No. 2021-1998

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

SOUND VIEW INNOVATIONS, LLC,

Plaintiff-Appellant,

v.

HULU, LLC,

Defendant-Appellee.

On Appeal from the United States District Court for the Central District of California
No. 2:17-cv-04146-JAK-PLA, Judge John A. Kronstadt

APPELLEE HULU, LLC'S PRINCIPAL BRIEF

Brett J. Williamson
John Kappos
Cameron Westin
Bo Moon
Bradley M. Berg
O'MELVENY & MYERS LLP
610 Newport Center Drive, 17th Fl.
Newport Beach, CA 92660
Telephone: (949) 823-6900

Patrick Nack-Lehman
O'MELVENY & MYERS LLP
2765 Sand Hill Road
Menlo Park, CA 94025
Telephone: (650) 473-2600

Counsel for Defendant-Appellee Hulu, LLC

November 12, 2021

PATENT CLAIM AT ISSUE

U.S. Patent No. 6,708,213, claim 16

16. A method of reducing latency in a network having a content server which hosts streaming media (SM) objects which comprise a plurality of time-ordered segments for distribution over said network through a plurality of helpers (HSs) to a plurality of clients, said method comprising:

receiving a request for an SM object from one of said plurality of clients at one of said plurality of helper servers;

allocating a buffer at one of said plurality of HSs to cache at least a portion of said requested SM object;

downloading said portion of said requested SM object to said requesting client, while concurrently retrieving a remaining portion of said requested SM object from one of another HS and said content server; and

adjusting a data transfer rate at said one of said plurality of HSs for transferring data from said one of said plurality of helper servers to said one of said plurality of clients.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number: 21-1998
Short Case Caption: Sound View Innovations, LLC v. Hulu, LLC
Filing Party/Entity: Hulu, LLC

Pursuant to Federal Circuit Rules 26.1, 27(a)(3), and 47.4, counsel for appellee certifies the following:

1. The full name of every entity represented in this case by me is:

   Hulu, LLC

2. The name of every real party in interest, if that entity is not the real party in interest, is:

   N/A

3. All parent corporations and every publicly held corporation that owns 10 percent or more of the stock of the entity represented by me are:

   The Walt Disney Company and Comcast Corporation

4. The names of all law firms, partners, and associates that have not entered an appearance in this appeal, and appeared for the entity in the trial court or are expected to appear for the entity in this court are:

   O'Melveny & Myers LLP: Brett J. Williamson, John Kappos, Cameron Westin, Bo Moon, Bradley M. Berg, Patrick Nack-Lehman, Andrew Bledsoe

5. The title and number of any case known to counsel 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 include:

Sound View Innovations, LLC v. DISH Network, LLC et al., No. 19-cv-3707 (D. Colo.), consolidated with *Sound View Innovations, LLC v. Sling TV LLC*, No. 19-cv-3709 (D. Colo.)

6. Provide 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: November 12, 2021

/s/ *Brett J. Williamson*

Brett J. Williamson
O'MELVENY & MYERS LLP
610 Newport Center Drive, 17th Floor
Newport Beach, CA 92660
Telephone: (949) 823-6900
Fax: (949) 823-6994
bwilliamson@omm.com

Counsel for Appellee
Hulu, LLC

TABLE OF CONTENTS

Page

CERTIFICATE OF INTEREST ii

STATEMENT OF RELATED CASES xii

INTRODUCTION 1

STATEMENT OF THE ISSUES 3

STATEMENT OF THE CASE 4

A. The '213 Patent 4

B. The Accused Products 6

C. Procedural History 6

1. The District Court's Claim Construction 6

2. Sound View's Motion for Reconsideration and Hulu's Motion for Summary Judgment of Noninfringement 7

3. The District Court's *Daubert* Orders 8

SUMMARY OF THE ARGUMENT 10

ARGUMENT 12

I. STANDARDS OF REVIEW 12

II. THE DISTRICT COURT CORRECTLY CONSTRUED THE TERM "DOWNLOADING … WHILE CONCURRENTLY RETRIEVING" 14

A. Legal Standards Relevant to Claim Construction 14

B. The '213 Patent's Intrinsic Evidence Supports the District Court's Construction of "downloading … while concurrently retrieving" 15

1. The Claim Language Supports the District Court's Construction 16

2. The '213 Patent's Specification Supports the District Court's Construction 16

TABLE OF CONTENTS
(continued)

Page

3. The Applicants' Clear and Unambiguous Disavowal to Overcome Prior Art Confirms the District Court's Construction 18

4. The District Court's Construction was Correct Regardless of Express Disclaimer 24

C. The Applicants' Disavowal was not "Agnostic" or "Ambiguous" 25

D. The District Court Here Correctly Determined that Sound View's Reinterpretation of the Applicants' Disavowal Was Unreasonable and Would Not Distinguish the Prior Art 30

E. The District Court's Construction Is Not "Inconsistent" with the Applicants' Cited Support for the Claim Language 34

III. THE DISTRICT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT OF NO INFRINGEMENT OF CLAIM 16 36

A. Legal Standards Relevant To A Motion for Summary Judgment of Non-infringement 36

B. The District Court's April 2020 Claim Construction Order Was Dispositive on the Issue of Infringement 37

C. The District Court Correctly Concluded That A Cache Cannot Constitute the Claimed "Buffer" in Claim 16 of the '213 Patent 38

D. The District Court Resolved the Claim Construction Dispute at the Heart of the Parties' Disagreement, and No Further Construction Was Necessary 42

E. The District Court Did Not Improperly Adopt a "Negative Limitation" of "Not A Cache" 45

F. Sound View's Improper New Claim Construction of "Buffer" is Unsupported And Contrary to the Intrinsic Evidence 48

TABLE OF CONTENTS
(continued)

Page

G. Even Under Sound View's Construction, the District Court Correctly Determined That No Evidence Supports Sound View's Claim That the Accused Servers Infringe Claim 16.....51

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING MR. YURKERWICH'S OPINIONS 53

A. The District Court Did Not Abuse its Discretion in Excluding Mr. Yurkerwich's Opinions Based On The Yao Study. 54

1. Mr. Yurkerwich's Opinions Based on the Yao Study Were Not Tethered to the Facts of the Case. 56

2. Dr. Richardson's Opinions Did Not Support Mr. Yurkerwich's Conclusions Based on the Yao Study. 57

3. The District Court Did Not Exclude the Yao Study Merely Because of its Inapposite Facts, but Because Mr. Yurkerwich Failed to Account for the Differences. 58

B. The District Court Did Not Abuse its Discretion in Excluding Mr. Yurkerwich's Calculations Based on a Press Release About a Study He Had Never Seen. 59

1. The District Court Correctly Concluded that Mr. Yurkerwich's Opinions Based on the Conviva Press Release Were Not Tethered to the Facts of the Case.....59

2. Mr. Yurkerwich's Amended Calculations Rested Exclusively on the Conviva Press Release. 61

3. The District Court Rightly Rejected Sound View's Attempt to Shoehorn Mr. Yurkerwich Unsupported Opinions into Dr. Richardson's Prior Opinions. 61

4. Sound View Cannot Blame Hulu for Mr. Yurkerwich's Unreliable and Factually Untethered Opinions. 62

CONCLUSION 64

TABLE OF AUTHORITIES

Page(s)

CASES

01 Communique Lab., Inc. v. LogMeIn, Inc.,
687 F.3d 1292 (Fed. Cir. 2012) 28

Abbott Labs. v. Baxter Pharm. Prod., Inc.,
334 F.3d 1274 (Fed. Cir. 2003) 32

AccuScan, Inc. v. Xerox Corp.,
76 F. App'x 290 (Fed. Cir. 2003) 26

Anchor Wall Sys., Inc. v. Rockwood Retaining Walls, Inc.,
340 F.3d 1298 (Fed. Cir. 2003) 44

Andersen Corp. v. Fiber Composites, LLC,
474 F.3d 1361 (Fed. Cir. 2007) 34

Aptalis Pharmatech, Inc. v. Apotex Inc.,
718 F. App'x 965 (Fed. Cir. 2018) 15

Arthur A. Collins, Inc. v. N. Telecom Ltd.,
216 F.3d 1042 (Fed. Cir. 2000) 37

Bayer Healthcare LLC v. Baxalta Inc.,
989 F.3d 964 (Fed. Cir. 2021) 43

CAE Screenplates v. Heinrich Fiedler GmbH & Co. KG,
224 F.3d 1308 (Fed. Cir. 2000) 37, 39

Camreta v. Greene,
131 S.Ct. 2020 (2011).....29

Comite de Jornaleros de Redondo Beach v. City of Redondo Beach,
657 F.3d 936 (9th Cir. 2011) 13

Commonwealth Sci. and Indus. Research Org. v. Cisco Sys., Inc.,
809 F.3d 1295 (Fed. Cir. 2015) 54

Daubert v. Merrell Dow Pharms., Inc.,
509 U.S. 579 (1993).....53

TABLE OF AUTHORITIES
(continued)

Page

Eon Corp. IP Holdings v. Silver Spring Networks,
815 F.3d 1314 (Fed. Cir. 2016) 42

Ethicon LLC v. Intuitive Surgical, Inc.,
847 Fed. Appx. 901, 2021 WL 960766 (Fed. Cir. Mar. 15, 2021).....46

Fenner Invs., Ltd. v. Cellco P'ship,
778 F.3d 1320 (Fed. Cir. 2015) 15

Gen. Elec. Co. v. Joiner,
522 U.S. 136 (1997).....58

Generation II Orthotics Inc. v. Med. Tech. Inc.,
263 F.3d 1356 (Fed. Cir. 2001) 31, 32

Gentry Gallery, Inc. v. Berkline Corp.,
134 F.3d 1473 (Fed. Cir. 1998) 34

Graco, Inc. v. Binks Mfg. Co.,
60 F.3d 785 (Fed. Cir. 1995) 43

Iridescent Networks, Inc. v. AT&T Mobility, LLC,
933 F.3d 1345 (Fed. Cir. 2019) 18, 24

Johansson v. Rose Displays Ltd., Inc.,
121 F.3d 727 WL 437016 (Fed. Cir. Aug. 5, 1997) 44

Markman v. Westview Instruments, Inc.,
52 F.3d 967 (Fed. Cir. 1995) 43

Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,
475 U.S. 574 (1986).....36

MicroStrategy Inc. v. Bus. Objects, S.A.,
429 F.3d 1344 (Fed. Cir. 2005) 13, 54, 57

O2 Micro Int'l Ltd. v. Beyond Innovation Tech. Co.,
521 F.3d 1351 (Fed. Cir. 2008) 42

TABLE OF AUTHORITIES
(continued)

Page

Omega Eng'g., Inc., v. Raytek Corp.,
334 F.3d 1314 (Fed. Cir. 2003) 13

Open Text S.A. v. Box, Inc.,
No. 13-cv-04910-JD, 2015 WL 349197 (N.D. Cal. Jan. 23, 2015) 60

Phillips v. AWH Corp.,
415 F.3d 1303 (Fed. Cir. 2005) 14

PODS, Inc. v. Porta Stor, Inc.,
484 F.3d 1359 (Fed. Cir. 2007) 34

Poly-America, L.P. v. API Indus., Inc.,
839 F.3d 1131 (Fed. Cir. 2016) 14, 48

Renishaw PLC v. Marposs Societa' per Azioni,
158 F.3d 1243 (Fed. Cir. 1998) 24

ResQNet.com, Inc. v. Lansa, Inc.,
594 F.3d 860 (Fed. Cir. 2010) 57

Retractable Techs., Inc. v. Becton, Dickinson & Co.,
653 F.3d 1296 (Fed. Cir. 2011) 15

Sound View Innovations, LLC v. Delta Air Lines, Inc.,
No. 19-659-CFC-CJB (D. Del.).....29

SpeedTrack, Inc. v. Amazon.com,
998 F.3d 1373 (Fed. Cir. 2021) 14, 31

SRI Int'l v. Matsushita Elec. Corp. of Am.,
775 F.2d 1107 (Fed. Cir. 1985) 36

Stilwell v. Smith & Nephew, Inc.,
482 F.3d 1187 (9th Cir. 2007) 13

Sulzer Textil A.G. v. Picanol N.V.,
358 F.3d 1356 (Fed. Cir. 2004) 13

TABLE OF AUTHORITIES
(continued)

Page

Summit 6, LLC v. Samsung Elecs. Co.,
802 F.3d 1283 (Fed. Cir. 2015) 42, 44

Tech. Properties Ltd. LLC v. Huawei Techs. Co.,
849 F.3d 1349 (Fed. Cir. 2017) 14

Teva Pharms. USA, Inc. v. Sandoz, Inc.,
574 U.S. 318 (2015)..... 13, 29, 42

Trs. of Columbia Univ. in City of New York v. Symantec Corp.,
811 F.3d 1359 (Fed. Cir. 2016) 24, 27

TWM Mfg. Co. v. Dura Corp.
789 F.2d 895 (Fed. Cir. 1986) 63

U.S. Surgical Corp. v. Ethicon, Inc.,
103 F.3d 1554 (Fed. Cir. 1997) 42

Uniloc USA, Inc. v. Microsoft Corp.,
632 F.3d 1292 (Fed. Cir. 2011) 60

Vasudevan Software, Inc. v. MicroStrategy, Inc.,
782 F.3d 671 (Fed. Cir. 2015) ..... passim

Vehicle IP, LLC v. AT & T Mobility, LLC,
594 F. App'x 636 (Fed. Cir. 2014) 46

Virnetx, Inc. v. Cisco Sys., Inc.,
767 F.3d 1308 (Fed. Cir. 2014) 60

Vita-Mix Corp. v. Basic Holding, Inc.,
581 F.3d 1317 (Fed. Cir. 2009) 14

Vitronics Corp. v. Conceptronic, Inc.,
90 F.3d 1576 (Fed. Cir. 1996) 38

Westinghouse Elec. & Mfg. Co. v. Wagner Elec. & Mfg. Co.
225 U.S. 604 (1912).....63

TABLE OF AUTHORITIES
(continued)

Page

Yufa v. Lockheed Martin Corp.,
575 F. App'x 881 (Fed. Cir. 2014) 37, 52

RULES

Fed. R. Civ. P. 56(c).....52

STATEMENT OF RELATED CASES

No other appeal in or from Civil Action No. 2:17-cv-04146-JAK-PLA in the United States District Court for the Central District of California was previously before this or any other appellate court.

