

**DECISION
of the First Board of Appeal
of 25 October 2018**

In Case R 2333/2017-1

Andrew Hines

PO BOX 12822

Birmingham B32 9BB

United Kingdom

EUTM Proprietor / Appellant

represented by BARKER BRETTELL LLP, 100 Hagley Road, Edgbaston,
Birmingham B16 8QQ, United Kingdom

v

Sweet Seeds, S.L.

C/Reverendo Jose Maria Pinazo n° 9, bajo.

46020 Valencia

Spain

Pot Sistemak, S.L.

C/ Portuetxe, 83

E-20018 Donostia-San Sebastián

Spain

Cancellation Applicants / Defendants

represented by GARRIGUES IP, S.L.P, C/ San Fernando 57, 03001 Alicante, Spain

APPEAL relating to Cancellation Proceedings No 13 000 C (European Union trade
mark registration No 13 924 139)

THE FIRST BOARD OF APPEAL

composed of Th. M. Margellos (Chairperson), Ph. von Kapff (Rapporteur) and M. Bra
(Member)

Registrar: H. Dijkema

gives the following

Decision

Summary of the facts

- 1 By an application filed on 9 April 2015, Andrew Hines ('the EUTM proprietor') sought to register the word mark

CHEESE

for the following list of goods:

Class 31 – Grains and agricultural, horticultural and forestry products not included in other classes; seeds.

- 2 The application was published on 30 June 2015 and the mark was registered on 7 October 2015.
- 3 On 20 May 2016, Sweet Seeds, S.L. and Pot Sistemak, S.L. ('the cancellation applicants') filed a request for a declaration of invalidity of the registered mark for all the above goods. They argued inter alia as follows:

- The contested application is a refiling of the same trade mark after an initial filing 1 0556 843 on 12 January 2012, regarding

Class 31 – grains and agricultural, horticultural and forestry products not included in other classes; seeds; foodstuffs for animals'

which was rejected by decision of 18 May 2012 pursuant to Article 7(1)(b) and (c) EUTMR.

- The EUTM consists of a word which refers to a kind of cannabis seed. The term 'CHEESE' is known by manufacturers, retailers and consumers active in the relevant industry as the name of a variety of marijuana seed.
- The cancellation applicants filed in particular the following evidence:
 - Exhibit 1: a copy of the Office's 'notice of grounds for refusal' of 13/02/2012 for EUTM application No 10 556 843 'CHEESE' (word mark), which was not considered registrable for part of the goods applied for in Class 31, namely 'grains and agricultural, horticultural and forestry products not included in other classes; seeds; foodstuffs for animals', pursuant to Article 7(1)(b) and (c) EUTMR.
 - Exhibit 2: a copy of the Office's 'refusal of application' of 18/05/2012 for the EUTM application No 10 556 843 confirming the partial objection raised in the letter above.
 - Exhibit 3: Printouts of the website <https://amsterdammarijuanaseeds.com> featuring a description of 'Cheese marijuana seeds'. Reference is also made to other strain variations indicated as 'cheese autofem' and 'cheese

feminized’. The printouts are undated and only bear a printing date of 16/05/2016.

- Exhibit 4: Printouts of the website www.cannabis-seeds.co.uk featuring the following description of ‘Cheese seeds’: ‘

If it’s Cheese Seeds you crave, The Rhino knows how to satisfy! This extra pungent, mutant Skunk strain has been the best-selling cannabis seed in Great Britain since it was first discovered decades ago, and you can find a full menu on this page. Say Cheese!’

Reference is also made to several ‘cheese seeds’ varieties indicated as ‘cheese#1’, ‘cheese dawg’, ‘cheese quattro’, ‘cheese tease’, ‘cream cheese’, etc. The printouts are undated and only bear a printing date of 16/05/2016.

- Exhibit 5: Printouts of the website <https://suzyseeds.com> referring to the ‘classic cheese’ as ‘a [...] legendary cannabis strain. It is one of the most smoked cannabis strains in the United Kingdom. This is not unusual, given that Classic Cheese was also born there. Its genetics were initially only available in clone form in the British underground scene [...]’. The printouts are undated and only bear a printing date of 16/05/2016.
- Exhibit 6: Undated printouts of the website www.leafly.com providing the following description of the ‘cheese strain’: ‘Named for its sharply sour aroma, Cheese is an indica-dominant hybrid from the U.K. that has achieved widespread popularity for its unique flavor and consistent potency. With origins that stretch back to the late 1980s, Cheese is said to descend from a Skunk #1 phenotype whose pungent aroma made it stand out. Breeders like Big Buddha Seeds later introduced Afghani indica genetics to increase Cheese’s trichome production and yields. The resulting hybrid is now well-known for its relaxed, happy effects that gently ease you into a blissful state of mind.’
- Exhibit 7: Printouts of the website www.bigbuddhaseeds.com referring to ‘Big Buddhas’ Cheese x Cheese Reversed’ as ‘the world’s greatest, purest cheese seed ever created. Probably the best cheese seed in the universe...’.

