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Datasheet for the decision of 27 April 2023

Case Number: T 0678/22 - 3.3.08

Application Number: 13732878.7

Publication Number: 2867670

IPC: G01N33/50

Language of the proceedings: EN

Title of invention:
Means and methods applying sFlt-1/PIGF or endoglin/PIGF ratio to rule out onset of preeclampsia within a certain time period

Patent Proprietor:
Roche Diagnostics GmbH
F. Hoffmann-La Roche AG

Opponent:
Luigi, Rumi

Headword:
rule out onset of preeclampsia/ROCHE DIAGNOSTICS

Relevant legal provisions:
EPC Art. 100(c), 123(2), 123(3)

Keyword:
Amendments - added subject-matter (yes) - extension of scope of protection (yes)

Decisions cited:
G 0003/89, G 0011/91, G 0002/10

Catchword:
-

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Case Number: T 0678/22 - 3.3.08

D E C I S I O N
of Technical Board of Appeal 3.3.08
of 27 April 2023

Appellant: (Patent Proprietor 1)	Roche Diagnostics GmbH Sandhofer Strasse 116 68305 Mannheim (DE)
Appellant: (Patent Proprietor 2)	F. Hoffmann-La Roche AG Grenzacherstrasse 124 4070 Basel (CH)
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Representative:	Ter Meer Steinmeister & Partner Patentanwälte mbB Nymphenburger Straße 4 80335 München (DE)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 5 January 2022 revoking European patent No. 2867670 pursuant to Article 101(3)(b) EPC**

Composition of the Board:

Chair	T. Sommerfeld
Members:	B. Claes
	A. Bacchin

Summary of Facts and Submissions

I. European patent No. 2 867 670, entitled "*Means and methods applying sFlt-1/PIGF or endoglin/PIGF ratio to rule out onset of preeclampsia within a certain time period*", is based on European patent application No. 13 732 878.7, which was filed as an international application under the PCT and published as WO 2014/001244 (application as filed). The patent was granted with eight claims.

The sole independent claim 1 of the patent as granted reads:

"1. A method for diagnosing whether a pregnant subject is not at risk for developing preeclampsia within a short window of time, wherein a short window of time is 2 weeks, comprising:

a) determining the amounts of the angiogenesis biomarkers sFlt-1 and PIGF in a sample of said subject;
b) calculating a ratio from said amounts of sFlt-1 and PIGF determined in the sample in step a) and
c) comparing the ratio with a reference value, whereby a subject being not at risk for developing preeclampsia within a short period of time is diagnosed if the value of the ratio is identical or decreased compared to the reference value, wherein said reference value allows for making the diagnosis with a negative predictive value of at least 98%,

wherein said pregnant subject is between week 20 and week 40 of gestation and wherein said reference value is 45 or less."

II. The appeal lodged by the patent proprietors (appellants) lies from the decision of the opposition division revoking the patent. The opposition proceedings were based on the grounds for opposition in Article 100(a) EPC - for lack of novelty (Article 54 EPC) and inventive step (Article 56 EPC), and Article 100(b) and (c) EPC. The opposition division held, *inter alia*, that although the requirements of Article 100(c) EPC did not prejudice the maintenance of the patent as granted (main request), the subject-matter of claim 1 lacked inventive step. As concerns auxiliary request 1, the requirements of Article 123(2) EPC were fulfilled, but the subject-matter of claim 1 lacked inventive step. The claims of auxiliary request 2, 5, 7 and 9 were held to lack clarity, and the claimed subject-matter of auxiliary request 3 lacked an inventive step. Although auxiliary request 4 was considered not to infringe Article 123(3) EPC, the claimed subject-matter of this request was also held to lack an inventive step. The claimed subject-matter of auxiliary requests 6, 8, 10 and 11 lacked an inventive step. Auxiliary request 12 was not admitted in the proceedings.

