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**Datasheet for the decision
of 14 October 2021**

Case Number: T 0007/17 - 3.3.01

Application Number: 10734541.5

Publication Number: 2448637

IPC: A61P25/08, A61K31/352

Language of the proceedings: EN

Title of invention:

USE OF ONE OR A COMBINATION OF PHYTO-CANNABINOIDS IN THE
TREATMENT OF EPILEPSY

Patent Proprietor:

GW Pharma Limited
Otsuka Pharmaceutical Co. Limited

Opponent:

Insys Therapeutics, Inc.

Headword:

Phyto-Cannabinoids in the treatment of epilepsy/GW PHARMA and
OTSUKA PHARMACEUTICAL

Relevant legal provisions:

EPC Art. 99(1)

EPC R. 22, 85, 103(4) (a), 115(1), 115(2), 130(1), 152(1),
152(6)

RPBA 2020 Art. 15(3)

Decision of the President of the EPO dated 12 July 2007 on the
filing of authorisations Art. 1(1), (2), (3)

Keyword:

Admissibility of appeal

Authorisation

Transfer of opponent status

Postponement of oral proceedings

Decisions cited:

G 0001/13, G 0002/04, G 0003/99, G 0004/97, G 0003/97,

G 0008/91, G 0004/88, J 0019/92, T 2357/12, T 0796/12,

T 2136/11, T 1700/11, T 1911/09, T 1421/05, T 0425/05,

T 0006/05, T 0956/03, T 0009/00, T 0247/98, T 1204/97



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Case Number: T 0007/17 - 3.3.01

D E C I S I O N
of Technical Board of Appeal 3.3.01
of 14 October 2021

Appellant: Insys Therapeutics, Inc.
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Chandler, AZ 85286 (US)

Representative: Carpmaels & Ransford LLP
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Respondents: GW Pharma Limited
(Patent Proprietors) Sovereign House
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Cambridge CB24 9BZ (GB)

and

Otsuka Pharmaceutical Co. Limited
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Representative: HGF
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**Purported transferee of
opponent status:** Benuvia Therapeutics Inc.
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Representative: Carpmaels & Ransford LLP
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Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted on
15 December 2016 concerning maintenance of the
European Patent No. 2 448 637 in amended form

Composition of the Board:

Chairman A. Lindner
Members: M. Pregetter
M. Blasi

Summary of Facts and Submissions

- I. The appeal lies from the interlocutory decision of the opposition division according to which European patent No. 2 448 637 as amended according to auxiliary request 3, and the invention to which it related, met the requirements of the EPC. The patent has the title "Use of one or a combination of phyto-cannabinoids in the treatment of epilepsy".
- II. The patent proprietors and the opponent appealed this decision. The patent proprietors withdrew their appeal in the course of the appeal proceedings and thus became the respondents to this appeal case. The opponent remained the sole appellant.
- III. The following documents, cited during the appeal proceedings, are relevant for the present decision.
- D40 "SEC Form 15", Investopedia, W. Kenton, 6 July 2020
- D41 Official US regulation on Form 15; "§ 249.323 Form 15"
- D42 "Insys Therapeutics, Inc., Docket No 1:19-bk-11292 (Bankr. D. Del. Jun 10, 2019), Court Docket, Bloomberg Law as of 26 February 2021", summary of the Insys bankruptcy proceeding
- D43 "United States Bankruptcy Court District of Delaware, Court Order, Case No. 19-11292 (KG), 16 January 2020; Doc 1115", Court approval of Insys reorganisation plan
- D44 Asset Purchase Agreement Insys Therapeutics, Inc and Chilion Group Holdings US, Inc. (with Schedule 5.8(a) - Assigned Intellectual Property) dated 6 August 2019

- D45 Bankruptcy Court Order Approval dated 23 August 2019
- D46 Patent Assignment Agreement between various Insys companies and Fresh Cut Development, LLC (with Exhibit A - Assigned Patents) dated 31 October 2019
- D47 Patent Assignment Agreement between Fresh Cut Development, LLC and Benuvia Therapeutics Inc. (with Exhibit A - Assigned Patents and Additional Patent Publications) dated 29 November 2019
- D48 Delaware Secretary of State Certificate confirming name change from Chilion Group Holdings US, Inc. to Benuvia Therapeutics Inc.
- D49 Benuvia Authorisation for Carpmaels & Ransford LLP signed by Mr T. Davis, Chairman and CEO of Benuvia Therapeutics Inc., dated "03/05/2021"

IV. The following information of the appeal proceedings is relevant for the present decision, in particular in view of the various requests for postponement made in these proceedings.

- Notice of appeal dated 5 December 2016 on behalf of the opponent Insys Therapeutics, Inc., filed by a professional representative of Elkington + Fife LLP ("E+F").
- Statement setting out the grounds of appeal dated 21 April 2017 on behalf of Insys Therapeutics, Inc.
- Summons to oral proceedings scheduled for 29 April 2020.

- Letter of 26 March 2020 from E+F on behalf of the appellant-opponent, the patent being identified as being "Opposed by Insys Therapeutics, Inc.", containing a withdrawal of the request for oral proceedings and comments on procedural matters and patentability.
- Communication dated 9 April 2020 by the board informing of a postponement of the oral proceedings to 9 March 2021 due to the spread of the coronavirus (COVID-19).
- Letter of 27 January 2021 from E+F indicating that it "*hereby resign[s] from representation of the Opponent, Insys Therapeutics Inc.*" and stating that the opponent's new representative was Mr Goodfellow, Carpmaels & Ransford LLP ("C&R").
- Letter of 23 February 2021 from the patent proprietors, accompanied by an annex according to which Insys Therapeutics, Inc. had filed, on 11 February 2020, a certification and notice of termination of registration (SEC Form 15), based on which it was submitted that "*it appears that the company is no longer in existence and therefore not able to act in these appeal proceedings*". Concerns were also expressed regarding the appellant-opponent's representation, and it was noted that no signed authorisation from the opponent had been submitted to the file.
- Communication by the board dated 1 March 2021, emailed on 26 February 2021 to the parties, indicating that the filing of an authorisation was not required for the change of representation being recorded and that, according to the European Patent

Register and the content of the file, the appellant-opponent was Insys Therapeutics, Inc. In view of the doubts raised by the patent proprietors, the appellant-opponent was invited to clarify the situation concerning its existence by 5 March 2021, 12.00 hrs CET. The board would then inform the parties whether the proceedings would be postponed.

