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**Datasheet for the decision  
of 9 March 2016**

**Case Number:** T 0194/15 - 3.3.04

**Application Number:** 05076131.1

**Publication Number:** 1593393

**IPC:** A61K39/395, A61K38/17,  
A61K31/505, A61P37/00

**Language of the proceedings:** EN

**Title of invention:**

Anti-TNF antibodies and methotrexate in the concomitant  
treatment of autoimmune diseases

**Patent Proprietor:**

The Kennedy Trust for Rheumatology Research

**Opponents:**

Celltrion, Inc. (opposition withdrawn)  
Althausen, Sonja  
Hospira UK Limited (opposition withdrawn)  
AbbVie Inc.  
Eiseler, Alice

**Headword:**

Anti-TNF antibodies and methotrexate/THE KENNEDY TRUST

**Relevant legal provisions:**

EPC Art. 106(1), 107

**Keyword:**

Admissibility of appeal - (yes)

Validity of transfer of opponent status - (no)

Remittal to the opposition division - (yes)

**Decisions cited:**

G 0004/88, G 0002/04, T 0799/97, T 1137/97, T 0273/02,

T 0261/03, T 0956/03, T 1178/04, T 0006/05, T 1421/05,

T 1982/09, T 0184/11

**Catchword:**



**Beschwerdekammern**  
**Boards of Appeal**  
**Chambres de recours**

European Patent  
Office  
D-80298 MUNICH  
GERMANY  
Tel. +49 (0) 89 2399-0  
Fax +49 (0) 89  
2399-4465

Case Number: T 0194/15 - 3.3.04

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.04**  
**of 9 March 2016**

**Appellant:** AbbVie Inc.  
(Opponent 4) 1 North Waukegan Road  
North Chicago, IL 60064 (US)

**Representative:** Roth, Carla  
König-Szynka-Tilmann-von Renesse  
Patentanwälte Partnerschaft mbB  
Postfach 11 09 46  
40509 Düsseldorf (DE)

**Respondent:** The Kennedy Trust for Rheumatology Research  
(Patent Proprietor) 16 St. John's Lane  
London  
EC1M 4BS (GB)

**Representative:** Almond-Martin, Carol  
Ernest Gutmann - Yves Plasseraud S.A.S.  
88, Boulevard des Belges  
69452 Lyon Cedex 06 (FR)

**Party as of right:** Althausen, Sonja  
(Opponent 2) Michalski Hüttermann & Partner  
Patentanwälte  
Hafenspitze  
Speditionstrasse 21  
40221 Düsseldorf (DE)

**Representative:** Michalski Hüttermann & Partner  
Patentanwälte mbB  
Speditionstraße 21  
40221 Düsseldorf (DE)

**Party as of right:** Eiseler, Alice  
**(Opponent 5)** Ermlandstrasse 39  
81929 München (DE)

**Representative:** Grünecker Patent- und Rechtsanwälte  
PartG mbB  
Leopoldstraße 4  
80802 München (DE)

**Decision under appeal:** Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
25 November 2014 concerning maintenance of the  
European Patent No. 1593393 in amended form.

**Composition of the Board:**

**Chairwoman** G. Alt  
**Members:** R. Morawetz  
M.-B. Tardo-Dino

## Summary of Facts and Submissions

- I. The present decision is only concerned with the procedural status of appellant-opponent 4 (now the sole appellant, following opponent 2's withdrawal of its appeal) and the admissibility of its appeal. Opponents 1 and 3 withdrew their oppositions during the first instance proceedings and are no longer parties to the proceedings, while opponents 2 and 5 are parties as of right.
- II. The facts relevant for the present decision may be summarised as follows:
- III. A notice of opposition was filed on 30 August 2012 by Abbott Laboratories, which was then "opponent 4".
- IV. During the opposition proceedings, by a letter dated 3 January 2013, opponent 4 filed a request for the transfer of the opposition from Abbott Laboratories to AbbVie Inc., stating *inter alia* that "On 1 August 2012 all of the business assets and liabilities pertaining to human therapeutic use of anti-TNF antibodies were moved from Abbott to AbbVie". In support of the request, opponent 4 filed
- a copy of a "Contribution, Assignment and Assumption Agreement",
  - a declaration by John M. Leonard, M.D., Senior Vice President, Pharmaceuticals, Research and Development at Abbott Laboratories, and
  - an "Authorization for the Transfer".