‘Big Buddha Cheese’ is also indicated as: “‘The Cheese’ ‘is the UK’s #1 strain, which we crossed with our pure Afghani male. Two years of selective backcrossing has allowed us to isolate specific traits we loved from the cheese. The Big Buddha Cheese Feminised seed retains its mother’s old skool taste and, with the help of Afghani, has a higher overall yield than the original cheese mother. NOW Feminised, The Big Buddha Cheese has now truly become the UK’s #1 strain!’

The printouts are undated and only bear a printing date of 16/05/2016.

- Exhibit 8: a copy of the judgement of 16/10/2015 No 222/2015 issued by the EUTM Court of Appeal of Alicante accompanied by its translation into English. These proceedings concerned an infringement action brought by a representative of the EUTM proprietor’s company (BBSCO Limited) against the company Pot Sistemak, S.L. (one of the applicants) on the alleged infringement of the EUTM proprietor’s EUTM No 11 877 578 ‘BLUE CHEESE’. Although the validity of the EUTM ‘BLUE CHEESE’ was not the subject of the proceedings, as the defendant (Pot Sistemak, S.L.) did not raise a counterclaim action, the Spanish judge found that there was no infringement of the EUTM ‘BLUE

CHEESE' as the relevant public would recognise this expression as the name of a cannabis seed variety.

- The 'urban dictionary' website, with definitions uploaded in 2008 and 2010 indicating that the term cheese was already associated with cannabis seeds and plants before the date of filing of the contested EUTM.
- Several websites contain references to the expression under examination indicating, inter alia, the following: 'cheese weed marijuana seeds [...] are developed by the best Dutch growers'; cheese 'strain has been the best-selling cannabis seed in Great Britain'; cheese is a 'legendary cannabis strain. It is one of the most smoked cannabis strains in the United Kingdom'; 'Cheese is known as one of the most potent strains'; Cheese, a strain known worldwide for its pungent flavour'. Several varieties of cheese seeds (i.e. 'cheese auto-fem', 'cheese feminized', 'cheese#1', 'cheese dawg', 'cheese quattro', 'cheese tease', 'cream cheese', etc.) are sold through different websites.
- Invoices - relating to the use of the expression 'CHEESE' for cannabis seeds in the Spanish market.

4 The EUTM proprietor argued that the word has been coined by himself and the trade mark licensed to third parties. he files inter alia the following evidence:

- The EUTM proprietor has worked for a so-called 'seed bank' - a creator/manufacturer of genetic seeds - known as 'Big Buddha Seeds', which participated at the international competition 'Cannabis Cup' where it came in third and first in 2005 and 2006, respectively. It further appears from the evidence that 'Big Buddha Seeds' is known as a successful seed bank that has developed 'cheese seeds' crossing different cannabis strains.
- The licence agreements signed with third parties demonstrate that a legitimate control over the use of the EUTM has been exercised.
- References to the participation at the competition 'Cannabis Cup', providing a list of cannabis seeds, general information on the business activity carried out under the name 'Big Buddha Seeds' and proof that the EUTM proprietor signed three license agreements with third parties.

5 The EUTM proprietor filed his observations to the cancellation application on 30 August 2016, stating inter alia on page 21:

'In the highly unlikely event the Office considers the evidence filed by SS & PS's attorneys to be sufficient to prove the mark is descriptive, devoid of distinctive character and customary, we expressly reserve the right to file evidence of use to prove that the mark has acquired distinctiveness.'

6 The cancellation applicants filed their observations in reply on 27 October 2017.

7 With a letter dated 27 October 2016 the Office gave to the EUTM proprietor the possibility of a rejoinder.

8 On 30 December 2016 the EUTM proprietor filed his observations in the second round without filing any further evidence.

- 9 The grounds of the request for a declaration of invalidity were those laid down in Article 59(1)(a) in conjunction with Article 7(1)(b), (c), (d) EUTMR.
- 10 By decision of 30 August 2017 ('the contested decision') the Cancellation Division declared the invalidity of the contested EUTM for all the goods applied for, namely:

Class 31 - Grains and agricultural, horticultural and forestry products not included in other classes; seeds.

It gave, in particular, the following grounds for its decision:

Absolute grounds for invalidity – Article 59(1)(a) EUTMR in conjunction with Article 7 EUTMR

- The relevant point in time is the date of application for registration of the contested EUTM, namely 9 April 2015.
- These goods are addressed at both the public at large and professionals operating in the agricultural, horticultural and forestry industry. For instance, 'seeds' are directed at consumers, who are interested in plants and planting seeds, as well as at specialists in the art, science, technology and business of growing plants. The public's attention will vary from normal to high according to the degree of specialisation in the relevant sector.
- Since the applicants have focused their evidence on the use of the contested EUTM in the Netherlands, Spain and the UK, the relevant public for this assessment consists of the Dutch, English and Spanish speaking part of the Union.
- The EUTM proprietor contests the probative value of the applicants' evidence stating that it is partly undated and contains no clear indication as to the EUTM being descriptive of a characteristic of the relevant goods in Class 31. In this regard, although the documentation filed within the first submissions was mainly undated, the extracts from the internet archive 'Wayback machine' presented on 27/10/2016 refer to the sale of different varieties of 'cheese seeds' between 10/04/2014 and 16/03/2015, at least, in the territory of the Netherlands and the UK.

