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**Datasheet for the decision  
of 15 October 2020**

**Case Number:** T 1556/14 - 3.3.01

**Application Number:** 06735710.3

**Publication Number:** 1853250

**IPC:** A61K31/337, A61K31/555,  
A61K38/22, A61K31/7068,  
A61P35/00

**Language of the proceedings:** EN

**Title of invention:**

COMBINATIONS AND MODES OF ADMINISTRATION OF THERAPEUTIC AGENTS  
AND COMBINATION THERAPY

**Patent Proprietor:**

Abraxis BioScience, LLC

**Opponents:**

Generics [UK] Limited  
MediGene Aktiengesellschaft

**Headword:**

nab-Paclitaxel combinations/ABRAXIS

**Relevant legal provisions:**

EPC Art. 104(1)  
EPC R. 88(1)  
RPBA Art. 16

**Keyword:**

Apportionement of costs - admissibility (no)

**Decisions cited:**

T 0765/89



**Beschwerdekammern**

**Boards of Appeal**

**Chambres de recours**

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Case Number: T 1556/14 - 3.3.01

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.01**  
**of 15 October 2020**

**Appellant:** Abraxis BioScience, LLC  
(Patent Proprietor) 86 Morris Avenue  
Summit, NJ 07901 (US)

**Representative:** Jones Day  
Prinzregentenstraße 11  
80538 München (DE)

**Appellant:** Generics [UK] Limited  
(Opponent I) Albany Gate  
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Hertfordshire EN6 1AG (GB)

**Representative:** Elkington and Fife LLP  
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**Party as of right:** MediGene Aktiengesellschaft  
(Opponent II) Lochhamer Strasse 11  
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**Representative:** Weickmann & Weickmann  
Patent- und Rechtsanwälte PartmbB  
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**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
19 May 2014 concerning maintenance of the  
European Patent No. 1853250 in amended form**

**Composition of the Board:**

**Chairman**           A. Lindner  
**Members:**         J. Molina de Alba  
                      P. de Heij

## **Summary of Facts and Submissions**

- I. In the case in hand the board ordered oral proceedings to be held on 12-14 August 2019.

With a letter filed in the evening of the last working day before the oral proceedings, 9 August 2019, appellant I (patent proprietor) withdrew its appeal against the opposition division's decision and its approval of both the text used for the grant of the patent and the text of the amended patent as maintained by the opposition division. Appellant I stated that it would not be filing a replacement text and requested that the patent be revoked.

Appellant I repeated its request at the oral proceedings on 12 August 2019. The other parties to the proceedings, appellant II (opponent 1) and the party as of right (opponent 2), were not represented. By decision of this board on the same day, the opposed patent was revoked and the appeal proceedings terminated.

By letter dated 15 August 2019, appellant II requested that costs be awarded against appellant I for the time spent preparing for the oral proceedings and for non-refundable travel costs (apportionment of costs).

By letter dated 21 August 2019, appellant I requested that the request for apportionment of costs be rejected.

In its communication of 23 January 2020, the board informed appellant II that it was minded to reject the

request as it seemed to be inadmissible. Appellant II was asked to inform the board whether it wished to maintain the request.

By letter dated 5 February 2020, appellant II provided further arguments to corroborate its request, which was maintained. Appellant I rebutted these arguments in its letter dated 19 February 2020 and, in the event that appellant II's request was allowed, in turn requested apportionment of costs against appellant II for the time spent on this issue.

II. Appellant II's arguments, as far as relevant for the present decision, can be summarised as follows.

Appellant II's representative received appellant I's letter of 9 August 2019 at 20:30 on that day. The representative was unable to consult appellant II and receive instructions in time to file a request for apportionment of costs prior to the oral proceedings. Attending the oral proceedings solely to request apportionment of costs would have been illogical. Although the case was terminated by the decision of 12 August 2019, the request for apportionment of costs was a matter arising from the earlier appeal proceedings and the board could decide on such a request. In this context reference was made to decision T 765/89.

III. Appellant I's arguments, as far as relevant for the present decision, can be summarised as follows.

Appellant II's request for apportionment of costs was filed after termination of the appeal proceedings and therefore had no legal effect. It contravened Rule 88(1) EPC as well as the established practice of

the boards of appeal. The representative had clearly been able to consult appellant II over the weekend and file the request before 12 August 2019. In case T 765/89, the request for apportionment of costs was filed before the final decision was taken. It did not set a legal precedent for justifying the request in the case in hand.

### **Reasons for the Decision**

1. Apportionment of costs is governed by Article 104(1) and Rule 88 EPC and, in this case, Article 16 RPBA 2007.
2. Under Rule 88(1) EPC, apportionment of costs is to be dealt with in the decision on the opposition. The rule implies that the request for apportionment is submitted before that decision is taken (see also Case Law of the Boards of Appeal, 9th edition, III.R.4.1).
3. Where such a request cannot be submitted before termination of the proceedings, for example when the only appeal is withdrawn and the timing of that withdrawal or other related circumstances are the alleged grounds for requesting apportionment of costs, the request must be accepted as being admissible despite being submitted after termination of the proceedings. Decision T 765/89, to which appellant II referred, seems to concern such a situation.
4. However, in the case in hand the board is not convinced that appellant II was unable to file a request for apportionment of costs prior to the termination of the proceedings on 12 August 2019. Appellant II's

representative was made aware of appellant I's letter of 9 August 2019 at 20:30 that day. It decided not to attend the oral proceedings and could therefore also have decided to file a request for apportionment of costs over the weekend, even if it had not been possible to consult appellant II. It must be assumed that the representative was authorised to file this uncomplicated request even without consulting its client, as it could only be beneficial to appellant II and could easily be withdrawn or not pursued further if appellant II so decided at a later date.

5. Therefore, the request must be held to be inadmissible.

## Order

### **For these reasons it is decided that:**

The request for apportionment of costs is inadmissible.

The Registrar:

The Chairman:



M. Schalow

A. Lindner

Decision electronically authenticated