

No. 24-

IN THE
Supreme Court of the United States

CLOUDOFCHANGE, LLC,

Petitioner,

v.

NCR CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Limelight Networks, Inc. v. Akamai Technologies, Inc.*, 572 U.S. 915 (2014), the Court observed that “[t]he Federal Circuit’s analysis fundamentally misunderstands what it means to infringe a method patent.” On remand, the Federal Circuit accepted the Court’s suggestion to “revisit the § 271(a) question,” and realigned § 271(a) method and system claim infringement jurisprudence into a common framework. *Akamai Technologies, Inc. v. Limelight Networks, Inc.*, 797 F.3d 1020 (Fed. Cir. 2015) (en banc) (per curiam).

Based on that common framework, the district court upheld a jury verdict that NCR committed vicarious-liability direct-use infringement of system claims under § 271(a). A Federal Circuit panel reversed because the district court’s vicarious-liability analysis “conflated” use of a method claim with use of a system claim. According to the Federal Circuit, the district court erred in relying on a vicarious liability principle that applied only to method claims.

The question presented is:

1. Whether the same vicarious liability analysis for direct use infringement under 35 U.S.C. § 271(a) must be applied to both method and system claims.

PARTIES TO THE PROCEEDING

Petitioner is CloudofChange, LLC.

Respondent is NCR Corporation.

CORPORATE DISCLOSURE STATEMENT

Petitioner CloudfChange, LLC has no parent corporation and no publicly held corporation owns 10% or more of CloudfChange, LLC's stock.

RELATED PROCEEDINGS

United States District Court: (W.D. Tex.):

CloudofChange, LLC v. NCR Corporation, Civil Action No. 6:19-cv-00513-ADA (October 27, 2022) (Order Denying Defendant NCR’s Rule 50(b) Motion for Judgment as a Matter of Law or Alternately, a New Trial)

CloudofChange, LLC v. Lightspeed POS Inc., Civil Action No. 6:21-cv-01102-ADA (stayed district court litigation)

United States District Court: (N.D. Cal.):

CloudofChange, LLC v. Clover Network, Inc., Civil Action No. 3:23-cv-03005-AMO (stayed district court litigation)

United States Court of Appeals (Fed. Cir.):

CloudofChange, LLC v. NCR Corporation, Nos. 23-1111, 23-1170 (December 18, 2024) (decision)

CloudofChange, LLC v. NCR Corporation, Nos. 23-1111, 23-1170 (February 19, 2025) (order denying petition for panel rehearing and rehearing en banc)

CloudofChange, LLC v. Lightspeed Commerce Inc., Nos. 24-1446, 24-1448 (pending appeal from Patent Trial and Appeal Board decision)

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The Federal Circuit’s decision is reported at 123 F.4th 1333 and reproduced at App. 1a–18a. The district court order denying NCR’s JMOL of no direct use infringement is reproduced at App. 19a–60a.

JURISDICTION

The Federal Circuit entered judgment on December 18, 2024. Petitioner’s timely petition for panel rehearing and rehearing en banc was denied on February 19, 2025. The order denying rehearing and rehearing en banc is unreported and reproduced at App. 61a–62a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 271(a) of the Patent Act, 35 U.S.C. § 271(a), states:

Except as otherwise provided in this title, *whoever* without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent.

INTRODUCTION

Section 271(a) of Title 35, *inter alia*, prohibits direct infringement by “use.” The statute makes “use” a tort without further delineation between method and system claims. A single actor must directly or vicariously

use each element of the claimed method or system. A jury found NCR committed direct use infringement of CloudofChange's system claims. Relying on a principle of vicarious liability announced in the en banc *Akamai* decision, the district court denied NCR's JMOL motion for no infringement.

The Federal Circuit, however, criticized the district court for relying on that vicarious liability principle because the *Akamai* en banc decision involved only method claims. Having concluded the district court should not have relied on that principle, the appellate court reversed the district court's denial of NCR's JMOL of no infringement.

This case is of great practical importance and presents an often-recurring fact pattern. A manufacturer may sell almost all of a set of system components to each of thousands of small businesses for use in an integrated system. In this case, NCR sells customers, *e.g.*, sandwich or pizza shops, less than all components of a claimed point-of-sale system, putting the onus on the customer to obtain the last component to complete the system. Manufacturers do so knowing customers have no real world choice except to obtain the last element of the system. Otherwise, as here, NCR's customers would have purchased hardware, licensed software, and agreed to make monthly payments to NCR without being able to use NCR's point of sale ("POS") system.

STATEMENT OF THE CASE

I. Legal Background

Section 271(a) of Title 35, which defines the tort of direct patent infringement, incorporates ordinary tort-related

vicarious liability rules. *See, e.g., Meyer v. Holley*, 537 U.S. 280, 285 (2003) (“The Court has assumed that, when Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules.”).

Section 271(b) defines the tort of inducing patent infringement. *Limelight Networks, Inc. v. Akamai Technologies, Inc.*, 572 U.S. 915 (2014) reversed a Federal Circuit decision holding a defendant liable for inducing patent infringement although no one person directly infringed. *Id.* at 917. “A method patent claims a number of steps; under this Court’s case law, the patent is not infringed unless all the steps are carried out.” *Id.* at 920–21, *citing Aro Mfg. Co. v. Convertible Top Replacement Co.*, 365 U.S. 336, 344 (1961); *Warner-Jenkinson Co. v. Hilton Davis Chemical Co.*, 520 U.S. 17, 29 (1997). *Aro* analyzed system claims while *Warner-Jenkinson* analyzed process claims. *Aro*, 365 U.S. at 339 n.1; *Warner-Jenkinson*, 520 U.S. at 22.

In so doing, *Limelight* effectively rejected the Federal Circuit’s notion that infringing “use” of a patented method “is fundamentally different” from infringing use of a patented system. *Compare Limelight*, 572 U.S. at 920–21 with *NTP, Inc. v. Research in Motion, Ltd.*, 418 F.3d 1282, 1317–18 (Fed. Cir. 2005) (“Under section 271(a), the concept of ‘use’ of a patented method or process is fundamentally different from the use of a patented system or device.”). Further, *Limelight* rejected the idea of “two parallel bodies on infringement law: one for liability for direct infringement, and one for liability of inducement.” *Id.* at 922. This admonition further counsels there should not

be two parallel bodies of law for vicarious-liability direct use infringement, depending on whether the claims are system or method claims. Thus, while *Limelight* referred to a method patent claim explicitly, it realigned method and system claim infringement jurisprudence into a common framework. Analysis of direct use infringement based on vicarious liability should apply the same vicarious liability rules to method and system claims.

On remand, the en banc *Akamai* opinion began by noting the “possibility that [we] erred by too narrowly circumscribing the scope of § 271(a),” after which “the court set forth the law of divided infringement under 35 U.S.C. § 271(a).” *Akamai*, 797 F.3d at 1022. In pertinent part, *Akamai* reiterated that vicarious liability attaches if an actor “contracts with another to perform one or more steps of a claimed invention.” *Akamai*, 797 F.3d at 1023 (citation omitted). “[L]iability can also be found when an alleged infringer conditions participation in an activity **or** receipt of a benefit upon performance of a step or steps of a patented method **and** establishes the manner **or** timing of that performance.” *Id.* (citation omitted) (emphases added).

Petitioner seeks a writ of certiorari because the Federal Circuit panel decision rejected the district court’s reliance on this vicarious-liability touchstone for direct use infringement as ostensibly applying only to method claims.

II. Factual Background

CloudofChange sued NCR for infringing U.S. Patent Nos. 9,400,640 and 10,083,012. The shared patent specification discloses an online web-based POS builder

system that a non-expert business operator can use to assemble a POS system for managing business operations. App. 2a–3a. “The claims expressly require two entities: a vendor and a subscriber. The claims require the vendor’s remote servers to host the web server software while subscribers possess the POS terminals that access the web server software.” App. 5a.

CloudfChange asserted that NCR’s product, NCR Silver, infringed system claims of the two asserted patents. “NCR Silver allows merchants to edit POS menus, perform transactions and build their own POS screens. . . . [U]se of NCR Silver requires application software, POS hardware . . . and an Internet connection to NCR’s backend servers.” App. 5a. NCR’s Silver Merchant Agreement contractually makes its customers responsible for supplying and maintaining an Internet connection to access and use NCR’s application software. App. 5a. The Agreement also requires customers to obtain the computer hardware necessary to operate the system and grants NCR the right to access customer computer systems. Appx15485–15502.

After a merchant signs the Agreement, NCR provides the customer with access to detailed training videos and ongoing technical assistance. Customers make each of the components of the patented system work for the system’s patented purpose and benefit from using each system component and the entire system. NCR also benefits from its customers using each system element. Among other things, customers pay NCR a monthly subscription fee. App. 15a.

CloudfChange tried infringement based only on NCR itself using every element of the claimed system either directly or based on vicarious liability. The jury found that NCR infringed. App. 9a.

The district court’s JMOL ruling opined that “substantial evidence supports the jury’s finding of direction and control, *i.e.*, divided infringement via vicarious liability, and control and beneficial use of each of the elements of the system.”¹ App. 35a. There was substantial evidence supporting “the jury’s finding of direction and control . . . and the control and beneficial use of each of the elements of the system.” App. 35a. Citing the *Akamai* en banc decision, the district court also held substantial evidence supported the jury verdict under *Akamai*’s “condition and benefit” analysis. App. 39a.

III. The Panel’s Refusal to Apply the Same Vicarious Liability Rules to Method and System Claims Improperly Engrafts a Method Claim/System Claim Distinction Into Section 271(a)

The Federal Circuit began by agreeing with the district court that NCR’s customers use every element of the claimed system. “Like the customers in [*Centillion Data Sys., LLC v. Quest Communs. Int’l, Inc.*, 631 F.3d 1279 (Fed. Cir. 2011)] NCR’s merchants put the system into service because they initiate at the POS terminal

1. For example, although NCR did not itself supply an internet connection, NCR’s Silver Merchant Agreement required that the merchant “must maintain Internet access.” App. 35a, 38a–39a. The district court pointedly noted NCR failed to dispute the Agreement was substantial evidence of NCR’s “direction or control” as to the limitations. App. 35a.

a demand for service . . . and benefit from the back end providing the service.” App. 14a.

Next, the Panel criticized the evidence of NCR benefitting from the entire Silver system as “not the kind of benefits on which *Centillion* focuses.” App. 15a (*citing Intell. Ventures I LLC v. Motorola Mobility LLC*, 870 F.3d 1320, 1329 (Fed. Cir. 2017) (parenthetical omitted)). Reversing the jury verdict, the Panel held that “NCR does not direct or control the merchants to subscribe to the NCR Silver system, download the NCR app on their POS terminals, or put the NCR Silver system into use. . . . NCR merchants take these actions of their own accord.” App. 16a.

Then, the Panel turned to the district court’s en banc *Akamai* analysis, opining that “the district court’s analysis **conflates use of a method claim . . . with use of a system claim. . .**” App. 17a, citing *NTP*, 418 F.3d at 1317–18 (emphasis added). The panel distinguished en banc *Akamai*, believing that while Limelight performed every method step except one, NCR’s contractual obligation to obtain and maintain an internet connection “does not amount to direction or control of a merchant’s use of the claimed system.” App. 18a. But for the Panel’s refusal to follow en banc *Akamai*, the Federal Circuit would not have reversed the district court’s denial of JMOL of no infringement.

REASONS FOR GRANTING THE WRIT

I. The Appellate Court Improperly Read Two Parallel Bodies of Direct-Use Infringement Law into 35 U.S.C. § 271(a)

The Court should grant the petition for certiorari because the language of § 271(a) does not countenance different rules of infringement for method and system claims. Yet, that is exactly what the Panel has done. There now are two inconsistent bodies of direct use infringement law; one for method claims and one for system claims. *Limelight*, 572 U.S. at 922.

