

ESTTA Tracking number: **ESTTA618643**

Filing date: **07/30/2014**

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

**Notice of Opposition**

Notice is hereby given that the following party opposes registration of the indicated application.

**Opposer Information**

Name	24 Hour Fitness USA, Inc.
Granted to Date of previous extension	07/30/2014
Address	12647 Alcosta Blvd., 5th Floor San Ramon, CA 94583 UNITED STATES

Attorney information	Susan E. Hollander, Esq. K&L Gates LLP 4 Embarcadero Center, Suite 1200 San Francisco, CA 94111-5994 UNITED STATES sftrademarks@klgates.com, sharoni.finkelstein@klgates.com, eve.gornall@klgates.com, rizalina.florencio@klgates.com Phone:415-882-8200
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**Applicant Information**

Application No	86113978	Publication date	04/01/2014
Opposition Filing Date	07/30/2014	Opposition Period Ends	07/30/2014
Applicant	Pro Nutra, LLC 3149 SW 42nd Street, #200 Hollywood, FL 33312 UNITED STATES		

**Goods/Services Affected by Opposition**

Class 005. First Use: 0 First Use In Commerce: 0 All goods and services in the class are opposed, namely: Dietary and nutritional supplements
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**Grounds for Opposition**

Priority and likelihood of confusion	Trademark Act section 2(d)
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**Marks Cited by Opposer as Basis for Opposition**

U.S. Registration No.	4179095	Application Date	11/30/2011
Registration Date	07/24/2012	Foreign Priority Date	NONE
Word Mark	APEX FIT 150		

Design Mark			
Description of Mark	The mark consists of "APEX" with two arrows following the "X", a vertical "FIT" and horizontal "150".		
Goods/Services	Class 029. First use: First Use: 2011/05/00 First Use In Commerce: 2011/05/00 Food products, namely, protein based snack foods		

U.S. Registration No.	4283994	Application Date	02/23/2012
Registration Date	01/29/2013	Foreign Priority Date	NONE

Word Mark	APEX FIT 150
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Design Mark			
Description of Mark	The mark consists of "APEX" with two arrows following the "X", a vertical "FIT" and horizontal "150".		
Goods/Services	Class 005. First use: First Use: 2011/05/00 First Use In Commerce: 2011/05/00 Nutritional products, namely, nutritional supplements and dietary supplements in the nature of nutritional bars and cookies; food supplements; meal supplements, namely, calcium supplements; dietary supplement drink mixes and powders		

Attachments	85483617#TMSN.png( bytes ) 85550873#TMSN.png( bytes ) Notice of Opposition_FIT 15 (Pro Nutra, LLC)_for filing.pdf(1475707 bytes )
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### Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address

record by First Class Mail on this date.

Signature	/Sharoni S. Finkelstein/
Name	Sharoni S. Finkelstein
Date	07/30/2014

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

**In the matter of Application Serial No. 86/113,978  
Published in the *Official Gazette* on April 1, 2014  
Mark: FIT 15**

**24 Hour Fitness USA, Inc.,**

**Opposer,**

**v.**

**Pro Nutra, LLC,**

**Applicant.**

**OPPOSITION NO.** \_\_\_\_\_

**NOTICE OF OPPOSITION**

24 Hour Fitness USA, Inc., a corporation organized and existing under the laws of California, with a business address of 12647 Alcosta Boulevard, 5th Floor, San Ramon, California 94583 (“Opposer”) believes that it will be damaged by registration of the FIT 15 mark shown in Application No. 86/113,978, and hereby opposes its registration pursuant to 15 U.S.C. §§ 1051 *et seq.*, including specifically 15 U.S.C. § 1063.

This Notice of Opposition has been timely filed. As grounds for its opposition, Opposer alleges as follows:

1. Upon information and belief, applicant Pro Nutra, LLC is a Florida limited liability company with a mailing address of 3149 SW 42nd Street #200, Hollywood, Florida 33312 (“Applicant”).

2. As illustrated in Application Serial No. 86/113,978, Applicant seeks to register the mark FIT 15 for “Dietary and nutritional supplements” in International Class 41.

3. Since at least as early as May 2011, Opposer has continuously and pervasively used the mark APEX FIT 150 in commerce in the United States in connection with nutritional and dietary supplements.