Descriptiveness (Article 7(1)(c) EUTMR)

- The arguments and evidence presented by the applicants to support the claim that the EUTM consists of a word which refers to a kind of cannabis seed is convincing. In particular, from the applicants' documentation it appears that the term 'CHEESE' is known by manufacturers, retailers and consumers active in the relevant industry as the name of a variety of marijuana seed. Therefore, the Cancellation Division considers that a purchaser of cannabis seeds would make a direct and immediate mental link between the EUTM and the contested goods at the time of filing of the contested sign.
- Moreover, even if, according to the EUTM proprietor, the 'urban dictionary' website possesses doubtful authority since the definitions contained therein

can be entered by volunteer editors, the definitions provided were uploaded in 2008 and 2010 clearly indicating that the term cheese was already associated to cannabis seeds and plants before the date of filing of the contested EUTM.

- Several websites contain references to the expression under examination indicating, inter alia, the following: ‘cheese weed marijuana seeds [...] are developed by the best Dutch growers’; cheese ‘strain has been the best-selling cannabis seed in Great Britain’; cheese is a ‘legendary cannabis strain. It is one of the most smoked cannabis strains in the United Kingdom’; ‘Cheese is known as one of the most potent strains’; ‘Cheese, a strain known worldwide for its pungent flavour’. Several varieties of cheese seeds (i.e. ‘cheese auto-fem’, ‘cheese feminized’, ‘cheese#1’, ‘cheese dawg’, ‘cheese quattro’, ‘cheese tease’, ‘cream cheese’, etc.) are sold through different websites.
- The EUTM proprietor’s observations and evidence have shown that he has worked for a so-called ‘seed bank’ - a creator/manufacturer of genetic seeds - known as ‘Big Buddha Seeds’, which participated at the international competition ‘Cannabis Cup’ where it came in third and first in 2005 and 2006, respectively. It further appears from the evidence that ‘Big Buddha Seeds’ is known as a successful seed bank that has developed ‘cheese seeds’ crossing different cannabis strains. However, this documentation says little about recognition of the word cheese as a trade mark amongst the relevant public. The material does not show that the goods under the contested EUTM were effectively sold and provided. Further, there is no independent evidence showing how intensive, geographically widespread and long-standing use of the mark has been.
- The EUTM proprietor claims that the licence agreements signed with third parties demonstrate that a legitimate control over the use of the EUTM has been exercised. However, those are private agreements between the parties involved, which provide no information on the perception of the relevant public over the mark, namely if consumers rely on the word cheese as a distinctive sign or as the name of a product.
- It follows that the evidence as a whole does not indicate that ‘Cheese’ is a proprietary term for the contested goods in Class 31 from a particular source or subject to proprietary rights. Rather, the documents show that consumers understand and use the term in a far simpler way; for them ‘Cheese’ is merely the name of a type of cannabis seeds.
- The EUTM proprietor’s evidence essentially consists of extracts from the Internet, copies of license agreements and references to the participation at the competition ‘Cannabis Cup’. This kind of evidence provides a list of cannabis seeds, general information on the business activity carried out under the name ‘Big Buddha Seeds’ and shows that the EUTM proprietor signed three license agreements with third parties.
- Nonetheless, it gives no direct information relating to the criteria of assessment as defined by the case-law, that is the market share held by the disputed mark, how intensive, geographically widespread and long-standing use of the mark has been, the amount invested by the undertaking in promoting the mark, the proportion of the relevant class of persons who,

because of the mark, identify the relevant goods as originating from a particular undertaking, and statements from chambers of commerce and industry or other trade and professional associations (04/05/1999, C-108/97 and C-109/97, Chiemsee, EU:C:1999:230, § 49 and 51). The average consumers' awareness of the contested mark is not proven by this evidence.

- Since Article 7(1) EUTMR makes it clear that it is sufficient that one of the absolute grounds for refusal listed in that provision applies for the sign at issue not to be registrable as a European Union trade mark (28/06/2011, T-487/09, ReValue, EU:T:2011:317, § 80; 17/04/2013, T-383/10, Continental, EU:T:2013:193, § 71-72; 12/06/2013, T-598/11, Lean Performance Index, EU:T:2013:311, § 52), it is no longer necessary to consider, in the present case, the applicants' arguments alleging a breach of Article 7(1)(b) and (d) EUTMR.

Acquired distinctiveness

- Since the EUTM proprietor did not demonstrate that the mark had acquired distinctiveness through use, even though it had the chance to do so before the cancellation proceedings, this claim must be dismissed.
- 11 On 30 October 2017, the EUTM proprietor filed an appeal against the contested decision, requesting that the decision be entirely set aside. The statement of grounds of the appeal was received on 20 December 2017.
 - 12 In their response received on 5 March 2018, the cancellation applicants requested that the appeal be dismissed.

