

The opinion in support of the decision being entered today was not written for publication in a law journal and is not binding precedent of the Board.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. 20

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex parte ASTRID GÖRGE, JULIANE MEESE-MARKTSCHIEFFEL,  
DIRK NAUMANN, ARMIN OLBRICH and FRANK SCHRUMPF

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Appeal No. 2002-0196  
Application No. 08/952,913

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ON BRIEF

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Before KIMLIN, JEFFREY T. SMITH and MOORE, Administrative Patent Judges.

KIMLIN, Administrative Patent Judge.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 1-3 and 20-23. Claim 1 is illustrative:

1. Basic cobalt (II) carbonate, agglomerated from fine primary particles and of general composition  $\text{Co}[(\text{OH})_2]_a[\text{CO}_3]_{1-a}$ , where  $0.1 \leq a \leq 0.9$ , characterised [sic, characterized] in that the agglomerates have a spheroidal habit and the average agglomerate diameter is 3 to 50  $\mu\text{m}$ .



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present case, we do not find that the examiner has presented sufficient facts to establish, prima facie, that Tsao discloses basic cobalt (II) carbonate of spheroidal habit, and to justify placing on appellants the burden of demonstrating that the particles of Tsao are not, in fact, spheroidal. While the examiner relies upon the EXAMPLE of the reference for the statement that "[a]ssuming the precipitated carbonate is in the form of 10 micron sphere the calculated surface area of the carbonate is 230,000 sq. ft." (lines 27-29), appellants have provided a Declaration by Dr. Armin Olbrich, one of the present co-inventors and self-described "expert," who states that the statement in the reference example is merely a theoretical construct used to derive a surface area estimate, and not a disclosure that the exemplified particles are spheres. The declarant sets forth a number of factual differences between the reference and inventive particles, including the fact that the reference lacks the intense long-term, spinning process of the present invention. Furthermore, the declarant states that "[i]f Tsao were to achieve 10 micro spheres (or nearly so) as primary particles this would not be the same as the present invention particles (of about 10 microns) which are secondary

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(agglomerated) particles, each made up of primary particles"  
(page 2 of Declaration, paragraph (f)).

Also, we find it not insignificant that the example of Tsao is directed to forming nickel carbonate, not cobalt carbonate, and the present specification explains that it was known in the art that the formation of nickel carbonate spheroidal particles was not problematic.

In conclusion, based on the foregoing, inasmuch as the examiner has not made out a prima facie case of anticipation/obviousness under § 102/§ 103, we will not sustain the examiner's rejection.

The decision of the examiner is reversed.

REVERSED

EDWARD C. KIMLIN	)	
Administrative Patent Judge	)	
	)	
	)	
	)	
	)	
	)	
JEFFREY T. SMITH	)	BOARD OF PATENT
Administrative Patent Judge	)	APPEALS AND
	)	INTERFERENCES
	)	
	)	
	)	
JAMES T. MOORE	)	
Administrative Patent Judge	)	

ECK:clm

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