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The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 19

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte GERALD L. BALLARD and JOHN G. GAUDIELLO

Appeal No. 96-1313
Application 08/202,536¹

ON BRIEF

Before WILLIAM F. SMITH, PAK and OWENS, *Administrative Patent Judges*.

OWENS, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal from the examiner's refusal to allow claims 10-18 and 25-27 as amended after final rejection. Claims 1-9 and 19-24, which are all of the other claims in the

¹ Application for patent filed February 28, 1994.

application, have been withdrawn from consideration by the examiner as being directed toward a nonelected invention.

THE INVENTION

Appellants' claimed invention is directed toward an electroless metal plating method wherein a substrate is immersed in a bath which contains water, a soluble source of metal ions, a soluble source of mediator ions which are different from the metal ions and are selected from a recited Markush group, a complexing agent for at least the metal ions, and a reducing agent for the mediator ions.^{2,3} Claim 10 is

² Regarding the reducing agent, appellants' specification states (page 5, lines 15-20) that the bath "includes a chemical reducing agent which is chosen to primarily reduce the mediator ions at the substrate surface of interest, not the metal ions ultimately intended to be reduced at, and deposited onto, the substrate surface of interest. (This chemical reducing agent may, to a lesser degree, necessarily and/or unavoidably also serve to reduce some of the metal ions at the substrate surface of interest.)"

³ Appellants state in their specification (page 6, line 30 - page 7, line 3), that "it is hypothesized that the mediator metal, e.g., palladium, reduced at, and deposited onto, the surface of the substrate metallic layer serves to catalyze the oxidation of the reducing agent at the surface of the substrate metallic layer. This oxidation results in a corresponding release of electrons which, it is believed, are conducted by the mediator metal into, and throughout, the existing substrate metallic layer. It is these electrons which then serve to reduce the metal ions in solution at the

illustrative and reads as follows:

10. A method for depositing a metal onto a substrate, comprising the step of immersing said substrate in an electroless metal plating bath having a composition which includes:

water;

a soluble source of metal ions;

a soluble source of mediator ions, different from said metal ions, chosen from the group consisting of palladium ions, platinum ions, silver ions, ruthenium ions, iridium ions, osmium ions and rhodium ions;

a first complexing agent for at least said metal ions;
and

a reducing agent for reducing said mediator ions.

THE REFERENCE

Morgan et al. (Morgan)	5,158,604	Oct. 27,
1992		

THE REJECTION

Claims 10-18 and 25-27 stand rejected under 35 U.S.C.

surface of the mediator metal and existing metallic layer."

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§ 103 as being unpatentable over Morgan.⁴

OPINION

We have carefully considered all of the arguments advanced by appellants and the examiner and agree with the examiner that appellants' claimed invention would have been obvious to one of

ordinary skill in the art at the time of appellants' invention over the applied reference. Accordingly, we sustain the aforementioned rejection. Because our reasoning differs substantially from that of the examiner, we denominate the affirmance as involving a new ground of rejection under 37 CFR § 1.196(b).

Appellants state that the claims stand or fall together (brief, page 6). We therefore limit our discussion to one claim, namely, claim 10. See *In re Ochiai*, 71 F.3d 1565, 1566

⁴ Claims 25-27 were not included in the final rejection. Because these claims have been addressed in both appellants' brief (page 6) and the examiner's answer (page 3), we consider the rejection of these claims to be before us for consideration.

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n.2, 37 USPQ2d 1127, 1129 n.2 (Fed. Cir. 1995); 37 CFR §
1.192(c)(7) (1995).

Morgan discloses a method for electroless deposition of a metal onto a substrate by use of a viscous aqueous electroless plating solution (col. 2, lines 38-42). The aqueous solution includes at least one water soluble source of ions of metal species selected from groups 1B, 6B and 8 of the periodic table (col. 3, lines 40-61). Morgan states (col. 3, lines 46-49) that "[u]seful depositable metal species from Group 1B are copper, silver and gold; from Group 6B, chromium; and from Group 8, iron, cobalt, nickel, palladium and platinum." The aqueous solution includes a complexing agent and a reducing agent for the metal ions (col. 3, line 62 - col. 4, line 9), and contains a thickener to provide the desired viscosity (col. 4, line 10).

