

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

VOVOMART (HK) ENTERPRISES CO., LTD.,
HK SANODESK CO., LTD., and LOCTEK, INC.,
Petitioner,

v.

OFFICE KICK, INC.,
Patent Owner.

PGR2022-00048
Patent 11,160,367 B1

Before BART A. GERSTENBLITH, JAMES A. TARTAL, and
ERIC C. JESCHKE, *Administrative Patent Judges*.

TARTAL, *Administrative Patent Judge*.

DECISION
Denying Institution of Post-Grant Review
35 U.S.C. § 324

I. INTRODUCTION

Vovomart (HK) Enterprises Co., Ltd., HK Sanodesk Co., Ltd., and Loctek, Inc. (“Petitioner”)¹ filed a Petition requesting a post-grant review of claims 1–10, 12, and 14–18 of U.S. Patent No. 11,160,367 B1 (Ex. 1001, “the ’367 patent”). Paper 2 (“Pet.”). The ’367 patent issued on November 2, 2021. Ex. 1001, code (45). The Petition was accorded a filing date of July 6, 2022. Paper 3. Because the Petition was filed less than 9 months after the date of issuance of the ’367 patent, the Petition is within the 9-month statutory period for requesting post-grant review. *See* 35 U.S.C. § 324(a). Office Kick, Inc. (“Patent Owner”)² filed a Preliminary Response. Paper 9 (“Prelim. Resp.”).

A post-grant review may be instituted only if “the information presented in the petition . . . demonstrate[s] that it is more likely than not that at least 1 of the claims challenged in the petition is unpatentable.” 35 U.S.C. § 324(a). Upon considering the arguments and evidence, we exercise our discretion to deny institution of post-grant review under 35 U.S.C. § 325(d).

II. BACKGROUND

A. *The ’367 Patent*

The ’367 patent issued from Application No. 17/118,593, which was filed on December 10, 2020, and claims priority back to Provisional

¹ Petitioner identifies “VovoMart (HK) Enterprises Co., Ltd., Loctek Inc., HK Sanodesk Co., Ltd., and Loctek Ergonomic Tech. Co.” as real parties in interest. Pet. 6.

² Patent Owner identifies Office Kick, Inc. and CKnapp Sales Inc., d/b/a VIVO as real parties in interest. Paper 4, 1.

Application No. 62/107,380, filed on January 24, 2015.³ Ex. 1001, codes (21), (22), (60). The '367 patent is directed to a desktop workspace platform with vertical adjustment. *Id.* at 1:28–29. The '367 patent explains, as background, that designs for adjustable desk platforms that sit on an existing desk have room for improvement. *Id.* at 1:52–54. For example, there is a “need for straight vertical motion of the desktop platform where the work surface does not protrude out toward the operator when elevated.” *Id.* at 1:55–58.

Figure 1 of the '367 patent is reproduced below.

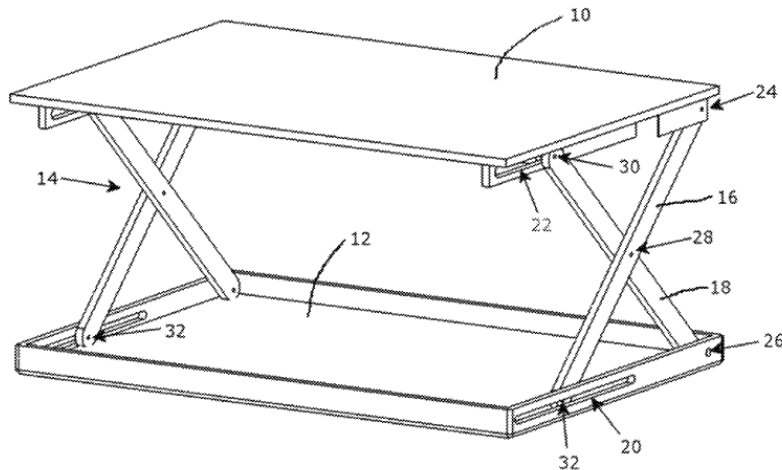


Figure 1 shows a vertically adjusting desktop workspace including work surface platform 10, base 12, and height adjustment mechanism 14. *Id.* at 4:11–16. Height adjustment mechanism 14 includes at least one set of arms 16 and 18, which are connected to each other at pivot point 28. *Id.* at 4:19–22. Arm 16 connects at one end to pivot point 24 in work surface platform 10, and the other end of arm 16 slides along sliding mechanism 20 at pivot and sliding point 32. *Id.* at 4:22–24. Similarly, arm 18 connects at