The Panel incorrectly relied on *NTP*'s pre-*Limelight* distinction between use of a patented method and use of a patented system or device to distinguish en banc *Akamai*. App. 17a, citing *NTP*, 418 F.3d at 1317 ("Under section 271(a), the concept of 'use' of a patented method or process is fundamentally different from the use of a patented system or device."). Reinforcing this error, the Panel then selectively quoted a sentence from *NTP*. App. 17a, citing *NTP*, 418 F.3d at 1318. The *NTP* full sentence leaves no doubt the Panel relied on the discredited pre-*Limelight* distinction between using method and system claims: "Because a process is nothing more than the sequence of actions of which it is comprised, the use of a process necessarily involves doing or performing each of the steps recited. This is unlike use of a system as a whole, in which the components are used collectively, not individually." *NTP*, 418 F.3d at 1318. *Limelight* rejected the appellate court's efforts to create separate infringement analyses for method and system claims. *Limelight*, 572 U.S. at 920–921. The Court should confirm that common rules of

vicarious liability apply to assess direct use infringement under § 271(a), whether the claims in issue are method or system claims.

II. The Questions Presented are Exceptionally Important and Warrant Review in this Case

As explained above, this case is of great practical importance because it presents an often-recurring fact pattern. System claims often turn out to require two entities. If one entity has “direction and control . . . and the control and beneficial use of each of the elements of the system,” that entity should be liable for direct-use infringement under recognized principles of vicarious liability. The alternative of suing a manufacturer’s individual customers is cumbersome and impractical.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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**APPENDIX A — OPINION OF THE UNITED STATES
COURT OF APPEALS FOR THE FEDERAL CIRCUIT,
FILED DECEMBER 18, 2024**

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2023-1111

CLOUDOFCHANGE, LLC,

Plaintiff-Appellee,

v.

NCR CORPORATION,

Defendant-Appellant.

Appeal from the United States District Court for
the Western District of Texas in No. 6:19-cv-00513-ADA,
Judge Alan D. Albright.

Decided December 18, 2024

Before DYK, REYNA, and STOLL, *Circuit Judges.*

STOLL, *Circuit Judge.*

This case asks us to consider again whether to attribute a customer’s use of a claimed system to the manufacturer of only part of the system. Appellant NCR Corporation (“NCR”) appeals the United States District Court for the Western District of Texas’s denial of judgment as a matter of law (“JMOL”) of no direct infringement. NCR asserts

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it could not directly infringe the claims of U.S. Patent Nos. 9,400,640 and 10,083,012 as a matter of law because NCR itself does not use the claimed system; rather, its merchants do. The district court found that the merchants' use of the system could be attributed to NCR under our precedent involving divided infringement and principles of vicarious liability. For the following reasons, we reverse.

BACKGROUND**I**

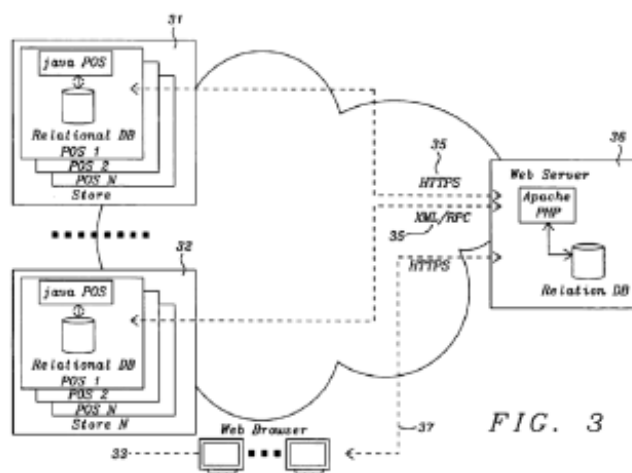
CloudfChange, LLC ("CloudfChange") sued NCR, alleging infringement of the '640 and '012 patents (collectively, the "Asserted Patents"). The Asserted Patents share a specification and a priority date of February 5, 2008. The shared specification discloses an online web-based point-of-sale-builder system that a non-expert business operator can use to assemble a point of sale ("POS") system for managing their business operations. '640 patent, col. 1 ll. 10-18. The specification explains that the conventional process of assembling a POS system required manually coding information, such as menu selections, and defining the position and operation of touch screen keys and their database correspondence. *Id.* at col. 1 ll. 20-32. According to the specification, this process was time-consuming and prone to mistakes, only specially trained individuals could build or change POS screens, and store owners tended to retain out-of-date POS screens to avoid the editing process. *Id.* at col. 1 ll. 32-37.

The disclosed object of the Asserted Patents is "to provide an online, web-based point of sale builder system,"

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id. at col. 2 ll. 3-4, that a non-expert business operator can use to assemble a POS system, which she could then use to manage her business.

Figure 3 of the Asserted Patents, reproduced below, illustrates an embodiment of the web-based POS system. *Id.* Fig. 3; col. 3 ll. 38-49. As shown, “[t]here are N POS terminals (POS 1, POS 2, . . . POS N) in ‘Store’ 31 and in ‘Store’ 32.” *Id.* at col. 3 ll. 37-40. “Each POS includes personal computer hardware and software,” and “[e]ach POS operates with a hardware/software connection 35 to the Internet.” *Id.* at col. 3 ll. 40-41, 43-44. Connection 35 allows each POS to communicate via Hypertext Transfer Protocol (HTTP) with Back-Office (“BO”) software implemented on web servers 36. *Id.* at col. 4 ll. 16-19. “In addition, the BO software and data can be viewed from any store employee at any PC 33 who has Internet access 37 and a password.” *Id.* at col. 4 ll. 20-22.



Id. Fig. 3.

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Appendix A

Claim 1 of the '640 patent is illustrative of the asserted claims and recites:

1. A web-based point of sale (POS) builder system comprising:

one or more point of sale terminals, that display POS screens,

an internet connection from said one or more point of sale terminals to a web server,

one or more local or remote POS workstations, and

point of sale builder software that runs on said web server, wherein said local or remote workstations are utilized to build or edit said POS terminals in real time, from anywhere in the world and over the worldwide web,

wherein said web servers are provided as a vendor subscription service *wherein web server software resides and is hosted on said vendor's remote servers and wherein subscriber company's POS terminals access and repeatedly interact with said web server software* from said vendor's remote servers, in order to perform the subscriber's desired terminal function, over a network, wherein the network comprises the Internet.

Appendix A

Id. at col. 6 ll. 11-28 (emphasis added). The claims expressly require two entities: a vendor and a subscriber. The claims require the vendor's remote servers to host the web server software while subscribers possess the POS terminals that access the web server software.

II

CloudfChange accused NCR's product, NCR Silver, of infringing several claims of the Asserted Patents. NCR Silver is a web-based POS solution designed for small and independent business owners. NCR Silver allows merchants¹ to edit POS menus, perform transactions, and build their own POS screens.

Relevant here, a merchant's use of NCR Silver requires application software, POS hardware—such as a tablet or personal computer—and an Internet connection to NCR's backend servers. It is undisputed that NCR does not provide all the necessary components of the accused system. Specifically, (1) NCR contractually makes users responsible for supplying and maintaining an Internet connection, which is necessary to use NCR Silver; and (2) most users supply their own POS hardware. While most merchants supply the POS hardware, a small number of merchants obtain the hardware from NCR. Hardware products available through NCR include tablets, display screens, payment processors, and cash drawers.

1. NCR refers to its customers as merchants. Appellee's Br. 10. This opinion refers to users, customers, and merchants interchangeably.

Appendix A

Merchants download NCR Silver software from an app store onto their POS hardware.

III

In the district court, CloudfChange pursued a single theory of infringement: that NCR directly used the claimed system by putting it into beneficial use under this court's *Centillion* precedent. *Centillion Data Sys., LLC v. Qwest Commc'ns Int'l, Inc.*, 631 F.3d 1279 (Fed. Cir. 2011). Specifically, CloudfChange asserted that NCR controls and benefits from each component recited in the claimed system and thus, under *Centillion*, uses the system. CloudfChange abandoned all other infringement theories, including induced infringement, contributory infringement, and direct infringement by importing, making, or selling the claimed system. The district court observed that CloudfChange's "proof requirements are particularly difficult" because CloudfChange "only asserts a direct infringement theory of 'use' against NCR" and "abandoned all other theories." *CloudfChange, LLC v. NCR Corp.*, No. W-19-cv-00513-ADA, 2022 U.S. Dist. LEXIS 195536, 2022 WL 15527756, at *5 (W.D. Tex. Oct. 27, 2022). Under CloudfChange's theory "[i]t's the defendant [NCR] that uses the Internet connection as part of the system," and thus has "control and beneficial use of the system per *Centillion*." J.A. 8195 (Pretrial Conference Tr. 45:16-18).

At trial, CloudfChange's technical expert, Gregory Crouse, testified that a customer-merchant downloads the NCR Silver software from an app store onto a POS terminal such as a tablet. He explained that a merchant

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can use NCR Silver, for example, to add new categories and add or edit buttons on the merchant's POS screens. He also testified that using NCR Silver requires an Internet connection between the merchant's POS terminal and NCR's backend server. Mr. Crouse concluded that use of NCR Silver infringed claim 1 of the '640 patent, but he did not discuss how that use could be attributed to NCR, as opposed to the merchants or users of NCR Silver.

CloudfChange's direct infringement theory turned on its argument that "NCR controls and benefits from its Silver system, including the requirement that customers who use the system supply an internet connection and network access to do so." J.A. 11059. In support of this argument, CloudfChange pointed to Mr. Crouse's testimony that a merchant who purchases NCR Silver must supply their own Internet access to use NCR Silver. CloudfChange also introduced into evidence NCR Silver's Merchant Agreement, which directs the merchant to "maintain Internet access at your own expense" to use the service. J.A. 15490. For its part, NCR did not dispute that its Merchant Agreement makes Internet access the merchant's responsibility; rather, NCR argued that this does not demonstrate control of the merchant's *use of* NCR Silver.

On cross-examination, CloudfChange's technical expert, Mr. Crouse, agreed that it is NCR's customer-merchants who put NCR Silver into service and benefit from using it. J.A. 9049 (Trial Tr. 469:6-25); J.A. 9051 (Trial Tr. 471:17-25). The following exchange from NCR's cross-examination of Mr. Crouse is illustrative:

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Q. And so as part of the merchant agreement, NCR tells customers that they need to get their own Internet access, correct?

A. Yes, sir.

Q. Okay. And so it's the consumers, the merchants that actually use NCR Silver, correct, in their retail operations?

A. Yes, sir.

Q. Okay. So you admit that a merchant who purchases the NCR Silver has to obtain their own Internet access, don't you?

A. Yes, sir.

Q. Okay. You admit that the merchants put NCR Silver into service, don't you?

A. Yes, sir.

....

Q. You admit that merchants benefit from the use of NCR Silver, don't you?

A. Yes, sir. I do.

J.A. 9049 (Trial Tr. 469:6-25). Citing this testimony, NCR timely moved for JMOL under Federal Rule of Civil

Appendix A

Procedure 50(a), arguing that no reasonable jury could find infringement.

After a four-day trial, the jury found that NCR directly infringed all asserted claims, including claims 1, 3, 4, 5, 6, 11, 12, and 13 of the '640 patent and claims 1-4 of the '012 patent (collectively the "Asserted Claims"). The jury also found that NCR had not proven that the Asserted Claims were invalid. Finally, the jury found NCR's infringement willful and awarded CloudofChange lump sum damages totaling \$13.2 million.

NCR then renewed its motion for JMOL under Rule 50(b) or, in the alternative, moved for a new trial under Rule 59. NCR's renewed motion challenged the verdict for five principal reasons: (1) the jury was erroneously instructed; (2) the district court erred by failing to interpret the claim term "builder"; (3) the Asserted Claims are invalid; (4) NCR does not use the claimed system (and thus does not infringe) as a matter of law; and (5) the jury's award of damages under the entire market value rule was erroneous.

