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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* DAVID COLWELL

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Appeal 2010-010071  
Application 11/467,468  
Technology Center 3700

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Before: JENNIFER D. BAHR, HYUN J. JUNG, and  
JEREMY M. PLENZLER, *Administrative Patent Judges*.

JUNG, *Administrative Patent Judge*.

DECISION ON APPEAL

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### STATEMENT OF THE CASE

David Colwell (Appellant) appeals under 35 U.S.C. § 134 from a rejection of claims 1-35, 37-41, and 43. We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

### THE CLAIMED SUBJECT MATTER

The claims are directed to personal or spot area environmental management systems and apparatuses. Claim 1, reproduced below, is illustrative of the claimed subject matter:

1. A personal or spot area environmental management system, comprising:
  - a low pressure air supply;
  - a water supply; and
  - a mixer;the mixer comprising a nozzle housing including an air nozzle in fluid communication with the low pressure air supply and a water nozzle in fluid communication with the water supply, the air nozzle providing an expanding air flow stream, the water nozzle arranged such that at least a lip of the water nozzle impinges the expanding air flow stream to create turbulence, wherein a low pressure area resides above the water nozzle to facilitate drawing water to the low pressure area from the water supply, wherein a temperature of the air flow stream decreases.

### THE REFERENCES

The prior art relied upon by the Examiner in rejecting the claims on appeal is:

Diggs

US 3,915,384

Oct. 28, 1975

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Polonsky	US 5,348,227	Sep. 20, 1994
Soule	US 5,692,682	Dec. 2, 1997
Parsons	US 5,724,824	Mar. 10, 1998
Dettling	US 6,406,006 B1	Jun. 18, 2002
Strauss	US 6,543,247 B2	Apr. 8, 2003
Huberty	US 6,627,563 B1	Sep. 30, 2003
Schenk	US 6,658,865 B2	Dec. 9, 2003

### THE REJECTIONS

Appellant seeks our review of the following rejections:

- (1) Claims 1, 4, 7, 8, 10, 15, 19-21, 27, 30, 38, 40, and 41 stand rejected under 35 U.S.C. § 102(b) as anticipated by Soule;
- (2) Claims 1, 4, 7, 8, 10, 15, 19-21, 27, 30, 38, 40, and 41 stand rejected under 35 U.S.C. § 102(b) as anticipated by Schenk;
- (3) Claims 1, 4-8, 10, 11, 19-21, 27, 30, 33-35, 38, 40, and 41 stand rejected under 35 U.S.C. § 102(b) as anticipated by Strauss;
- (4) Claim 43 stands rejected under 35 U.S.C. § 103(a) as unpatentable over Schenk, Strauss, or Soule;
- (5) Claims 2, 3, 9, 11-14, 28, 29, and 39 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Schenk, Strauss, or Soule and Parsons;
- (6) Claims 16-18 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Schenk, Strauss, or Soule and Huberty;
- (7) Claims 22-26 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Schenk, Strauss, or Soule and Dettling;
- (8) Claims 31 and 32 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Schenk, Strauss, or Soule and Polonsky; and

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(9) Claim 37 stands rejected under 35 U.S.C § 103(a) as unpatentable over Schenk, Strauss, or Soule and Diggs.

## ANALYSIS

### *Rejections (1) and (4)-(9) based on Soule*

The Examiner finds that Soule discloses the personal or spot area environmental management system of independent claims 1 and 30 that includes a water nozzle arranged such that at least a lip of the water nozzle impinges expanding air. Ans. 4-5. In particular, the Examiner finds that a helical member 18 of Soule discloses the water nozzle and shoulders 60, 62 disclose a lip that impinges expanding air. *Id.* at 4.

Appellant argues that Soule does not disclose a water nozzle arranged such that at least a lip of the water nozzle impinges an expanding air flow stream, as required by claim 1, or a water nozzle having a lip that impinges on the air stream, as required by claim 30. App. Br. 19 and 22. Appellant asserts that the shoulders 60, 62 are associated with a housing 16 and not the helical member 18. *Id.*

We agree with Appellant. Soule describes a helical vane or spray member 18 and a spray head 16 co-axially disposed about the helical spray member 18. Soule, col. 3, ll. 3-5, and fig. 1. Soule states that the spray head 16 includes two annular shoulders 60 and 62 which disrupt the laminar flow of gas entering from gas passages 48. Soule, col. 3, ll. 61-64, and fig. 1. Soule thus describes the shoulders 60, 62 as part of the spray head 16, which is co-axially disposed around the spray member 18, and does not describe the shoulders 60, 62 as a part of the spray member 18. Therefore, Soule does not disclose by a preponderance of the evidence a water nozzle

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arranged such that at least a lip of the water nozzle impinges air, as required by independent claims 1 and 30.

