

The opinion in support of the decision being entered today was not written for publication in a law journal and is not binding precedent of the Board.

Paper No. 51

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte TRUNG T. DOAN, RANDHIR P. S. THAKUR
and YAUH-CHING LIU

Appeal No. 1999-1548
Application No. 08/859,629

ON BRIEF

Before KRASS, DIXON and BARRY, Administrative Patent Judges.
KRASS, Administrative Patent Judge.

ON REQUEST FOR REHEARING

On October 9, 2002, appellants filed a request for rehearing of our decision of July 29, 2002 in this case. On January 30, 2003, we entered a decision on that request wherein we stated that since we have already decided a previous rehearing request, prosecution must stop and we did not entertain the latest request

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for rehearing of October 9, 2002.

The previous "request for rehearing," entered as Paper No. 44, and duplicated as Paper No. 47, was decided by us on September 19, 2002 (Paper No. 48).

On reconsideration of the matter, in order to give appellants every reasonable consideration, since appellants' previous request for rehearing (Paper Nos. 44 and 47) was not, technically, in response to a final decision, but rather in response to a remand by us, we will treat the request for rehearing of October 9, 2002, as a first request for rehearing, and decide as follows:

Appellants argue, at page 5 of the request for rehearing of October 9, 2002, that the burden of proof as to the "planarization layer" has been unfairly placed on appellants rather than on the examiner. We disagree.

While it is true that the examiner has the initial burden of establishing a prima facie case of obviousness, in the instant case, the term, "planarization layer" was considered by the examiner to have been disclosed by the applied references. The examiner may have had a reasonable case if that term was simply construed, by its ordinary meaning, as a flat layer. But

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appellants argued strenuously that such a "planarization layer" was not taught by the applied references although appellants did not, in our view, give an adequate reason as to why this was not so. Thus, we offered both appellants and the examiner ample opportunity, through remand, to further explain their positions and to define "planarization layer," as they were employing that term. Neither forthcoming explanation was deemed adequate, since appellants only indicated that "planarization" is defined adequately "in view of its common usage in the semiconductor arts" and the examiner merely indicated that he agreed with appellants' remarks "in its entirety." Accordingly, we made our decision (Paper No. 46 -July 29, 2002) based on the ordinary meaning, as we understand the plain and ordinary term, "planarization layer," as constituting a substantially flat layer. Since layers 5 and 9 in the Kuecher reference appear to be quite flat, they were interpreted, in our view, to be "planarization layers." Our decision was based on this finding and we find no error in that finding in view of any arguments by appellants.

Accordingly, we find no unfair placement, regarding the burden of proof, upon appellants. Rather, we made our decision by balancing the arguments, or lack thereof, presented by both

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appellants and the examiner regarding the "planarization layer" and on the evidence of record before us.

Appellants still admit that they cannot point to anything in the specification that defines "planarization layer" in a manner inconsistent with the way we have interpreted that term (request for rehearing, Paper No. 49 - page 6), yet they continue to argue that we had "sufficient information regarding the meaning" of that term as commonly understood in the art. Later on down the page in the request for rehearing, appellants point to page 1, lines 8-13, of the specification for a definition of "planarization layer." But our reference to that part of the specification only reveals a statement about employing "flat" semiconductor wafers to achieve the goal of "high device yields." This is not a definition of "planarization layer" in any way inconsistent with our interpretation. Appellants talk about how their "planarization layers" are made, i.e., by reheating and reflowing, but the instant claims are not directed to any particular method of forming such layers, only a structure containing a "planarization layer."

Appellants have not convinced us of any error in our decision regarding the "planarization layer." Further, although

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appellants point out, at page 8 of the latest request for rehearing, that the references to Samata and Maeda are "inadequate" to support a prima facie case of obviousness, appellants point to nothing specific in the claims which is alleged to distinguish over the prior art. The mere allegation that there is an "inadequate" showing, with no specific argument, is not persuasive to establish nonobviousness.

Appellants further argue that the limitations of claims 54-56 and 88-91 have not been met by the applied references because "the claims do not recite any and all compounds of silicon or Markush group equivalents." Taking claim 54 as exemplary, the claim requires that the first planarization layer be formed of one of tungsten, titanium, tantalum, copper, aluminum,...

Since the examiner identified layer 5 in Kuecher as the claimed "first planarization layer," and this layer is identified as comprising "titanium" (column 4, line 26, of Kuecher), i.e., one of the recited possibilities in the claim, the claim language is met by the applied references.

We have carefully reconsidered our decision in view of appellants' latest request for rehearing. We have granted the request to the extent of reconsidering our decision but we deny the request with respect to making any changes therein.

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

DENIED

ERROL A. KRASS)	
Administrative Patent Judge)	
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JOSEPH L. DIXON)	BOARD OF PATENT
Administrative Patent Judge)	APPEALS AND
)	INTERFERENCES
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LANCE LEONARD BARRY)	
Administrative Patent Judge)	

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EK/RWK

MICHAEL G FLETCHER
FLETCHER & ASSOCIATES
P O BOX 692289
HOUSTON, TX 77269-2289