

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

CLOUDOFCHANGE, LLC                   \*           May 19, 2021  
                                          \*  
VS.                                   \* CIVIL ACTION NO. W-19-CV-513  
                                          \*  
NCR CORPORATION                   \*

BEFORE THE HONORABLE ALAN D ALBRIGHT  
JURY TRIAL PROCEEDINGS  
Volume 3 of 4

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*KRISTIE M. DAVIS, OFFICIAL COURT REPORTER*  
*U.S. DISTRICT COURT, WESTERN DISTRICT OF TEXAS (WACO)*

1 (May 19, 2021, 8:30 a.m.)

2 THE COURT: Why can't we go ahead and get the prove-up  
3 done? The jury's all here.

4 MR. YATES: Mr. Barr's in the building apparently.

5 THE COURT: Mr. Yates, about how long will it take you to  
6 do your offer of proof?

7 MR. YATES: Mr. Barr is just down the hall and will be  
8 here in less than two minutes. And I believe the total would  
9 be about ten minutes, probably less, to do the offers of proof.

10 THE COURT: I just want the jury to know about how long  
11 it'll take.

12 MR. YATES: I suspect it's ten minutes.

13 THE COURT: Let the jury know they'll be coming in in  
14 about 15 minutes.

15 MR. BARR: Sorry about that, Your Honor.

16 THE COURT: No, no. I came in early. I just thought we'd  
17 get a jump on it and get the offer of proof done and then we  
18 can bring the jury in.

19 MR. YATES: Your Honor, plaintiffs would like to call  
20 Mr. Crouse to testify regarding technical apportionment outside  
21 the presence of the jury under Federal Rule of Evidence  
22 103(a)(2).

23 THE COURT: Okay. Mr. Crouse?

24 DIRECT EXAMINATION

25 BY MR. YATES:

1 Q. Mr. Crouse, did you conduct the technical  
2 apportionment in this case?

3 A. Yes, sir. I did.

4 Q. And what did you conclude?

5 A. I concluded that at least 80 percent of the value to  
6 the accused products in this case as it relates to features and  
7 functionality -- 80 percent of the value to the features and  
8 products in this -- to the accused products are taught by the  
9 patents-in-suit.

10 Q. And how did you reach that conclusion?

11 A. I reached that conclusion through a number of steps.

12 Q. Well, what was your first step?

13 A. My first step was to determine the benefits, at least  
14 at a high level, for the patents-in-suit.

15 Q. And what benefits did you identify?

16 A. I identified the high-level benefits of a web-based  
17 point-of-sale builder that is flexible, easy to use and  
18 accurate. Customers of any skill level can manage their  
19 point-of-sale system directly, and the point-of-sale system can  
20 be managed from anywhere in the world, and the POS system is  
21 managed in realtime.

22 Q. And what did you do next?

23 A. My next step was to look at the high-level components  
24 of NCR Silver, and more broadly all point-of-sale systems --  
25 all point-of-sale systems.

1 Q. And what components did you identify?

2 A. I identified six functional categories or groups of  
3 components that represent a point-of-sale system of which NCR  
4 Silver is one. And I opined on this yesterday, but No. 1 is  
5 transaction handling which represents purchases -- purchases,  
6 credits, et cetera.

7 The second item is inventory or item management. The  
8 third item is point-of-sale content management. The fourth is  
9 point-of-sale infrastructure, so the network, the hardware,  
10 et cetera. The fifth component is reporting. And the sixth  
11 component is security.

12 Q. What did you do next?

13 A. The next thing I did was to determine which  
14 functional -- which of these functional categories were taught  
15 by the patents-in-suit. And these were the first four that I  
16 just mentioned: Transaction handling, inventory management,  
17 point-of-sale content management and point-of-sale  
18 infrastructure. And those were the core functions.

19 Q. And what do you mean when you say these are the core  
20 functions of NCR Silver?

21 A. I believe these are taught by the invention on our  
22 significant differentiating drivers of demand for the accused  
23 NCR product.

24 Q. Okay. How does that correspond to your 80 percent  
25 number?

1           A.    Sure.  So now I have a list of six functional  
2 categories.  And as I looked at this list, my job here was to  
3 ascribe or assign relative percentages that represent the  
4 overall functionality of the point-of-sale system to each of  
5 these functional categories.  So since we're talking about an  
6 entirety of a point-of-sale solution, this number will add up  
7 to 100 percent.

8           So as I was assigning these functional categories, these  
9 percentages of functional categories and looking at the list, I  
10 realized that I knew -- I knew the two end points, No. 1 and  
11 Nos. 5 and 6, I knew the answer.  And I knew them to be  
12 relatively consistent across point-of-sale systems.

13          Q.    So you would describe this as an end point analysis  
14 for your six items?

15          A.    Yes, sir.  So the end points are Item 1, as I  
16 mentioned, and Items 5 and 6.  And so what I did is I looked  
17 through this.  As I looked at, for instance, No. 1, transaction  
18 handling.  And what I discussed yesterday is transaction  
19 handling is the backbone of a point-of-sale solution.  You  
20 quite simply don't have a point-of-sale solution without  
21 transaction handling.  And if you look at Dr. Chatterjee's  
22 report, he opines that transaction handling is a broad category  
23 to which I agree.  And so I assigned 50 percent to this  
24 functional category which is Category 1.

25          Q.    Okay.  But 50 percent is not 80 percent.  What'd you

1 do next?

2 A. No, sir. It's not. As I continued to look over the  
3 list, I looked at the other end point which are Items 5 and 6.  
4 And, again, I looked at those and I said those are relatively  
5 consistent across point-of-sale solutions, and they represent  
6 anywhere between 5 and 20 percent of the overall functionality  
7 of the point-of-sale solution.

8 Q. So how did you get to your 80 percent?

9 A. And so now we have between 5 and 20 percent in the  
10 Groups 5 and 6 that left a remaining 80 to 95 percent  
11 representing categories -- functional Categories 1 through 4.

12 So then what I did is I went to our damages expert,  
13 Ambreen Salters, and I stated I have the representative --  
14 relative grouping of Items 1 through 4 that represent the  
15 functionality of a point-of-sale solution of 80 to 95 percent.  
16 She then told me she would like a conservative number, so I  
17 arrived at the lowest number of that range which was  
18 80 percent. And that's how I arrived at my conclusion.

19 Q. Thank you, Mr. Crouse.

20 A. Thank you, sir.

21 THE COURT: Thank you. You may step down.

22 THE WITNESS: Thank you, Your Honor.

23 THE COURT: Yes, sir?

24 MR. BARR: Yes, Your Honor. Plaintiffs would call Ambreen  
25 Salters for an offer of proof.

1 THE COURT: Okay.

2 And you all need to remember to read in your exhibits from  
3 yesterday, if you have --

4 MR. BARR: Yes, Your Honor. We do.

5 DIRECT EXAMINATION

6 BY MR. BARR:

7 Q. Ms. Salters, could you state your name for the  
8 record, please?

9 A. Ambreen Salters.

10 Q. Okay. And you are the damages expert for the  
11 plaintiffs in this case; is that correct?

12 A. That is correct.

13 Q. Okay. Did Mr. Greg Crouse, CloudofChange technical  
14 expert, conclude that the Silver Essentials software as opposed  
15 to the hardware embodies the patented functionality at issue in  
16 this case?

17 A. Yes. He did.

18 Q. Did Mr. Crouse perform a technological apportionment  
19 analysis to determine the percentage of the Silver Essentials  
20 software's value in terms of components, features and functions  
21 taught by the patents-in-suit?

22 A. Yes.

23 Q. Did you use this apportionment in your damage model  
24 to determine the amount of the Silver essential software  
25 revenue that is attributable to the patents-in-suit?

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1           A.    Yes.

2           Q.    What is the amount of the technical apportionment  
3 that Mr. Crouse determined?

4           A.    80 percent.

5           Q.    Could you explain to us how you used this technical  
6 apportionment in your report?

7           A.    Yes.  According to Mr. Crouse, the Silver Essentials  
8 software contains a patented functionality which is essential  
9 to the web-based POS system.  The accused software follows --  
10 offers the following high-level components:  Transaction  
11 handling, inventory item management, POS content management,  
12 POS infrastructure, reporting and security.

13           The Silver Essentials software features of reporting and  
14 security are not essential to the functioning system and also  
15 not covered by the patents-in-suit.

16           Based on this analysis, Mr. Crouse concluded that at least  
17 80 percent of the accused software's value in terms of  
18 components, features and functions is taught by the  
19 patents-in-suit.

20           Q.    Did you accept that 80 percent figure in your -- and  
21 use it in your modeling?

22           A.    Yes.  I did.

23           Q.    And using that 80 percent apportionment figure for  
24 the functionality of the systems contributed by the  
25 patents-in-suit, what did you find was the appropriate royalty?

1 A. 16.5 million.

2 Q. How did you arrive at that figure?

3 A. I utilized NCR's monthly baseline software pricing of  
4 79 percent. I applied Mr. Crouse's technical --

5 Q. I'm sorry. Did you say 79 percent?

6 A. Or \$79. I apologize. \$79. And I applied  
7 Mr. Crouse's technical apportionment of 80 percent and then I  
8 multiplied that by NCR's accused software's gross profits of  
9 42 percent. And then I multiplied that by the number of  
10 accused monthly software subscriptions of 547,907.

11 Q. I'm sorry. What was the percentage of gross profit  
12 for NCR Silver that you used?

13 A. 47 percent on average. It is a little bit different  
14 per year based on their profitability.

15 MR. BARR: Okay. That concludes our offer of proof, Your  
16 Honor, for this witness.

17 THE COURT: Thank you, ma'am.

18 MR. BARR: May this witness be excused, sir?

19 THE COURT: Yes, sir.

20 If you all want to read into the record your exhibits from  
21 yesterday. And then we will bring the jury in.

22 (Conference between counsel.)

23 MS. CAMERON: Good morning. The parties have conferred  
24 this morning and we believe the only new exhibit that was  
25 admitted yesterday was DTX-133 which was on the list the Court

1 provided.

2 We had one additional note. In reviewing the list, we see  
3 that Plaintiff's Exhibit 82 is marked as having Tab A and B. I  
4 think it should be Joint Exhibit 82 with A and B.

5 (Off-the-record discussion.)

6 MS. CAMERON: Okay. Thank you very much.

7 THE COURT: Ready to go?

8 MR. BARR: Plaintiff's ready, Your Honor.

9 MR. BAKER: Defendant's ready, Your Honor.

10 THE COURT: Is your witness ready to go?

11 MR. BAKER: Yes, Your Honor.

12 THE COURT: I'll be back in about five minutes. We'll  
13 bring the jury in.

14 (Recess taken from 8:44 to 8:49.)

15 THE BAILIFF: All rise.

16 THE COURT: Please remain standing for the jury.

17 (The jury entered the courtroom at 8:49.)

18 THE COURT: Thank you. You may be seated.

19 Ms. Collings, are you calling the next witness?

20 MS. COLLINGS: Thank you, Your Honor. The defense calls  
21 Dr. Devrim Ikizler.

22 (The witness was sworn.)

23 DIRECT EXAMINATION

24 BY MS. COLLINGS:

25 Q. Good morning.

1 A. Good morning.

2 Q. Could you please introduce yourself?

3 A. Yes. My name is Devrim Ikizler. I live in Austin.

4 Q. And what are you appearing on today, Dr. Ikizler?

5 A. I'm here to opine on the patent infringement issue  
6 that we all know in this case.

7 Q. Have you created some slides to assist you in  
8 presenting your testimony today?

9 A. Yes. I did.

10 Q. And are they in front of you?

11 A. Yes.

12 Q. Okay. Could you tell us a little bit about yourself,  
13 starting with your education?

14 A. Yes. I studied mathematics and economics as an  
15 undergraduate in Turkey. And then I studied my -- got my Ph.D.  
16 in economics from the University of Texas at Austin.

17 Q. And what do you do for a living now, Dr. Ikizler?

18 A. I do quite a few things. I have three -- I do three  
19 things essentially, split my time between research, consulting  
20 and teaching.

21 Q. Now, as an economist do you have a particular field  
22 of concentration?

23 A. Yes. I do specialize in competition economics which  
24 essentially deals with business-to-business transactions and  
25 the consequences of those transactions on the companies and the

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1 industry as a whole.

2 Q. So you said you really are doing three things right  
3 now. You do research, consulting and teaching. Do you do that  
4 all freelance? Do you have your own business?

5 A. Yes. I own a small business based in Austin. I have  
6 five full-time employees, three Ph.D.-level researchers,  
7 including myself and two data scientists. It's a company  
8 called Intelligent Analytics and Modeling. So that is my  
9 research and consulting side of the business.

10 But I also do teach regularly, at least one class a year  
11 at the University of Texas at Austin in the economics  
12 department. And I do research with my colleagues at UT  
13 regularly which I will tell you about it.

14 Q. So going back to your research arm, the research arm  
15 of your business, can you tell us a little bit about that?

16 A. Well, I do a lot of nonprofit research. I help  
17 nonprofits do their data analysis and consult them about how to  
18 grow their business and about -- give them insights about their  
19 past actions.

20 And to give you some examples of that is I consult  
21 regularly a nonprofit called JUST that -- that serves female  
22 entrepreneurs that are under-served communities that gives them  
23 micro loans so they can get -- form businesses. So I gave them  
24 data analytics services.

25 But I'll give you a couple other examples. I was part of

1 the team of researchers that got hired by the Texas General  
2 Land Office after -- in 2017 after Hurricane Harvey happened.  
3 The federal funds that Texas -- State of Texas received had to  
4 be distributed in the state of Texas. Each county was going to  
5 get a different allocation. And part of that -- I was part of  
6 the researchers that calculated that allocation, for example,  
7 in 2017.

8 And besides that I have -- as you can see on the screen, I  
9 represented the State of Texas in specifically TABC against  
10 Walmart in 2018 in the federal court in Austin as an expert  
11 witness.

12 And I recently got two Small Business Administration  
13 grants that are federal grants and one National Science  
14 Foundation grant that in conjunction City of Austin we're  
15 developing a mobility hub in the underserved neighborhood in  
16 Austin.

17 Q. So in addition to the research arm of the business,  
18 you mentioned that there was also a consulting section. Can  
19 you tell us a little bit about the work that you do in the  
20 consulting portion?

21 A. The consulting portion involves consulting some  
22 businesses, but also consulting law firms in litigation cases  
23 such as this one. I do a few of those only a year because I  
24 have too much on my plate essentially. Because I have a  
25 seven-month-old, so I do a lot of diaper changing for that.

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1           And my wife is also a business owner. She's a -- sorry.  
2           She's a floral designer so she does a lot of weddings,  
3           especially all the postponed weddings from the COVID time now.  
4           So I try to not to take too much of the litigation cases, but I  
5           do a few of those a year.

6           Q.    And this is one more thing. So you've been retained  
7           in this case by NCR Corporation as an expert witness on  
8           reasonable royalty; is that correct?

9           A.    Correct.

10          Q.    And you're being paid by NCR Corporation for your  
11          work on this case?

12          A.    Yes. I get paid hourly, and my compensation, which  
13          was one of the things that I was -- I never understood in this  
14          industry, my compensation is not dependent on the outcome of  
15          this case, whether -- whichever party -- whatever you guys  
16          decide today is not going to affect my compensation.

17          (Clarification by the reporter.)

18          BY MS. COLLINGS:

19          Q.    Okay. So let's go back to your litigation  
20          experience.

21          On the litigation side, with respect to -- you've worked  
22          on patent litigation matters, correct?

23          A.    Yes. Between 2010 and 2015, especially, I worked  
24          full time in litigation with one of the best experts in the  
25          United States, I considered. Professor McGee was my mentor.

1 He's a finance professor and advisor to four different  
2 presidents. So I essentially learned this business from him  
3 over the years. So I did a -- quite a bit of patent  
4 infringement cases.

5 Q. And on your patent litigation cases, can you describe  
6 for me how much work you do for plaintiffs, how much work you  
7 do for defendants?

8 A. I do about 50/50.

9 Q. And in those cases, patent litigation cases, have you  
10 used the same methodologies in calculating a reasonable royalty  
11 that you have used in this case?

12 A. Yes. Pretty much in every patent litigation case we  
13 do -- construct a hypothetical negotiation using, what you  
14 heard yesterday, Georgia-Pacific 15 factors.

15 But every case, depending on the data availability, we  
16 have to do -- use a slightly different methodology, using what  
17 we have, because we're trying to estimate something. If you  
18 have great past transactions, you could use that; otherwise,  
19 you have to use other things.

20 So you have to look at the data availability to choose the  
21 methodology.

22 Q. And have you ever worked on a case involving  
23 point-of-sale solution technology?

24 A. I worked on two cases that relate to payment systems.  
25 They were not about the specific point-of-sale terminal, but

1 they were in the payment processing systems.

2 One of them was a trade secret case in 2016. One was -- I  
3 think that was my first deposition. It was a trade secret case  
4 involving a technology. It was a imaging technology, when you  
5 had to deposit a check at the bank. There was a person that  
6 wrote the software that was working with a bank. So that was a  
7 related case.

8 And then another one was an antitrust matter between  
9 Discover and Visa about the debit cards and their securities.

10 MS. COLLINGS: Your Honor, we proffer Dr. Ikizler as an  
11 expert witness on economics in this case.

12 MR. BARR: No objection, Your Honor.

13 THE COURT: He'll be admitted.

14 BY MS. COLLINGS:

15 Q. And I'll remind you to please slow down.

16 A. I will do my best. Please remind me regularly. I  
17 don't mind.

18 Q. Thank you.

19 Dr. Ikizler, what was your assignment in this case that  
20 you've completed?

21 A. I had three assignments. First, you heard  
22 Ms. Salters yesterday. So my -- I was assigned to analyze her  
23 report and her opinions and quality control her calculations as  
24 a rebuttal expert. That was my first assignment.

25 My second assignment was to construct a hypothetical

1 negotiation, which is if the parties had a chance to go back to  
2 2016, before this all started, when the patents were issued, if  
3 they had sit down at a table and negotiated, what would they  
4 have decided, which is a really hard task.

5 But as a result of that hypothetical negotiation, what  
6 reasonable royalties should be paid today that resembles what  
7 the parties would have agreed back in 2016 considering a bunch  
8 of factors.

9 Q. So let's start with that hypothetical negotiation.

10 Can you tell us a little bit about what your  
11 considerations were with respect to the hypothetical  
12 negotiation?

13 A. Well, first thing is the timeline. When would that  
14 hypothetical negotiation take place?

15 So in 2012, NCR started selling this product. And in  
16 2016 -- to July of 2016, the patents were issued by the U.S.  
17 PTO.