Submissions and arguments of the parties

- 13 The arguments raised in the statement of grounds may be summarised as follows:
 - To limit the relevant consumer by using evidence provided by one side only will inevitably lead to a skewed result which, as a result, has unfairly disadvantaged the other party without due cause.
 - It was not properly proven that the contested trade mark is descriptive in Spain. No information as to the level of understanding of the mark to the relevant consumer in Spain has been provided; nor has any evidence been provided that said consumers would understand the meaning of 'CHEESE'. The Examiner has taken it upon himself to make this assumption, without any validation whatsoever.
 - The EUIPO prima facie accepted the contested trade mark for registration. There is therefore a presumption of validity in respect of the mark and, as a result, a high burden on the applicants to prove that the previous decision was wrong.
 - The examiner has not considered all of the evidence presented by both parties and he does not assess properly the lack of dated material submitted by the applicants. The applicants have not provided any evidence which adheres to

the relevant point in time; none of their evidence dates from the date of application for registration of the contested EUTM and must therefore be disregarded.

- The Spanish evidence was not translated and should have been inadmissible, therefore.
- The EUTM proprietor has ‘expressly reserved the right to file evidence of use to prove that the mark has acquired distinctiveness’ which was disregarded by the Cancellation Division.
- The EUTM proprietor did not file any further evidence before the Board.

14 The arguments raised in reply to the appeal may be summarised as follows:

- Based on the provided evidence, the relevant public is correctly defined by the Cancellation Division;
- The Cancellation Division arrived at the unavoidable conclusion of declaring the invalidity of the contested EUTM precisely on the basis of the indisputable allegations and exhibits.
- Nevertheless, as can easily be seen, neither of the sets of evidence have the slightest relevance to the present appeal proceedings, since it is ‘under no discussion’ that the Cancellation Division did indeed take into account each of the observations and sets of evidence submitted by both parties and, by doing so, found that hat the EUTM consists exclusively of an indication that may serve, in trade, to designate a kind of the contested goods, the same situation already existed at the time of filing of the contested mark, and, therefore, the mark has been registered contrary to the provision of Article 7(1)(c) EUTMR;
- In this respect, the EUTM proprietor in essence, argues that ‘the previous refusal was a partial refusal only. It therefore does not prove that the contested mark is descriptive or devoid of distinctive character or generic in its entirety’. It is obvious that the said argument lacks any substantiation due to the fact the goods for which the previous trade mark application for registration was denied ‘grains and agricultural, horticultural and forestry products not included in other classes; seeds’ were exactly the same (!) as those for which the contested EUTM was applied and registered ‘grains and agricultural, horticultural and forestry products not included in other classes; seeds’; which shows, once again, that there is no basis to rely on the EUTM proprietor’s veracity.
- The EUTM proprietor had the chance to prove the acquired distinctiveness of the contested trade mark but did not use this opportunity in either round of the cancellation proceedings.

Reasons

15 All references made in this decision should be seen as references to the EUTMR (EU) No 2017/1001 (OJ 2017 L 154, p. 1), codifying Regulation (EC) No 207/2009 as amended, unless specifically stated otherwise in this decision.

- 16 The appeal complies with Articles 66, 67 and Article 68(1) EUTMR. It is admissible.

Scope of appeal

- 17 The appeal merely deals with the contested trade mark as referenced above.
- 18 It does not deal with the identical trade mark applied for (No 1 556 843) which was rejected on 18 May 2012 for the following goods

Class 31 – Grains and agricultural, horticultural and forestry products not included in other classes; seeds.

Nor did the Cancellation request the revocation of the contested mark in accordance with Article 58(1)(b) EUTMR because the trade mark has become the common name in the trade later than the filing date. Further, the decision does not deal with any possible plant breeders rights belonging to the proprietor.

- 19 That decision was not appealed and, consequently, it became final.
- 20 Nor does it deal with identical word mark 10 556 843 which, as in the present case, but unlike the application mentioned before, was actually registered for

Class 31 - Live animals; Fresh fruits and vegetables; Natural plants and flowers; Malt.

Article 59(1)(a) EUTMR

- 21 Pursuant to Article 59(1) EUTMR an EU trade mark shall be declared invalid on application to the Office where the EU trade mark has been registered contrary to the provisions of Article 7 EUTMR.
- 22 When the Office examines a trade mark application on absolute grounds, it must have regard to all the relevant facts and circumstances and it cannot carry out the examination in the abstract. Firstly, it must have regard to the characteristics peculiar to the mark and, in the case of a word mark, its meaning, in order to ascertain whether or not any of the grounds for refusal set out in Article 7 EUTMR apply. Secondly, it must have regard to the goods or services (12/02/2004, C-363/99, Postkantoor, EU:C:2004:86, § 31-35). Thirdly, regard must be had to the perception of the relevant public of the mark. Fourthly, it must have regard to previous decisions.
- 23 It may be stated that the Office did not decide in a coherent way with respect to the trade mark ‘CHEESE’, initially rejecting an application only to then allow re-filings. In the present case the examiner has allowed the application to proceed to registration, a decision which has now been challenged by the cancellation applicants.
- 24 In invalidity proceedings, and as a general principle, the Office cannot be required to carry out afresh the examination which the examiner conducted, of his own motion, of the relevant facts which could have led him to apply the absolute grounds for refusal (28/09/2016, T-476/15, FITNESS, EU:T:2016:568, § 47).

