

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION**

CloudofChange, LLC,

Plaintiff,

v.

NCR Corporation,

Defendant.

Case No. 6:19-CV-00513-ADA

JURY TRIAL DEMANDED

**PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT OF INVALIDITY**

PUBLIC VERSION

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	FACTUAL BACKGROUND.....	1
III.	LEGAL STANDARD.....	3
IV.	ARGUMENT.....	5
A.	Attorney Argument Is Not Clear and Convincing Evidence that the Asserted Claims are Anticipated.....	6
B.	There is a Battle of the Experts—Not Clear and Convincing Evidence that the Asserted Claims are Anticipated.....	6
1.	Local Server	7
2.	Internet Connection.....	8
3.	Vendor Subscription Service.....	9
4.	Testing While Said POS Terminals Are Simultaneously in Use	10
5.	Software as a Subscription (SaaS)	11
6.	Open-Source, Non-Proprietary Technologies	12
7.	Without Specialized Hardware or Software.....	13
8.	POS Terminal Interaction with POS Builder	14
C.	CloudofChange Has Set Forth Specific Facts Showing there are Genuine Issues for Trial	15
V.	CONCLUSION.....	15

TABLE OF AUTHORITIES

	<u>Page(s)</u>
Cases	
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986).....	3, 4
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986).....	3, 4
<i>Eli Lilly & Co. v. Barr Labs., Inc.</i> , 251 F.3d 955 (Fed. Cir. 2001).....	4
<i>Enzo Biochem v. Gen-Probe, Inc.</i> , 424 F.3d 1276 (Fed. Cir. 2005).....	4, 6, 13, 14
<i>In re Gabapentin Patent Litig.</i> , 503 F.3d 1254 (Fed. Cir. 2007).....	5
<i>In re NTP Inc.</i> , 654 F.3d 1279 (Fed. Cir. 2011).....	11
<i>In re Schreiber</i> , 128 F.3d 1473 (Fed. Cir. 1997).....	10
<i>Invitrogen Corp. v. Biocrest Mfg., L.P.</i> , 424 F.3d 1374 (Fed.Cir.2005).....	4
<i>Invitrogen Corp. v. Clontech Labs., Inc.</i> , 429 F.3d 1052 (Fed. Cir. 2005).....	4, 6, 13, 14
<i>KSR Int’l Co. v. Teleflex, Inc.</i> , 550 U.S. 398 (2007).....	5
<i>Medical Instrumentation and Diagnostics Corp. v. Elekta AB</i> , 344 F.3d 1205 (Fed. Cir. 2003).....	5
<i>Microsoft Corp. v. i4i Ltd. P’ship</i> , 564 U.S. 91 (2011).....	4

<i>MiMedx Grp., Inc. v. Tissue Transplant Tech., Ltd.</i> , 354 F.Supp.3d 742 (W.D. Tex. 2018).....	3
<i>Oney v. Ratliff</i> , 182 F.3d 893 (Fed.Cir.1999).....	4
<i>Zoltek Corp. v. U.S.</i> , 95 Fed. Cl. 681 (Fed. Cl. Dec. 16, 2010).....	5
Statutes	
35 U.S.C. § 282.....	4
Rules	
FED. R. CIV. P. 56(a).....	3

Plaintiff CloudfChange, LLC (“CloudfChange” or “Plaintiff”) files this Response in Opposition to Defendant NCR Corporation’s (“NCR” or “Defendant”) Motion for Summary Judgment of Invalidity (Dkt. 66 or “Invalidity MSJ”).

I. INTRODUCTION

Either NCR’s Invalidity MSJ amounts to nothing more than conclusory attorney argument in an attempt to read out claim limitations or NCR’s Invalidity MSJ is a disguised rehash of the opinions of its technical expert Sandeep Chatterjee, Ph.D. (“Dr. Chatterjee”), regarding the *Woycik* reference, which are specifically disputed point by point by CloudfChange’s technical expert, Gregory G. Crouse (“Mr. Crouse”). Thus, NCR’s Invalidity MSJ amounts to a classic battle of the experts. As set forth herein, there are, at a minimum, significant factual disputes regarding each of the eight “technical areas” addressed in NCR’s Invalidity MSJ as evidenced by Mr. Crouse’s opinions and the *Woycik* reference itself. As such, genuine issues of material fact exist in the record, and summary judgment is not appropriate.¹