Appellant Sound View is asserting U.S. Patent No. 6,708,213, the patent at issue in this appeal, in a pending litigation in the United States District Court for the District of Colorado before the Hon. Christine M. Arguello: *Sound View Innovations, LLC v. DISH Network, LLC*, No. 19-cv-3707 (D. Colo.), consolidated with *Sound View Innovations, LLC v. Sling TV LLC*, No. 19-cv-3709 (D. Colo.).

Appellee is unaware of any other related cases.

INTRODUCTION

The single claim at issue on appeal (reproduced verbatim above) is directed to a specific method for storing and delivering multimedia content using a buffer in a helper server. The parties agree that, during prosecution, the applicant amended the claim to require that portions of the content are "concurrently" downloaded and retrieved to distinguish the anticipatory "DeMoney" prior art reference. The district court, exercising its duty to resolve claim construction disputes, and after detailed briefing and argument, ruled that the amended claim limitation requires downloading a portion of the video content from a buffer while concurrently retrieving another portion from the same buffer. Because it is undisputed that Hulu's accused video streaming method does not include servers that store different portions of the streamed content in the same buffer at the same time, the court concluded that no triable issue of fact existed regarding the absence of this limitation from the Hulu streaming method, thereby granting summary judgment of non-infringement. The district court did its job correctly, and Sound View's brief offers no plausible alternative outcome.

The district court's construction of "downloading… while concurrently retrieving" —the critical claim term—was based on an unambiguous disavowal of claim scope by the applicants. Sound View's brief addresses only a portion of the relevant prosecution history and fails to acknowledge the other intrinsic evidence

that likewise compels the district court's construction. Moreover, the interpretation of the prosecution history Sound View offers on appeal both contradicts the statements of the inventors and fails to distinguish the prior art that the statements were made to overcome.

Sound View's other attack on the summary judgment order is purely a rehash of its strained, last-gasp infringement theory. The district court's conclusion—that a server's *cache* cannot constitute the claimed "buffer" in claim 16—is not a close call. Those are two entirely distinct components of the streaming method claimed in the '213 Patent, as described in both the specification and in distinct limitations in the claims. In fact, Sound View's brief barely mounts a substantive argument in favor of the belatedly proposed "plain and ordinary meaning" construction of buffer, and instead expends most of its effort arguing that the district court was procedurally required to *further* construe the asserted claim terms beyond resolving the dispute over the "downloading… while concurrently retrieving" limitation, despite the district court's acknowledgment that this resolution was the product of a "fully-briefed claim construction dispute." Again, the district court did its job correctly, entirely resolving claim construction in a detailed and well-reasoned order that foreclosed Sound View's last remaining argument for infringement of the '213 Patent.

Finally, Sound View asks this Court to relitigate the district court's exclusion of damages theories offered by Sound View's retained expert, without identifying any abuse of discretion in the Court's decisions. Sound View's expert sought to calculate the alleged damages based on wholly unreliable "benchmarks," including numbers pulled from a study about the strength of a signal in the trunk of a car in Australia and ambiguous statements pulled from a press release about a report on "quality of experience" he had never seen. The opinions were properly excluded as unreliable, and the district court did not abuse its discretion when it excluded them.

The district court's orders each dutifully follow this Court's guidance and stand on their own as correctly decided. They should therefore be affirmed.

STATEMENT OF THE ISSUES

1. Whether the district court correctly construed the term "downloading… while concurrently retrieving" in claim 16 of the '213 Patent.

2. Whether the district court erred in granting summary judgment of noninfringement of claim 16 of the '213 Patent.

3. Whether the district court abused its discretion by excluding Mr. Yurkerwich's calculations of a reasonable royalty that (a) used the Yao Study as a benchmark without accounting for the unique circumstances in the Study; and (b) used a press release about a report by Conviva as a benchmark without ever

reading the underlying report and without technical support tying that press release to the purported patented invention.

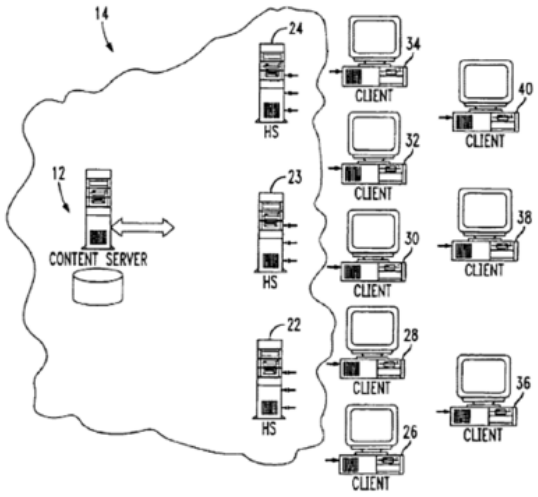
STATEMENT OF THE CASE

A. The ’213 Patent

The ’213 Patent purportedly discloses methods to “improve the caching of streaming multimedia data (e.g., audio and video data) from a content provider over a network to a client’s computer.” Appx0163-0180 (“’213 Patent”) at 1:10-15. In describing the alleged invention, the ’213 Patent’s inventors disparaged existing caching systems as “restricted to support static web objects” while “not adequately support streaming multimedia data” because multimedia files (such as video or audio files) “are usually too large to be cached in their entirety.” *Id.* at 2:23-27; *see also id.* at 4:9-15.

The ’213 Patent describes “helper servers (HS)” that “operate as caching and streaming agents inside the network” in a way that “reduces server and network loads” for distributing streaming media objects (“SM objects”). *Id.* at 2:64-66 and 3:6-8. These helper servers, like proxy servers that were well known in the prior art, are located between the content servers and the clients, as shown in Figure 2, below.

FIG. 2



The ’213 Patent’s helper servers implement specific caching and streaming techniques, including those to which claim 16 is directed. The ’213 Patent purports to maximize the available memory at the helper server by streaming a SM object using a single buffer that is allocated upon receiving a request for a SM object and concurrently filled and drained with portions of the requested SM object. The patent explains that a “buffer management module manages a pool of buffers in the main memory of an HS.” *Id.* at 10:57-60 (figure numerals omitted). When the helper server receives a request for a SM object, the buffer management module allocates a buffer in the buffer pool for the incoming SM object. *Id.* at 10:33-39. The helper server downloads a portion of the SM object from the allocated buffer to the client, while at the same time retrieving additional portions of the SM object into the same buffer. *Id.* at 10:33-67.

B. The Accused Products

Sound View accused Hulu's streaming video-on-demand ("SVOD") platform of infringing claim 16 of the '213 Patent by delivering content using one of two video streaming protocols—HLS and MPEG-DASH—through edge servers of two content delivery networks ("CDNs"), provided by third-parties, Akamai and Level 3. Appx3758-3759 (Undisputed Facts Nos. 2 & 5). The HLS and MPEG-DASH protocols allow end users to request full videos in short "byte ranges," each 4-6 seconds in length. Appx3759-3760 (Undisputed Facts Nos. 6 & 7). End users send requests for these byte ranges to one or more of the CDNs' edge servers. Appx3760-3761 (Undisputed Facts Nos. 8 & 9).

Sound View accuses the CDNs' edge servers of operating as the "helper servers" recited in claim 16 and identifies the "byte ranges" as the recited "portions." However, it is undisputed that the CDNs' edge servers store each byte range of the streaming video content independently, and that the edge servers will not store subsequent byte ranges (or pieces thereof) in the same buffer. *See* Appx3765-3772 (Undisputed Facts Nos. 17-29).

C. Procedural History

1. The District Court's Claim Construction

During pretrial proceedings, it became apparent that the parties disputed the meaning of claim 16's phrase "downloading… while concurrently retrieving." *See* Appx3309-3310 and Appx3316-3317. The district court allowed the parties to file

supplemental claim construction briefs as to this issue. Appx3309-3310; Appx3316-3317. The district then issued a supplemental claim construction order that ruled the applicants had clearly and unequivocally disavowed the full scope of the disputed phrase. Appx0017-0022. The district court held that, in distinguishing the proposed patent claims over a prior art reference to "DeMoney," the applicants characterized the claims as only covering concurrent downloading from and retrieving to the same buffer, and construed the phrase "downloading… while concurrently retrieving" as "downloading said portion of said requested SM object *from said allocated buffer* to said requesting client, while concurrently retrieving *into the same buffer* a remaining portion of said requested SM object from one of another HS and said content server." Appx0017-0022 (emphasis added).

2. Sound View's Motion for Reconsideration and Hulu's Motion for Summary Judgment of Noninfringement

Along with its construction of "downloading… while concurrently retrieving," the district court ordered the parties to submit a Joint Report stating their respective views regarding how the construction affected Sound View's arguments for infringement of claim 16 by the accused system. Appx0022. In the Joint Report, Sound View implausibly claimed the construction had no impact on infringement, while simultaneously stating its intent to move for reconsideration of the supplemental claim construction order. *See* Appx3581. The parties also

agreed that, if the district court denied reconsideration, Hulu would file a motion for summary judgment of noninfringement. *See id.*

The district court denied Sound View's motion for reconsideration, Appx0011-0016, and Hulu filed its summary judgment motion soon thereafter. After detailed briefing and oral argument by the parties, the district court agreed with Hulu that the new construction of "downloading… while concurrently retrieving" was outcome determinative. Appx0003-0010. The court also recognized that Sound View's "sole remaining infringement theory" relied on the "assumption" that the cache in the accused edge servers could satisfy the claimed buffer—a theory that was no longer tenable in light of the new construction. Appx0010. As a result, the district court granted Hulu's motion for summary judgment of non-infringement of claim 16 of the '213 Patent.

3. The District Court's *Daubert* Orders

The district court twice excluded certain opinions from Sound View's retained damages expert, Mr. Yurkerwich.

On November 18, 2019, the district court ruled on multiple challenges against Mr. Yurkerwich's expert opinions. Appx0046-0050. The district court denied some of the challenges but granted one—a challenge against Mr. Yurkerwich's use of the Yao Study in his damages calculations. Appx0047-0048. The district court reasoned that Sound View failed to offer "any explanations"

about how the differences between the Yao Study's experimental design (involving "a moving mobile device" connected to a "wireless wide area network" in Australia) and Hulu's products (often involving a "stationary device" such as a "desktop computer or television") would impact Mr. Yurkerwich's damages calculation. Appx0047-0048. Mr. Yurkerwich's failure to account for these differences, according to the district court, rendered the damages opinion based on the Yao Study "unreliable" and "not proper to present to the jury." Appx0048.

The court allowed Sound View to file an amended report that removed "all calculations" relying on the Yao Study. Appx0053. In place of the Yao Study, Mr. Yurkerwich's amended report used a press release from Conviva to calculate his damages figure. *See* Appx0054-0059. That press release stated that viewers "watch 250% more when they have optimal experience," which Mr. Yurkerwich used to conclude that "Hulu viewers with adaptive bit rate" watch "250% more content." Appx0055 and Appx0057. The district court accepted the amended report procedurally, subject to Hulu's ability to take additional discovery and challenge the new report under *Daubert*. Appx3318-3319.

