXPRESS	2,926,364	Class 41: Providing health club services, namely, providing fitness and exercise facilities.
24 HOUR FITNESS ULTRA SPORT	3,083,119	Class 41: Health club services.
24 HOUR FITNESS	3,806,844	Class 41: Health club services; instruction services, namely, instruction in the field of health and physical fitness; educational services, namely, instruction and training in the fields of fitness and nutrition; instruction programs, namely, providing exercise classes for groups of individuals.
24 HOUR FITNESS	3,971,927	Class 35: Retail outlet services featuring fitness related clothing, sportswear, and accessories.
24 HOUR FITNESS	4,032,527	Class 25: Clothing, namely, T-shirts, tank tops, sweatshirts, tights, exercise pants, exercise shorts, bicycle shorts, jackets, socks, headwear, gloves, and footwear.

CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2014, I sent via electronic mail (with consent) a true and complete copy of the foregoing **OPPOSER'S FIRST SET OF REQUESTS FOR ADMISSION** to the following counsel of record:

PAUL S. SUDA
LAW OFFICES OF PAUL S. SUDA
sudalaw@bellsouth.net



Riza Florencio

EXHIBIT C

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

In the matter of Application Serial No. 85/954,555
Published in the *Official Gazette* on August 27, 2013
Mark: 24 7 & Design



24 Hour Fitness USA, Inc.,

Opposer,

v.

Workout Anytime Franchising Systems, LLC dba
Workout Anytime,

Applicant.

Opposition No. 91214193

**OPPOSER'S NOTICE OF
DEPOSITION PURSUANT TO
FED. R. CIV. P. 30(B)(6) AND
TBMP § 404.05**

PLEASE TAKE NOTICE that, pursuant to Federal Rule of Civil Procedure 30(b)(6) and Trademark Manual of Board Procedure ("TBMP") § 404.05, Opposer 24 Hour Fitness USA, Inc. ("24 Hour Fitness"), through its undersigned counsel, will take the deposition of Workout Anytime Franchising Systems, LLC dba Workout Anytime ("Applicant") through Applicant's most qualified individual on the subject matters set forth below. The deposition will be taken at Littler Mendelson P.C., 3344 Peachtree Road, N.E., Suite 1500, Atlanta, GA 30326, commencing at 11:00 a.m. on June 23, 2013 and continuing from day to day thereafter. The deposition will be held before a certified shorthand reporter, and notice is hereby given that the

deposition may be videotaped. Applicant shall identify the persons who will speak on its behalf on each topic below at least seven (7) days before the deposition(s).

DEFINITIONS

1. “Applicant,” “you,” or “your” means Applicant herein, Workout Anytime Franchising Systems, LLC dba Workout Anytime, and any person acting or purporting to act on Applicant’s behalf, including but not limited to any and all parents or predecessors, subsidiaries, related groups and divisions, as well as all officers, directors, employees, agents, distributors, jobbers, salespersons, sales representatives, licensees, and attorneys.

2. “Applicant’s Mark” means the 24 7 & Design mark covered by Application Serial No. 85/954,555.

3. The “24 HOUR FITNESS Marks” means 24 Hour Fitness’ 24 HOUR FITNESS trademarks shown at Paragraph 4 of 24 Hour Fitness’ Notice of Opposition, including without limitation U.S. Registration Nos. 4,072,074; 3,665,437; 4,149,597; 2,130,895; 2,395,153; 2,395,501; 3,741,704; 4,132,191; 2,477,323; 2,499,844; 2,549,894; 2,633,150; 2,684,457; 2,926,364; 3,083,119; 3,806,844; 3,971,927; and 4,032,527, and covering the goods and services shown therein.

4. “Opposition” means Opposition No. 91214193 entitled 24 Hour Fitness USA, Inc. v. Workout Anytime Franchising Systems, LLC dba Workout Anytime.

5. “Person” means any individual, corporation, proprietorship, association, company, partnership, or any legal or business entity, including governmental bodies and/or agencies.