- 25 According to a string of the General Court case law, the European trade mark is regarded as valid until it has been declared invalid by EUIPO following invalidity proceedings. It therefore enjoys a presumption of validity, which is the logical consequence of the check carried out by EUIPO in the examination of an application for registration. By virtue of that presumption of validity, EUIPO's obligation, under Article 95(1) EUTMR, to examine of its own motion the relevant facts which may lead it to apply absolute grounds for refusal, is restricted to the examination of the application for a European trade mark carried out by the Examiners of EUIPO and, on appeal, by the Boards of Appeal during the procedure for registration of that mark. In invalidity proceedings, as the registered European trade mark is presumed to be valid, it is for the person who has filed the application for a declaration of invalidity to invoke before EUIPO the specific facts which call the validity of that trade mark into question.
- 26 It follows from the foregoing that, in the invalidity proceedings, the Cancellation Division and the Board of Appeal are not required to examine of their own motion the relevant facts which might have led them to apply the absolute ground for refusal set out in Article 7 EUTMR (13/09/2013, T-320/10, Castel, EU:T:2013:424, § 27-29).
- 27 Whether a trade mark should be registered or should be declared invalid must be assessed on the basis of the situation at the date of its application, not of its registration (judgment of 03/06/2009, T-189/07, Flugbörse, EU:T:2009:172, § 19-20; confirmed by order of 23/04/2010, C-332/09 P, Flugbörse, EU:C:2010:225, § 41-48 and 06/03/2014, C- 337/12 P – C-340/12 P, Surface covered with circles, EU:C:2014:129, § 59).

Article 7(1)(c) EUTMR

- 28 Pursuant to Article 7(1)(c) EUTMR in conjunction with Article 59(1)(a) EUTMR, trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service, or other characteristics of the goods or service are to be declared invalid.
- 29 Furthermore, Article 7(2) EUTMR states that 'paragraph 1 shall apply notwithstanding that the grounds of non-registrability obtain in only part of the European Union.'
- 30 This provision pursues an aim which is in the public interest, namely that descriptive signs should not be monopolised by a single undertaking (04/05/1999, C-108/97 & C-109/97, Chiemsee, EU:C:1999:230, § 25).
- 31 The public interest that names of plants shall not be registered as a trade mark also emerges from Article 20(1) of the International Convention for the Protection of New Varieties of Plants ('UPOV Convention') ('Each Contracting Party shall ensure that [...] no rights in the designation registered as the denomination of the variety shall hamper the free use of the denomination in connection with the variety, even after the expiration of the breeder's right') (15/10/2015, Geisha, R 528/2014-1).


- 32 At issue in the present case is whether this term, at the time of filing of the contested sign, could be perceived by the relevant public as describing the concrete type of the contested goods, relevant in the present appeal and that, as a result of this, it does not constitute an indication of origin (15/01/2015, T-197/13, Monaco, EU:T:2015:16, § 52).
- 33 Therefore, it is now for the Board to assess whether the term ‘CHEESE’, at the time of filing of the contested sign, namely 9 April 2015, designated a plant denomination which was associated with the category of goods concerned, or whether it was reasonable to assume that such an association may be established in the future (04/05/1999, C-108/97 and C-109/97, Chiemsee, EU:C:1999:230, § 31).
- 34 In view of the function of Article 7(1)(c) EUTMR, the examination must be assessed in view of the relevant public of both in trade, including competitors, and consumers, as those acquiring the products (03/12/2009, R 1743/2007-1, Vesuvia, § 24-28), including a part of the public knowing specialised terminology (17/09/2008, T-226/07, Pranahaus, EU:T:2008:381, § 36, and of 18/11/2015, T-558/14, Trilobular, EU:T:2015:858, § 50; 28/04/2004, 09/03/2006, [C-421/04](#), Matratzen, EU:C:2006:164, § 24).
- 35 Since the argument for declaring the invalidity of the contested trade mark is concentrated on ‘cannabis’, included in the broad specification of goods registered, note is taken that the products refer to a highly regulated market (27/10/2016, R 1881/2015-1, KB KRITIKAL BILBO (fig.)).
- 36 Since the argument is that ‘cheese’ is a usual designation of a specific hybrid, not a registered variety, it may be that such designation has become usual only in certain territories. Evidence in the file hints at least to the United Kingdom, the Netherlands and Spain. An obstacle in those Member States is sufficient to declare the trade mark invalid in application of Article 7(2) EUTMR.
- 37 However, it is highly probably that on the filing date at least the designation could be used to give the name to the hybrid in other territories. It should also be considered that as a rule hybrid plants only have one name, thus allowing its identification as a product in commerce; it has not been demonstrated by either party that the hybrid in question is known under different names in different territories within the EU. Moreover, cheese is a standard word of the English language, largely understood both in its meaning as a dairy product and as an exclamation used to encourage people to smile just before a photo is taken of them throughout the entire Union.
- 38 For this reason, it is likely that the name of a hybrid called ‘cheese’ will be used in the whole of the European Union.