II. FACTUAL BACKGROUND

Prior to the patents-in-suit, point of sale systems were tethered to in-store servers and required expensive and time-consuming manual software coding for store and restaurant owners to make even minor changes to menu items or product offerings. Plaintiff’s inventions for the first time removed the requirement of maintaining on site computer servers for point of sale (“POS”) systems and provided an inexpensive and efficient method “for online, web-based point of sale (POS) building and configuration, which can assist non-expert business operators in

¹ NCR’s Invalidity MSJ includes an inappropriate, alternative request that if the Court finds the Asserted Claims distinguishable over *Woycik*, “then NCR submits that NCR Silver does not infringe.” Dkt. 66, p. 16. In response, CloudfChange incorporates by reference its response in opposition to NCR’s Noninfringement MSJ, filed concurrently herewith.

building, editing and testing a point of sale system to manage their businesses.” Dkt. 66-1, ’640 Patent, Abstract. An example of a point of sale touch screen in a pretzel store may include touch keys for pretzels and for drinks, with secondary screens displaying specific product keys for ordering different types of pretzels, drinks, and pretzel toppings. *See id.*, 2:35-42, Fig. 1. Historically, “practice in the field of assembling point of sale systems includes manually coding front-of-screen information ... by a business expert with the help of a programmer or data expert.” *Id.*, 1:20-26. Further, since POS screen changes are difficult, POS systems assembled manually are prone to mistakes and time-consuming. *See id.*, 1:33-35. As such, prior to the Plaintiff’s inventions, “store owners tend[ed] to retain older, inaccurate, out-of-date POS screens in order to avoid the POS screen editing process.” *Id.*, 1:35-38.

Inventors Wayne Baratta and Quentin Olson developed systems “for building a point of sale (POS) system to manage business operations...from a single branch to a large chain of stores.” *Id.*, 1:11-14. These inventions are described and claimed in the ’640 Patent, which was filed on February 5, 2008, and its continuation, the ’012 Patent. These inventions solve problems in the prior art by allowing utilization of the cloud to remove the requirement of on site servers, and reducing the need for manually coding POS systems with the help of a programmer or data expert. *See, e.g., id.*, 1:20-40. The web-based point of sale (POS) builder system, as described in the common specification of the ’640 and ’012 Patents, provides for a back-office which supports numerous point of sale terminals. *See id.*, Fig. 3. The patented technology also enables a store operator, who does not have to be technically trained, to edit and test the store’s screens. *See id.*, 2:66-67.

While the *Woycik* reference was filed on May 1, 2007, about nine-months prior to the ’640 Patent, as discussed in detail in Mr. Crouse’s report and below, *Woycik* does not anticipate

the Asserted Patents. *Woycik* is entitled “**Computer-based** Ordering System” and describes as its objective “to provide an improved **computer-based** ordering system for ordering goods and services.” Dkt. 66-4, *Woycik*, ¶ [0010] (emphasis added). Very simply, there are significant factual disputes between the expert witnesses for each side regarding *Woycik*, including, but not limited to, whether or not *Woycik*:

- requires a local server;
- relies on communications over a LAN (not the internet);
- teaches a “vendor subscription service;”
- allows testing of POS screens iteratively in real time while the POS terminals are simultaneously in use;
- is usable to deliver POS application solutions using software as a subscription (SAAS);
- discloses a web-based POS builder system;
- requires specialized hardware or software; and
- discloses POS terminals that interact with the administrative tool on the remote server.

III. LEGAL STANDARD

Summary judgment should only be granted “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(a). A factual dispute is genuine “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is material only if it might affect the outcome of the suit under governing law. *Id.* The movant has the “initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (internal

citations omitted). Once this initial burden is met, the burden shifts to the nonmoving party, who “must set forth specific facts showing that there is a genuine issue for trial.” *Id.* at 322, n.3. In deciding a motion for summary judgment, “[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Anderson*, 477 U.S. at 255.