Most relevant to this opinion, NCR argued it was entitled to JMOL of no infringement because CloudofChange did not offer substantial evidence that NCR (as opposed to its merchant customers) controls and benefits from every element of the claimed system as required by *Centillion*. Specifically, NCR argued that "[s]imilar to Qwest [the accused infringer in *Centillion*], NCR does not infringe the asserted system claim because 'the entire system is not used until a customer loads

Appendix A

software on its personal computer and processes data.” J.A. 10781 (quoting *Centillion*, 631 F.3d at 1287). NCR pointed to CloudofChange’s expert’s admission that NCR’s merchants, not NCR, put NCR Silver into service, control their use of NCR Silver, and benefit from the use of NCR Silver.

The district court held that substantial evidence supported the jury’s infringement findings and denied NCR’s JMOL motion. In so holding, the court acknowledged that NCR is liable for direct infringement for “use” only if it controls the system and obtains benefit from it. But the court explained that the “sticking point is whether [CloudofChange] provided substantial evidence to support a theory of vicarious liability as to certain claim elements.” *Cloudofchange*, 2022 U.S. Dist. LEXIS 195536, 2022 WL 15527756, at *5.

The district court first held “that NCR, although it owns and operates the Back Office, does not put the accused system into service because it does not itself control the network.” 2022 U.S. Dist. LEXIS 195536, [WL] at *7. Instead, the court concluded that NCR’s merchants were analogous to the accused infringer’s customers in *Centillion* because the merchants benefit from and put the system into service by initiating demand for service at the front-end. Accordingly, the district court held that NCR’s customers—not NCR—“put the accused system into service by obtaining internet access” and “therefore, control this portion of the accused system.” *Id.*

The court then turned to whether the merchants’ use of NCR Silver could be attributed to NCR under *Centillion*

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and *Akamai Technologies, Inc. v. Limelight Networks, Inc.*, 797 F.3d 1020 (Fed. Cir. 2015) (en banc) (per curiam). Relying on the legal framework for direct infringement of method claims in *Akamai*, the court held that substantial evidence supported the jury’s finding that NCR directed or controlled its merchants’ use of the claimed system. In so holding, the court distinguished the facts in this case from those in *Centillion*, noting that in *Centillion* there was “no vicarious liability because ‘Qwest in no way direct[ed] its customers to perform nor d[id] its customers act as its agents.’” *Cloudofchange*, 2022 U.S. Dist. LEXIS 195536, 2022 WL 15527756, at *7 (quoting *Centillion*, 631 F.3d at 1287). The court concluded that “[u]nlike Qwest in *Centillion*, NCR ‘directs its customers to perform’ by requiring its merchants to obtain and maintain internet access.” 2022 U.S. Dist. LEXIS 195536. [WL] at *8. To support its conclusion, the court pointed to the NCR Silver Merchant Agreement as evidence that “NCR ‘contracts with [merchants] to perform one or more’ of the claimed elements, i.e., internet or network access.” *Id.* (quoting *Akamai*, 797 F.3d at 1023) (alteration in original).

NCR appeals, arguing *inter alia* that the district court erred in denying JMOL of noninfringement. We have jurisdiction under 28 U.S.C. § 1295(a)(1).

DISCUSSION

We review the grant or denial of a motion for JMOL under the law of the regional circuit. *Kaufman v. Microsoft Corp.*, 34 F.4th 1360, 1368 (Fed. Cir. 2022). The Fifth Circuit reviews the grant or denial of JMOL de novo. *Janvey v. Dillon Gage, Inc. of Dallas*, 856 F.3d 377,

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384 (5th Cir. 2017). Under the Fifth Circuit’s standard for JMOL, a jury’s determination on infringement must be upheld unless it is not supported by substantial evidence. *ACCO Brands, Inc. v. ABA Locks Mfr. Co. Ltd.*, 501 F.3d 1307, 1311 (Fed. Cir. 2007).

I

Because this case turns on the application of *Centillion* and principles of vicarious liability, we begin by discussing our precedent and the relevant legal framework.

This court first addressed the issue of infringement for “use” of a system claim that includes elements in the possession of more than one actor in *Centillion*. We held that a party “uses” a system for purposes of infringement when it “control[s] the system as a whole and obtain[s] benefit from it.” *Centillion*, 631 F.3d at 1284. The control contemplated is not direct or physical control over each individual element of the system, but rather the ability to make the system elements “work for their patented purpose” and thus use “every element of the system by putting every element collectively into service.” *Id.*

At a high level, the claims at issue in *Centillion* involved a system for presenting information to an end user related to transaction records and summary reports from those records. *Id.* at 1281. The system claims included both a back-end system, maintained by the service provider, and a front-end system with a personal computer, maintained by the end user. *Id.* The accused

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systems also included two parts: (i) Qwest's back-office system that processed data and (ii) Qwest's customers' front-end client application with a personal computer for managing billing information. *Id.* The parties disputed whether it was Qwest or its customers that "used" the claimed system for purposes of direct infringement.

We held that Qwest's customers (not Qwest) used the claimed system as a matter of law. *Id.* at 1285. Because the customers chose when to put the system into service either by (1) creating queries, which in turn resulted in the back-end processing by Qwest; or (2) by subscribing to receive monthly electronic billing information from Qwest's back-office system, we concluded the customer controlled the system. We reasoned that if the customer did not make the request or subscribe, then the back-end processing would not be put into service. *Id.* We further explained that this was "use" because "but for the customer's actions, the entire system would never have been put into service" and "the customer clearly benefit[ed] from this function." *Id.*

We next considered whether Qwest was vicariously liable for the actions of its customers such that the customers' use may be attributed to Qwest. We looked to our precedent on vicarious liability regarding both method claims and system claims. *Id.* at 1286-87 (collecting cases). Applying this precedent, we held that because Qwest "in no way directs its customers to perform nor do its customers act as its agents," Qwest was not vicariously liable for the actions of its customers. *Id.* at 1287.

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Turning to the facts of this case, we hold that the district court correctly determined that it is NCR's merchants (not NCR) that use the claimed system. *See id.* at 1284. As the district court explained "NCR, although it owns and operates the Back Office, does not put the accused system into service." *Cloudofchange*, 2022 U.S. Dist. LEXIS 195536, 2022 WL 15527756, at *7. Like the customers in *Centillion*, NCR's merchants put the system into service because they initiate at the POS terminal a demand for service (for example, building or editing a POS) and benefit from the back end providing that service. NCR's merchants therefore "control the system as a whole and obtain benefit from it." *Centillion*, 631 F.3d at 1284. In other words, the merchants make the system parts "work for their patented purpose," and thus use "every element of the system by putting every element collectively into service." *Id.*

That NCR occasionally provides the POS hardware used by the customer-merchants does not change our view. J.A. 8195-96. CloudofChange admitted that, in most cases, NCR's merchants provide their own hardware. And CloudofChange did not present different infringement arguments based on whether NCR merely provided the software or provided both the POS hardware and the software. Because in most cases NCR provides only the software to the merchant and CloudofChange forfeited any argument for those few circumstances where NCR provides the POS hardware, we see little daylight between this case and *Centillion*. Moreover, as CloudofChange's own expert agreed, it is NCR's merchants who put NCR

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Silver into service, control their own use of NCR Silver, and benefit from the use of NCR Silver.

CloudofChange next argues that, in fact, NCR “benefits from” the entire NCR Silver system from the monthly subscription fee, product improvements through testing and evaluation, product ideas, transaction data, revenues from third-party products and services, marketing rights associated with the merchant’s use, and advertising. Appellee’s Br. 26-27. But these are not the kind of benefits on which *Centillion* focuses. *See, e.g., Intell. Ventures I LLC v. Motorola Mobility LLC*, 870 F.3d 1320, 1329 (Fed. Cir. 2017) (rejecting notion that an accused infringer need only derive a benefit from a claimed component of the claimed system to directly infringe). *Centillion* asks whether a party uses the entire claimed system by putting that system to use and receiving the benefit (i.e., the recited purpose or result) of that use. Here, we agree with the district court that it is NCR’s merchants, not NCR, who initiate the use of NCR Silver at the POS terminals and benefit from the POS builder software at the web server building or editing the POS terminals.

III

We now turn to whether NCR is vicariously liable for its merchant-customers’ use of the claimed system. As the district court correctly recognized, *Centillion*’s analysis did not end after concluding that Qwest’s customers used the claimed invention. Instead, we considered whether “Qwest is vicariously liable for the actions of its customers such that ‘use’ by the customers may be attributed to

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Qwest.” *Centillion*, 631 F.3d at 1286. Answering this question, we held that because Qwest “in no way directs its customers to perform nor do its customers act as its agents,” Qwest was not vicariously liable for the actions of its customers. *Id.* at 1287. In so holding, we emphasized that while Qwest provided application software and technical assistance, it was entirely the decision of the customer whether to install and operate the software on its personal computer data processing means. *Id.*

So too here. NCR does not direct or control its merchants to subscribe to the NCR Silver system, download the NCR Silver app on their POS terminals, or put the NCR Silver system into use by initiating action at the POS terminals to cause the NCR Silver software to modify its POS terminals. NCR’s merchants take these actions of their own accord. That NCR’s Merchant Agreement makes merchants responsible for obtaining and maintaining Internet access does not equate to contractually obligating merchants put the entire accused NCR Silver system into use. We thus conclude as a matter of law that NCR does not direct or control its merchants’ use of the claimed system, nor do its merchants act as NCR’s agents.

In concluding otherwise, the district court erred by focusing its direction or control analysis on one element of the system—Internet access. Because NCR’s Merchant Agreement makes merchants responsible for obtaining and maintaining Internet access, the district court determined “NCR ‘contracts with [merchants] to perform one or more’ of the claimed elements.” *Cloudfchange*, 2022 U.S. Dist. LEXIS 195536, 2022 WL 15527756, at *8

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(alteration in original) (quoting *Akamai*, 797 F.3d at 1023). Based on this conclusion, the district court held that NCR directed or controlled its merchant-customers' use of the claimed system. But, in the context of this case, directing the merchants to perform one element of a system claim is not the proper test for analyzing vicarious liability for use of a system claim.

Specifically, the district court's analysis conflates use of a method claim (which was at issue in *Akamai*) with use of a system claim (which was at issue in *Centillion*). "Under section 271(a), the concept of 'use' of a patented method or process is fundamentally different from the use of a patented system or device." *NTP, Inc. v. Rsch. In Motion, Ltd.*, 418 F.3d 1282, 1317 (Fed. Cir. 2005). "[T]he use of a process necessarily involves doing or performing each of the steps recited," while the "use of a system as a whole" involves putting that entire system to use and benefitting from it. *Id.* at 1318.

In *Akamai*, the accused infringer, Limelight, performed every step of the claimed method except one, which was performed by its customer. *Akamai*, 797 F.3d at 1024. It was in this unique context that this court focused on one claim element (the one that Limelight itself did not perform) and considered whether Limelight directed or controlled its customers' performance of this claim step. *Id.* at 1024. After answering this question in the affirmative, the court held that Limelight was vicariously liable for the performance of all the steps of the method claim because it either performed or directed or controlled the performance of all of the claim elements. *Id.* at 1024-25.

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Applying the vicarious liability principles from *Akamai* to this case, the appropriate question is whether NCR directed or controlled or should otherwise be vicariously liable for its customers' use of the system claim. Specifically, the issue is whether NCR directed or controlled its merchant-customer's actions in putting the entire claimed system to service to build or edit POS systems. As the contractual obligation to supply an Internet connection does not amount to direction or control of a merchant's use of the claimed system to build POS systems, we hold that NCR is not vicariously liable for that infringing use.

CONCLUSION

Because we conclude the district court erred in denying JMOL of no infringement, we do not reach the other issues presented on appeal.² For the reasons discussed above, we reverse the district court's denial of JMOL and vacate the jury verdict.³

REVERSED

2. At oral argument, NCR contingently abandoned its counterclaim for declaratory judgment of invalidity should this court reverse the infringement verdict. Oral Arg. at 8:03-8:57, https://oralarguments.ca9.uscourts.gov/default.aspx?fl=23-1111_06042024.mp3. Accordingly, we do not reach the issue of invalidity.

