

Nos. 2019-2054, 2019-2081

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

HOLOGIC, INC.,
CYTYC SURGICAL PRODUCTS, LLC,
Plaintiffs-Cross-Appellees,

v.

MINERVA SURGICAL, INC.,
Defendant-Cross-Appellant.

Appeals from the United States District Court for the District of Delaware
Case No. 1:15-cv-01031, Senior Judge Joseph F. Bataillon

**PLAINTIFFS-CROSS-APPELLEES' RESPONSE
TO DEFENDANT-CROSS-APPELLANT'S
PETITION FOR REHEARING *EN BANC***

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CERTIFICATE OF INTEREST

Counsel for appellants Hologic, Inc., and Cytoc Surgical Products, LLC, certifies the following:

1. The full name of every party or amicus represented by me is:

Hologic, Inc.
Cytoc Surgical Products, LLC

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

N/A

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or *amicus curiae* represented by me are:

As disclosed in the “Security Ownership by Certain Beneficial Owners” section of Hologic, Inc.’s most recent Proxy Statement filed with the SEC, The Vanguard Group, Inc. and T. Rowe Price Associates, Inc. each own more than 10 percent of the outstanding stock in Hologic, Inc.

Cytoc Surgical Products, LLC is an indirect, wholly-owned subsidiary of Hologic, Inc.

4. The names of all law firms and the partners or associates that appeared for the party or *amicus* now represented by me in the trial court or agency or are expected to appear in this court are:

Karen Pascale and Pilar Kraman of Young, Conaway, Stargatt & Taylor LLP; Assad Rajani, David A. Caine, Philip W. Marsh, Ryan J. Casamiquela, William Z. Loudon, William Young, Jr., R. Stanton Jones, William C. Perdue, and Sean A. Mirski of Arnold & Porter Kaye Scholer LLP; William M. Jay and David J. Zimmer of Goodwin Procter LLP; and Amie L. Medley and Peter Root, both formerly affiliated with Arnold & Porter Kaye Scholer LLP.

5. The title and number of any case known to me to be pending in this or any other court or agency that will directly affect or be directly affected by this Court's decision in the pending appeal are:

N/A

6. Any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees):

N/A

Dated: October 25, 2022

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INTRODUCTION

Minerva Surgical, Inc. tries to dress up the panel’s decision in this case as charting the future course of assignor estoppel, the doctrine that “prohibits an assignor of a patent, or one in privity with an assignor, from attacking the validity of that patent when he is sued for infringement by the assignee.” *MAG Aerospace Indus., Inc. v. B/E Aerospace, Inc.*, 816 F.3d 1374, 1379-80 (Fed. Cir. 2016). But any questions about the scope of assignor estoppel were either already resolved by the Supreme Court earlier in this case, or waived when Minerva failed to raise them in its briefing on remand. Instead, as relevant here, the panel did only one thing: it decided an ordinary claim-construction dispute using settled principles of claim construction. Despite its lofty language, Minerva’s petition presents neither a question of “exceptional importance” nor a concern about the “uniformity of the court’s decisions,” Fed. R. App. P. 35(a), and it should thus be denied.

In 2015, Hologic, Inc. and Cytoc Surgical Products, LLC (together, Hologic) sued Minerva Surgical, Inc. for infringement of claim 1 of Hologic’s U.S. Patent No. 9,095,348 (the ’348 Patent). Minerva’s privies, including named co-inventor Csaba Truckai, had previously sold the application that became the ’348 Patent to Hologic’s predecessor. The district court held, among other things, that Minerva was estopped from challenging the validity of the ’348 Patent. When Minerva appealed, this Court affirmed the district court’s application of assignor estoppel.

Minerva then asked the Supreme Court to abrogate assignor estoppel altogether. But the Supreme Court reaffirmed the doctrine's vitality, while clarifying its scope. The Supreme Court then remanded for this Court to apply the clarified doctrine to the facts of this case.

On remand, the panel had one job: to determine whether claim 1 of the '348 Patent "is materially broader than the [claims] Truckai assigned." *Minerva Surgical, Inc. v. Hologic, Inc.*, 141 S. Ct. 2298, 2311 (2021). Since the parties agreed that only one previously assigned claim was relevant to that comparison, the panel construed that claim, holding that it was materially identical to claim 1 of the '348 Patent. As a result, the panel concluded that assignor estoppel barred Minerva's validity challenge.