III. With the statement of grounds of appeal, the appellants requested that the decision under appeal be set aside and the patent be maintained as granted (main request) or on the basis of the claims of one of auxiliary requests 1 to 12 (re-submitted with the grounds of appeal) or new auxiliary requests 13 to 71.

For the sake of brevity, the board provides the following table depicting an overview of the amendments in claim 1 of each auxiliary request (AR). Claim 1 of auxiliary request 36 is identical to claim 1 of the main request (MR). Furthermore, claim 1 of auxiliary requests 36 to 71 is identical to claim 1 of auxiliary requests 1 to 35, respectively.

	A	B	C	D	E	F	
MR							AR36
AR1	x						AR37
AR2	x	x					AR38
AR3	x	x	x				AR39
AR4	x	x	x	x			AR40
AR5		x					AR41
AR6				x			AR42
AR7		x		x			AR43
AR8	x			x			AR44
AR9	x	x		x			AR45
AR10		x	x				AR46
AR11		x	x	x			AR47
AR12					x		AR48
AR13		x			x		AR49
AR14		x	x		x		AR50
AR15		x	x	x	x		AR51
AR16				x	x		AR52
AR17		x		x	x		AR53
AR18						x	AR54
AR19	x					x	AR55
AR20	x	x				x	AR56
AR21	x	x	x			x	AR57
AR22	x	x	x	x		x	AR58
AR23		x				x	AR59
AR24				x		x	AR60
AR25		x		x		x	AR61
AR26	x			x		x	AR62
AR27	x	x		x		x	AR63
AR28		x	x			x	AR64
AR29		x	x	x		x	AR65
AR30					x	x	AR66
AR31		x			x	x	AR67
AR32		x	x		x	x	AR68
AR33		x	x	x	x	x	AR69
AR34				x	x	x	AR70
AR35		x		x	x	x	AR71

The permutated amendments to claim 1 as granted (main request) are referred to in the table by capital letters as follows:

Amendment A:

replacement of the feature "wherein said reference value is 45 or less" with the feature "wherein said reference value is 35 ± 20%"

Amendment B:

addition of the feature "wherein said pregnant subject has been identified to be at risk for developing preeclampsia, eclampsia and/or HELLP syndrome by abnormal uterine Doppler ultrasonography results or belongs into a risk group having a higher prevalence for preeclampsia"

Amendment C:

addition of the feature "and wherein said pregnant subject belonging into a risk group having a higher prevalence for preeclampsia is a subject suffering from adiposity, hypertension, autoimmune disease such as Lupus erythematosus, thrombophilia, or diabetes mellitus"

Amendment D:

replacement of the feature "wherein a short window of time is 2 weeks" with the feature "wherein a short window of time is 1 week"

Amendment E:

replacement of the feature "wherein said reference value is 45 or less" with the feature "wherein said reference value is of from 33 to 45"

Amendment F:

replacement of the feature "pregnant subject is between week 20 and week 40 of gestation" with the feature "pregnant subject is between week 24 and week 40 of gestation"

IV. The sole opponent (respondent) replied to the appeal.

V. The board issued a communication pursuant to Article 15(1) RPBA in which it provided, *inter alia*, the preliminary opinion that the grounds for opposition under Article 100(c) EPC prejudiced the maintenance of the patent as granted (main request) and further that claim 1 of each auxiliary request did not comply with one or more of the requirements in Article 56 EPC, Article 84 EPC, and Article 123(2) and (3) EPC.

VI. At the end of the oral proceedings, the Chair announced the decision of the board.

VII. The appellants' requests which were relevant for the decision were:
- that the decision under appeal be set aside and
- that the opposition be rejected (i.e. patent be maintained as granted; main request),
or alternatively,
- that the patent be maintained on the basis of the sets of claims of one of auxiliary requests 1 to 11,

all re-submitted with the statement of grounds of appeal,
or further alternatively,
- auxiliary request 12, re-submitted with the statement of grounds of appeal, be admitted in the proceedings and the patent be maintained on the basis of the set of claims of this request,
or further alternatively,
- to admit in the proceedings the sets of claims of auxiliary request 13 to 71, all filed with the statement of grounds of appeal, and the patent be maintained on the basis of the set of claims of one of these requests.