After additional discovery, Hulu filed its second *Daubert* motion against Mr. Yurkerwich. *See* Appx0054. The district court concluded again that Mr. Yurkerwich's opinions were not admissible, explaining that Mr. Yurkerwich's "reliance on the press release presents the same reliability issues as the Yao

Study." Appx0057. And, yet again, the district court stopped short of a complete prohibition against Mr. Yurkerwich's involvement in the case, instead asking the parties to meet and confer and further brief the fallout from the second *Daubert* grant. *See* Appx0058-0059. That briefing, and the district court's ultimate decision on what (if anything) Mr. Yurkerwich would be allowed to say at trial, remained unresolved when Hulu received final judgment in its favor. *See* Appx3955 (staying "all other proceedings" in favor of deciding Hulu's then-pending summary judgment motion).

SUMMARY OF THE ARGUMENT

First, the district court correctly construed the term "downloading… while concurrently retrieving" according to the applicants' clear and unmistakable disavowal during prosecution. Sound View fails to identify a reasonable alternative interpretation of the applicants' statements to the Patent Office. It argues that the applicants were merely distinguishing the claimed invention as sending and receiving data "concurrently," but their statements distinguish sending and receiving data concurrently from the same buffer, precisely as the district court concluded. Sound View's interpretation would conflict with the specification support for the "downloading… while concurrently retrieving" term that the applicants relied upon to add it to the claim. Moreover, Sound View's interpretation would not distinguish the prior art reference that this limitation was

added to overcome. Sound View cannot reclaim this scope after relying on it to obtain allowance of claim 16, and the district court's construction correctly prevented it from doing so. That construction should be affirmed.

Second, the district court correctly granted Hulu's motion for summary judgment of non-infringement. After the district court construed the "downloading… while concurrently retrieving" term, Sound View sought to salvage its infringement argument by changing its accusation of which part of the edge server performed this limitation. While Sound View's original infringement theory accused the buffers in the edge server of practicing Hulu's accused streaming method, its new theory pointed to the closest element it could find for this limitation—the edge server's disk cache. The district court correctly concluded that the undisputed intrinsic evidence precluded Sound View's last-minute reinterpretation of what could be considered a "buffer" in the context of the '213 Patent, because the patent is clear that the buffer and the cache are two distinct (and fundamentally different) components. Sound View does not seriously dispute this, and yet urges this Court to reverse the district court and adopt a vastly overbroad construction of "buffer" that would make every server and every device in the '213 Patent a "buffer." Because the district court's summary judgment order was correct based on the undisputed evidence, it should be affirmed.

Third, the district court did not abuse its discretion either time it excluded Mr. Yurkerwich's damages opinions. The district court's first order excluding Mr. Yurkerwich's opinion was based on his use of the Yao Study (*see* Appx3175-Appx3178) as a benchmark. Mr. Yurkerwich provided no basis for tying the Yao Study to the accused technology, rendering his opinions unfit to reach the jury. The district court's second order excluding Mr. Yurkerwich's opinion was based on Mr. Yurkerwich's use of a press release (Appx3326-Appx3328) about a research report that Mr. Yurkerwich never read. Without the underlying report, Mr. Yurkerwich could not, and did not, tie the press release's statistics to the allegedly infringing features of the accused products, again rendering his opinions unfit for the jury. Both determinations were well within the discretion afforded to trial judges when ruling on evidentiary issues, and both should be affirmed.

ARGUMENT

I. STANDARDS OF REVIEW

When reviewing a district court's claim construction, this Court reviews *de novo* "the ultimate question of the proper construction of patent claims and the evidence intrinsic to the patent." *Vasudevan Software, Inc. v. MicroStrategy, Inc.*, 782 F.3d 671, 676 (Fed. Cir. 2015). When considering extrinsic evidence, however, this Court reviews "the subsidiary factual findings underlying the district

court's claim construction for clear error." *Id.* (*citing Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 331 (2015)).

When reviewing a district court's order granting summary judgment, this Court applies the law of the regional circuit, in this case the Ninth Circuit, which reviews them *de novo*. *Id.* In the Ninth Circuit, "summary judgment is appropriate when, even 'drawing all reasonable inferences in favor of the non-moving party,' there is no 'genuine issue of material fact.'" *Id.* (quoting *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 942 (9th Cir. 2011)). While the meaning and scope of the patent claims are reviewed *de novo* as a matter of law, comparing "the properly construed claims to the accused device" is a question of fact. *Omega Eng'g., Inc., v. Raytek Corp.*, 334 F.3d 1314, 1320 (Fed. Cir. 2003).

A district court's evidentiary rulings, such as *Daubert* rulings, are reviewed under the law of the regional circuit. *MicroStrategy Inc. v. Bus. Objects, S.A.*, 429 F.3d 1344, 1349 (Fed. Cir. 2005) (*citing Sulzer Textil A.G. v. Picanol N.V.*, 358 F.3d 1356, 1363 (Fed. Cir. 2004)). In the Ninth Circuit, a trial court's decision to admit or exclude expert testimony is reviewed for abuse of discretion. *Stilwell v. Smith & Nephew, Inc.*, 482 F.3d 1187, 1191 (9th Cir. 2007).

II. THE DISTRICT COURT CORRECTLY CONSTRUED THE TERM "DOWNLOADING … WHILE CONCURRENTLY RETRIEVING"

A. Legal Standards Relevant to Claim Construction

While the words of a claim "are generally given their ordinary and customary meaning," claim terms must also "be read in view of the specification," which is "always highly relevant." *Phillips v. AWH Corp.*, 415 F.3d 1303, 1315 (Fed. Cir. 2005) (en banc). The prosecution history can also "often inform the meaning of the claim language by demonstrating how the inventor understood the invention and whether the inventor limited the invention in the course of prosecution." *Id*. at 1317.

A patentee may, "through a clear and unmistakable disavowal in the prosecution history, surrender certain claim scope to which he would otherwise have an exclusive right by virtue of the claim language." *SpeedTrack, Inc. v. Amazon.com*, 998 F.3d 1373, 1377-78 (Fed. Cir. 2021) (quoting *Vita-Mix Corp. v. Basic Holding, Inc.*, 581 F.3d 1317, 1324 (Fed. Cir. 2009)). This Court considers "the statements in the context of the entire prosecution" when determining whether claim scope has been disavowed. *Tech. Prop. Ltd. LLC v. Huawei Techs. Co.*, 849 F.3d 1349, 1357-58 (Fed. Cir. 2017). Moreover, "[w]hile disavowal must be clear and unequivocal, it need not be explicit." *Poly-America, L.P. v. API Indus., Inc.*, 839 F.3d 1131, 1136 (Fed. Cir. 2016).

The prosecution history is also relevant beyond applicants' disavowals of claim scope. "Any explanation, elaboration, or qualification presented by the inventor during patent examination is relevant, for the role of claim construction is to 'capture the scope of the actual invention' that is disclosed, described, and patented." *Fenner Invs., Ltd. v. Cellco P'ship*, 778 F.3d 1320, 1323 (Fed. Cir. 2015) (quoting *Retractable Techs., Inc. v. Becton, Dickinson & Co.*, 653 F.3d 1296, 1305 (Fed. Cir. 2011)). Thus, "even in the absence of a clear and unmistakable disavowal," the prosecution history "can be evaluated to determine how a person of ordinary skill would understand a given claim term." *Aptalis Pharmatech, Inc. v. Apotex Inc.*, 718 F. App'x 965, 971 (Fed. Cir. 2018).

B. The '213 Patent's Intrinsic Evidence Supports the District Court's Construction of "downloading … while concurrently retrieving"

All of the intrinsic evidence supports the district court's construction of this term. In the context of the entire prosecution, the applicants' disavowal of any process that did not download while concurrently retrieving into the same allocated buffer, made to distinguish otherwise anticipatory prior art, is clear and unambiguous. Appx0021. The district court's construction is also the only logical reading of the claim language, and the only interpretation supported by the specific passage in the specification that the applicants relied on as support for this claim limitation.

1. The Claim Language Supports the District Court's Construction

The language of claim 16 mandates that the same buffer is used for both "downloading" and "concurrently retrieving":

> *allocating a buffer* at one of said plurality of HSs *to cache at least a portion of said requested SM object*;
>
> *downloading said portion* of said requested SM object to said requesting client, *while concurrently retrieving a remaining portion* of said requested SM object from one of another HS and said content server…

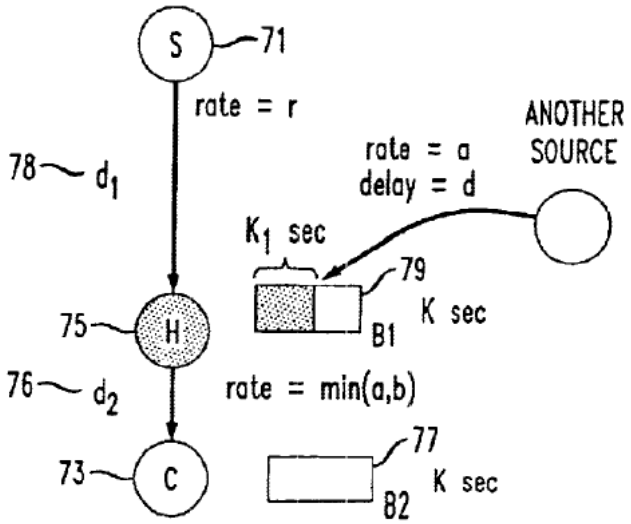
'213 Patent at claim 16 (emphasis added). Because the only buffer mentioned in the claim language is "allocated to cache" the same portion of the SM object that is downloaded to the client in the next step, it logically follows that the transmission to the requesting client must be from that allocated buffer. Moreover, "the remaining portion of said requested SM object" that is "concurrently retriev[ed]" must, like the first portion, also be cached into the same buffer, as no other buffer is identified in the claim.

2. The '213 Patent's Specification Supports the District Court's Construction

When the applicants amended claim 16 to add the step of "downloading…while concurrently retrieving…," they identified the precise portion of the specification that supported this limitation. Appx4412 (citing 8:46-9:14 of the '213 Patent as issued). That cited portion of the specification describes

the filling and emptying of a single buffer in connection with the '213 Patent's Figure 7B, shown below:

FIG. 7B



In Figure 7B, buffer B1 79 is associated with a helper server (HS) 75. '213 Patent at 8:24-27. Buffer B1 79 "streams the received data to a client 73" that has its own "associated playout buffer B2 77." *Id.* at 8:26-28. In the portion of the specification cited by the applicants as supporting the "downloading … while concurrently retrieving" limitation, the helper server's buffer B1 79 operates in the same manner as the "allocated" buffer recited in claim 16. Data in buffer 79 is downloaded to the client 73, while the helper server retrieves additional data into the buffer 79. The "fill rate" of the single buffer 79 is defined according to how quickly helper server 75 downloads (*i.e.*, "fills") and concurrently retrieves (*i.e.*,

"drains") the buffer. Buffer B1 79 "*is filled at rate 'a' and drained with an average rate of 'b'* with the remaining K-K1 seconds of data." *Id.* at 9:10-12 (emphasis added).[1]

The applicants identified this specific portion of the specification (and no other portion) when adding the "downloading… while concurrently retrieving" term, confirming they also understood those operations to occur in the same buffer—*i.e.*, buffer B1 of the helper server. *See Iridescent Networks, Inc. v. AT&T Mobility, LLC*, 933 F.3d 1345, 1351 (Fed. Cir. 2019) (figure relied upon as supporting amendment to claim language supported construction for that term). Confirming the district court's construction, the same buffer is both drained (by downloading data to the client) and filled (by retrieving a remaining portion).

3. The Applicants' Clear and Unambiguous Disavowal to Overcome Prior Art Confirms the District Court's Construction

The district court correctly determined that the applicants disavowed any scope of the "downloading… while concurrently retrieving" limitation that did not include downloading from, and retrieving to, the only "allocated" buffer recited in claim 16. Sound View's brief addresses the applicants' statements only partially,

[1] This portion of the specification contains a typographical error that refers to the buffer 79 as "buffer B2 79." The above-discussed portions of the specification and Figure 7B make clear that the sole allocated buffer at the helper server is buffer B1 79, while buffer B2 77 is the playout buffer of the client 73. *See, e.g.*, '213 Patent at 8:24-31.

and mischaracterizes the applicants' statements and the prior art those statements sought to overcome.

The context of this disavowal was the applicants adding the step of "downloading… while concurrently retrieving" to overcome the examiner's rejection of claim 16 as anticipated by U.S. Patent No. 6,438,630 to DeMoney. Appx4394-4396, Appx4411. DeMoney disclosed a "ring of N buffers" to hold "the next N blocks" of a media stream to be sent to a requesting client. Appx4415-4441 ("DeMoney") at 4:11-13. DeMoney explains: "During streaming the buffers of the buffer ring are accessed one after another in a circular manner. The deadline time assures that each buffer is filled before it is needed by the stream requester according to the guaranteed rate." *Id*. at 12:36-40; *see also id.* at 6:52-62 and 11:21-54. Thus, in DeMoney, the data was sent to the user from one buffer in the ring of buffers, with each empty buffer being filled while data is sent from the other buffers in the ring.

