

Entered: February 4, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

BUTAMAX ADVANCED BIOFUELS LLC,
Petitioner,
v.
GEVO, INC.,
Patent Owner.

Case IPR2013-00539
Patent 8,273,565 B2

Held: October 28, 2014

BEFORE: RAMA G. ELLURU, CHRISTOPHER L. CRUMBLEY,
and KERRY BEGLEY, Administrative Patent Judges.

APPEARANCES:

ON BEHALF OF THE PETITIONER:

DEBORAH STERLING, ESQ., Ph.D.
PETER JACKMAN, ESQ.
Sterne, Kessler, Goldstein & Fox P.L.L.C.
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ON BEHALF OF PATENT OWNER:
BRETT LUND, ESQ., MBA
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The above-entitled matter came on for hearing on Tuesday, October 28, 2014, commencing at 9:06 a.m., at the U.S. Patent and Trademark Office, 600 Dulany Street, Alexandria, Virginia.

P R O C E E D I N G S

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2 JUDGE CRUMBLEY: Have a seat, everyone.

3 Good morning, everyone. I appreciate the patience. This
4 morning we have our final hearing in IPR2013-00539, Butamax
5 Biofuels versus Gevo. I'm Judge Crumbley and to my right is Judge
6 Elluru, to my left is Judge Begley.

7 We will get appearances, for the Petitioner, please?

8 MS. STERLING: Good morning, my name is Deborah
9 Sterling from Sterne, Kessler, Goldstein & Fox, and this is Peter
10 Jackman with me, who is lead back-up counsel for Petitioner.

11 JUDGE CRUMBLEY: Good morning. Who do we have
12 from the Patent Owner?

13 MR. LUND: Good morning, Your Honors, Brett Lund,
14 lead counsel for Gevo.

1 JUDGE CRUMBLEY: We put this in our trial order just
2 so everybody is on the same page, everybody will have an hour,
3 Petitioner may reserve time for rebuttal at the beginning of the
4 argument. Gevo will then have an opportunity to present any
5 argument in response, and then the rebuttal time. I'm notoriously bad
6 at setting the clock with the lights up here, so unless either party
7 objects, I will use the clock on the wall and I will try to give you a
8 five-minute warning when you get close to your time. Is that all right
9 with everyone?

10 COUNSEL: Fine.

11 JUDGE CRUMBLEY: So, if nothing else, you may
12 begin when you're ready, Ms. Sterling. Are you reserving any time?

13 MS. STERLING: I will, I will reserve 20 minutes,
14 please.

15 JUDGE CRUMBLEY: Twenty?

16 MS. STERLING: Twenty, please. I brought hard copies
17 of the slides. May I approach?

18 JUDGE CRUMBLEY: Absolutely.

19 MS. STERLING: May it please the Board, really there
20 are a few issues of contention here this morning. For start, the
21 contention of priority as to whether Gevo's claims in the '565 patent
22 are entitled to claim the benefit of priority of the provisional
23 applications. Secondly, whether the art used in the combination for
24 the 103 ground teaches away from the claims, and whether there are

1 secondary considerations commensurate in scope with the claims that
2 would weigh in favor of the patentability.

3 So, we plan to talk about the three contentious issues.
4 We also understand that the Board has questions, and issues from our
5 phone conference, so we're also happy to address any of the Board's
6 questions that they have.

7 JUDGE CRUMBLY: We always have questions.

8 MS. STERLING: So, if we can get started, go to slide 3,
9 please. If we start with ground 1, and this is the anticipation ground
10 where claims 1 to 4, 6 to 8 and 11 to 19 are anticipated by the Flint
11 reference. And Gevo doesn't contend that Flint teaches each and
12 every limitation of these claims, but the contention here lies around
13 priority date, because if Gevo was entitled to claim the benefit of the
14 provisional applications, Flint is not prior art.

15 So, if we look at the prior art, of course, lies with the
16 claims, so the next slide, this is claim 1.

17 JUDGE BEGLEY: Before we get into the priority, just
18 on the anticipatory disclosure, I have a question about claim 12. I
19 understand that you've cited paragraph 6 of Flint for that, specifically
20 a disclosure that "native yeast DHAD is located in the mitochondria."
21 Can you explain how that discloses the recombinantly overexpressed
22 DHAD being localized and located in the mitochondria?

23 MS. STERLING: Sure. Bear with me for a second.

24 JUDGE BEGLEY: Page 35 of the expert declaration.
25 It's the claim chart where paragraph 6 of Flint is cited, and I'm just

1 wondering if you could elaborate on that and explain how it discloses
2 the claim limitation.

3 MS. STERLING: Yes, I see that, and it says that native
4 yeast DHAD is localized in the mitochondria, and I guess your
5 question is would that be a recombinant yeast microorganism that's
6 recombinantly overexpressing DHAD. Is that your question?

7 JUDGE BEGLEY: Yes.

8 MS. STERLING: So, as cited in the petition, we also
9 cite to other paragraphs of the Flint reference, if I can just look at
10 those. So, here, in Flint, it talks about using yeast host cells and
11 overexpressing a yeast DHAD enzyme. This is, for example, at
12 paragraph 25 in Flint, a yeast enzyme is natively targeted to the
13 mitochondria, so expressing a yeast DHAD within a yeast
14 microorganism, it would be natively or it would be expressed in the
15 mitochondria, unless one expressed it without a mitochondrial
16 targeting sequence, but there's no indication in Flint in certain of these
17 paragraphs, example 25, for example, that the mitochondrial targeting
18 sequence was removed.

19 Does that answer your question?

20 JUDGE BEGLEY: So, if there's no indication that the
21 mitochondrial target was removed, but that doesn't teach that -- it
22 doesn't teach the opposite, I guess, is what I'm --

23 MS. STERLING: Well, DHAD is natively localized in
24 the mitochondria in yeast.

25 JUDGE BEGLEY: Yes.

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