- V. AbbVie Inc. was listed for the first time as opponent 4 in release 2014/47 of the European Patent Register.
- VI. The oral proceedings before the opposition division were held with AbbVie Inc. as opponent 4 (see page 1 of the minutes, EPO Form 2309.1 12.08CSX).
- VII. During appeal proceedings, after the board had accepted the appellant's request for acceleration of the proceedings, the respondent submitted for the first time in a letter dated 26 January 2016 the objection that the appellant's appeal was inadmissible because the transfer of the status of opponent 4 from Abbott Laboratories ("Abbott") to AbbVie Inc. ("AbbVie") was not effective. It submitted that the evidence filed with the letter of 3 January 2013 was insufficient to demonstrate that the business assets to which the opposition related had been transferred together with the opposition from Abbott to AbbVie.
- VIII. With its communication dated 8 February 2016 the board informed the parties of its provisional view on the issue of the transfer of opponent status. It also indicated that this issue would be discussed at the beginning of the oral proceedings.
- IX. With letter of 24 February 2016, in support of its contention that AbbVie was not entitled to pursue the opposition and the appeal proceedings, the respondent filed new submissions and document:

D115: pages 1/52 to 8/52 of "Form 10-Q" filed by AbbVie Inc. on 11 June 2015 before the "United States Securities and Exchange commission", being the "Quarterly Report Pursuant to section 13 or 15(d) of the

Securities Exchange Act of 1934" and drawn up "for the quarterly period ended September 30, 2015".

X. By letter of 4 March 2016 the appellant replied and, to prove the validity of the transfer, filed the following documents:

D116: Excerpts from a "Separation and Distribution Agreement" of 28 November 2012; table of contents and definitions;

D117: Excerpts from an "Employee Matters Agreement" of 31 December 2012; table of contents and definitions;

D118: Excerpts from "Form 10-K" for "the fiscal year ended December 31, 2012" filed by Abbott Laboratories with the United States Securities and Exchange Commission;

D119: Declaration by Johanna M. Corbin, Vice-President Intellectual Property & Strategy at AbbVie Inc., dated 4 March 2016;

D120: Patient's instructions for HUMIRA<sup>®</sup> single-use prefilled syringe, Abbott Laboratories (September 2012);

D121: Marketing brochure "Living with Spondylitis", Abbott Laboratories (August 2012);

D122: Marketing brochure for plaque psoriasis, Abbott Laboratories (December 2012);

D123: FDA communication to Abbott Laboratories re Supplemental HUMIRA<sup>®</sup> approval, 28 September 2012;

D124: Extended HUMIRA<sup>®</sup> label, as approved on 28 September 2012;

D125: Declaration of Kris Hoult, Director Mergers & Acquisitions in the Corporate Human Resources Department at AbbVie Inc., dated 4 March 2016;

D126: Declaration of David S. Fishman, Vice President Licensing and Acquisitions, Legal at AbbVie Inc., dated 4 March 2016.

XI. Oral proceedings before the board took place on 9 March 2016. Opponents 2 and 5 were absent, as notified previously in writing. The debate at the oral proceedings was restricted to the admissibility of the appeal and the transfer of opponent 4's status as an opponent. At the end of the oral proceedings the chairwoman announced the board's decision.

XII. The respondent's arguments on those two issues, in writing and at the oral proceedings, and as far as they are relevant to the present decision, may be summarised as follows:

Although filed late, the objection to the status of opponent 4 and thus to the admissibility of the appeal was admissible, because issues of admissibility may be raised at any stage of the proceedings.

As stated in decision G 4/88, "the opposition must constitute an inseparable part of the assets and insofar as those assets are transferable or assignable [...] the opposition which is part of them must be regarded as transferable or assignable in accordance with the principle that an accessory thing when annexed to a principal thing becomes part of the principal thing".



The request of 3 January 2013 was based on the transfer of all assets of the business to which the opposition related. That all assets were transferred had however not been demonstrated by the evidence filed with the request. It was not possible to know from the "Contribution, Assignment and Assumption Agreement" of 1 August 2012 (i) which assets were assigned and (ii) to whom.

As to (i), the passages in the Agreement regarding the definition of the assets assigned, the assets excluded from the transfer and those for which the transfer was delayed, had been redacted. Humira<sup>®</sup> was such an important product that it would not have been treated as a footnote.