A patent is presumed valid upon issuance from the United States Patent and Trademark Office, and the “burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity.” 35 U.S.C. § 282. Overcoming this presumption requires the party seeking to invalidate to prove invalidity by clear and convincing evidence. *Microsoft Corp. v. i4i Ltd. P’ship*, 564 U.S. 91, 95 (2011). This standard applies at the summary judgment stage. *Invitrogen Corp. v. Biocrest Mfg., L.P.*, 424 F.3d 1374, 1378 (Fed.Cir.2005). Regarding the standards for summary judgment in the context of a patent case, “[a]lthough anticipation is a question of fact, it still may be decided on summary judgment if the record reveals no genuine dispute of material fact.” *Oney v. Ratliff*, 182 F.3d 893, 895 (Fed.Cir.1999).

Thus, in order to prevail on summary judgment, the movant on the issue of invalidity “must submit such clear and convincing evidence of invalidity so that no reasonable jury could find otherwise.” *Eli Lilly & Co. v. Barr Labs., Inc.*, 251 F.3d 955, 962 (Fed. Cir. 2001). If the decisive determination of invalidity depends on resolution of material factual differences, summary judgment is inappropriate. *See Invitrogen Corp. v. Clontech Labs., Inc.*, 429 F.3d 1052, 1069 (Fed. Cir. 2005). Attorney argument is no substitute for evidence. *See Enzo Biochem v. Gen-Probe, Inc.*, 424 F.3d 1276, 1284 (Fed. Cir. 2005); *see also Invitrogen*, 429 F.3d at 1071 (“Unsubstantiated attorney argument regarding the meaning of technical evidence is no substitute for competent, substantiated expert testimony. It does not, and cannot, support [the] burden on summary judgment.”).

Moreover, summary judgment is never appropriate where the parties have proffered conflicting expert opinions. *See In re Gabapentin Patent Litig.*, 503 F.3d 1254, 1259-62 (Fed. Cir. 2007) (reversing summary judgment when the parties had proffered conflicting expert opinions).² Any such “battle of the experts” demonstrates that the moving party has not clearly established their invalidity by anticipation defense by the clear and convincing evidence standard necessary to grant summary judgment. *See MiMedx Grp., Inc. v. Tissue Transplant Tech., Ltd.*, 354 F.Supp.3d 742, 755 (W.D. Tex. 2018) (internal citations omitted).

IV. ARGUMENT

NCR’s Invalidity MSJ fails for two fundamental reasons: 1) it is either based on attorney argument, or 2) on expert opinions specifically disputed by Plaintiff’s expert—thereby becoming a quintessential battle of the experts. In addition, NCR erroneously uses its Invalidity MSJ as an opportunity to skirt page limits and to respond to Mr. Crouse’s Rebuttal Report, rather than to provide clear and convincing evidence that the Asserted Claims are anticipated by a particular reference, which is contrary to the rules and docket control order governing this case.

Strangely and inappropriately, although NCR simultaneously filed an MSJ of non-infringement in a separate motion, it throws in a one-sentence request at the conclusion of several

² *See Medical Instrumentation and Diagnostics Corp. v. Elekta AB*, 344 F.3d 1205, 1220 (Fed. Cir. 2003) (explaining where a non-moving party presents an expert who “quote[s] particular portions of the references that [are] relevant for each of the claim limitations...[does] not simply make conclusory statement[s] that, in his opinion, the claims [are] invalid...and for each claim limitation...connect[s] it with disclosures in the prior art that he believe[s] [teach] each particular limitation,” then to the extent that such assertions conflict with similarly specific testimony by the patent holder’s expert, there exists a triable issue of fact); *see also Zoltek Corp. v. U.S.*, 95 Fed. Cl. 681, 693 (Fed. Cl. Dec. 16, 2010) (citing *KSR Int’l Co. v. Teleflex, Inc.*, 550 U.S. 398, 427 (2007)).

paragraphs of its invalidity MSJ, without citation to any evidence, that it is also entitled to an MSJ of non-infringement. For the reasons discussed below, NCR's Invalidity MSJ should be denied.