- Letter of 4 March 2021 from Mr Goodfellow of C&R indicating that while Insys Therapeutics, Inc. was presently in insolvency proceedings, it was not yet dissolved and therefore existed as a legal entity and still had capacity to act. The letter was accompanied by documents D40 to D43.
- Letter of 8 March 2021 from the patent proprietors explaining why D43 demonstrated that Insys Therapeutics, Inc. no longer had capacity to act in the appeal proceedings and requesting postponement of the oral proceedings to be able to consult with US counsel on the underlying issues of US law arising from the letter of 4 March 2021.
- Communication dated 9 March 2021, emailed to the parties on 8 March 2021, that the oral proceedings were cancelled.
- Summons dated 16 March 2021 to oral proceedings scheduled to take place on 14 October 2021.
- Letter of 1 April 2021 from Mr Goodfellow of C&R on behalf of the appellant-opponent asking for the board's instructions in relation to next steps in the written procedure.

- Letter of 21 April 2021 from the patent proprietors stating that upon review of the evidence filed by C&R on 4 March 2021, they had concluded that Insys Therapeutics, Inc. clearly did not have the capacity to act. A letter outlining the findings of the patent proprietors' US counsel, Cooley LLP, dated 1 April 2021, was annexed.

- Communication by the board dated 6 July 2021 indicating that the determination whether a legal entity existed or had ceased to exist and had capacity to act was a matter of national law and that in cases such as this where the answer was to be found in laws foreign to the EPC and its contracting states, it was for the parties to provide evidence of the legal provisions which they considered relevant. The board raised questions relating to a potential universal legal succession, the impact of the liquidation proceedings on the appellant-opponent's capacity to act in national court proceedings, the role of the liquidation trustee in this context, and the appellant-opponent's possible dissolution date and asked the appellant-opponent for comments. Furthermore, the appellant-opponent's professional representative was invited to file a signed authorisation within two months.

- Upon a request dated 5 August 2021 from C&R, representation was transferred from individual representatives of C&R to association 182.

- Letter from C&R dated 16 September 2021 in which the "transfer of opposition to Benuvia Therapeutics Inc." was requested based on annexed documents D44 to D48, also indicating, by referring to D49, that

C&R had been authorised by Benuvia Therapeutics Inc. to act in these proceedings.

- Communication by the board dated 29 September 2021, observing that no authorisation from the appellant-opponent (Insys Therapeutics, Inc.) had been filed and commenting on the transfer of the party status as opponent. The board indicated, *inter alia*, that issues addressed in the board's earlier communication still appeared to be relevant, in particular the existence of the appellant-opponent on the date of receipt of the transfer request, and that it appeared necessary to establish that Insys Therapeutics, Inc. had agreed or agreed that its party status as opponent be transferred.
- Letter dated 8 October 2021 from the patent proprietors contesting that the appellant-opponent existed and had capacity to act and explaining why the requirements for a transfer of opponent status were not met.
- Letter dated 12 October 2021 from C&R requesting postponement of the oral proceedings for the reason that it would take a few more days to obtain further evidence, e.g. in relation to the issue of party status of the opponent, to confirm the situation concerning an effective transfer of opponent status beyond any reasonable doubt.
- Communication dated 18 October 2021, sent by email to the parties on 13 October 2021, by which the board rejected the request for postponement and gave reasons for the rejection.

V. Oral proceedings before the board took place on 14 October 2021. In the course of the oral proceedings, the board rejected the request of Benuvia Therapeutics Inc. that the party status as opponent be transferred to it and the request from C&R that the oral proceedings be postponed for the filing of an authorisation from the appellant-opponent. In the absence of an authorisation, the appellant-opponent had to be considered as not being represented at the oral proceedings, and the board decided to continue the proceedings in the appellant-opponent's absence. The patent proprietors withdrew their appeal (see the minutes of the oral proceedings for the details). At the end of the proceedings, the board gave its final decision.

VI. The following requests were relevant for the decision terminating the appeal proceedings.

- The appellant-opponent had requested in writing that the decision under appeal be set aside and that the patent be revoked.
- The patent proprietors requested that the opponent's appeal be dismissed, implying that the patent be maintained in amended form pursuant to the decision under appeal.

VII. The submissions of Benuvia Therapeutic Inc. can be summarised as follows.

Request for transfer of opponent status

The opponent, Insys Therapeutics, Inc., had instituted opposition proceedings in the interests of its cannabidiol ("CBD") business. The opponent's CBD business, including the assets in the interest of which the opposition had been filed, had been transferred in

its entirety to Chilion Group Holdings US, Inc. (see the Asset Purchase Agreement D44 dated 6 August 2019 ("Agreement") which had been approved by Bankruptcy Court Order D45 dated 23 August 2019).

The opposition constituted an inseparable part of those transferred CBD business assets since the opposed patent related to medical uses of CBD. Being an inseparable part of the assets, the opposition was also transferred.

Even if the opposition were considered a separate right, it had been transferred. Under the Agreement D44, Insys Therapeutics, Inc. had also agreed to transfer the opposition, together with the CBD business assets, as could be derived from D44, page 6; Section 2.2(a), items (i), (iii), (xii) and (xx), and the definitions of the terms "Product Technology" on page 14, "Transferred Record" on page 16, "Intellectual Property" on page 10 and "Patent Rights" and "Proceeding" on page 13, the latter explicitly mentioning "reexaminations" and "foreign counterparts". Schedule 5.8(a) might seem limiting, but in fact all Intellectual Property had been transferred, as clarified on page 18 of D44. Only "valid" and "enforceable" IP rights had to be listed. The list of inclusions, being broadly defined, should prevail over the list of exclusions. Opponent status did not constitute proceedings but a right and thus was not covered by Section 2.2(b)(vi), which moreover related to "litigation proceedings" rather than just "proceedings".

Because the Agreement D44 was clear and the transfer had taken place at that point in time, there was no

need for a later agreement as suggested by the patent proprietors.

As assignee of those business assets, Chilion Group Holdings US, Inc. had an interest in continuing the opposition. Pursuant to decision G 4/88, the opposition was transferable to the assignee.

Chilion Group Holdings US, Inc. subsequently changed its name to Benuvia Therapeutics Inc., as shown by D48. The CBD patents were transferred to Benuvia Therapeutics Inc. via holding company Fresh Cut Development, LLC, as shown by D46 and D47. Benuvia Therapeutics Inc. did not retain any interest in patents licensed to Insys. The licensed patents were not transferable. The patent proprietors had failed to demonstrate that the licences had been retained by Insys Therapeutics, Inc.

As for the letter filed on 26 March 2020 referring to Insys Therapeutics, Inc. as opponent, C&R had acted diligently. Furthermore, there was no deadline for making the request for a transfer of opponent status. Decision T 2357/12 confirmed that a unilateral request from the new party was possible.