18 So when the patents were issued, that dictates the  
19 hypothetical negotiation date. That's the date the  
20 CloudofChange would have come to the table, knock on the door,  
21 hey, we need to sign a deal. What do you want to do?

22 So that is the date that I picked as the hypothetical  
23 negotiation date.

24 Q. And earlier in your testimony I heard you mention the  
25 Georgia-Pacific factors.

1           If we turn to Slide 5.5, are these the Georgia-Pacific  
2 analysis factors that you were referring to earlier?

3           A.    Yes.  This is a long list of factors that the courts  
4 recommend that the experts use for this analysis.  I  
5 highlighted some of them to be more important, but you already  
6 heard about it from Ms. Salters as well.

7           These factors are common, and I followed these factors.  I  
8 will go over them essentially -- as necessary throughout my --  
9 throughout my slides later today.  So we'll cover them as  
10 needed.

11          Q.    Okay.  Well, now that you've outlined the context,  
12 can you tell us a little bit about your analysis of  
13 Ms. Salters' report?

14          A.    Yes.  So Ms. Salters did an analysis that could be  
15 summarized in a few components.  There's a price component.  
16 She takes \$79 price per unit as you can see on this screen top  
17 row.  And that is same from year to year, she takes the same  
18 price.  And then she takes a gross profit percentage that she  
19 calculates that varies between 40 percent to 50 percent.  And  
20 then she calculates number of subscriptions that's been sold in  
21 this software.

22          And then comes up with damages that in her report she  
23 suggested 16.5 million.  And yesterday she testified she gave a  
24 range.  She said somewhere between 12 to 20 million.  I will go  
25 over her -- the details of her analysis and explain which parts

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1 I agree with her and which parts I don't agree with her.

2 Q. Do you have an understanding of how Ms. Salters  
3 reached her conclusions?

4 A. Yes. So one of the first observations that you will  
5 realize she relies on Mr. Crouse very heavily, which is the  
6 expert for the plaintiff, the technical expert. She read and  
7 cited blog posts which I found unreliable to some degree. Not  
8 that there's anything wrong with the blog posts, but if that's  
9 your only data source that you're relying on -- for example, I  
10 task my students every semester for a research study, I do not  
11 allow them to recite a blog post. They could cite a blog post  
12 as supplemental evidence, but if the fundamental portion of  
13 your analysis relies on a data point that's written by a blog  
14 post which is not peer-reviewed, which means other people --  
15 other researchers didn't get to quality control that data, I  
16 don't find that reliable. So that's another observation.

17 In her report she did not cite one academic research  
18 paper, not one. It's all blog posts. You can look at the  
19 footnotes. I wanted to put them in, but I have limited time.  
20 It's in her report, as part of it.

21 She used a survey to compare profitability of NCR which is  
22 a publicly-traded company. She said in the SaaS industry  
23 profitability is somewhere between 70 to 95 percent.

24 Q. You referenced the SaaS industry. Can you explain  
25 what you're referring to? What does that acronym stand for?

1           A.     That stands for software as a service, which is --  
2     Netflix is in that SaaS industry as we talk yesterday. All the  
3     apps you download that you may be paying for is in the app  
4     industry is in the SaaS industry essentially. You just pay for  
5     a subscription month to month.

6           Q.     How else did you find that Ms. Salters reached her  
7     opinion?

8           A.     And lastly, with using three excuses -- when I say  
9     excuses, in my opinion they're excuses -- she deemed NCR  
10    financials -- she assumed NCR financials are simply not  
11    correct.

12          Q.     Okay. And based on your analysis of Ms. Salters'  
13    report, your understanding of how she reached those  
14    conclusions, do you have an opinion about Ms. Salters' NCR  
15    Silver profitability analysis?

16          A.     Yes. Before we get into profitability, I want to say  
17    one thing. The importance of these bullet points that I put  
18    here, as economist -- everybody watches the news. You're aware  
19    that one of the hardest jobs is economy, because we constantly  
20    go through economic depressions and financial crises.

21          Why is that? Because there's usually a number out there  
22    you want to estimate. That's what we do. We look at multiple  
23    data points. We look at a lot of data which you've seen in  
24    slides -- everybody's slides, stack of papers. Everybody  
25    analyzes data. Great. What's the purpose? Is to estimate

1 that one value out there, how much CoC should have gotten paid  
2 in 2016.

3 But when you do that analysis, what I'm trying to  
4 highlight here with these five bullet points, because it's such  
5 an unknown number you have to seek precision, accuracy and you  
6 have to be detail-oriented. You can't just do -- take  
7 constantly shortcuts. And that is the pattern that I realized  
8 in Ms. Salters' analysis, a lot of shortcuts which makes her  
9 results unreliable. But I will get to details on that one.  
10 Let's move to profitability.

11 Q. Okay.

12 MS. COLLINGS: Let's move to the Slide 5.9.

13 BY MS. COLLINGS:

14 Q. Now, can you explain to us what opinions you had with  
15 respect to Ms. Salters' profitability analysis?

16 A. Yes. So this is the financials that is produced by  
17 NCR. Publicly-traded company, regulated by Securities and  
18 Exchange Commission. They have investors they have to report  
19 to. They can't just make up numbers.

20 MR. BARR: Your Honor, I object to narrative answers to  
21 every question.

22 THE COURT: Overruled.

23 BY THE WITNESS:

24 A. So this screenshot here is a list of the expense  
25 items that is as listed in NCR's financials. I didn't change

1 anything except I highlighted three of them in light yellow,  
2 which I'll have another slide later annotated.

3 But you can see on the explanation part, in the middle, it  
4 says "Salters excludes," "Salters excludes," and then "Salters  
5 and Ikizler includes."

6 So there are three items out of this 27 that Ms. Salters  
7 decided to include only. She said the other ones cannot be  
8 reliably correct, and she used three excuses. I will walk over  
9 all of these three excuses. You actually heard some of them in  
10 this trial in the last two days.

11 THE COURT: Okay. At some point you got to ask a  
12 question.

13 BY MS. COLLINGS:

14 Q. So you mentioned the rationalization for your opinion  
15 that Ms. Salters overinflated NCR Silver's profitability  
16 analysis.

17 MS. COLLINGS: If we turn the slide.

18 BY MS. COLLINGS:

19 Q. And you provide an explanation of the basis for that  
20 opinion.

21 How did Ms. Salters, in your opinion, overinflate NCR  
22 Silver's profitability?

23 A. So simple math. There were 27 items, and she picked  
24 three of them to the other ones. Therefore, she excluded 24  
25 out of 27 cost items that NCR's accounting department thought

1 was appropriate.

2 And as a result of that exclusion, she reached  
3 47.2 percent profitability. If you just do exactly what NCR's  
4 financials, as they produce and as they view internally, you  
5 would have reached 28.1 percent.

6 Q. So overinflation of NCR Silver's profitability was  
7 your first observation with respect to Ms. Salters' opinion.  
8 Your next was that she inappropriately was citing to a blog  
9 post.

10 MS. COLLINGS: If we turn the slide.

11 BY MS. COLLINGS:

12 Q. Can you -- and in doing so, she not only overinflated  
13 the NCR Silver profitability margin, but she also contrasted --  
14 is that what you were just explaining, she contrasted the  
15 profitability with the SaaS industry study?

16 A. So if you could go to the previous slide, please.

17 Yeah. Even the previous one.

18 So I said Ms. Salters used three rationales for inflating  
19 the gross profit analysis. One of which is the fact that there  
20 must be something wrong with this financial.

21 And she said, well, Ms. Schoonover was asked a series of  
22 questions in her deposition, and she did not answer them  
23 properly.

24 And we heard two days ago -- I don't know if you remember,  
25 but we heard two days ago here, Ms. Schoonover was never asked

1 the questions about this specific P&L. She was being asked  
2 questions about the selling expenses. So that was one of the  
3 reasons that she found this unreliable.

4 The second reason was that 400 survey. Well, just  
5 yesterday she said there was 1,200 companies that was surveyed  
6 in that SaaS industry survey. That is actually incorrect.  
7 There is 400 companies, which I corrected her in my deposition  
8 but still she said 1,200 yesterday.

9 So what's wrong with that survey? Surveys are a great way  
10 to rely on data. Well, if you want to estimate how much Texans  
11 drink coffee, would you do a survey in New York? No. Because  
12 you're interested in how much Texans drink coffee.

13 Well, she used a survey that is conducted by a venture  
14 capital firm that has vested interest in collecting funds so  
15 that they can invest into start-ups. So they had surveyed --

16 Q. Dr. Ikizler, I'm going to interrupt you. I'm sorry.

17 But you've just mentioned a vested interest. Are you  
18 talking about the public -- the publisher of the study of the  
19 blog article?

20 A. Yes. The company who conducted the survey.

21 Q. Okay. What about the company who conducted the  
22 survey? Who is that company?

23 A. That is a venture capital company.

24 Q. Okay. And what is wrong with a venture capital  
25 company conducting this survey that you're discussing?

1           A.    Well, venture capital firms, they go after investors  
2 to collect money. So they have every interest to say, hey,  
3 look at these high profitable firms I got for you. You want to  
4 give me some money? That is the business model of a venture  
5 capital firm.

6           Q.    And I'll remind you to please try to slow down on  
7 your answers.

8           And you said that the study was not representative. What  
9 did you mean by the study was not representative?

10          A.    It was not statistically representative. That's why  
11 I gave the example. If you want to measure how much Texans  
12 drink coffee, you don't do a survey in New York, because New  
13 Yorkers and Texans don't have the same habits. You have to get  
14 a sample of Texan people -- Texas people. You can't just  
15 assume that they must be similar.

16          And that is the analogy I'm giving you. Comparing NCR's  
17 financials to a group of small firms that are in the SaaS  
18 industry that generates 70 to 95 percent profit rate is just  
19 not a fair comparison.

20          Q.    So in addition to disregarding NCR Silver's own  
21 financial documents and referencing a nonrepresentative survey  
22 study, are there any other bases for your opinion that  
23 Ms. Salters' gross profit analysis of NCR Silver was  
24 inaccurate?

25          A.    Yes. She mentioned that the transactional NCR data,

1 sales data, did not match these financials. She said there was  
2 a gap of 14 million unexplained revenues. Which I have a  
3 series of slides I will tell you how she miscalculated the  
4 data. That's one of the reasons I said the lack of precision  
5 in her analysis end up leading to her believe that the  
6 financials must be wrong. But I will highlight for you what  
7 she should have done in her analysis.

8 Q. So in addition to overstating the profitability  
9 analysis, I think your next issue with Ms. Salters' report was  
10 that it overstated the importance of the patents-in-suit. What  
11 did you mean by that? If we could --

12 A. Well, part of the analysis is let's set aside the  
13 profitability. I calculated 28 percent. It consisted with NCR  
14 documents. She suggests 48 -- I calculated 28 percent, she  
15 suggest 47 percent. Let's set aside that one. Great. High  
16 profitability, low profitability. There are things that I  
17 don't agree with.

18 But then the other big issue that is really at the core of  
19 the hypothetical negotiation is how valuable is this technology  
20 to NCR? How relevant it is. Because you're going to come to  
21 me -- if I'm NCR, you're going to come to the table and try to  
22 say, hey, do you want to license these patents? I need to  
23 understand that these patents are relevant and important for my  
24 product.

25 So when she did her analysis, she did not apportion any

1 value for all the factors that are contributed by NCR in her  
2 analysis. And I have a list of them here. NCR's brand, for  
3 example. With 130 years of recognition in the industry, when a  
4 vendor wants to go buy something, the name recognition is a  
5 factor. How much exactly? Really difficult question to ask.  
6 But it definitely has a lot of value in it.

7 NCR's technology and know-how. This is not the first  
8 product NCR did in this industry. So you want to buy a  
9 point-of-sale system, you want to rely on -- I need to buy this  
10 from someone who knows what they're doing. And they have over  
11 1,200 patents in this industry, and they have acquired multiple  
12 companies about how to make this correct.

13 Q. In addition to NCR Corporation brand and experience  
14 and depth in the market, what about NCR Silver itself, that  
15 you're suggesting Ms. Salters assigned zero value to?

16 A. The NCR Silver product itself is driven by, as you  
17 heard, a team of 100 people. And what's unique about them -- I  
18 interviewed one of their client representatives, the  
19 representatives from the NCR company. And one of the -- what's  
20 unique about them is their on-the-ground sales team. So they  
21 do -- some companies just do sales on the Internet, like  
22 Square, the newer companies. Some older companies, like NCR,  
23 they go in every shop, every mom-and-pop shop. They knock on  
24 the door and try to sell the product on the ground. So that is  
25 what's unique about them.

1           And you, when you allocate profits, how much should go to  
2 CloudofChange versus how much should go to NCR, you have to  
3 factor in all these factors that are contributed by NCR.

4           Q.   And why is that -- in a calculation of a reasonable  
5 royalty, you said that you have to, you know, balance what's  
6 being contributed to the technology at issue.

7           What requires that balance?

8           A.   The law requires --

9           Q.   Not the -- I'm sorry. I did not mean to elicit a  
10 legal opinion. You talked about how you frame your analysis in  
11 calculating a reasonable royalty with respect to the  
12 hypothetical negotiation.

13          Is that what you're referring to when you talk about the  
14 balance?

15          A.   The reasonable royalty -- I think you're asking me  
16 about the apportionment, so the factors, GP 15 factors, to say  
17 how profitable is this product, first question.

18          And the second question is, how much of this product  
19 should go to which company?

20          And that is the apportionment. You have to apportion.  
21 That is the factor that leads to reasonable royalties.

22          Q.   So, Dr. Ikizler, in addition to the overinflated  
23 profit margin and the overstatement of the importance of the  
24 technology in the patents-in-suit in this case, what else?  
25 What else did you find disagreement with pertaining to

1 Ms. Salters' report?

2 A. Well, again, you will remember Mr. -- from  
3 Mr. Crouse's report and slides and also Ms. Salters' slides,  
4 they listed a list of four core functionalities. I just want  
5 to highlight you guys that before we move on to the next. The  
6 four core functionalities, inventory management, content  
7 management, they are common in every POS system, every POS  
8 system.

9 So Ms. Salters listed those and said, hey, these are  
10 taught by the patent, but they happen to be existed in the  
11 prior art as well. And Starbucks had the same things, same  
12 four core functionalities.

13 Those are the core functionalities of every point-of-sale  
14 transaction. You have to run a payment, you have to run  
15 inventory. So because those four, also mentioned in the  
16 report, she assumes 100 percent of the product value should go  
17 essentially to CloudfChange.

18 Q. And in addition to what we've already discussed  
19 today, I think you also had mentioned earlier the lack of  
20 precision or detail orientation in what is supposed to be an  
21 economic analysis.

22 Can you elaborate on why you found there was a lack of  
23 precision and detailed-orient -- detail?

24 A. Yes. I prepared a sequence of slides to show what  
25 she should have done, if she was more detail-oriented, and I

1 wanted to highlight for you.

2       So first of all, when she counts the units sold, she has a  
3 number of subscriptions sold. That's how her damages model  
4 works. She looked at what's highlighted in red, which is the  
5 name of the product in this spreadsheet, the name of the  
6 product. She looked at it. Not the actual price charged to  
7 the customer.

8       And she used a \$50 arbitrary threshold because she didn't  
9 want to figure out, which was a lot of work -- I had two data  
10 scientists worked on it in my team -- to exactly which one of  
11 these line items are subscriptions sold to clients versus are  
12 just the line items, such as, oh, it's this is an add-on  
13 concierge plan, it's not a subscription.

14       So instead of doing the detailed work, she took two  
15 shortcuts. First, the \$50 arbitrary threshold, and the second  
16 is she focused on what's in the name of the product, as listed.  
17 Not how much the client got charged for it.

18       MS. COLLINGS: And if we turn to the next slide.

19 BY MS. COLLINGS:

20       Q. What other problems did you see with respect to  
21 Ms. Salters' failure to focus on detail orientation in her  
22 analysis?

23       A. So that transactional data had one tab in it that  
24 NCR's internal data team had left the formulas visible, which  
25 is not all that common in every litigation that I've been part

1 of. Usually you hide formulas.

2 The formulas was available to both the experts to actually  
3 replicate exactly how NCR calculated. So she could have just  
4 followed the formulas to replicate the numbers correctly, and  
5 she would have not found the 14 million gap, supposedly, that  
6 she claimed that there exists in between the invoice data and  
7 the financials, which she end up using to inflate her  
8 profitability analysis because she concludes that the  
9 financials must be unreliable.

10 Whereas, if she followed detailed work, she would have  
11 seen that the numbers actually not -- there is not a mismatch  
12 that she claimed.

13 Q. Are there any other issues that you found with the  
14 report?

15 A. If you go to the next slide, another thing that she  
16 did, she used only one of the four spreadsheets that's  
17 available. I highlighted in green what she used.

18 She used just invoice item report, but she did not take  
19 into account the adjustments, the credit -- credits given back  
20 to the vendors. Let's say if you return -- if you cancel your  
21 subscription, that doesn't show up in the spreadsheet that she  
22 looked at. It shows up in another spreadsheet she did not  
23 analyze.

24 Q. And so, Dr. Ikizler, what are the conclusions that  
25 you reached with respect to these missteps of Ms. Salters?

1           A.    Again, I gave you that little -- there's a true  
2 number out there. Nobody knows how much really should CoC get  
3 paid. It's your job. But what we can do as economists, do our  
4 best to follow the detailed data work to help estimate that  
5 number.

6           And my conclusion is that she took a lot of shortcuts in  
7 her analysis that makes it unreliable in my opinion. But  
8 especially it comes to -- as it comes to the profitability  
9 analysis, she gets -- that's where the big stark difference is,  
10 that she gets twice as high profitability as she should have.

11          MS. COLLINGS: If we go to the next slide.

12 BY MS. COLLINGS:

13          Q.    What is the effect of that overinflation of the  
14 profitability?

15          A.    So NCR Silver's software revenues are 66.6 million.  
16 And that's for the accused time period, from since the patents  
17 were issued till the end of 2020. 66.6 million. These are  
18 software revenues.

19          And then the profits, the 28 percent correct profit  
20 number, that would have -- that's how much NCR actually made  
21 profits, \$18.4 million. That represents 27 percent of  
22 66 million.

23          And she opined yesterday she thinks anywhere from 12 to  
24 \$20 million should go to CoC. So if CloudfChange got  
25 \$20 million, that would have been more than 100 percent of the

1 profits.

