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MERCHANT & GOULD P.C. P.O. BOX 2903 MINNEAPOLIS, MN 55402-0903			RUDDOCK, ULA CORINNA	
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte RANDY GENE OGG, PHIL BENNETT,
ALAN SEIDEL, and PAUL GIFFORD

Appeal 2019-004524
Application 14/174,027
Technology Center 1700

Before ROMULO H. DELMENDO, BEVERLY A. FRANKLIN, and
JULIA HEANEY, *Administrative Patent Judges*.

FRANKLIN, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(a), Appellant¹ appeals from the
Examiner's decision to reject claims 1–16. We have jurisdiction under
35 U.S.C. § 6(b).

We AFFIRM-IN-PART.

¹ We use the word Appellant to refer to “applicant” as defined in 37 C.F.R.
§ 1.42(a). Appellant identifies the real party in interest as Encell
Technology, Inc. Appeal Br. 1.

CLAIMED SUBJECT MATTER

Claim 1 is illustrative of Appellant's subject matter on appeal and is set forth below:

1. A battery comprising an iron anode, a nickel cathode, and an electrolyte comprised of sodium hydroxide, lithium hydroxide and a soluble metal sulfide, wherein the amount of sulfide contained in the electrolyte ranges from 0.23% to 0.75% by weight of the electrolyte, and with the iron anode comprising a polyvinyl alcohol binder.

REFERENCES

The prior art relied upon by the Examiner is:

Name	Reference	Date
Kuczkowski	US 1,417,391	May 23, 1922
Moulton	US 2,871,281	Jan. 27, 1959
Kononenko	US 4,123,568	Oct. 31, 1978
Kobayashi	US 6,558,848 B1	May 6, 2003
Phillips	US 7,816,030 B2	Oct. 19, 2010
Duong	US 2011/0123850 A1	May 26, 2011
P. Periasamy et al., <i>Electrochemical behaviour of Teflon-bonded iron oxide electrodes in alkaline solutions</i> , 63 J. Power Sources 79–85 (1966)		

REJECTIONS

1. Claims 1–10 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Moulton in view of Phillips, Periasamy, and Kononenko.
2. Claims 11–14 are rejected under pre-AIA 35 U.S.C. § 103(a) as being unpatentable over Moulton, in view of Phillips, Periasamy, Kononenko, and Duong.
3. Claims 11–16 are rejected under pre-AIA 35 U.S.C. § 103(a) as being unpatentable over Moulton, in view of Phillips, Periasamy, Kononenko, and Kobayashi.

4. Claims 1–5 and 11–16 and rejected on the ground of nonstatutory double patenting as being unpatentable over claims 1–4, 7, 8, and 13–19 of US Patent Application 14/173,991.

OPINION

Upon consideration of the evidence and each of the respective positions set forth by each party, we find that the preponderance of evidence supports Appellant’s position for Rejections 1–3 (but not for Rejection 4). We thus reverse the Examiner’s decision to reject the appealed claims for the reasons provided by Appellant for Rejections 1–3 in the Appeal Brief and in the Reply Brief, and add the following for emphasis.

Rejections 1–3

As argued by Appellant, the Examiner misinterprets certain teachings of Moulton. Appeal Br. 2–3. The Examiner’s position is that Moulton suggests the claimed amount of sulfide (the amount of sulfide contained in the electrolyte ranges being from 0.23% to 0.75% by weight of the electrolyte) based on certain calculations made by the Examiner. Ans. 3–6. However, we agree with Appellant that the solution having the amount of sulfide as calculated by the Examiner is not the electrolyte used in the battery (this is the misinterpretation made by the Examiner).

As Appellant explains, Moulton describes preparing an iron anode containing sulfur. The solution used contains 2.5 wt % sulfur. Moulton, col. 2, l. 65–col. 3, l. 2. Appellant explains that it is from this solution (hereinafter referred to as the “remaining solution”) that the sulfur migrates into the iron anode. Appellant explains that this remaining solution is not the electrolyte used in the battery as the Examiner believes it to be. Appeal

Br. 2–3. Appellant explains that this remaining solution is in fact drained (see col. 3, l. 11 of Moulton). *Id.* Then, a “new” solution for use as the electrolyte in the battery is added. Moulton, col.3, ll. 11–14. Or, alternatively, “the same electrolyte is modified to have the desired sulphide electrolyte mixed therewith” is added to be used as the electrolyte of the battery. *Id.* We agree with this understanding of Moulton. The pertinent disclosure of Moulton in this regard is reproduced below:

The electrolyte is then drained from the cell and a new or the same electrolyte is modified to have the same desired sulphide electrolyte mixed therewith and is then added to the cell. Thereafter, the cell is put immediately on charge and cycled several times according to the usual practice.

Moulton, col. 3, ll. 10–14.

In either scenario (new or the same-but-modified electrolyte solution), the electrolyte solution is not the same as the “remaining solution” discussed, *supra*. Hence, the calculations presented by the Examiner concern a remaining solution which is not used as the electrolyte for the battery.² The Examiner’s response made on pages 16–17 of the Answer is not supported by the preponderance of the evidence.

Hence, we agree with Appellant that the claimed amount of sulfide in the battery electrolyte (“from 0.23% to 0.75% by weight of the electrolyte”) is not suggested by Moulton. The Examiner does not rely upon the other applied references of record to remedy this deficiency of Moulton. We

² Although not dispositive in making our determinations herein, it is noteworthy that the amount of sulfur that migrates into the iron anode is somewhat a speculative variable that undermines the exactness of the Examiner’s calculations.

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therefore reverse Rejections 1–3. We need not reach Appellant’s rebuttal evidence (Ogg Declaration and Example 2 of the Specification) in making this determination.

Rejection 4

This nonstatutory double patenting rejection is summarily affirmed because it is not argued on the merits. *See Hyatt v. Dudas*, 551 F.3d 1307, 1314 (Fed. Cir. 2008) (explaining that summary affirmance without consideration of the substantive merits is appropriate where an appellant fails to contest a ground of rejection). Appellant indicates that a terminal disclaimer will be filed at the appropriate time. Appeal Br. 12–13.

CONCLUSION

We reverse Rejections 1–3, but summarily affirm Rejection 4.

DECISION SUMMARY

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Reversed	Affirmed
1-10	103	Moulton Phillips, Periasamy, Kononenko	1-10	
11-14	103	Moulton, Phillips, Periasamy, Kononenko, Duong	11-14	
11-16	103	Moulton, Phillips, Periasamy, Kononenko, Kobayashi	11-16	
1-5, 11-16		Nonstatutory Double Patenting		1-5, 11-16
Overall Outcome			6-10	

TIME PERIOD FOR RESPONSE

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED-IN-PART