Minerva admits that the panel compared the relevant claims using settled principles of claim construction. But Minerva nevertheless seeks further review, arguing that (1) the panel should have employed something other than settled claim-construction principles to determine the breadth of the relevant claim, and (2) in any event, the panel misapplied those principles. Neither argument has merit or warrants *en banc* review. After seven years of litigation, it is time for this case to end.

BACKGROUND

In 1998, Truckai and four co-inventors filed a patent application for tissue ablation methods and devices related to the NovaSure endometrial ablation system. Add. 2. Many of the application’s original claims recited a device with a “fluid permeable elastic member” that could transport moisture away from the ablation site. Add. 3. But one—claim 31—did not. Claim 31 did not recite any limitation relating to moisture permeability or transport. Add. 3, 14.

During prosecution, Truckai swore in the inventor’s oath that he was “an original, first and joint inventor ... of the subject matter which is claimed and for which a patent is sought,” including claim 31. Appx40375-40376. In 1998, Truckai then assigned his interest in the application, as well as all divisions and continuations, to his company Novacept, Inc. Appx40377.

Truckai and Novacept then prosecuted claim 31 vigorously. Although the examiner initially rejected claim 31 as anticipated by prior art, Truckai and Novacept persuaded the examiner that claim 31 was not anticipated. Add. 9. In 2001, however, the examiner determined that the application claimed two inventions—an apparatus (including in claim 31) and a method—and imposed a restriction requirement compelling Novacept to elect one invention to pursue in that application. *Id.*; see 25 U.S.C. § 121. Truckai and Novacept unsuccessfully tried to persuade the examiner otherwise but in 2002, they ultimately elected to

pursue the method claims first. Add. 10. Novacept remained free to later pursue the apparatus claims—including claim 31 and allowable variations—through a continuation application. *Id.*

In 2004, Truckai sold Novacept to Hologic’s predecessor for \$325 million. Add. 3. In the deal, Novacept assigned all “inventions, discoveries, or improvements, ... whether or not patented, patentable, ... or reduced to practice,” including divisions and continuation applications. Appx36405. In the parties’ agreement—which Truckai “approved and adopted” as a Novacept board member, Appx36354—Novacept represented and warranted that it had no knowledge that any assigned intellectual property was “invalid or unenforceable.” Appx36367.

Hologic subsequently filed a continuation application based on Truckai’s original application. Appx138. The continuation claimed an ablation device that, like the original claim 31 that Truckai had warranted to be valid, lacked any moisture-permeability limitation. Appx169. The continuation application later resulted in the ’348 Patent. Add. 4.

Meanwhile, after selling Novacept, Truckai founded Minerva to develop a new endometrial ablation device that would compete against Hologic’s NovaSure system. *See* Add. 3. Minerva told FDA that its device was “almost dead identical to NovaSure,” and it was pitched as “look[ing] like NovaSure” and “specifically designed to virtually mimic the steps of the NovaSure procedure.” Appx36416,

31468, 36715. A member of Minerva’s Medical Advisory Board warned of “major ‘patent infringement’ disputes for this device vs Novasure.” Appx17637.

In 2015, Hologic sued Minerva, alleging that Minerva’s device infringed claim 1 of the ’348 Patent. Add. 5. Minerva argued repeatedly that Truckai’s specification requires a moisture-permeable applicator head and that claim 1 was thus invalid under 35 U.S.C. § 112. On summary judgment, the district court disagreed and held that (1) claim 1 contains no moisture-permeability limitation, (2) assignor estoppel barred Minerva from challenging the ’348 Patent’s validity, and (3) in any event, on the merits, the ’348 Patent was valid. *See Hologic, Inc. v. Minerva Surgical, Inc.*, 325 F. Supp. 3d 507, 523-27 (D. Del. 2018).