A. Attorney Argument Is Not Clear and Convincing Evidence that the Asserted Claims are Anticipated

In its Invalidity MSJ, apparently mindful of the fact that MSJ's based on conflicting expert opinions fail as a matter of law, NCR cites only once, and appends, its entire expert report of invalidity by Dr. Chatterjee as "clear and convincing" evidence that the Asserted Claims are anticipated by US2007265935 ("*Woycik*"). See Dkt. 66, p. 9. Then, NCR identifies eight "technical areas" discussed in detail in Mr. Crouse's Rebuttal Report which NCR erroneously alleges have "little, if anything, to do with the limitations recited in CloudofChange's Asserted Claims" and proceeds to provide attorney argument in attempted rebuttal to Mr. Crouse's expert opinions. Dkt. 66, p. 9. NCR's Invalidity MSJ must be denied because attorney argument is no substitute for clear and convincing evidence. See *Enzo Biochem*, 424 F.3d at 1284; see also *Invitrogen Corp.*, 429 F.3d at 1069. The experts dispute the facts made the basis of NCR's MSJ, and disputed expert opinions paraphrased as attorney argument provide no basis for an MSJ.

B. There is a Battle of the Experts—Not Clear and Convincing Evidence that the Asserted Claims are Anticipated

While NCR deliberately avoids specific citation to Dr. Chatterjee's report, NCR's attorney arguments are really just regurgitations thereof. But, NCR's attempt to shroud its contradicted, expert testimony must fail. Importantly, and as set forth in Plaintiff's *Daubert* Motion to Exclude the Invalidity Opinions and Testimony of Dr. Chatterjee, his opinions are not clear and convincing, particularly since his deposition testimony demonstrates that he does not understand the applicable legal standards, which renders his opinions unreliable. See Dkt. 78. For example, Dr. Chatterjee erroneously combines multiple references to show anticipation. See Dkt. 78, pp. 5-7.

Substantively, each of the “technical areas” described in Mr. Crouse’s Rebuttal Report clearly analyzes the language of the Asserted Claims and highlights how *Woycik* fails to anticipate each and every claim of the Asserted Patents.³

1. Local Server

Woycik requires a local server in each of its described embodiments, therefore *Woycik* does not teach key benefits of the Asserted Patents. NCR’s attempts to explain away *Woycik*’s clear statements as to the advantages of the local server in its disclosed POS system fail on their face. Asserted Claim 5 states, *inter alia*, “the web-based point of sale (POS) builder system of claim 1...wherein no on site, in-store server is required.” Dkt. 66-1, ’640 Patent, Claim 1. In contrast, *Woycik* makes it clear that stores using the *Woycik* POS system “include at least one local server 16 and at least one client kiosk 30.” Dkt. 66-4, *Woycik*, [0071]. Moreover, the local, on site server allows “administration” from “any client kiosk (30, Fig. 1; 80 Fig. 3) configured to communicate with the server 16, 82.” *Id.*

NCR attempts to avoid the clearly described advantages of an on site server explained in *Woycik* by citing an alternate embodiment wherein the local server resides in a (still on site) local kiosk 30. Dkt. 66, p. 11 (citing Dkt. 66-4, *Woycik*, [0072]). However, NCR’s argument is unavailing. The cited embodiment does not state that the local, on site server does not exist; rather, the embodiment merely provides that the on site, local kiosk 30 operates as *both* the on site server and the on site kiosk. Dkt. 66-4, *Woycik*, [0072]. Accordingly, the embodiment fails to anticipate

³ CloudfChange does not dispute that the prior art discloses POS builder software. The ’640 Patent admits as much, explaining: “U.S. Pat. No. 7,051,091 B1 (Cohen et al.) discloses a **configuration builder** useful in configuring software containing hardware units which are serviced by a center which services a multiplicity of similar units having a plurality of different configurations.” Dkt. 66-1, ’640 Patent, 1:50-55 (emphasis added). As set forth in this Response, CloudfChange does dispute, including with evidence and expert testimony, that the prior art (for example, *Woycik*) anticipates the web-based point of sale (POS) builder system recited in the Asserted Claims.

the language of the Asserted Claims because it explicitly requires an on site server.

Moreover, in each embodiment in *Woycik*, illustrated in Figure 1, the on site server 16 is shown within one of the two “stores.” In the different embodiments, the local server/local server kiosk 16 performs different functions, such as interacting with a remote client 36 (Dkt. 66-4, *Woycik*, [0074]; Fig. 1), interacting directly with the client kiosks 30 via the LAN network (*id.*), or, wherein the local server and kiosk are the same, interacting directly with the client 30 (*Id.*, [0072]). Accordingly, *Woycik* discloses no embodiment wherein the on site server does not exist in the store. NCR’s attorney arguments to the contrary do not make it so. Accordingly, NCR has not shown, and cannot show, that *Woycik* teaches the specific claim limitations of the Asserted Claims because *Woycik*, specifically and repeatedly, discloses a POS system which requires a local, in-store, on-site, server.