‘CHEESE’ as designation of cannabis plants

- 39 The parties dispute the origin of the coining, or creation, of the term ‘cheese’ for seed. However, even assuming that this product was first created by the EUTM proprietor and his partners back in the period 2002-2005, the evidence shows that the contested EUTM has been used in general to identify a kind of seed over the years.

- 40 Thus, based on the provided evidence, the use of the term 'CHEESE' was not done in a way that it could be distinguished from the denomination of the cannabis hybrid, namely (Exhibit 3 of the provided evidence by the cancellation applicants):

Homepage (7) / Cheese marijuana seeds



CHEESE




Cheese weed is known for its sharp, sour aroma: that's where the name comes from. This marijuana is great for chilling with friends and it's perfect for medical use as well. A cheese strain grows into the weirdest and funniest cannabis available, guaranteed to make you laugh. Smoking cheese weed gives a strong body high and a long lasting happy giggle. Smile and say cheese.

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In stock Outdoor Indoor

STRAIN VARIATIONS:

 **CHEESE**
 **CHEESE AUTO-FEM** [Click here](#)
 **CHEESE FEMINIZED** [Click here](#)

CHEESE



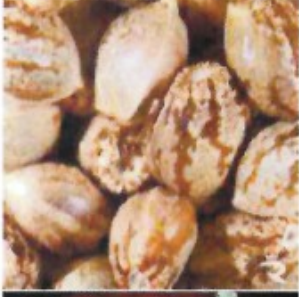

WHY AMSTERDAM MARIJUANA SEEDS?

- ✓ Guaranteed delivery
- ✓ World wide shipping
- ✓ Excellent customer service and reviews
- ✓ 5 Free **White Queen Feminized seeds** with every **seed** order over €120,00 (excluding shipping fee)

DETAILS:

Thc level	Up to 21 %
Indica / Sativa	Indica 65% Sativa 35%
Climate	Indoor / Outdoor

- 41 Besides, there are different types of 'CHEESE' - seeds under different trade marks on the market:

LIVE VIEW	PRODUCTS Per Page 10
	<p>Cheese #1</p> <p>If you're adding a Cheese section to your growing collection of cannabis seeds, why not start off with the original? Cheese #1 by Kaliman Seeds was the first of its kind and continues to be the only s</p> <p style="text-align: right;">10 seeds - £60.99</p>
	<p>Cheese Dawg</p> <p>In the ongoing pursuit to find unique flavours and tastes, Big Buddha Seeds has yet again achieved something special. Chemdawg originated from the USA from some seeds which were found in some marijuana</p> <p style="text-align: right;">5 Pack - £26.99</p>
	<p>Cheese Quattro</p> <p>The Cheese Quattro is a must-have addition for any serious collector with a Cheese fixation. In addition to providing four of the most popular Cheese varieties that Kaliman Seeds has to offer, this co</p> <p style="text-align: right;">16 seeds - £49.99</p>
	<p>Cheese Tease</p> <p>Unlike most Cheese varieties, cheese isn't the dominant flavor. Your first impression will be of a powerful Skunk #1, but the more delectable cheesy aftertaste, the Cheese Tease, will be a pleasant an</p> <p style="text-align: right;">10 seeds - £49.99</p>
	<p>Cream Cheese</p> <p>Classic Cheese with a Gourmet Upgrade!</p> <p>Cream of the Crop gives classic UK Cheese a gourmet twist with a fresh infusion of Afghani genetics. The stench is as strong as ever but just a touch more refined.</p> <ul style="list-style-type: none"> • 400 gr/m2 Inside, 650 gr/m2 Outside • Needs 50-60 Days of Bloom <p style="text-align: right;">3 Seeds - £19.99</p>

- 42 This has led consumers to perceive the word 'cheese' as designating not just a particular producer's product but a particular type of product at least in the Dutch and UK market. In other words, Dutch and UK consumers would and, in fact do, readily accept it as a name for the product itself. Furthermore, competitors are also using the registered EUTM as a plant denomination.
- 43 Therefore, the legal issue in the case at hand is not who created the cannabis type but whether the word 'CHEESE' directly refers to the contested goods with

sufficient clarity that the relevant consumers are likely to apprehend the meaning of such expression instead of viewing it as a specific trade mark

- 44 The evidence coincides that the Classic Cheese cannabis is a hybrid of Cannabis Indica species, more particular of 60% Cannabis sativa and 40% Cannabis indica. The name is derived from the strong cheesy odour given off by the plant. Further hybrids have been taken by crossing it with other species.
- 45 It is further said that Classic Cheese has quickly become a legendary cannabis strain. According to promotional material, it is one of the most smoked cannabis strains in the United Kingdom, which was not unusual, given that Classic Cheese was created there. As an example, the following evidence has been provided (Exhibit 5):

Home (<https://suzyseeds.com/>) >
Cannabis Seeds (<https://suzyseeds.com/cannabis-seeds>) > Classic Cheese



(<https://suzyseeds.com/media/catalog/product/cache/1/image/800x800/9df78eab33525d08d6e5fb8d2713>)

Classic Cheese

This classic is a powerful hybrid of 60% Sativa and 40% Indica. The name is derived from the strong cheesy odour given off by the plant. Classic Cheese has quickly become a legendary cannabis strain. It is one of the most smoked cannabis strains in the United Kingdom. This is not unusual, given that Classic Cheese was also born there. Its genetics were initially only available in clone form in the British underground scene.