At trial, Truckai conceded that original claim 31 had no permeability-related limitations. In testimony elicited by Minerva’s counsel, Truckai confirmed that claim 31 lacked “a fluid permeable exterior.” Appx30568; *see* Appx30568-30571. Truckai also admitted that, in 1998, “it was our belief that we can get a broader claim” not limited to moisture transport. Appx30721-30722. Truckai thus acknowledged that “when [Hologic’s predecessor] bought this patent [application], they had [his] sworn statement that [he] didn’t believe that moisture transport was an essential part of [his] invention.” Appx30724. While Truckai testified that he “came to change [his] mind” about the scope of his invention, “at the time, it wasn’t like [he] told [Hologic’s predecessor], [‘]look, these patents only apply to

moisture transport and you are not going to get protection against someone that uses something different.[']” *Id.*

On appeal, this Court affirmed the district court’s construction of claim 1 and the application of assignor estoppel. Dkt. 56. *Minerva* then petitioned the Supreme Court to abrogate assignor estoppel or alternatively to narrow it. After granting review, the Court declined to abrogate the doctrine, explaining that assignor estoppel, “like many estoppel rules, reflects a demand for consistency in dealing with others.” *Minerva*, 141 S. Ct. at 2309. But the Court clarified that assignor estoppel’s applicability depends on whether “the assignor’s claim of invalidity contradicts explicit or implicit representations he made in assigning the patent.” *Id.* at 2302. “By saying one thing and then saying another, the assignor wants to profit doubly—by gaining both the price of assigning the patent and the continued right to use the invention it covers.” *Id.* at 2309. The Supreme Court remanded the case with one instruction—to consider “whether Hologic’s new claim is materially broader than the ones Truckai assigned.” *Id.* at 2311.

On remand, the panel followed that instruction, answering the only two questions the parties agreed were at issue: “(1) whether Mr. Truckai warranted claim 31’s validity at the time of assignment, considering the parties’ arguments regarding the implications of the 2002 cancelation; and (2) whether claim 31 is materially broader than claim 1 of the ’348 patent—specifically, whether claim 31

is broad enough to cover moisture-impermeable devices, or if instead it is limited to moisture-permeable devices.” Add. 8.

As to the first question, the panel held that Truckai warranted claim 31’s validity as part of the 2004 assignment. Acknowledging that the claim had been canceled in 2002 due to a restriction requirement, the panel concluded that the cancelation said “nothing, implicitly or explicitly, about the patentability of claim 31.” Add. 10. The claim was canceled “for reasons other than patentability,” *id.*, and “an objective assignee ... would have understood that the restriction requirement and subsequent cancelation in response to the restriction requirement meant that the patent applicant could later prosecute claim 31’s subject matter,” Add. 9-10. The panel especially stressed that by the time of the 2004 assignment, Truckai had represented and reaffirmed the validity of claim 31 three times over: when presenting the application, when successfully defending the claim from the examiner’s anticipation rejection, and when warranting that he had no knowledge that the intellectual-property rights assigned were invalid. Add. 11. The panel underscored, however, that its decision was “limited to the facts of this case,” and did “not address whether a claim canceled for reasons other than to comply with a restriction requirement would be part of [an] assignment.” Add. 11 n.3.

As to the second question, the panel decided that claim 1 was not “materially broader” than claim 31. As a preliminary matter, the panel stressed that the

“question before [it] on remand” had been “significantly narrowed” by the parties’ arguments. Hologic and Minerva agreed “on which assigned and new claims to compare,” and they also agreed that claim 1 would be “materially broader” than claim 31 only “if claim 31 is limited to moisture-permeable devices.” Add. 12-13. The parties also agreed that claim 31 “does not have an express moisture-permeability limitation,” and there was thus “no dispute [about] the plain claim language.” Add. 14. Applying the principle of claim differentiation to the narrowed question before it, the panel observed that while other claims in the application *were* limited to moisture-permeable devices, claim 31 was not, and thus Truckai and the other inventors “did not intend to so limit that claim.” Add. 14-15. The panel then determined that the specification did not require a moisture-permeability limitation in claim 31. Although the specification referenced a moisture-permeable electrode array, that disclosure referred to “preferabl[e]” characteristics, not mandatory ones. *Id.* (citation omitted). And although “the written description ‘emphasizes the importance of moisture removal,’” that was not enough to overcome “the intrinsic record as a whole.” Add. 16 (citation omitted).