3. In light of our disposition on the merits, we deny as moot Appellant NCR's Renewed Motion Regarding IPR Decisions asking us to take judicial notice of *inter partes* review decisions related to the Asserted Patents (ECF No. 67).

**APPENDIX B — ORDER OF THE
UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF TEXAS,
WACO DIVISION, FILED OCTOBER 27, 2022**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

W-19-CV-00513-ADA

CLOUDOFCHANGE, LLC,

Plaintiff,

-vs-

NCR CORPORATION,

Defendant.

**ORDER DENYING DEFENDANT NCR'S RULE
50(B) MOTION FOR JUDGMENT AS A MATTER
OF LAW OR ALTERNATIVELY, A NEW TRIAL**

Before the Court is Defendant NCR Corporation's ("NCR") Rule 50(b) Motion for Judgment as a Matter of Law ("JMOL") and Rule 59 Motion for a New Trial filed on August 10, 2021. ECF No. 194. Plaintiff CloudofChange, LLC ("CoC") filed its Response on August 24, 2021. ECF No. 196. NCR then filed its Reply on August 31, 2021. ECF No. 197. NCR asks this Court for a judgment as a matter of law ("JMOL") of no infringement for U.S. Patent Nos. 9,400,640 ("640 Patent") and 10,083,012 ("012 Patent"), a

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judgment of invalidity for the asserted claims of the '640 Patent and the '012 Patent, a judgment of no willfulness, and a judgment of no damages or a remittitur. *Id.* After considering the parties' briefs and relevant law, the Court **DENIES** Defendant's Motion for the reasons below.

I. BACKGROUND

CoC filed its suit for patent infringement on August 30, 2019. ECF No. 1. In its Complaint, CoC accused NCR of infringing the '640 Patent and '012 Patent (collectively, the "Asserted Patents"). On May 17, 2021, following a four-day trial, the jury found that NCR infringed claims 1, 3, 4, 5, 6, 11, 12, and 13 of the '640 Patent and claims 1, 2, 3, and 4 of the '012 Patent (collectively, the "Asserted Claims"). ECF No. 159 at 3-4. The jury also found that NCR had not met its burden to prove that claims 1, 3, 4, 5, 6, 11, 12, or 13 of the '640 Patent were invalid; nor did the jury find that claims 1, 2, 3, 4, or 9 of the '012 Patent were invalid. *Id.* at 5-6. The jury also found that NCR's infringement was willful. *Id.* at 8. Accordingly, the jury awarded CoC lumpsum damages in a total of \$13,200,000.00. *Id.* at 7-8. NCR subsequently filed a Rule 50(b) Motion for JMOL and alternatively a Rule 59 Motion for a New Trial on August 10, 2021. ECF No. 194.

II. LEGAL STANDARD

A court may grant JMOL against a prevailing party only if a reasonable jury would not have a legally sufficient evidentiary basis to find for the non-moving party on that issue. Fed. R. Civ. P. 50(a)(1). In deciding a renewed JMOL

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motion, a “court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence.” *Taylor-Travis v. Jackson State Univ.*, 984 F.3d 1107, 1112 (5th Cir. 2021). The court must disregard all evidence favorable to the moving party that the jury is not required to believe. *Id.* This is because “[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.” *Wellogix, Inc. v. Accenture, L.L.P.*, 716 F.3d 867, 874 (5th Cir. 2013).

Courts grant JMOL for the party bearing the burden of proof as to invalidity only in extreme cases, when the party bearing the burden of proof has established its case by evidence that the jury would not be at liberty to disbelieve, and the only reasonable conclusion is in its favor. *Mentor H/S, Inc. v. Medical Device All., Inc.*, 244 F.3d 1365, 1375 (Fed. Cir. 2001). JMOL is inappropriate if the record evidence is such that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions. *Laxton v. Gap Inc.*, 333 F.3d 572, 579 (5th Cir. 2003).

A jury verdict must stand unless there is a lack of substantial evidence, in the light most favorable to the successful party, to support the verdict. *Am. Home Assur. Co. v. United Space All., LLC*, 378 F.3d 482, 487 (5th Cir. 2004). Substantial evidence is more than a scintilla, but less than a preponderance. *Nichols v. Reliance Standard Life Ins. Co.*, 924 F.3d 802, 808 (5th Cir. 2019). Thus, JMOL must be denied if a jury’s verdict is supported by legally

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sufficient evidence that amounts to more than a mere scintilla. *Laxton*, 333 F.3d at 585.

Similarly, a court may grant a new trial on all or some of the issues only when “the verdict is against the great weight of the evidence.” *Whitehead v. Food Max Miss., Inc.*, 163 F.3d 265, 269 (5th Cir. 1998). In other words, the movant must show “an absolute absence of evidence to support the jury’s verdict.” *Id.* The court need not view the evidence in the light most favorable to the nonmoving party. *Smith v. Transworld Drilling Co.*, 773 F.2d 610, 613 (5th Cir. 1985). There must be a “miscarriage of justice” for a court to grant a new trial. *Datatreasury Corp. v. Wells Fargo & Co.*, 758 F. Supp. 2d 382, 385 (E.D. Tex. 2010).

III. DISCUSSION

A. The jury was not erroneously instructed.

Rule 51 of the Federal Rules of Civil Procedure states that “A party may assign as error: (A) an error in an instruction actually given, if that party properly objected; or (B) a failure to give an instruction, if that party properly requested it and—unless the court rejected the request in a definitive ruling on the record—also properly objected.” Because objections to jury instructions are a procedural matter, the law of the Fifth Circuit applies. *See Advanced Display Sys., Inc. v. Kent State Univ.*, 212 F.3d 1272, 1281 (Fed. Cir. 2000).

“A party seeking to alter a judgment based on erroneous jury instructions must establish that (1) it made

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a proper and timely objection to the jury instructions, (2) those instructions were legally erroneous, (3) the errors had prejudicial effect, and (4) it requested alternative instructions that would have remedied the error.” *Advanced Display*, 212 F.3d at 1281. A district court’s refusal to give a requested jury instruction is reversible error “only if the instruction 1) was a substantially correct statement of law, 2) was not substantially covered in the charge as a whole, and 3) concerned an important point in the trial such that the failure to instruct the jury on the issue seriously impaired the [party’s] ability to present a given [claim].” *Kanida v. Gulf Coast Med. Pers. LP*, 363 F.3d 568, 578 (5th Cir. 2004) (quoting *United States v. McClatchy*, 249 F.3d 348, 356 (5th Cir. 2001)).

NCR contends that a new trial is necessary because an instructional error was made to the jury. ECF No. 194 at 3. NCR asserts that the jury should have been instructed that to find infringement, CoC had to prove that NCR controls and benefits from “each element” of the claimed system. *Id.* at 2. NCR argues that the jury instructions allowed the jury to find infringement if NCR controlled and benefited from the system as a whole without instructing the jury to find that NCR controlled and benefited from each individual element of the system. ECF No. 197 at 4. Because the jury instruction “conflate[d] ‘use’ by the end-user with ‘use’ by NCR,” at minimum, a new trial is required. ECF No. 194 at 3-4.

CoC argues that a new trial is unnecessary because the jury was not erroneously instructed. Both parties agreed that the “use” standard is whether NCR “control[s] the system and obtain[s] benefit from it.” ECF No. 196

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at 2. CoC points out that the instructions required the jury, immediately preceding the contested language, to “compare the system with each and every one of the requirements of a claim to determine whether or not all of the requirements of that claim have been met.” *Id.* at 3 (citing Trial Tr. 837:9-11) (emphasis omitted). The instructions also stated that “[i]f one party controls and makes beneficial use of a system that contains all the requirements of the claim, that party may be an infringer even though the parts of the system do not all operate in the same place or at the same time.” *Id.* (citing Trial Tr. 837:17-20).

The Court does not find NCR’s argument persuasive. The record shows that the jury instructions tasked each juror with determining whether “the accused system includes each element of the asserted claim” and to “compare the system with each and every one of the requirements of a claim.” Trial Tr. 837:13-14, 837:9-11. In short, the first sentence is the controlling instruction as to the depth of the analysis. Thus, when the instruction is read as a whole, it instructs the jury that to find infringement, the jury must analyze each and every element, or requirement, of a claim, and that use follows the same analysis. NCR’s argument simply does not reflect the language of the jury instructions as to literal infringement.

Even if the instruction were in error, as NCR claims, for failure to differentiate between a system level analysis and a claim-element level analysis, NCR’s proposed instruction does not remedy the error. After the charge

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conference, NCR stated, “But we want you to make it very clear that a single-actor infringer of a systems claim does not have to have physical control but still has to put it into service consistent with the instructions that defendant NCR Corporation recommended to be included in the final charge.” Trial Tr. 816:16-20.¹ To the Court’s knowledge, the last recommendation was filed as a supplement to the pretrial order. *See* ECF No. 124-2 at 36. In those instructions, NCR disagreed with the language: “If one party controls and makes beneficial use of a system that contains all the requirements of the claim, that party may be an infringer even though the parts of the system do not all operate in the same place or at the same time.” *See id.* at 35. NCR provided alternative instructions which stated in full:

Direct infringement of a system claim by use occurs if a party must put the invention into service, i.e., controls the system as a whole and obtain benefit from it. Plaintiff has made the assertion that NCR has used the systems covered by the Asserted Claims. To prevail on this assertion, Plaintiff must prove that NCR, as a single entity, put the system into serve, i.e., controls the system as a whole and obtains benefit from it. If a customer, instead of NCR, uses the system by putting it into service, then NCR has not directly used that claim.

1. In the Court’s view, NCR should have read its proposed instruction into the record to provide explicit “alternative instructions that would have remedied the error.” *Advanced Display*, 212 F.3d at 1281.

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Id. at 36. These instructions are redundant of the Court's instructions. "NCR, as a single entity, put the system into serve, i.e., controls the system as a whole and obtains benefit from it," *see id.*, is the equivalent of the Court's instructions that "[i]f one party controls and makes beneficial use of a system that contains all the requirements of the claim . . .," *see* Trial Tr. 837:17-20. Additionally, "[i]f a customer, instead of NCR, uses the system by putting it into service, then NCR has not directly used that claim," *see* ECF No. 124-2 at 36, is also covered by the Court's instruction that "the accused system includes each element of the asserted claim" and "one party controls and makes beneficial use of a system . . .," *see* Trial Tr. 837:13-14, 17. NCR's repetitive instruction would not cure the alleged deficiency.

In addition, while attorneys cannot fix errant instructions, both attorneys clearly argued that only "use" by NCR, not "use" by the end-user, constituted direct infringement. The parties' arguments remove any doubt as to a misunderstanding. At closing arguments, CoC argued:

But specifically you should look at the instructions -- I want to talk to you about the system instructions. This is -- NCR sells this as a system. And I expect that the defendants are going to argue that it's not a system. They don't meet the system claim because we don't -- they don't supply every part of the system. That's not true.

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Trial Tr. 868:18-23. NCR responded in its closing arguments with the same point:

Finally, we heard a little bit about a while ago about how we don't meet the system claim limitation. And, again, they've got to prove, it's their burden of proof that we supply all these things, that we control all these things.

Trial Tr. 897:20-24. The Court's instructions provided the necessary support for each party to reference to emphasize that "use" was required by NCR at an element level, not a system level. Thus, the Court denies NCR's motion for a new trial based on errant jury instructions for "use" of a system. The jury was instructed to evaluate control and benefit at an element level, not merely a system level. Having determined that the Court properly instructed the jury, the Court addresses the remaining arguments regarding whether substantial evidence supported the jury's findings of infringement.