Conclusively to this point, NCR is correct that the on site, local server/kiosk is not an indication of some drawback in *Woycik*. Dkt. 66, p. 10. However, the on site, local server/kiosk does preclude a finding that *Woycik* anticipates the Asserted Claims because *Woycik*, through its on site server requirement, cannot teach each and every claim limitation of the Asserted Patents. *See, e.g.*, Dkt. 66-1, Claim 1 (“wherein web server software resides and is hosted on said vendor’s remote servers”), Claim 4 (“wherein no on site, in-store server is required”); *see also* Dkt. 66-2, ’012 Patent, Claim 1 (“POS builder interface configured to be accessible via network communication with said web server over a communications network”). Accordingly, a simple reading of *Woycik* and statements made in the Rebuttal Report make clear that *Woycik* does not teach the Asserted Claims, and thus *Woycik* cannot anticipate each and every limitation of the Asserted Claims. The MSJ of invalidity by anticipation should be denied on this basis alone.

2. Internet Connection

Similarly, NCR improperly attempts to read out language of the Asserted Claims by citing

various provisions of *Woycik* out of context, which it contends suggest “internet connection.” However, as described in *Woycik* and discussed in Mr. Crouse’s Rebuttal Report, the *Woycik* POS system relies on communications over a LAN, and does not disclose the limitation in the Asserted Claims. Dkt. 66-7, Crouse Rebuttal Report, ¶ 43 (citing Dkt. 66-4, *Woycik*, [0074] (“the cash register 32 or another device on the network 40 can be connected to a credit card payment center... via the Internet 18”)).

Notably, NCR fails to identify which elements of the Asserted Claims it believes to be disclosed in its vaguely cited portions of *Woycik*, likely because the cited portions of *Woycik* describe how a *remote server* connects to the “local servers and/or client kiosks” to “run a diagnostic” or “restore a previously working kiosk” by accessing a “web installation service provided by the remote server.” Dkt. 66-4, *Woycik*, [0123], [0124]. These sections of *Woycik* make no mention of any “internet connection” between the POS terminals to a web server, as required by the Asserted Claims. Likewise, NCR’s contention that *Woycik*’s “[use] of the internet” allegedly described in these sections does not amount to a teaching of elements of the Asserted Claims, nor does it amount to clear and convincing evidence of the same.

3. Vendor Subscription Service

Similarly, NCR’s attorney argument that providing a web server as a “vendor subscription service” is functional rather than structural such that there is no technical difference in the claimed “vendor subscription service” does not make it so. Likewise, NCR’s expert, whose opinion on the “vendor subscription” limitation is noticeably not cited in NCR’s Invalidity MSJ (likely because it admits the limitation is not expressly disclosed and conflates an anticipation analysis with obviousness), ignores the technical differences and reaches erroneous, conclusory findings that *Woycik* allegedly inherently teaches the limitations of the Asserted Claims. Ex. A, Chatterjee Dep. 82:12-84:4, Mar. 4, 2021. Namely, NCR, through its attorneys and expert, ignores the differences

regarding the importance of the on site “local server” on the entire system architecture of the system disclosed in the *Woycik* system in comparison to the Asserted Patents—which explicitly require no on site local server. *See, e.g.*, Dkt. 66-1, ’640 Patent, Claims 1, 4 (“wherein no on site, in-store server is required”); *see also* Dkt. 66-2, ’012 Patent, Claim 1. NCR’s attempt to isolate certain “monetization” capabilities of general web servers does not overcome this critical fact, and certainly do not rise to the level of meeting the heavy burden of clear and convincing evidence needed to invalidate CloudfChange’s Asserted Claims.