Appellants argue that their method differs from that of Morgan in that appellants' substrate is immersed in the plating bath whereas Morgan's viscous solution is applied to the substrate by a method such as screen printing (brief, pages 6-7). The examiner argues that the second paragraph of column 2 of Morgan indicates that Morgan was well aware of

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applying an electroless plating composition by immersion, but developed a procedure which is effective on large or fixed substrates (answer, pages 4-5). In the event that it was desired to plate a substrate which could be immersed in a bath, the examiner argues, it would have been obvious to one of ordinary skill in the art to immerse the substrate in Morgan's electroless plating bath (answer, page 5).

Morgan's disclosure encompasses not only what it expressly discloses, but also what it would have fairly suggested to one of ordinary skill in the art. See *In re Lamberti*, 545 F.2d 747, 750, 192 USPQ 278, 280 (CCPA 1976). Morgan teaches that he increases the viscosity of his solution by use of a thickener to prevent the solution from running when it is applied to only a restricted area of a substrate or is applied to substrates which are too large to be immersed in the solution or are fixed in place such that immersion in the solution is prohibited (col. 2, lines 5-17). It would have been readily apparent to one of ordinary skill in the art, given this teaching, that if the thickener were omitted from Morgan's solution, the solution still would be suitable for

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use in applications where running of the solution is not a problem, i.e., when the substrates are small enough to be immersed in the solution and are movable such that immersion in the solution is not possible. Consequently, it would have been *prima facie* obvious to one of ordinary skill in the art to omit Morgan's thickener along with its function when a substrate is used which can be plated by immersing it in the thickener-free solution. See *In re Wilson*, 377 F.2d 1014, 1017, 153 USPQ 740, 742 (CCPA 1967); *In re Larson*, 340 F.2d 965, 969, 144 USPQ 347, 350 (CCPA 1965); *In re Brown*, 228 F.2d 247, 249, 108 USPQ 232, 234 (CCPA 1955).

Appellants point out that Morgan teaches that the bath should contain sufficient reducing agent to reduce both ionic species when two ionic species are used in combination, and argues that this teaching indicates that the conditions in the bath are such that the second ionic species does not function as a mediator ion in relation to the first ionic species (brief, pages 7-8). This argument is not persuasive because it is merely an unsupported argument by appellants' counsel. See *In re De Blauwe*, 736 F.2d 699, 705, 222 USPQ 191, 196

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(Fed. Cir. 1984); *In re Payne*, 606 F.2d 303, 315, 203 USPQ 245, 256 (CCPA 1979); *In re Greenfield*, 571 F.2d 1185, 1189, 197 USPQ 227, 230 (CCPA 1978); *In re Pearson*, 494 F.2d 1399, 1405, 181 USPQ 641, 646 (CCPA 1974). Appellants' specification discloses that if the concentration of reducing agent in the bath is too high, the stability of the bath is significantly reduced (page 14, lines 5-9). Appellants have not pointed out, and we do not find, any teaching that a high concentration of reducing agent prevents the mediator ions recited in appellants' claim 10 from serving as mediator ions.

Appellants argue that Morgan does not disclose the order of adding the ingredients to appellants' bath which, appellants state, is essential to appellants' invention (brief, page 8).⁵ This argument is not well taken because appellants' claims do not require that the ingredients be added to the bath in any particular order.

⁵ In view of the indication in appellants' specification (page 11, lines 26-29) that the order of adding the ingredients to the bath is critical, the examiner should consider, in the event of further prosecution, rejecting appellants' claims on the ground that the claims, because they fail to recite a critical feature of the claimed invention, are not enabled by the specification. See *In re Mayhew*, 527 F.2d 1229, 1233, 188 USPQ 356, 358 (CCPA 1976).