SUBJECTS OF EXAMINATION

1. Applicant's selection of Applicant's Mark.
2. Applicant's search or investigation of any records such as, but not limited to, the United States Patent and Trademark Office ("USPTO") records, state trademark records, trademark or trade publications, business directories, or the records of any trademark service organization conducted by Applicant or on Applicant's behalf prior to its use of and application for Applicant's Mark.
3. Applicant's adoption of Applicant's Mark.
4. Applicant's knowledge of 24 Hour Fitness and of 24 Hour Fitness' rights in and to the 24 HOUR FITNESS Marks.
5. Goods and/or services that have been advertised, distributed, offered, and/or licensed for sale by Applicant under Applicant's Mark.
6. Applicant's use or intended use of Applicant's Mark and/or versions and variations thereof, including any mark that incorporates "24/7."
7. Geographic location of all past, current and intended future distribution for the Applicant's services.
8. Channels of trade through which the Applicant's services were, are, or are intended to be distributed or offered for sale.
9. Past, current and intended future classes of consumers and geographic location of consumers for the Applicant's goods and/or services.
10. All instances in which a person has been confused, mistaken, or deceived as to the source or origin between goods and/or services sold by Applicant under Applicant's Mark and goods and/or services sold by 24 Hour Fitness under the 24 HOUR FITNESS Marks.

11. All forms of advertising, marketing and promotion used in connection with the Applicant's goods and/or services, including the dates and media on and through which each advertisement occurred, and the geographic scope of each.

12. The amount of money spent by or on behalf of Applicant for advertising, promotion and marketing of each of Applicant's services.

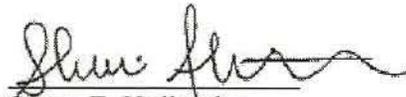
13. The price for each of Applicant's services.

14. Number of purchasers of Applicant's health club services.

15. Factual bases for all statements, allegations, and denials asserted in Applicant's Answer.

Respectfully submitted,

Dated: May 13, 2014



Susan E. Hollander
Sharoni S. Finkelstein
K&L Gates LLP
4 Embarcadero, Suite 1200
San Francisco, CA 94111

Attorneys for Opposer
24 Hour Fitness USA, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2014, I sent via electronic mail (with consent) a true and complete copy of the foregoing **OPPOSER'S NOTICE OF DEPOSITION PURSUANT TO FED. R. CIV. P. 30(B)(6) AND TBMP § 404.05** to the following counsel of record:

PAUL S. SUDA
LAW OFFICES OF PAUL S. SUDA
sudalaw@bellsouth.net



Riza Florencio

EXHIBIT D

June 18, 2014

Sharoni S. Finkelstein
D 415.882.8042
F 415.882.8220
sharoni.finkelstein@klgates.com

**VIA CERTIFIED MAIL/RETURN RECEIPT REQUESTED AND
E-MAIL (SUDALAW@BELLSOUTH.NET)**

Paul S. Suda
Law Offices of Paul S. Suda
1362 Salem Drive
Alpharetta, GA 30009

**CONFIDENTIAL SETTLEMENT COMMUNICATIONS
FEDERAL RULE OF EVIDENCE 408**

**Re: *24 Hour Fitness USA, Inc. v. Workout Anytime Franchising Systems, LLC*
TTAB Opposition No. 91214193**

Dear Mr. Suda:

This letter is in follow up to our May 13, 2014 meet and confer letter to you regarding your client's failure to serve its initial disclosures, a copy of which is enclosed. As you are aware, by that letter we properly served your client with Opposer's First Set of Interrogatories, First Set of Requests for Production of Documents, First Set of Requests for Admission, and Notice of Deposition Pursuant to Fed. R. Civ. P. 30(b)(6) (collectively, the "Discovery Requests"). Pursuant to the Trademark Trial and Appeal Board Manual of Procedure ("TBMP") §§ 405.04, 406.04(a), and 407.03(a), your client's time to respond expired on June 12, 2014. We have not received your client's responses to the Discovery Requests, nor have we received your client's initial disclosures. Please consider this letter to be our second—and final—meet and confer effort concerning your client's wholesale failure to respond to the Discovery Requests and to serve the mandatory initial disclosures.

Failure to Serve Mandatory Initial Disclosures

As you are aware, TBMP § 401.02 provides that "[e]ach party involved in an inter partes proceeding is obligated to make initial disclosures to every other party, by the deadline set in the Board's institution order" 37 C.F.R. § 2.120(a). Your client's initial disclosures were due on April 3, 2014; yet, we have not received these disclosures. So that we can avoid filing a motion to compel, please immediately serve a copy of your client's initial disclosures.

K&L GATES

Paul S. Suda
Law Offices of Paul S. Suda
June 18, 2014
Page 2

Failure to Respond to Discovery Requests

The Board makes extremely clear that it “expects parties (and their attorneys or other authorized representatives) to cooperate with one another in the disclosure and discovery process, and looks with extreme disfavor on those who do not.” TBMP § 408.01 (and cases cited therein). For that reason, it is surprising to us that your client simply dispensed with its discovery obligations and elected not to respond to Opposer’s Discovery Requests. So that we can avoid filing a motion to compel, please immediately produce Applicant’s responses to the Discovery Requests.