Additionally, NCR erroneously relies on *In re Schreiber* to suggest that functional claim language should never be used to distinguish a reference relying on inherency to anticipate an asserted claim. 128 F.3d 1473 (Fed. Cir. 1997). NCR misconstrues the holding of *In re Schrieber*. There, in contrast with this case, the Federal Circuit noted that “there [was] no dispute that the structural limitations recited [in the patent application] [were] all found in the [] reference....” *Id.* at 1477. Here, CloudfChange unequivocally disputes that *Woycik* teaches an “identical structure” as required by the Asserted Claims. In addition, and at the very least, *In re Schreiber* reinforces that whether a reference inherently anticipates an asserted claim is an issue of fact which must be proved by clear and convincing evidence. *Id.* NCR has failed to show that the exact “structure” of the Asserted Claims are all found in the prior art by clear and convincing evidence. Likewise, NCR’s unsupported attorney arguments regarding inherency fare no better.

4. Testing While Said POS Terminals Are Simultaneously in Use

Whether or not the specific claim limitation regarding the “testing of said POS screens is done iteratively in real time while said POS terminals are simultaneously in use” is disclosed by *Woycik* is also a disputed question of fact inappropriate for summary judgment. As the contradicting expert reports of Mr. Crouse and Dr. Chatterjee demonstrate, the Parties disagree as to whether *Woycik* teaches any of the claim limitations of the Asserted Patents. For instance,

Dr. Chatterjee's report makes conclusory statements as to what he believes a person of ordinary skill in the art would understand is meant by "iteratively" and "testing of said POS screens." *See* Dkt. 66-5, pp. 9-10, 26-27. NCR's Invalidity MSJ merely reiterates Dr. Chatterjee's opinion. Accordingly, in his Rebuttal Report, Mr. Crouse states that Dr. Chatterjee's invalidity report improperly "attempts to read elements out of...Claim 4." Dkt. 66-7, Crouse Rebuttal Report, ¶¶ 48, 53. As such, there is a "battle of the experts" regarding the teachings of *Woycik*. Summary judgment is inappropriate given the significant factual disputes that exist for the jury.

Furthermore, NCR's criticism of the manner that Mr. Crouse phrased his objections to NCR's expert's anticipation opinion is nothing more than attorney argument that cannot serve as clear and convincing evidence of anticipation. NCR's argument also fails substantively since there is no requirement that Mr. Crouse expressly state that a particular claim element is not disclosed in *Woycik*, particularly since disproving anticipation only requires proof that one element is not taught by the reference, and since it is Mr. Crouse's opinion that Dr. Chatterjee improperly read that limitation out of the Asserted Claims in its entirety. *See, e.g., In re NTP, Inc.*, 654 F.3d 1279, 1302 (Fed. Cir. 2011) ("It is axiomatic that for anticipation, each and every claim limitation must be explicitly or inherently disclosed in the prior art.").

5. Software as a Subscription (SaaS)

NCR's attempt to prove anticipation of Claim 6 of the '640 Patent is another paraphrase of its conclusory and erroneous expert report. Dkt. 66, Invalidity MSJ, p. 14. However, that argument also fails, because NCR's expert again failed to apply the required standard of the understanding of a person of ordinary skill in the art to show inherency of the specific claim language, and instead makes the conclusory and unsupported statement that "Woycik discloses, at least to the same extent as the '640 Patent, that the POS builder is usable to deliver POS application solutions using software as a subscription (SAAS)." Dkt. 66, Invalidity MSJ, p. 14; *see also* Dkt.

66-5, Chatterjee, A1, p. 12. Of course, NCR provides no citation to any portion of *Woycik* for this argument. Indeed, *Woycik*, makes no mention whatsoever of “software as a subscription” as required by the Asserted Claims. *See* Dkt. 66-4, *passim*.

Instead, NCR again relies on its fall back inherency allegation in a failed attempt to plug the holes in its anticipation argument regarding the missing “vendor subscription service” limitation required by Asserted Claim 1. Dkt. 66-5, Chatterjee, A1, p. 12. As explained above, these arguments fail to sufficiently show anticipation. Furthermore, Dr. Chatterjee’s expert report similarly conflates an anticipation analysis with an obviousness standard to erroneously suggest that the “software as a subscription” limitation of Asserted Claim 6 of the ’640 Patent is disclosed by *Woycik*—it is not. Dkt. 66-5, Chatterjee, A1, p. 12. Accordingly, NCR has failed to meet its burden of showing *Woycik*’s anticipation of Asserted Claim 6.