Since claim 31, like claim 1, was not limited to moisture-permeable devices, the panel held that assignor estoppel barred Truckai and his privy Minerva from challenging claim 1’s validity. *Id.*

ARGUMENT

Minerva does not challenge the panel’s holding that Truckai and Novacept warranted claim 31’s validity as part of the assignment to Hologic’s predecessor. Instead, Minerva takes issue only with the panel’s holding that claim 1 is not “materially broader” than claim 31. According to Minerva, the panel erred both in thinking that claim 31 should be construed using settled claim-construction principles, and in applying those principles to the intrinsic record. Minerva is wrong on the merits and, regardless, neither issue warrants the full Court’s review.

I. MINERVA’S CHALLENGE TO THE USE OF SETTLED CLAIM-CONSTRUCTION PRINCIPLES DOES NOT WARRANT REVIEW

Minerva first argues that the panel should not have applied what it repeatedly derides as “mechanical” claim-construction principles when determining the scope of claim 31, and instead should have undertaken an amorphous “equitable inquiry” into that claim’s scope. Pet. 12, 14. That argument is waived, does not warrant *en banc* review, and fails on the merits.

First, Minerva’s argument is not properly before this Court. Both sides agreed that the task before the panel on remand was to determine whether claim 1 is “materially broader” than claim 31. Add. 12. Minerva never hinted in its briefing that the panel should answer that question by applying anything other than settled claim-construction principles. To the contrary, nearly all of Minerva’s briefing on remand was dedicated to explaining why the panel should not

“*constru[e]* application claim 31 to cover a moisture impermeable device.” Dkt. 84, at 8 (emphasis added). “It is well settled that an appellant is not permitted to make new arguments that it did not make in its opening brief.” *Pieczenik v. Dyax Corp.*, 265 F.3d 1329, 1332-33 (Fed. Cir. 2001).

Second, even if Minerva had not waived this issue, it would not meet the high standard for rehearing *en banc*. Minerva claims that the panel’s decision concerns a “precedent-setting question of exceptional importance”—namely, “how should a court determine an inventor’s representation of patent scope in a never-issued claim in the original patent application?” Pet. 1. Even as Minerva phrases it, that question is narrow and case-specific; at most, assignor estoppel arises in a handful of cases nationwide each year, and the number of cases involving unissued claims in patent applications is smaller yet. But the actual question presented is even narrower and more case-specific still, as the panel expressly “limited [its holding] to the facts of this case.” Add. 11 n.3. Specifically, the panel addressed *only* how to determine an inventor’s representation of patent scope in an original claim that was canceled “for reasons other than patentability”—in particular, because of a restriction requirement. Add. 10. Minerva does not suggest that this fact pattern has ever arisen before or will ever arise again. Minerva’s assertion that the panel “restore[d] assignor estoppel to its prior overly broad status” is thus unsupported hyperbole. Pet. 2.

Third, regardless, the panel did not err in applying settled claim-construction principles to decide the scope of claim 31—indeed, it is unclear what else the panel could have done. The Supreme Court was clear: the task on remand was for the panel to decide “whether Hologic’s new claim is materially broader than the ones Truckai assigned.” *Minerva*, 141 S. Ct. at 2311. *Minerva* does not dispute that that task boiled down to whether claim 31 was “broad enough to cover moisture-impermeable devices.” Add. 8. *Minerva* disputes only *how* the panel should have determined whether claim 31 covers moisture-impermeable devices.

Minerva now claims that the panel should have determined claim 31’s scope using something *other* than settled claim-construction principles. But *Minerva* provides no authority for eschewing the well-established path for determining claim scope set by this Court in *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (*en banc*). Courts approach every issue relating to patent rights—*infringement, validity, enforceability, and remedies*—based on a claim construction under *Phillips*.

Minerva nevertheless argues that in the context of applying assignor estoppel to patent applications—and *only* that context—courts should determine claim scope differently. But *Minerva*’s reasoning makes little sense. *Minerva* suggests that “[w]hen an inventor assigns a patent application, it assigns only an ‘inchoate right’ of indefinite scope,” and that “[c]ourts therefore must exercise

special care in determining the scope of the resulting estoppel.” Pet. 14 (citation omitted). That reasoning ignores, however, that in this case, Truckai warranted the validity of *a specific claim that was already drafted*, not an “inchoate right of indefinite scope.” Where an assignor represents the validity of a specific, previously drafted claim, the scope of the assignor’s representation is clear, and is necessarily co-extensive with the scope of that claim. The only sensible way to determine the scope of a claim is to construe it in accordance with this Court’s settled claim-construction rules. After all, those are the rules that this Court has long applied to determine how a skilled artisan would understand a claim’s scope. And nothing in the Supreme Court’s decision implies that the remanded question—“whether Hologic’s new claim is materially broader than the ones Truckai assigned,” 141 S. Ct. at 2311—should be approached in any other way.