Insys Therapeutics, Inc. was still in existence on the date when the request for transfer of opponent status was made because:

- as shown by D42, the bankruptcy proceedings were still pending, the latest docket entry being dated 25 February 2021
- the bankruptcy was filed under Chapter 11 of the US Bankruptcy Code as a "reorganization bankruptcy" (11 US Code Title 11). Chapter 11

proceedings allowed a business to declare bankruptcy and reorganise while remaining in operation

- as shown by D43, Insys had won court approval of its Chapter 11 bankruptcy reorganisation plan on 16 January 2020, and the court authorised Insys to continue acting. Thus, Insys still had capacity to act and still existed as a legal entity.

Furthermore, according to the records checked on the day of the oral proceedings, Insys was still not dissolved. The patent proprietors had furnished no evidence that Insys Therapeutics, Inc. had been dissolved. If it were necessary to check the register, the proceedings could be adjourned for a short period of time, enabling the submission of appropriate evidence.

As for the capacity to act, the letter dated 1 April 2021 submitted by the patent proprietors with the letter of 21 April 2021 confirmed that Insys Therapeutics, Inc. still had duties. D42, item 1334, showed that something had been filed by Insys Therapeutics, Inc. on 1 May 2020.

Pursuant to decision T 796/12, even a company struck from the register was considered to have capacity to act in proceedings before the EPO.

VIII. The relevant submissions on behalf of the appellant-opponent can be summarised as follows.

Postponement of the oral proceedings for the filing of an authorisation

It was not possible to provide an authorisation on behalf of Insys Therapeutics, Inc. on the date of the oral proceedings. If the transfer of opponent status was considered not allowable, postponement of the oral proceedings was requested to provide the authorisation which the representatives of C&R were certain to get. The legal counsel for the bankruptcy was, however, not available for health reasons. The representatives had been informed of this by email that morning. These were new facts which had to be taken into account, but the email could not be submitted. A brief postponement would be sufficient as Insys Therapeutics, Inc. had not yet been completely dissolved, and any deficiency could be remedied quickly.

While it was true that the board had invited the filing of an authorisation from the opponent, the board's instruction in the communication dated 6 July 2021 that an authorisation needed to be filed had been responded to in a way that made it unnecessary to file an authorisation from the opponent, namely by requesting transfer of the party status as opponent on behalf of Benuvia Therapeutics Inc. Furthermore, no legal basis had been indicated in the communication.

It had only been at the oral proceedings, after the board had announced its decision to reject the requested transfer of opponent status, that the need to file an authorisation on behalf of Insys Therapeutics, Inc. became relevant.

It had come as a surprise that the request for transfer of opponent status had been rejected; unilateral requests for a transfer of party status had been accepted in other cases (e.g. in T 2357/12).

To reply to the board's communication as soon as possible after receipt, a request for transfer of opponent status had been made based on publicly available documents. Bankruptcy proceedings were very slow, and trusts worked at "glacial speed", such that it took a very long time to get authorisations.

The filing of an authorisation was not needed since the representatives of C&R had been validly appointed by E+F in the latter's letter dated 27 January 2021. The board had been wrong to ask for an authorisation from the outset. The representatives had been given authorisation by E+F, and there had been no circumstances which would have necessitated the invitation to file an authorisation under Article 1(3) of the Decision of the President of the EPO dated 12 July 2007 on the filing of authorisations.

Insys Therapeutics, Inc.'s right to be heard would be infringed if the request for postponement was not granted and the case was decided before C&R could file an authorisation.

Requiring an authorisation and not postponing the proceedings for it to be filed was too formalistic considering that the patent was invalid and that the interest of the public required that a decision finding this invalidity be made.

The patent proprietors themselves had suggested postponement in their last written submission before the oral proceedings.

- IX. The relevant submissions of the patent proprietors can be summarised as follows.

Transfer of opponent status to Benuvia Therapeutics Inc.

The transfer or assignment of opponent status to a third party had to be made as part of the transfer or assignment of the opponent's business assets, together with the assets in the interests of which the opposition was filed (G 4/88). It had to be demonstrated with appropriate evidence that the transferor had agreed or did agree that its party status as opponent be transferred. There was no automatic transfer of an opposition with the business assets in the interests of which the opposition was filed.

The documents submitted in support of the requested transfer did not show that the assets in the interest of which the opposition had been filed were transferred in their entirety.

Section 2.2 of D44 made clear that not all of Insys's business assets were transferred as it referred to "Transferred Assets" and "Excluded Assets". With regard to the Transferred Assets, D44 stated that these included "Product Technology" and "Assigned Intellectual Property". According to the definition of "Assigned Intellectual Property", as set forth in Section 5.8(a), "a list of all issued or registered Intellectual Property that is reasonably known or

believed by the Seller to be part of the Product Technology... as of the Closing Date" was provided in Schedule 5.8(a). Schedule 5.8(a) contained a list of patent filings made by Insys and a list of patents under which licence rights had been granted to Insys.

According to D44, the transfer of any patent-related assets was dependent on the execution of certain Ancillary Agreements, namely the Patent Assignments. However, it was evident from the Patent Assignments D46 and D47 that the licence rights held by Insys under various patent filings, all of which relating to CBD, had not been assigned to Fresh Cut Development, LLC or Benuvia Therapeutics Inc.

Likewise, the opposition filed against the patent in suit had not been transferred by Insys. The opposition was mentioned neither in D44 nor in Schedule 5.8(a). As such, it was not defined as part of the "Transferred Assets". Section 2.2(b) of D44 made it clear that any assets not expressly included within the definition of "Transferred Assets" under point Section 2.2(a) were to be regarded as "Excluded Assets". The opposition had to be considered an excluded asset under Section 2.2(b), as did the "Proceedings" mentioned in item (vi) - "Any and all litigation Proceedings" - as the EPO opposition proceedings were also *inter partes* proceedings. The definition of "Proceedings" on page 13 of D44 included any proceeding before a "Governmental Entity", this term as used in D44 included patent offices. D44 was confined to Insys's own product technology and patents and did not extend to other companies' patents. Under Section 2.2(b) (vi), "litigation proceedings" which did not relate to the product technology were excluded.

The opposition not having been transferred under D44 was consistent with the fact that Insys Therapeutics, Inc. had continued to make submissions in the appeal proceedings in its own name. D44 had been concluded in 2019, and further material submissions and requests had subsequently been made before the EPO on behalf of Insys Therapeutics, Inc., in particular in the letter dated 26 March 2020.

When a request for transfer of opponent status is made, the transferor, i.e. the original opponent, must still be in existence and have capacity to act in the proceedings. The legal personality of an entity acting in proceedings under the EPC is to be decided on the same basis as before national courts (G 1/13, Reasons 5.1 and 6; and G 3/99, Reasons 9).