B. Substantial Evidence Supports the Jury's Infringement Findings for the Asserted Patents.

Under 35 U.S.C. § 271, to prove a literal infringing "use" of a system, "a patentee must demonstrate 'use'—that is, 'control' and 'benefit'—of the claimed system by an accused direct infringer." *Intell. Ventures I LLC v. Motorola Mobility LLC*, 870 F.3d 1320, 1328 (Fed. Cir. 2017). The jury found that the NCR Silver system sold by NCR literally infringed the '640 Patent and the '012

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Patent. NCR seeks JMOL on those findings and, in the alternative, a new trial.

1. Substantial Evidence Supports the Jury’s Infringement Finding for the “Internet Connection,” “Network,” and “Network Access” Limitations.

NCR argues that CoC failed to meet its burden of proof because there is no substantial evidence that NCR itself controls end users’ network connections. ECF No. 197 at 5. Specifically, NCR points to Claim 1 of the ’640 Patent, which requires the presence of “a network, wherein the network comprises the Internet” and/or “the worldwide web.” ECF No. 194 at 5 (citing ’640 Patent at Cl. 1). Similarly, Claim 1 of the ’012 Patent requires “a communications network.” *Id.* (citing ’012 Patent at Cl. 1). NCR points out that it is ultimately the merchant’s decision, not NCR’s, on whether or not the NCR Silver software is installed and runs. *Id.* NCR points to the concession of CoC’s expert witness, Mr. Crouse, that merchants “put NCR Silver into service,” and that the merchant “controls its own use of NCR Silver.” Tr. 469:10-25. Additionally, NCR argues that because the “network” elements do not exist without the “affirmative decisions and actions of third parties,” CoC has not shown that NCR “controls” the end users’ network connections. ECF No. 194 at 4. NCR claims that evidence showing NCR Silver requires a network for its full use is not evidence that NCR exerts control over the claimed element. *Id.* (citing *LifeNet Health v. LifeCell Corp.*, 837 F.3d 1316, 1326 (Fed. Cir. 2016)) (“The claimed inventions . . . affirmatively required

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action by a third party, without which a limitation would be absent.”).

CoC argues that evidence established at trial does show NCR controls the “network access” limitation. ECF No. 196 at 4_8. For the internet, NCR exerts control over the end user through its Merchant Agreement, which directs merchants to obtain and maintain their own Internet access to use the NCR Silver software. *Id.* at 5_6. CoC also points out that there is ample testimony that NCR uses an internet connection for its Back Office functionality, which shows use through control and benefit. *Id.* at 6. Specifically, CoC points out that the jury saw evidence that “the hardware and software of the NCR Silver system can use HTTPS to communicate” and that one of those pieces of evidence included a screenshot of several NCR training videos showing internet connection. *Id.*; Trial Tr. 178:20-23. Additionally, NCR “benefits” from the entire NCR Silver system from the monthly subscription fee, product improvements through testing and evaluation, product ideas, transaction data, revenues from third-party products and services, marketing rights associated with the merchant’s use, and advertising. *Id.* at 4. Specifically, as to the “Network access” limitation, NCR received a benefit through its Back Office functionality. *Id.* at 6.

At the outset, the Court notes that patentees have “little chance of prevailing in a multiple-party scenario by asserting direct infringing ‘use’ against the company entity that provided the system to its end-users.” Dolly Wu, *The Use of Use for Patented Systems in A Single*

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or *Joint Infringement World*, 14 COLUM. SCI. & TECH. L. REV. 514, 544 (2013). The caselaw is daunting; results can turn on fact-specific scenarios, the definitional language used for some terms overlaps with that of other unrelated terms, and standards used among system and method claims may or may not differ in inarticulable ways. CoC's proof requirements are particularly difficult as it only asserts a direct infringement theory of "use" against NCR, having abandoned all other theories. *See* ECF No. 196 at 2.

The parties agree that NCR is liable for direct infringement for "use" if it "control[s] the system and obtain[s] benefit from it." *See id.* at 2 (citing ECF No. 194 at 2); *see also Centillion Data Sys., LLC v. Qwest Communs. Int'l*, 631 F.3d 1279, 1284 (Fed. Cir. 2011) ("We hold that to 'use' a system for purposes of infringement, a party must put the invention into service, *i.e.*, control the system as a whole and obtain benefit from it."). For a finding of direct infringement, CoC must prove one of two types of control: (1) control and beneficial use, *i.e.*, single party direct infringement, or (2) control under a theory of vicarious liability, *i.e.*, divided infringement. *See Centillion*, 631 F.3d at 1286 (explaining that if the defendant did not "use" the patented invention itself, the plaintiff must show that the defendant is vicariously liable for the acts of others). Here, the sticking point is whether CoC provided substantial evidence to support a theory of vicarious liability as to certain claim elements. If it did, then the jury could have correctly found that NCR directly infringed the Asserted Claims. Otherwise, judgment as a matter of law in favor of NCR is required.

*Appendix B***1. NCR's Independent "Use" of the Accused System**

The Federal Circuit holds that "to 'use' a system for purposes of infringement, a party must put the invention into service." *Centillion*, 631 F.3d at 1284 (citing *NTP, Inc. v. Research In Motion, Ltd.*, 418 F.3d 1282, 1317 (Fed. Cir. 2005)). "In order to 'put the system into service,' the end user must be using all portions of the claimed invention." *Id.* To "put the system into service" the accused infringer must "control the system as a whole and obtain benefit from it." *Id.* (citing *NTP, Inc.*, 418 F.3d at 1317). Yet the requisite control need not be "physical" or "direct" control over each individual element of the system. *See id.*

The *Centillion* opinion is a guide for divining the necessary "control" of an accused system running software on a front- and back-end. In *Centillion*, the Federal Circuit considered asserted system claims and determined that the defendant, Qwest, did not exercise sufficient control over the accused system despite owning and operating all the back-end components. *Id.* at 1286-87. Yet Qwest's customers, who only contribute the front-end hardware, *did* exercise sufficient control. *Id.* at 1285. The accused system included two parts: Qwest's back-end systems and front-end client applications that Qwest's customers could install on their personal computer. *Id.* at 1281. The accused products provided two different modes of operations. *Id.* at 1285. First, Qwest offered an "on-demand" operation in which a customer could create a query with "particular and specified information" that the Qwest back-end system processes to provide a

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result for the customer to download. *Id.* Second, Qwest offered a “standard” operation in which, after a customer subscribes to receive monthly summary reports, Qwest’s back-end systems automatically creates summary reports every month that the customer may download. *Id.*

The *Centillion* panel determined that the customer controls the system and obtains a benefit from it in the on-demand operation:

The customer controls the system by creating a query and transmitting it to Qwest’s back-end This query causes the back-end processing to act for its intended purpose to run a query and return a result. The user may then download the result and perform additional processing as required by the claim. If the user did not make the request, then the back-end processing would not be put into service It makes no difference that the back-end processing is physically possessed by Qwest.

Id. at 1285. It reached the same conclusion for the standard operation:

By subscribing a single time, the user causes the back-end processing to perform its function on a monthly basis. Like the on-demand operation, the back-end processing in normal operation is performed in response to a customer demand. The difference though is that a single customer demand (the act of subscribing to the service)

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causes the back-end processing monthly. But in both modes of operation, it is the customer initiated demand for the service which causes the back-end system to generate the requisite reports. This is “use” because, but for the customer’s actions, the entire system would never have been put into service. This is sufficient control over the system . . . and the customer clearly benefits from this function.

Id. The *Centillion* panel rejected the theory that Qwest itself controls the system and obtains benefit from it. *Id.* at 1286. The discussion was brief: “While Qwest may make the back-end processing elements, it never ‘uses’ the entire claimed system because it never puts into service the personal computer data processing means. Supplying the software for the customer to use is not the same as using the system.” *Id.*

Centillion’s effects in the software space are slowly percolating through district courts. For example, in *Acceleration Bay LLC v. Activision Blizzard, Inc.*, the U.S. District Court for the District of Delaware concluded that a defendant, Activision, did not “use” the accused system where Activision’s customers installed and executed Activision’s software on the customer’s own computer. 324 F. Supp. 3d 470, 483-84 (D. Del. 2018). The asserted claims were directed to “networks” or “channels” made up of “participants” and “connections” between “participants.” *Id.* at 479. The plaintiff’s experts agreed that “participants” are ultimately “application programs”—namely, video games—executing on

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Activision's customers' computers. *Id.* at 480. It was undisputed that "the customer must install Activision's software" on a computer, "execute it, and choose an online, multiplayer game mode with more than 5 other participants to make and use the accused networks." *Id.* at 481. Invoking *Centillion*, the *Acceleration Bay* court determined that Activision's "exclusive ownership and control of the game software" did not "put the invention into service." *Id.* at 482. Activision never used the entire claimed system because "[n]o claimed system can be put into service until multiple [Activision] customers install the software and 'execut[e] [it] on the client computers.'" *Id.* The Court also found that Activision did not benefit from the use of each element of the claimed system. *Id.* at 483.

This Court finds itself in accord with the *Centillion* and *Acceleration Bay* opinions in concluding that NCR, although it owns and operates the Back Office, does not put the accused system into service because it does not itself control the network. In *Centillion*, the accused infringer's customers put the accused system into service by initiating, on the front-end components, a demand for service that caused back-end components to act out their intended purpose: running a query and returning a result. 631 F.3d at 1285. Accordingly, the accused infringer did not control the accused system—the customers did. Like the customers in *Centillion*, NCR's merchants put the accused system into service by obtaining internet access. NCR's merchants, therefore, control this portion of the accused system—not NCR. And, as in *Centillion*, it is of no moment that NCR supplies "the software for the customer to use." *Id.* at 1286.

*Appendix B***2. The Merchants’ “Use” Can Be Attributed to NCR**

NCR’s argument solely focuses on the role of the end user, asserting that the merchants “must maintain Internet access at [their] own expense.” ECF No. 197 at 1 (citing ECF No. 194-4 ¶¶ 8.1, 8.2). CoC does not meaningfully dispute that the merchants obtain the internet access, though it argues NCR itself also uses the internet. Thus, the parties largely agree on the lack of the first form of control, i.e., single-party infringement. But NCR does not opine on whether such language from the NCR Silver Merchant Agreement (ECF No. 194-4, JTX 80) constitutes “direction or control” over the merchant such that NCR controls the network limitations. CoC’s theory of the case relies on this point—“NCR controls and benefits from its Silver system, including the requirement that customers who use the system supply an internet connection and network access to do so.” ECF No. 196 at 6. The Court finds that substantial evidence supports the jury’s finding of direction and control, i.e., divided infringement via vicarious liability, and the control and beneficial use of each of the elements of the system.

In *Centillion*, the Federal Circuit concluded, as this Court does here, that the accused infringer has not committed infringement through traditional “use” because the accused infringer has not put the entire accused system into service. 631 F.3d at 1286. Yet this Court, like the *Centillion* court, will not end its analysis there. The *Centillion* panel then considered whether it could attribute Qwest’s customers’ use of the front-end components to Qwest under a “vicarious liability” theory. *Id.* In doing

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so, the court heavily cited divided infringement caselaw restricted to the method-claim context. *Id.* (first citing *BMC Res., Inc. v. Paymentech, L.P.*, 498 F.3d 1373 (Fed. Cir. 2007); then citing *Muniauction, Inc. v. Thomson Corp.*, 532 F.3d 1318 (Fed. Cir. 2008); and then citing *Cross Med. Prods. v. Medtronic Sofamor Danek, Inc.*, 424 F.3d 1293 (Fed. Cir. 2005)). The *Centillion* court concluded there was no vicarious liability because “Qwest in no way directs its customers to perform nor do its customers act as its agents.” *Id.* at 1287 (“While Qwest provides software and technical assistance, it is entirely the decision of the customer whether to install and operate this software on its personal computer data processing means.”).

