

Fed. Circ. Backs PTAB Ax Of Gevo Jet Fuel Patent

By **Bryan Koenig**

Law360, Washington (February 11, 2016, 2:31 PM ET) -- A Federal Circuit panel Wednesday summarily upheld the Patent Trial and Appeal Board's finding that a Gevo Inc. renewable jet fuel patent was, in light of prior art, not protected intellectual property.

The ruling boiled down to a single word — affirmed — and left intact a PTAB inter partes review win by Gevo rival Butamax Advanced Biofuels LLC, which had managed to convince the board that based on a preponderance of the evidence, the challenged claims of Gevo's U.S. Patent No. 8,304,588 were invalid as obvious over the prior art.

PTAB found patent claims 1 through 28 unpatentable in September 2014, but it was not Butamax which Gevo squared off against in the Federal Circuit. Instead, Butamax, a joint venture between BP PLC and DuPont Co., moved to bow out of the case in mid-September and was allowed to do so two weeks later, leaving the U.S. Patent and Trademark Office itself to defend the finding against Gevo's appeal as an intervenor. The USPTO stepped in right after Butamax was let out of the case, according to court records.

PTAB had picked up the '588 challenge simultaneously with one against Gevo's U.S. Patent No. 8,283,505, which was also invalidated, although Gevo appealed only over the '588 patent. Both patents relate to the Gevo Integrated Fermentation Technology, or GIFT, process. The '588 refers to a process of producing biofuels from fermentation broths and other solutions, according to PTAB's September 2014 ruling.

Butamax and Gevo have been feuding over each other's ethanol alternative biofuel patents since 2011, when Butamax filed suit alleging the Englewood, Colorado-based Gevo was infringing Butamax's patents.

By August 2014, there were at least nine suits pending between the two companies, while multiple PTAB petitions were filed challenging the validity of various patents.

The U.S. Supreme Court waded into the dispute in January 2015, when it ordered the Federal Circuit to take a fresh look at a decision to vacate a ruling that Gevo did not infringe certain Butamax patents.

The justices decided the move was warranted in light of its holding in *Teva Pharmaceuticals USA Inc. v. Sandoz Inc.*, which changed the standard for reviewing claim construction rulings on appeal.

The parties managed to resolve their feud in August 2015 with an announced cross-license and settlement agreements to end all lawsuits over the ethanol-alternative biofuel isobutanol.

As part of the deal, both parties licensed to one another all their patents for making and using isobutanol, which can be used as a fuel additive. Butamax would take the lead in developing the market for blending isobutanol with gasoline for automotive use, while Gevo would focus on jet-fuel blending.

A USPTO representative said Wednesday that the agency does not typically comment on pending litigation. A representative for Butamax declined to comment, and a representative for Gevo did not immediately respond late Wednesday to a press inquiry.

U.S. Circuit Judges Sharon Prost, Pauline Newman and Alan D. Lourie sat on the panel for the Federal Circuit.

The USPTO is represented in-house by Thomas W. Krause, Jeremiah Helm, Stacy Beth Margolies and Scott Weidenfeller.

Gevo is represented by Stephen R. Smith and Thomas Andrew Blinka with Cooley LLP.

Butamax is represented by Deborah Sterling and Paul A. Ainsworth of Sterne Kessler Goldstein & Fox PLLC.

The case is In re: Gevo Inc., case number 15-1317, in the U.S. Court of Appeals for the Federal Circuit.

--Additional reporting by Vin Gurrieri, Ryan Davis, Alex Lawson and Kat Greene. Editing by Edrienne Su.