4. Opposer is the owner of Registration No. 4,179,095 for the mark APEX FIT 150 & Design which covers “Food products, namely, protein based snack foods” in Class 29, and Registration No. 4,283,994 for the mark APEX FIT 15 & Design which covers “Nutritional products, namely, nutritional supplements and dietary supplements in the nature of nutritional bars and cookies; food supplements; meal supplements, namely, calcium supplements; dietary supplement drink mixes and powders” in Class 5 (collectively, the “APEX FIT 150 Marks”). True and correct copies of Opposer’s APEX FIT 150 trademark registrations are attached hereto as Exhibit A.

5. Today, Opposer’s distinctive APEX FIT 150 Marks are highly recognizable and valuable marks in the nutritional supplement industry. Opposer’s products bearing the APEX FIT 150 Marks are sold, *inter alia*, throughout Opposer’s health and fitness chains in the United States. Opposer currently offers more than 400 facilities located throughout the United States with membership of more than 3.5 million. Accordingly, due to the national consumer recognition and goodwill of Opposer’s APEX FIT 150 Marks, consumers have come to recognize the APEX FIT 150 Marks as symbolizing the goodwill inherent in the APEX FIT 150 Marks and, further, to associate the APEX FIT 150 Marks solely with Opposer and its high quality dietary and nutritional products.

6. No issue of priority exists with respect to Opposer’s first use of its APEX FIT 150 Marks as set forth above and Applicant’s FIT 15 mark. Opposer has used, promoted and advertised its goods under its APEX FIT 150 Marks in commerce in the United States since at

least as early as May 2011. Conversely, Applicant filed Application Serial No. 86/113,978 for FIT 15 on November 8, 2013, and bases its application on Section 1(b) of the Lanham Act.

Applicant has not yet submitted a Statement of Use, nor has it claimed an earlier date of first use.

7. Applicant's proposed FIT 15 mark is confusingly similar to Opposer's APEX FIT 150 Marks because it is similar in appearance, meaning, and overall impression pursuant to 15 U.S.C. § 1052(d). Among other things, Applicant's FIT 15 mark consists entirely of an excerpt of Opposer's APEX FIT 150 Marks, which makes it confusingly similar to Opposer's APEX FIT 150 Marks. In addition, Applicant's FIT 15 mark is nearly identical to Opposer's stylized APEX FIT 150 Marks, which prominently features the terms FIT 150.

8. In addition, Applicant's FIT 15 mark creates a similar commercial impression as Opposer's APEX FIT 150 Marks. Opposer uses its APEX FIT 150 Marks in connection with its well known dietary and nutritional supplements, and related products. Consumers are accustomed to seeing the APEX FIT 150 Marks used by Opposer in connection with Opposer's dietary and nutritional supplements and are likely to assume that Applicant's FIT 15 mark is associated with Opposer's APEX FIT 150 Marks and supplements.

9. The goods that Opposer sells under its APEX FIT 150 Marks, namely, dietary and nutritional supplements in Class 5 (and related goods) are identical to the goods described in Applicant's application for FIT 15.

10. Applicant's goods would also be marketed and advertised through overlapping channels as Opposer's goods. Both parties would be marketing their respective dietary and nutritional supplements, for example, on the Internet. Due to the overlap in marketing channels, prospective purchasers and others are likely to be confused as to whether Applicant's goods offered under the FIT 15 mark emanate from and/or are in some way affiliated with, or

sponsored or approved by, Opposer or are otherwise related to Opposer and/or Opposer's products, thereby damaging Opposer.

11. Given the goodwill and public recognition arising from the association of the distinctive APEX FIT 150 Marks with Opposer, consumers are likely to believe that Opposer has licensed, approved or otherwise authorized Applicant's use of the FIT 15 mark, when it has not.

12. The maturation of Applicant's application into registration will cause a likelihood of confusion, mistake or deception with respect to the source or origin of Applicant's goods. Consumers will erroneously believe that Applicant's services are produced by, licensed, or associated with Opposer.

13. Pursuant to 15 U.S.C. § 1063(a), Opposer will be damaged by registration of Applicant's proposed mark, which would grant Applicant a *prima facie* exclusive right to use the proposed mark despite Opposer's priority over Applicant, resulting in the likelihood of confusion as well as the likelihood of dilution and injury to Opposer's goodwill.