There was no evidence provided that Insys Therapeutics, Inc. still existed and had capacity to act.

Postponement of the oral proceedings for the filing of an authorisation

The oral proceedings should not be postponed. The board had explicitly invited the filing of an authorisation and set a deadline. There was no excuse not to file an authorisation. C&R misinterpreted the patent proprietors' letter dated 8 October 2021.

In fact, there had been no need to wait for such an authorisation request. The question of proper representation and the status of the appellant-opponent had already been put forward by the patent proprietors themselves in their letter of 23 February 2021, and C&R had had the opportunity to react in time.

In its communication of 29 September 2021 in reply to the requested transfer, the board again indicated that the status of Insys Therapeutics, Inc. remained relevant.

There was no justification for a postponement. C&R, by referring to the trustee for an authorisation, had confirmed that Insys Therapeutics, Inc. had no capacity to act. If it was now so easy to rectify the deficiencies within a short time frame, why could this not have been done earlier?

As C&R had failed to file any other authorisation, C&R could only act on behalf of Benuvia Therapeutics Inc. at the oral proceedings. If the transfer were considered invalid, it would have to be concluded that there was no one there to make requests such as for postponement on behalf of Insys Therapeutics, Inc. since the representatives of C&R attending the oral proceedings did not have the right to represent Insys Therapeutics, Inc. in the proceedings.

Admissibility of the opponent's appeal

It was contested that Insys Therapeutics, Inc. was still in existence and not yet dissolved. The board had asked for this to be answered in a question to the appellant-opponent in its communication. The appellant-opponent had not done so, nor had it responded in relation to a transfer to the liquidation trust.

The appellant-opponent was in bankruptcy proceeding. On 18 February 2020, the "Second Amended Joint Chapter 11 Plan of Liquidation of Insys Therapeutics, Inc. and Its Affiliated Debtors" (the "Plan" and the "Debtors"), confirmed by the Bankruptcy Court for the

District of Delaware (D43), had become effective, and the interests of the Debtors existing as of this date had been transferred to and had become vested in the liquidation trust, and Mr W. Heinrich had been appointed the liquidating trustee of the liquidation trust. The Debtors still existed as a legal entity until the "Dissolution Date" specified as no later than 30 days after completion of the acts required of the Debtors or the Liquidating Debtors by Article V of the Plan.

Article V dealt with the winding up of the Liquidating Debtors. Hence, while it was possible that Insys still existed as a corporation because it had not yet filed dissolution documents with the appropriate state agency, the Plan made clear that Insys's only duties were to wind up its operations. Therefore, it did not appear that Insys had the "capacity to act" in any way outside the scope of the court-ordered mandate. It would go against the purpose of winding up the company to accept that the appellant-opponent in bankruptcy proceedings had capacity to act in court proceedings.

An active bankruptcy docket did not in any way signify that Insys was still acting in any capacity other than winding up its affairs. Indeed, Insys had not filed any recent pleadings in the bankruptcy case. Item 1334 in D42 was an entry made on 1 May 2020, i.e. much earlier. After this date, Insys Therapeutics, Inc. no longer appeared in D42, only the liquidation trust.

Insys's bankruptcy was not a reorganisation bankruptcy but a liquidating case, as evidenced by the name, nature and contents of the confirmed Plan, resulting in the orderly liquidation of the bankrupt company's assets and the payment of creditors.

While during the pendency of the bankruptcy case the Debtors were authorised to, and did, operate their businesses and manage their properties, after the Plan became effective on 18 February 2020, Insys's only duty was to wind up its operations in accordance with Article V of the Plan.

In any case, if the appellant-opponent still existed, it clearly no longer had capacity to act in EPO proceedings since it had no capacity to sue or to be sued in its own name and on its own account, a question that had to be assessed under national law (see G 1/13, Reasons 5.1 and 6; and G 3/99). This could be derived from D43, page 12 and paragraphs 18 and 50. The US counsel who had considered D40 to D43 likewise concluded that the appellant-opponent clearly no longer had capacity to act in accordance with the relevant legal standard (see the opinion annexed to the letter dated 21 April 2021).

If a sole appellant no longer had capacity to act in appeal proceedings, the proceedings should be terminated.

If there were a unilateral succession, the successor would probably be the Insys liquidation trust, and the party status would be with the trust. Even though the board had explicitly asked the appellant-opponent about its existence and its capacity to act, nothing had been provided by the appellant-opponent.

Reasons for the Decision

Transfer of party status as opponent to Benuvia Therapeutics Inc.

1. The request of Benuvia Therapeutics Inc. that the party status as opponent be transferred to it - and with it the opponent's procedural status as appellant in the appeal proceedings - had to be rejected.
 - 1.1 In accordance with established case law, the party status as an opponent cannot be freely transferred (see G 2/04, OJ EPO 2005, 549), although it may be transferred - in opposition and opposition appeal proceedings - in the following two circumstances.
 - 1.1.1 The status as an opponent passes to the successor in title in a universal succession in law (see also G 4/88, OJ EPO 1989, 480, Reasons 4). For transfer by universal succession, the universal successor automatically acquires the bundle of procedural rights from the predecessor. Hence, the party status is acquired from the date on which universal succession becomes effective (see T 6/05, Reasons 1.7 and T 425/05, Reasons 1.2).
 - 1.1.2 Furthermore, an opposition pending before the EPO may 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, cited above, Headnote; T 2357/12, Reasons 2 to 4; and Case Law of the Boards of Appeal, 9th edition 2019, III.O.2).

For a transfer of the party status as opponent to be accepted, i.e. for a transferee to be acknowledged in place of an original opponent, appropriate evidence must be produced to satisfy the opposition division or the board that an allowable transfer has occurred. In the absence of such evidence, a request to acknowledge a transfer must be refused (see T 956/03, Reasons 2), and the original opponent remains the party to the proceedings (see G 3/97, OJ EPO 1999, 245, Reasons 2.2).

Where a transfer of opponent status is requested and the relevant requirements are met, the party status as opponent is transferred only with effect from when the allowable request for transfer of the opponent status is received. This is based on considerations of treating the contractual transfer of the opponent status similar to a transfer of a European patent application or patent under Rules 22 and 85 EPC, respectively, (see also T 6/05, Reasons 1.6.1). A transfer of opponent status thus has no retroactive effect. What is transferable, however, is not the right of opposition, i.e. to file notice of opposition, but the procedural status as opponent, consisting of a bundle of procedural rights (see also G 4/88, cited above, Reasons 2 and T 9/00, OJ EPO 2002, 275, Reasons 2.c.dd) resulting from an opposition having been filed.