To overcome DeMoney, the applicants amended claim 16 to add the entire limitation "downloading said portion of said requested SM object to said requesting client, while concurrently retrieving a remaining portion of said requested SM object from one of another HS and said content server." Appx4406; Appx0019. Contrary to the implication in Sound View's brief, which excerpted only a single paragraph from the response accompanying the amendment, the

applicants made *three separate statements* confirming the only logical reading of the newly added limitation: that "downloading" and "concurrently retrieving" occurred in the same "allocated buffer."

First, the applicants argued that DeMoney failed "to disclose each and every element of the claimed invention," and copied DeMoney's Abstract in full into its argument, underlining a key provision:

> "A system for scheduling storage accesses of multiple continuous media streams may include a plurality of media stream clients. Associated with each media stream client is one of a plurality of media stream managers. Each media stream manager maintains a ring of buffers configured to buffer media stream data between its associated media stream client and one or more storage systems. A different deadline queue may be associated with each one of the storage systems. Each deadline queue may be configured to queue buffer requests from the media stream managers. Each buffer request may include a deadline by which the buffer request must be fulfilled by the corresponding storage system. Each media stream manager may be configured so that once one of its buffers is consumed by the associated media stream client, the media stream manager submits a buffer request and deadline for that buffer to the appropriate deadline queue. Buffer requests may be ordered in each deadline queue from the earliest to the latest deadline. Each media stream manager may be configured to provide a guaranteed maximum media stream rate to its associated media stream client. The system may also include an admission controller configure to negotiate a maximum media stream rate with each media stream client. The admission controller may allow additional media stream clients only if negotiated maximum media stream rates can be maintained for all current media stream clients. The system may also include a bandwidth allocator that allocates bandwidth between guaranteed rate request and non-rate-requests." (emphasis added). (See DeMoney, Abstract).

Appx4410-4411 (underlining in original).

As the district court rightly concluded, the applicants' emphasis of the abstract recognizes "that DeMoney contemplated downloading content *from one buffer* while *other buffers* are filled concurrently." Appx0020 (emphasis added). Once the data of "one of its buffers" is downloaded to the client, "that buffer" is then added to the queue to be filled while another buffer proceeds to download data to the client. Appx4410-4411 (underlining in original). Accordingly, the only interpretation of the applicants' "downloading… while concurrently retrieving" limitation that would distinguish DeMoney is that the "downloading" and "concurrently retrieving" must occur in the same allocated "buffer."

Second, the applicants clearly and unambiguously distinguished their invention from DeMoney as one that "allocates a buffer" and then concurrently downloads and retrieves into "the buffer":

> By contrast, the applicants' invention allocates a buffer at one of the plurality of helpers to cache at least a portion of the requested SM object, and downloads the portion of the SM object to the requesting client, while concurrently retrieving a remaining portion of the requested SM object from another HS or a content server. That is, the applicants' invention concurrently empties and fills the buffer, while the DeMoney reference teaches filling the buffer only after the buffer is empty. (See DeMoney, col. 12, lines 28-40). Furthermore, the buffer of the applicants' invention may be filled by information stored in another HS, which is also not taught by the DeMoney reference.

Appx4411 (underlining in original); *see also* Appx0019. The district court correctly noted that this distinction repeatedly refers to, and relies upon, the

claimed invention concurrently emptying and filling "the buffer," and referring to "the buffer of the applicant's invention" *as a singular term*, not "a buffer" or "one or more buffers." Appx0020. Further, the district court correctly determined that the Sound View's contrary interpretation would not distinguish DeMoney, including the multiple buffers described in DeMoney's Abstract that applicants cited. *Id.*

Third, the applicants further crystallized their disavowal of claim scope by identifying the precise portion of the specification they were relying upon as "support for the applicants' invention, as recited in Claim 16":

> Support for the applicants' invention, as recited in claim 16, is found in the specification. In particular, a first process is to download the existing K_1 seconds of data stored in the playout buffer B_1 associated with the HS to the client as fast as the bandwidth allows. The second concurrent process is for the HS to request $K - K_1$ seconds of data from either its local disk, or another HS, or the content server so that the clients playout buffer may be completely filled. Only after both the first and second processes conclude, where a process then represents the download of the first K_1 seconds of data to the client, and process 2 represents the retrieval of the remaining $K - K_1$ seconds of data, can the HS start to send the remaining $K - K_1$ seconds of data to the client. Upon completion of processes 1 and 2, the buffer at the HS is filled at a rate "a" and drained with average rate "b" with the remaining $K - K_1$ seconds of data. In order to avoid buffer underflow, the draining rate for the buffer is set to be the minimum of the fill-in drain rates, min. (a, b) (see applicants' specification, page 16, line 3 through page 17, line 4).

Appx4412.[2] This "support" is the '213 Patent's discussion of Figure 7B, which describes a single buffer "downloading … while concurrently retrieving" data. The applicants repeatedly referred to the downloading and concurrent retrieving to "*the* playout buffer B_1 associated with the HS," where "*the* buffer at the HS" is "filled at a rate 'a'" and concurrently "drained with average rate 'b'." *Id* (emphasis added). These statements cannot be reasonably interpreted as applying to concurrently downloading from one buffer while retrieving into another buffer—the applicants describe their "invention" while discussing only the single buffer B_1. *Id.* Moreover, monitoring the fill and drain rates "to avoid buffer underflow" means those fill and drain rates are for a single buffer. *Id.*

The applicants' claim amendment adding the "downloading… while concurrently retrieving" limitation to distinguish DeMoney, their identification of support for this amendment, and their arguments why the amendment distinguished "the buffer of the applicants' invention" from DeMoney's concurrent emptying and filling of *multiple* buffers, all add up to a clear and unmistakable disavowal surrendering claim scope. Appx0017-0022. Viewing these statements "in the context of the entire prosecution," the district court correctly concluded that the only reasonable interpretation was that the applicants' disavowed any scope of the

[2] This cited disclosure and paragraphs of the specification are the same portions discussed above in Section II.B.2 n.1.

"downloading … while concurrently retrieving" limitation that did not include downloading and retrieving into the same allocated buffer. *Tech. Properties*, 849 F.3d at 1357-58.

4. The District Court's Construction was Correct Regardless of Express Disclaimer

Even if the district court had not based its construction on the applicants' clear and unmistakable disavowal of claim scope, the construction would have been correct. Ultimately, "the 'construction that stays true to the claim language and most naturally aligns with the patent's description of the invention will be, in the end, the correct construction.'" *Trs. of Columbia Univ. in City of New York v. Symantec Corp.*, 811 F.3d 1359, 1366 (Fed. Cir. 2016) (*quoting Renishaw PLC v. Marposs Societa' per Azioni*, 158 F.3d 1243, 1250 (Fed. Cir. 1998)). And even in the absence of a "clear and unmistakable disavowal," one of ordinary skill in the art, viewing the applicants' arguments during prosecution and the disclosure in the specification upon which they relied for the amendment, would have understood the newly added limitation to require "downloading… while concurrently retrieving" into the previously allocated buffer, not multiple buffers. *Iridescent Networks*, 933 F.3d at 1352-53. Reading the claim language in view of the supporting disclosure in the specification would only confirm that view. All intrinsic evidence supports the district court's construction, and that construction should be affirmed.

C. The Applicants' Disavowal was not "Agnostic" or "Ambiguous"

Sound View's attempt to cast the applicants' disavowal of claim scope as "agnostic" or "ambiguous at most" is baseless. *See* App. Br. at 24-30.

First, Sound View argues that a "reasonable interpretation" of the applicants' prosecution statements is that the applicants intended "to contrast the *concurrent* prefetching process in the '213 Patent from the *serial* (i.e., one after the other) process in DeMoney." *Id.* at 24-25 (emphasis in original). The district court correctly concluded that interpretation was not a reasonable one, as it mischaracterizes the applicants' statements, the claim language, and the DeMoney reference they sought to overcome. Appx0020-0021.

The applicants' statements do not refer to any "serial" or "one after the other" process when distinguishing DeMoney. Instead, they contrasted their invention, which "concurrently empties and fills the buffer," with DeMoney's, which "teaches filling the buffer only after the buffer is empty." Appx4411 (emphasis in original). The applicants needed to emphasize the concurrent emptying and filling of *the single buffer* because DeMoney disclosed concurrently filling one or more buffers while *another* buffer was *concurrently* being emptied: "During streaming the buffers of the buffer ring are accessed one after another in a circular manner. The deadline time assures that *each buffer is filled before it is*

needed by the stream requester according to the guaranteed rate." Appx4415-4441 ("DeMoney") at 12:28-40 (emphasis added).

As the district court correctly noted, the prosecution history's emphasis on DeMoney's abstract—"once one of its buffers is consumed by the associated media stream client"—shows that the applicants recognized that DeMoney disclosed concurrently filling and emptying multiple buffers, called a "ring of buffers." Appx0019-0020. Thus, the applicants also recognized that DeMoney could only be distinguished by claim 16 concurrently filling and emptying "one of its buffers," *i.e.*, the single allocated buffer. Appx0019-0020.

On appeal, Sound View attempts to cast the applicants' statements as merely distinguishing "an issue of timing." *See* App. Br. at 25-26. Yet every single statement Sound View relies upon is in accord: they do not merely refer to concurrently emptying and filling, but concurrently emptying and filling "the buffer." *Id.* Following this Court's precedent, that is the exact scope that the district court afforded to this claim limitation. *See AccuScan, Inc. v. Xerox Corp.*, 76 F. App'x 290, 292 (Fed. Cir. 2003) ("prosecution disclaimer applies to the determination of literal infringement by excluding from the claim construction any claim scope that has been clearly and unmistakably disavowed during prosecution").

Sound View's characterization of these statements as merely mentioning buffers "in passing" (App. Br. at 26) is also inaccurate, even for the limited excerpts that Sound View addresses in its brief, and certainly in the broader context of the prosecution history and specification. *See* Section II.B, *supra*. And even if these statements could be interpreted as not explicitly contrasting "the number of buffers," as Sound View incorrectly contends, "a patent applicant need not expressly state 'my invention does not include X' to indicate his exclusion of X from the scope of his patent." *Trs. of Columbia Univ.*, 811 F.3d at 1364. The applicants' addition of claim language to overcome prior art that disclosed concurrently downloading into multiple buffers, their identification of a single buffer being emptied and filled to support that amendment, and their arguments that the amendment overcame the prior art because it disclosed concurrently emptying and filling "the buffer" clearly and unmistakably disavow the broader scope Sound View now seeks to reclaim.

Second, Sound View confuses case law regarding the interpretation of claim language with the standard at issue here—interpreting disavowals made by applicants during prosecution. Sound View contends that the district court erred by relying on the applicants' repeated reference to "the buffer" in the prosecution history based on precedent regarding the interpretation of "grammatical articles" in claim language. App. Br. at 27 (citing *01 Communique Lab., Inc. v. LogMeIn,*

Inc., 687 F.3d 1292, 1297 (Fed. Cir. 2012)). Sound View offers no rationale why this precedent would apply to statements made during prosecution, particularly where (as here) there is an apparent, common-sense meaning of "the buffer" in the applicants' statements. *See* Section II.B, *supra*. Sound View's argument also fundamentally mischaracterizes the "Federal Circuit law" that it accuses the district court of violating, which on its face only refers to claim terms that use "a," "an," or "the." *See 01 Communique*, 687 F.3d at 1297. Even assuming, *arguendo*, the applicants' arguments about "the buffer" in its prosecution statements could be reinterpreted to refer to "one or more" buffers, their statement that "the buffer" must be concurrently emptied and filled would require *each* of the "one or more" buffers to be concurrently emptied and filled, not one buffer being emptied while *another* buffer is filled.

Third, a Delaware Magistrate Judge's recommended construction for the same term does not render the applicants' disavowal any less clear and unmistakable. *See* Appx4576-4605. Sound View's brief fails to mention that Judge Kronstadt considered this exact recommendation and held it "does not affect the outcome here." Appx0016; *see also* Appx4572-4605. The district court's consideration of this extrinsic evidence, and its subsidiary factual finding that it did not alter the correct construction of the claims, is entitled to deference and can only

be reversed "for clear error." *Vasudevan Software*, 782 F.3d at 676 (*citing Teva Pharms.*, 574 U.S. at 331).