As to (ii), the Agreement referred to a "Separation and Distribution Agreement" between Abbott and its subsidiaries and AbbVie and its subsidiaries.

AbbVie had been incorporated on 12 April 2012 as a subsidiary of Abbott. The opposition could therefore have been filed by AbbVie.

On 1 January 2013, Abbott had merely sold shares in its subsidiary AbbVie. Such an transaction was not conclusive proof of the validity of a transfer (see decision G 2/04).

XIII. The appellant's arguments on the admissibility and opponent status issues, in writing and at the oral proceedings, and as far as they are relevant to the present decision, may be summarised as follows:

The respondent's request that the appeal be dismissed as inadmissible was clearly at odds with established case law such as decisions T 1178/04 and T 1982/09.

The respondent's attack was unfounded. It first contended that appellant-opponent 4 had failed to establish the transfer of all relevant assets relating to the business in the interest of which the opposition had been filed. Then it claimed that all the assets had been transferred on 1 August 2012 and thus before the opposition was filed on 30 August 2012.

Recital 3 of the "Contribution, Assignment and Assumption Agreement" announced a "Separation and Distribution Agreement" which would "more fully define the allocation of Assets and Liabilities between Abbott and its Subsidiaries on the one hand and AbbVie and its Subsidiaries on the other".

The separation and transfer of ownership of the pharmaceutical business from Abbott to AbbVie, including the Humira® business and assets, was a complex multiple-step process which had continued after the opposition was filed.

The Humira® business, in whose interest the opposition had been filed, had not been transferred to AbbVie on 1 August 2012, the date of the "Contribution, Assignment and Assumption Agreement". In fact, the opposition had been filed by Abbott in the interest of its own ongoing Humira® business, which as such did not have legal personality. This segment of business had been transferred to and taken over by AbbVie only with effect from 1 January 2013. The request for transfer of the opponent status had been filed with the corresponding

evidence on 3 January 2013, once that business had been transferred.

That Abbott continued the Humira<sup>®</sup> business after 1 August 2012 was shown by documents D116 to D126. One important milestone establishing the continuation of Humira<sup>®</sup> business by Abbott was the transfer of the employment contracts from Abbott to AbbVie on 31 December 2012.

In case the board did not find the transfer valid, a power of attorney was included in which Abbott approved, confirmed and, to the extent legally possible, authorised with retroactive effect all the earlier procedural actions, requests, submissions and observations made in the name of AbbVie in the present proceedings.

- XIV. Neither of the two parties as of right made any submission with regard to the issues under consideration.
- XV. The appellant requested that the decision under appeal be set aside and that the patent be revoked.

The respondent requested that the appeal be declared inadmissible because the transfer of opponent status was invalid.

Should the transfer be held valid, the respondent requested that the appeal be dismissed (i.e. that the patent be maintained in the version maintained by the opposition division), or alternatively on the basis of auxiliary request I, filed with the letter of 9 February 2016, or of auxiliary request II filed with the letter of 24 August 2015.

## **Reasons for the Decision**

1. The duly summoned parties as of right (opponents 2 and 5) did not attend the oral proceedings, as communicated to the board in writing beforehand. In accordance with Rule 115(2) EPC and Article 15(3) RPBA the oral proceedings were held in their absence.

### *Admissibility of the appeal*

2. The respondent submits that the transfer of the opponent status to AbbVie was invalid and that therefore AbbVie was not entitled to file the present appeal, which should therefore be held inadmissible.
  - 2.1 According to Article 107 EPC "Any party to proceedings adversely affected by a decision may appeal". Thus, the question arises whether, on the assumption that the transfer of the opposition from Abbott to AbbVie was invalid, AbbVie was nevertheless at the relevant time a "party to [the opposition] proceedings". The board agrees with the board in T 261/03 (see reasons, point 1.5) that the decision as to whether and when an alleged opponent gains party status falls within the exclusive competence of the organ, i.e. opposition division or board of appeal, before which the proceedings are pending.
  - 2.2 In the present case, there is no indication in the public part of the file pertaining to the opposition proceedings, and in particular in the decision under appeal, that the opposition division took a decision on the transfer of opponent status. The board notes that release 2013/36 of the European Patent Register lists Abbott as opponent 4, whereas release 2014/47 lists

AbbVie. However, the entry of a change of an opponent's name in the European Patent Register does not establish a right, it merely records it (see also T 799/97, reasons, point 2.4).