Only 100 left

Availability: **In stock**

1 seed €7.00 Buy Now	3 seeds €17.00 Buy Now	5 seeds €25.00 Buy Now
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- 46 As per the provided pieces of evidence, according to the website <https://amsterdammarijuanaseeds.com/cheese-marijuana-seeds> ‘CHEESE’ is perceived as a descriptive term for a particular strain or plant name Exhibit 3):

‘Cheese weed is known for it’s sharp, sour aroma: that’s where the name comes from. This marijuana is great for chilling with friends and it’s perfect for medical use as well. A cheese strain grows into the weirdest and funniest cannabis available, guaranteed to make you laugh. Smoking cheese weed gives a strong body high and a long lasting happy giggle. Smile and say cheese’.

- 47 Therefore, it is obvious that the specific group of cannabis consumers will understand the word CHEESE as ‘*One of the most popular indoor growing strains around, Cheese cannabis seeds ensure a happy harvest*’ (<http://cannabis-seeds-ukdirect.11il.com/cheese>). As a result, the relevant consumer will not perceive it as unusual but rather as a meaningful expression: a particular variety of marijuana seeds. Thus, the relevant public who smoke marijuana will immediately and without further thought make a connection between the sign in question and the characteristics of the goods in question, all of which renders the sign descriptive in addition (19/11/2009, T-234/06, Cannabis, EU:T:2009:448). Thus, the relevant consumer, without making any mental effort or being required to stop and think, will immediately perceive said sign as being obviously descriptive in connection with the kind of goods concerned and the purpose thereof (27/10/2016, R 1881/2015-1, KB KRITIKAL BILBO (fig.), § 42).

- 48 The EUTM proprietor claims that the licence agreements signed with third parties for the use of the trade mark ‘CHEESE’ for the products for which it is registered, demonstrate that a legitimate control over the use of the EUTM has been exercised. However, those are private agreements between the parties involved, which provide no information as to the perception of the relevant public of the mark, namely as to whether consumers rely on the word cheese as a distinctive sign, or merely as the name of a product.

- 49 Although the EUTM proprietor stated that the word ‘cheese’ is generally recognized as referring to a ‘food made from the pressed curds of milk, firm and elastic or soft and semi-liquid in texture’ from Oxford Dictionaries, the cancellation applicants’ evidence indicate that ‘cheese’ is known as a variety of seed by the relevant public in the Dutch and the UK territories and that (ii) ‘these goods also appear to be marketed by several online shops specialised in cannabis products’.

- 50 As per the argument of the EUTM proprietor stating that the evidence of the cancellation applicants is partly undated, the EUIPO correctly claimed that ‘the extracts from the internet archive “Wayback machine” presented on 27/10/2016 refer to the sale of different varieties of “cheese seeds” between 10/04/2014 and 16/03/2015, at least, in the Dutch and UK territories’. In this case, since some of the Internet extracts proffered within the first round of allegations did not contain a concrete indication of the date of publication — although they were displayed within the relevant period of time — the same Internet extracts were submitted by the cancellation applicants within the second round of observations using the internet archive ‘Wayback Machine’ and, hence, correctly dated before the filing date.

- 51 In addition, contrary to the EUTM proprietor's statements, the evidence provided shows that the said term 'CHEESE' is known by different manufacturers (Exhibit 3 to 6), retailers and consumers active in the relevant industry as the name of a hybrid designation of a type of marijuana seed. These precisely show that the said term is known as a seed by the relevant public and these goods also appear to be marketed by several online shops specialised in cannabis products; therefore it lacks distinctive character. It follows that the evidence as a whole, and does not need to be observed individually, as claimed by the EUTM proprietor, does not indicate that 'CHEESE' is a proprietary term for the contested goods in Class 31 from a particular source. Rather, the documents show that *relevant* consumers understand and use the term in a far simpler way; for them 'Cheese' is merely the name of a type of cannabis seeds.
- 52 However, as a plant variety denomination (whether it is registered or not) is the generic designation for the plant variety, it must also be within the reach of other undertakings to use this designation to describe their products. Furthermore, the proprietor himself confirms this finding, who always refers to the sign 'CHEESE' to identify a particular kind of cannabis variety and needs to then accompany it with its trade name 'BIG BUDDHA' to distinguish its cheese seeds from those of its competitors (Exhibit 7), namely:

Big Buddha Cheese



Winners of the 19th annual Cannabis Cup
 "Best Indica" - FEMINISED !
 Feminised Seeds

'The Cheese' is the UK's #1 strain, which we crossed with our pure Afghan male.
 Two years of selective backcrossing has allowed us to isolate specific traits we loved from the cheese.
 The Big Buddha Cheese Feminized seed retains its mother's old school taste and, with the help of Afghan has a higher overall yield than the original cheese mother.
 NOW Feminised. The Big Buddha Cheese has now truly become the UK's #1 strain!

Say 'Cheese Baby' !