The district court's finding that the Magistrate's recommendation does not impact a correct construction of claim 16 was unquestionably correct, and far from the type of clear error required to overturn it. Appx0016. The recommendation was never even adopted by the district court in the Delaware case in question, as Sound View settled that case shortly after the defendants objected to the Magistrate's construction. *See* Objections to Report and Recommendation, *Sound View Innovations, LLC v. Delta Air Lines, Inc.*, No. 19-659-CFC-CJB (D. Del. May. 29, 2020), ECF No. 117 and Order of Dismissal With Prejudice (D. Del. Nov. 18, 2020), ECF No. 166. Even if it had been adopted by the Delaware court, a "decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." *Camreta v. Greene*, 131 S.Ct. 2020, 2033 n.7 (2011). Adopting Sound View's argument would mean that one court's decision against a clear and unmistakable disavowal would *preclude* any other district court from reaching the opposite conclusion, regardless of the legally correct construction. The district court was not so bound, and even after considering the Delaware Magistrate's recommendation and Sound View's arguments along with it, reaffirmed that its construction "was based on the reasons stated in the Supplemental Claim

Construction Order and on the statements made by the patent applicant during prosecution history to distinguish DeMoney." Appx0016.

D. The District Court Here Correctly Determined that Sound View's Reinterpretation of the Applicants' Disavowal Was Unreasonable and Would Not Distinguish the Prior Art

Sound View argues that it was "an error of law" for the district court to consider whether Sound View's interpretation of the applicants' statements in prosecution would have distinguished DeMoney, yet then proceeds to argue at length about what would and would not have distinguished DeMoney. (App. Br. at 30-33.) Sound View is wrong on both counts.

First, the district court did not commit an "error of law" by considering whether Sound View's interpretation would have distinguished DeMoney, as Sound View contends on appeal. The district court undertook this analysis in response to Sound View's contention (which it also makes here on appeal) that the applicants' statements could reasonably be subject to a different interpretation. *See* Appx0020 and App. Br. at 33. After analyzing the applicants' prosecution statements and the prior art, the district court correctly concluded that plaintiff's interpretation of the prosecution history was not reasonable—it "would not be sufficient to distinguish DeMoney from Claim 16, including the excerpts of DeMoney that the patent applicant quoted in the office action response." Appx0019-20.

This analysis was entirely proper. This Court recently did the same on *de novo* review in *SpeedTrack*, finding that the plaintiff's interpretation of the applicants' statements distinguishing a prior art reference ("Schwartz") "leads to the paradoxical result that the claims cover hierarchical relationships between fields and values but not among values, even though Schwartz discloses that exact arrangement." 998 F.3d at 1380. The plaintiff's interpretation "could not have distinguished Schwartz." *Id.* As the Court succinctly stated: "That can't be right." *Id.* Likewise, in *Vasudevan Software*, this Court noted that statements in the prosecution history could "theoretically, be interpreted in two ways." 782 F.3d at 680. However, because the plaintiff's narrower interpretation of those statements would not have distinguished the prior art reference, the district court was right to afford the disavowal the broader interpretation that distinguished the prior art. *Id.*

The cases cited by Sound View do not undermine the district court's analysis. In *Technology Properties*, the district court rejected the patentees' attempt to find a narrower basis for distinguishing the prior art on appeal (essentially what Sound View seeks to do here), because the applicant had made a broader argument during prosecution. 849 F.3d at 1359. In *Generation II Orthotics Inc. v. Med. Tech. Inc.*, 263 F.3d 1356 (Fed. Cir. 2001), this Court engaged in a similar analysis of prior art that Sound View claims to be improper, but determined that the claims as written already distinguished the prior art and no

argument during prosecution supported a broader disavowal. *Id.* at 1366. That is, of course, not the situation here. In *Abbott Labs. v. Baxter Pharm. Prod., Inc.*, 334 F.3d 1274 (Fed. Cir. 2003), the district court erred by giving the claim "a narrow reading to preserve its validity," despite the issue of validity not being properly presented at the district court. *Id.* at 1282. None of these holdings suggest it was improper for the district court below to assess the reasonableness of Sound View's interpretation of prosecution statements in light of the prior art they were made to distinguish.

Second, the district court's conclusion that DeMoney disclosed "downloading content from one buffer while other buffers are filled concurrently," and thus would not be distinguished by Sound View's interpretation of the applicants' disavowal, was certainly correct. Appx0020. As discussed further in Section II.B, *supra*, DeMoney's Abstract, which the applicants included in their prosecution statements, disclosed that its "media stream manager maintains a ring of buffers" that provides "continuous media streams" to its clients. Appx4415. Once "one of its buffers is consumed by the associated media stream client," it "submits a buffer request" that "may include a deadline by which the buffer request must be fulfilled." *Id*. During streaming, the buffers "are accessed one after another in a circular manner." DeMoney at 12:36-39. A "deadline time" ensures "that each buffer is filled before it is needed by the stream requester." *Id*.

This "deadline time" is calculated based on how long it will take to concurrently empty the other buffers: it "is calculated simply as *currentTime+(N-1)*bufTime*, where bufTime is the minimum time in which the *requester can consume a buffer* without exceeding the contracted rate guarantee." *Id.* at 4:15-21 (emphasis added).

Third, Sound View does not actually argue that the district court's conclusion about DeMoney is wrong. Instead, Sound View argues that DeMoney "never *expressly* discloses any such parallel process," and that the district court "*inferred* from DeMoney's plural buffers" that DeMoney disclosed filling and emptying those buffers concurrently. App. Br. at 31-32 (emphasis added and emphasis in original). This misrepresents the district court's analysis, which quoted at length from DeMoney's abstract, including the process of emptying one buffer than submitting it to the deadline queue to be filled. Appx0019-0020. Even if the arguments that Sound View now raises on appeal could distinguish DeMoney in some narrower fashion (they do not), that does not negate the actual arguments that the applicants made during prosecution. "The patentee's disclaimer may not have been necessary, but its statements made to overcome [the prior art] were clear and unmistakable." *Tech. Properties*, 849 F.3d at 1358.

Fourth, Sound View points to a different argument by the applicants during prosecution that it contends was a separate basis for why claim 16 was distinct from DeMoney. Sound View argues that DeMoney does not describe retrieving

content "*from a helper server*," which "the applicants pointed out also distinguishes Claim 16." App. Br. At 32-33 (emphasis in original). That alternative argument is irrelevant. "[W]here a patent applicant sets forth multiple bases to distinguish between its invention and the cited prior art, *the separate arguments can create separate estoppels* as long as the prior art was not distinguished based on the combination of these various grounds." *PODS, Inc. v. Porta Stor, Inc.*, 484 F.3d 1359, 1367 (Fed. Cir. 2007) (emphasis added) (internal quotations omitted). Sound View cannot rely on multiple attempts to distinguish prior art to "immunize each of them from being used to construe the claim language." *Andersen Corp. v. Fiber Composites, LLC*, 474 F.3d 1361, 1374 (Fed. Cir. 2007); *see also Gentry Gallery, Inc. v. Berkline Corp.*, 134 F.3d 1473, 1477 (Fed. Cir. 1998) (same). Sound View cites no contrary authority.

E. The District Court's Construction Is Not "Inconsistent" with the Applicants' Cited Support for the Claim Language

Contrary to the heading in its brief, Sound View does not actually argue that the district court's construction is "inconsistent with" the embodiment the applicants cited as support for the "downloading… while concurrently retrieving" language. App. Br. at 33-35. Indeed, in a footnote, Sound View acknowledges there "is no dispute that the specification discloses a figure that depicts a single buffer at the helper server, buffer 79, in which portions of the SM object are stored at various times." *Id.* at 34 n.5. Sound View instead argues that what was added to

the claim was the initial process of filling this single buffer, while the rest of this disclosure, despite being cited by the applicants as support for the added claim language, is actually "a separate, unclaimed process" that "(optionally) happens later." *Id.* at 34-35.

This argument is meritless. As described in Section II.B, *supra*, the applicants specifically cited data being concurrently downloaded from and retrieved to the single buffer 79 as the support for the "downloading… while concurrently retrieving" term: "Upon completion of processes 1 and 2, the buffer at the HS is filled at a rate 'a' and drained with average rate 'b' with the remaining $K–K_1$ seconds of data." Appx4412. To avoid "buffer underflow" from draining buffer 79 faster than it is concurrently filled, its drain rate is set to "the minimum of the fill-in drain rates." *Id.* This disclosure is entirely consistent with the district court's construction of that term.

* * * * *

Sound View's attempts to reinterpret, evade, or simply ignore the applicants' disavowal of prior art do not subvert the district court's conclusions on claim construction. The applicants recognized that DeMoney disclosed downloading content from one buffer while other buffers are filled concurrently, and to overcome that anticipatory reference, they clearly and unambiguously distinguished the single buffer of their invention as being concurrently emptied and

filled. Sound View's different interpretation of the applicants' statements is not supported by the prosecution history, would not distinguish the prior art, and is not a reasonable interpretation of the applicants' statements. Appx0020. Moreover, Sound View cites no support for any other interpretation of the claim language from the '213 Patent's specification, making the applicants' clear and unambiguous disavowal only a confirmation of the proper construction of the "downloading… while concurrently retrieving" term. The district court correctly construed this claim term, and that construction should be affirmed.

III. THE DISTRICT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT OF NO INFRINGEMENT OF CLAIM 16

A. Legal Standards Relevant To A Motion for Summary Judgment of Non-infringement

The moving party has the initial burden of demonstrating the absence of any genuine dispute of material fact. *SRI Int'l v. Matsushita Elec. Corp. of Am.*, 775 F.2d 1107, 1116 (Fed. Cir. 1985). To defeat a well-founded summary judgment motion, the nonmoving party must set forth "specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The determination of literal infringement is a two-step analysis, where the court must first construe the asserted claim to determine its scope, then compare the claim as construed to the accused device. *CAE Screenplates v. Heinrich*

Fiedler GmbH & Co. KG, 224 F.3d 1308, 1316 (Fed. Cir. 2000). In the context of a motion for summary judgment of noninfringement, "an expert's unsupported conclusion on the ultimate issue of infringement is insufficient to raise a genuine issue of material fact." *Arthur A. Collins, Inc. v. N. Telecom Ltd.*, 216 F.3d 1042, 1046 (Fed. Cir. 2000). Furthermore, mere attorney argument is insufficient to establish a factual dispute. The summary judgment standard "is whether there is evidence—not argument—that a reasonable jury could find sufficient." *Yufa v. Lockheed Martin Corp.*, 575 F. App'x 881, 886 (Fed. Cir. 2014).

B. The District Court's April 2020 Claim Construction Order Was Dispositive on the Issue of Infringement

Upon entry of the district court's April 2020 claim construction order construing the "downloading … while concurrently retrieving" term to occur in the same buffer, Sound View could not plausibly argue that there remained any viable evidence of infringement. Indeed, Sound View had spent nearly *two years* fighting against the proper construction of this claim term, using every conceivable avenue to avoid it—*expert reports* (Appx3729-3730), *Daubert motions* (*see* Appx0040-0041, deferring ruling on Sound View's motion to exclude regarding the "downloading… while concurrently retrieving" term), *motions in limine* (*see* Appx0041, deferring ruling on Sound View's motion *in limine* No. 6 regarding the "downloading… while concurrently retrieving" term), *joint reports* (*see* Appx0052-0053, requesting a joint report, and Appx1030, showing filing of the

joint report on November 21, 2019), *claim construction briefing* (*see* Appx0017, discussing supplemental briefing for the "downloading… while concurrently retrieving" term), and even a *motion for reconsideration* (*see* Appx0011-0016, denying Sound View's motion for reconsideration).

After the district court denied Sound View's motion for reconsideration of the April 2020 claim construction and Hulu moved for summary judgment of non-infringement, Sound View did not contend that the accused products concurrently downloaded and retrieved portions of streaming media objects into the same buffer. Appx3741-3742. Instead, it raised only a claim construction dispute—that "a buffer is simply temporary storage," and "Hulu puts forth no evidence that a cache is not a buffer under that understanding of buffer." *Id.*

C. The District Court Correctly Concluded That A Cache Cannot Constitute the Claimed "Buffer" in Claim 16 of the '213 Patent

The intrinsic evidence mandates that the "buffer" in claim 16 cannot be a cache, as required by Sound View's sole remaining infringement theory. Those are two fundamentally distinct components and concepts in the context of the '213 Patent. *See, e.g., Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996) ("It is well-settled that, in interpreting an asserted claim, the court should look first to the intrinsic evidence of record.").