2 If they get \$16 million, \$16.5 million, as she suggested  
3 in her report, that would be 90 percent of the profits.

4 That is the conclusion that I'm highlighting. That's the  
5 effect of what her steps end up leading to as a result.

6 Q. And in your opinion, is that a reasonable royalty?

7 A. No. Because it does not capture all the factors that  
8 NCR contributed to the profitability of the NCR Silver product.  
9 It's not a reasonable royalty.

10 Q. Now, you said that you had three assignments,  
11 evaluate, overview the hypothetical negotiation, reviewing  
12 Ms. Salters' report. And then now as an economist,  
13 Dr. Ikizler, how should you have valued this technology?

14 A. Again, this is a difficult task. I'm going to give  
15 you three methodologies that are most common in this field.  
16 The first one, unfortunately we couldn't do. It's called a  
17 comparable licensing. So to give out a house, if a house -- if  
18 you buy a house, if it's sold before, if there are comparable  
19 houses, that's the best thing you can do. You can look at the  
20 comparables and say, hey, this is probably worth \$1 million  
21 because a similar patent just got sold a year ago. That would  
22 have been the best thing that every expert would have dreamed.  
23 There's no such thing, because these patents has never been  
24 sold before to another entity, so we can't use comparable  
25 licenses from the past --

1 Q. What do you mean?

2 A. That is out of the window.

3 Q. Excuse me, Dr. Ikizler. Are you able to use a  
4 comparable license then methodology in this case?

5 A. No. We can't.

6 Q. And that's because there are no comparable licenses  
7 in this case?

8 A. Yeah. Both Ms. Salters and I agree on this. This  
9 would have been great, but there's no comparable licenses.

10 Q. Okay. What is the next potential method you might  
11 use in order to value a technology?

12 A. Apportion the profits. This is consistent, again,  
13 with the GP 15 factor. You look at how profitable this --  
14 remember the pie? That we have a pie of profits. It -- the  
15 task is how to split the pie. Ms. Salters suggests 90 to 10  
16 percent. 90 percent goes to CloudfChange, 10 percent goes to  
17 NCR. So if you properly apportion it, the question is how much  
18 of that pie should go to each company. That's what you -- what  
19 I recommend is how to think of this methodology.

20 If we can go two slides back, please. Yes.

21 And the term methodology is the design-around solution.  
22 Which is when NCR sit down at the table did they have an  
23 alternative on that negotiation? Did they have an alternative  
24 to come up with another solution that does not infringe on the  
25 CloudfChange but still delivers the same output? And I'll go

1 over that as well.

2 Q. Okay. Let's go back to the apportion profits  
3 methodology.

4 MS. COLLINGS: And specifically Slide 518.

5 BY MS. COLLINGS:

6 Q. And if you look there I think you discussed the  
7 Georgia-Pacific Factor 8. Now, with respect to the  
8 Georgia-Pacific Factor 13, can you describe what is involved in  
9 applying that particular factor?

10 A. So this is the factor that tells us how should we  
11 split that pie? And this is read the language exactly as it  
12 exists, that's what recommended methodology is. So the portion  
13 of the realizable profit that should be credited to the  
14 invention -- really importantly -- as distinguished from the  
15 non-patented elements such as the manufacturing process, the  
16 business risks, significant features or improvements added by  
17 the infringer, in this case NCR.

18 So we have to separate everything. Only that the relative  
19 contribution of the patented technology should go to  
20 CloudofChange. Everything else remains at NCR. That's what  
21 this patent states.

22 Q. And when you just said the infringer, in this case  
23 NCR, what did you mean by that, Dr. Ikizler?

24 A. So as an expert witness -- again, the technical  
25 experts have a battle between validity and infringement. As

1 part of my assignment I have to assume these patents are valid  
2 and I have to assume these patents are infringed by NCR. So I  
3 assume NCR to some degree uses this technology in my analysis.  
4 I assume they use this technology. That's what I meant. It is  
5 an alleged infringement, but I have to assume that happened.

6 Q. All right.

7 MS. COLLINGS: Let's turn to Slide 519.

8 BY MS. COLLINGS:

9 Q. And is this your understanding? Is this your  
10 analysis, your profitability analysis with respect to Silver?

11 A. I will say it's mine, but actually, it's NCR's. This  
12 is what they reported. I did not modify anything. I just  
13 looked at the numbers. They said, hey, we have \$66.6 million  
14 in revenues and \$48.2 million in costs. Therefore, we have  
15 \$18.4 million in gross profits that I just adopted that without  
16 making any changes to it.

17 Q. Okay.

18 MS. COLLINGS: And if we turn to the next slide.

19 BY MS. COLLINGS:

20 Q. You mentioned that -- or you discussed that  
21 Georgia-Pacific Factor No. 32 (sic) with respect to breaking  
22 out the value in the technology that's at issue.

23 How did you analyze that apportionment?

24 A. So I think you meant Factor 13, not 32.

25 Q. Sorry.

1           A.    I'll assume that's correct, and I'm going to move on.

2           Q.    Yes.  Thank you.

3           A.    So it's about splitting the pie.  How should the pie  
4 split?

5           Again, Ms. Salters did not do a pie split, essentially  
6 just gave, without no numerical analysis, no apportionment,  
7 gave 90 percent to the CloudfChange.

8           And if you use her upper bound, it's more than  
9 100 percent, more than the profits goes to CloudfChange.  What  
10 could we have done?

11          Well, remember that GP 13 said, look at what's -- look at  
12 the features, look at what's added by NCR, what's added by CoC  
13 to this product.

14          So Ms. Schoonover testified that there's a database called  
15 Jira -- you heard about it two days ago -- that lists all the  
16 features available in this product.  So why don't we just look  
17 at all the features that's available in this product rather  
18 than looking at these four core functionalities every POS  
19 system has in the world.  That's common.  That's not specific  
20 to NCR Silver.  Let's look at what NCR Silver has as features.

21          And that's what you see on your screen.  This is a  
22 screenshot of only a subset of the features available in NCR  
23 Silver.  And you can see in the columns different versions of  
24 the NCR Silver.  On the rows, you see there's a little X if  
25 that feature is available in that specific version of the NCR

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1 Silver.

2 Q. I appreciate your screenshot, but let's go ahead and  
3 bring up the actual exhibit.

4 MS. COLLINGS: It's Joint Exhibit 98-C. Thank you.

5 BY MS. COLLINGS:

6 Q. Do you recognize this document, Dr. Ikizler?

7 A. Yes. I think this is only the first page of it.

8 Q. Okay. And we can go to the next -- there's four  
9 pages of this Exhibit 98-C.

10 And is this -- is this what you're referring to as the  
11 collection of features, on the left-hand column, that was  
12 included in the Jira database?

13 A. Yes. So I want to just give couple examples here why  
14 this is important, as opposed to saying every POS does  
15 transaction handling.

16 Q. Well, why don't we do it this way? Why don't I ask  
17 you to identify a couple of features included in Exhibit 98-C  
18 that you think are important to the analysis?

19 A. Every one of these are important to the analysis if  
20 they're offered in the product. If they're offered in the  
21 product -- there's a reason they are listed here by NCR product  
22 designers because they make these decisions day-to-day. What  
23 do people -- what do customers want? What should be put into  
24 this product?

25 So they are listed here for a reason, because they are --

1 there is -- the product designers told it -- said it was  
2 important to list them here. So that's why this is important.

3 And you can look at them. Can you do refunds on the  
4 system? Did you hear anything about refunds so far? Probably  
5 not. But it's right there.

6 Can you split checks between people? These are also  
7 software features that contribute to the saleability of the  
8 product that -- each of these has to be taken into account, if  
9 you want to do a detailed analysis, because you're trying to  
10 apportion the profits that's generated by this specific  
11 product, not the 1990 Starbucks POS system.

12 Q. And then once you identify the features, Dr. Ikizler,  
13 what would be the next step in conducting the Georgia-Pacific  
14 Factor No. 13 analysis that you described?

15 A. Well, unlike Mr. Crouse and Mr. Chatterjee, I'm not a  
16 technical expert. So I didn't know exactly how many -- which  
17 one of these are contributed by the CloudfChange's patents. I  
18 couldn't make that decision.

19 Q. What did you do?

20 A. I asked Dr. Chatterjee to help me identify which one  
21 of these items are related to -- are benefitting from the  
22 teachings of the patent.

23 Q. And please remind us, who is Dr. Chatterjee?

24 A. Dr. Chatterjee is the technical expert in this case  
25 retained by NCR.

1 Q. And we heard him testify yesterday?

2 A. Yes.

3 Q. Okay. And so then what did you discuss with  
4 Dr. Chatterjee?

5 A. Could we go to the next slide?

6 MS. COLLINGS: Slide 5.21. Thank you.

7 BY THE WITNESS:

8 A. I asked him two questions. Two questions. I said,  
9 Dr. Chatterjee, can you tell me -- and I said, assume -- put  
10 yourself in my shoes, assume validity and infringement. Can  
11 you identify which one of these product features that's offered  
12 in these products are fully attributable to the patents'  
13 teachings, fully attributable. And she said -- he said, none  
14 of them are fully attributable.

15 And I said, okay. I understand, because every -- even  
16 splitting check is a -- multiple lines of codes in the  
17 software. There's multiple factors that go in there.

18 And I asked a second question. Well, can you identify  
19 which one of these features partially benefit from the patents,  
20 which is still important because these patents may be  
21 contributing to some of these items to some degree.

22 So he identified eight features. He identified eight  
23 features. And as you saw, not every feature is available every  
24 version of the software. So I highlight here what percent of  
25 the features, what percent of the features are partially

1 benefitting from the CloudfChange patents, just as a way to --  
2 as a way to starting point to how to split the pie rather than  
3 just looking at the four factors that's available in every POS  
4 solution.

5 BY MS. COLLINGS:

6 Q. Let's break that down a little bit.

7 So you just said that not every feature that was listed in  
8 Exhibit 98-C that we saw is actually included in every single  
9 version of NCR Silver; is that correct? Is that your  
10 understanding?

11 A. Correct. That's what I said.

12 Q. Okay. And so then you said that you were sort of  
13 weighting -- or seeing how many of these particular features  
14 were actually found in which NCR Silver product; is that  
15 correct?

16 A. I did no weighting. That's not correct.

17 Q. Okay. Then what did you do when you said that you  
18 were looking at which version of NCR Silver included these  
19 features?

20 A. So if you go to the previous slide, I'll explain that  
21 one more time. I guess that wasn't clear.

22 So you see the Xs on the screen? So, for example, let's  
23 take "Send New Items to Kitchen."

24 Highlight that all the way to the right, please. Thank  
25 you.

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1           What I meant is, this is not one of the items selected,  
2 but I will take a shortcut here.

3           So as you can see, there's Xs in the first two columns,  
4 there's no X in the last two columns. So I meant this  
5 feature's available in the Silver -- Pro for restaurants, in  
6 Silver Pro, but not in the other two versions, which is Silver  
7 Total and Silver.

8           Which means if this item happened to be selected by  
9 Dr. Chatterjee, that would have only contributed to that  
10 percentage calculation for those specific versions of things,  
11 NCR product.

12          Q.   And who actually designated the Xs in those  
13 individual cells? Did you do that?

14          A.   No. This is coming from the Jira database of NCR.

15          Q.   Okay. Thank you.

16          MS. COLLINGS: So then if we could go to the next slide.

17 BY MS. COLLINGS:

18          Q.   So you applied no weights to the actual features that  
19 you were comparing; is that correct?

20          A.   Yes. I had no way to know exactly how many -- which  
21 one of these features are so important for the customers versus  
22 not. So I decided to say if they're all listed in this list,  
23 I'm going to assume they're all equally weighted -- just I  
24 treat them all equally.

25          Q.   And so you didn't evaluate to what extent the

1 patents-in-suit that Dr. Chatterjee -- sorry.

2 You did not analyze to what extent the patents-in-suit  
3 might be contributing to the particular features that  
4 Dr. Chatterjee identified; is that accurate?

5 A. That's also a correct -- that's not what I was  
6 saying, but that's also accurate.

7 Q. Okay. So then in the far right-hand column when you  
8 have these percentages, this represents the percentage of  
9 features that are partially benefitting. So when you say  
10 restaurants, POS solution restaurants, that's a particular  
11 version of NCR Silver, correct?

12 A. Correct.

13 Q. So out of all the features that are applicable to  
14 restaurants, based on Dr. Chatterjee's and your discussion,  
15 you're assuming that 11.1 percent of the features are at least  
16 partially benefitting from the patents; is that accurate?

17 A. I wouldn't say I'm assuming. I literally -- it's a  
18 very straightforward analysis. I looked at their 60 features  
19 listed. And if six of them were highlighted by Dr. Chatterjee,  
20 I said six out of 60 is 10 percent. So 10 percent of the  
21 features are being partially benefitting from the patents.  
22 That's what I wrote here.

23 So that represents what percent of the product features  
24 are benefitting from the teachings. That should be the maximum  
25 percentage that's attributable to the patents, in my opinion.

1 Q. And we'll see that if we look at the next slide. So  
2 this is wrapping up that apportionment analysis or the  
3 apportion profits analysis that you identified earlier. Did  
4 you -- what is your conclusion, then, based on your comparison  
5 of the NCR Silver features?

6 A. Again, this an estimation method. It's not -- no  
7 estimation is perfect. We don't know exactly what number is  
8 true out there, but that's -- I'm trying to get one data point  
9 to help us split the pie. And I'm deciding, using my  
10 discussion with Dr. Chatterjee, that no more than 8 to  
11 11 percent should be going to CloudfChange, at most. No more,  
12 because it's partially benefitting.

13 For each of those line items that's identified by  
14 Dr. Chatterjee, NCR also contributing to them. So after  
15 \$18.4 million gross profits, no more than 8 to 11 percent  
16 should be allocated to CloudfChange. That's the result of  
17 this analysis.

18 Q. Okay. And I think then your third analysis was the  
19 design-around.

20 MS. COLLINGS: There you go. Slide 5.23.

21 BY MS. COLLINGS:

22 Q. Can you please describe your design-around  
23 methodology?

24 A. Absolutely. So design-around option is in the --  
25 going back to the hypothetical negotiation, 2016, the parties

1 sit around the table. They come -- CoC brings to the table --  
2 CloudfChange brings to the table two patents. And then NCR,  
3 before they decide to pay for these patents, they would want to  
4 estimate what's my other option? Can I just -- is this  
5 something I can design on my own without actually infringing  
6 these patents? Can I build this functionality on my own? And  
7 if so, how much would it cost me?

8 That is called the design-around option, which discussed  
9 by Mr. Crouse yesterday and Mr. -- Dr. Chatterjee as well.  
10 Both of them identify in a very high level -- my understanding,  
11 at a nontechnical layperson's understanding, it's possible and  
12 very easy to take away the web server out and just directly go  
13 to the application server. And that is the design-around I had  
14 a discussion with Dr. Chatterjee and get their opinions on.

15 Q. So what --

16 MS. COLLINGS: If we go to the next slide.

17 BY MS. COLLINGS:

18 Q. What are the specific elements, what steps would you  
19 take in conducting that design-around analysis?

20 A. The steps that would -- that I took -- well, first of  
21 all, I -- the entirety of this opinion I had to rely on the  
22 technical guidance of the experts. It's not something I could  
23 decide, oh, it is possible to design this. No. I asked them,  
24 is it possible? And Dr. Chatterjee said, yes. It is possible.

25 So I get information. How long would it take to do so,

1 and how much money it would cost? So how much money it would  
2 cost is my job to estimate, but how much work it would take is  
3 an engineering question.

4 MS. COLLINGS: Let's go to the next slide, and flesh that  
5 out a little bit.

6 BY THE WITNESS:

7 A. So according to my -- you heard from Dr. Chatterjee  
8 yesterday. He explained that it would have take two to three  
9 developers, which I assume three to be conservative, and up to  
10 six months of programming work, up to six months of programming  
11 work, to redesign the software so that it doesn't have to go to  
12 the web server at all. It goes directly to the application  
13 server every time.

14 So that, I calculated, how much would it cost to NCR to do  
15 this design-around? So you have to hire three additional  
16 softwares from the marketplace, you have to hire three  
17 additional software developers, and you have to hire them for  
18 six months.

19 BY MS. COLLINGS:

20 Q. And at what point in time did you ask Dr. Chatterjee  
21 to envision when you asked him whether it would be possible and  
22 how long it would take? What period of time were you asking  
23 him to put himself in?

24 A. It's back in the hypothetical negotiation, which is  
25 July of 2016, because this is the conversation that NCR would

1 have had internally -- or externally. This is the calculation  
2 they would want to have in their pocket before they sit down at  
3 that table for hypothetical negotiation.

4 Q. So your understanding is that back in 2016, it would  
5 have taken three software -- or three developers, approximately  
6 six months of work.

7 MS. COLLINGS: All right. Back to Slide 5.25.

8 BY MS. COLLINGS:

9 Q. What did you do in order to calculate what those  
10 total costs would have been?

11 A. Can we go to the next slide, please? Yes.

12 So because NCR would have had to hire three additional  
13 software engineers, I estimated, well, how much would it cost  
14 to get a top-level software developer?

15 So I go to Bureau of Labor Statistics -- that's the  
16 marketplace for estimating wages, the official government  
17 website, and I looked at the 90th percentile of the wage  
18 distribution, and that was \$160,000 annual wage.

19 So I took that number and I multiplied it by three and  
20 divided by two, because it's the annual salary. I needed only  
21 six months of work for three people. Multiplied by three  
22 divide by two, I get \$240,000.

23 That is the software development cost of just hiring  
24 people to do the development. And I had to add -- because it  
25 will take six months, and I still need to offer something to my

1 customers for those six months. I can't just stop servicing my  
2 customers.

3 So I brought back in six months of licensing costs from my  
4 other analysis because I still want to license the solution for  
5 six months at least from the CloudfChange because I can't just  
6 stop servicing my clients.

7 So I would service them six months, develop my own  
8 solution meanwhile, and that would have cost me \$240,000. But  
9 I still have to pay for that six months of licensing.

10 Q. And so you estimated a 6-month license to be what  
11 amount?

12 A. You remember I told you 8 to 11 percent of the gross  
13 profits would have gone at maximum to the CloudfChange? I  
14 calculated the maximum amount that I would give them, just took  
15 the --

16 Q. What is that?

17 A. -- 11 percent.

18 So 11 percent of the profits, that is from 2016, July, to  
19 January 2, 2017 is 1.2 million, and 11 percent of that is  
20 \$130,000.

21 So \$240,000 development costs, \$130,000 licensing cost --  
22 licensing costs for six months.

23 MS. COLLINGS: And let's go to the next slide.

24 BY MS. COLLINGS:

25 Q. So again, you summarize your NCR Silver's

1 design-around analysis?

2 A. As I was trying to do, \$240,000 development costs and  
3 \$130,000 temporary licensing costs, together it would have cost  
4 \$370,000.