Minerva errs when it claims that the panel held that “silence [is] an implicit representation of boundless scope.” Pet. 15. Quite the opposite: the panel held that the “representation” at issue was not a generalized “silence” but an affirmative representation about the validity of a specific claim. It is Minerva, not the panel, that is trying to twist “silence” (the lack of any moisture-permeability limitation in claim 31’s plain language) into something it is not (an implicit limitation on the scope of the warranty of validity).

Minerva would jettison decades of settled claim-construction jurisprudence in favor of a heretofore unknown “equitable inquiry,” to be applied only in this one rare context. Pet. 12. Exactly what that inquiry would entail is a mystery; Minerva offers few clues as to the inquiry’s mechanics other than that it favors Minerva’s interpretation of claim 31. Minerva suggests that its “equitable inquiry” would place less weight on the plain meaning of claim language and the principle of claim differentiation, and be more willing to import implicit limitations from the specification. *See* Pet. 14-17. But that rewriting of the *Phillips* analysis is entirely self-serving, and Minerva cannot even explain how it complies with the underlying rationale of assignor estoppel.

II. MINERVA’S CHALLENGE TO THE SPECIFIC CONSTRUCTION OF CLAIM 31 DOES NOT WARRANT REVIEW

Minerva also argues that that the panel misapplied settled claim-construction principles when it held that claim 31 was not limited to moisture-permeable devices. That mine-run, case-specific claim-construction dispute is unrelated to the proper scope of assignor estoppel and is not worthy of *en banc* review. In any event, Minerva’s arguments are contrary to its own prior admissions and wrong as a matter of law.

First, Minerva’s claim-construction arguments are case-specific and unworthy of *en banc* review. In the claim-construction section of its opinion, the panel decided *only* whether “claim 31 is limited to moisture-permeable devices.”

Add. 13. In so doing, the panel merely applied well-settled principles, including the “bedrock principle” that “the claims of a patent define the invention,” *Innova/Pure Water, Inc. v. Safari Water Filtration Sys.*, 381 F.3d 1111, 1115 (Fed. Cir. 2004), and the rule that although claims “must be read in view of the specification,” *Phillips*, 415 F.3d at 1315, the specification may not be used to “read a limitation into a claim,” *Innova*, 381 F.3d at 1117; *see id.* at 1116 (claim construction must “begin and remain centered on the claim language itself”). Minerva argued that, based on the specification, the “electrode array” of claim 31 had to be a “moisture-permeable” electrode array. The panel rejected that argument based on the language of this particular claim and the relevant intrinsic evidence—nothing more. Panels of this Court resolve this kind of issue routinely. Indeed, Minerva’s petition for rehearing *en banc* of the panel’s first decision in this case accused the panel of making nearly identical claim-construction errors in construing claim 1, yet this Court denied rehearing (without a noted dissent). Dkt. 58, at 3, 17-21; Dkt. 72.

Second, Minerva’s arguments also contradict prior representations Minerva made to the Supreme Court and this Court. Minerva told the Supreme Court that Truckai’s original application “included one claim [claim 31] without a moisture-permeability limitation.” Reply Br. for Pet’r at 18, *Minerva*, 141 S. Ct. 2298 (No. 20-440); *see* Br. for Pet’r at 7-8, *Minerva*, 141 S. Ct. 2298 (No. 20-440) (similar).

Minerva likewise told this Court that “prosecution claim 31 ... did not expressly limit the applicator head to using a permeable material.” Dkt. 27 at 19. And in testimony elicited by Minerva’s counsel, Truckai told the jury that claim 31 lacked “a fluid permeable exterior,” Appx30568, and that at the time of assignment, Hologic’s predecessor “had [his] sworn statement that [he] didn’t believe that moisture transport was an essential part of [his] invention,” Appx30724. While the panel addressed Minerva’s claim-construction arguments on the merits, Minerva’s prior representations raise a threshold issue that would impede the full Court’s ability to review the claim-construction question raised in Minerva’s petition.