- 1.2 While the board had raised, during the appeal proceedings, the question as to whether circumstances had occurred which might qualify as a universal succession, it could not be established, on the basis of the submissions received, that a transfer in the form of a universal succession had taken place.

In fact, neither on the appellant-opponent's part nor on the part of Benuvia Therapeutics Inc. has a case of universal succession been presented. Instead, it has been argued that Benuvia Therapeutics Inc., by way of a contractual agreement, had acquired from the appellant-opponent the opposition together with the relevant business assets in the interests of which the opposition was filed and that the appellant-opponent was still in existence as a legal entity.

- 1.3 The requirements for a transfer of party status as appellant-opponent are not met since the board considers it not sufficiently proven that all relevant business assets in the interests of which the opposition had been filed had been transferred to Benuvia Therapeutics Inc., nor that the opposition was transferred.
- 1.3.1 The board considers that it is on the opponent or the third party seeking the party status as opponent to prove that all assets had been transferred in the interest of which the opposition had been filed. It was not on the patent proprietors to show that not all assets had been transferred.
- 1.3.2 In the case at hand, the patent in suit relates to medical uses of CBD (cannabidiol) and, indeed, the Agreement (D44) arranges a transfer of the appellant-opponent's CBD-related business activities. With regard to the "Transferred Assets", these include all Product Technology including the Assigned Intellectual Property (see Section 2.2(a)(i) of D44). Section 5.8(a) of D44 refers to Schedule 5.8(a) as "a list of all issued or registered Intellectual Property that is reasonably known or believed by the Seller to be part of the Product Technology (the 'Assigned Intellectual

Property')". Schedule 5.8(a) lists various patent filings made by the appellant-opponent or its affiliated companies and patents under which licence rights had been granted to them. According to D44, the transfer of any patent-related asset was dependent upon execution of the Patent Assignments.

- 1.3.3 While the two Patent Assignments D46 and D47 show that all the listed patent filings had indeed been assigned to Fresh Cut Development, LLC or Benuvia Therapeutics Inc., respectively, no evidence was provided in relation to the licence rights.

On the part of Benuvia Therapeutics Inc., it was submitted that the licensed patents were not transferable and that the patent proprietors had failed to show that the licences had been retained by Insys Therapeutics, Inc. The board, however, considers that it was for Benuvia Therapeutics Inc. to clarify the situation concerning the licence rights listed in Schedule 5.8(a) among the then existing IP rights relating to CBD but which, in contrast to the patent rights listed, were not covered by the assignments D46 and D47. As it was Benuvia Therapeutics Inc. requesting the transfer of opponent status, it was on Benuvia Therapeutics Inc. to show that the requirements for the requested transfer had been met.

On the basis of the submissions and evidence filed, the board could not establish that the licence rights listed in Schedule 5.8(a) as part of the CBD business assets had indeed been transferred by the appellant-opponent, and it thus had to conclude that these business assets remained with the appellant-opponent, i.e. Insys Therapeutics, Inc.

1.3.4 Where only part of the assets in the interests of which the opposition had been filed - here the CBD business assets - were transferred, the requirements set by the Enlarged Board of Appeal in its decision G 4/88 (cited above) cannot be considered to be met. In such a case, the original opponent remains party to the proceedings. This is due to the fact that the party status as opponent is not freely transferable, and decision G 4/88 provides for a limited exception only.

1.4 Irrespective of the fact that the board does not consider it to be proven that all the appellant-opponent's business assets in the interest of which the opposition had been filed were assigned to Benuvia Therapeutics Inc., the board likewise does not consider it proven that the opposition was transferred under the Agreement D44.

1.4.1 The board does not agree with the main line of argument of Benuvia Therapeutics Inc. that the opposition, in case of a transfer of all business assets in the interest of which the opposition had been filed, is transferred with the transfer of these assets under all circumstances. The board takes the view that this does not occur automatically.

1.4.2 The Enlarged Board of Appeal, in the referral case G 4/88 (cited above), was concerned with whether an opposition could be transferred freely or with a part of the opponent's enterprise. The Enlarged Board of Appeal found that an "opposition pending before the European Patent Office may 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, cited above, Order). In the Reasons, the Enlarged Board of

Appeal stated that where the opposition had been instituted in the interest of the opponent's business, " ... the opposition constitutes an inseparable part of those assets. Therefore, in so far as those assets are transferable or assignable under the applicable national laws, the opposition which is part of them must also 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." (see G 4/88, cited above, Reasons 6).

Neither from the context of the referred question nor the decision can the board derive that the transfer of the opposition, i.e. the party status as opponent, would be an obligation or an inevitable consequence of the transfer of the relevant business assets. To the contrary, the wording chosen by the Enlarged Board of Appeal ("may be transferred" and "transferable or assignable") makes it clear that the decision specifies the conditions under which a transfer of the opponent status is possible. Thus, decision G 4/88 does not envisage an "automatic" transfer of the opponent status in cases of a contractually agreed transfer of the business assets in the interests of which the opposition was filed (see also T 1911/09, Reasons 2.1.2 and T 1421/05, Reasons 3.2 ff).

This is consistent with the nature of opposition procedure. It is a legal remedy in the public interest which, in accordance with Article 99(1) EPC, can be filed by "any" person without any restriction, in particular without any need for a legitimate interest to initiate the proceedings (see also G 4/97, OJ EPO 1999, 270, Reasons 3.2.1). It is therefore also not necessary for an opponent to show, subsequent to the filing of the opposition, any continuing interest,

of whatever kind, in the patent being invalidated (see also T 1204/97, Reasons 1.2). Accordingly, where a company contractually transfers the business assets in the interests of which an opposition had initially been filed, it is a matter of the parties' agreement whether or not the opposition - i.e. the party status as opponent - is transferred together with these business assets.

- 1.4.3 In line with this and as an alternative line of argument, Benuvia Therapeutics Inc. submitted that the opposition was indeed transferred under the Agreement D44. The board, however, is not convinced.

It was not disputed that D44 does not mention the opposition in relation to the patent in suit.

- 1.4.4 Benuvia Therapeutics Inc. cited several passages in D44 (see section VII above) from which it argued it should be derived that the parties agreed that Insys Therapeutic, Inc.'s party status as opponent be transferred.

The board, however, agrees with the patent proprietors' point of view. They had pointed out that the Agreement D44 was confined to the appellant-opponent's own-product technology relating in particular to CBD, including its intellectual property rights (see Section 2.2(a)(i) and page 14, first paragraph, of D44).