³ Petitioner states that, for purposes of its Petition, “the priority date is assumed to be January 24, 2015.” Pet. 7–8.

one end to pivot point 26 in base 12, and the other end of arm 18 slides along sliding mechanism 22 at pivot and sliding point 30. *Id.* “The arms pivot at 28, arm 16 slides along 20 and arm 18 slides along 22, creating a scissor motion to allow the work surface platform 10 to move up and down.” *Id.* at 4:24–27. The ’367 patent describes that the scissor motion created by height adjustment mechanism 14 provides vertical motion without lateral or protruding motion side-to-side, and work surface platform 10 remains vertically aligned with base 12 as the platform raises or lowers. *Id.* at 5:16–20.

Figure 2 of the ’367 patent is reproduced below.

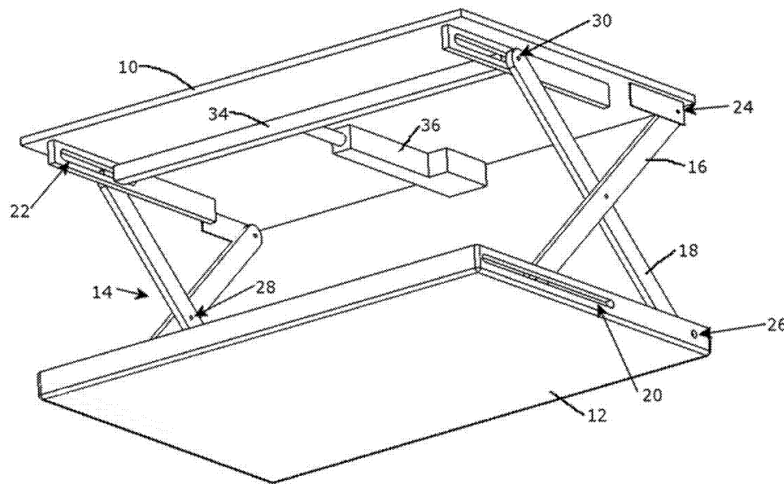


Figure 2 shows additional aspects of height adjustment mechanism 14, including cross beam 34 attached to pivot arms. *Id.* at 5:61–62. Element 36 applies a pushing or pulling force to cross beam 34 and causes pivot arms 16 and 18 to move in a scissor motion that raises or lowers the work surface platform 10. *Id.* at 6:5–7, 6:18–21. “[T]he force that element 36 provides could come from[] a linear actuator, AC or DC motor, human force, gravity, springs, other objects with kinetic energy, or another source of force.” *Id.* at 6:11–14. Element 36 may also act as a locking device to maintain the

vertical position of work surface platform 10 at various heights. *Id.* at 6:40–47, 6:64–67.

B. Illustrative Claim

Petitioner challenges claims 1–10, 12, and 14–18 of the '367 patent. Pet. 6. Claims 1, 10, 12, and 18 are independent, claims 2–9 depend from claim 1, and claims 14–17 depend from claim 12. Ex. 1001, 8:23–9:52, 10:12–62. Claim 1 is illustrative of the claimed subject matter and is reproduced below.

1. A desktop workspace that adjusts vertically, comprising:
 - a work surface platform;
 - a keyboard platform in a position that protrudes out, down, and parallel to the work surface platform;
 - a base configured to sit on an existing platform; and
 - a height adjustment mechanism connecting the work surface platform and the base, the height adjustment mechanism including:
 - a set of pivot arms that connect at a scissoring pivot point creating a scissoring motion when raising and lowering the work surface platform to various heights;
 - a base pivot point fixed relative to the base and connecting the base and the set of pivot arms;
 - a platform pivot point fixed relative to the work surface platform and connecting the work surface platform and the set of pivot arms;
 - a sliding mechanism on an end of an arm of the set of pivot arms between the end of the arm and either the work surface platform or the base; and
 - a gas spring that assists in elevation of the work surface platform by applying a force to rotate one of the set of pivot arms as part of the scissoring motion,
- wherein an end of the gas spring is fixed to the work surface platform.

Ex. 1001, 8:23–48.