The Court views *Centillion* as endorsing the theory that divided infringement applies to infringement through the “use” of system claims just as it applies to method claims. *Centillion* supposes that vicarious liability may be used to attribute a customer’s use of a claimed component to the accused service provider. And the *Centillion* court separated its vicarious-liability analysis from its analysis as to whether Qwest put the entire system into service. The *en banc* Federal Circuit’s *Akamai V* opinion then clarified and expanded how to attribute one entity’s conduct to another using vicarious liability principles.² *Akamai V* articulated these viable theories, stating that a single

2. The *Akamai V* court clarified, however, that unnamed previous opinions used the term “vicarious liability” loosely. 797 F.3d at 1022 n.2. “In the context of joint patent infringement, an alleged infringer is not liable for a third party’s commission of infringement—rather, an alleged infringer is responsible for method steps performed by a third party.” *Id.*

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entity directs or controls the acts of another “if it acts through an agent (applying traditional agency principles) or contracts with another to perform one or more steps of a claimed method.” 797 F.3d at 1022-23. The court then expanded the available vicarious liability theories, adding that liability under § 271(a) “can also be found when an alleged infringer conditions participation in an activity or receipt of a benefit upon performance of a step or steps of a patented method and establishes the manner or timing of that performance.” *Id.* at 1023. “In those instances, the third party’s actions are attributed to the alleged infringer such that the alleged infringer becomes the single actor chargeable with direct infringement. Whether a single actor directed or controlled the acts of one or more third parties is a question of fact, reviewable on appeal for substantial evidence, when tried to a jury.” *Id.* *Akamai V* did not, as far as this Court can tell, overturn *Centillion*³ or its application of principles of attribution. Accordingly, the Court finds it only appropriate to apply the principles of vicarious liability endorsed in *Akamai V* in this context as well.⁴

3. See, e.g., *United Servs. Auto. Ass’n v. Wells Fargo Bank, N.A.*, No. 2:18-CV-00366-JRG-RSP, 2019 U.S. Dist. LEXIS 217004, at *5 (E.D. Tex. Dec. 17, 2019) (“The Court finds that even in light of *Akamai*, *Centillion* continues to be the appropriate standard under which to analyze infringement of system claims.”); *CenTrak, Inc. v. Sonitor Techs., Inc.*, No. 14-183-RGA, 2017 U.S. Dist. LEXIS 139277, at *16 (D. Del. Aug. 30, 2017) (“There is no indication that *Centillion* has been overruled or that its holding is no longer good law.”).

4. To be sure, *Lyda v. CBS Corp.* opined that “[o]ur cases have applied joint infringement to method claims and not system claims.” 838 F.3d 1331, 1339 (Fed. Cir. 2016). Nevertheless, the *Lyda* panel

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Unlike Qwest in *Centillion*, NCR “directs its customers to perform” by requiring its merchants to obtain and maintain internet access. This fact was the at the heart of the parties’ contentions before the jury. Specifically, CoC relied on the NCR Silver Merchant Agreement, ECF No. 194-4, JTX 80. Repeatedly, the jury observed particular segments of the agreement, namely sections entitled “NCR Responsibilities” and “Your Responsibilities.” *Id.* at 5. Within these responsibilities, NCR states that it will provide remote support for the service in return for the subscription fee. *Id.* ¶ 7.1. As for the merchants, each agrees that it “will provide NCR access to [its] network, system, data, and relevant information as reasonably required to perform the Service.” *Id.* ¶ 8.1. And, all importantly, “[t]o use the Service, you must maintain Internet access at your own expense.” *Id.* ¶ 8.2. Here, NCR “contracts with [merchants] to perform one or more” of the claimed elements, i.e., internet or network access. *See Akamai V*, 797 F.3d at 1023. Indeed, NCR “directs its customers to perform” the relevant claim elements. *See Centillion*, 631 F.3d at 1287; *see also BMC Res., Inc. v. Paymentech, L.P.*, 498 F.3d 1373, 1381 (Fed. Cir. 2007) (“A party cannot avoid infringement, however, simply by contracting out steps of a patented process to another entity. In those cases, the party in control would be liable for direct infringement. It would be unfair indeed for

cannot overturn the *Centillion* opinion or its application of divided-infringement principles to system claims. *See Newell Cos., Inc. v. Kenney Mfg. Co.*, 864 F.2d 757, 765 (Fed. Cir. 1988) (“This Court has adopted the rule that prior decisions of a panel of the court are binding precedent on subsequent panels unless and until overturned [*en banc*.”]).

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the mastermind in such situations to escape liability.”), *overruled on other grounds by Akamai V*, 797 F.3d 1020. The control asserted in this case, and accepted by the jury, was more than instructions, directions, or an option to be employed by an end-user; instead, it was a contractual requirement.

If any questions abound regarding the contractual obligation NCR requires for the purposes of infringement, it can be settled under the “condition and benefit” analysis from *Akamai V*. Not only does NCR control its merchants via their contractual obligations, it also conditions a benefit to its merchants—e.g., access to the software—based on the merchants’ performance of claim elements established by NCR—e.g., obtain internet or network access. *See Travel Sentry, Inc. v. Tropp*, 877 F.3d 1370, 1378 (Fed. Cir. 2017) (quoting *Akamai V*, 797 F.3d at 1023) (concluding that “liability under § 271(a) can also be found when an alleged infringer ‘conditions participation in an activity or receipt of a benefit upon performance of a step or steps of a patented method’ and ‘establishes the manner or timing of that performance’”). For these reasons, the Court finds substantial evidence to support the jury’s finding of infringement as to the “network” and “network access” limitations.

2. Substantial Evidence Supports the Jury’s Infringement Finding for the “PC Workstation” Limitation.

NCR argues that CoC did not provide substantial evidence to allow a jury to find infringement on the “PC

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Workstation” limitation. NCR points out that Mr. Crouse used his personal laptop as a workstation during his investigation. ECF No. 194 at 5. NCR asserts that this does not show control by NCR, but rather how customers use NCR Silver. ECF No. 197 at 2. Thus, NCR argues that the merchants control the “PC Workstation,” which makes the evidence presented by CoC categorically irrelevant. ECF No. 194 at 5.

NCR also claims CoC’s argument for the “POS terminals” doubling as “PC Workstations” fails. NCR asserts that even with the assumption that a tablet is a “PC Workstation,” CoC still has not met its burden of proof in demonstrating that NCR ‘uses’ each element of the system because NCR does not control the tablet. ECF No. 197 at 2-3. NCR argues that per the words of the patent claim, two different structures exist: a “PC workstation” and a separate “POS terminal.” *Id.* at 3. NCR also points out that the testimony of Ms. Schoonover, NCR’s Executive Director of Product Management, did not establish that a tablet is a “personal computer workstation” but only a “workstation.” *Id.* NCR contends that Ms. Schoonover’s testimony cannot be the basis for legally sufficient evidence to support the jury’s finding of infringement as to this claim. *Id.*

CoC contends that the evidence at trial is legally sufficient to show NCR meets the “PC Workstation” limitation. ECF No. 196 at 8. CoC points to Mr. Crouse’s testimony to show that NCR itself “uses” the system in connection with Back Office functions, which shows that NCR satisfies the “PC Workstation” limitation. *Id.* NCR “controls” the “PC Workstation” by requiring customers

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to provide their own computer hardware necessary to operate NCR Silver. *Id.*

CoC also argues that the “POS terminals” double as “PC Workstations.” *Id.* CoC lists three reasons to support its contention. First, assuming that a tablet is a “PC Workstation,” CoC demonstrated through NCR’s use of Back Office functions that there is sufficient “control” and “benefit.” *Id.* Second, the “PC Workstation” claim does not require two unique structures but rather two different meanings. *Id.* at 8 n.3. Third, Ms. Schoonover testified at trial that an iPad can and often does double as a “PC Workstation.” *Id.* at 11.

The Court does not find NCR’s arguments persuasive. Given the Court’s analysis above regarding “use” and “control,” the Court agrees with CoC that the evidence presented at trial demonstrates that NCR “uses” the infringing system by exerting “control” and “benefit” over the “PC workstation.” CoC provided testimony and evidence showing that NCR exerted control over the “PC workstations” through Back Office functions. ECF No. 196 at 8-9. The testimony of Mr. Crouse and Ms. Schoonover is instructive and substantial.

The Court also does not find NCR’s arguments refuting the “POS terminals” doubling as “PC Workstations” contention persuasive. CoC provided the jury with substantial evidence that NCR’s use of Back Office functions was sufficient to constitute “control” and “benefit” to establish infringement as to this limitation. *Id.* at 8. Additionally, NCR’s assertion that because the patent claim lists “PC Workstation” and “POS terminal”

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as two separate terms, they must be unique structures, is unpersuasive. In its response, CoC cites *CAE Screenplates, Inc. v. Heinrich Fiedler GmbH & Co. KG*, 224 F.3d 1308, 1317 (Fed. Cir. 2000), for the proposition that the “use of these terms in the claims connotes different meanings.” *Id.* at 8. CoC never argued that the “PC Workstation” and the “POS terminals” have the same meaning, but rather it is possible for a “PC Workstation” to be a “POS terminal.” Also, the language of the ’640 Patent does not clearly support NCR’s argument of distinguishing structure. ECF No. 197 at 3 (citing to ECF No. 194 at 5; ECF No. 194-2, JTX-1, Col. 2:9-14). Finally, while Ms. Schoonover did not explicitly say that a “tablet” was a “PC Workstation,” the context surrounding the line of questioning demonstrates that the discussion centered around the topic of “PC Workstations.” ECF No. 196 at 9. The jury could, therefore, reasonably find that the iPads function as both the point-of-sale devices and PC Workstations. Legally sufficient evidence supports the jury’s findings as to the PC Workstation limitations.

3. Substantial Evidence Supports the Jury’s Infringement Finding for the “POS Terminal” limitation.

NCR argues that because it does not supply or control the majority of the POS terminals, it cannot directly infringe as to a majority of sales. ECF No. 197 at 3. NCR reasons that because customers usually obtain their own POS terminals in the form of iPads, NCR cannot be charged with supplying or controlling the “POS terminal” element. *Id.* NCR claims that 75% of NCR Silver sales are for an iPad, not Android, eliminating most CoC’s claimed

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damages. ECF No. 194 at 6. Additionally, NCR contends that because it does not use the “POS terminal,” it cannot meet this element of the claim. ECF No. 197 at 3.

CoC argues that it demonstrated the requisite benefit and control through evidence showing NCR’s use of Back Office operations through the “POS terminals.” ECF No. 196 at 9. CoC argues that NCR’s “75% number” is not supported by any documents or other evidence presented at trial but rather is solely based on Ms. Schoonover’s testimony. *Id.* at 13. However, CoC contends that even if Ms. Schoonover’s statement is true, it does not impact the damages award. *Id.* CoC requested that the jury award damages solely for NCR’s software subscription sales and not NCR’s hardware sales. *Id.* CoC points out that its damages expert, Ms. Salters, apportioned hardware sales out of the damages when presenting it to the jury. *Id.* Thus, CoC contends that the “percentage of NCR’s revenues attributable to particular subset of its hardware sales is irrelevant....” *Id.*

Again, using the same framework indicated above, the evidence supports the jury’s finding that NCR controls the POS terminals and therefore directly infringes.

4. Substantial Evidence Supports the Jury’s Infringement Finding for the “POS Builder” limitation.

NCR argues that under the Court’s construction of using “plain and ordinary” meaning, the parties were left to explain the term “builder.” NCR reasons that its proffered construction of the term should be preferred

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because it reflects the language of the patent claim. ECF No. 197 at 4. NCR points to conflicting testimony given by CoC technical expert Mr. Crouse. He testified that in his experience, “there was coding involved” to “build” POS terminals. So, under Mr. Crouse’s understanding, “building” requires coding to manipulate the look and feel. ECF No. 194 at 7 (citing Trial Tr. 457:22-458:5). Further, Mr. Crouse agreed that the merchant, “could not build the POS terminal” because the software was “prebuilt.” *Id.* (citing Trial Tr. 458:23-25; 459:1-4). Mr. Quinn, NCR’s Director of Engineering for NCR Silver, stated that NCR Silver is pre-built because, “when you purchase an application from the App Store, you get it already prebuilt.” *Id.* at 8 (citing Trial Tr. 207:19-23). NCR argues that independent claim 1 of the ’640 Patent confirms its position because it states, “build or edit said POS terminals in real time.” *Id.* at 9 (citing JTX-1, Col. 6:18-20). NCR points to the “or” as instructive in distinguishing “building” a POS screen from “changing” one that has already been built. *Id.* at 9. Additionally, NCR points to Mr. Crouse’s testimony to illustrate the discrepancy. *Id.* at 10.