The terms "reexaminations" and "all foreign counterparts" on page 13 of D44, to which Benuvia Therapeutics Inc. referred, appear within the definition of the term "Patent Rights". "Patent Rights" are covered by the definition of the term "Intellectual

Property" (see page 10 of D44), the latter being listed among the "Transferred Assets" in Section 2.2(a) of D44. The board therefore accepts the patent proprietors' view that the terms "reexaminations"/"all foreign counterparts" relate to the patents transferred under Agreement D44 and not to patents owned by third parties.

- 1.4.5 While Benuvia Therapeutics Inc. emphasised that the opposition was a "right", it is, however, not a substantive right but a bundle of procedural rights (see G 4/88, cited above, Reasons 2; point 1.1.2 above; and the board's communication dated 29 September 2021).

As far as procedural rights are concerned, the list of "Excluded Assets" in D44 mentions "[a]ny and all litigation Proceedings" in Section 2.2(b)(vi). Even if the argument of Benuvia Therapeutics Inc. that "any" does not mean "any Proceedings" but "any litigation Proceedings" were accepted, the board accepts the patent proprietors' considerations that item (vi), referring to "Proceedings", comes closest to opposition proceedings. Furthermore, under Section 2.2(b), the "Transferred Assets" do "not include any assets... that are not expressly included within the definition of 'Transferred Assets'".

- 1.4.6 The consideration that the party status as opponent had not been transferred under Agreement D44 is consistent with the fact that Insys Therapeutics, Inc. had continued to make submissions in the appeal proceedings after the conclusion of the Agreement D44 and the patent assignment agreements D46 and D47, as pointed out by the patent proprietors.

1.4.7 During the oral proceedings before the board, Benuvia Therapeutics Inc. referred to decision T 2357/12, emphasising that unilateral succession had been acknowledged by the deciding board.

The board notes that in case T 2357/12 the opponent was being dissolved and all assets and liabilities were transferred to its sole shareholder. This led the deciding board to conclude that the case in question was to be considered one of universal succession (see T 2357/12, section XI and XII, Reasons 14).

In the case at issue, however, the requested transfer of party status was based on the line of argument that the opponent's CBD business had been transferred to Benuvia Therapeutics Inc., in accordance with the Agreement D44. It had not been argued that all the opponent's business assets and liabilities were transferred to Benuvia Therapeutics Inc. This part of the decision thus does not support the case of Benuvia Therapeutics Inc.

As far as the obiter dictum concerning "singular succession" (see T 2357/12, Reasons 22) is concerned, this part of the decision does not need to be further addressed. In the case at issue, the question of whether the opponent (still) has to be in existence when a request for transfer of opponent status is received is ultimately not relevant for the board's decision on the request for transfer of opponent status as the request fails for other reasons. Moreover, in this case, the transfer was requested at the appeal stage and relates to the party status as appellant-opponent. Hence the underlying situation is different from in case T 2357/12 in this respect, too.

- 1.5 Since the requirements for a transfer of the opponent status were not met, the request of Benuvia Therapeutics Inc. that the party status be transferred to it was rejected. Accordingly, the appeal proceedings were continued with the original appellant-opponent, i.e. Insys Therapeutics, Inc.

Representation of the appellant-opponent at the oral proceedings

2. The oral proceedings took place in the absence of the appellant-opponent, Insys Therapeutics, Inc. Even though professional representatives attended the oral proceedings for the appellant-opponent, they were not entitled to act on behalf of the appellant-opponent because they had not submitted an authorisation, despite the board's earlier invitation to do so.
- 2.1 In accordance with Rule 115(1) EPC, the appellant-opponent was duly summoned to the oral proceedings taking place on 14 October 2021. The summons for these oral proceedings were issued on 16 March 2021 and received by the appellant-opponent's representative on 22 March 2021.
- 2.1.1 In accordance with Rule 130(1) EPC, the summons had been addressed to Mr Goodfellow of Carpmaels & Ransford LLP ("C&R"), being the appellant-opponent's representative at the time the summons was issued.

Mr Goodfellow had been identified in the letter from Elkington + Fife LLP ("E+F") dated 27 January 2021 to be the new representative. The association E+F had represented the appellant-opponent in the proceedings until then. While Mr Kingsbury, professional representative of E+F, had been the representative from

the filing of the notice of opposition up until after the lodging of the appeal, the EPO was informed by a professional representative at E+F in the appeal proceedings that E+F as an association was the new representative.

In accordance with Rule 152(1) EPC and Article 1(1) of the Decision of the President of the EPO dated 12 July 2007 on the filing of authorisations (OJ EPO 2007, Special edition No. 3, 128, "Decision on the filing of authorisations"), neither the identified individual professional representative working at E+F nor the E+F Association were required to file an authorisation.

Nor did Mr Goodfellow of C&R have to file an authorisation when he became the new representative. Since the former representative, E+F Association, had informed the EPO of its resignation from representation and the fact that Mr Goodfellow was the new representative, Article 1(2) of the Decision on the filing of authorisations did not apply. Accordingly, Mr Goodfellow was recorded as the new representative, and the subsequent proceedings were conducted with him as the appellant-opponent's representative.

- 2.1.2 After issuance of the summons, a change of representation from Mr Goodfellow to C&R Association was recorded as requested by letter of C&R dated 5 August 2021.
- 2.2 At the oral proceedings, Mr Goodfellow and Mr Newell of C&R were present. However, the board could not consider them entitled to act on behalf of the appellant-opponent in the absence of a signed authorisation, which could have been presented at the latest at the

oral proceedings, despite the board's earlier invitation to present one.

- 2.2.1 The board could not accept Mr Goodfellow's line of argument that he did not have to submit an authorisation from the appellant-opponent because he was authorised by E+F, the previous authorised representative, from whom he had duly taken over representation.

It is true that neither Mr Kingsbury from E+F, nor E+F Association nor, initially, Mr Goodfellow when taking over representation were required to file an authorisation to be able to act on behalf of the appellant-opponent. In the decision on the filing of authorisations, the EPO President, based on Rule 152(1) EPC, determined the cases in which a signed authorisation has to be filed by representatives acting before the EPO. This decision also applies to proceedings before the boards of appeal (see also T 1700/11, Reasons 3). Pursuant to Article 1(1) of the Decision on the filing of authorisations, a professional representative whose name appears on the list maintained by the EPO and who identifies themselves as such has to file a signed authorisation only in the circumstances of Article 1(2) and (3) of the Decision. As set out above in point 2.1.1, Article 1(2) of the Decision did not apply.

- 2.2.2 However, with the communication dated 6 July 2021, the board had invited the appellant-opponent's representative - at that time, Mr Goodfellow - to file an authorisation pursuant to Article 1(3) of the Decision. Under this provision, the EPO may require that an authorisation be produced if the circumstances of a particular case necessitate this, particularly in

case of doubt as to the professional representative's entitlement to act.