The district court correctly concluded that the language of the claims prevents conflating the helper server's buffers and its cache. Appx0008. For

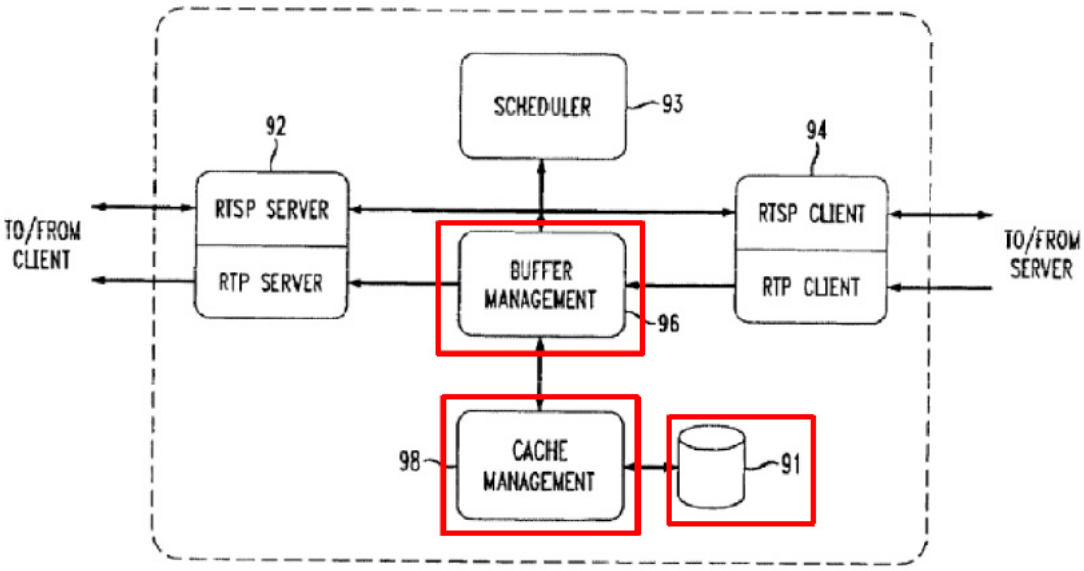
example, the district court noted that claim 17 of the '213 Patent recites both "buffers" and the "cache" as two separate and distinct elements. Appx0008 (citing claim 17). Thus, the district court correctly found that "[i]f the claimed buffer could be met by a cache, both of these claim phrases would be without meaning." Appx0008. *See CAE Screenplates*, 224 F.3d at 1317 ("In the absence of any evidence to the contrary, we must presume that the use of these different terms in the claims connotes different meanings.").[3]

From the '213 Patent's specification, the district court identified numerous passages showing that "there is a distinction between allocated buffers and the cache of the helper server." Appx0006-0010. For example, the '213 Patent expressly defines a "cache" as "a region on the computer disk that holds a subset of a larger collection of data." '213 Patent at 4:7-8. Buffers, on the other hand, are located "in the memory of" the helper server. *Id*. at 5:55-60. *See* Appx0006-0007. The district court also excerpted a portion of the specification contrasted cache storage, located on a disk, and "the buffer in memory of a helper server." Appx0007-0008. The district court emphasized this passage's explanation that when client requests cannot be fully satisfied from buffers, the helper server can

[3] The district court also correctly recognized that allowing "buffer" to be satisfied by the cache would eviscerate its previous construction of "downloading… while concurrently retrieving," because equating the buffer and the cache would negate any distinction between that claim and DeMoney. Appx0008.

rely on *other* sources "including: the memory ring buffer, cache on the disk, the memory or disk of other HSs in the network, and the content server." *Id.* (quoting '213 Patent at 7:55-67).

In a particularly compelling example, the district court cited and annotated Figure 9 of the '213 Patent, which shows distinct "cache management" and "buffer management" modules, which manage the cache 91 and a separate "available memory in the form of a pool of buffers," respectively. Appx0009 (citing '213 Patent at 10:31-32, 10:54-56, and Fig. 9). Sound View's infringement theory would conflate these entirely distinct components:



The district court also noted that the helper server has a single cache, but it has multiple buffers. Appx0007; *compare* '213 Patent at 5:32-40 (one "local cache" per helper server) *with id*. at 7:40-42 (allocating multiple buffers at the helper server for servicing client requests) and 10:57-66 (managing a "pool of

buffers" in the memory of the helper server). The specification's discussion of a helper server's single cache cannot be squared with its description of allocating *multiple buffers* at the helper server, or with the claims reciting multiple buffers in the same memory (*see id*. at claims 1, 8, and 9).

The '213 Patent's buffers perform a different function than the cache in both the claims and the specification. Claim 16 requires "downloading" a portion of a requested streaming media object to the buffer "while concurrently retrieving a remaining portion" of the requested streaming media object to the same buffer. As the district court correctly noted, in the '213 Patent, that function is performed only by the buffers, not the cache. Appx0008-0010 (quoting '213 Patent at 8:50-61).[4]

Finally, the district court correctly held that extrinsic evidence submitted by Sound View in response to Hulu's motion for summary judgment did not overcome the compelling intrinsic evidence (discussed above) that a cache cannot constitute the claimed buffer. Appx0009-0010. Indeed, the district court found to the contrary—that much of this extrinsic evidence supports the conclusion that the cache and the buffer were distinct. *Id.* This consideration of extrinsic evidence, and the district court's subsidiary factual finding that it did not alter the correct

[4] Similarly, as discussed in Section III.G, *infra*, claim 16 requires that the buffer be "allocated" to store the portion of the streaming media object. Appx0007-0008. The district court correctly noted that the '213 Patent only discloses buffers, not the cache, being "allocated." *Id*.

construction of "buffer," is entitled to deference and can only be reversed "for clear error." *Vasudevan Software*, 782 F.3d at 676 (*citing Teva Pharms.*, 574 U.S. at 331). Sound View can show no such error in the district court's analysis.

D. The District Court Resolved the Claim Construction Dispute at the Heart of the Parties' Disagreement, and No Further Construction Was Necessary

The district court's duty with regard to claim construction "is, simply… to resolve a dispute about claim scope that has been raised by the parties." *Eon Corp. IP Holdings v. Silver Spring Networks*, 815 F.3d 1314, 1319 (Fed. Cir. 2016). District courts "are not (and should not be) required to construe every limitation present in a patent's asserted claims," because claim construction "'is a matter of resolution *of disputed meanings and technical scope*, to clarify and when necessary to explain what the patentee covered by the claims, for use in the determination of infringement.'" *O2 Micro Int'l Ltd. v. Beyond Innovation Tech. Co.*, 521 F.3d 1351, 1362 (Fed. Cir. 2008) (*quoting U.S. Surgical Corp. v. Ethicon, Inc.*, 103 F.3d 1554, 1568 (Fed. Cir. 1997)) (emphasis added). So long as the district court resolves "the heart of the parties' disagreement" and the "actual disputes" about the claim's scope, there is no need to further construe the term. *Summit 6, LLC v. Samsung Elecs. Co.*, 802 F.3d 1283, 1291 (Fed. Cir. 2015); *see also U.S. Surgical*, 103 F.3d at 1568 (courts need not construe every term in an asserted claim). This is particularly true when a district court grants summary judgment of non-

infringement based on that resolution, and thus no claim construction dispute is left to the jury. *See Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 979 (Fed. Cir. 1995) ("[I]n a case tried to a jury, the court has the power and obligation to construe as a matter of law the meaning of language used in the patent claim.").

Here, the district court fully resolved the dispute raised between the parties—"whether a cache can constitute the claimed buffer" in claim 16. Appx0006. After conducting a detailed analysis of the intrinsic evidence and considering Sound View's proffered extrinsic evidence, the district court determined that "the specification shows that there is a distinction between allocated buffers and the cache of the helper server." Appx0007-0010. Contrary to Sound View's insistence, no further "explicit construction" of "what a buffer is" was necessary to resolve the dispute. *See Bayer Healthcare LLC v. Baxalta Inc.*, 989 F.3d 964, 977-978 (Fed. Cir. 2021) (no *O2 Micro* problem when the district court declined "to provide a detailed interpretation of the term 'random'" after resolving the defendants' claim construction disputes).

To argue otherwise, Sound View relies on cases far afield from the circumstances here. In *Graco, Inc. v. Binks Mfg. Co.*, 60 F.3d 785, 791 (Fed. Cir. 1995), this Court reversed the district court's order granting summary judgment because that order was "absolutely devoid of *any* discussion of claim construction." *Id.* at 791 (emphasis in original). Likewise, in *Anchor Wall Sys.,*

Inc. v. Rockwood Retaining Walls, Inc., 340 F.3d 1298 (Fed. Cir. 2003), the district court's order left no basis to conclude that it had "performed either of the two steps required for a proper infringement analysis." *Id.* at 1311. Similarly, in the unpublished decision in *Johansson v. Rose Displays Ltd., Inc.*, 121 F.3d 727, 1997 WL 437016, No. 96-1410 (Fed. Cir. Aug. 5, 1997), the only claim construction analysis from the district court "simply rejected the notion that ordinary wear and tear could constitute deformation," and did not construe the claim at all. *Id.* at *2. None of that precedent applies here, and none of it supports Sound View's dismissal of the district court's conclusions.

Here, the district court performed the two-step analysis required by Rule 56 and *CAE Screenplates*. For the first step, after receiving detailed briefing from both parties on whether a cache can constitute a claimed buffer, the Court had before it a "fully-briefed claim construction dispute," and resolved that dispute in a five-page single-spaced analysis. Appx0006-0010. There is no "unstated construction of 'buffer'" (App. Br. at 39) at issue here. Rather, having resolved the heart of the parties' disagreement in rejecting Sound View's position and adopting Hulu's, the Court was not required to further construe the term. *Summit 6*, 802 F.3d at 1291.

For the second step, the district court granted summary judgment because Sound View's "sole remaining infringement theory rests on the assumption that a

cache can satisfy the claimed buffer limitations in Claim 16 of the '213 Patent." Appx0010. Sound View did not dispute throughout the briefing that the claim construction dispute was dispositive on the issue of infringement, and does not dispute the district court's characterization of its "sole remaining infringement theory" on appeal. Indeed, that theory was Sound View's only basis for opposing Hulu's motion for summary judgment. Appx3741-3742.

E. The District Court Did Not Improperly Adopt a "Negative Limitation" of "Not A Cache"

The issue briefed by the parties and decided by the district court was clear—"whether a cache can constitute the claimed buffer" in claim 16 of the '213 Patent. Appx0006. The district court did not rule "that 'buffer' carries a negative limitation of 'not a cache,'" and Sound View's logic to make such an assertion is circular; it contends that the district court's construction contains a negative limitation because the term "buffer" would "normally encompass any cache used as temporary storage for data sent or received." App. Br. at 41. In other words, Sound View's argument is based on unilaterally assigning its own construction as the ordinary meaning of "buffer," and then arguing that anything less is a "negative limitation."

The district court's holding here is far different from the so-called "negative limitations" adopted by district courts in Sound View's cited precedent. In *Ethicon LLC v. Intuitive Surgical, Inc.*, 847 Fed. Appx. 901, 2021 WL 960766, No. 2020-

1600 (Fed. Cir. Mar. 15, 2021), the parties *agreed* that the plain and ordinary meaning of a "rotary drive" was "a component that rotates to drive another component," yet the defendant argued that the plain and ordinary meaning should be further narrowed "to exclude a trigger and a component integral with a trigger." *Id.* at *907. The Court held that importing such a negative limitation would require either support in "the words of the claim" or an "express disclaimer or independent lexicography in the written description." *Id.* After examining both the claims and the specification and finding none, the district court rejected the defendants' narrower limitation. *Id.* Similarly, in *Vehicle IP, LLC v. AT & T Mobility, LLC*, 594 F. App'x 636 (Fed. Cir. 2014), the district court construed "expected time of arrival" to mean "time of day at which the vehicle is expected to arrive somewhere (and not remaining travel time)." *Id.* at *640. The Court held that the district court erred in excluding "remaining travel time" from the construction because "expected time of arrival" was "broadly used in the claims" and the specification contained no definition of the term. *Id.* at *641. Here, by contrast, the district court correctly concluded that, in the context of the '213 Patent, the plain and ordinary meaning of "buffer" does not include the helper server's cache. *See* Section III.C, *supra*.

Moreover, even if a "plain and ordinary meaning" of buffer were to be accepted, both the claims (which distinguish between buffers and the cache) and

the written description (which provide an express lexicography for buffers and the cache) require that the cache cannot constitute the claimed "buffer" in any manner that is consistent with the '213 Patent. Sound View is simply wrong when it argues that the district court did not identify a lexicography supporting its construction. As discussed in Section Section III.C, *supra*, the district court found that the '213 Patent defines a "cache" as "*a region on the computer disk* that holds a subset of a larger collection of data." Appx0006-0007 (emphasis in original, quoting '213 Patent at 4:7-8). It contrasted that lexicography with the '213 Patent's description of "ring buffers in the memory of the HS." *Id*. (quoting '213 Patent at 5:56-60). The district court also explained that the '213 Patent expressly describes and depicts the cache and the buffers as distinct components. *See, e.g.,* Appx0009 (discussing '213 Patent, Fig. 9); *see also* '213 Patent at Figs. 10a, 10b.

Furthermore, Sound View's assertion that the district court "identified *no express statement* that a cache cannot be a buffer or that a buffer cannot be a cache" is wrong. App. Br. at 42 (emphasis in original). First, the district court extensively detailed the distinct meanings of "cache" and "buffer" as described throughout the '213 Patent to illustrate that they are not the same thing. *See* Appx0006-0010. Moreover, narrowing disavowals of claim scope, whether in the specification or the prosecution history, "need not be explicit" when they are

supported by the intrinsic evidence, as the district court's interpretation was. *Poly-America*, 839 F.3d at 1136; *see also Trs. of Columbia Univ.*, 811 F.3d at 1363-64.

