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**Datasheet for the decision
of 7 October 2022**

Case Number: T 1026/19 - 3.3.04

Application Number: 11164850.7

Publication Number: 2371383

IPC: A61K39/12

Language of the proceedings: EN

Title of invention:

Use of a PCV2 immunogenic composition for lessening clinical symptoms in pigs

Patent Proprietor:

Boehringer Ingelheim Animal Health USA Inc.

Opponents:

Intervet International BV (opposition withdrawn)
Eli Lilly and Company

Headword:

Single dose administration/BOEHRINGER INGELHEIM

Relevant legal provisions:

EPC Art. 101, 113(2)

Keyword:

Basis of decision - agreement to text withdrawn by patent proprietor - patent revoked by opposition division - appeal dismissed

Decisions cited:

T 0073/84, T 0454/15



Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 1026/19 - 3.3.04

D E C I S I O N
of Technical Board of Appeal 3.3.04
of 7 October 2022

Appellant: Boehringer Ingelheim Animal Health USA Inc.
(Patent Proprietor) 3239 Satellite Blvd
Duluth, GA 30096 (US)

Representative: Hoffmann Eitle
Patent- und Rechtsanwälte PartmbB
Arabellastraße 30
81925 München (DE)

Respondent: Eli Lilly and Company
(Opponent 2) Lilly Corporate Center
Indianapolis, IN 46285 (US)

Representative: Potter Clarkson
The Belgrave Centre
Talbot Street
Nottingham NG1 5GG (GB)

Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 4 February 2019
revoking European patent No. 2371383 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairwoman R. Morawetz
Members: A. Chakravarty
F. Bostedt

Summary of Facts and Submissions

- I. The appeal of the patent proprietor (appellant) lies from the opposition division's decision revoking European patent No. 2 371 383 ("the patent"). Opponent 2 is respondent to this appeal. Opponent 1 has withdrawn its opposition and has ceased to be a party to the appeal as regards substantive issues.

- II. With the statement setting out the grounds of appeal, the appellant requested as a main request that the decision under appeal be set aside and that the patent be maintained as granted. Alternatively, it was requested that the patent be maintained on the basis of the set of claims of auxiliary request 1, filed 10 September 2018 in the proceedings before the opposition division, or on the basis of the set of claims of one of auxiliary requests 2 to 13, filed 3 November 2016 in the proceedings before the opposition division. Further alternatively, it was requested that the patent be maintained on the basis of the set of claims of one of auxiliary requests 14 to 21, filed 11 July 2018 in the proceedings before the opposition division. As final alternative, the patent should be maintained on the basis of one of auxiliary requests 22 or 23, filed with the statement setting out the grounds of appeal.

- III. With their reply to the statement of grounds of appeal, the respondent requested that the appeal be dismissed, that auxiliary request 1, filed 10 September 2018, not be admitted into the proceedings and that auxiliary requests 22 to 23 not be admitted into the proceedings. They further requested that the appellant not be permitted to file any further auxiliary requests and

that the case not be remitted to the opposition division for further prosecution.

- IV. The board appointed oral proceedings and, in a subsequent communication pursuant to Article 15(1) RPBA 2020, provided its preliminary appreciation of the appeal.

- V. Oral proceedings before the board were held by videoconference. During the oral proceedings, the appellant declared that they no longer approved of the text of the patent as granted, that they would not pursue any of the auxiliary requests, and that they would not propose any other amended text. The appellant also withdrew the requests for referral to the Enlarged Board of Appeal that they had submitted with a letter dated 6 October 2022. The appellant stated that there were, therefore, no outstanding requests.

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

Reasons for the Decision

- 1. The appeal complies with Articles 106 to 108 and Rule 99 EPC and is admissible.

- 2. Pursuant to the principle of party disposition established by Article 113(2) EPC, the EPO shall examine, and decide upon, the European patent only in the text submitted to it, or agreed, by the proprietor of the patent.

- 3. At the oral proceedings before the board, the appellant declared that they no longer approved of the text of the patent as granted, that they would not pursue any

of the auxiliary requests on file and that they would not propose any amended text (see Section V., above).

4. According to the case law of the boards of appeal, in these circumstances the proceedings are to be terminated by a decision ordering revocation of the patent under Article 101 EPC without assessing issues relating to patentability (see decision T 73/84, OJ EPO 1985, 241, and Case Law of the Boards of Appeal of the European Patent Office, 10th edition 2022, III.B.3.3). In the case at hand, where the patent had already been revoked by the opposition division and, as correctly pointed out in decision T 454/15 (see Reasons, point 6), cannot be revoked again, the effect of the appellant's declaration is that the appeal has to be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairwoman:



A. Chavinier Tomsic

R. Morawetz

Decision electronically authenticated