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**Datasheet for the decision  
of 11 July 2016**

**Case Number:** T 2524/12 - 3.3.04

**Application Number:** 01939145.7

**Publication Number:** 1282443

**IPC:** A61K39/395, A61K31/335,  
G01N33/574, A61P35/00

**Language of the proceedings:** EN

**Title of invention:**

Gene detection assay for improving the likelihood of an effective response to an ErbB antagonist cancer therapy

**Patent Proprietor:**

Genentech, Inc.

**Opponents:**

BioGeneriX AG  
Teva Pharmaceutical Industries Ltd.

**Headword:**

Anti-ERBB antibody cancer therapy/GENENTECH

**Relevant legal provisions:**

EPC Art. 113(2)

**Keyword:**

Withdrawal of approval of text on which patent was granted -  
appeal dismissed

**Decisions cited:**

T 0163/99, T 1637/06, T 0784/14

**Catchword:**



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

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Case Number: T 2524/12 - 3.3.04

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.04**  
**of 11 July 2016**

**Appellant:** Genentech, Inc.  
(Patent Proprietor) 1 DNA Way  
South San Francisco, CA 94080-4990 (US)

**Representative:** Kiddle, Simon John  
Mewburn Ellis LLP  
City Tower  
40 Basinghall Street  
London EC2V 5DE (GB)

**Respondent:** BioGeneriX AG  
(Opponent 1) Janderstrasse 3  
68199 Mannheim (DE)

**Respondent:** Teva Pharmaceutical Industries Ltd.  
(Opponent 2) 5 Basel Street  
P.O. Box 3190  
49131 Petah Tiqva (IL)

**Representative:** D Young & Co LLP  
120 Holborn  
London EC1N 2DY (GB)

**Decision under appeal:** **Decision of the Opposition Division of the European Patent Office posted on 5 September 2012 revoking European patent No. 1282443 pursuant to Article 101(3)(b) EPC.**

**Composition of the Board:**

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

## **Summary of Facts and Submissions**

- I. An appeal was lodged by the patent proprietor (hereinafter "the appellant") against the decision of the opposition division to revoke the European patent No. 1 282 443.
- II. In its statement of grounds of appeal, the appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of the set of claims of either the main request or one of the six auxiliary requests. In a common reply to the statement of grounds of appeal, the respondents (opponents 1 and 2) requested that the appeal be dismissed.
- III. In a letter dated 9 June 2016 the appellant stated the following:

*"The Proprietor no longer approves the text in which the patent was granted. In addition, we withdraw all of the claim requests in the proceedings"*.
- IV. Subsequently, the oral proceedings which had been summoned to take place on 30 June 2016 were cancelled.

## **Reasons for the Decision**

1. Pursuant to Article 113(2) EPC the "European Patent Office shall examine, and decide upon, the European Patent application or the European patent only in the text submitted to it, or agreed, by the applicant or the proprietor of the patent".

2. The appellant has withdrawn all claim requests and no longer approves the text in which the patent was granted (see section III above). It thus follows from the provision cited above that there is no subject-matter upon which the board could decide. In such a situation, where a substantive requirement for allowing the appeal is lacking, the proceedings should, in the board's view, be terminated by a decision ordering the dismissal of the appeal (see for example decisions T 163/99, T 1637/06 and T 784/14).

## Order

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

The appeal is dismissed.

The Registrar:

The Chairwoman:



P. Cremona

G. Alt

Decision electronically authenticated