Sound View's attempts to ignore the '213 Patent's clear distinction between a buffer and a cache boil down to this: "Just because terms are used non-identically does not mean that they exclude each other." App. Br. at 43. Whatever the legal support for this assertion may be (and it is *not* found in *Ethicon*, the case Sound View cites to support it), the district court's order granting summary judgment does not deal in such abstractions. The district court correctly found that, in the context of the '213 Patent's intrinsic evidence, there could be no mistake about the distinction between allocated buffers and the cache.

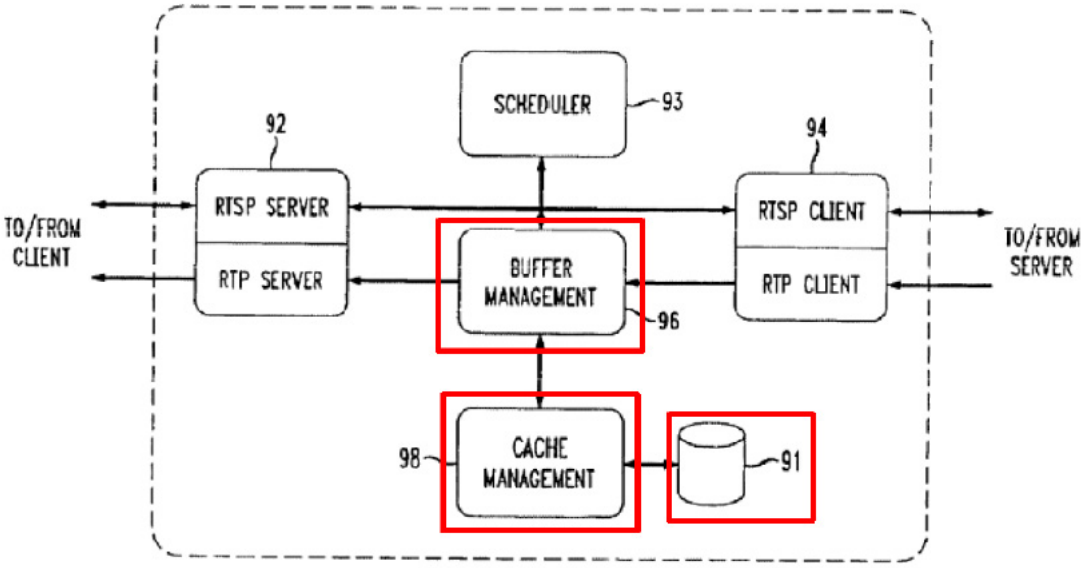
F. Sound View's Improper New Claim Construction of "Buffer" is Unsupported And Contrary to the Intrinsic Evidence

Sound View argues that the "plain and ordinary meaning" of "buffer" is "temporary storage for data being sent or received." App. Br. at 44. This purported construction is so vague and overbroad as to be effectively meaningless, making any kind of "storage for data" a "buffer." *See also* App. Br. at 49 ("Properly construed, therefore, a buffer can exist in memory or disk (or something else), and can be implemented in various ways."). No support for such a construction is found anywhere in the intrinsic evidence, and indeed that evidence is contrary to it. That is why the district court correctly rejected Sound View's proposed construction. Appx0008.

On appeal, Sound View does not dispute, and appears to concede, that its proposed "plain and ordinary meaning" would conflate caches and buffers, contrary to the two distinct components described in the '213 Patent. *See* App. Br. at 43 ("the '213 Patent recognizes that a buffer may be a cache in several ways."); *id.* ("there is no reason that 'a region on the computer disk that holds a subset of a larger collection of data' (*i.e.*, a cache) cannot also be 'temporary storage for data being sent or received' (*i.e.*, buffer)"). Indeed, a construction so vague as to include *any* "temporary storage for data being received" would encompass not just the cache, but the helper server, the client devices, and numerous other distinct components discussed throughout the '213 Patent. *See, e.g.,* '213 Patent at 7:55-67 (contrasting ring buffers with other "sources" including "cache on the disk, the memory or disk of other [helper servers] in the network, and the content server").

Sound View's only attempt to find intrinsic support for its construction is to identify various examples of buffers in the '213 Patent and say that they would fall within its overly broad construction. That is a pointless exercise. Virtually any element in the '213 Patent can be considered "temporary storage for data being sent or received." For example, in Figure 9, cited by the district court in rejecting Sound View's proposed construction (*see* Appx0008-0009), the RTSP/RTP Server 92, the cache 91, the RTSP/RTP Client 94, and the unidentified "client" and "server" that they transmit to, could all theoretically be "temporary storage for data

being sent or received" (Appx0008). Yet none of these are even the buffers described in this very figure—*i.e.*, the "pool of buffers" that are managed by the buffer management module 96.



Besides the few cherry-picked descriptions of buffers, Sound View relies only on extrinsic evidence to support its construction. This extrinsic evidence includes dictionary definitions, its expert's declaration, and deposition testimony from third parties. App. Br. at 47-49. The district court correctly concluded that none of this extrinsic evidence could overcome the intrinsic evidence that contradicted Sound View's proposed construction, and some of the extrinsic evidence even weighed against it. Appx0009-0010. That subsidiary factual finding is entitled to deference and can only be reversed "for clear error." *Vasudevan Software*, 782 F.3d at 676. Sound View cannot show any such error here.

G. Even Under Sound View's Construction, the District Court Correctly Determined That No Evidence Supports Sound View's Claim That the Accused Servers Infringe Claim 16

Even if a cache could be considered the claimed buffer of claim 16 (it cannot), the district court was still correct to grant Hulu's motion for summary judgment of non-infringement. That is because Hulu's motion did not merely argue that it was entitled to summary judgment on the basis that a buffer could not be a cache; it also argued there was no material dispute that a cache could not meet claim 16's requirement that the same buffer be "allocate[ed]" to store at least a portion of the streaming media object. The district court correctly determined that, if the buffer were read to encompass the "cache," the cache would never be "allocated" to store a portion of the streaming media object. Appx0008 ("Thus, the cache could not necessarily be 'allocated' in the same manner as a buffer.").

Sound View did not identify any disputed *material facts* in response to this argument. Instead, it relied solely on *attorney argument* that an edge server allocates the cache, without citing any evidence supporting this proposition. *See* Appx3741 ("each edge server allocates a cache"), Appx3748 ("The cache is allocated in the edge server"), Appx3750 (same). This attorney argument goes so far as to equate "allocat[ing]" a cache with the cache merely "exist[ing]." Appx3744.

Of course, "allocating" a buffer does not mean that the buffer merely "exists," especially in the context of the '213 Patent. Rather, the system allocates buffers in response to client requests and that the system can allocate multiple buffers in memory:

> It is further noted, that whenever a ring buffer is allocated in memory in response to a client request, as the ring buffer is filled, the data is simultaneously streamed to the requesting client. It is also further noted, that in general, the number of ring buffers which may be allocated is practically limited by the size of the local memory…

'213 Patent at 7:55-61; *see also id.* at 10:36-39. This construction of "allocating" becomes even less sensical in view of the '213 Patent's claim 11, which requires *de-allocating* a buffer. *Id.*, claim 11.

Sound View bears the burden to prove infringement, and the law requires Sound View to provide specific facts showing there is a genuine issue for trial. Fed. R. Civ. P. 56(c). Sound View's attorney argument does not satisfy that burden. *Yufa v. Lockheed Martin Corp.*, 575 F. App'x 881, 886 (Fed. Cir. 2014) ("the summary-judgment question is whether there is evidence—not argument—that a reasonable jury could find sufficient"). Thus, even if Sound View had been successful in convincing the district court to adopt its vague construction of "buffer," there is no evidence in the record to support its sole remaining infringement theory. This is yet another reason that the district court's order, even

if a contrary construction were adopted, still correctly granted Hulu's motion for summary judgment.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING MR. YURKERWICH'S OPINIONS

On two separate occasions, the district court fulfilled its gatekeeping duties under *Daubert v. Merrell Dow Pharms., Inc*., 509 U.S. 579, 589 (1993), and excluded Mr. Yurkerwich's unreliable opinions. Appx0036-0053 and Appx0054-0059. The district court's orders were well-reasoned, carefully metered, and well within its discretion. Before issuing these orders, the district court offered Sound View the opportunity to establish that any admissible evidence or testimony tied the "benchmarks" underlying his opinions to Hulu's accused products, or at least to identify some explanation of the apparent differences. Appx0036-0053 and Appx0054-0059. Finding nothing, the district court concluded that Mr. Yurkerwich's damages opinions were unsupported, unreliable, and unfit for presentation to a jury.

This is not surprising. Mr. Yurkerwich has a history of offering such unsupported opinions, often drawing similar criticism from federal courts. For example, this Court previously quoted a district court's characterization of Mr. Yurkerwich's opinions as follows:

> In the direct, but supportable, terms of the district court, 'this report does not pass the red face test. It does not pass the *Daubert* test. It does not pass the Rule 702

> test…. I read the report before I read any of the briefs, and I, frankly, was appalled at it.' Exercising its gatekeeper role, the district court properly excluded [Mr. Yurkerwich's] initial expert report on this basis.

MicroStrategy Inc. v. Bus. Objects, S.A., 429 F.3d 1344, 1355 (Fed. Cir. 2005) (internal quotations and citations omitted).

In this case, Sound View sought to have Mr. Yurkerwich offer damages opinions untethered to the facts of the case and lacking sufficient reliability to present to the jury. Opinions relating to patent damages are analyzed with particular caution, "given the great financial incentive parties have to exploit the inherent imprecision in patent valuation, courts must be proactive to ensure that the testimony presented—using whatever methodology—is sufficiently reliable to support a damages award." *Commonwealth Sci. and Indus. Research Org. v. Cisco Sys., Inc.*, 809 F.3d 1295, 1301 (Fed. Cir. 2015). Here, the district court, in an appropriate exercise of its discretion, excluded Mr. Yurkerwich's opinions because they failed to meet Rule 702's reliability standards. That determination should not be disturbed.

A. The District Court Did Not Abuse its Discretion in Excluding Mr. Yurkerwich's Opinions Based On The Yao Study.

Mr. Yurkerwich's first damages opinion relied on a study titled "Empirical Evaluation of HTTP Adaptive Streaming under Vehicular Mobility" (referred to herein as the "Yao Study") to determine the purported benefit of adaptive

streaming to Hulu. That study focused on the potential benefits of adaptive bit rate technology "in the context of vehicular mobility, where a viewer on a moving vehicle watches the video stream on a mobile device (phone, tablet or laptop) connected to the Internet via a WWAN connection." Appx3175. It used the unique—and totally irrelevant—scenario of a moving vehicle connected over a wireless wide area network (WWAN) connection using cellular modems "housed in the boot of a car" traveling through Sydney, Australia. Appx3176. Indeed, the study itself contrasts this context to a more traditional one for consuming streaming video, where "the viewer is connected via a wired connection, which has high and fairly stable bandwidth." Appx3175.

The district court correctly excluded Mr. Yurkerwich's opinions based on the Yao Study because, despite the obvious differences between the Study's circumstances and the circumstances surrounding Hulu's streaming video products, Mr. Yurkerwich adopted the statistics from the Yao Study wholesale and used them as the foundation of his first damages calculation. He made no attempt to relate the benefits of adaptive bitrate technology for the Study's cell phone to the benefits for a computer, tablet, or television. He made no attempt to relate the benefits of adaptive bitrate technology to the WWAN network signal in the Study to the benefits for a WiFi or wired cable connection. And he made no attempt to relate the benefits of adaptive bitrate technology for the Study's receiver housed in

"the boot" of a moving car in Australia to the benefits to a Hulu user in the U.S. sitting in his home. In short, Mr. Yurkerwich did nothing to relate the benefits of adaptive bit rate technology in the inapplicable context of the Yao Study to Hulu's U.S. users. Appx0047-0048.

1. Mr. Yurkerwich's Opinions Based on the Yao Study Were Not Tethered to the Facts of the Case.

The district court correctly recognized that the Yao Study was untethered from the accused technology, explaining that:

- the Study "analyzed a moving mobile device user connected through a wireless wide area network" whereas Hulu's "customers may use a stationary device";
- Hulu's "users in the United States may experience different WWAN coverage than the Australian WWAN coverage studied in the Yao Study"; and
- Mr. Yurkerwich did not provide (and Sound View could not offer at oral argument) "any explanations whether these differences affect the appropriateness of relying on the Yao Study."