NCR also contends that the Court’s decision to rest on the term’s plain and ordinary meaning was independent error because “it failed to give clear meaning to an essential term.” ECF No. 194 at 8. NCR argues that a “term of art” is not the same as “plain and ordinary meaning.” ECF No. 197 at 4-5. NCR once again points to the discrepancy between the two parties in the construction of “builder” and that because the case turns “substantially on the meaning of a disputed term” that the

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Court “*must* provide guidance” through construction. *Id.* at 5 (emphasis in original).

CoC argues that NCR’s use of Mr. Crouse’s testimony was misleading and taken out of context because it related to his prior employment and not his investigation of NCR Silver. ECF No. 196 at 11. CoC points to NCR’s statement that “Mr. Crouse agreed that the merchant or customer ‘could not build the POS terminal’ because the terminal software was ‘prebuilt.’” *Id.* (citing ECF No. 194 at 7). CoC responds by explaining that this testimony related solely to Mr. Crouse’s “work at Perot System and has nothing to do with his investigation of NCR Silver.” *Id.* at 11. CoC then asserts that Mr. Crouse testified in detail as to how NCR Silver meets the “POS builder” limitation. *Id.* at 11-12 (citing Trial Tr. 411:6-412:10, 416:5-17).

CoC also argues that the Court’s claim construction was proper making the jury instructions void of error. *Id.* CoC first points out that NCR’s argument ignores its own prior statement that the term “point of sale builder software” “is a term of art used in the POS industry.” *Id.* (citing ECF No. 37 at 6). CoC argues that because there is no evidence to suggest that CoC intended to “deviate from the plain and ordinary meaning used in the POS industry,” there is no need for further clarification beyond the term’s plain and ordinary meaning. *Id.*

CoC presents more compelling arguments as to this limitation and its construction. First, the Court agrees with CoC that Mr. Crouse’s testimony was indeed cited misleadingly and that the testimony only related to Mr.

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Crouse's prior employment. NCR argues that regardless of prior employment, its argument stands to show that there is a discrepancy in defining the plain and ordinary meaning of "builder" sufficient to warrant a new trial. The Court disagrees. The jury heard Mr. Crouse's opinion that NCR Silver met the limitation and Dr. Chatterjee's contrary opinion. In its fact-finding duties, the jury weighed the evidence, made credibility determinations, and found that the limitation was met. Because the jury's verdict was not against the great weight of the evidence, the Court denies NCR's motion for a new trial.

As to the claim construction, NCR waived any rehashing of the term. The Court addressed these arguments at claim construction, the parties relied on the constructions in preparation for and at trial, and NCR failed to object to the Court's jury instructions, which incorporated the relevant construction. *See Koito Mfg. Co. v. Turn-Key-Tech, LLC*, 381 F.3d 1142, 1150 (Fed. Cir. 2004) (holding that because defendant did not object to the jury's instructions on a claim term, it failed to preserve its rights to object to the court's claim construction).

5. Substantial Evidence Supports the Jury's Infringement Finding for the "Web Server" Limitation.

NCR contends that for CoC to succeed on the "Web Server" limitation, CoC must prove that NCR's alleged builder software resides on the claimed "web server." ECF No. 194 at 11. NCR argues that because Dr. Chatterjee's expert testimony demonstrated that the alleged "builder

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software” resides on an application server, and not a web server, there can be no infringement. *Id.* From here, NCR asserts that CoC failed to meet its burden of proof because CoC provided no evidence that the builder software itself resides on a web server. *Id.* Additionally, NCR argues that Dr. Chatterjee’s testimony shows that the training video does not show that the web server “houses or runs the Back Office software” and is thus not legally sufficient evidence to support the jury’s finding of infringement. ECF No. 197 at 5.

CoC argues that there is no legitimate dispute that NCR Silver software is “installed,” “runs on,” and “interacts with” a “server.” ECF No. 196 at 13. CoC claims that Dr. Chatterjee’s testimony on the application/web server distinction is merely semantics in an attempt to avoid the “web server” limitation. *Id.* CoC compares NCR’s argument to the “prebuilt” argument because “application server” does not appear in any NCR document and is only mentioned through Dr. Chatterjee’s testimony. *Id.* CoC further points out that during the trial, CoC presented numerous examples of NCR Silver running, being installed on, and interacting with a web server. *Id.* CoC argues that these examples are substantial evidence that allows the jury’s finding to be grounded in legally sufficient evidence. *Id.*

The jury heard the competing testimonies of Mr. Crouse and Dr. Chatterjee. The jury also saw examples of NCR Silver running and interacting with a web server. NCR presented arguments in an attempt to discredit CoC’s examples. But the jury’s finding is supported by

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legally sufficient evidence presented at trial. Thus, the Court denies NCR's motion for JMOL. Similarly, the jury's finding is not against the great weight of the evidence, and its verdict is not a miscarriage of justice. Thus, the Court also denies NCR's motion for a new trial.

C. The Proposed Invalidity Claim is Unpersuasive.

NCR next argues it proved, through the testimony of Dr. Chatterjee, that the '640 and '012 Patents are invalid twice over, by prior art references Woycik and Brown. According to NCR, Woycik discloses "the claimed 'web-based point of sale (POS) builder stem' in [0121] that store administrators may access on a remote central server in [0122] using a standard web browser." ECF No. 194 at 13. NCR further argues that Woycik discloses "an internet connection from said one or more point of sale terminals to a web server." *Id.* at 14. Last, Woycik discloses "point of sale builder software which runs on said web server, wherein said local or remote workstations are utilized to build or edit said POS terminals in real time, from anywhere in the world and over the worldwide web' through its discussion of the 'administration tool.'" *Id.* NCR also points to Brown, arguing that it discloses "the claimed web-based point of sale builder system and software that builds POS terminals." *Id.* at 15.

In response, CoC argues that there was sufficient evidence for a reasonable jury to conclude that Woycik and Brown did not anticipate the '012 and '640 Patents. CoC alleges that Dr. Chatterjee's testimony was insufficient to show NCR's invalidity case was of such an "extreme

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nature” to require the jury’s decision to be overturned. ECF No. 196 at 14. Specifically, CoC contends that Dr. Chatterjee admitted Woycik and Brown do not expressly teach each of the limitations of the asserted claims. *Id.* Instead, Dr. Chatterjee only made inherency arguments and as a result the jury was not required to believe them. *Id.*

The Court agrees that the jury was not required to believe NCR’s argument through Dr. Chatterjee’s testimony. The jury’s duty was to weigh the evidence presented by both parties’ expert witnesses and reach a conclusion based on the evidence. NCR claims the jury could not have rationally sustained a verdict in favor of CoC because Mr. Crouse’s testimony was “wholly conclusory.” ECF No. 197 at 5. Mr. Crouse’s conclusory statements were no different than those cited by NCR as support from Dr. Chatterjee’s testimony—concise final opinions after proceeding through the analysis. *Compare, e.g.,* Tr. 784:25-785:2 (Mr. Crouse, testifying: “Q. And would a person of skill in the art understand the local are network in Woycik to satisfy that claim element? A. No, sir.”), *with* Tr. 617:20-23 (Dr. Chatterjee, testifying: “Q. Now, is it your opinion that Brown also discloses all the limitations in the dependent claims from the ’640 patent and the ’012? A. Yes. Yes.”). Ultimately, Mr. Crouse’s statements were not solely conclusory as he also opined and explained why he disagreed with Dr. Chatterjee’s opinions regarding Woycik and Brown. *See e.g.,* Trial Tr. 785:20-786:1; 786:9-19; 788:20-25. Given the competing evidence, the Court concludes NCR failed to provide sufficient reason to overturn the jury’s findings.

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As to obviousness, NCR relies on combining Michaud with Woycik and/or Brown to invalidate the claim, stating that “[c]ommon sense and ordinary creativity suffice to justify combining Michaud with Woycik and/or Brown.” ECF No. 197 at 6. CoC contends that NCR’s obviousness case was deficient because NCR failed to present a *prima facie* case of obviousness based on any combination of Woycik, Brown, and Michaud as “Dr. Chatterjee failed to offer any testimony or evidence regarding motivation to combine the obviousness references.” ECF No. 196 at 15.

This Court agrees with CoC that NCR’s argument fails for a couple of reasons. First, an obviousness claim “is a question of law based on factual findings: (1) the scope and content of the prior art; (2) the differences between the claims and the prior art; (3) the level of ordinary skill in the art; and (4) the objective indicia of nonobviousness.” *Kinetic Concepts, Inc. v. Smith & Nephew, Inc.*, 688 F.3d 1342, 1360 (Fed. Cir. 2012) (citing *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 17-18, 86 S. Ct. 684, 15 L. Ed. 2d 545 (1966)). NCR must prove by “clear and convincing evidence that a skilled artisan would have been motivated to combine the teachings of prior art references to achieve the claimed invention, and that the skilled artisan would have had a reasonable expectation of success in doing so.” *Id.* NCR failed to meet this standard as only Dr. Chatterjee supplied evidence supporting an obviousness conclusion. With the benefit of all the referenced evidence before it, the jury found that the claims were not rendered invalid by obviousness. Whether the jury remained unconvinced after Dr. Chatterjee’s testimony, *see* Tr. 621:22-624:3, or perhaps gave more credit to Mr. Crouse’s testimony in

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rebuttal, *see* Tr. 790:23-793:12, the jury's findings of no invalidity on the asserted patents need not be disturbed. *See Mentor H/S*, 244 F.3d at 1375 ("Courts grant JMOL for the party bearing the burden of proof only in extreme cases, when the party bearing the burden of proof has established its case by evidence that the jury would not be at liberty to disbelieve and the only reasonable conclusion is in its favor.").

Finally, NCR argues Dr. Chatterjee's testimony "that a person of ordinary skill in the art would appreciate the 'subscription service' element to be disclosed by the central server 22/84 and understand that vendor subscriptions are an implicit and well known method of monetization" sufficiently meets the requisite standard to render the '640 Patent's claims invalid despite the jury's verdict. ECF No. 194 at 15. According to NCR, no combination with Brown is required as "a product is inherently capable of being leased rather than sold." *Id.* at 15-16. To this, NCR claims CoC does not respond.

But again, the jury was not convinced as to NCR's inherency arguments. The jury also could have credited the testimony of Mr. Crouse when he opined that the prior art did not disclose vendor subscription services. *See* Tr. 786:11-14; 788:13-22; 789:15-16; 792:10-24. In sum, NCR bears the burden of showing facts supported by clear and convincing evidence to prove the patents invalid. *Mentor H/S*, 244 F.3d at 1375. Competing expert testimony and evidence supports the jury's finding. Thus, the Court denies NCR's motion for a judgment of invalidity or new trial regarding validity.