The respondent requested that the appeal be dismissed.

VIII. A request for correction of the minutes of the oral proceedings of 27 April 2023 was filed by the appellants on 2 June 2023.

Reasons for the Decision

Main request (patent as granted) - claim 1
Added subject-matter (Article 100(c) EPC)

1. The opposition division considered the claims of the patent as granted not to relate to added subject-matter (see section II. above). In appeal, the respondent reiterated that the application as filed failed to disclose a basis for the claimed combination of, *inter alia*, the following features (for the full wording of granted claim 1, see section I. above):

- a reference value for the ratio of the amounts of soluble fsm-like tyrosine kinase 1 ("sFlt-1") and placental growth factor ("PlGF") in a sample of a pregnant subject "between week 20 and 40 of gestation"

- the reference value "is 45 or less"

- the reference value "allows for making the diagnosis with a negative predictive value of at least about 98%" that

- the pregnant subject is not at risk for developing preeclampsia within a short window of time which "is 2 weeks"

2. The gold standard for assessing compliance with Article 123(2) EPC - with the same principles applying to the ground for opposition under Article 100(c) EPC - is that any amendment to the parts of a European patent application as filed or a European patent relating to the disclosure is subject to the mandatory prohibition on extension laid down in Article 123(2) EPC. Therefore, irrespective of the context, an amendment can only be made within the limits of what a skilled person would derive directly and unambiguously, using common general knowledge, and seen objectively and relative to the date of filing, from the whole of these documents as filed. After the amendment, the skilled person must not be presented with new technical information (see decisions G 3/89, OJ EPO 1993, 117; G 11/91, OJ EPO 1993, 125 and G 2/10, OJ EPO 2012, 376 and "Case Law of the Boards of Appeal of the EPO", 10th edition 2022, "CLBA", II.E.1.1).

3. The appellants referred to claims 1 to 4, 6 and 7 of the application as filed as the primary disclosure of the claimed subject-matter. These claims read:

"1. A method for diagnosing whether a pregnant subject is not at risk for preeclampsia within a short window of time comprising:

a) determining the amount of at least one angiogenesis biomarker selected from the group consisting of sFlt-1, Endoglin and PlGF in a sample of said subject; and

b) comparing the amount with a reference, whereby a subject being not at risk for developing preeclampsia within a short period of time is diagnosed if the amount is identical or decreased compared to the reference in the cases of sFlt-1 and Endoglin and identical or increased in the case of PlGF, wherein said reference allows for making the diagnosis with a negative predictive value of at least about 98%.

2. The method of claim 1, wherein said method comprises in step a) determining the amounts of the biomarkers sFlt-1 or Endoglin and PlGF in the sample of said subject and in step c) comparing the value of the ratio with a reference value, whereby a subject being not at risk for developing preeclampsia within a short period of time is diagnosed if the value of the ratio is identical or decreased compared to the reference value.

3. The method of claim 2, wherein said method comprises prior to step b) the further step of calculating a ratio from said amounts of sFlt-1 or Endoglin and PlGF determined in the sample in step a).

4. The method of claim 2 or 3, wherein said reference value is about 46 or less, preferably, is about 33.

6. The method of any one of claims 1 to 5, wherein said short period of time is a time period from about 1 to about 2 weeks.

7. The method of any one of claims 1 to 6, wherein said pregnant subject is between about week 20 and about week 40 of gestation." (emphasis added by the board)

4. In the method for diagnosing whether a pregnant subject is not at risk for preeclampsia within a short period of time defined in claim 1 of the application as filed, the required negative predictive value (NPV) of at least about 98% for making the diagnosis depends on a comparison of the *amount* of either or moreof sFlt-1, Endoglin or PlGF in a sample of a pregnant subject with a reference *amount* of these markers for angiogenesis. Claims 2 and 3 of the application as filed relate this NPV to the *ratio of the amounts* of sFlt-1 and PlGF or of Endoglin and PlGF in the sample with a, not further specified, reference value for the respective ratio. The application as filed does not express any preference for either of these ratios. Claim 1 of the patent is limited to the reference value for the ratio of the amounts of sFlt-1 and PlGF in the sample of a pregnant subject.