- 2.3 Nevertheless, on the front page of the minutes of the oral proceedings before the opposition division opponent 4 is referred to as "AbbVie Inc." Moreover, at the end of the oral proceedings the opposition division announced its decision. These circumstances indicate to the board that the opposition division accepted and thus implicitly decided that AbbVie was the new opponent 4. Thus, AbbVie was a "party" to the opposition proceedings within the meaning of Article 107 EPC. It was therefore entitled to file an appeal against the decision of the opposition division (see for example also T 1178/04, reasons, points 1 to 5 and T 1982/09, reasons, points 1.5 and 1.6). Since there is no dispute that the other requirements of Article 107 and 108 EPC have been satisfied in this case, AbbVie's appeal is admissible and therefore the respondent's request that it be held inadmissible is refused.

*The status of opponent 4 during the opposition proceedings*

3. The objection as regards the validity of the status of opponent was raised late in the appeal proceedings (see section VII above). However, as a matter of principle, the European Patent Office has a duty to examine, at all stages of the proceedings, the position of a party who claims to be a transferee from the original opponent (see e.g. T 1178/04, reasons, point 34). The board has thus examined the validity of the transfer of the opposition to AbbVie Inc.

4. In the course of the opposition proceedings, opponent 4, Abbott Laboratories ("Abbott"), requested that its opponent status be transferred to AbbVie Inc. ("AbbVie"). In support of the request, a declaration from the Senior Vice President, Pharmaceuticals, Research and Development at Abbott ("Declaration") and a redacted copy of an agreement between Abbott and AbbVie ("Agreement") were filed (see section IV above).
5. From the evidence on file it appears that the parties were neither heard on this request by the opposition division nor notified of its decision or of a change in the European Patent Register. And while the decision under appeal is silent as regards the transfer of opponent status, the board has concluded (see point 2.3 above) that the opposition division agreed to it.
6. The EPC does not contain any provision governing such transfers, apart from an implicit acknowledgement in Rule 84(2) EPC that the opposition is transmitted to the opponent's heirs. It is also well-established case law that opponent status is not freely transferable (see G 2/04, OJ EPO 2005, 549, Order, point I(a)). An opposition may, however, be transferred or assigned to a third party as part of the opponent's business assets, together with the assets in the interests of which the opposition was filed (see G 4/88, OJ EPO 1989, 480, Order and Case Law of the Boards of Appeal, 7th edition 2013, section IV.C.2.2.3).
7. As to the point in time when a transfer of opponent status becomes procedurally effective, the boards of appeal have, in such situations, applied *mutatis mutandis* the principle laid down in Rules 22(3) and 85 EPC, i.e. that transfers of European patents take effect for the European Patent Office's purposes only

when and to the extent that the necessary documentary evidence has been produced. To apply the same requirements to patent proprietors and opponents would appear justified given the principle of equal treatment of parties to proceedings (see also e.g. T 6/05, reasons, point 1.6.1).

8. As a consequence, a transfer of opposition can only be acknowledged as from the date when adequate evidence is filed, i.e. *ex nunc* (see e.g. T 956/03, reasons, point 4; T 1137/97, reasons, point 4; T 1421/05 reasons, point 3.3). Until such evidence is provided, the original party to the proceedings continues to have the relevant rights and obligations (see T 184/11, reasons, point 2.6).
9. Therefore, in the present case, the following issues need to be decided: (i) which business assets were transferred from Abbott, (ii) to whom, and (iii) when.

The documentary evidence available to answer these questions at the time when the opposition division had to decide on the transfer are the Agreement and the Declaration (see section IV above).

10. As to (i), the Declaration sets out in its introduction its purpose as follows: "In support of transfer of the above-mentioned opposition from Abbott Laboratories ("Abbott") to AbbVie Inc. ("AbbVie"), I, John M. Leonard, M.D., hereby declare and state as follows: (...)". Six numbered paragraphs then follow.
  - 10.1 The first two paragraphs state Dr Leonard's position and responsibilities at Abbott, i.e. that he is the Senior Vice President, Pharmaceuticals, Research and Development, and responsible *inter alia* for the

management of global proprietary pharmaceutical discovery and development efforts. In the board's view, this establishes that Dr Leonard was qualified to make the statements he was making.