5 So this is a data point that NCR would have strongly  
6 considered in that negotiation because they would have do their  
7 math before they sign the agreement, how much would it cost to  
8 me to do this? But that will be the number they would have --  
9 have it in mind when they walk into the negotiations.

10 MS. COLLINGS: No further questions.

11 MR. BARR: Your Honor, I hate to ask this, but before I  
12 start, could we have a short break, restroom break?

13 THE COURT: Sure.

14 Ladies and gentlemen, why don't we take just a, you know,  
15 5- or 10-minute break? We'll come back.

16 If I could have counsel up here for just a second after --  
17 you all -- you'll be excused, remembering my instructions not  
18 to discuss the case.

19 THE BAILIFF: All rise.

20 (Jury exited the courtroom at 9:46.)

21 THE COURT: Thank you. You may be seated.

22 You can step down, sir.

23 Just after this gentleman we'll have -- who do you  
24 anticipate calling, Mr. Barr?

25 MR. BARR: Mr. Yates will be putting on Mr. Crouse to do

1 our invalidity rebuttal case.

2 THE COURT: And will there be one on damages?

3 MR. BARR: No, Your Honor.

4 THE COURT: Okay. Very good. And it's fine if there is.  
5 I'm just -- just for planning purposes.

6 When we finish with the rebuttal case from plaintiff,  
7 we'll take up the issues that we have with the charge. When  
8 that's done, we'll see where we're at. If we can squeeze in  
9 closing arguments before lunch, we will. If not, we'll take an  
10 early lunch and we'll come back and do it then. But it seems  
11 like we're on track to finish up relatively quickly.

12 So thank you all.

13 Is there any issues we need to take up?

14 MR. BARR: No, Your Honor.

15 MR. BAKER: No, Your Honor.

16 THE BAILIFF: All rise.

17 (Recess taken from 9:47 to 9:56.)

18 THE BAILIFF: All rise.

19 THE COURT: Please remain standing for the jury.

20 (The jury entered the courtroom at 9:56.)

21 THE COURT: Thank you. You may be seated.

22 Do we have a witness?

23 MR. BAKER: Yes, Your Honor.

24 CROSS-EXAMINATION

25 BY MR. BARR:

1 Q. Dr. Ikizler, you were asked some questions about a  
2 SaaS, S-a-a-S, survey that Ms. Salters relied upon in her  
3 report. Do you recall that, sir?

4 A. Yes. I do.

5 Q. This is the report you were talking about right here?  
6 SaaS survey?

7 MS. COLLINGS: Objection, Your Honor. The witness doesn't  
8 have that in front of him.

9 MR. BARR: Okay. May I approach, Your Honor?

10 THE COURT: Yes.

11 BY MR. BARR:

12 Q. Why don't you take a moment and make sure that's  
13 the -- I'm asking you about the right document, sir?

14 Sir, I'll represent to you that we didn't stick any pages  
15 in there. That's the one that's been used in the case.

16 A. I apologize for the delay. I'm finding the pages to  
17 make sure it's the same one that I did my analysis on.

18 Q. Do you recognize the Bates numbers in the bottom  
19 right-hand corner of it from your report? CoC-2262 through  
20 CoC-2314?

21 A. I see those numbers.

22 Q. Okay. So are you comfortable that this is the SaaS  
23 benchmark report that you relied upon in your opinion, sir?

24 A. I didn't rely on this document. Ms. Salters did.

25 Q. Okay. Fair enough. You looked at it, though, and

1 analyzed it, right?

2 A. Yes, sir.

3 Q. You read the whole thing?

4 A. Pretty much.

5 Q. Okay. And you recall that this survey said that  
6 profitability for companies in the SaaS industry ranged from 70  
7 to 90 percent; is that right?

8 A. Partially.

9 Q. Okay. And I think you told Ms. Collings that you  
10 thought Ms. Salters got it wrong when she said there were 1,200  
11 companies that had provided -- or that there was information  
12 from 1,200 companies in this survey. Do you recall that  
13 answer?

14 A. Yes. I said that.

15 Q. Would you have a look at the introduction page from  
16 the report which is at Page 2264. And this is the very last  
17 sentence in the introduction. Could you read it for us? On  
18 the left side?

19 A. "This 2020 benchmark report incorporates data from  
20 more than 1,200 respondents aggregated across prior surveys as  
21 well as more than 400 this year alone."

22 Q. Now, I know you said that the companies in this  
23 survey, you didn't feel like the companies were comparable to  
24 NCR Corporation which is a \$6.2 billion company; is that right,  
25 sir?

1 A. Correct.

2 Q. Okay. But you will agree with me that the companies  
3 in this survey, that these companies, the products lines of  
4 these companies in the survey are comparable to the NCR Silver  
5 product line alone, right?

6 A. No.

7 Q. Let me hand you your deposition.

8 MR. BARR: May I approach, Your Honor?

9 BY MR. BARR:

10 Q. Is that your deposition that I just handed you?

11 A. It seems like it. Yes.

12 Q. Okay. Could you turn to Page 45 of your deposition,  
13 sir, at Line 4? Let me know when you've found it, please.

14 A. Are you talking about the top right of the page  
15 numbers?

16 Q. The page numbers are in the top right corner of each  
17 of these little boxes. And the actual Page 45 that I'm going  
18 to ask you about is in the top left of the page.

19 A. I'm there now.

20 Q. All right. And I'd like to draw your attention to  
21 the question I asked you, starting at Line 4.

22 My question was: "It's possible for companies to look at  
23 the growth rate of their product lines on a standalone basis;  
24 isn't that right, sir?"

25 And your answer was: "Yes. You could look at the

1 revenues of the specific product line and analyze what percent  
2 growth of that product line's revenues grew."

3 And then I asked you, at Line 10: "And companies do that  
4 every day, don't they?"

5 And your answer was: "Yes. To understand how their  
6 product lines succeed within the industry, within their own  
7 company, they do that. They do project-by-project analysis,  
8 they do product-by-product analysis. Of course they do."

9 Right, sir?

10 A. Yes, sir.

11 Q. So you know that big companies like NCR that have  
12 many different product lines look at their product lines  
13 independently so they can see how those product lines are  
14 doing, right?

15 A. Partially, correct.

16 Q. Now, in regard to the SaaS survey, I think you  
17 testified to Ms. Collings that you think that surveys are  
18 generally -- I'm sorry -- that blog posts -- and let me just  
19 make a point here. To be fair, this survey is not a blog post.  
20 It was referenced in a blog post; isn't that right?

21 A. That is correct.

22 Q. Okay. And I think you told us that even though this  
23 SaaS survey we know is not just a blog post, you said blog  
24 posts should never be relied upon by experts, right?

25 A. Are you talking about what I testified in my -- in --

1 today, Mr. Barr? I didn't understand. Can you say it one more  
2 time?

3 Q. Sure. I think I asked you this earlier, but I think  
4 Ms. Collings asked you. And in response to Ms. Collings'  
5 question, you testified that one of the reasons that you think  
6 that Ms. Salters should not have consulted the 2020 benchmark  
7 survey is because you say that it was a blog post, right?

8 A. No. Not correct.

9 Q. Okay. Well, let's -- let me ask you this, sir. Do  
10 you let your people at your office use blog posts for their  
11 work?

12 A. Not as a primary source.

13 Q. Well, you know in this case Dr. Chatterjee cited a  
14 blog post in his expert report; isn't that right, sir?

15 A. I do not know.

16 Q. Okay.

17 MR. BARR: I'll try to operate the document camera.

18 So we have Mr. Chatterjee's report on the screen. So  
19 after all of that I can do without the document camera.

20 Sorry, ma'am.

21 Could you please go to Paragraph 44 of Dr. Chatterjee's  
22 report? And would you highlight the first sentence of  
23 Paragraph 44? I'm sorry. The first -- the entire sentence  
24 going all the way down to the cite. Where it says "history."

25 BY MR. BARR:

1 Q. So you can see here that Dr. Chatterjee, on Paragraph  
2 44 of his report, cited a blog post, the toasttab.com blog  
3 modern POS history; isn't that right, sir?

4 A. That is right.

5 Q. Look at that exhibit.

6 I think you told us earlier that you have testified --  
7 that you testify in about three patent cases a year; is that  
8 right, sir?

9 A. No.

10 Q. You didn't say that?

11 A. I didn't say three patent cases. I said I testify --  
12 I take about three to four litigation cases a year.

13 Q. Oh, okay. And how long have you been doing this  
14 litigation consulting work, sir?

15 A. 11 years.

16 Q. And I believe your resume said that you testified in  
17 more than 50-plus patent cases, right?

18 A. No. I said -- it does say -- my resume doesn't  
19 say -- my background slides said calculated damages for more  
20 than 50 cases.

21 Q. Okay. Because the math wouldn't work, would it, sir,  
22 if you've only been doing this for 11 years and doing three a  
23 year, we wouldn't get to 50, would we?

24 A. No. That wouldn't work because I was full-time --  
25 doing full-time litigation work until 2018 when I formed my own

1 company in 2018, anyways. But I apologize.

2 Q. Now, I believe when Ms. Collings was asking you about  
3 the hypothetical negotiation in 2016, you said that that's when  
4 CloudofChange would have knocked on the door of NCR; is that  
5 right?

6 A. I did say that. Yes.

7 Q. And you know that CloudofChange did knock on the door  
8 of NCR; isn't that right, sir?

9 A. I do not know.

10 Q. And NCR didn't answer, did they, sir?

11 A. I do not know.

12 Q. Now, you have said that the market for point-of-sale  
13 is fragmented and oversaturated; is that right?

14 A. When did I say that?

15 Q. I thought it was in your slides. But is that not  
16 your opinion?

17 A. It is something that I do believe. I don't think I  
18 said it today though.

19 Q. All right. Well, I'm trying to get to the bottom of  
20 your opinion. So if it's not your opinion, just tell me and  
21 I'll skip this section of questions.

22 Is it your opinion that the point-of-sale market is  
23 fragmented and oversaturated?

24 A. I think -- yes. That is my opinion, but I didn't say  
25 it today. I was trying to be precise about your question.

1 Q. Okay.

2 MR. BARR: Well, let me try the ELMO again.

3 (Off-the-record discussion.)

4 MR. BARR: I'm going to let Ms. Fastow handle the document  
5 slides from now on. I apologize, Your Honor.

6 BY MR. BARR:

7 Q. This is from your presentation that you went through  
8 with Ms. Collings just today, right?

9 A. No.

10 Q. It's not?

11 A. Well, this page is, but the page you're about to put  
12 on is not in my slides today, sir.

13 Q. Well, these are the slides Ms. Collings gave us last  
14 night, saying that she was going to go through them today with  
15 you.

16 MR. BARR: Let's put it up on the screen. It's Slide 5.5.

17 BY MR. BARR:

18 Q. This slide is -- certainly represents opinions that  
19 you have in this case, right, sir?

20 A. That's correct.

21 Q. And the first one is what?

22 A. Is POS market is fragmented and oversaturated.

23 Q. Okay. So that's an opinion you've given in this  
24 case, right, sir?

25 A. Yes. It's in my report. This is what I think about

1 the industry. I just didn't think it was relevant for my  
2 presentation today, so I took out that slide.

3 Q. You don't have any problem with me asking you about  
4 it, do you, sir?

5 A. No. Not at all.

6 Q. Okay. And you also say that all firms have small  
7 market shares, right?

8 A. I did say that. Yes.

9 Q. Okay. Now, your outlook for the point-of-sale market  
10 sure is different from NCR's, isn't it, sir?

11 A. I don't know what that means.

12 Q. Okay. Well, you're saying that it's fragmented and  
13 oversaturated and has small market shares. You make the market  
14 for point-of-sale sound kind of bad, right?

15 A. I don't make it sound that bad. It's a good sign.  
16 If every company has a small market share, it's very good thing  
17 for the industry because that means it's great for the  
18 consumers. It's not a bad thing.

19 Q. So you'd agree with me that, in fact, the  
20 point-of-sale market is a great market, right?

21 A. I don't know what "great" means, but it's a growing  
22 market. I can tell you that.

23 Q. Okay. Well, let me show you one of NCR's documents,  
24 and let's see what they think "great" means.

25 MR. BARR: Could we see PTX-100? Specifically Page 6426.

1 BY MR. BARR:

2 Q. First thing on that page says, "54 percent of SMBs  
3 intend to spend on tech in 2019," right?

4 A. That sounds right to me. Yeah.

5 Q. And you know SMBs is the small- and medium-sized  
6 businesses that NCR's targeting with this Silver product,  
7 right, sir?

8 A. That's my understanding. Yes.

9 Q. That would be a good thing for a tech company, if  
10 54 percent of their customers plan to buy new tech, agreed?

11 A. Yes.

12 MR. BARR: Could we look at Page 6431, please? Could you  
13 blow up the part in green at the bottom?

14 BY MR. BARR:

15 Q. NCR's also told us that they think the overall global  
16 cloud POS market size is expected to almost triple, from  
17 \$1.34 billion in 2018 to U.S. \$3.73 billion by 2023, right?

18 A. Yes, sir. That makes sense. We're in full agreement  
19 here. I agree with this. It's a growing market, it's a great  
20 market.

21 Q. And you're an economist, so you know this stuff,  
22 right?

23 A. Yeah, yeah. This is all good stuff. We are  
24 agreement.

25 Q. Great market to be selling a product in right now,

1 right?

2 A. Great is relative, but it's definitely a growing  
3 market. A growing market is good for businesses.

4 Q. Well, when you're talking about relative, going from  
5 1.34 billion to 3.73 billion is a pretty good thing, isn't it?

6 A. I would like it. If I had a firm in that industry,  
7 I'd like it.

8 Q. Pretty soon you're talking about real money, aren't  
9 you.

10 A. Say it again?

11 Q. I said pretty soon you're talking about real money,  
12 aren't you? 3.73 billion?

13 A. I don't have a POS system to sell in the market.  
14 So...

15 Q. All right. That's a million dollars a year since the  
16 time of Jesus Christ, right?

17 (Laughter.)

18 BY THE WITNESS:

19 A. I don't know the math behind that, but that's funny.

20 BY BARR:

21 Q. All right. So the date of the hypothetical  
22 negotiation in this case is -- that you chose is the date that  
23 the patents issued -- or that the first patent issued, right?  
24 July of 2016?

25 A. Yes, sir.

1 Q. Now, you were here for Mr. Quinn and Ms. Schoonover's  
2 testimony, right?

3 A. Yes, sir.

4 Q. And you know that Ms. Schoonover and Mr. Quinn are  
5 two of the top executives at NCR in connection with the Silver  
6 product line, right?

7 A. I think that's correct.

8 Q. You heard that from the witness stand, didn't you?

9 A. I don't remember that exactly the top executives.  
10 What I have in my mind as top executives are usually CEOs,  
11 COOs. But we may have different definitions.

12 Q. So you don't consider Mr. McGill Quinn, who is the  
13 director -- the head of engineering to be a top executive?  
14 He's got 240 people reporting to him. That's not a top  
15 executive?

16 A. Again, it's a relative term. What's a top executive?  
17 I just didn't want to be speculating, but sure, it's a great  
18 position to be in.

19 Q. And Ms. Schoonover, who was the person that was in  
20 charge of the entire NCR Silver product line, would you  
21 consider her a top executive?

22 A. I'm with you. If you think that's -- I'm with you.

23 Q. Well, I'm glad you agree with me. But you never  
24 talked to them before you did your report, did you?

25 A. I didn't talk to neither of them before I wrote my

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U.S. DISTRICT COURT, WESTERN DISTRICT OF TEXAS (WACO)

1 report. No.

2 Q. You're being asked to come into this courtroom and  
3 testify to this jury about what you think the reasonable  
4 economics are for this product line, yet you didn't bother to  
5 talk to Ms. Schoonover who was the head of the product line,  
6 right?

7 A. That's not correct.

8 Q. You didn't talk to her, did you?

9 A. I did not talk, but it's not that I did not bother.  
10 That's different question.

11 Q. All right. And you didn't talk to McGill Quinn, the  
12 head of engineering, with 242 people reporting to him either,  
13 did you?

14 A. Well, I tried. I just couldn't.

15 Q. You never talked to him before you did your report,  
16 did you?

17 A. No, sir.

18 Q. You think he might know something about this  
19 technology?

20 A. I'm sure he knows a lot about the technology.

21 Q. In fact, the only person, the only single person that  
22 you talked to at NCR Corporation, which has what, 34,000  
23 employees, is a gentleman named Keith Dunphy, right?

24 A. Before filing my report, that's correct.

25 Q. Well, that's what matters, right? You know the

1 opinions in this case that you get to talk about are the ones  
2 that you formed in your report, right?

3 A. No. I think I get to testify about things I heard in  
4 this trial as well.

5 Q. Okay. Well, Mr. Dunphy wasn't here in trial, was he?

6 A. No, sir. He wasn't here.

7 Q. And prior to preparing your reports in this case, you  
8 never had an NCR employee go through the costs and the  
9 financial statements of NCR that are in Exhibit -- Joint  
10 Exhibit 88, did you?

11 A. Can you repeat the first part of your question? I  
12 apologize.

13 Q. Sure. Before you prepared your report in this case,  
14 you did not have an NCR employee go through the costs and  
15 financial documents in Exhibit -- Joint Exhibit 88, did you?

16 A. Your statement is correct.

17 Q. You never sat down with Mr. Dunphy and went through  
18 NCR's costs, did you?

19 A. I tried. He said he doesn't know.

20 Q. Mr. Dunphy didn't know anything about these costs  
21 that NCR's trying to charge to this product line?

22 A. No. He said he -- he's not familiar with the  
23 financials, so he said he was not familiar with the P&L data.

24 Q. And when Mr. Dunphy told you he didn't know, you  
25 didn't check with anybody else at NCR to see if they had

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1 anybody that knows what these costs are and why they're in  
2 these financial statements, did you?

3 A. I did. Yeah.

4 Q. But you didn't talk to anybody, did you?

5 A. Well, I did talk to somebody. Yes.

6 Q. Not before you did your report, though, did you, sir?

7 A. No. Not before I did my report.

8 Q. So when you went to Mr. Dunphy and you were asking  
9 about the costs that NCR says are so important in this case  
10 that they should cut the damages down to nothing, when  
11 Mr. Dunphy couldn't help you with that, you never asked to talk  
12 to anybody else, did you?

13 A. I did ask to talk to somebody.

14 Q. Well, they didn't let you talk to anybody, did they?

15 A. They did let me talk to somebody.

16 Q. Okay. We're asking about before you did your report,  
17 all right?

18 A. Okay.

19 Q. Are we clear on that?

20 A. Okay. Well, I didn't know it's true for every  
21 question you're asking, Mr. Barr. So I was trying to be honest  
22 and truthful.

