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EXAMINER

SNOW, BRUCE EDWARD

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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* MALAN de VILLIERS and ULRICH HAHNLE

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Appeal 2017-001507<sup>1</sup>  
Application 14/287,709<sup>2</sup>  
Technology Center 3700

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Before MICHAEL C. ASTORINO, KENNETH G. SCHOPFER, and  
BRADLEY B. BAYAT., *Administrative Patent Judges*.

SCHOPFER, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134 from the rejection of claims 1–11 and 13. We have jurisdiction under 35 U.S.C. § 6(b). An oral hearing was held on January 15, 2019.

We REVERSE.

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<sup>1</sup> Our decision references the Appeal Brief (“Appeal Br.,” filed June 9, 2016), the Reply Brief (“Reply Br.,” filed Nov. 10, 2016), the Examiner’s Answer (“Ans.,” mailed Sept. 26, 2016), and the Final Office Action (“Final Act.,” mailed Dec. 21, 2015).

<sup>2</sup> According to Appellants, the real party in interest is Simplify Medical Pty Ltd. Appeal Br. 3.

## BACKGROUND

According to Appellants, “the invention relates to a prosthetic disc for intervertebral insertion, such as in the lumbar and cervical spine.” Spec. ¶ 2.

## CLAIMS

Claims 1 and 7 are the independent claims on appeal. Claim 1 is illustrative of the appealed claims and recites:

1. An intervertebral prosthetic disc for insertion between adjacent vertebrae, the disc comprising:

upper and lower plates having outer surfaces locatable against the respective vertebrae and inner bearing surfaces;

core between the plates, the core having upper and lower surfaces complementary in shape to the inner bearing surfaces of the plates to allow the plates to slide over the core, the core including a lateral surface between the upper and lower surfaces; and

one of the plates including a retaining structure that projects at least partly into the lateral surface of the core only at diametrically opposed regions thereof to hold the core captive between the plates when the plates slide over the core; wherein the core has a substantially circular shaped perimeter which defines the lateral surface and the retaining structure extends inward from the perimeter.

Appeal Br. 13.

## REJECTION

The Examiner rejects claims 1–11 and 13 under 35 U.S.C. § 102(e) as anticipated by Huppert.<sup>3</sup>

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<sup>3</sup> Huppert et al., US 7,056,344 B2, iss. June 6, 2006.

## DISCUSSION

We are persuaded of error by Appellants' argument that Huppert does not disclose a core with a circular shaped perimeter that defines a lateral surface into which retaining structures extend. *See* Appeal Br. 6–9; *see also* Reply Br. 1–3.

In the rejection, the Examiner finds that Huppert discloses a core 13 with a perimeter that “closely resembles that of the upper plate 111” and may be considered substantially circular in shape according to the broadest reasonable interpretation of the claim. Final Act. 2–3. The Examiner makes clear that under this application of Huppert, the core includes arms 131 and 132. *Id.* Alternatively, the Examiner indicates in the Answer that Huppert's core includes an upper portion that includes a substantially circular perimeter and an additional lateral surface, i.e., arms 131 and 132, into which the retaining structures extend. *See* Ans. 4–5.

Claim 1 expressly requires that the core includes a substantially circular perimeter, that the circular perimeter defines the lateral surface of the core, and that the retaining structures extend inward from this perimeter. Thus, the claim requires a core in which the retaining structures extend inward from a substantially circular perimeter. We agree with Appellants that Huppert does not disclose such a core. As acknowledged by the Examiner, Huppert discloses a core in which retaining structures are included within the arms of the core. *See* Huppert Fig. 1. We do not agree that the claimed “substantially circular perimeter” reads on a core with arms as depicted in Huppert's Figure 1. Further, to the extent that the Examiner relies on the upper portion of Huppert's core as the circular perimeter and the lower portion as the lateral surface into which the retaining structures

extend, the claim requires that the retaining structures extend inward from the circular perimeter. Thus, the Examiner's alternative application of the core of Huppert fails to show that Huppert discloses a core as claimed.

Based on the foregoing, we are persuaded of error in the rejection, and therefore, we do not sustain the rejection of claim 1 as anticipated by Huppert. Independent claim 7 similarly requires providing a core with a substantially circular perimeter into which retaining structures extend. Thus, for the same reasons, we also do not sustain the rejection of claim 7 as anticipated by Huppert. Finally, for the same reasons, we do not sustain the rejection of dependent claims 2–6, 8–11, and 13, each of which depends from claims 1 or 7.

#### CONCLUSION

We REVERSE the rejection of claims 1–11 and 13.

REVERSED