10.2 Paragraphs 3 to 5 of the Declaration relate to the actual transfer and are set out below in full:

"3. Enclosed with this Declaration is a copy of a Contribution, Assignment and Assumption Agreement between Abbott and AbbVie which provides evidence of transfer of all proprietary pharmaceutical business assets from Abbott to AbbVie.

4. Specifically, the business assets included in the transfer encompass all of the business assets pertaining to human therapeutic use of anti-TNF antibodies. More specifically, the business assets encompass the commercial product HUMIRA, which is used in the treatment of autoimmune disease.

5. Thus, the opposition, along with all of the business assets and liabilities to which the opposition relates, have been transferred from Abbott to AbbVie."

10.3 Thus, paragraph 4 of the Declaration defines the transferred assets as "all of the business assets pertaining to human therapeutic use of anti-TNF antibodies". As the opposed patent relates to the use of anti-TNF antibodies in the treatment of autoimmune disease, the board considers that this statement in the Declaration establishes that all the assets relating to the business in the interest of which the opposition had been filed were transferred.



- 10.4 As to (ii) of point 9 above, the Declaration states that the Agreement provides "evidence of transfer of all proprietary pharmaceutical business assets from Abbott to AbbVie" (see point 10.2 above) and the first paragraph of the Agreement states that it is "by and between" Abbott and AbbVie. The reference in the Agreement (page 1, 4th paragraph) to yet another agreement, i.e. the "Separation and Distribution Agreement" by which further steps in the separation process are to be defined, namely "the allocation of Assets and Liabilities between Abbott and its Subsidiaries on the one hand and AbbVie and its Subsidiaries on the other hand", has no bearing on the fact that the Agreement itself provides for a transfer of the assets from Abbott to AbbVie. The board concludes that the assets were transferred from Abbott to AbbVie, and to AbbVie only.
11. The respondent submitted that it was not possible to establish from the Agreement which assets had been transferred or to whom, as it had been heavily redacted.
- 11.1 It is true that the entire section setting out the assets of Abbott to be transferred to AbbVie (see Section 1.01 on pages 1 and 2 of the Agreement) is redacted in the Agreement, as are the sections on pages 3 and 4 setting out which assets are not being transferred and the sections on pages 6 and 7 setting out those whose transfer is being delayed.
- 11.2 It is conceivable that an unredacted version of the Agreement might have been a more direct piece of evidence than the one submitted. But the evidence has to be taken as it stands (see also T 273/02, reasons, point 2.6; T 1178/04, reasons, point 40).

Anyway, in the board's judgement, the fact that the Agreement was redacted has no bearing on the issue to be decided because, as found above, the Agreement with the Declaration as complementary evidence defines which assets were transferred - namely all of them - and to whom (see points 10.3 and 10.4 above). The Agreement serves to prove that a transfer of assets from Abbott to AbbVie has taken place. That such transfer has taken place has not been contested by the respondent.

12. In view of the above, the board is satisfied that the Agreement supported by the Declaration, i.e. the evidence which was on file when the opposition division had to decide the issue, prove that all the assets relating to the business in the interest of which the opposition had been filed had been transferred to AbbVie as sole transferee.
  
13. As to (iii) of point 9 above, i.e. the date of the transfer of the relevant business assets, the Agreement states that "This Contribution, Assignment and Assumption Agreement (this "Agreement"), dated as of August 1, 2012 (the Effective Date) is ...".

1 August 2012 is in fact the only date derivable from the available evidence. It is moreover in agreement with what was stated in the request to which the Declaration and the Agreement were annexed, namely that "On 1 August 2012, all of the business assets and liabilities pertaining to human therapeutic use of anti-TNF antibodies were moved from Abbott to AbbVie." These were the relevant business assets in the present case, see point 10.3 above.

14. The appellant submitted that while some assets had been transferred on 1 August 2012 to AbbVie, the relevant

business assets, namely the assets relating to the anti-TNF antibody HUMIRA<sup>®</sup> business, had been transferred to AbbVie only after the opposition had been filed on 30 August 2012.

14.1 However, although the Agreement provides for the delayed transfer of some assets (see point 11.1 above), it does not indicate what these assets are, as the relevant parts have been blackened out.