2.3 C&R's argument that the board was wrong to request an authorisation because there were no circumstances which would have necessitated the filing of an authorisation since representation had been taken over from E+F could not be accepted.

2.3.1 In the communication dated 6 July 2021, in the sections preceding the board's invitation to file an authorisation, the board explained its doubts that the appellant-opponent, being a company in the process of liquidation, was able to act without the involvement of the liquidator. The board therefore saw the need to ascertain that the professional representative was indeed empowered to act and thus invited the professional representative to file, within two months of notification of the communication, a signed authorisation in which, in particular, the capacity of the person signing should be stated.

2.3.2 The board can also not find the communication dated 6 July 2021, nor the request to file an authorisation, misleading or unclear. The board explicitly referred to Article 1(3) of the Decision on the filing of authorisations. It is immaterial that no legal consequence was mentioned. The communication is addressed to a professional representative who should know that, in case of non-compliance, they cannot be considered entitled to act on behalf of the party to the proceedings. Moreover, under Rule 152(6) EPC, if a required authorisation is not filed in due time, any procedural step taken by the representative, other than the filing of a European patent application, is deemed

not to have been taken.

It can also be noted that neither the initial professional representative at E+F nor the E+F Association had filed an authorisation from the appellant-opponent, and the letter dated 27 January 2021 was clearly about a change of representation and not, for instance, granting sub-authorisation.

- 2.3.3 The representatives of C&R suggested that the board's stance of requiring the submission of a signed authorisation was too formalistic because the patent was invalid and this was detrimental to the general interest of the public. However, the board notes that according to this kind of argument, many legal provisions governing the proceedings before the boards of appeal that put a certain burden on a party could be abrogated. Procedural provisions form part of the legal framework under the EPC and thus have to be observed, and it is not uncommon that appeal cases are lost on procedural issues rather than substantive points.

The suggestion that the board should make the application of the procedural provisions somewhat dependent on substantive considerations can likewise not be accepted. While opposition proceedings can be initiated by any person (see Article 99(1) EPC) and opposition proceedings may be continued by the opposition division of its own motion (see Rule 84(2) EPC and Article 114(1) EPC) - both of which are aspects which indeed serve the general interest of the public of having in force only European patents complying with the requirements of the EPC - *inter partes* appeal proceedings are different in view of the prevailing principle of party disposition. Accordingly,

for instance, in cases of a withdrawal of the appeal by the sole appellant-opponent, the appeal proceedings are to be terminated, and whether the patent as granted or the version considered allowable by the opposition division indeed complies with the requirements of the EPC is not further assessed (see G 8/91, OJ EPO 1993, 346, Reasons 7 and 10.1 to 10.3).

2.4 The fact that the board, after issuance of the summons dated 16 March 2021, had to regard the representatives as not being entitled to act on behalf of the appellant-opponent does not mean that, retroactively, Mr Goodfellow was not the correct person to address the summons to nor that the appellant-opponent was not duly summoned. Regarding to whom notifications are to be addressed under Rule 130(1) EPC, the legal situation on the date of issuance of the communication is relevant (see J 19/92, Reasons 4 and T 247/98, Reasons 1). While Rule 152(6) EPC creates the legal fiction that if a required authorisation is not filed in due time, any procedural steps taken by the representative are, as a rule, deemed not to have been taken, this does not relate to the steps taken by the EPO.

2.5 The appellant-opponent's representatives were present at the oral proceedings but could be considered as attending on behalf of Benuvia Therapeutics Inc. only. As no authorisation from the appellant-opponent had been submitted despite the board's invitation in its communication of 6 July 2021 and one could not be submitted in the course of the oral proceedings, as stated by the professional representatives at the oral proceedings, the appellant-opponent had to be considered as not being represented at the oral proceedings. In order to avoid any further procedural delays, the board decided, in accordance with

Rule 115(2) EPC and Article 15(3) RPBA 2020, that the proceedings be continued in the appellant-opponent's absence, and the party was treated as relying on its written case.

Request at the oral proceedings to postpone the proceedings for the filing of an authorisation

3. The request of the appellant-opponent's representatives, submitted at the oral proceedings, that the proceedings be postponed so that the appellant-opponent could file an authorisation was rejected.

3.1 The patent proprietors had submitted that in the absence of an authorisation from the appellant-opponent, the attending representatives of C&R could not make any procedural request at the oral proceedings on behalf of the appellant-opponent.

In the board's view, however, the representatives could validly make this request, and the board therefore had to decide upon it because the request related to the filing of an authorisation of the appellant-opponent, the presentation of which would have permitted C&R to act on the appellant-opponent's behalf.

3.2 Nevertheless, having considered the different arguments, the board decided not to allow the requested postponement for the filing of an authorisation.

The request was made at an extremely late stage, namely at the oral proceedings. However, the question of authorisation had been an issue long before. Not only had the patent proprietors challenged the existence of the appellant-opponent, its capacity to act and the

question of C&R's authorisation in February 2021, but, more importantly, the board had in its communication dated 6 July 2021 requested that the appellant-opponent's representative file an authorisation, setting a two-month time limit for so doing.

While, at the oral proceedings, the representatives indicated that the liquidation proceeding, which the appellant-opponent was undergoing, was very slow and that trusts worked at "glacial speed", which the board interpreted to mean that it could take a long time to obtain a signed authorisation, the board notes that at no stage during the appeal proceedings did the representatives inform the board that they might have difficulties in obtaining the required authorisation due to too a short time limit, let alone request an extension.

Neither had C&R's request for a postponement of the oral proceedings filed on 12 October 2021, i.e. two days before the scheduled date, referred to any difficulties in obtaining a signed authorisation of the appellant-opponent.

The representatives only learning on the morning of the oral proceedings that the trustee was unavailable due to personal reasons may indeed constitute new facts suggesting that they would not be able to obtain the required document at short notice. However, this did not explain why the relevant steps had not been taken earlier in the appeal proceedings.

3.3 The representatives' justification for not having submitted any authorisation from the appellant-opponent as requested by the board in due time was not convincing. It was submitted that by requesting that

the party status as appellant-opponent be transferred to Benuvia Therapeutics Inc. in reply to the board's communication dated 6 July 2021, it had no longer been necessary for them to submit an authorisation of the appellant-opponent as requested by the board and that only when the board took its decision on the requested transfer at the oral proceedings and did not allow the transfer did the question of submitting an authorisation of the appellant-opponent become relevant.

However, when requesting a transfer of opponent status, certain requirements have to be met. It was therefore a possible scenario that the board might not allow the requested transfer, in which case the proceedings were to be continued with the appellant-opponent, with the consequence that the issues addressed by the board in its communication of 6 July 2021, including the question of authorisation from the appellant-opponent, would continue to be relevant. This scenario, which the professional representative must have been aware of, could not simply be ignored.