23 Q. I want you to be honest and truthful. That is the  
24 most important thing as we sit here in the United States  
25 District Court for the Western District of Texas. Do you

1 understand that?

2 A. I am very serious about this. Yes.

3 Q. So just also so we're clear, all my questions relate  
4 to things you did before you prepared your report, all right?  
5 Unless I tell you otherwise, all right?

6 A. We're in agreement right now. Thank you.

7 Q. When you were trying to prepare your report, you were  
8 looking at the financial statements and documents of NCR,  
9 right?

10 A. Yes.

11 Q. You knew that the revenues were important, right?

12 A. Revenues are very important. Yes.

13 Q. You knew that the costs were important, right?

14 A. Costs are very important.

15 Q. The only guy that NCR gave you to talk to was  
16 Mr. Dunphy, right?

17 A. Yes, sir.

18 Q. And Mr. Dunphy didn't know anything about the costs,  
19 did he, sir?

20 A. He didn't know the details about it.

21 Q. Okay. And NCR didn't give you anybody else to talk  
22 about the costs, did they? Before you did your report?

23 A. I didn't talk to anybody about this P&L before I  
24 filed my report.

25 Q. You didn't discuss in detail the features of NCR

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1 Silver before you filed your report, did you?

2 A. Can you repeat the end -- very end of your question,  
3 please?

4 Q. You did not discuss in detail the features of NCR  
5 Silver, did you?

6 A. Can you give a little more context about with whom?

7 Q. With anybody. Before you wrote your report, you  
8 didn't discuss the features of NCR with anybody at NCR, did  
9 you?

10 A. At NCR. I discussed those with Dr. Chatterjee.  
11 That's why I was asking, because the answer is yes to the first  
12 question, but second to the second -- no to the second  
13 question, sir.

14 Q. Whose features are these, Dr. Chatterjee's or NCR's?

15 A. This is NCR's Silver products' features.

16 Q. So maybe somebody at NCR could have told you  
17 something about the features, right?

18 A. They could have told me something about it. Yes.

19 Q. You sat in here for Ms. Schoonover's testimony,  
20 right?

21 A. Yes, sir.

22 Q. You heard her say that she's the person at NCR that's  
23 in charge of the features on this product, right?

24 A. Yes, sir.

25 Q. You never talked to her?

1 A. Before the report, no, sir.

2 Q. You based your opinion on these features, but you  
3 never talked to the person at NCR who knows about them, right?

4 A. That's not correct.

5 Q. You didn't talk to Ms. Schoonover, right?

6 A. No, sir. I did not talk to Ms. Schoonover.

7 Q. You only talked to Mr. Dunphy at NCR, right?

8 A. Correct, sir.

9 Q. Didn't discuss the features with Mr. Dunphy, did you?

10 A. No, sir. I did not discuss the features with  
11 Mr. Dunphy.

12 Q. And you didn't discuss this design-around that you  
13 say is feasible with Mr. Dunphy either, did you?

14 A. No.

15 Q. Now, Ms. Collings was asking you about these  
16 features. She threw it up on the screen. It had a lot of  
17 different things on it, right? A lot of lines, right?

18 A. Vague question, but yeah.

19 Q. Did you understand my question?

20 A. I think you're talking about the image that has the  
21 spreadsheet with features and the columns with the product  
22 names.

23 Q. Precisely.

24 A. Okay. Then we're on the same page.

25 Q. Okay. Some features could be more important than

1 others, correct, Dr. Ikizler?

2 A. Yes. I said that in my testimony.

3 Q. But you didn't do that analysis, did you? You didn't  
4 analyze the importance of the features, did you?

5 A. I treat them equally. I don't understand the  
6 question. Can you --

7 Q. Right. Exactly. We saw a list of -- I don't know  
8 how many features -- lots, on those -- on that document. You  
9 treated them all the same, didn't you?

10 A. Yes. I did treat them all the same. Correct.

11 Q. Now, I know you're not a technology expert, but could  
12 you agree with me that the features that handle the  
13 transactions, that get the merchant paid might be a little more  
14 important than a feature that relates to a discount card? Can  
15 you agree with me on that, sir?

16 A. I don't agree from the perspective of value  
17 generation. No.

18 Q. Because you really don't know anything about the  
19 value generation of these features in regard to NCR, do you?

20 A. I know they all matter.

21 Q. But you don't know how much they matter, do you, sir?

22 A. I don't have a quantifiable answer for you, Mr. Barr.

23 Q. Because you didn't ask anybody at NCR, did you, sir?

24 A. I don't think I asked anybody at NCR.

25 Q. If you really wanted to know from that list of all

1 these things you guys are calling features, if any of them  
2 matter very much, Ms. Schoonover could have told you, couldn't  
3 she?

4 A. I don't think someone from NCR would be appropriate  
5 to ask that question, sir.

6 Q. You don't think it would be appropriate to ask NCR  
7 about their own product that they sell? Is that what you're  
8 saying, sir?

9 A. No.

10 Q. In fact, you know that this document -- I think it's  
11 Exhibit 98 -- that you used to base your opinion on was  
12 prepared by a summer intern, right?

13 A. Not correct.

14 Q. That's not correct? You didn't know that? Are you  
15 saying that, sir?

16 A. Can you repeat your last question?

17 Q. Sure. You know that this document was not -- was  
18 created by -- was not created by a summer intern. Is that what  
19 you're testifying to, sir?

20 A. I'm testifying to the opposite of that issue that you  
21 said. You said I don't know that it's prepared by a summer  
22 intern. You asked me if -- isn't it correct that it's prepared  
23 by a summer intern. I said no. That's not correct.

24 Q. So are you testifying affirmatively that the document  
25 was not created by a summer intern?

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1           A.    No.  I'm just saying I can't say yes to that, so I'm  
2 giving you a no because I can't say a fully honest yes to that.

3           Q.    So really an answer to that might be "I don't know,"  
4 right?

5           A.    I don't know.

6           Q.    Okay.  You said you sat in here when Ms. Schoonover  
7 testified, right?  Yesterday or -- gosh, I guess it was  
8 yesterday.  Were you here when Ms. Schoonover testified?

9           A.    Yes, sir.  I was.

10          Q.    And did you hear her when I asked her that same  
11 question?  Did you hear her say that it was prepared by a  
12 summer intern?

13          A.    Same question.  I can't tell you yes or no, because I  
14 don't remember.  Will you just pull up the transcript so we can  
15 resolve the uncertainty?

16          Q.    Sure.

17          MR. BARR:  Put that on the screen, please, Ms. Fastow.  I  
18 think it's in the closing.

19 BY THE WITNESS:

20          A.    And the reason I'm stating, Mr. Barr, is because the  
21 same question was asked in her deposition, which I reviewed it.  
22 She did not say yes to that question.

23 BY MR. BARR:

24          Q.    Sir, if you'd just answer my questions.

25          That's incorrect, number one.  I'll show you the

1 deposition, then we'll show you the transcript from the trial.

2 But I'd appreciate it if you would wait till I ask you a  
3 question and you would answer the question, okay?

4 A. That's what I was trying, Mr. Barr.

5 Q. We're going to do this a little differently than  
6 Ms. Collings. I'm not going to just put you up there and wind  
7 you up and let you talk, all right?

8 THE COURT: Counsel.

9 MS. COLLINGS: Object to side-bar, Your Honor.

10 MR. BARR: Sorry, Your Honor.

11 THE COURT: Sustained.

12 MR. BARR: Is this the trial testimony?

13 BY MR. BARR:

14 Q. We'll come back to that one, because they're looking  
15 for Ms. Schoonover's deposition. Luckily I have a few more  
16 questions.

17 A. Understood. Thank you.

18 Q. Now, you relied on Dr. Chatterjee to tell you about  
19 the technology of point-of-sale systems; is that right, sir?

20 A. I relied on him. Yes.

21 MR. BARR: I have the deposition. Can you pull it up?

22 BY MR. BARR:

23 Q. This is the deposition of Ms. Schoonover that you  
24 asked to see, sir. Because you reviewed Ms. Schoonover's  
25 deposition in preparation for your report, right?

1 A. Yes, sir.

2 Q. Okay. Page 162, Lines 3 through 5. My question to  
3 Ms. Schoonover: "Do you know who determined the weights for  
4 each feature?"

5 Answer: "It was a summer intern."

6 Do you now recall that, sir?

7 A. I recalled this the whole time. This is not asking  
8 the question you asked me two minutes ago, Mr. Barr. You know  
9 that, too.

10 Q. I was simply trying to get to the point that this  
11 document was a summer intern document. Can we agree on that at  
12 least, sir?

13 A. No. We cannot.

14 Q. All right. Well, Ms. Schoonover certainly talked  
15 about the summer intern working on it, didn't she?

16 A. Yes. That's correct.

17 Q. Thank you.

18 Now, I believe in response to Ms. Collings' questions you  
19 said that you were surprised that NCR did not hide their  
20 formula in that financial document that she showed you. Do you  
21 recall that?

22 A. I said it's uncommon. I said something slightly  
23 different, I think. I said it's uncommon to show formulas in  
24 litigation, because typically parties produce without the  
25 formulas.

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1 Q. And, in fact, NCR hid their data from you in this  
2 case, didn't they, on costs?

3 A. That's not correct.

4 Q. You never got to see the backup for NCR's costs in  
5 this case, did you?

6 A. I don't know what that means, backup for NCR's costs.

7 Q. Okay. NCR did not provide you with any of the  
8 underlying source documents for the costs of goods sold that we  
9 see in the various costs listed in NCR financial record Joint  
10 Exhibit 88, correct?

11 A. Correct.

12 Q. In fact, you do not have any information as to what  
13 NCR is attributing or calling other costs of revenue, excluding  
14 D.A., right?

15 A. That's correct, sir. Yes.

16 Q. And we have heard of one of NCR's biggest cost  
17 categories, technology go-to-market, right?

18 A. I think that's accurate.

19 Q. You don't have the hard data that goes into these  
20 numbers, correct?

21 A. I think we all have that one Google Cloud agreement.  
22 But besides that I don't have any of the data that adds up to  
23 that number, sir. No.

24 Q. And you don't have the hard numbers, did not see the  
25 underlying expense reports and do not have the data that forms

1 these expenses, do you, sir?

2 A. No, sir. I did not see the receipts or the  
3 underlying expense reports that folds into the P&L items. I do  
4 not have that. I did not see that.

5 Q. You do not know exactly what NCR is depreciating, do  
6 you?

7 A. I think I only have some understanding of it.

8 Q. And these cost numbers from NCR are some pretty big  
9 numbers, correct?

10 A. That's a very relative -- "big" is a relative term,  
11 sir. So you'll have to give me a reference point.

12 Q. More than \$1 million is pretty big to me,  
13 Dr. Ikizler. Is it to you?

14 A. It depends on the context, sir. For a 6 billion  
15 company, 1 million is small. For me, \$1 million is really big.  
16 Depends on the person you're asking.

17 Q. For a \$6.2 billion company, you and I can agree that  
18 \$1 million is pretty small potatoes, right, sir?

19 A. Yeah. Relatively correct.

20 Q. And you can't say specifically what costs are for the  
21 NCR Silver product line, right?

22 A. That's a very general question, Mr. Barr. Can you  
23 please be a little more detailed?

24 Q. Pull out your deposition again, sir, please.

25 A. Yes, sir. I have it here.

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1 Q. Page 97, Lines 1 through 4.

2 Question -- you found it? Have you found it, Dr. Ikizler?

3 A. Page 97, yes, sir. Which line?

4 Q. Line 1 through 4.

5 The question I asked you: "But you don't know specifically  
6 what it is for the NCR Silver product, right -- line, right?"

7 And you said: "Yes. I do not know. No. I do not know  
8 exactly what's included in that line item."

9 Right?

10 A. Yes, sir. That's what I said.

11 Q. You personally did not do anything to verify that any  
12 of the costs of goods sold that NCR claims relates only to the  
13 NCR Silver product, correct?

14 A. Are we still on the before filing of my report  
15 assumption, Mr. Barr?

16 Q. Yes. We are.

17 A. Okay. Before filing my assumption -- my report, I  
18 only did one type of research. I think I explained that to you  
19 in my deposition. It's doing the research GAAP analysis. This  
20 is generally accepted accounting principles. That's the only  
21 analysis I could have done.

22 Q. To be fair, sir, you got to choose whatever kind of  
23 research you wanted to do before you presented your report in  
24 this case, right?

25 A. Yes, sir.

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1 Q. You're the guy that chose to do only one kind of  
2 research, right?

3 A. Yeah. It was my decision to analyze everything the  
4 way I did.

5 Q. Nobody said, Dr. Ikizler, you can do some research  
6 but you can't look at the costs. Nobody told you that, did  
7 they, before you did your report?

8 A. Nobody told me that, sir. No.

9 Q. And you knew costs were very important in a case like  
10 this, aren't they, sir?

11 A. Costs and revenues are always important, sir. Yes.

12 Q. Costs and revenues are always important, right?

13 A. Yes.

14 Q. And you heard Mr. Baker say the reason that NCR  
15 doesn't owe the money that these inventors contend that they're  
16 entitled to is because of the costs. That's one of the  
17 reasons, right?

18 A. I don't remember that, sir. No.

19 Q. But you say that Ms. Schoonover -- I mean,  
20 Ms. Salters got it wrong because of -- she didn't consider all  
21 the costs, right?

22 A. Yeah. She only selected -- that's correct. Yes.

23 Q. And to be fair, you would very much agree with me  
24 that if any costs in the technology go-to-market category  
25 relates to part of NCR's business other than NCR Silver only,

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1 it would be wrong to charge those costs to NCR Silver, correct?

2 A. Yes. The costs has to be allocated to the product  
3 line, sir. I agree with you fully.

4 Q. That's basic accounting, isn't it?

5 A. Yes, sir. If you look at the product line, you have  
6 to allocate the costs to the products. Correct.

7 Q. Now, we're talking about accounting. You're not an  
8 accountant, right?

9 A. I'm not an accountant, sir. No.

10 Q. You don't have a CPA, do you?

11 A. I do not have a CPA.

12 Q. Hadn't passed the CPA exam, have you?

13 A. I didn't try, but I did not pass it.

14 Q. Now, you and Ms. Collings made a big deal out of the  
15 fact that NCR is a publicly-traded company that gets audited,  
16 right?

17 A. Again, making a big deal is a very relative term,  
18 sir. So I spoke about it. How's that?

19 Q. You more than spoke about it. You had a bullet point  
20 on it in your presentation that you showed to the jury this  
21 day, today.

22 A. I did have a bullet point about it. Yes, sir.

23 Q. So it was important enough to your argument here that  
24 they're an audited company, NCR, right?

25 A. It's a very -- I think it's an important point, sir.

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1 Yes.

2 Q. All right. But you have no knowledge that Joint  
3 Exhibit 88, the spreadsheet provided to us by NCR with the  
4 financial information for NCR Silver, has ever been audited,  
5 right?

6 A. That's not correct.

7 Q. You know that the NCR Silver document, Exhibit  
8 JTX-88, has been audited?

9 A. Yes. NCR's accounting personnel, Randy, told me that  
10 these are part of the audited documents.

11 Q. Now you're telling us that Randy -- that Mr. Dunphy  
12 told you that NCR JTX-88 was an audited document?

13 A. No, sir. I'm talking about the NCR's accounting  
14 person that I talked to after I filed my report.

15 Q. Please. I'm going to only ask you about things you  
16 did before you filed your report unless I tell you otherwise,  
17 okay?

18 A. Sir, you asked me do I know. You didn't tell me --  
19 had you -- did you know before you filed your report?

20 Q. Well, let's just make it -- I don't think I'm going  
21 to ask you about anything that's not in your report. So let's  
22 do it this way. Maybe this will work better.

23 If I ask you a question, I'm asking about stuff you did  
24 before you prepared your report and submitted it to the Court  
25 in this case. Do you understand that?

1 A. Yes. But I --

2 Q. Let's go back to that.

3 A. Yes, sir.

4 Q. Before you did your report, nobody at NCR ever told  
5 you that Joint Exhibit 88 had been audited by anybody, right?

6 A. That's correct, sir.

7 Q. And, in fact, in a \$6.2 billion company, you're not  
8 saying that any auditor would ever have been interested in  
9 auditing a document like that for a \$25-million-a-year product  
10 line anyway, are you?

11 A. I do not know what --

12 Q. You don't know because you're not an auditor, right?

13 A. I'm not an auditor, sir. No.

14 Q. So you can't tell us whether it makes any difference  
15 at all that NCR is an audited public company, can you?

16 A. I don't understand this question, sir.

17 Q. You know that the revenue for the NCR Silver product  
18 line is less than one-half of 1 percent of total NCR  
19 Corporation revenue of \$6.2 billion, right?

20 A. Annually, that sounds correct, sir. Yes.

21 Q. So we can agree that the NCR Silver product line is  
22 not a very big product line for NCR Corporation, is it, sir?

23 A. I would agree with that. Yeah.

24 Q. Now, while we're talking about costs, I think you  
25 just told Ms. Collings that Ms. Salters used the \$14 million to

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1 inflate the profits. Was that your testimony?

2 A. Something slightly different, sir.

3 Q. In fact, Ms. Salters did not use the \$14 million for  
4 her damages. She took it out, right?

5 A. She did not take out anything in my -- based on my  
6 understanding, sir.

7 Q. Ms. Salters didn't consider the \$14 million where the  
8 invoices from NCR didn't match their other financial documents,  
9 did she?

10 A. She used the \$14 million mismatch as a justification  
11 to ignore cost items, sir. Because she's -- she argued that it  
12 was -- it must not be reliable because she couldn't match the  
13 two numbers.

14 Q. She also argued that she was going to let NCR keep  
15 that money because she couldn't figure out what it went to,  
16 right?

17 A. That's not correct, sir.

18 Q. She didn't put the 14 million into the total number  
19 that she was multiplying against, did she, sir?

20 A. She did not do a revenue-based analysis, sir. You're  
21 misrepresenting her analysis. She did a subscription base,  
22 number of subscriptions.

23 Q. First of all, sir, I'm not going to misrepresent  
24 anything to you in this courtroom. I might misstate  
25 something -- make a mistake because I'm not an accountant and

1 I'm not an auditor, but I'm not going to misrepresent anything  
2 to you. Do you understand that?

3 A. That's what I meant, sir. You have mistaken me  
4 probably.

5 Q. Now, going back to your design-around, you talked  
6 about that with Ms. Collings, didn't you?

7 A. Yes, sir.

8 Q. You said that you chose to use occupational  
9 employment statistics from surveys to get software developers  
10 average wage statistics for your design-around costs, right?