In addition to the foregoing, please be aware that our client intends to file a motion for an order finding that (1) all Requests for Admission are deemed admitted, and (2) Workout Anytime has waived its right to object to the Discovery Requests on their merits. *See* Fed. R. Civ. P. 36(a)(3) (“A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney”); TBMP §§ 524.01 and 527.01(c).

Deposition Pursuant to Fed. R. Civ. P. 30(b)(6)

As you are aware, Opposer noticed the deposition of your client pursuant to Federal Rules of Civil Procedure 30(b)(6). Pursuant to the notice, the deposition was scheduled for June 23, 2014 in the Atlanta, GA office of Littler Mendelson P.C., and Applicant was required to identify the person who will speak on its behalf at least seven (7) days before the deposition. Because Applicant has not yet identified the person who will speak on its behalf, and because Applicant has not responded to the Discovery Requests, we assume that your client will not participate in this deposition. Please be aware that we intend to re-notice your client’s deposition for ten (10) days after receipt of your client’s responses to the Discovery Requests, or as otherwise ordered by the Board.

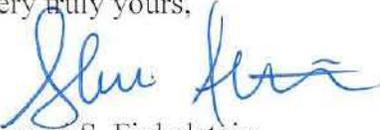
Please be aware that if we do not receive your client’s responses to the Discovery Requests and Initial Disclosures by **June 25, 2014**, we will have no choice but to file a motion to compel and seek immediate entry of sanctions. TBMP §§ 411 and 523; 37 C.F.R. § 2.120(g)(2). We look forward to your prompt response.

K&L GATES

Paul S. Suda
Law Offices of Paul S. Suda
June 18, 2014
Page 3

This letter is without prejudice to any rights 24 Hour Fitness may have, each of which is reserved.

Very truly yours,



Sharoni S. Finkelstein

Encls.

cc: 24 Hour Fitness USA, Inc.



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sharoni.finkelstein@klgates.com

May 13, 2014

VIA CERTIFIED MAIL/RETURN RECEIPT REQUESTED AND
E-MAIL (SUDALAW@BELLSOUTH.NET)

Paul S. Suda
Law Offices of Paul S. Suda
1362 Salem Drive
Alpharetta, GA 30009

CONFIDENTIAL SETTLEMENT COMMUNICATIONS
FEDERAL RULE OF EVIDENCE 408

Re: *24 Hour Fitness USA, Inc. v. Workout Anytime Franchising Systems, LLC*
TTAB Opposition No. 91214193

Dear Mr. Suda:

This letter is in follow up to our letter to you of April 18, 2014 regarding the above matter. We still have not received your response to our letter, in which we addressed the possibility of settling this matter. Despite your earlier representation that your client desires to resolve this matter amicably, we are concerned by your failure to respond to our correspondence and your client's failure to cooperate in the Board discovery process.

Pursuant to the Trademark Trial and Appeal Board Manual of Procedure ("TBMP") § 401.02, "[e]ach party involved in an inter partes proceeding is obligated to make initial disclosures to every other party, by the deadline set in the Board's institution order" 37 C.F.R. § 2.120(a). According to the Board's institution order, your client's initial disclosures were due on April 3, 2014; yet, we have not received these disclosures. Please consider this letter to be our meet and confer effort concerning your client's failure to make the requisite disclosures. So that we can avoid filing a motion to compel, please immediately serve a copy of your client's initial disclosures. If we do not receive your client's disclosures by May 19, 2014, we will have no choice but to bring a motion to compel. TBMP §§ 411.01 and 523.

In addition to the foregoing, please find enclosed 24 Hour Fitness' First Set of Interrogatories, First Set of Requests for Production of Documents, First Set of Requests for Admission, and Notice of Deposition Pursuant to Fed. R. Civ. P. 30(b)(6). Further, in order to facilitate the discovery process, we are again enclosing a copy of the Standard Protective Order for your review and signature.

K&L GATES

Paul S. Suda
Law Offices of Paul S. Suda
May 13, 2014
Page 2

We look forward to hearing from you by **May 19, 2014**. This letter is without prejudice to any rights 24 Hour Fitness may have, each of which is reserved.

Very truly yours,



Sharoni S. Finkelstein

Encls.

cc: 24 Hour Fitness USA, Inc.