Parents:	Original UK Cheese backcross X Afghan
Flowering time:	Indoors = 7 - 9 weeks Outdoors = End of Oct.
Genetics:	Mostly Indica
Sensory experience:	Very uplifting high, no ceiling, clear, long lasting.
Smell:	Unique, pungent, old school aroma.
Taste:	Very appealing, fruity, DANK!

Conclusion

- 53 Notwithstanding whether the EUTM proprietor participated in the hybrid creation of the cannabis variety ‘CHEESE’ or whether the sign initially could have been registered before it became the name of a cannabis hybrid, it has been demonstrated that it was the name of the product at least at the filing date of the trade mark.
- 54 For this reason, the sign is not to be kept by the proprietor, It is not seen as the indication of origin but as the name of the specific product. Further, as shown by the cancellation applicants, the term is already used by competitors as the name of the product – namely a hybrid of the species *cannabis indica*. Considering the evidence as whole, consumers will perceive the word ‘CHEESE’ as designating not just the proprietary name of a particular producer’s product but as a particular type of product.
- 55 This means that, despite any previous decisions, which are not legally binding, the Cancellation Division did provide a legally sound conclusion within the scope of the parties’ submissions and evidence. In addition, the Cancellation Division is in line with the previous examiner’s decision rejecting the identical trade mark in 2012.
- 56 Since Article 7(1) EUTMR makes it clear that it is sufficient that one of the absolute grounds for refusal listed in that provision applies for the sign at issue not to be registrable as a European Union trade mark (28/06/2011, T-487/09, ReValue, EU:T:2011:317, § 80; 17/04/2013, T-383/10, Continental, EU:T:2013:193, § 71-72; 12/06/2013, T-598/11, Lean Performance Index, EU:T:2013:311, § 52), it is no longer necessary to consider, in the present case, the applicant’s arguments also alleging a breach of Article 7(1)(b) and (d) EUTMR.
- 57 For the sake of clarity, the trade mark is at the same time a descriptive indication in a larger context. Firstly, the Board may not decide on its own motion on a limitation of the goods that was worded by the proprietor in such a broad way, as in:

Class 31 - Grains and agricultural, horticultural and forestry products not included in other classes; seeds.

and must therefore reject the trade mark for the entire list, which includes hemp.

- 58 Secondly, the word ‘cheese’ describes the possible smell of plants in a more general context. The odour of a plant may be a decisive characteristic of the product, be it in a positive or in a negative way. This in itself justifies the refusal of the trade mark.

Article 59(1)(a) EUTMR conjunction with Article 7(3) EUTMR regarding acquired distinctiveness

- 59 As per the allegation of the EUTM proprietor in his letter of 30 August 2016, where he ‘expressly reserved the right to file evidence of use to prove that the mark has acquired distinctiveness’, considering that this is ‘disregarded’ by the Cancellation Division ought to have been ‘rectified’, it should be noted that the

EUTM proprietor was duly informed by letter of the Office dated 27 October 2016 that he indeed had the final word in this proceeding. For their part the cancellation applicants expressly suggested to the EUTM proprietor in their second set of observations that a possible defence against a claim of lack of distinctiveness is to provide evidence that the contested EUTM has acquired distinctive character through use (in accordance with article 59(2) EUTMR).

- 60 Contrary to a request for proof of use in accordance with Article 64(2) EUTMR and Article 19(2) EUTMDR, there is no provision obliging the Cancellation Division to set a separate time limit to file evidence of acquired distinctiveness. Whether such a time limit must be set depends on the circumstances of the case. Here, it would have been appropriate for the EUTM proprietor to file evidence for acquired distinctiveness on his own motion at least in the rejoinder or to request for a suspension of the examination of acquired distinctiveness.
- 61 In addition, it is obvious that the trade mark has not acquired distinctiveness in the whole of the European Union (see paragraph 37). The EUTM proprietor did not provide any evidence — neither before the Cancellation Division, nor before the Board — to prove that the contested EUTM had acquired distinctiveness. He does not even allege that he had used the trade mark in all of the Member States of the European Union.

Costs

- 62 Pursuant to Article 109(1) EUTMR and Article 18 EUTMIR, the EUTM proprietor, as the losing party, must bear the cancellation applicants' costs of the cancellation and appeal proceedings
- 63 As to the appeal proceedings, these consist of the cancellation applicants' costs of professional representation of EUR 550.
- 64 As to the cancellation proceedings, the Cancellation Division ordered the EUTM proprietor to bear the cancellation applicants' representation costs which were fixed at EUR 450 and the cancellation fee of EUR 630. This decision remains unaffected. The total amount for both proceedings is, therefore, EUR 1 630.

Order

On those grounds,

THE BOARD

hereby:

- 1. Dismisses the appeal;**
- 2. Orders the EUTM proprietor to bear the cancellation applicants' costs in the appeal proceedings, which are fixed at EUR 550. The total amount to be paid by the EUTM proprietor in the appeal and cancellation proceedings is EUR 1 630.**

Signed

Th. M. Margellos

Signed

Ph. von Kapff

Signed

M. Bra

Registrar:

Signed

p.o. I. Romero Conrad