11 A. Not today I said that, but yes. That's in my report  
12 and in my deposition, sir. Yes.

13 Q. And that's what you did, right? You -- whether you  
14 said it or not to Ms. Collings, the salaries that you looked at  
15 to calculate the costs of this design-around came from  
16 occupational employment statistics, right?

17 A. Yes. Conducted by Bureau of Labor Statistics, sir.

18 Q. You could have just asked NCR what they pay their  
19 software engineers, right?

20 A. I could have asked NCR. Yes, sir.

21 Q. But you didn't do that, did you?

22 A. I didn't think that was relevant. I did not do that,  
23 sir. No.

24 Q. You didn't think it was relevant that the guys that  
25 would be doing the design-around -- you didn't think that what

1 they're getting paid would be relevant to figuring out how much  
2 the design-around would cost?

3 A. I thought they would hire engineers from the  
4 marketplace, sir.

5 Q. But you don't have any basis to say that, because you  
6 never asked anybody what they made, right?

7 A. I didn't understand. Can you repeat that question,  
8 sir?

9 Q. You didn't ask one software engineer over at NCR how  
10 much they get paid per hour, did you, sir?

11 A. No, sir. I did not ask any software engineer at NCR.

12 Q. And I presume that Mr. McGill Quinn could have told  
13 you that as head of engineering if you'd talked to him. You  
14 think so?

15 A. Actually we chatted about it a little bit. He didn't  
16 know. But...

17 Q. You didn't talk about it with him before you did your  
18 report, did you?

19 A. No, sir.

20 Q. Okay. I've asked you a couple of times. I'm  
21 interested in what you did before you did your report. So I'm  
22 going to ask you to quit volunteering information that is not  
23 correct about what you looked at before you did your report,  
24 okay?

25 A. Not all your questions can be assumed to be related

1 to the timeline of the report, sir. I'm sorry.

2 Q. I just told you that that was what my questions are  
3 going to be related to.

4 A. But some of your questions -- okay.

5 Q. All right.

6 A. I'll do my best, sir.

7 Q. Here's what I'd like you to do. If I'm asking you a  
8 question and you think it calls for some information that you  
9 learned in litigation after you submitted your report, please  
10 tell me, Mr. Barr, I've got some information on this, but I  
11 learned it after my report. Okay?

12 A. Yes, sir. I will -- that's what I thought I was  
13 doing. I'm sorry if I wasn't doing that properly.

14 Q. You're not telling us when you learned it, sir, are  
15 you?

16 A. I said I chatted with her just a few days ago.  
17 That's when I met Mr. McGill, sir.

18 Q. Few days ago was months after your report was  
19 submitted, right?

20 A. Yes, sir.

21 Q. March 4th was when your report was submitted, right?

22 A. Yes, sir.

23 Q. So you don't know one way or the other what the  
24 actual costs to NCR would be for the alleged design-around, do  
25 you?

1 A. As of now or before I filed my report, sir? Sorry.

2 Q. Before filing your report, sir.

3 A. Okay. Before filing my report I only had an estimate  
4 for how much it would cost, sir. That is part of knowing, but  
5 I did not know for a fact what it will be, because it never  
6 happened.

7 Q. An estimate is not actual costs, is it?

8 A. It's not an actual cost, sir. No.

9 Q. And you never talked to NCR about the costs, so you  
10 really don't even have an estimate from NCR, do you?

11 A. That's not entirely accurate, sir. No.

12 Q. You used the labor statistics, right?

13 A. Along with my conversations with Dr. Chatterjee who I  
14 know spoke to NCR about this.

15 Q. Hold on a minute. You don't know what Dr. Chatterjee  
16 spoke to NCR about, sir, about specific labor costs, do you?

17 A. About specific labor costs? Not to wages, but he  
18 told me -- I have no reason to believe --

19 Q. Hold on. I don't want to know -- unless  
20 Dr. Chatterjee put it in his report that he has the labor  
21 costs, I don't want you talking about it on this witness stand.  
22 Do you understand, sir?

23 A. Yes, sir. No problem.

24 Q. Dr. Chatterjee didn't tell you that he visited with  
25 NCR about specific software labor costs for their employees,

1 did he?

2 A. Well, he did tell me.

3 Q. You didn't put it in your report then. Why didn't  
4 you use the real numbers? If you had that information from  
5 Dr. Chatterjee, why didn't you use that in your math instead of  
6 going out and finding some other numbers?

7 A. The information I got wasn't wages, sir. It was  
8 about how many developers it would take.

9 Q. Precisely. That's what I just asked you. You don't  
10 know how much NCR -- it would cost NCR for their employees to  
11 do this work, right?

12 A. If they had their own employees that's already on  
13 salary, then I don't know, sir. No.

14 Q. In any event, the actual cost doesn't matter because  
15 NCR has never done a design-around, have they?

16 A. First part of the question, no. Second part of the  
17 question, yes, sir.

18 Q. We can agree that as we sit here today, several years  
19 after the notice letter was sent, several years after the  
20 lawsuit was filed, NCR has never done a design-around, have  
21 they?

22 A. I don't -- I'm not aware that they did a  
23 design-around, sir. No.

24 Q. And even if NCR had done a design-around, you never  
25 talked to any NCR customers to find out if the NCR

1 design-around would be acceptable to anybody, did you?

2 A. I did not spoke to any NCR customers, sir. No.

3 Speak to. I apologize. I did not speak.

4 Q. And, in fact, you've calculated that the costs for  
5 this design-around that you came up with was around \$240,000  
6 for three engineers to work for six months, right?

7 A. Correct.

8 Q. Now, you were here when Ms. Salters testified, right?

9 A. Yes, sir.

10 Q. And you heard Ms. Salters testify that she had  
11 calculated a reasonable royalty rate of at least \$20.3 million  
12 in this case, right?

13 A. That's not correct. I think she gave a range of 12  
14 to \$20 million, sir.

15 Q. Okay. And then you saw me ask her about the -- if we  
16 use the SaaS benchmark survey and use the profitability for  
17 those software companies, the number would go up over  
18 30 million, right?

19 A. I did see you do some math, sir. Yes.

20 Q. Okay. And to say nothing of the costs of all this  
21 litigation, right?

22 A. What does that mean, sir?

23 Q. Well, we're here. Obviously there's a lot of people  
24 here, right, sir?

25 A. Yes.

1 Q. But you heard Dr. Chatterjee tell us that he's  
2 charging NCR \$825 an hour for several hundred hours of work on  
3 this case, right?

4 A. I heard that. Yes, sir.

5 Q. So please check my math on this. If we multiplied  
6 \$800 an hour times 300 hours, how much money is that?

7 A. That would be \$240,000.

8 Q. So just for Dr. Chatterjee alone, NCR has spent  
9 \$240,000 at least in this litigation, right?

10 A. Assuming they're going to pay him. Yes.

11 Q. You don't think NCR's going to pay their debt to  
12 Dr. Chatterjee?

13 A. I have no idea one way or the other.

14 Q. They certainly haven't offered to pay our clients,  
15 have they, sir?

16 A. I don't know.

17 Q. Well, the \$240,000 that NCR's already paid  
18 Dr. Chatterjee is the exact amount that it would have cost them  
19 to do this easy design-around and avoid all this expense,  
20 right?

21 A. Yes. But, again, they don't assume infringement like  
22 I do.

23 Q. Well, you're assuming that a design-around is easily  
24 possible for less than a quarter of a million dollars, you and  
25 Dr. Chatterjee, right?

1 A. I'm estimating that. Yes.

2 Q. Quarter of a million dollars certainly pales in  
3 comparison to \$20 or \$30 million, doesn't it?

4 A. Yes. Much smaller than \$30 million. Correct, sir.

5 Q. And, in fact, that's just Dr. Chatterjee. You  
6 charged NCR \$60,000 for your report, right?

7 A. Correct.

8 Q. And your report was 34 pages long, wasn't it?

9 A. That's not correct. There's a lot of exhibits in  
10 there, hundreds of pages, sir.

11 Q. All right. The report -- the report part that you  
12 wrote is 34 pages.

13 A. Oh, the Word document portion, sir?

14 Q. Yes.

15 A. Yes. That's true. It was shorter than the exhibits.

16 Q. So you charged NCR \$2,000 a page for your report  
17 document that you wrote, right?

18 A. I did not -- I don't charge by page, sir. No.

19 Q. Maybe Dr. Chatterjee does. He had a 100-page report.  
20 Did you hear that?

21 A. I think he has long reports. Correct.

22 MR. BARR: Could you put up the DDX-3.109?

23 BY MR. BARR:

24 Q. This is one of Dr. Chatterjee's slides from  
25 yesterday. You probably looked at it. So this is when

1 Dr. Chatterjee was talking about the technical opinions he had  
2 about whether or not this design-around was feasible and what  
3 needed to be done to design around the patents, right?

4 A. That's correct, sir.

5 Q. And you understand that what a design-around means,  
6 it means what changes do I need to make to my product if I  
7 infringe to make it not infringe anymore, right?

8 A. Yeah. That's part of it, sir. Yes.

9 Q. So here we can see that on Dr. Chatterjee's picture  
10 of the design-around -- so this is Dr. Chatterjee's opinion of  
11 what would not infringe the patents, right?

12 A. It's part of it, sir. Yes.

13 Q. Okay. We can see that there's no web server on that  
14 slide, right?

15 A. I don't see a web server here, sir. Yes. That's  
16 correct.

17 Q. Dr. Chatterjee is saying if you don't want to  
18 infringe, you've just got to take the web server out of your  
19 product, right?

20 A. In my lay understanding, that's correct, sir.

21 MR. BARR: Let's have a look at the next slide, please.

22 BY MR. BARR:

23 Q. That's what Dr. Chatterjee said. He said removing  
24 the web server's a simple design-around, right?

25 A. Yes, sir.

1 Q. This confused me because all day long yesterday  
2 Dr. Chatterjee was telling us that NCR Silver doesn't have a  
3 web server. Did you hear him say that?

4 A. Again, that is -- I think those are two different  
5 things, sir. Because one of them assumes the infringement.  
6 For this analysis I asked him, can you assume infringement --

7 THE COURT: You just need to answer his question directly.

8 THE WITNESS: I apologize.

9 BY MR. BARR:

10 Q. Let me try it again.

11 A. Can we try again, sir?

12 Q. And I'll just -- in advance we will assume  
13 infringement for the design-around purposes. Okay?

14 A. Yes, sir.

15 Q. Feel comfortable?

16 A. Yes. I feel comfortable.

17 Q. All right. Dr. Chatterjee said that all we've got to  
18 do, NCR, to remove -- to remove our product from the infringing  
19 box over here is to remove the web server, right?

20 A. Something along those lines, sir. Yes.

21 Q. But all day long yesterday Dr. Chatterjee was telling  
22 us that NCR Silver doesn't infringe because it doesn't have a  
23 web server, right?

24 A. I don't feel comfortable. That -- if that's what he  
25 opined on, if that's on the record, I agree with that. I'm not

1 a technical expert, sir.

2 Q. Well, even though you're not a technical expert and  
3 neither am I, if somebody's telling you in order to not  
4 infringe you need to take out the web server, it kind of  
5 assumes that you've already got one if you're being accused of  
6 infringing, doesn't it, sir?

7 A. I don't want to speculate, Mr. Barr.

8 Q. This is just another Dr. Chatterjee diversion, isn't  
9 it, sir?

10 MS. COLLINGS: Objection, Your Honor. Argumentative.

11 THE COURT: Overruled.

12 BY THE WITNESS:

13 A. I don't know what another Dr. Chatterjee  
14 distraction -- or whatever you said, sir. I don't know what  
15 that means. Can you explain more?

16 BY MR. BARR:

17 Q. Sure. Dr. Chatterjee has cooked up a lot of new  
18 words in this case like "prebuilt" that doesn't appear on one  
19 document over there at NCR. Brand new for this litigation. He  
20 says because the software's prebuilt, it doesn't infringe.

21 We say the software being prebuilt is irrelevant to  
22 infringement. What's relevant is do they use point-of-sale  
23 builder software to build point-of-sale terminals, because  
24 that's what the patent says. Do you understand that?

25 MS. COLLINGS: Objection, Your Honor. This is outside the

1 scope. This is a --

2 THE COURT: Of what? Outside the scope of what?

3 MS. COLLINGS: A damages expert.

4 THE COURT: It's cross-examination.

5 MS. COLLINGS: Of a damages expert.

6 THE COURT: Please sit down.

7 BY MR. BARR:

8 Q. Dr. Chatterjee also came up with the idea that NCR  
9 doesn't have a web server. What it's really got is an  
10 application server. Do you recall that testimony?

11 A. Again, it's -- we're getting into the technical  
12 details. I don't feel -- I think that may be correct. There's  
13 definitely -- I know removing the web server was a  
14 design-around solution, part of it. That I feel comfortable,  
15 but the rest gets too technical for me.

16 Q. Well, just with that one. If all NCR had is an  
17 application server and that is really different from a web  
18 server, then Dr. Chatterjee wouldn't need to tell NCR if they  
19 don't want to infringe, you need to get rid of your web server,  
20 right?

21 A. I don't want to speculate on these issues, Mr. Barr.  
22 I'm sorry.

23 Q. Another way to get rid of the web server would be for  
24 Dr. Chatterjee to come in here and just call it something else.  
25 An application server, right?

1           A.    Again, asking me things about some other expert's  
2 opinions, I don't feel comfortable, sir.

3           MR. BARR:   Pass the witness, Your Honor.

4                               REDIRECT EXAMINATION

5 BY MS. COLLINGS:

6           Q.    Dr. Ikizler, Mr. Barr asked you about the survey that  
7 Ms. Salters relied on with respect to the profitability.   And  
8 he asked you specifically if the companies in the survey were  
9 comparable to NCR Silver.   Do you recall that?

10          A.    Something along those lines.   Yes.

11          Q.    Okay.   Do you have an opinion as to whether or not  
12 the companies that were included in the survey are or are not  
13 comparable to NCR Silver, the product line?

14          A.    I think it's just not a well-defined issue.   You  
15 cannot compare product to product lines.   That's the end of the  
16 question.

17          Q.    And why is that?

18          A.    Because a company that has multiple products -- I can  
19 be selling -- I can be doing multiple services like NCR does,  
20 NCR Silver, and then they have banking solutions and retail  
21 solutions, they're all different solutions.   Again, this is one  
22 product line.   We're talking about total \$100 million of  
23 revenues, one product line.

24               And then the company itself is \$6 billion.   So when you  
25 look at just companies, you collect data from companies, you

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U.S. DISTRICT COURT, WESTERN DISTRICT OF TEXAS (WACO)*

1 have to compare companies to companies. If you want to  
2 specifically look at the product line, then you look at the  
3 product line P&L. So it's not -- you just can't compare  
4 product lines to companies.

5 Q. It wasn't apples to apples?

6 A. It was not apples to apples. Correct.

7 Q. What was NCR Silver's market share in the  
8 point-of-sale solution as you understand it, Dr. Ikizler?

9 A. We looked for data. It was not available anywhere.  
10 I asked Keith Dunphy that was the VP of sales at some point.  
11 And he estimated low single digits. That's what he said, he  
12 said low single digits.

13 Q. So that would be between 1 and 4 percent in your  
14 understanding?

15 A. Yeah. Less than 5 percent probably.

16 Q. Okay. And, again, that's the market share of the  
17 point-of-sale solutions that NCR Silver was competing in,  
18 correct?

19 A. That was just his guess. Yes. That was his estimate  
20 as the salesperson -- the VP of sales, I think.

21 Q. I'm sorry. And that was Mr. --

22 A. Keith Dunphy.

23 Q. And what was his role?

24 A. I think he was VP of business strategy and sales.  
25 It's in my report. I could give you a precise answer. I don't

1 remember exactly.

2 Q. And that's who you spoke with before your report?

3 A. Yes. That's -- before my report I spoke to him.

4 Q. And in addition to talking with Mr. Dunlap (sic),  
5 what about documents review? Can you describe for the jury the  
6 amount of documents, roughly? The nature of the documents that  
7 you reviewed in preparation of your report?

8 A. Everybody has access to the same set of legal  
9 documents, the spreadsheets and bunch of PDFs. We all had  
10 access to it. I started from the most relevant ones. To me  
11 that's data. And then I did consult with -- I read about ten  
12 peer-reviewed articles about how to calculate the methodologies  
13 of the damages. And then I conducted interviews. I think  
14 that's about it.

15 Q. Well, when you talk about the data, what data are you  
16 referring to?

17 A. Talking about the financial data and the  
18 transactional data which I showed screenshots of, the  
19 transactional data which is item-level data.

20 Q. And what form was that production or that data  
21 provided to you? Were those PDFs?

22 A. Excel files.

23 Q. What does that mean, Excel files?

24 A. Excel file is -- I don't know how to -- I never had  
25 to --

1 Q. The data?

2 A. -- define Excel file before.

3 Q. Is it a database?

4 A. Yeah. Some degree.

5 Q. Okay. And it's the native -- it's the native version  
6 of those documents, correct?

7 A. That's a native file. Yes.

8 Q. Okay. And, you know, when you look -- when you open  
9 up an Excel document, it has those little tabs or worksheets at  
10 the bottom. The documents in the data that you were reviewing  
11 in preparation of your report, did -- and just looking at the  
12 P&L, for example, did that have multiple tabs included in that  
13 document?

14 A. Yes. It had a U.S. tab and a worldwide tab, for  
15 example, the P&L document.

16 Q. And when you clicked on one of those worksheet tabs,  
17 what happened?

18 A. You view that tab. I don't understand.

19 Q. You reviewed the tab. The tab opens and you see some  
20 data. Is that all of the data that you then see when you open  
21 the tab?

22 A. I'm having a hard time understanding the questions.

23 Q. Is there more data? When you open an Excel tab and  
24 that tab comes up in the native file, is that all the data, or  
25 is there any other way that you can select that even more data

1 will be displayed on the monitor?

2 A. Oh, maybe you're talking about the -- they use a  
3 table format where you have to click a few -- like a few  
4 plus/minus signs that opens up the -- is that what you're  
5 referring to?

6 Q. Yes.

7 A. Okay. Yes. You have to do some work to get to more  
8 data. Yes. It's not just everything's visible on your screen.  
9 If that's what you're asking, that's correct.

10 Q. And that's what I want you to describe, though,  
11 Dr. Ikizler. I want you to describe for the jury how many tabs  
12 you had to open and how many little plus and minus signs you  
13 had to click in order to describe the amount of data that you  
14 reviewed prior to preparing your report.