C. Asserted Grounds of Unpatentability

In the Petition, Petitioner asserts that claims 1–10, 12, and 14–18 of the '367 patent are unpatentable based on the following grounds:

Claim(s) Challenged	35 U.S.C. §⁴	Reference(s)/Basis
1–3, 5–9, 12, 14, 16, 17	103	Chouinard, ⁵ Yixu ⁶
1–3, 5–9, 12, 14, 16, 17	103	Flaherty, ⁷ Huang, ⁸ Lindhal ⁹
10, 18	103	Chouinard, Lindhal, Stevens ¹⁰
10, 18	103	Flaherty, Huang, Stevens
4, 15	103	Chouinard, Yixu, Huang, Franklin ¹¹

⁴ The Leahy-Smith America Invents Act (“AIA”) included revisions to 35 U.S.C. § 103 that became effective on March 16, 2013. The '367 patent asserts priority to a provisional application filed on January 24, 2015, after the effective date of the AIA. See Ex. 1001, code (60). In this Decision, we assume the asserted priority (which has not been challenged) is correct and apply the post-AIA version of § 103 here. Although Petitioner identifies the statutory ground as “§ 103(a),” we assume Petitioner intended to refer to “§ 103,” in accordance with the AIA. This Decision, however, would not change regardless of which version of the statute applies.

⁵ U.S. Patent No. 7,677,518 B2, issued Mar. 16, 2010 (Ex. 1016, “Chouinard”).

⁶ CN 201657970 U, published Dec. 1, 2010 (Ex. 1017, “Yixu”). An English-language translation is included on pages 11–21 of Exhibit 1017.

⁷ U.S. Patent No. 9,113,703 B2, issued Aug. 25, 2015 (Ex. 1018, “Flaherty”).

⁸ CN 2637251 Y, issued Sept. 1, 2004 (Ex. 1019, “Huang”). An English-language translation is included on pages 9–21 of Exhibit 1019.

⁹ EP 0531385 B1, published Aug. 2, 1995 (Ex. 1020, “Lindhal”).

¹⁰ U.S. Patent No. 5,400,720, issued Mar. 28, 1995 (Ex. 1021, “Stevens”).

¹¹ U.S. Patent No. 4,558,648, issued Dec. 17, 1995 (Ex. 1022, “Franklin”).

Pet. 32–33.¹² Petitioner relies on the supporting Declaration of William C. Messner, Ph.D., dated July 6, 2022. Ex. 1003. Patent Owner’s Preliminary Response is supported by the Declaration of Mark E. Benden, Ph.D., dated October 17, 2022. Ex. 2001.

D. Related Proceedings

The parties identify the ’367 patent as a subject of *Vovomart (HK) Enterprises Co. Ltd. v. Office Kick, Inc.*, 22-cv-01186 (D. Colo. 2022). Pet. 6; Paper 4, 2.

III. DISCRETIONARY DENIAL UNDER 35 U.S.C. § 325(d)

Patent Owner contends that we should exercise our discretion under 35 U.S.C. § 325(d) and deny the Petition, because Petitioner relies on the same or substantially the same prior art previously presented to the Office during prosecution of the ’367 patent and fails to identify any material error by the Office during prosecution. Prelim. Resp. 13–27. Petitioner did not address discretionary denial under Section 325(d) in the Petition. Moreover, after receiving Patent Owner’s Preliminary Response arguing discretionary denial under Section 325(d) is warranted in this proceeding, Petitioner did not seek leave to file a reply. For the reasons that follow, we find that exercise of our discretion to deny institution of review is warranted.

A. Applicable Legal Framework

A petition may be denied because “the same or substantially the same prior art or arguments previously were presented to the Office.” 35 U.S.C. § 325(d). When applying Section 325(d), we utilize a two-part framework.

¹² Petitioner identifies the last unpatentability ground in the table above as Ground 5 and describes it as “Chouinard in view of Yixu and Huang and/or Franklin.” Pet. 33.

See Advanced Bionics, LLC v. MED-EL Elektromedizinische Geräte GmbH, IPR2019-01469, Paper 6 at 8 (PTAB Feb. 13, 2020) (precedential). Only if the same or substantially the same art or arguments were previously presented to the Office do we then consider whether petitioner has demonstrated a material error by the Office. *Id.* “At bottom, this framework reflects a commitment to defer to previous Office evaluations of the evidence of record unless material error is shown.” *Id.* at 9.