*Appendix B***D. CloudofChange Sufficiently Proved Willfulness.**

NCR argues that CoC failed to prove that NCR had a “specific intent” to infringe at the time of the challenged conduct and this Court should enter a judgment of no willful infringement or grant a new trial. ECF No. 194 at 17 (citing *Bayer Healthcare LLC v. Baxalta Inc.*, 989 F.3d 964, 987 (Fed. Cir. 2021)). As justification, NCR points to *Erfindergemeinschaft UroPep GbR v. Eli Lilly Co.*, 2017 U.S. Dist. LEXIS 75517, 2017 WL 2190055, at *1-3 (E.D. Tex. May 18, 2017), where the court granted a pre-verdict JMOL because the court found it would be inappropriate to put the issue of willfulness before the jury. ECF No. 197 at 7. NCR effectively argues it only had “mere knowledge” of the patent and claims and that it never resorted to “intentional copying or an intent to harm a market competitor.” *Id.*

CoC argues that the jury’s finding of willfulness should be affirmed because NCR had more than “mere knowledge.” ECF No. 196 at 17. CoC alleges that NCR should be found willful because NCR made false statements in its post-trial declaration and omitted the date that NCR conducted an “investigation” into the notice letter. *Id.* Additionally, CoC claims that NCR’s infringement was intentional because NCR made no good-faith effort to avoid infringing, no attempt to design around the patent, and tried to cover up its infringement. *Id.* at 17-18. Accordingly, CoC argues that the jury had the opportunity to weigh the evidence, make credibility determinations, and find against NCR’s positions. *Id.* at 18.

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The Court finds sufficient evidence to support the jury's finding of willfulness. Despite NCR's claim that this case is similar to *UroPep*, the two cases are distinguishable. Here, this Court allowed the willfulness argument to be presented before the jury because the notice letter, in conjunction with Mr. Quinn's testimony identifying a partial investigation, provided a sufficient basis to bring the issue before the jury; this was not the case in *UroPep*. Accordingly, contrary to NCR's assertions, the Court does not disregard case law approving use of post-trial declarations for willfulness; rather, the Court uses its discretionary authority to affirm the jury's verdict. Nonetheless, the issue is largely moot as this Court denied CoC's Motion for Enhanced Damages. *See* ECF No. 207; *see also UroPep*, 2017 U.S. Dist. LEXIS 75517, 2017 WL 2190055, at *3 ("Finally, the Court notes that the question whether the issue of willfulness should have been submitted to the jury is rendered largely moot by the fact that the decision whether to enhance damages on a finding of willfulness is for the Court.").

E. Substantial Evidence Supported the Jury's Damages Award.

The jury awarded a lump sum of \$13.2 million for infringement of the '640 and '012 Patents. ECF No. 159. NCR argues that it is entitled to be granted a new trial or, alternatively, enter a remittitur of 75%. ECF No. 194 at 18. First, NCR claims Ms. Salters, CoC's damages expert, erred by relying on the entire market value. *Id.* Second, NCR asserts that Ms. Salters failed to apportion

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damages to the allegedly patented features separately. *Id.* at 9. Third, NCR argues that it is entitled to a remittitur based on Dr. Ikizler, NCR's expert, providing the sole apportionment evidence identifying the value of patented versus unpatented features. ECF No. 197 at 10. Accordingly, NCR requests this Court remit damages to the sole appropriate basis in the record, or alternatively order a new trial. *Id.* NCR calculates that an appropriate remitted amount totals no more than 11% of the \$18.4 million gross profit, or approximately \$2 million. ECF No. 194 at 20.

CoC responds that it presented substantial evidence supporting the damages award. First, CoC argues NCR's allegation that "CoC had *no* evidence that the patented features drive demand" ignores CoC's expert testimony and NCR's own documents and witnesses. ECF No. 196 at 18 (quoting ECF No. 194 at 19). CoC points to four elements that drive merchant demand for POS systems derived from an NCR document, Mr. Crouse's opinions, and testimony from Ms. Schoonover, NCR's Executive Director of Product Management. *Id.* Second, CoC alleges that the four-part apportionment analysis Ms. Salters presented to the jury was specific and reasonable to justify the royalty. *Id.* at 19. Such apportionment included focus on the software, accounting for only the full software product subscriptions (550,000 versus 700,000), accepting the lower end of the subscription price range (\$79 versus up to \$200), and profits of 28 to 47 percent. *Id.* at 19-20. Third, CoC claims that NCR's remittitur argument should also fail because the jury was entitled to disagree with Dr. Ikizler's apportionment testimony. *Id.* at 20. And

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CoC claims that NCR's remittitur argument is based on a hardware apportionment, but CoC apportioned and requested damages only related to NCR's subscription software sales. *Id.*

CoC cannot entertain both a theory of entire market value *and* apportionment. "A patentee is only entitled to a reasonable royalty attributable to the infringing features." *Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.*, 904 F.3d 965, 977 (Fed. Cir. 2018). "Recognizing that each case presents unique facts, we have developed certain principles to aid courts in determining when an expert's apportionment model is reliable." *Commonwealth Sci. & Indus. Rsch. Organisation v. Cisco Sys., Inc.*, 809 F.3d 1295, 1302 (Fed. Cir. 2015). In other words, royalties generally must be based not on the entire product, but instead on the smallest salable patent-practicing unit. *LaserDynamics, Inc. v. Quanta Comput., Inc.*, 694 F.3d 51, 67 (Fed. Cir. 2012). "The entire market value rule is a narrow exception to this general rule." *Id.*; *see also Virnetx, Inc. v. Cisco Sys., Inc.*, 767 F.3d 1308, 1326 (Fed. Cir. 2014) ("These strict requirements limiting the entire market value exception . . ."). The entire market value rule acts as a check to ensure that damages sought are reasonable given the technology at issue. *Id.*

Here, CoC's damages expert, Ms. Salters, based her damages calculations on the entire market value of NCR Silver. Contrary to CoC's arguments, Ms. Salters did not apportion the damages the question is whether CoC presented substantial evidence to support an entire market value theory. "[A] patentee may assess damages

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based on the entire market value of the accused product *only where* the patented feature creates the basis for customer demand or substantially creates the value of the component parts.” *Virnetx, Inc. v. Cisco Sys., Inc.*, 767 F.3d 1308, 1326 (Fed. Cir. 2014) (emphasis in original) (quoting *Versata Software, Inc. v. SAP Am., Inc.*, 717 F.3d 1255, 1268 (Fed. Cir. 2013)). CoC highlights four factors, derived from the Strawhecker Report and addressed in testimony from Ms. Salters, Mr. Crouse, and Ms. Schoonover, including: (1) transaction handling, (2) inventory/item management, (3) content management, and (4) POS infrastructure. Trial Tr. 509:6-510:23. NCR disputes that such evidence suffices to show that “the patented feature is the *sole* driver of customer demand or substantially creates the value of the component parts.” ECF No. 194 at 18 (quoting *Power Integrations*, 904 F.3d at 979). NCR asserts that several other factors, unrebutted by CoC’s evidence at trial, preclude application of the entire market value theory. *Id.* at 19. Those factors included NCR’s strength of brand, NCR’s 24/7 customer support, and a unique distribution model. *Id.* The Court disagrees with the basis of NCR’s “other factors” for the following reasons.

NCR relies heavily on *Power Integrations* in support of its position. For clarity, the Court provides the relevant language from the Federal Circuit’s order describing the parameters of the entire market value theory.

As *LaserDynamics*, *Versata*, and *VirnetX* held, the entire market value rule is appropriate only when the patented feature is the sole driver of

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customer demand or substantially creates the value of the component parts. The burden of proof in this respect is on the patent holder. The question is whether the accused product, compared to other products in the same field, has features that would cause consumers to purchase the products beyond the patented feature, i.e., valuable features. Where the accused infringer presents evidence that its accused product has other valuable features beyond the patented feature, the patent holder must establish that these features do not cause consumers to purchase the product. A patentee may do this by showing that the patented feature “alone motivates customers to purchase [the infringing product]” in the first place. But when the product contains multiple valuable features, it is not enough to merely show that the patented feature is viewed as essential, that a product would not be commercially viable without the patented feature, or that consumers would not purchase the product without the patented feature. When the product contains other valuable features, the patentee must prove that those other features do not cause consumers to purchase the product.

Power Integrations, 904 F.3d at 979 (internal citations omitted). NCR hangs its hat on the final sentence above, arguing that CoC must disprove the value of NCR’s strength of brand, NCR’s 24/7 customer support, and a unique distribution model. ECF No. 194 at 19. However,

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the Court finds that the proposed “features” are not other non-patented features of a multi-component product. *See LaserDynamics*, 694 F.3d at 68 (finding that the plaintiff “failed to present evidence showing that the patented disc discrimination method drove demand for the laptop computers”); *see also Power Integrations*, 904 F.3d at 979 (finding the “power supply controllers had other valuable features, such as jittering;” also noting “the *product contains* multiple valuable features”) (emphasis added). Here, none of the allegedly un rebutted features relate to the system claims at issue in this case. Nor has NCR pointed to any caselaw that identifies similar features as applying against the entire market value theory. If NCR’s contentions were correct, plaintiffs would be forced to contest an unlimited amount of market-based “features,” wholly removed from the context of the patented features in a multi-component product. The Court also made this clear in its instructions. *See* ECF No. 150 at 32 (“The amount you find as damages must be based on the value attributable to the patented technology, as distinct from other, unpatented features of the accused product, or other factors such as marketing or advertising, or NCR’s size or market position.”).

Nonetheless, an alleged infringer does not carry the burden to disprove application of the exception. The burden to prove that the entire market value theory applies rests with the patentee. Thus, CoC must prove that the patented feature is the sole driver of customer demand to rely on the entire market value exception. Whether the patented feature is the sole driver of customer demand is a question for the jury. The Court finds that CoC provided

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sufficient evidence to support a damages award based on the entire market value. CoC provided the jury four factors that drove customer demand, all of which are patented features of the accused product. Furthermore, the jury was instructed that “damages must be based on the value attributable to the patented technology, as distinct from other, unpatented features of the accused product.” ECF No. 150 at 32. With this instruction, the jury found that CoC was entitled to damages based on the entire market value of NCR’s product. NCR has not provided sufficient reason to overturn the jury’s findings.

Lastly, the Court finds NCR’s remaining remittitur argument unpersuasive. The Court disagrees with NCR’s allegation that CoC failed to supply sufficient evidence to support the jury’s damages award. As discussed above, the Court finds that CoC provided sufficient evidence for a reasonable jury to find that the entire market value theory applies. Because a reasonable jury could find that the entire market value exception applies, the jury could have rationally disagreed with the testimony of NCR’s expert, Dr. Ikizler. Rather than considering whether the totality of the evidence supported the jury’s finding, this Court must limit its determination to whether the jury’s verdict is based on legally sufficient evidence that amounts to more than a scintilla. The jury satisfied this standard by relying on CoC’s damages expert’s royalty calculation. While NCR may disagree with this result, NCR fails to prove that jury’s verdict was unreasonable and should be overturned or remitted. Therefore, the jury’s damage findings stand.

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IV. CONCLUSION

For the reasons above, the Court finds that CoC produced sufficient evidence to support the jury's verdict in this case. The Court therefore **DENIES** NCR's Motion for Judgment as a Matter of Law or Alternatively, For a New Trial (ECF No. 194).

SIGNED this 27th day of October, 2022.

/s/ Alan D Albright
ALAN D ALBRIGHT
UNITED STATES DISTRICT JUDGE

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**APPENDIX C — DENIAL OF REHEARING OF THE
UNITED STATES COURT OF APPEALS FOR THE
FEDERAL CIRCUIT, FILED FEBRUARY 19, 2025**

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2023-1111

CLOUDOFCHANGE, LLC,

Plaintiff-Appellee,

v.

NCR CORPORATION,

Defendant-Appellant

Appeal from the United States District Court for
the Western District of Texas in No. 6:19-cv-00513-ADA,
Judge Alan D. Albright.

**ON PETITION FOR PANEL REHEARING AND
REHEARING EN BANC**

Before MOORE, *Chief Judge*, LOURIE, DYK, PROST, REYNA,
TARANTO, CHEN, HUGHES, STOLL, CUNNINGHAM, and STARK,
Circuit Judges.¹

PER CURIAM.

1. Circuit Judge Newman did not participate.

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ORDER

CloudfChange, LLC filed a combined petition for panel rehearing and rehearing en banc. The petition was referred to the panel that heard the appeal, and thereafter the petition was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

February 19, 2025

Date

FOR THE COURT

/s/Jarett B. Perlow

Jarett B. Perlow

Clerk of Court