15 A. Well, every spreadsheet is different, and honestly I  
16 don't remember. But I think the transactional data was four  
17 different spreadsheets, really huge. I had one of my data  
18 scientists analyze that under my direction. Probably take  
19 days. I think it definitely take days. That data was more  
20 complicated.

21 The P&L data was relatively simpler, had a U.S. and  
22 worldwide tabs in it. You had to scroll down. There's cost of  
23 goods sold for software portion and then a similar version for  
24 selling expenses allocated for -- so the NCR allocates line  
25 items to the product line and selling purposes and operating

1 purposes, as far as I remember.

2 So I'm not sure if I'm telling you the answer you're  
3 asking -- look. I don't know what you're asking.

4 Q. It's fine. Just -- I'm not asking anything in  
5 particular. I just want you to describe what you reviewed in  
6 preparation of your report.

7 And just sticking with the P&L financials, for example,  
8 was that just annual financial information for NCR Silver, or  
9 did it break it out incrementally to monthlies?

10 A. Oh, I see. It does a month-by-month solution --  
11 month-by-month data. I'm sorry. Two hours now.

12 Had monthly data. Revenue items were broken up  
13 by software, hardware. And then cost items were -- as I  
14 mentioned, there's 27 different cost items that I focused on  
15 under the software portion.

16 So there were fees, technology go-to market, labor costs,  
17 hardware costs. That's another section.

18 Q. And in this --

19 A. Yeah. If you want to pull out the spreadsheet, we  
20 can just show the spreadsheet. That would be probably easier.

21 MS. COLLINGS: Do you want to put that up, then? Joint  
22 Trial Exhibit 88.

23 BY MS. COLLINGS:

24 Q. And again, these are the P&Ls, the income statements  
25 for NCR Silver?

1           A.     Correct.  And then we can open some of those  
2 plus/minus signs, that would be much easier to show, because I  
3 don't want to...

4           Q.     We can't open the native.  I'm so sorry.  We're  
5 unable to open the native.

6           Do perhaps you want -- would it be helpful if you went  
7 line by line?

8           A.     Okay.

9           Q.     So that was the financials, the income statements,  
10 for NCR Silver that you reviewed.  And I think you mentioned  
11 another set of data.

12          You refer that -- you refer to that as the transactional  
13 data?

14          A.     Correct.

15          Q.     Can you describe the transactional data that you  
16 reviewed?

17          A.     Yes.  For example -- I'll give you one example,  
18 Waffle House, which I love.  Waffle House is one of the clients  
19 of NCR.  So you could see for how many exact locations they  
20 purchased which software solution.

21          You could tell how much they paid.  Because they are big  
22 client, they got a discount.  For example, you could see that  
23 they -- that's one of the line items, for example, I described  
24 in my deposition that Ms. Salters missed.  Because she used  
25 that \$50 threshold, he ended up excluding that -- ignoring that

1 whole line item because they got a discount on their  
2 subscriptions.

3 This is one example. I'm not saying that necessarily made  
4 the results unreliable. Just the whole methodology is -- I  
5 think is a little bit -- shortcuts, that's what I wanted to  
6 use.

7 But that's one of the things. You could see who paid for  
8 what exactly.

9 Q. In addition to the inconsistencies, though,  
10 Dr. Ikizler, can you explain -- so within the transactional  
11 data, was it -- was it at an invoice level, as you understood  
12 it?

13 A. Yes. But I think it's transactional level, the same  
14 invoice repeated multiple times. If there's five items in the  
15 same invoice, I think it was five entries for the same invoice.  
16 So it was invoice level but transactional level as well.

17 Q. Both invoice and transactional level data?

18 A. Correct.

19 Q. And do you recall approximately how many worksheets  
20 or tabs were at the bottom of that native file that you  
21 analyzed?

22 A. These four data tabs and then one dashboard, which I  
23 showed, that has the NCR's summation formulas to show -- which  
24 indicated how we should use each column from each tab to -- how  
25 did -- to track how do you account for the discounts,

1 et cetera, in the first dashboard tab.

2 So it's five tabs, I think it is. Again, I'm just  
3 testifying from memory right now.

4 Q. So within the two sources of financial data that  
5 you've reviewed, the financial income statement of NCR Silver  
6 and the transactional data of NCR Silver, there were multiple  
7 levels of data that you reviewed in preparation of your  
8 opinions, correct?

9 A. Multiple levels of data. Correct. Yeah.

10 Q. And these were all transaction level data?

11 A. Not all --

12 Q. I'm sorry. In talking about the transaction data  
13 spreadsheet, these were transactional level?

14 A. That's correct. Yes.

15 Q. Okay. And in addition to reviewing the native files,  
16 the spreadsheet -- the spreadsheet native files and other  
17 documents in the case, did you also read depositions --  
18 deposition testimony before you prepared your opinions?

19 A. Yes. I read Mr. Schoonover's (sic) deposition  
20 testimony, and I had my staff members read Mr. --  
21 Dr. Chatterjee's and Mr. Crouse's testimony. I personally read  
22 Ms. Salters' testimony as well. I think there's one more,  
23 McGill, Mr. McGill's testimony --

24 Q. Mr. Quinn?

25 A. -- my teammates read.

1 Q. Okay. And then now focusing on the features analysis  
2 that we discussed and that Mr. Barr discussed with you,  
3 Mr. Barr asked you some questions about not allocating any  
4 weights to the particular features of each of the NCR Silver  
5 products.

6 Do you recall that discussion?

7 A. Yes. I do.

8 Q. Okay. And you said that you treated them all  
9 equally, even the ones that Dr. Chatterjee identified as  
10 potentially benefiting, at least to some extent, by the  
11 patents-in-suit?

12 A. Yes. I did. I treated them all equally because,  
13 otherwise, I would have been making up biased weights, because  
14 I didn't have any way to quantify any weights.

15 Q. But it's more than that, isn't it, Dr. Ikizler?

16 If you had actually attempted to quantify or somehow apply  
17 a weight or a further analysis on the features that  
18 Dr. Chatterjee had identified as contributing to this product  
19 from the patent, the weight you could have applied could have  
20 been .1 percent to 99.9 percent; isn't that correct?

21 A. Yeah. It could have been any number of -- weights  
22 can be any number between zero and one.

23 Q. Could have been really, really small?

24 A. Yeah.

25 Q. Or it could have been 100 percent?

1           A.     Correct.

2           Q.     And by treating them equally, what was the effect of  
3 what that weight became?

4           A.     That just becomes unbiased. Because I'm giving just  
5 as much importance to features that Dr. Chatterjee identified  
6 as relevant to the technology, just as the other one. I'm  
7 just -- I'm not adding any of my -- any bias to the data.  
8 That's what I'm doing.

9           Q.     And by treating it one for one, that means you're  
10 giving 100 percent weight to these features, 100 percent weight  
11 to those features. They're all equal, correct?

12          A.     Correct.

13          Q.     In sticking with the features spreadsheet that you  
14 reviewed, I think you testified about the Jira database. What  
15 is the Jira database at NCR Silver?

16          A.     My knowledge comes from Ms. Schoonover's testimony.  
17 What I understand is that it's a database they use -- she said  
18 every day to -- about the product design. Which means they add  
19 all the features that currently exist in the products, but also  
20 features that they want to add to the product. That's what I  
21 remember.

22          Q.     And do you have an understanding of how that features  
23 spreadsheet was put together at NCR Silver?

24          A.     What I understood, I think that's what Ms. Schoonover  
25 said, it was an export from the Jira database.

1 Q. And you've heard a lot about the poor summer intern.  
2 Do you have an understanding of whether or not there was a  
3 summer intern who compiled this data, Dr. Ikizler?

4 A. My understanding from Ms. Schoonover's testimony --  
5 again, we can just put it up in the screen and everybody  
6 understands what's going on. But what I understand is a summer  
7 intern was given the data of spreadsheet to -- of the features  
8 and --

9 MR. BARR: Your Honor, I object. This is not in his  
10 report.

11 MS. COLLINGS: He was asked about it on cross, Your Honor.  
12 I'm just trying to clean it up.

13 THE COURT: Overruled.

14 BY MS. COLLINGS:

15 Q. Go ahead.

16 A. Oh, sorry.

17 Q. You can answer.

18 A. So a summer intern was given this list of features  
19 and asked can you go do some market research and assign weights  
20 to these? So there were actually weights in that spreadsheet I  
21 could have used. And I actually did use them for a second.  
22 And I realized -- as soon as I found out it was assigned by a  
23 summer intern, I removed it. But to be fair, if I use it, it  
24 still comes up to 10 percent. So it just doesn't make any  
25 difference. So the whole big discussion is irrelevant, in my

1 opinion.

2 Q. Dr. Ikizler, is there something that you think you  
3 needed in order to perform your analysis in this case that for  
4 some reason you weren't provided?

5 A. Again, I mean, I tried to talk to NCR financial  
6 people just to verify some of my understanding before the  
7 report and organize --

8 Q. Yes, and I'm just talking about -- sorry.

9 A. It would have been nice -- it would have been nice,  
10 but I spoke to them a few days after my report and they  
11 verified my understanding.

12 Q. But in focusing on just your report, there wasn't  
13 anything you needed to do to complete that analysis that you  
14 didn't have, now, was there, Dr. Ikizler?

15 A. I was comfortable with all the opinions I gave in my  
16 report.

17 Q. As far as you're concerned, was your report complete?

18 A. You're asking a data person. I never believe I  
19 actually get to that dreamy point. So I can always do more.  
20 So I don't want to answer that question.

21 Q. Is there anything else that you think you needed to  
22 put in your report that would make it reliable?

23 A. No. I find my report very reliable.

24 Q. Have you heard anything, or did you ever see anything  
25 in all your work in this case to suggest that NCR Silver

1 misallocated any of the costs that it included in its P&L?

2 A. No. Actually quite the opposite. Because based on  
3 my conversations with Mr. Randy which is the head of the  
4 accounting department, he explained to me how they do the  
5 allocation. For each line item we went over he said they're  
6 only the costs relevant to this product I allocated. Is that  
7 what you're asking --

8 Q. I'm focusing on --

9 MR. BARR: Your Honor, objection. Again, he's talking  
10 about the gentleman he talked to after his report. I thought  
11 we were clear on that. Randy.

12 MS. COLLINGS: Mr. -- I'm sorry. I'll rephrase.

13 BY MS. COLLINGS:

14 Q. Dr. Ikizler, in the material that you reviewed, all  
15 of the transaction data, the income statement, all the levels  
16 of data and information that was included in the income  
17 statement and the transaction documents and all of the  
18 deposition testimony that you reviewed prior to finalizing your  
19 report, is there anything that would make you suspect or cause  
20 you to think there might have been a risk that NCR Silver was  
21 misallocating any of its costs in its income statement?

22 A. No. I had no such opinions about --

23 Q. And Mr. Barr asked you about whether there had been  
24 audits or not audits. Let me just ask it this way,  
25 Dr. Ikizler. Do you think that a company like NCR Corporation,

1 a publicly-traded company, would take the risk in making a  
2 misrepresentation in a product line's P&L?

3 MR. BARR: Your Honor, I object. This witness doesn't  
4 have a basis to talk about auditing. He's already said he's  
5 not an auditor or an accountant.

6 MS. COLLINGS: I'll withdraw.

7 BY MS. COLLINGS:

8 Q. The \$14 million mismatch that Mr. Barr referred to  
9 and that was also identified in Ms. Salters' report, was  
10 that -- can you explain, again, what was the mismatch? I want  
11 to make sure that we're clear between your discussion with  
12 Mr. Barr. What was the mismatch that Ms. Salters identified in  
13 her report?

14 A. Okay. So this got a little confusing. I want to  
15 clarify. Thank you for asking.

16 So Ms. Salters' opinions are not -- she's not doing a  
17 damages model based on the revenues. She showed revenues, but  
18 she's doing a subscription-based model. She looks at the  
19 number of subscriptions, multiplies them with some numbers --

20 THE COURT: You've got to slow down.

21 THE WITNESS: I apologize, sir.

22 BY THE WITNESS:

23 A. She does a subscription number base. So she looks  
24 at, okay, this product has been sold 540,000 units. And then  
25 she multiplies that with a number to come up with the damages.

1 The mismatch of the revenues relates to why she believed the  
2 P&L must be not correct, as an excuse.

3 That's not what she said in her deposition. She said I  
4 can't trust NCR financials, because I look at the transactional  
5 data that shows a different revenue amount than the P&L data.

6 And what I tried to highlight in my slides that the  
7 transactional data actually is -- there is not a \$14 million  
8 mismatch. If you just look at the formulas properly -- it's a  
9 lot of work. We did it, it's a lot of work. But if you look  
10 at the formulas properly, follow the same formulas that NCR did  
11 their summations, you would get the same numbers.

12 But that was the summary. She did not include or exclude  
13 any \$14 million. That has nothing to do with the damages. It  
14 was only the reason she decided not to rely on the NCR  
15 financials, is that mismatch. One of the three reasons.

16 Q. And finally, Dr. Ikizler, you were asked about your  
17 design-around opinions. And to be clear, you're not -- you're  
18 not here to offer a damages opinion. You're not here to opine  
19 on what you think a specific damage number is in this case, are  
20 you?

21 A. No. I'm just providing that as another relevant data  
22 point that NCR would have considered during those negotiations.  
23 I don't have a damages number that I'm recommending that you  
24 guys should allocate.

25 Q. And when you say that negotiation, what are you

1 referring to?

2 A. The hypothetical negotiation.

3 Q. The hypothetical negotiation applying the  
4 Georgia-Pacific factors you talked about earlier?

5 A. Correct.

6 Q. Okay. What is the Bureau of Labor Statistics?

7 A. It's the official statistical arm of the government  
8 that surveys wages for each location for -- I guess since maybe  
9 before tens of years at least. There's data going back 40,  
10 50 years in there.

11 Q. And why did you use that information in looking at  
12 the design-around analysis?

13 A. Because I -- was my understanding that NCR would have  
14 had to hire three additional software developers, and I assumed  
15 they're going to hire from the United States, which is more  
16 expensive to hire developers here. But -- and I looked at the  
17 90th percentile of the distribution to say some skilled  
18 software developers, how much would it have cost? That is  
19 official government data.

20 Q. So worst-case scenario, Dr. Chatterjee said it would  
21 take two to three middle-level software engineers, and you're  
22 saying, okay. Worst-case scenario, you're going to have to --  
23 they may be senior. They may be -- you know, they may be even  
24 more elevated.

25 And so you used the 90th percentile of the Bureau's

1 statistics, correct?

2 A. Yes. To be conservative, to give the benefit of the  
3 doubt, because I'm sure this is complicated task.

4 Dr. Chatterjee said mid-level software developers would be  
5 sufficient. I did the 90th percentile wage.

6 Q. And again, there was some discussion about web  
7 servers and the design-around and Dr. Chatterjee's opinion.  
8 But as a damages expert in this case, you have to assume  
9 infringement; is that correct?

10 A. Yes. I assume that NCR benefits from the CoC patents  
11 to some degree.

12 Q. But you don't have that opinion, do you?

13 A. I mean, I put my -- all the facts that I could  
14 collect together in there. If -- it's not an opinion, it's a  
15 requirement I have, legally, that I have to assume  
16 infringement. It's not -- I can't offer opinions on  
17 infringement anyways.

18 I'm sorry. Maybe I'm misunderstanding the question.

19 Q. That's fine. That's just fine.

20 MS. COLLINGS: No further questions.

21 MR. BARR: Just a few questions, Your Honor.

22 RECROSS-EXAMINATION

23 BY MR. BARR:

24 Q. While we're talking about percentages, Dr. Ikizler,  
25 if we were to go back to that SaaS revenue model that you

1 looked at, looked at the industry, you recall?

2 And I think you testified earlier today that the  
3 percentages of profitability and profit margins varied from 70  
4 to 95 percent, yes, sir?

5 A. I was just reciting Ms. Salters' opinion, sir, about  
6 the survey, right.

7 You're talking about the survey, sir?

8 Q. Yes. I understand that you don't like that survey.  
9 I'm not saying that you used it in your opinion.

10 Are we clear?

11 A. Can you repeat the question?

12 Q. Sure. You didn't use the SaaS survey in your  
13 opinions in this case, right?

14 A. I did not rely on that survey, sir. No.

15 Q. But you did read it. You told us that?

16 A. I analyzed it.

17 Q. Does that mean the same thing as read it?

18 A. Not the same thing. No.

19 Q. It's a deeper dive than reading it?

20 A. Yes.

21 Q. Okay. When you were doing that analyzation or  
22 analysis of the SaaS report, did you notice that this -- the  
23 report said that in this industry, that 70 to 95 percent was a  
24 common gross profit range?

25 A. I think that's what this survey concludes. Correct,

1 sir. Yes.

2 Q. So if we use those higher numbers than Ms. Salters  
3 used, we'd be looking at a 70 to \$90 million damages number,  
4 wouldn't we, sir?

5 A. Can you walk me through the math? I don't see that  
6 math, sir. No.

7 Q. You can't imagine the math, that you multiply  
8 95 percent instead of 48 percent, like Ms. Salters did?

9 A. Ms. Salters had a lot of different opinions, sir.  
10 Could you refer to me which number you're multiplying with  
11 what so I'm telling the truth to everybody?

12 Q. Sure. Absolutely.

13 We're going to multiply the number of sold -- the software  
14 subscriptions, 572,000-plus, right?

15 A. That's not correct. I think it was 547,000, sir.

16 Q. Well --

17 A. I am under oath. I don't -- I'm sorry. I just have  
18 to tell the truth.

19 Q. All right. I want you to tell the truth.

20 A. That's what I'm trying to do.

21 Q. We're here to learn the truth. I'm dying to hear the  
22 truth from that witness stand, Dr. Ikizler.

23 A. I'm doing my best, sir.

24 Q. All right. Here we go. Ms. Salters' slide that I  
25 wrote on. Do you see it?

1 A. Yes, sir. I remember this from yesterday.

2 Q. So these are the numbers, right, that we're talking  
3 about doing the math on, right?

4 A. I am following you, sir. I do not know the answer to  
5 that question.

6 Q. Fair enough. And I understand that you do not agree  
7 with Ms. Salters' opinions in this case. You and I can agree  
8 on that.

9 A. Yes, sir.

10 Q. You and Ms. Salters disagree, right?

11 A. Not on everything, sir, but on some issues.

12 Q. Okay. You can see in the last column of my really  
13 messy handwriting, right, sir?

14 A. It's better than mine.

15 Q. Okay. And what I did is I did a little bit of math,  
16 right?

17 A. Yes, sir.

18 Q. And I multiplied the number of Silver software  
19 subscriptions times a basic software price of \$79, right?

20 A. Okay.

21 Q. And you can see that I put there that 70 to  
22 95 percent profit margin that the SaaS survey benchmark talks  
23 about, right?