First, we determine “whether the same or substantially the same art previously was presented to the Office or whether the same or substantially the same arguments previously were presented to the Office.” *Id.* at 8. Second, “if either condition of [the] first part of the framework is satisfied,” we consider “whether the petitioner has demonstrated that the Office erred in a manner material to the patentability of challenged claims.” *Id.*

B. Whether the Same or Substantially the Same Prior Art Previously Was Presented to the Office

Under the first part of our framework, we consider (i) the similarities and material differences between the asserted art and the prior art involved during examination; (ii) the cumulative nature of the asserted art and the prior art evaluated during examination; and (iii) the extent of the overlap between the arguments made during examination and the manner in which petitioner relies on the prior art or patent owner distinguishes the prior art. *See Advanced Bionics*, Paper 6 at 9 n.10, 10–11 (citing factors (a), (b), and (d) of *Becton, Dickinson & Co. v. B. Braun Melsungen AG*, IPR2017-01586, Paper 8 (PTAB Dec. 15, 2017) (precedential as to § III.C.5, first para.)). In the Petition, to show the unpatentability of the challenged claims, Petitioner relies on the following seven references: Chouinard, Yixu, Flaherty, Huang, Lindhal, Stevens, and Franklin. Pet. 32–33. We consider

each of these references in turn below and conclude that Patent Owner has shown that the same or substantially the same prior art previously was presented to the Office for the following reasons.

Patent Owner shows that Chouinard, Stevens, and Franklin were submitted to the Office by the applicant on an Information Disclosure Statement (“IDS”), were considered by the Examiner during prosecution, and are cited on the face of the ’367 patent. Prelim. Resp. 15–18; Ex. 1001, code (56); Ex. 1002, 115, 117, 119 (IDS dated Dec. 10, 2020). Petitioner concedes that Chouinard and Stevens were considered during prosecution, and further states that they were not cited or raised by the Examiner in “any office action.” Pet. 24, 30–31. Additionally, Petitioner mistakenly asserts that “Franklin was not cited during prosecution of the ’367 patent.” *Id.* at 32; *cf.* Ex. 1001, code (56) (identifying Franklin in a list of “References Cited”). We find each of Chouinard, Stevens, and Franklin is the same art previously presented to the Office.

Patent Owner shows that the information Flaherty discloses was submitted to and considered by the Office as related U.S. Patent No. 9,554,644 (“the ’644 patent”), which is listed on the face of the ’367 patent and “claims priority to and fully includes the teachings of” Flaherty. Prelim. Resp. 16; Ex. 1001, code (56); Ex. 1002, 48. In support, Patent Owner provides a document comparing Flaherty to the ’644 patent, which appears to show text present only in Flaherty in strikethrough and text present only in the ’644 patent with underlining. Ex. 2008. In this regard, Petitioner directs us to no material differences between Flaherty and

the '644 patent.¹³ On this record, we find Flaherty is substantially the same as the '644 patent previously presented to the Office.

Patent Owner shows that the information Lindhal discloses was submitted to and considered by the Office as a WIPO publication, which is listed on the face of the '367 patent as WO 1991017906 ("WO-906"). Prelim. Resp. 16; Ex. 1001, code (56); Ex. 1002, 125. In support, Patent Owner provides a document comparing Lindhal to WO-906, which appears to show text present only in Lindhal in strikethrough and text present only in WO-906 with underlining. Ex. 2010. In this regard, Petitioner asserts that "Lindhal was not cited during prosecution of the '367 patent," but directs us to no material differences between Lindhal and WO-906. Pet. 29. On this record, we find Lindhal is substantially the same as WO-906 previously presented to the Office.

Yixu and Huang were not considered during prosecution of the '367 patent.¹⁴ Petitioner relies on Yixu in combination with Chouinard and asserts that "[t]he scissor arm and gas spring of Yixu can be easily

¹³ According to Petitioner, "Flaherty was cited prior art during prosecution of the '367 patent, however, it was not raised by the examiner during any office action." Pet. 27 (citing Ex. 1002, 75). The page of the IDS cited by Petitioner, however, identifies two patents associated with the same inventor as Flaherty, neither of which is the reference Petitioner identifies as Flaherty. See Ex. 1002, 75 (identifying U.S. Patent Nos. 9,055,810 and 9,554,644 as "Flaherty" and "Flaherty et al.," respectively).

