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14/174,327	02/06/2014	Randy Ogg	70208.0029USU1	2563
23552	7590	06/29/2020	EXAMINER	
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

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* RANDY OGG

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Appeal 2019-004526  
Application 14/174,327  
Technology Center 1700

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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), Appellant<sup>1</sup> appeals from the Examiner's decision to reject claims 1, 3–12, and 14. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

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<sup>1</sup> 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:  
a nickel cathode;  
an iron anode comprising an iron active material that comprises metal iron or an iron oxide material and a polyvinyl alcohol binder; and  
an electrolyte comprising sodium hydroxide, lithium hydroxide, and sodium sulfide, with the amount of sulfide in the electrolyte ranging from 0.23% to 0.75% based on the weight of the electrolyte; and  
with the battery exhibiting a cycle life of at least about 10,000 cycles.

### REFERENCES

The prior art relied upon by the Examiner is:

<b>Name</b>	<b>Reference</b>	<b>Date</b>
Moulton et al.	US 2,871,281	Jan. 27, 1959
Gillman et al.	US 3,918,989	Nov. 11, 1975
Ogg et al.	US 9,368,788 B2	June 14, 2016
Ogg	US 9,450,233 B2	Sept. 20, 2016
Ogg et al.	US 9,478,806 B2	Oct. 25, 2016
Choi	WO 94/20995	Sept. 15, 1994

## REJECTIONS<sup>2</sup>

1. Claims 1, 4–12, and 14 are rejected under 35 U.S.C. § 103(a) as being unpatentable by Moulton in view of Gillman.

2. Claim 3 is rejected under 35 U.S.C. § 103(a) as being unpatentable by Moulton in view of Gillman and Choi.

## 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 and 2 (but not for the double patenting rejections, *see* footnote 2). We thus reverse the Examiner's decision to reject the appealed claims for Rejections 1 and 2 for the reasons provided by Appellant in the Appeal Brief and in the Reply Brief, and add the following for emphasis.

### Rejections 1 and 2

As argued by Appellant, the Examiner misinterprets certain teachings of Moulton. Appeal Br. 2–4. The Examiner's position is that Moulton suggests the claimed amount of sulfide (the claimed amount of sulfide contained in the electrolyte used in the battery being from 0.23% to 0.75% by weight of the electrolyte) based on certain calculations made by the

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<sup>2</sup> Claims 1, 3–12, and 14 are rejected under several double patenting rejections (including provisional) as identified by the Examiner on pages 9–15 of the Answer, which we do not list here for brevity. These rejections are summarily affirmed since they are not argued on the merits by Appellant. Appellant states that respective terminal disclaimers will be filed if appropriate. Appeal Br. 10–11.

Examiner. Ans. 3–8. However, we agree with Appellant that the solution having the amount of sulfide as calculated by the Examiner is not used as the electrolyte in the battery (this is the misinterpretation made by the Examiner).

As Appellant explains, Moulton describes preparing an iron anode containing sulfur, and the solution used for this 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 the remaining solution is not the electrolyte in the battery as the Examiner believes it to be. Appeal Br. 2–4. 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 for 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 in 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 in the

battery.<sup>3</sup> The Examiner's response made on pages 15–16 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 (being 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 therefore reverse Rejections 1 and 2. We need not reach Appellant's rebuttal evidence (Ogg Declaration) in making this determination.

### CONCLUSION

We reverse Rejections 1 and 2, but affirm the obviousness–type double patenting rejections (including the provisional double-patenting rejections (see footnote 2, *supra*)).

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<sup>3</sup> 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 to an extent that undermines the exactness of the Examiner's calculations.

DECISION SUMMARY

In summary:

<b>Claims Rejected</b>	<b>35 U.S.C. §</b>	<b>Reference(s)/Basis</b>	<b>Reversed</b>	<b>Affirmed</b>
1, 4–12, 14	103(a)	Moulton, Gillman	1, 4–12, 14	
3	103(a)	Moulton, Gillman, Choi	3	
1, 3–12, 14		Nonstatutory Double Patenting & provisionally double patenting as identified on pages 9–15 of the Answer		1, 3–12, and 14
<b>Overall Outcome</b>				1, 3–12, and 14

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