5. Claim 6 of the application as filed specifies that the short time period for which the method for diagnosing whether a pregnant subject is not at risk for preeclampsia in, *inter alia,* claim 3 is from about 1 to about 2 weeks. In granted claim 1, the maximum, and hence most ambitious and thus most preferable, time period of 2 weeks has been selected.

6. Claim 4 of the application as filed specifies that in the method of claim 2 or 3, the reference value is "about 46 or less, preferably, is about 33". Accordingly, claim 4 of the application as filed discloses neither the ratio of "45" nor the ratio range of "45 or less" for the reference value. The skilled person would also not derive from claim 4 of the application as filed the suggestion that such a ratio or ratio range was preferred, as could be argued to be required to meet the ambitious standard for diagnosing whether a pregnant subject is not at risk for preeclampsia within the maximum window of time of 2 weeks disclosed in the range specified in claim 6 of the application as filed with an NPV of at least about 98%.

7. Accordingly, the board is not persuaded that the claims of the application as filed, as referred to by the appellants, directly and unambiguously disclose a basis for the subject-matter of claim 1. The board has furthermore established that the various levels of disclosure of features combined in granted claim 1 are not disclosed in the claims of the application as filed with the same level of preference for formulating the disclosed invention, hence allowing the conclusion that the claims of the application as filed fail to point to the claimed subject-matter.

8. The appellants have additionally referred to the paragraph bridging pages 19 and 20, to the examples (in particular example 2) and the legend of Figure 2 on page 31 of the application as filed for the ratio range for the reference value in granted claim 1. The paragraph bridging pages 19 and 20 reads:

"The term 'comparing' as used herein encompasses comparing the ratio to the reference as defined elsewhere. It is to be understood that comparing as used herein refers to any kind of comparison made between the ratio with the reference. A decreased or not increased risk for developing preeclampsia has been found in the studies underlying the present invention to correlate with a ratio for determined for sFlt-1 or Endoglin and PlGF which is identical or decreased compared to the reference value. More preferably, said reference value for the ratio is about 46, about 45, about 40, or about 35 or less and, preferably, it is about 33 or less. Even more preferably, said reference value for the ratio determined for sFlt-1 and PlGF is about 38 or less; most preferably, said reference value for the ratio determined for sFlt-1 and PlGF is about 38. The aforementioned cut-off values differ considerably compared to those referred to for other (unspecific) rule out approaches for diagnosis on the day of presentation in the prior art (see, e.g., Stepan loc cit.) and achieve a surprisingly high negative predictive value for the prediction when applied in the method of the invention."

9. Although it could be argued that in the fourth sentence of this paragraph a disclosure of the ratio range of "45 or less" for the reference value can be identified, the disclosure of this ratio range is not in the context of a method for diagnosing whether a pregnant subject is not at risk for preeclampsia with a NPV of at least about 98% for making the diagnosis. Neither is it in the context of a method for diagnosing whether a pregnant subject is not at risk for preeclampsia with particular reference to the value for the ratio of the amounts of sFlt-1 and PlGF in the sample of a pregnant

subject nor does it refer to the exclusion time period for preeclampsia of 2 weeks.

10. Furthermore, also in the above passage, the required ratio range of "45 or less" for the reference value is not disclosed at a high, let alone the highest, level of preference, as could be argued to be required to meet the ambitious standard for diagnosing whether a pregnant subject is not at risk for preeclampsia within the maximum window of time of 2 weeks.