15. The board concludes that on the basis of the evidence provided with the request, the date of the transfer of the relevant business assets was 1 August 2012. It follows, that, when the opposition was filed by Abbott on 30 August 2012, the business assets in the interest of which the opposition was filed and to which the opposition was the accessory in the sense of G 4/88 (see reasons, point 6) had already been transferred to AbbVie. Accordingly, the opposition filed by Abbott could no longer be transferred to AbbVie.

16. As a consequence, the opposition proceedings were continued with the wrong party as opponent 4.

*The status of opponent 4 during the appeal proceedings*

17. Based on the Agreement and the new evidence, documents D116 to D126, the appellant's new argument during the appeal proceedings was that "even though certain individual assets had been transferred to AbbVie Inc. on August 1, 2012, the actual HUMIRA<sup>®</sup> business ("Geschäftsbetrieb") [note by the board: the business assets in the interest of which the opposition was filed] was not transferred and continued essentially unchanged at Abbott Laboratories until the end of 2012. The opposition was thus filed in the interest of Abbott

Laboratories own HUMIRA<sup>®</sup> business. Abbott Laboratories proprietary pharmaceutical business segment, including the HUMIRA<sup>®</sup> business, was transferred to and taken over by AbbVie Inc. with effect from **January 1, 2013**, when the separation from Abbott Laboratories was accomplished and the distribution occurred" (emphasis in the original). It was further submitted that the separation between the two companies had been a multistep process.

- 17.1 The respondent argued that the relevant assets had been transferred on 1 August 2012 and submitted document D115 "which conveniently sets out the background to the incorporation of AbbVie Inc. and the disposal of the common stock to its shareholders by which it became an independent company".
  
18. Thus, it has to be determined whether the date of transfer of those business assets in the interest of which the opposition was filed, which was found on the basis of the Agreement, the Declaration and the request to be 1 August 2012 (see points 13 to 15 above), was not the correct date after all. In the board's view, to answer this question documents D116 to D126 have to be evaluated in the light of document D115.
  
19. Document D115 recounts on page 7 the history of the separation between Abbott and AbbVie. Thus, it appears that AbbVie became a legal entity on 10 April 2012, when it was incorporated in Delaware (page 7, second paragraph). Document D115 also confirms that the separation process foreseen in the Agreement needed time and (*ibid.*) that "in connection with the separation, AbbVie and Abbott entered into transition services agreements covering certain corporate support and back office services that AbbVie historically received from Abbott. Such services included information technology,

accounts payable, payroll, receivables collection, treasury, and other financial functions, as well as order entry, warehousing, engineering support, quality assurance support, and other administrative services." That the separation process continued even after the date of 1 January 2013 is also evident from document D115 (*ibid.*) which states that "these agreements facilitated the separation by allowing AbbVie to operate independently prior to establishing stand-alone back office functions across its organization. The majority of these transition service agreements expired without extension at December 31, 2014; however, some of these services continue to be provided to AbbVie on a temporary basis."

19.1 Document D115 thus discloses that, while AbbVie was incorporated in Delaware on 10 April 2012, Abbott conducted business activities on behalf of AbbVie at least until 31 December 2014.

20. As to documents D116 to D126:

Document D116 consists of the "Table of Contents"- and the "Definitions"-part of a "Separation and Distribution Agreement by and between Abbott Laboratories and AbbVie Inc. dated as of November 28, 2012". Although the appellant states that document D116 "provides a detailed "roadmap" for the separation including a multitude of further intercompany transactions", nothing can in fact be learned from the table of contents and definitions part of this document about the separation or its roadmap.

Document D117 consists of the "Table of Contents"- and "Definitions"-part of the "Employee Matters Agreement by and between Abbott Laboratories and AbbVie Inc. dated as

of December 31, 2012". Again, nothing of relevance can be learned from document D117. In particular, it does not disclose, as the appellant would have it, that "on January 1, 2013 they [note by the board: the employees working at Abbott in the proprietary pharmaceutical business segment] became employees of AbbVie Inc. so that just from that date AbbVie Inc. could take over and continue Abbott Laboratories HUMIRA® business."

Document D118 are excerpts from "Form 10-K" for the fiscal year ended December 31, 2012 filed by Abbott with the "United States Securities and Exchange Commission". It discloses on page 27, that "on January 1, 2013, Abbott distributed all of the outstanding shares of AbbVie to Abbott's shareholders" and that "As a result of the distribution, AbbVie is now an independent company".