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Appellants argue that Morgan would not have suggested, to one of ordinary skill in the art, adding the constituents to the bath in the order set forth in appellants' specification which, appellants' argue, is necessary for achieving and maintaining the stability of the bath (brief, page 5).

Regarding this order, appellants' specification states (page 11, lines 29-32): "Any disclosure which lacks this order of incorporation would not be enabling, and would likely lead the ordinary skilled artisan to an unstable bath, i.e., a bath which exhibits the homogenous reaction." Appellants state that a homogenous reaction is a chemical reduction of the metal ions in solution rather than on the substrate surface (specification, page 4, lines 27-33).

Regarding enablement, a predecessor of our appellate reviewing court stated in *In re Marzocchi*, 439 F.2d 220, 223-24, 169 USPQ 367, 369-70 (CCPA 1971):

[A] specification disclosure which contains a teaching of the manner and process of making and using the invention in terms which correspond in scope to those used in describing and defining the subject matter sought to be patented *must* be taken as in compliance with the enabling requirement of the first paragraph of § 112 *unless* there is reason to doubt the objective truth of the statements

contained therein which must be relied on for enabling support. . . .

. . . .

. . . it is incumbent upon the Patent Office, whenever a rejection on this basis is made, to explain *why* it doubts the truth or accuracy of any statement in a supporting disclosure and to back up assertions of its own with acceptable evidence or reasoning which is inconsistent with the contested statement. Otherwise, there would be no need for the applicant to go to the trouble and expense of supporting his presumptively accurate disclosure.

In accord with *Marzocchi*, the order set forth in appellants' specification of combining the ingredients of appellants' bath is presumed to be enabling. However, appellants' statement that other orders of combination likely would result in instability is not directed toward appellants' invention but, rather, pertains to methods other than that of appellants. There is no presumption that appellants' statements in their specification regarding other methods are correct. For this reason and because 1) Morgan does not indicate that the disclosed baths are unstable in the absence of a thickener, and 2) appellants provide no evidence or sound technical reasoning as to why the order recited in their specification of adding the components of their bath is

essential for maintaining bath stability but, rather, merely assert in their specification (page 11, lines 29-32) that if the ingredients are not added in the stated order, instability is "likely", we are not convinced that one must combine the ingredients of Morgan's bath according to the sequence set forth in appellants' specification in order for the bath to be stable.

Appellants argue that Morgan would not have led one of ordinary skill in the art to combine the bath ingredients in an order such that one of the ionic species acts as a mediator for another ionic species (brief, page 8). Appellants' specification indicates (page 4, lines 27-33) that homogeneous reaction is avoided, and heterogeneous reaction at the substrate surface is permitted, by using a complexing agent for the metal ions. Because Morgan uses a complexing agent for the ionic depositable species (col. 3, line 62 - col. 4, line 9), it reasonably appears that Morgan's reaction takes place on the substrate surface. For this reason and because appellants believe that the mediator ions produce their effect on the substrate surface (specification, page 6, line 29 - page 7, line 7), it reasonably appears that one of Morgan's

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ionic species can serve as a mediator ion for another ionic species.

For the above reasons, we conclude, based on the preponderance of the evidence, that appellants' claimed invention would have been obvious to one of ordinary skill in the art within the meaning of 35 U.S.C. § 103.

DECISION

The rejection of claims 10-18 and 25-27 under 35 U.S.C. § 103 as being unpatentable over Morgan is affirmed. This affirmance is denominated as involving a new ground of rejection under 37 CFR § 1.196(b).

This decision contains a new ground of rejection pursuant to 37 CFR § 1.196(b)(amended effective Dec. 1, 1997, by final rule notice, 62 Fed. Reg. 53131, 53197 (Oct. 10, 1997), 1203 Off. Gaz. Pat. Office 63, 122 (Oct. 21, 1997)). 37 CFR § 1.196(b) provides that, "A new ground of rejection shall not be considered final for purposes of judicial review."

