

ESTTA Tracking number: **ESTTA1144455**

Filing date: **07/02/2021**

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

Proceeding	91269478
Party	Defendant Home Brew Mart, Inc.
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Date	07/02/2021
Attachments	Applicant_s Answer to Notice of Opposition - 07 02 2021.pdf(128577 bytes )

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

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Tootsie Roll Industries, LLC,	)	
	)	
Opposer,	)	Opp. No. 91269478
	)	
v.	)	Mark: DOT'S
	)	Serial No. 90/294,127
Home Brew Mart, Inc.,	)	
	)	
Applicant.	)	

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**APPLICANT’S ANSWER TO NOTICE OF OPPOSITION**

Applicant, Home Brew Mart, Inc. (“Home Brew Mart”), for its answer to the Notice of Opposition of Tootsie Roll Industries, LLC (“Opposer”) states as follows:

1. Applicant seeks to register the mark DOT’S, in standard character form, as a trademark mark for “Beer; Beer-based cocktails; Fruit drinks and fruit juices; Mineral and aerated waters.”

**ANSWER:** Applicant admits that it seeks to register the mark DOT’S, in standard character form, as a trademark for “Beer; beer-based cocktails.” Applicant does not seek to use or register the mark DOT’S as a trademark for “Fruit drinks and fruit juices; Mineral and aerated waters.” Applicant has filed a Motion to Amend Application, which would exclude “Fruit drinks and fruit juices; Mineral and aerated waters” from Application Serial No. 90/294,127 and, therefore, Applicant denies the remaining allegations contained in Paragraph 1.

2. The opposed Application was filed on November 12, 2020, based upon an alleged bona fide intention to use the mark in commerce under Section 1(b) of the Lanham Act.

**ANSWER:** Applicant admits that it filed the opposed application under Section 1(b) of the Lanham Act. Applicant denies that it filed the application on November 12, 2020.

3. From a date long prior to Applicant's filing date, Opposer has continuously and extensively used the trademark DOTS in connection with candy and other products, including clothing, jewelry, cosmetics, picture frames, stationery, toy banks, and other ancillary products.

**ANSWER:** Applicant lacks sufficient knowledge and information to form a belief as to the truth of the allegations contained in Paragraph 3 and therefore denies them.

4. Opposer is the owner of United States Trademark Registration No. 1,098,933 for the mark DOTS for "candy." Said registration issued on August 8, 1978. Under 15 U.S.C. § 1115(b), said registration is conclusive evidence of the validity of the registered mark, of Opposer's ownership thereof, and of Opposer's exclusive right to use this mark in commerce in connection with the goods specified in the registration. Pursuant to Trademark Rule 2.122(d), attached is a printout of the electronic record of the USPTO for said registration.

**ANSWER:** Applicant lacks sufficient knowledge and information to form a belief as to the truth of the factual allegations contained in Paragraph 4 and therefore denies them. With respect to the legal conclusions no response is required. The USPTO records speak for themselves.

5. The goods set forth in Application Serial No. 90/294,127 are closely related to the goods with which Opposer has used and is using its mark DOTS. On information and belief, Applicant's goods will be offered to the same general classes of consumers who purchase the goods with which Opposer has used and is using its DOTS mark.

**ANSWER:** Applicant lacks sufficient knowledge and information to form a belief as to the truth of the allegations contained in Paragraph 5 and therefore denies them.

6. The mark DOT'S sought to be registered by Applicant is legally identical to Opposer's registered mark DOTS.

**ANSWER:** Denied.

7. In view of the legal identity of the involved marks and the close relatedness of the involved goods, if Applicant's proposed mark is used in connection with its identified goods, such use would be likely to cause confusion, mistake, or deception of relevant consumers as to the source of Applicant's products. Customers and potential customers are likely to believe that Applicant's goods offered under the mark DOT'S emanate from, or are licensed or approved by, Opposer, when that is not the case. Any dissatisfaction with Applicant's goods will reflect upon and irreparably damage the reputation and goodwill of Opposer as embodied in its DOTS mark. Consequently, there exists a likelihood of confusion under Section 2(d) of the Lanham Act.

**ANSWER:** With respect to the legal conclusions in Paragraph 7, no response is required. Applicant denies the remaining allegations in Paragraph 7.

8. For purposes of the anti-dilution provisions of Section 43(c) of the Lanham Act, Opposer's mark DOTS has become famous from a time long prior to Applicant's filing date.

**ANSWER:** The allegations in Paragraph 8 are legal conclusions, to which no response is required. To the extent a response is required, Applicant denies the allegations in Paragraph 8.

9. Applicant's use of the mark DOT'S is likely to dilute by blurring, and thereby impair, the distinctive quality of Opposer's DOTS trademark, in violation of Section 43(c).

**ANSWER:** The allegations in Paragraph 9 are legal conclusions, to which no response is required. To the extent a response is required, Applicant denies the allegations in Paragraph 9.

10. If Applicant is granted the registration herein opposed, it would thereby obtain a prima facie exclusive right to use the mark DOT'S for its goods, which would be a further source of damage to Opposer.

**ANSWER:** The allegations in Paragraph 10 are legal conclusions, to which no response is required. To the extent a response is required, Applicant denies the allegations in Paragraph 10.

## AFFIRMATIVE DEFENSES

Applicant hereby asserts the following affirmative defenses. Applicant reserves the right to add additional affirmative defenses under Rule 8(c) of the Federal Rules of Civil Procedure, the laws of the United States, and any other legal or equitable defenses that may now exist or in the future be available based on further investigation and discovery in this case.

### **FIRST AFFIRMATIVE DEFENSE (15 U.S.C. § 1068)**

Pursuant to 15 U.S.C. § 1068 and Rules 514.03 and 311.02(b) of the Trademark Trial and Appeal Board Manual of Procedure (“TBMP”) and related regulations, Applicant is at least entitled to registration of the DOT’S mark for Applicant’s specified proposed amended goods. In accordance with Applicant’s Motion to Amend Application filed with the Board, Applicant proposes to amend the identification of goods in Application Serial No. 90/294,127 (the “Application”) to delete the Class 32 goods shown in bold and strikethrough (the “Proposed Excluded Goods”) as follows:

Beer; Beer-based cocktails; ~~**Fruit drinks and fruit juices; Mineral and aerated waters**~~

For clarity, if this amendment is allowed, the resulting identification of goods would be as follows: “Beer; beer-based cocktails” in Class 32 (the “Proposed Amended Goods”). Applicant notes that the reason for the amendment is that Applicant does not now have an intent to use the applied-for mark for the Proposed Excluded Goods. Consistent with TBMP Rule 311.02(b)(1), Applicant’s proposed amendment “will avoid a likelihood of confusion” and “plaintiff is not using the mark on the products or services being excluded from the [application].” TBMP Rule 311.02(b)(1).

Applicant's Motion to Amend Application under 37 C.F.R. § 2.133, TBMP Rule 514.03, and governing TTAB precedent, establishes that the Board may immediately grant the proposed amendment consistent with its authority under 15 U.S.C. § 1068.

WHEREFORE, Applicant respectfully requests that the Board dismiss this opposition with prejudice and order the Office to allow the Application to proceed toward registration.

Respectfully submitted this 2nd day of July, 2021,

**Home Brew Mart, Inc.**

By: s/ Jeffrey H. Brown /

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**CERTIFICATE OF SERVICE**

The undersigned certifies that on July 2, 2021 the foregoing APPLICANT'S ANSWER TO NOTICE OF OPPOSITION was served by email upon Opposer's attorney to the email addresses listed below:

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*s/ Jeffrey H. Brown /* \_\_\_\_\_