Appx0047-0048. Because Sound View failed to account for any differences between mobile users in Australia and Hulu's customers in the U.S., or any evidence of "what portion of streaming is to such devices," the Court concluded that Mr. Yurkerwich's opinion lacked any "sufficient basis to rely on the Yao

Study," rendering his opinion "unreliable" and "not proper to present to the jury." Appx0048.

2. Dr. Richardson's Opinions Did Not Support Mr. Yurkerwich's Conclusions Based on the Yao Study.

On appeal, Sound View argues that because its other expert, Dr. Richardson, "specifically discussed" the Yao Study in his expert report, Mr. Yurkerwich was allowed to use the Study however he pleased. App. Br. at 53. That is not the law. "While an expert need not consider *every* possible factor to render a 'reliable' opinion, the expert still must consider *enough* factors to make his or her opinion sufficiently reliable in the eyes of the court." *MicroStrategy*, 429 F.3d at 1355 (emphasis in original). The determination of "whether or not *enough* factors have been considered to make an expert report *sufficiently* reliable" is "committed to the sound discretion of the district court, *not* the jury." *Id.* (emphasis in original).

Here, Mr. Yurkerwich was required to "carefully tie" his opinions on damages "to the claimed invention's footprint in the marketplace." *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 869 (Fed. Cir. 2010). He failed to do so, adopting the benefits for mobile signals over a WWAN network in Australia instead of addressing the impact of the invention on Hulu's streaming platform in the U.S. Sound View does not dispute that fact, which alone is fatal to Sound View's appeal, regardless of whether Mr. Yurkerwich got the idea to use the Yao

Study as a benchmark from Dr. Richardson. The opinions were untethered to the facts of this case and therefore properly excluded.[5]

3. The District Court Did Not Exclude the Yao Study Merely Because of its Inapposite Facts, but Because Mr. Yurkerwich Failed to Account for the Differences.

Sound View also argues that the district court's legitimate concerns about the reliability of Mr. Yurkerwich's opinions based on the Yao Study were mere "factual arguments" that "go to the weight" of Mr. Yurkerwich's opinions, not the reliability of his methods. App. Br. at 55. In doing so, Sound View sets up a strawman, contending that "perfect data" is not a prerequisite for reliability. *Id.* at 57. The district court never insisted on "perfect data." But the Yao Study is not even close to "perfect," and Mr. Yurkerwich made no attempt to explain or account for the multiple, fundamental shortcomings of the Yao Study, yet adopted its inapplicable statistics wholesale. In cases like this, a district court, in its discretion, can and should "conclude that there is simply too great an analytical gap between the data and the opinion proffered" and exclude the opinion evidence. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

[5] Sound View's argument that the district court's order was "internally inconsistent" is wrong. App. Br. at 55. Even if Mr. Yurkerwich was allowed to rely on Dr. Richardson's opinions, in the abstract, nothing in Mr. Yurkerwich's opinions (or, for that matter, Dr. Richardson's opinions) explained the differences between the Yao Study and the accused products in a manner that would render use of the Yao Study reliable or applicable to Hulu.

B. The District Court Did Not Abuse its Discretion in Excluding Mr. Yurkerwich's Calculations Based on a Press Release About a Study He Had Never Seen.

After excluding Mr. Yurkerwich's opinions based on the Yao Study, the district court gave him a second chance to submit an amended report removing "all calculations that rely on the Yao Study." Appx0053. In place of the excluded Yao Study, Mr. Yurkerwich relied on a January 2013 *press release* from a company called Conviva describing the "release of its landmark 2012 Viewer Experience Report." Appx3326-3328. The press release provides no real insight into the specifics of the underlying report, other than a general statement that it measured "22.6 billion video streams from viewers in more than 190 countries watching content on more than 150 of the most recognizable video sites in the world." Appx3326-3328. It is unknown (to this day) which, if any, of those companies are American companies, Hulu's competitors, or Hulu itself. Presumably, the report itself contains more detail, but when he formed his new opinion, Mr. Yurkerwich had never seen the 2012 Viewer Experience Report, and it was never produced by Sound View.

1. The District Court Correctly Concluded that Mr. Yurkerwich's Opinions Based on the Conviva Press Release Were Not Tethered to the Facts of the Case.

Despite his complete lack of knowledge about the underlying participants, data, or conclusions in the Viewer Experience Report, Mr. Yurkerwich

nevertheless made the analytical leap to assuming that, when the press release says that viewers "watch 250% more when they have an optimal experience," it actually means that Hulu viewers with adaptive bit rate would watch 250% more content than those without. Appx4524, ¶ 267 (discussing Appx3326-3328). Mr. Yurkerwich could not base that assumption on anything more than speculation.

In addition to the technical disconnect between the press release's "optimal experience" and Mr. Yurkerwich's conclusions about Hulu viewers with adaptive bit rate (discussed in Section IV.B.3, *infra*), the district court explained that the figures mentioned in the press release could not be tied to Hulu's accused product. As the district court explained, the press release provides no "information about what percentage of study participants were located within the United States," and similarly no information about how many of the participants "used Hulu," leaving the press release untethered to the case. Appx0057. The district court was right to require more, as this Court has repeatedly "rejected deriving a royalty rate by picking a starting point based on industry-wide data (rather than facts specific to the case at hand)." *Open Text S.A. v. Box, Inc*., No. 13-cv-04910-JD, 2015 WL 349197, at *6 (N.D. Cal. Jan. 23, 2015) (citing *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1313-18 (Fed. Cir. 2011) and *Virnetx, Inc. v. Cisco Sys., Inc.*, 767 F.3d 1308, 1331-34 (Fed. Cir. 2014)). Mr. Yurkerwich did not even try to account for differences between the press release's unidentified 150 streaming

services, offering a mix of live and on-demand traffic in 190 different countries (on the one hand), and Hulu's accused services in the United States (on the other).

2. Mr. Yurkerwich's Amended Calculations Rested Exclusively on the Conviva Press Release.

Sound View argues that Mr. Yurkerwich's amended report used "[t]wo initial data points"—a "Hulu internal document from 2013" and the "Conviva press release." App. Br. at 58. That is demonstrably false, as the district court correctly determined. Mr. Yurkerwich's amended damages calculation ***only*** used the press release's 250% figure, not any other figure from any Hulu "internal document." Appx0058. He was not, as Sound View claimed in hindsight, "using the figure as a 'check' of an alternative, analytical basis for the figure." Appx0058. Rather, as the district court explained, "if the 250% figure were removed, Yurkerwich's damages calculation would change," but if Hulu's internal figure from the internal document were removed, "Yurkerwich's damages calculation would remain the same." Appx0058.

3. The District Court Rightly Rejected Sound View's Attempt to Shoehorn Mr. Yurkerwich Unsupported Opinions into Dr. Richardson's Prior Opinions.

Mr. Yurkerwich is not a technical expert, and he made no attempt to discuss the Conviva press release (the foundation of his second damages opinion) with Sound View's technical expert. Nor did he seek out any other support for his assumption equating a 250% increase due to an "optimal experience" to a 250%

increase due to adaptive bit rate. *See* Appx0057-0058. On appeal, Sound View argues that "Dr. Richardson also opined that Hulu achieved benefits from the '213 Patent such as (1) reducing "video startup time," … (2) reducing re-buffering and initial buffering, … ; and (3) delivering the highest-bitrate, highest-quality representation that the client can support," and that the "Conviva press release tied its 250% statistic to those very same benefits." App. Br. at 61-62.

The district court already correctly rejected this post-hoc reasoning from Sound View, noting "several reasons" why Dr. Richardson's separate opinions were insufficient to support Mr. Yurkerwich's analytical leap or to tie the Conviva Press Release to any benefit from the accused products. Appx0057. First, it remains "not clear from the Conviva Press Release that its listed benefits are necessarily attributable to the '213 Patent's claimed technology," and without the underlying report, there is simply no way to know. Second, even if there was some relationship between the benefits in the press release and the benefits from the asserted patent, the press release still lists other benefits which Mr. Yurkerwich ignored, and instead "simply attributes the entirety of the increase in viewed content referenced in the Conviva Press Release to the '213 Patent." Appx0058.

4. Sound View Cannot Blame Hulu for Mr. Yurkerwich's Unreliable and Factually Untethered Opinions.

In a last ditch attempt to justify Mr. Yurkerwich's failed amended report, Sound View feigns prejudice from Hulu "profit[ing] from the absence of more

detailed information." App. Br. at 60-61. Sound View cannot identify anything in the record indicating that Mr. Yurkerwich's inability to form a reliable opinion was Hulu's fault, because nothing in the record supports that accusation. Indeed, the district court cited Sound View's assertion that the report underlying the press release was "easily retrievable," but never produced to Hulu and never shown to Sound View's experts, as an "independent reason[]" to exclude Mr. Yurkerwich's opinions. Appx0058.

Sound View's cases are easily distinguishable. The evidentiary latitude afforded in *TWM Mfg. Co. v. Dura Corp.* was based on the accused infringer's "failure to keep accurate or complete records"—Sound View makes no comparable showing here. 789 F.2d 895, 900 (Fed. Cir. 1986). *Westinghouse Elec. & Mfg. Co. v. Wagner Elec. & Mfg. Co.* is even further afield. 225 U.S. 604 (1912). That case, from over a century ago, recognized that, in some instances, unwinding the portion of profits attributable to the patented invention might be impossible, but held that a plaintiff must first demonstrate that impossibility before it can shift the burden of apportionment to the defendant. *Id.* at 616-617. Sound View made no such showing of impossibility in the district court, makes no such argument here, and the excluded opinions did not pertain to apportionment of profits, but to a measure of Sound View's supposed damages through a reasonable royalty. The

case is simply inapplicable here, and does not excuse Mr. Yurkerwich's unreliable opinions.

* * * * *

Sound View's appeal brief merely reiterates arguments that were raised and rejected at the district court as it attempted to defend Mr. Yurkerwich's unreliable testimony. Those arguments are no more valid here, and certainly do not show that the district court abused its discretion in exercising its gatekeeper role under *Daubert*. The district court's orders excluding Mr. Yurkerwich's opinions should be affirmed.

CONCLUSION

For the reasons discussed herein, the district court's April 2020 Claim Construction Order correctly applied the intrinsic evidence of the '213 Patent, including the applicants' clear and unmistakable disavowals of claim scope, to construe the "downloading… while concurrently retrieving" claim term. The district court's November 2, 2020 order rightly granted summary judgment of no infringement of the '213 Patent, after disposing of Sound View's last remaining theory of infringement as a matter of law. And the district court appropriately exercised its gatekeeping function to exclude the unreliable opinions of Mr. Yurkerwich. Sound View has not identified error with any of the district court's decisions, and they should be affirmed.

Dated: November 12, 2021

/s/ *Brett J. Williamson*

Brett J. Williamson
John Kappos
Cameron Westin
Bo Moon
Bradley M. Berg
O'MELVENY & MYERS LLP
610 Newport Center Drive, 17th Floor
Newport Beach, CA 92660
Telephone: (949) 823-6900
Fax: (949) 823-6994
bwilliamson@omm.com
jkappos@omm.com
cwestin@omm.com
bmoon@omm.com
bmberg@omm.com

Patrick Nack-Lehman
O'MELVENY & MYERS LLP
2765 Sand Hill Road
Menlo Park, CA 94025
Telephone: (650) 473-2600
pnack-lehman@omm.com

Counsel for Appellee Hulu, LLC

FORM 19. Certificate of Compliance with Type-Volume Limitations **Form 19**
July 2020

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

Case Number: 21-1998

Short Case Caption: Sound View Innovations, LLC v. Hulu, LLC

Instructions: When computing a word, line, or page count, you may exclude any items listed as exempted under Fed. R. App. P. 5(c), Fed. R. App. P. 21(d), Fed. R. App. P. 27(d)(2), Fed. R. App. P. 32(f), or Fed. Cir. R. 32(b)(2).

The foregoing filing complies with the relevant type-volume limitation of the Federal Rules of Appellate Procedure and Federal Circuit Rules because it meets one of the following:

☑ the filing has been prepared using a proportionally-spaced typeface and includes 13,994 words.

☐ the filing has been prepared using a monospaced typeface and includes _____ lines of text.

☐ the filing contains _____ pages / _____ words / _____ lines of text, which does not exceed the maximum authorized by this court's order (ECF No. _____).

Date: 11/12/2021

Signature: /s/ Brett J. Williamson

Name: Brett J. Williamson

PROOF OF SERVICE

I hereby certify that on November 12, 2021, the foregoing APPELLEE HULU, LLC'S PRINCIPAL BRIEF was filed with the Federal Circuit's ECF System and copies were served on all counsel of record.

Dated: November 12, 2021

/s/ Brett J. Williamson

Brett J. Williamson
O'MELVENY & MYERS LLP
610 Newport Center Drive, 17th Floor
Newport Beach, CA 92660
Telephone: (949) 823-6900
Fax: (949) 823-6994
bwilliamson@omm.com

Counsel for Appellee
Hulu, LLC