37 CFR § 1.196(b) also provides that the appellant, WITHIN TWO MONTHS FROM THE DATE OF THE DECISION, must exercise

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one of the following two options with respect to the new ground of rejection to avoid termination of proceedings (§ 1.197(c)) as to the rejected claims:

(1) Submit an appropriate amendment of the claims so rejected or a showing of facts relating to the claims so rejected, or both, and have the matter reconsidered by the examiner, in which event the application will be remanded to the examiner. . . .

(2) Request that the application be reheard under § 1.197(b) by the Board of Patent Appeals and Interferences upon the same record. . . .

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

AFFIRMED, 37 CFR § 1.196(b)

CHUNG K. PAK)	
Administrative Patent Judge)	BOARD OF PATENT
)	APPEALS AND
)	INTERFERENCES
)	
TERRY J. OWENS)	
Administrative Patent Judge)	

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William F. Smith, Administrative Patent Judge, dissenting.

I dissent from the action taken today by the majority on both procedural and substantive grounds.

Procedure

By statute this board serves as a board of review, not as a de novo examining tribunal. 35 U.S.C. § 7(b) ("The Board of Patent Appeals and Interferences shall, on written appeal of an applicant, review adverse decisions of the examiners upon application for patents . . . "). Here, the examiner's adverse decision is that claims 10-18 and 25-27 are unpatentable under 35 U.S.C. § 103. In making a rejection of claims pending in a patent application, the Patent and Trademark Office (PTO) must state the reasons for such rejection and provide "such information and references as may be useful in judging of the propriety of continuing the prosecution of [the] application." 35 U.S.C. § 132.

Here, all of the claims stand rejected under 35 U.S.C. § 103. As evidence of obviousness, the examiner relies upon Morgan. No other evidence is relied upon by the examiner in stating the rejection on pages 3-5 of the Examiner's Answer. The significant difference between the procedure required by

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claim 10 on appeal and that described in Morgan is that claim 10 requires a step of immersing a substrate in the recited electroless metal plating bath while the electroless metal plating bath of Morgan has been designed so that it is to be coated on the substrate.

The reason given by the examiner why this aspect of claim 10 on appeal would have been obvious to one of ordinary skill in the art appears in the paragraph bridging pages 4-5 of the Examiner's Answer as follows:

[Morgan] also differs from the claimed invention by not applying the electroless plating solution to the substrate by immersion. However, the second paragraph of column 2 makes it clear that Morgan was well aware of applying electroless plating composition by immersion (which is the most common method) but designed his procedure to work on large or fixed substrates which could not be immersed. In the event that it was desired to plate a substrate which could be immersed with Morgan's composition it is the Examiner's position that a person having ordinary skill in the art at the time of the claimed invention would have found it obvious to immerse same in Morgan's electroless plating bath because immersion is the most common method for applying an electroless bath and thus an expected result would be anticipated.

The second paragraph of column 2 of Morgan which the examiner relies upon in support of this portion of his rejection reads as follows:

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In many cases it is desirable to apply an electroless deposition solution to a surface which is not amenable to immersion in a plating bath, e.g. because the substrate is not stable in aqueous solutions, because the substrate is large or fixed in place in a way that prohibits immersion in a solution or because it is desirable to restrict the application of plating solution to the region of a catalytic image. In such cases it would be useful to employ a highly viscous electroless plating solution that would be substantially immobilized when applied to a substrate, i.e. would not run from the localized area of application. A common belief in the field of electroless plating solution is that plating baths must be well agitated to allow sufficient mass transfer of metal to a catalytic surface and liberation of hydrogen from the plating surface. For instance, if hydrogen, which is liberated during the reduction of ionic metal to deposited metal, is not removed from the surface, the transfer of ionic species to the surface is impeded. Such a belief has not doubt inhibited the development of highly viscous plating media.

One reading the majority's opinion "affirming" the examiner's adverse decision rejecting claims 10-18 and 25-27 under 35 U.S.C. § 103 would reasonably expect to find a discussion regarding this critical finding by the examiner. However, the majority has chosen not to decide this issue. I believe this constitutes procedural error on the part of the majority.