11. Example 2 of the application as filed concerns an analysis of preeclampsia as an outcome within 1 week and therefore explicitly does not pertain to diagnosing whether a pregnant subject is not at risk for preeclampsia within (the maximum window of time of) 2 weeks. The corresponding arguments of the appellants must thus also fail in this context.

12. The legend of Figure 2 (page 31, second paragraph) reads:

"*Figure 2 shows the ratio of sFlt-1/PlGF at different weeks of gestation. Empty circles represent cases where no preeclampsia (PE) has been determined within 2 weeks after the sample has been taken (visit). Grey circles represent cases with preeclampsia (PE). Below a cut-off of 46, no PE cases where detected. (A) n=94, below a cut-off of 46, no PE cases where detected; (B) n=269; below a cut-off of 38, only few PE cases where* [sic] *detected.*"

13. Figure 2 and its legend, although in the context of diagnosing whether a pregnant subject is not at risk for preeclampsia within (the maximum window of time of) 2 weeks, does not disclose a method for diagnosing

whether a pregnant subject is not at risk for preeclampsia within a short period of time and additionally neither discloses the ratio of "45" nor the ratio range of "45 or less" for the reference value.

14. In view of the above considerations, the board decided that the ground for opposition under Article 100(c) EPC prejudices the maintenance of the patent as granted.

Auxiliary requests

15. The appellants filed 71 auxiliary requests (see section III.) during the appeal proceedings and requested a decision of the board on each. During the oral proceedings, after the board had come to the conclusion that the ground for opposition in Article 100(c) EPC prejudiced the maintenance of the patent as granted, the appellants limited the further discussions to the sets of claims of auxiliary requests 1, 6, 12 and 30. For the other auxiliary requests, the appellants referred to their written submissions. In the following, the board first deals with the prioritised auxiliary requests and subsequently with the remaining auxiliary requests.

Auxiliary request 1 - claim 1
Added subject-matter (Article 123(2) EPC)

16. This claim is identical to claim 1 of the main request but with the reference value now defined as "35 ± 20%" (see section III., amendment A).

17. As with the ratio range of "45 or less" for the reference value (see points 9. and 10. above), also the required ratio range of "35 or less" is not disclosed

in the paragraph bridging pages 19 and 20 of the application as filed (see point8. above) in the context of the other features referred to in the claim and equally not at a preference level commensurate to meet the ambitious standard for diagnosing whether a pregnant subject is not at risk for preeclampsia within the maximum window of time of 2 weeks. The same considerations as above therefore apply to this claim.

18. The board accordingly concluded that the claim does not comply with the requirements of Article 123(2) EPC.

Auxiliary request 6 - claim 1
Extension of protection (Article 123(3) EPC)

19. Compared to the method for diagnosing whether a pregnant subject is not at risk for developing preeclampsia within a short window of time of 2 weeks as defined in granted claim 1 (see section I.), the claim now defines this short window of time as limited to 1 week (see section III., amendment D). The respondent considered the amendment to extend the protection as compared to that of the patent as granted, and thus to contravene Article 123(3) EPC, as it reduced the period of time for which a pregnant subject is prognostically diagnosed *not* to be at risk of preeclampsia from 2 weeks to a less ambitious 1 week window of time.

20. Claim 1 as granted covers a diagnosis (prognosis) that safely rules out preeclampsia for a period of 2 weeks for the given circumstances of the claim. The question with regard to the requirement of Article 123(3) EPC is whether, for the same given circumstances of the claim, the definition of a shorter predictive period of 1 week extends the scope of protection of claim 1 as granted.

Although the appellants argued that it actually limited the protection conferred, the board agrees with the respondent that the extent of protection conferred by granted claim 1 is shifted by the amendment.

21. Indeed, a diagnostic method that only rules out preeclampsia for a period of 1 week does not imply a ruling-out for a longer period of two weeks, and thus not all methods falling within claim 1 of auxiliary request 6 would also be covered by claim 1 as granted. In practice, a medical practitioner seeking to make a rule-out diagnosis about the risk of preeclampsia in a given pregnant subject for a window of time of two weeks would work within the extent of claim 1 as granted. The medical practitioner would, however, be free to make a rule-out diagnosis for just one week without the risk of preeclampsia and not fall under granted claim 1. Therefore, the diagnosis of a low preeclampsia risk for a more limited window of time of one week is not covered by claim 1 as granted.