Third, the panel’s construction of claim 31 was correct. To begin with, Minerva conceded that the claim language includes *no* reference to moisture permeability. In the panel’s words, “Minerva and Hologic agree that claim 31 does not have an express moisture-permeability limitation.” Add. 14. “Thus, there is no dispute that the plain claim language—the starting point of any claim construction analysis—suggests that claim 31 is not limited to moisture-permeable devices. Rather, the plain claim language is broad enough to encompass moisture-impermeable devices as well.” *Id.* (citation omitted). Minerva’s petition does not contend otherwise.

The language of other claims further weighs against reading a moisture-permeability limitation into claim 31. As the panel noted, claims 1 and 16 of

Truckai’s original application expressly required the device’s electrode array to be permeable to moisture. “This shows,” the panel explained, “that Mr. Truckai and the other inventors knew how to draft claims that require moisture permeability. The fact that they chose not to include this limitation in claim 31, unlike claims 1 and 16, indicates that they did not intend to so limit that claim.” Add. 15. Minerva notes that “the doctrine of claim differentiation is not a hard and fast rule,” Pet. 20 (citation omitted), but the panel did not treat it as such. Claim differentiation merely confirmed what the claim language already made clear—claim 31 contains no moisture-permeability limitation.

Furthermore, contrary to Minerva’s protestations that the panel “ignored” the specification, Pet. 5, the panel acknowledged that the specification describes an embodiment with “an array of electrodes formed on the surface of [an] electrode carrying means” that is “permeable to moisture,” Add. 15. But because this description “refers merely to ‘preferabl[e]’ characteristics” of the embodiment, the panel concluded that moisture permeability was not “required or mandatory.” *Id.* Minerva now argues that the panel misread the passage referring to “preferabl[e]” characteristics, *see* Pet. 19-20, but the panel quoted and faithfully interpreted the specification’s plain language, *see* Add. 15. And Minerva has never made this argument before now, even though Hologic has raised the point repeatedly. *See* Dkt. 70, at 14; Br. for Resps. at 7-8, *Minerva*, 141 S. Ct. 2298 (No. 20-440).

The panel also acknowledged that “the written description emphasizes the importance of moisture removal, as reflected in Minerva’s citations to descriptions of moisture removal and permeability.” Add. 16 (quotation marks omitted). But “[a]fter considering the intrinsic record as a whole,” the panel “disagree[d] with Minerva’s assertion that claim 31 is limited to a moisture-permeable device.” *Id.*

Ultimately, Minerva is asking the full Court to second-guess a panel’s routine construction of a single claim in a patent application. Worse, Minerva is asking the full Court to take that extraordinary step in order to read a moisture-permeability limitation into claim language that does not mention any such limitation, and that the inventor has stated did not (and was not intended to) include any such limitation. That is not the purpose of rehearing *en banc*. Even if the panel’s decision were erroneous—and it was not—revisiting it is hardly necessary to “maintain uniformity” in this Court’s decisions or settle “a question of exceptional importance.” Fed. R. App. P. 35(a). One can characterize debates over the permeability of ablation-device electrode arrays in many ways, but surely they are not the stuff of *en banc* review.

CONCLUSION

For the foregoing reasons, Minerva's petition should be denied.

Dated: October 25, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Plaintiffs-Cross-Appellees' Response to Defendant-Cross-Appellant's Petition for Rehearing *En Banc* complies with the type-volume requirements of Federal Rule of Appellate Procedure 35(b)(2)(A) because it contains 3,845 words, excluding the portions exempted under Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 35(c)(2).

/s/ Matthew M. Wolf
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CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2022, I caused true and correct copies of the foregoing Plaintiffs-Cross-Appellees' Response to Defendant-Cross-Appellant's Petition for Rehearing *En Banc* to be served upon counsel of record via email through the Court's CM/ECF system.

/s/ Matthew M. Wolf
Matthew M. Wolf
Counsel for Plaintiffs-Cross-Appellees Hologic, Inc. and Cytoc Surgical Products, LLC