6. Open-Source, Non-Proprietary Technologies

NCR first cites Paragraph 40 of Mr. Crouse’s Rebuttal Report in an attempt to confuse Mr. Crouse’s statement regarding “open, non-proprietary technology” with the limitations of Asserted Claims 5 and 4, respectively. However, as discussed herein, *infra*, the Crouse Rebuttal Report independently discusses and rebuts Dr. Chatterjee’s Report regarding Claims 5 and 4. Specifically, Mr. Crouse directly rebuts Dr. Chatterjee’s assertion that “*Woycik* discloses a **web-based** point of sale (POS) builder system.” Dkt. 66-5, Chatterjee, A1, p. 1 (emphasis added). As the Crouse Rebuttal Report explains, *Woycik* “embraces Microsoft specific technologies” which precludes the *Woycik* system from being “web-based.” For instance, the *Woycik* system relies on a required “on-premises server” and does not disclose a “hosted system.” Dkt. 66-4, *Woycik*, Fig. 1, item 16 (“local server”); Fig. 3, item 82; [0071]. Rather, “*Woycik* embraces Microsoft specific technologies (Windows XP and .NET).” Dkt. 66-7, Crouse Rebuttal Report, p.12. Mr. Crouse’s Rebuttal Report goes on to explain that “combining Microsoft-specific” technology

with “open, non-proprietary” technology “is analogous to mixing oil and water” and cannot be indicative of a “web-based point of sale (POS) builder system,” as recited in Claim 1. *Id.*

NCR’s attorney argument also fails to prove that Claim 1 of the Asserted Patents is anticipated since attorney argument is not evidence. *See Enzo Biochem*, 424 F.3d at 1284; *see also Invitrogen Corp.*, 429 F.3d at 1069. Moreover, as set forth above, Crouse’s Rebuttal Report makes it clear that *Woycik* fails to anticipate the preamble of Asserted Claim 1 for the ’640 Patent and the ’012 Patent, respectively. Thus, at a minimum CloudofChange has identified a genuine issue of material fact regarding the language of the claim preambles, which the Court construed to mean “a point of sale (POS) builder system that requires the internet,” and summary judgment of anticipation is therefore precluded. Moreover, NCR’s argument ignores the fact that overcoming anticipation only requires evidence that any single claim limitation is not disclosed in the reference and Mr. Crouse identified numerous elements not disclosed in *Woycik*.

7. Without Specialized Hardware or Software

Likewise, a genuine issue of material fact exists as to whether *Woycik* discloses a system “without specialized hardware or software,” as required in Asserted Claims 5 and 4. While *Woycik* makes no mention of the term “hardware,” it describes that the “kiosk 50 includes most of the elements commonly found in a general purpose computer...” Dkt. 66-4, *Woycik*, [0077]. Accordingly, *Woycik* “is silent as to whether its kiosk is specialized or not.” Dkt. 66-7, Crouse Rebuttal Report, ¶ 54. NCR has failed to meet its burden to show anticipation of a required claim limitation, which is noticeably absent from *Woycik*. In view of this fact issue, the Court should let the finder of fact determine whether *Woycik* discloses the Asserted Claim limitation.

Similarly, NCR has failed to show by clear and convincing evidence that *Woycik* discloses the claimed system “without specialized...software.” As discussed above (open-source, non-proprietary tech.), *Woycik* describes a system which “embraces Microsoft specific technologies.”

Dkt. 66-7, Crouse Rebuttal Report, ¶ 40. Moreover, *Woycik* describes a system which requires a local server or in-store server (*see id.*, ¶ 49; *supra* Section III(B)(1)), which suggests that a specialized hardware and/or software would be used for the specific implementation of the POS terminals. At the very least, it fails to teach the Asserted Claims. Here, the Asserted Patents explicitly claim a “web-based point of sale (POS) builder system wherein no specialized hardware or software is required to implement said POS builder, and wherein no on site, in-store server is required.” Dkt. 66-1, ’640 Patent, Claim 5 (emphasis added); *see also* Dkt. 66-2, ’012 Patent, Claim 4.