22. In view of the above considerations, the limitation of the predictive period to a shorter window of time than 2 weeks extends the protection provided by the patent with claim 1 beyond that of the patent as granted. The amendment therefore infringes the requirements of Article 123(3) EPC.

Auxiliary request 12
Admittance

23. This auxiliary request was not admitted into the proceedings by the opposition division pursuant to Rule 116(1) EPC as it was late filed. The appellant re-submitted the request with the statement of grounds of appeal and requested that it be admitted into the

proceedings. The board admitted and considered the request in the appeal proceedings. However, since the request is not allowable in substance (see points 24. to 26.), it is not necessary to provide reasons for the decision to admit the request.

Claim 1 - added subject-matter (Article 123(2) EPC)

24. Compared to the method for diagnosing whether a pregnant subject is not at risk for developing preeclampsia within a short window of time defined in claim 1 of the main request (see sectionI.), the reference value of "45 or less" has been amended to a reference value of "from 33 to 45" (see section III., amendment E).

25. Since the considerations of the board in points 4. to 14. above in the context of the reference value range of "45 or less" also apply to the endpoint "45" of the range, they, *a fortiori,* apply *mutatis mutandis* to claim 1 of this auxiliary request.

26. The board accordingly concluded that claim 1 of auxiliary request 12 does not comply with the requirements of Article 123(2) EPC.

Auxiliary request 30 - claim 1

Admittance

27. The board decided to admit this auxiliary request into the appeal proceedings. However, since it is not allowable in substance as set out in the following, the board does not provide a reasoning in writing for its decision to admit this claim request.

Added subject-matter (Article 123(2) EPC)

28. Compared to the method for diagnosing whether a pregnant subject is not at risk for developing preeclampsia within a short window of time defined in claim 1 of auxiliary request 12 (see sectionIII. and point 24., i.e. the reference value of "from 33 to 45", amendment E), the claim is further amended to specify that the pregnant subject, instead of being between gestation week 20 and week 40, is "between week 24 and week 40" (see section III., amendment F).

29. The appellants argued that this amendment brings the claimed subject-matter closer to the disclosure in the examples of the patent. However, what is at stake when considering the requirements of Article 123(2) EPC is whether the skilled person can directly and unambiguously derive the combination of features defining the claimed subject-matter from the application as filed (see point 2.).

30. Examples 2 to 4 of the application as filed relate to experiments on the analysis of preeclampsia as an outcome within one week or four weeks which are therefore explicitly not in the context of diagnosing whether a pregnant subject is not at risk for preeclampsia within (the maximum window of time of) 2 weeks.

31. The board accordingly concluded that claim 1 of auxiliary request 30 does not comply with the requirements of Article 123(2) EPC.

Auxiliary requests 2 to 5, 7 to 11 and 13 to 29 and 31 to 71

Auxiliary requests 13 to 29 and 31 to 71 - admittance

32. The board decided to admit all auxiliary requests which had been filed by the appellants with the statement of grounds of appeal into the appeal proceedings. However, since they are not allowable in substance as set out in the following, the board does not provide a reasoning in writing for its decision to admit these claim requests.

Auxiliary requests 4, 7 to 9, 11, 15 to 17 and 22, 24 to 27, 29 and 33 to 35 - claim 1
Extension of protection (Article 123(3) EPC)

33. Like claim 1 of auxiliary request 6, claim 1 of each of these auxiliary requests defines the short window of time as limited to 1 week (see section III., amendment D).

34. For the reasons in points 19. to 21. above, the board considered the limitation of the predictive period to a shorter window of time than 2 weeks to extend the protection conferred by the patent beyond that of the patent as granted. This accordingly also applies *mutatis mutandis* to claim 1 of these requests, which thus infringe the requirements of Article 123(3) EPC.