Document D119 is a declaration by Johanna M. Corbin. She declares *inter alia* (see points 9 and 10) that the "Abbott Laboratories HUMIRA® Team continued these HUMIRA®-related activities throughout the entirety of 2012" while "on and after January 1, 2013 the HUMIRA® Team continued their HUMIRA®-related work at AbbVie."

Documents D120 to D122 are marketing leaflets for HUMIRA® issued in the name of Abbott Laboratories and dated September 2012, August 2012 and December 2012 respectively.

Document D123 is a document from the FDA proposing a new indication for HUMIRA®. The addressee is Abbott and the document refers *inter alia* to "your amendments" of "August 01, 2012, August 15, 2012, August 22, 2012, September 17, 2012, September 18, 2012, and September 26, 2012".

Document D124 highlights some prescription information for HUMIRA®. It is in the name of Abbott Laboratories and bears the revision date "09/2012".

Document D125, a declaration by Kris Hault, states (see point 4) that "at least 80 people from the senior staff of Abbott Laboratories with substantial responsibility for the HUMIRA® business throughout 2012 and in years before that, transferred to AbbVie Inc. with effect of January 1<sup>st</sup>, 2013."

Document D126, a declaration by David S.Fishman, summarises the processes leading to the establishment of AbbVie Inc.. He declares *inter alia* (see point 4) that "a first contract was executed between Abbott Laboratories and AbbVie Inc. on August 1st, 2012 ("Contribution , Assignment and Assumption Agreement"). Therewith certain assets were transferred from Abbott Laboratories to AbbVie Inc."

- 20.1 In the board's view, documents D116 to D126 fall into two categories. Documents D116 and D117 appear to be of no evidential value for the facts to be proven, while documents D118 to D126 merely seem to illustrate what document D115 already discloses (see point 19 above), namely that the separation process was indeed a complex one and that Abbott performed activities on behalf of AbbVie during the separation process.
- 20.2 But these documents, taken as a whole, do not prove that the relevant business assets were transferred to AbbVie on a date other than 1 August 2012, as established on the basis of the Agreement, Declaration and the request (see points 13 to 15 above).

21. Hence, the transfer of opponent status from Abbott to AbbVie cannot be acknowledged in the appeal proceedings either.

*Remittal*

22. In circumstances like the present ones, the board in case T 1178/04 held (see reasons, points 44 to 45) that requests made by the wrong party during the proceedings before the opposition division were inadmissible, and saw no other means to correct this procedural deficiency than to order remittal of the case to the opposition division so that the proceedings could be conducted with the right party.
23. The board in case T 1982/09, in the same circumstances, considered in accordance with Article 11 RPBA whether there were any "special reasons" speaking against remittal. In the end it decided against remittal (see reasons, point 2.2 ), the "special reasons" being that "the appellant's representative explicitly stated that he had been and was still authorized to represent the original opponent (...), none of the parties argued that the fact that the opposition proceedings were continued with the wrong party had changed the outcome of the proceedings in substance (...), any suggestion that the true opponent might not have appealed the decision or might have conducted the appeal proceedings differently would amount to mere speculation (...), and all the parties agreed that a remittal and the ensuing repetition of the first instance proceedings would cause a considerable and undesirable delay (...)".
24. In the present case, the board, seeking to come to a final decision in these proceedings without delay, has therefore, like the board in T 1982/09, considered



whether there were any "special reasons" against remittal.

- 24.1 However the board, whilst well aware of the negative consequences that remittal entails, does not see any "special reasons" justifying non-remittal in the present case. Also the new evidence submitted during the appeal proceedings has not established that the relevant business assets were still with Abbott when the opposition was filed, i.e. that the opposition could have been transferred to AbbVie as part of the opponent's business assets together with the assets in the interests of which the opposition was filed.
25. As a consequence, it has decided to remit the case to the opposition division so that the proceedings can be conducted with the right party.

It is noted that the opposition division will be bound only by the *ratio decidendi* of the board's decision concerning the validity of the transfer of opponent status, but not by its previous decision.

## Order

### For these reasons it is decided that:

1. The appeal is held admissible.
2. The decision under appeal is set aside.
3. The case is remitted to the opposition division with the order to continue the opposition proceedings with Abbott Laboratories as opponent 4.

The Registrar:

The Chairwoman:



P. Cremona

G. Alt

Decision electronically authenticated