8. POS Terminal Interaction with POS Builder

Once again, NCR’s attorney-arguments and citation to its rebutted expert’s report do not provide clear and convincing evidence required to show anticipation of Claim 1 of the ’012 Patent by *Woycik*. *See Enzo Biochem*, 424 F.3d at 1284; *see also Invitrogen Corp.*, 429 F.3d at 1069. NCR reasserts its previously stated allegations as to the teachings of *Woycik* (namely its erroneous assertion that *Woycik*’s POS terminals interact with the administrative tool on the remote server). As Mr. Crouse opined, “*Woycik* teaches that the kiosks interact with its local server, and the local servers interact with the central server.” Dkt. 66-7, Crouse Rebuttal Report, ¶¶ 51-52.

Thus, CloudofChange presents yet another point of dispute between the experts in this case which is not appropriate to determine at the summary judgment stage of this proceeding.

NCR offers attorney argument that “the local server can operate as a POS terminal” and introduces a new claim chart in support thereof. *See* Dkt. 66, p. 15, citing “additional claim chart...attached as Ex. 8.” Not only is NCR’s attorney argument not sufficient for summary judgment, but it is also an improper attempt to skirt page limits and avoid the Court’s docket control order by offering a new claim chart with new positions that were not enumerated in NCR’s

Invalidity Report or Invalidity Contentions. At a minimum, this new “evidence” should be subject to cross examination and is therefore not ripe for summary judgment.

C. CloudofChange Has Set Forth Specific Facts Showing there are Genuine Issues for Trial

As set forth above, NCR has done nothing more than offer conclusory attorney argument, including regarding Mr. Crouse’s opinions that contradict those of Dr. Chatterjee, in an attempt to rehash Dr. Chatterjee’s opinions and thereby read out certain limitations of the Asserted Claims, including, for example, “testing” and “while said POS terminals are simultaneously in use.” CloudofChange has responded by clearly identifying factual disputes, including, for example, that *Woycik* requires a local server and that *Woycik* does not disclose “vendor subscription service” or “using software as a subscription.” As CloudofChange explains, at the very least, Mr. Crouse’s Rebuttal Report demonstrates that there are genuine issues of material fact regarding the teachings of *Woycik* with regard to the Asserted Claims such that a reasonable jury could return a verdict for CloudofChange. Thus, NCR has wholly failed to prove—by clear and convincing evidence—that *Woycik* anticipates the Asserted Claims. Summary judgment should therefore be denied.

V. CONCLUSION

For at least the foregoing reasons, CloudofChange respectfully requests the Court deny Defendant’s Motion for Summary Judgment of Invalidity.

Dated: March 26, 2021

Respectfully submitted,

By: /s/ John H. Barr, Jr.

John H. Barr, Jr.
Attorney In Charge
Texas Bar No. 00783605
jbarr@pattersonsheridan.com

John A. Yates
Texas Bar No. 24056569
jyates@pattersonsheridan.com

B. Todd Patterson
Texas Bar No. 00789537
tpatterson@pattersonsheridan.com

Edgar N. Gonzalez
Texas Bar No. 24092431
egonzalez@pattersonsheridan.com

Patterson + Sheridan LLP
24 Greenway Plaza, Suite 1600
Houston, Texas 77046
(Tel.): 713-623-4844
(Fax): 713-623-4846

Abelino Reyna
Texas Bar No. 24000087
areyna@pattersonsheridan.com

Patterson + Sheridan LLP
900 Washington Ave., Suite 503
Waco, Texas 76701
(Tel.): 254-777-5248
(Fax): 877-777-8071

*Attorneys for Plaintiff,
CloudofChange, LLC*

CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2021, I caused the foregoing and its exhibits to be electronically served upon counsel of record.

/s/ John H. Barr, Jr.

John H. Barr, Jr.

Charles E. Phipps, cphipps@lockelord.com
Daniel G. Nguyen, dnguyen@lockelord.com
Steven F. Meyer, smeyer@lockelord.com

LOCKE LORD LLP

2200 Ross Avenue, Suite 2800
Dallas, Texas 75201

Counsel for Defendant NCR Corporation

FILED UNDER SEAL

I hereby certify that on March 26, 2021, I electronically filed the foregoing document under seal with the Clerk of the Court using the CM/ECF system pursuant to the Court's Standing Order regarding Filing Documents under Seal in Patent Cases and Redacted Pleadings (Dkt. 60).

/s/ John H. Barr, Jr.

John H. Barr, Jr.