Independent claim 40 recites a fluid distribution device that includes a mixer comprising “means for producing a vortex in the low pressure air stream to facilitate drawing water from the water supply into the low pressure air stream.” App. Br., Claims App’x. Appellant argues that Soule does not disclose the means for producing a vortex in the low pressure air stream to facilitate drawing water. App. Br. 23.

Appellant states that the means for producing a vortex is described in the Specification at [para. 17]. App. Br. 13. Appellant states that a vortex is produced when water nozzle 404 is placed such that a lip 410 of nozzle 404 impinges on expanding air stream A and air stream A passing around the side 414 of the nozzle 404 creates a vortex V to further reduce the pressure of area 408 to draw water. App. Br. 13 (identifying this as the claimed subject matter); see also Spec. [para. 17] and fig. 4. As discussed *supra*, the spray member 18 and shoulders 60, 62 of Soule are not the same as the disclosed structure nor do they perform the identical function, in substantially the same way, with substantially the same result. Therefore, Soule does not disclose by a preponderance of the evidence means for producing a vortex in the low pressure air stream to facilitate drawing water from the water supply into the low pressure air stream, as required by independent claim 40.

Accordingly, we cannot sustain the rejection of independent claims 1, 30, and 40, or claims 4, 7, 8, 10, 15, 19-21, 27, 38, and 41 which depend from these claims, under 35 U.S.C. §102(b) as anticipated by Soule.

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Independent claim 43 recites “water nozzles . . . having a lip that impinges on its associated air stream.” As discussed above regarding claims 1 and 30, Soule fails to disclose the claimed lip. Accordingly, we cannot sustain the Examiner’s rejection of claim 43 under 35 U.S.C. § 103(a) as unpatentable over Soule.

Furthermore, the Examiner does not rely on Parson, Huberty, Dettling, Polonsky, or Diggs for any teaching that would remedy the deficiencies of Soule. Therefore, we cannot sustain the rejection of claims 2, 3, 9, 11-14, 28, 29, and 39 as unpatentable over Soule and Parsons; the rejection of claims 16-18 as unpatentable over Soule and Huberty; the rejection of claims 22-26 as unpatentable over Soule and Dettling; the rejection of claims 31 and 32 as unpatentable over Soule and Polonsky; and the rejection of claim 37 as unpatentable over Soule and Diggs.

*Rejections (2)-(9) based on Schenk or Strauss*

The Appellant filed a Declaration under 37 C.F.R. § 1.132 by David Colwell (“Colwell Declaration”) with the Appeal Brief that avers Schenk and Strauss fail to disclose features of the claimed invention. App. Br., Evid. App’x. The Colwell Declaration also previously accompanied an Amendment filed on March 30, 2009 in response to a rejection mailed January 8, 2009. Electronic Acknowledgement Receipt 2 (Mar. 30, 2009). Both filings were timely.

After reviewing the record, we cannot find any explicit indication that the Examiner has considered the Colwell Declaration filed with the Appeal Brief or previously considered the Colwell Declaration filed with the Amendment. Ans. 13-34 and Office Action 9-13 (mailed May 14, 2009). As such, we cannot sustain the rejections based on Schenk or Strauss. *See In*

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*re Stepan Co.*, 660 F.3d 1341, 1344 (Fed. Cir. 2011) (finding the Board relied on a new ground of rejection by making and relying on new fact findings regarding an issue the examiner did not raise, the sufficiency of a declaration) and Manual of Patent Examining Procedure (MPEP) § 716.01(B) (8<sup>th</sup> Ed., Rev. 9, Aug. 2012) (stating “[a]ll entered affidavits, declarations, and other evidence traversing rejections are acknowledged and commented upon by the examiner in the next succeeding action” and “[w]here the evidence is insufficient to overcome the rejection, the examiner must specifically explain why the evidence is insufficient”).

Thus, because the record plainly fails to indicate that the Examiner considered the Colwell Declaration, we cannot sustain the rejection of claims 1, 4, 7, 8, 10, 15, 19-21, 27, 30, 38, 40, and 41 as anticipated by Schenk; the rejection of claims 1, 4-8, 10, 11, 19-21, 27, 30, 33-35, 38, 40, and 41 as anticipated by Strauss; the rejection of claim 43 as unpatentable over Schenk or Strauss; the rejection of claims 2, 3, 9, 11-14, 28, 29, and 39 as unpatentable over Schenk or Strauss and Parsons; the rejection of claims 16-18 as unpatentable over Schenk or Strauss and Huberty; the rejection of claims 22-26 as unpatentable over Schenk or Strauss and Dettling; the rejection of claims 31 and 32 as unpatentable over Schenk or Strauss and Polonsky; and the rejection of claim 37 as unpatentable over Schenk or Strauss and Diggs.

## DECISION

For the reasons *supra*, the Examiner’s rejections are reversed.

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REVERSED

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