- 3.4 The representatives of C&R suggested that it would have been contradictory to on the one hand request a transfer of the opponent status on behalf of Benuvia Therapeutics Inc. and on the other hand submit an authorisation of the appellant-opponent. The board, however, does not see any contradiction. It is not infrequent that the same professional representative is authorised to represent both the current opponent and the person to whom the party status as opponent is requested to be transferred. As stated in decision T 2357/12 (see Reasons 15), delivering precautionary arguments where the status of party is under dispute is a widely acknowledged measure in the

case law of the boards of appeal. Moreover, the Enlarged Board of Appeal, in decision G 2/04 (cited above, Reasons 3.2.3(c)), confirmed that in cases of transfers of opposition as envisaged in G 4/88 (cited above), it may be doubtful in an individual case whether the EPO is satisfied by the evidence submitted that the requirements for the transfer are met. As there may be open time limits for performing procedural acts, it was considered legitimate that action be taken for the assignee and, alternatively, for the assignor if the requirements for a transfer have not been established.

- 3.5 At the oral proceedings, the patent proprietors requested that the oral proceedings not be postponed to not further delay the proceedings. They argued that questions relating to the status of the appellant-opponent and to proper representation had been raised by them at the end of February 2021. Subsequently, the oral proceedings scheduled for 9 March 2021 had been cancelled. The board therefore agreed with the patent proprietors that there had been no reason for the appellant-opponent's representative to wait for any instructions from the board.

Also, in light of the board's obligation to bring proceedings to an end to thus ensure legal certainty, it would not have been appropriate to postpone the oral proceedings again at this late stage at which all relevant issues had been on the table for months.

Admissibility of the opponent's appeal

4. It was a matter of dispute whether the appellant-opponent, Insys Therapeutics, Inc., a company in bankruptcy proceeding, was still in existence as a

legal entity at the date of the oral proceedings before the board and, if it existed, whether it had capacity to act in the proceedings before the EPO.

- 4.1 The questions of whether a legal entity such as a company exists or has ceased to exist and has capacity to act are to be answered on the basis of the national law governing its incorporation, subsequent existence and cessation (see also G 1/13, OJ EPO 2015, A42, Reasons 5.1 and 6.).

The board had no reason to doubt the correctness of the declaration of the professional representative of Benuvia Therapeutics Inc. made at the oral proceedings that, according to the records checked on that day, Insys Therapeutics, Inc. had not yet been dissolved. Adjournment of the oral proceedings enabling the submission of documentary evidence did not appear necessary under the circumstances.

While the patent proprietors contested that the appellant-opponent was still in existence, they did so only on the basis of the argument that the appellant-opponent had not reacted to the board's invitation to provide information on its status. They did not argue that it would have been impossible for them to provide proof for their allegation that the appellant-opponent had been dissolved.

Given these circumstances and the documents on file relating to the bankruptcy proceeding, the board had no reason to doubt that the appellant-opponent was still in existence as a legal entity on the date of the oral proceedings.

4.2 The board, however, had to conclude on the basis of the arguments and evidence submitted that the appellant-opponent no longer had capacity to act in the proceedings before the EPO. Moreover, it could not be established whether under the relevant law a person other than the appellant-opponent could act in the name and on the account of the appellant-opponent nor who that person was. Also, a potential universal succession could not be established by the board.

As the appellant's capacity to act in the proceedings before the EPO is, as is the party's existence, among the requirements the board has to establish of its own motion, the board took into account all submissions and evidence made in these proceedings and suitable to clarify the matter, notwithstanding that they were filed by a representative who could not be considered entitled to act on behalf of the appellant-opponent or by Benuvia Therapeutics Inc., a legal entity seeking to become a party to the proceedings.

4.2.1 The patent proprietors, referring to D43, page 12 and paragraphs 18 and 50 and the opinion of the US counsel dated 1 April 2021, convincingly argued that Insys Therapeutics, Inc. had no capacity to act in any way outside the scope of its court-ordered mandate, its only duty being to wind up its operations, and that it therefore had no capacity to act in accordance with the relevant legal standard for the EPO proceedings.

4.2.2 The submissions made in support of the appellant-opponent having capacity to act in the proceedings before the EPO were not convincing.

Irrespective of Insys Therapeutics, Inc. not having filed any pleadings since 1 May 2020, an active

bankruptcy docket does not, as pointed out by the patent proprietors, signify that Insys was still acting in any capacity other than winding up its affairs.

The appellant-opponent's bankruptcy was not a reorganisation bankruptcy in which a liquidating company would emerge as a reorganised entity on the effective date of its Plan but ultimately a liquidating case resulting in the company's liquidation.

As of the effective date of the Plan of 18 February 2020, the appellant-opponent's only duty in accordance with the Plan was to wind up its operations, and it would go against this purpose to consider that the appellant-opponent, in this phase of bankruptcy proceeding, had capacity to sue or be sued in its own name and on its own account in court proceedings.

The reference to decision T 796/12 was of no assistance in the case at hand. In that decision, the competent board was concerned with a company incorporated in Germany (see T 796/12, Reasons 1 with further references). German law clearly does not apply here.

- 4.3 The patent proprietors had, in written proceedings, suggested that a finding by the board that the appellant-opponent was no longer in existence or had lost the capacity to act in the proceedings before the EPO should result in the appeal proceedings being terminated.

An appellant existing as a natural or legal person and the appellant having capacity to act in the proceedings before the EPO are requirements for the board to be able to hold an appeal admissible and decide on the appeal as to its merits.

The board takes the view that in the circumstances of the current case in which the board had to conclude that the appellant-opponent no longer has capacity to act in the appeal proceedings and where this issue had been a contentious one, albeit in the context of a transfer of party status, a decision is to be taken on the admissibility of the appeal (similar to in T 2136/11, Reasons 4 to 6).

Thus, based on the findings above, the board holds that the appeal is to be rejected as inadmissible.

*Reimbursement of the patent proprietors' appeal fee at 25%
(Rule 103(4) (a) EPC)*

5. As the patent proprietors withdrew their appeal in the course of the oral proceedings before the decision terminating the appeal proceedings was announced, the appeal fee is to be reimbursed at 25% pursuant to Rule 103(4) (a) EPC. The reimbursement does not depend on a request to this effect and, thus, is to be made *ex officio*.

Order

For these reasons it is decided that:

- 1. The appellant-opponent's appeal is rejected as inadmissible.**
- 2. The patent proprietors' appeal fee is to be reimbursed at 25%.**

The Registrar:

The Chairman:



M. Schalow

A. Lindner

Decision electronically authenticated