¹⁴ Patent Owner additionally argues that Petitioner failed to provide the required affidavits attesting to the accuracy of the translations of Yixu and Huang relied upon by Petitioner. Prelim. Resp. 7–13 (citing 37 C.F.R. §§ 1.68, 42.63(b)); see also 37 C.F.R. § 42.2 (providing that affidavit "means affidavit or declaration under § 1.68 of this chapter"). Petitioner has not sought to address the alleged deficiencies in the affidavits; however, we need not reach this issue in light of our determination below.

substituted for the scissor arm and motor configuration of Chouinard.”
Pet. 38 (citing Ex. 1003 ¶ 84); *see also id.* at 103 (stating that a person of ordinary skill in the art would have been motivated “to substitute Yixu’s manual gas spring for Chouinard’s electronically powered lifting mechanism”). As noted above, Chouinard was previously presented to the Office.

Petitioner relies on Huang in combination with Flaherty and Lindhal, and asserts that both Huang and Lindhal disclose “lifting mechanisms” that use “scissor arms” and “gas springs.” Pet. 63. Petitioner explains as follows:

[A] person of skill would have been motivated to use the gas spring configurations taught by Huang and Lindhal when manipulating the Flaherty design to use scissor arms instead of parallel arms. *Id.*, ¶163. Huang teaches that a gas spring (or “air spring”) supplies sufficient force to cause a rising desk to rise and descend with minimal assistance by the user. *Id.*; Ex. 1019.014-015. In Huang, a gas exerts force on the pivot arms, which assists the user when lifting the desk, and provides buffering support when the user lowers the desk, making the “desktop rise and drop stably.” Ex. 1003, ¶163; Ex. 1019.014-015. Lindhal similarly teaches that the use of a gas spring enables the frame holding the upper platform “in a smooth continuous fashion, both in an upward and downward direction.” Ex. 1003, ¶163; Ex. 1020 at 2:26-31.

Pet. 64–65; *see also id.* at 67 (stating, in regard to claim 1, it “would have been obvious to a person of skill to combine the scissoring pivot arms from Lindhal or Huang with the adjustable desk platform of Flaherty”). As noted above, Lindhal is substantially the same as WO-906 previously presented to the Office. More specifically, Petitioner relies on Huang as disclosing, with regard to claim 1, for example, a “base pivot point,” a “platform pivot point,” a “sliding mechanism,” and a “gas spring.” *Id.* at 69–72; *see also id.*

at 98–101 (relying on Huang in combination with Flaherty as to claim 10 for the same reasons as claim 1 and asserting Huang further discloses two air springs). Petitioner also relies on Huang in combination with Chouinard, and asserts that Huang discloses the use of two gas springs. *Id.* at 103–07.

Patent Owner argues that Yixu and Huang are relied upon by Petitioner as disclosing a “gas spring” known in the art and “are less relevant than, or at best, similar to and possess no material differences from, the prior art involved during examination.” Prelim. Resp. 16–17. Specifically, Patent Owner shows that Yixu and Huang are cumulative to Baudermann¹⁵ and Edmo,¹⁶ both of which were considered during examination of the ’367 patent. *Id.* at 18; Ex. 1001, code (56); Ex. 1002, 71, 99, 106. According to Patent Owner, “none of the gas spring teachings relied upon by Petitioners provide a more comprehensive teaching than Baudermann’s gas spring and scissor leg configuration examined during prosecution.” Prelim. Resp. 20. In support, Patent Owner provides illustrations comparing Baudermann and Edmo to Yixu and Huang, and argues that “Baudermann’s gas spring is affixed to a bracket assembly located in a proximity to its top surface.” *Id.* at 19–21. In this regard, Petitioner asserts that Yixu and Huang were “not cited during prosecution of the ’367 patent,” but directs us to no material differences between either Yixu and Huang or Baudermann

¹⁵ DE102013008020, published Nov. 13, 2014 (Ex. 1002, 140–59; Ex. 2006, “Baudermann”). What Patent Owner provides as “Baudermann” as Exhibit 2006 consists of seven pages of figures without further identification. However, a copy of the Baudermann reference appears in the prosecution history of the ’367 patent in German with an English translation of the Abstract, including figures that correspond to the figures discussed by Patent Owner and reproduced in Exhibit 2006. *See* Ex. 1002, 140–59.

¹⁶ U.S. Patent No. 4,577,821, issued Mar. 25, 1986 (Ex. 2007, “Edmo”).

and Edmo. Pet. 25, 27. On this record, we find Patent Owner has sufficiently shown that Yixu and Huang are substantially the same as Baudermann and Edmo, which were previously presented to the Office.