14. In summary, registration of the proposed mark would be incorrect and improper in view of the requirements of the Trademark Act of 1946, as amended, including specifically but not limited to the provisions of 15 U.S.C. §§ 1051, *et seq.*

WHEREFORE, Opposer prays that this Opposition be sustained, and that registration to Applicant for FIT 15 in Application Serial No. 86/113,978 be denied.

Opposer submits this Notice of Opposition via the e-filing procedure of the Trademark Trial and Appeal Board, and hereby authorizes the Board to debit Deposit Account No. 021818 of K&L Gates LLP for the appropriate filing fee of \$300.00. Please direct all notices, pleading and correspondence in this matter to the undersigned counsel for Opposer.

Respectfully submitted,



Dated: July 30, 2014

Susan E. Hollander  
Sharoni S. Finkelstein  
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Four Embarcadero Center  
Suite 1200  
San Francisco, CA 94111  
Phone: 415.882.8200  
Fax: 415.882.8220  
Attorneys for Opposer  
24 Hour Fitness USA, Inc.

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **NOTICE OF OPPOSITION** has been properly served, via U.S. Mail, on the following correspondent for Applicant on this 30th day of July, 2014.

John C. Carey  
Carey Rodriguez et al LLP  
1395 Brickell Avenue, Suite 700  
Miami, FL 33131

  
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Riza Florencio

## **EXHIBIT A**

United States of America  
United States Patent and Trademark Office

**apex**   
**FIT 150**

**Reg. No. 4,179,095**

24 HOUR FITNESS USA, INC. (CALIFORNIA CORPORATION)  
12647 ALCOSTA BLVD., 5TH FLOOR  
SAN RAMON, CA 94583

**Registered July 24, 2012**

**Int. Cl.: 29**

FOR: FOOD PRODUCTS, NAMELY, PROTEIN BASED SNACK FOODS, IN CLASS 29 (U.S. CL. 46).

**TRADEMARK**

FIRST USE 5-0-2011; IN COMMERCE 5-0-2011.

**PRINCIPAL REGISTER**

OWNER OF U.S. REG. NOS. 3,045,062, 4,050,607 AND OTHERS.

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "150", APART FROM THE MARK AS SHOWN.

THE MARK CONSISTS OF "APEX" WITH TWO ARROWS FOLLOWING THE "X", A VERTICAL "FIT" AND HORIZONTAL "150".

SER. NO. 85-483,617, FILED 11-30-2011.

GILBERT SWIFT, EXAMINING ATTORNEY



*David J. Kyfos*

Director of the United States Patent and Trademark Office

# United States of America

United States Patent and Trademark Office

**apex**  
**150**  
**FIT**

**Reg. No. 4,283,994**

24 HOUR FITNESS USA, INC. (CALIFORNIA CORPORATION)  
12647 ALCOSTA BLVD., 5TH FLOOR  
SAN RAMON, CA 94583

**Registered Jan. 29, 2013**

**Int. Cl.: 5**

FOR: NUTRITIONAL PRODUCTS, NAMELY, NUTRITIONAL SUPPLEMENTS AND DIETARY SUPPLEMENTS IN THE NATURE OF NUTRITIONAL BARS AND COOKIES; FOOD SUPPLEMENTS; MEAL SUPPLEMENTS, NAMELY, CALCIUM SUPPLEMENTS; DIETARY SUPPLEMENT DRINK MIXES AND POWDERS, IN CLASS 5 (U.S. CLS. 6, 18, 44, 46, 51 AND 52).

**TRADEMARK**

**PRINCIPAL REGISTER**

FIRST USE 5-0-2011; IN COMMERCE 5-0-2011.

OWNER OF U.S. REG. NOS. 3,045,062, 4,050,608, AND OTHERS.

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "150", APART FROM THE MARK AS SHOWN.

THE MARK CONSISTS OF "APEX" WITH TWO ARROWS FOLLOWING THE "X", A VERTICAL "FIT" AND HORIZONTAL "150".

SN 85-550,873, FILED 2-23-2012.

GILBERT SWIFT, EXAMINING ATTORNEY



*David J. Kyfos*

Director of the United States Patent and Trademark Office