Appellants' have invested a significant amount of resources, both financially and timewise, in order for this

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Board to decide the correctness of the examiner's decision. The above referenced finding by the examiner is the keystone to the rejection. If that keystone fails, so does the rejection. Yet the majority has refused to decide this critical issue. In my view, this leaves appellants and the examiner in an untenable position.

As set forth in 37 CFR § 1.196(a), the affirmance by the majority of the examiner's decision means that the rejection premised upon the examiner's reasoning still stands since it was not explicitly reversed. Thus, upon return of the application to the examiner, the examiner and appellants must still confront the examiner's rejection in addition to the new rejection made by the majority based upon its own reasoning. I see no reason why we should not decide the examiner's rejection since it has been fully briefed. For the reasons set forth below, I disagree with the examiner's rejection and vote to reverse the rejection. However, without the majority expressing its view as to the propriety of the examiner's rejection and reasoning, consideration of this case upon its return to the jurisdiction of the examiner by both appellants' and the examiner is needlessly confused.

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I believe the majority has made a second, separate procedural error in making the new ground of rejection under 37 CFR § 1.196(b). As stated at page 4 of the majority opinion, the majority's "affirmance" of the examiner's decision rejecting the claims under 35 U.S.C. § 103 is premised upon appellants' statement in the Appeal Brief that the claims on appeal stand or fall together. Thus, the majority has limited their discussion to one claim, claim 10 on appeal. In my view, the rule which provides for separate argument of claims before this Board, 37 CFR § 1.197 (2)(c)(7), applies only when we are reviewing the examiner's decision as expressed in the Examiner's Answer. It does not apply when the Board makes a new ground of rejection under 37 CFR § 1.196(b), as here. This follows since an appellant must make this election in drafting the Appeal Brief. That election is based, in part, upon the perceived strength or weakness of the examiner's case at that point in time.

Here, appellants have not had an opportunity to consider the new reasoning supplied by the majority. It is improper for the majority to bootstrap an "affirmance" of all claims on totally new reasoning when appellants' election to not

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separately argue the patentability of the claims on appeal was based on the examiner's reasoning. As a result, while the majority states at page 11 of their majority opinion that claims 10-18 and 25-27 are subject to a new ground of rejection, the majority has not explained why any claim beyond claim 10 is unpatentable under 35 U.S.C. § 103. The failure of the majority to explain their reasons why the remaining claims are unpatentable is in violation of 35 U.S.C. § 132.

Under 37 CFR § 1.196(b), appellants have two options. They can file an amendment and/or a showing of facts not previously of record and have the matter reconsidered by the examiner. 37 CFR § 1.196(b)(1). Alternatively, appellants may seek rehearing from this merits panel based upon the same record. 37 CFR § 1.196 (b)(2).

Considering the second option first, if appellants seek rehearing from this merits panel of the decision of the majority rejecting claims 11-18 and 25-27, what would appellants ask? For the majority to provide reasoning in support of its conclusion of unpatentability? It is difficult to determine what other argument appellants could reasonably make. Why should appellants be placed in a position where

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they have to ask the majority why claims 11-18 and 25-27 are unpatentable? Again, it is the PTO's responsibility to provide reasons in support of any rejection made.

Now considering the first option, what amendment or showing of facts would be sufficient to overcome the majority's new rejection of claims 11-18 and 25-27? On this record, appellants have to guess why these claims are unpatentable. As a consequence, they may needlessly amend the claims and give up potentially valuable subject matter to which they would otherwise be entitled.

These are not frivolous issues. The amendment of patent claims during prosecution for the purposes of establishing patentability has real world consequences if the application issues into a patent. If such a patent is involved in an enforcement action, one of the factors to be considered by a court in construing the patent's claims is the prosecution history of the patent before the PTO, including any amendments made to the claims and the reasons why such amendments were made. Thus, prior to amending the claims and possibly giving up protection to which they might have been entitled, an applicant should be informed why the PTO has determined the

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claims are unpatentable. Furthermore, amendments to claims made during prosecution of the patent before the PTO are a factor to be considered in determining possible infringement of such a claim under the doctrine of equivalents. Again, appellants should not have to guess why the PTO has determined a given claim in an application to be unpatentable under 35 U.S.C. § 103. 35 U.S.C. § 132.