Based on our analysis above, we find that Patent Owner has shown that the same or substantially the same art previously was presented to the Office. In summary, Chouinard, Stevens, and Franklin are each cited on the face of the '367 patent, Flaherty is substantively duplicative to the '644 patent cited on the face of the '367 patent, Lindhal is substantively duplicative to the WO-966 reference cited on the face of the '367 patent, and Yixu and Huang are substantially the same as Baudermann and Edmo, which are cited on the face of the '367 patent.

C. Whether Petitioner Has Demonstrated that the Office Erred in a Manner Material to Patentability

Because we find that the same or substantially the same art was previously presented to the Office under our framework for evaluating discretionary denial under Section 325(d), we next consider whether Petitioner “has demonstrated that the Office erred in a manner material to the patentability of challenged claims.” *Advanced Bionics*, Paper 6 at 8; *see also id.* at 8–9 (further explaining that if “petitioner fails to make a showing of material error,” generally discretion will be exercised to deny institution of review). In the second part of our framework, we consider (i) the extent to which the asserted art was evaluated during examination, including whether the prior art was the basis for rejection; (ii) whether Petitioner has pointed out sufficiently how the Examiner erred in evaluating the asserted prior art; and (iii) the extent to which additional evidence and facts presented in the Petition warrant reconsideration of the prior art. *See id.* at 9 n.10, 10–11 (citing factors (c), (e), and (f) of *Becton, Dickinson*). For the reasons that

follow, we find that Petitioner does not demonstrate an error material to patentability.

First, with regard to the extent to which the asserted art was considered during prosecution, Patent Owner shows that five of the seven references relied upon by Petitioner are cited on the face of the '367 patent (either explicitly or “in a form containing an identical disclosure,” as discussed above) and “are therefore presumed to have been fully considered by the Examiner.” Prelim. Resp 17–18 (citing, e.g., 37 C.F.R. § 1.106(b); Ex. 1002, 115–28). Patent Owner further shows that Yixu and Huang are cumulative to Baudermann and Edmo, references considered and applied by the Examiner during prosecution of the '367 patent. *Id.* at 18. Patent Owner directs us to no instance where any of the asserted references was relied on by the Examiner as a basis for rejection; however, we note that Baudermann and Edmo were both relied on by the Examiner to reject claims during prosecution. *See* Ex. 1002, 89–105.

Second, Petitioner fails to point out sufficiently how the Examiner erred in evaluating the asserted prior art. Indeed, Petitioner makes no argument in the Petition directed specifically to Section 325(d) and, as noted above, made no request for leave to respond to the extensive arguments advanced by Patent Owner in its Preliminary Response directed to Section 325(d). *See* Prelim. Resp. 13–27. Thus, Petitioner does not explicitly assert any material error was made by the Office during prosecution of the '367 patent and does not otherwise explain how the Examiner erred.

Third, we are not persuaded that any additional evidence or facts presented in the Petition warrant reconsideration of the prior art. In the

Petition, Petitioner summarizes the prosecution history of the '367 patent, and notes that, during prosecution, claims were rejected as anticipated by Baudermann and by Edmo, respectively, and were rejected as obvious over Baudermann and other references. Pet. 10–13. Petitioner states that the applicant proposed amended claims, after which the Examiner issued a Notice of Allowance. *Id.* at 13 (citing Ex. 1002, 326–28). Petitioner identifies in the Petition no material error in the Examiner's determination. *Advanced Bionics* states that “[i]f reasonable minds can disagree regarding the purported treatment of the art or arguments, it cannot be said that the Office erred in a manner material to patentability.” *Advanced Bionics*, Paper 6 at 9. Under the circumstances presented in this proceeding, our own evaluation of the evidence and facts presented in the Petition does not convince us of any material error by the Examiner, particularly in the absence of any argument from Petitioner to the contrary.

IV. CONCLUSION

For the reasons set forth above, we do not institute review of claims 1–10, 12, and 14–18 of the '367 patent because, under 35 U.S.C. § 325(d), the same or substantially the same prior art previously was presented to the Office, and Petitioner has not shown that the Office erred in a manner material to patentability.

V. ORDER

Upon consideration of the record before us, it is:

ORDERED that the Petition is *denied* and no post-grant review is instituted.

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