Auxiliary requests 2, 3, 5 and 10 - claim 1
Added subject-matter (Article 123(2) EPC)

35. Claim 1 of auxiliary requests 2 and 3 is identical to claim 1 of auxiliary request 1, albeit with the addition of further features at the end. Equally, claim 1 of auxiliary requests 5 and 10 is identical to

claim 1 of the main request albeit with the addition of further features at the end (see section III., amendments B and C).

36. Accordingly, the considerations for auxiliary request 1 (see points 16. to 18.) apply *mutatis mutandis* to claim 1 of auxiliary requests 2 and 3, and the considerations for claim 1 of the main request (see points 1. to 11.) apply *mutatis mutandis* to claim 1 of auxiliary requests 5 and 10.

37. Claim 1 of these auxiliary requests does not therefore comply with the requirements of Article 123(2) EPC.

Auxiliary requests 13 and 14 - claim 1
Added subject-matter (Article 123(2) EPC)

38. Claim 1 of auxiliary requests 13 and 14 is identical to claim 1 of auxiliary request 12, albeit with the addition of further features at the end (see section III., amendments B and C).

39. Accordingly, the considerations for auxiliary request 12 (see points 24. and 25.) apply *mutatis mutandis* to claim 1 of auxiliary requests 13 and 14.

40. Claim 1 of these auxiliary requests does not therefore comply with the requirements of Article 123(2) EPC.

Auxiliary requests 18 to 21, 23, 28, 31 and 32
Added subject-matter - Article 123(2) EPC

41. Claim 1 of these auxiliary requests is identical to claim 1 of the main request and auxiliary requests 1 to 3, 5, 10, 13 and 14, respectively, albeit amended to specify that the pregnant subject, instead of being

between week 20 and week 40 of gestation, is "between week 24 and week 40 of gestation" (see section III., amendment F).

42. For the reasons set out in points 28. to 31. above for claim 1 of auxiliary request 30, the board is equally not convinced that the skilled person would directly and unambiguously derive the claimed subject-matter from the application as filed.

43. The board accordingly concluded that claim 1 of these requests does not comply with the requirements of Article 123(2) EPC.

Auxiliary requests 36 to 71 - claim 1

44. Claim 1 of auxiliary request 36 is identical to claim 1 of the main request, and claim 1 of auxiliary requests 36 to 71 is identical to claim 1 of auxiliary requests 1 to 35, respectively (see table included in section III.). Accordingly, the same deficiencies as for claim 1 of the main request and auxiliary requests 1 to 35 apply *mutatis mutandis* to auxiliary requests 36 to 71, respectively. These requests are therefore equally not allowable.

Correction of the minutes

45. The appellants' request for correction of the minutes of the oral proceedings of 27 April 2023 is granted (see communication containing the decision of the board of 5 October 2023).

46. On 2 June 2023, the appellants submitted that at the oral proceedings they withdrew the request not to admit document D34 and related arguments. Since no discussion

on admittance of arguments on inventive step based on combinations of disclosure in documents other than documents D1 and D34 took place, the request was not withdrawn. It was thus requested that the minutes be amended accordingly on page 2, last paragraph and page 6, third paragraph.

47. The requested correction of the minutes does not have an impact on the present decision since it relates to an issue which did not need to be discussed at the oral proceedings to arrive at the final decision. Nevertheless, the proposed correction concerns one of the appellants' initial requests, i.e. the withdrawal of a request for a document not to be admitted, and appears consistent with the appellants' arguments as reflected in the written submissions of 27 February 2023 (points 1.3.6 and 4.). Thus, the corresponding paragraphs of the minutes (page 2, last paragraph and page 6, third paragraph) were corrected to reflect the actual requests of the appellants.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chair:

L. Malécot-Grob T. Sommerfeld

Decision electronically authenticated