In my view, the majority should (1) explicitly decide the correctness of the examiner's position on the obviousness of immersing substrates in the bath of Morgan and (2) explain why claims 11-18 and 25-27 are unpatentable under their new ground of rejection.

Substance

1. The Examiner's Position

I would reverse the rejection made by the examiner in the Examiner's Answer. Morgan describes a viscous aqueous electroless plating solution to be coated on substrates. See,

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e.g., col. 2, lines 30-42. In support of his position that it would have been obvious to one of ordinary skill in the art to immerse substrates in the viscous bath of Morgan, the examiner points to col. 2, lines 5-26 reproduced above. As seen, this portion of Morgan merely mentions that, in the past, electroless plating processes were known in which substrates were immersed in a bath. In my view, this does not establish that one of ordinary skill in the art would have found it obvious to immerse a substrate in the viscous bath of Morgan. As set forth in the passage of Morgan relied upon by the examiner, there are many considerations one of ordinary skill in the art faces in deciding how to go about electroless plating a given substrate including the viscosity of the electroless plating solution and the method of applying that solution to the substrate. These two considerations are related and can not be considered in isolation of each other.

In making this rejection, the examiner has not relied upon any other evidence beyond Morgan, e.g., references involved with electroless plating solutions which are applied

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by immersing the substrate.⁶ Morgan itself is directed to processes which involve coating, not immersing, substrates in the electroless bath solution. It is unclear from this record that merely immersing a substrate in the viscous bath of Morgan would reasonably produce a satisfactory result. As explained in Morgan, there are issues of bath stability (release of hydrogen) and the ability to place the bath in an appropriate area of the substrate which must be addressed. Absent a more fact-based explanation by the examiner why it would have been obvious to one of ordinary skill in the art to immerse a substrate in the viscous electroless plating solution of Morgan, I do not find that the examiner has satisfied his initial burden of providing reasons of unpatentability. In re Oetiker, 977 F.2d 1443, 1446, 24 USPQ2d 1443, 1445 (Fed. Cir. 1992). Accordingly, I vote to reverse the examiner's rejection.

2. New Ground of Rejection

⁶ As a matter of logic, one would think that a rejection of claim 10 would be premised upon a reference directed to immersing substrates in an electroless plating bath. The fact that the examiner apparently failed to uncover references from the "immersion" art area which teach or suggest a bath having the ingredients required by claim 10 on appeal is applicable by immersion of the substrate may be telling.

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As explained on pages 5-6 of their opinion, the majority believes that it would have been "readily apparent to one of ordinary skill in the art . . . that if the thickener were omitted from Morgan's solution, the solution still would be suitable for use in applications where running of the solution is not a problem, i.e, when the substrates are small enough to be immersed in the solution and are movable such that immersion in the solution is possible." The majority does not cite any facts in support of this conclusion but, rather, hinges that conclusion solely on the basis of the three cases cited at page 6 of their opinion.

As set forth in In re Cofer, 354 F.2d 664, 667, 148 USPQ 268, 271 (CCPA 1966) "Necessarily it is facts appearing in the record, rather than prior decisions in and of themselves, which must support the legal conclusion of obviousness under 35 USC 103." Here, the majority only expresses its opinion that one of ordinary skill in the art would have found it obvious to immerse a small substrate in this electroless plating solution of Morgan. However, as explained above, Morgan indicates that the stability of the electroless plating solution as well as the ability to place and maintain the

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electroless solution on a particular portion of the substrate are relevant concerns in this art area. It is not clear on this record that if one were to eliminate the thickener from the viscous electroless plating solution of Morgan how stable and useful the remaining composition would be. In other words, would a bath according to Morgan having the metal species and additives required by that reference be stable and applicable by immersion? In my view, Morgan by itself does not permit one to reasonably answer such questions. Absent a more fact-based explanation, I do not see that the majority has satisfied its initial burden of providing reasons of unpatentability. In re Oetiker, supra.

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