24 A. Yes.

25 Q. But I didn't use that number for my math, did I?

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1 A. I don't know what you did, sir.

2 Q. You can't tell that I multiplied 80 percent times \$79  
3 times 547,907?

4 A. Oh, that's right. You did take the -- kind of the  
5 low mid point there. Yes, sir. I remember now. Yes, sir.

6 Q. So if I didn't do that, if we went with the SaaS  
7 number, the number from the benchmark survey of the 1,200  
8 companies in the same business as the NCR Silver product, if I  
9 use their number of profitability?

10 A. I'm sorry, but I think you did use --

11 Q. Let me finish my question, okay?

12 A. Oh, I apologize. I'm sorry.

13 Q. I'll let you know. Okay? I'll end with "correct" or  
14 something, or "right" or "we agree," okay?

15 So let's go back. If we use the SaaS benchmark survey  
16 that was 1,200 -- information from 1,200 companies, right?

17 A. Again, 400 for 2020, because that's the number --  
18 that's where it's coming from, sir, to be fair.

19 Q. Let me try it again. I won't quibble with you, all  
20 right?

21 If we use the SaaS survey, it talked about 70 to  
22 95 percent gross profit margin as being common in the industry  
23 for software, right?

24 A. For the SaaS. Yes, sir.

25 Q. Okay. And SaaS is the same kind of industry -- same

1 kind of pricing model that NCR uses for NCR Silver, right?

2 A. I would say in the same industry, but I wouldn't  
3 say -- pricing model is very complicated issue there. If you  
4 want to get into it, I'm happy to get into it.

5 Q. It's late in the day. Well, let me just ask you  
6 this. SaaS, we've heard this defined in this courtroom. Have  
7 we heard an incorrect definition when Ms. Schoonover said that  
8 SaaS stands for software as a service?

9 Did we -- was that the correct definition?

10 A. Yes, sir.

11 Q. And all that means is that you're giving somebody  
12 something on a monthly basis and they're paying you on a  
13 monthly basis for it, right?

14 A. It's more complicated than that, but I'm going to  
15 agree with you.

16 Q. That's how NCR charges for the Silver product, right?

17 A. That's correct.

18 Q. You can see it on the slide, right?

19 It says \$79 is their basic software pricing. They're not  
20 selling the software, they're renting it. You get a  
21 subscription to it, right?

22 A. That's how NCR does it, sir. Yes. I'll agree with  
23 that.

24 Q. Yeah. Because as Mr. Quinn or Dr. Chatterjee said,  
25 they update their software regularly, right?

1 A. I did hear that, sir. Yes.

2 Q. Okay. So let's go back to the math.

3 A. Yes.

4 Q. Multiplying the number of subscriptions 547,907,  
5 right?

6 A. Yes.

7 Q. Times the price, \$79 a month, right?

8 A. Okay.

9 Q. Times the profit margin, 80 percent, right?

10 A. That's what you're doing there. Yes, sir.

11 Q. Okay. And I used that number, 80 percent, and I came  
12 up with \$34.6 million in damages.

13 Do you see that?

14 A. Yes, sir. That sounds about -- correct math. I  
15 didn't double-check, but I'll take your word for it.

16 Q. Okay. Well, if I use 95 percent, the top of the  
17 range, instead of the middle of the range, we'd be talking  
18 about something like 70 to \$90 million -- or \$90 million at the  
19 top of the range, wouldn't we?

20 A. Not at all, sir. No.

21 Q. Not at all?

22 What would it be? Why don't you do the math for us?

23 A. Sure.

24 Q. If we did 95 percent --

25 A. Yeah.

1 Q. Times \$79 --

2 A. So let me give you a shortcut with the -- so you used  
3 80 percent?

4 Q. Yeah.

5 A. If you use 95 percent instead, which is the top of  
6 the top --

7 Q. Yep.

8 A. That's -- from 80 percent to 95 percent is  
9 15 percentage difference.

10 Q. Okay.

11 A. What is that as a -- in the denominator, put  
12 80 percent. 15 divided by 80, you essentially increasing less  
13 than 25 percent, the damage, what you have.

14 Q. So what would the number be, if we did that math?

15 A. Yeah. So 34 percent -- \$34 million, increase that  
16 about 23 percent, will be -- divide that by 5, roughly, so  
17 7 million, that will be \$41 million.

18 Q. \$41 million?

19 A. Again, somebody should double-check the math. I'm  
20 just doing it from my memory, but it's about right.

21 Q. Now, let me go back to what Ms. Collings just asked  
22 you about. We were talking -- you talked a bit about today  
23 this \$14 million that Ms. Salters concluded was missing from  
24 the documentation from NCR, right?

25 A. Yes, sir.

1 Q. And you understand that Ms. Salters, at least as I  
2 understood her testimony, did not charge damages on that. She  
3 let NCR keep that money, because she didn't know what to do  
4 with it?

5 A. I can't agree with that statement, sir.

6 Q. Okay. Well, let me hand -- you read Ms. Salters'  
7 report, didn't you?

8 A. Yes, sir.

9 Q. Because part of your job was to come in here and tell  
10 people why Ms. Salters made a mistake, right?

11 A. On one specific -- on couple specific issues. Yes,  
12 sir.

13 Q. Okay. And one of those was the \$14 million,  
14 apparently, right?

15 A. Yes, sir.

16 MR. BARR: May I approach the witness, Your Honor?

17 THE COURT: Yes, sir.

18 BY MR. BARR:

19 Q. I've handed you Ms. Salters' report that you read  
20 before you prepared your report in this case, right, sir?

21 A. Yes, sir.

22 Q. Now, Footnote 77 on Page 13 of Ms. Salters' report  
23 talks about the \$14 million, right?

24 A. Yes, sir.

25 Q. Could you read that footnote to the jury?

1 A. The entire footnote, sir?

2 Q. Yes, sir.

3 A. "14 percent equals (\$20 million divided by \$12  
4 million) to the power of one-fourth minus 1. StoneTurn  
5 Workpaper 6.2. I note that NCR produced two sources of Accused  
6 Product revenue" --

7 (Clarification by Reporter.)

8 THE WITNESS: Yes. I apologize.

9 BY THE WITNESS:

10 A. "I note that NCR produced two sources of Accused  
11 Product revenue including detailed invoice data from 2018 to  
12 2020, and NCR Silver-specific income statements from 2016 to  
13 2020. The detailed invoice data can be filtered in two  
14 different ways to achieve a similar result for Accused Software  
15 revenue and units, but this data understates Accused Software  
16 revenue by more than \$14 million compared to the NCR  
17 Silver-specific income statements. See StoneTurn Exhibit 4."

18 BY MR. BARR:

19 Q. All right. Now, you agree that -- and not  
20 considering that -- by not putting that 14 million into the  
21 revenue column, Ms. Salters left that revenue for NCR, right?

22 A. That's not correct, sir.

23 Q. Maybe we'll just have to agree to disagree about  
24 that, sir.

25 Let's go back to the intern document that Ms. Collings was

1 asking you about. And I believe -- let me just ask you. Do  
2 you know if these weights -- weight determinations were used by  
3 NCR for these features?

4 A. I do not know, sir.

5 Q. Okay. Well, did you use these weights to determine  
6 what features would be offered or would be considered  
7 necessary?

8 A. No, sir.

9 Q. You don't know what the purpose of this document was,  
10 right?

11 A. I do know the purpose of the document, sir.

12 Q. Okay. Do you recall that this document, you said,  
13 was to assess the relative value against the price being  
14 charged?

15 A. That sounds about right, sir. Yes.

16 Q. And was a determination made, based on this document,  
17 on that issue?

18 A. I do not know that, sir.

19 Q. In fact, you're not aware of any determination that  
20 was made using that document that you relied on, are you, sir?

21 A. I thought we were talking about the weight, sir. I'm  
22 sorry.

23 Can you clarify the full -- are you talking about the  
24 weights or the document, sir?

25 Q. I'm talking about -- well, let's just talk about the

1 weights.

2 You're not aware that NCR ever used that document to  
3 calculate any weights of features, are you?

4 A. I'm aware of a presentation that was made based on  
5 this document. I've seen that.

6 MR. BARR: Let's look at his -- please pull up his  
7 exhibit, Page 162, Line 13 through 19. Question -- get it up  
8 first.

9 BY MR. BARR:

10 Q. My question was to you, sir. It says: "What was  
11 the -- you don't know what the purpose of this document was?"

12 Your answer was: "It was to -- to assess the relative  
13 value against the price being charged."

14 Right?

15 Next question: "And was a determination made based on  
16 this document on that issue?"

17 And what was your answer, sir?

18 A. Mr. Barr, can you put the correct portion of the  
19 deposition testimony? I'm not seeing it. They've put  
20 mistakenly wrong portion of it.

21 Q. I'm sorry. It's Page 162 of Mr. Ikizler's -- oh, I'm  
22 sorry. I put up the wrong document. I pulled up  
23 Ms. Schoonover's deposition by mistake.

24 A. I thought so too.

25 Q. Well, let's pull that up and read what she said about

1 it because you read her deposition, right?

2 A. Yes, sir.

3 Q. And you relied on it in connection with how you  
4 handled that document, right?

5 A. Yes, sir.

6 Q. I apologize.

7 A. No problem.

8 Q. See, that's an example of me making a mistake, and  
9 thank you for letting me know.

10 So question to Ms. Schoonover, again, at Page 162,  
11 Lines 13 through 19: "What was -- you don't know what the  
12 purpose of this document was?"

13 Ms. Schoonover said: "It was to assess the relative value  
14 against the price being charged."

15 And then at Line 17, I asked Ms. Schoonover: "And was a  
16 determination made based on this document on that issue?"

17 And what was Ms. Schoonover's answer?

18 A. "Not that I'm aware of. No."

19 Q. And we know that Ms. Schoonover would be the one who  
20 would be aware of it, if it was used, because that was her job,  
21 right?

22 A. I think that's fair. Yeah. If anybody knew, that's  
23 our best bet.

24 Q. If anybody knew, Ms. Schoonover, the person in charge  
25 of the product line, who testified that part of her job was

1 determining what features to put in the product, would know,  
2 right?

3 A. Yes, sir. About the spreadsheet. You're correct.

4 Q. And she didn't know, did she?

5 A. About the purpose of the document. No, sir.

6 Q. But that's the document that you chose to use as the  
7 foundation for your opinion in this case; isn't that right,  
8 sir?

9 A. Not the document, sir. Just the list of features.  
10 It's different -- two are different things.

11 MR. BARR: Pass the witness, Your Honor.

12 MS. COLLINGS: No further questions, Your Honor.

13 THE COURT: You may step down, sir.

14 Can I have one counsel from each side up here?

15 (Off-the-record bench conference)

16 THE COURT: Mr. Baker, does the defendant have any other  
17 witnesses?

18 MR. BAKER: No, Your Honor.

19 THE COURT: Subject to any motions that might be pending  
20 right now, does the defendant rest?

21 MR. BAKER: Yes, Your Honor. We rest subject, again, to  
22 the motions.

23 THE COURT: Mr. Barr, subject to any motions you might  
24 have pending at the moment, do you have any rebuttal witnesses?

25 MR. BARR: We do have a rebuttal witness to call, but

1 subject to our pending motions and the motion we plan to file  
2 and subject to our rebuttal case, the plaintiff rests.

3 THE COURT: Okay. You do have a -- but you -- no. You  
4 don't rest. You have --

5 MR. BARR: No. I'm sorry. You're right. We have a  
6 rebuttal case that we're going to put on. I'm sorry.

7 THE COURT: Don't cut Mr. Yates out of this.

8 MR. BARR: I'm not. I'm not. I'm sorry.

9 THE COURT: Mr. Yates, would you --

10 MR. BARR: It was a long night last night.

11 THE COURT: I understand.

12 Mr. Yates, would you call your witness, please?

13 MR. YATES: Plaintiff calls Gregory Crouse, please.

14 DIRECT EXAMINATION

15 BY MR. YATES:

16 Q. Good morning, Mr. Crouse.

17 A. Good morning.

18 Q. You submitted two expert reports in this case,  
19 correct?

20 A. Yes, sir. I did.

21 Q. And this morning we're here to talk about your  
22 opinions regarding validity for the '640 and the '012 patents?

23 A. Yes, sir. That's correct.

24 Q. And this week you heard NCR remind the jury that  
25 federal law says that patents are presumed to be valid,

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U.S. DISTRICT COURT, WESTERN DISTRICT OF TEXAS (WACO)

1 correct?

2 A. Yes, sir.

3 Q. And you heard Dr. Chatterjee remind the jury that  
4 NCR's burden is clear and convincing evidence?

5 A. Yes. That's my understanding, sir.

6 Q. And it's your understanding that the Court will  
7 instruct the jury on the law later today?

8 A. Yes, sir. That's also my understanding.

9 Q. Okay. Well, let's start with Dr. Chatterjee's  
10 anticipation arguments.

11 MR. YATES: Can we pull up DTX-50?

12 BY MR. YATES:

13 Q. Now, this is U.S. Patent Publication  
14 No. 2007/0265935.

15 Are you familiar with this document?

16 A. Yes, sir. I am. This is a patent application. The  
17 original filer is Thomas E. Woycik, whatever we've been calling  
18 it. So we call it Woycik.

19 Q. And Dr. Chatterjee offered opinions on Woycik  
20 yesterday?

21 A. Yes, sir. He did.

22 Q. Okay. And do you agree with those opinions?

23 A. No, sir. I do not.

24 MR. YATES: Can we look at the picture?

25 BY MR. YATES:

1 Q. So the picture --

2 MR. YATES: If we could go back to the one page, please.

3 BY MR. YATES:

4 Q. So the picture on the front of this patent, did we  
5 see this picture yesterday?

6 A. Yes, sir. We did.

7 MR. YATES: And now can we please turn to actually  
8 Figure 1 from inside the patent?

9 BY MR. YATES:

10 Q. And so this is the Figure 1 of the patent, correct?

11 A. Yes, sir. That's correct.

12 MR. YATES: And can we highlight the Item 16s, the one in  
13 Store 1 and the one in Store 2? Thank you.

14 BY MR. YATES:

15 Q. Now, what does Figure 1 say that Item 16 is, there in  
16 Store 1?

17 A. This item that we've highlighted is the in-store  
18 server.

19 Q. And what does Figure 1 say Item 16 is in Store 2?

20 A. That is also the in-store server for the second  
21 store.

22 Q. And as part of Dr. Chatterjee's opinions, did he  
23 analogize this or identify this Item 16 as the point-of-sale  
24 terminal?

25 A. Incorrectly. Yes.

1 Q. And what actually is Item 16?

2 A. It is an in-store server.

3 Q. So is this local server, or in-store server, similar  
4 to the servers you used in your work experience from 2004 to  
5 2009?

6 A. Yes, sir. Very similar to many clients' back in the  
7 day. It was very common to have a local on-site in-store  
8 server on premises.

9 Q. And is this the local server that Mr. Baratta and  
10 Mr. Olson testified earlier in this week they wanted to get rid  
11 of when they were developing their inventions?

12 A. Yes, sir. As I've discussed, that's -- that is one  
13 of the main objectives of the invention is to get rid of that  
14 server.

15 Q. And so Dr. Chatterjee says Item 16 is not a server,  
16 correct?

17 A. Incorrectly, that's what he said. Yes.

18 Q. And you say it is a server?

19 A. I do.

20 Q. What does Woycik say it is?

21 A. Woycik says it's a server.

22 Q. And it shows us here on Figure 1, correct?

23 A. It does. In black and white.

24 Q. And besides in Figure 1, does Woycik call this a  
25 local server throughout the document?

1           A.    He does.  I think 70 times he talks about the  
2 in-store server.

3           MR. YATES:  Can we turn to Paragraph 0071?

4 BY MR. YATES:

5           Q.    Now, can you point to us or read part of this  
6 paragraph to explain what Woycik says when it's describing  
7 Item 16?

8           A.    It says:  "In each store the local on-site server is  
9 connected to the Internet."

10          Q.    And when a patent puts the number after it, that  
11 means that that corresponds to the item we see in the figures?

12          A.    Yes, sir.  That's correct.

13          Q.    Okay.  And if we go down about midway through the  
14 paragraph, does it say in general a single store location will  
15 include at least one local server 16?

16          A.    Yes, sir.  That's what it says in black and white.

17          Q.    And then it continues in a more typical configuration  
18 such as shown in Store 1, store location 12, the store location  
19 will include a single server and multiple client kiosk?

20          A.    Yes, sir.  That's what it says.

21          Q.    Okay.  And what's a client kiosk in Woycik?

22          A.    That's the point-of-sale device.

23          Q.    Okay.  And so is a client kiosk the same thing as a  
24 server in Woycik?

25          A.    Absolutely not.

1 Q. Now, a server can also be a kiosk; is that correct?

2 A. Absolutely.

3 Q. Now, how does the client kiosk communicate with the  
4 local server, assuming they're not in the same box?

5 A. Sure. Again, a popular term of the day was LAN, or a  
6 local area network, and that's how this would connect it.

7 MR. YATES: Can we go to Paragraph 0074, please?

8 BY MR. YATES:

9 Q. And what does Woycik tell us in this first sentence?

10 A. "The local kiosk, cash register, and kitchen screen  
11 printer are connected together by a local area network that  
12 uses TCP/IP over an Ethernet connection."

13 Q. Thank you. So Claim 1 of the '640 patent requires  
14 "wherein the network comprises the Internet," correct?

15 A. Yes, sir. That's correct.

16 Q. And would a person of ordinary skill in the art  
17 understand the local area network that Woycik's describing to  
18 be the Internet?

19 A. No, sir. Not -- no, sir.

20 Q. And Claim 1 of the '012 patent requires "wherein said  
21 POS builder software is configured to interact with one or more  
22 POS terminals over the communications network"; is that  
23 correct?

24 A. Yes, sir. That's correct.

25 Q. And would a person of skill in the art understand the

1 local area network in Woycik to satisfy that claim element?

2 A. No, sir.

3 MR. YATES: Now, if we could bring up the one slide I hope  
4 to use, Dr. Chatterjee's DTX-3.83.

5 BY MR. YATES:

6 Q. And I'll give you a minute to refresh.

7 Mr. Crouse, do you agree when Dr. -- with Dr. Chatterjee's  
8 testimony, that the highlighted material shows the language on  
9 Claim 9?

10 And just to refresh, on the right-hand side, we have  
11 Claim 9 of the '012 patent, and there's some highlighted  
12 language there for the element. And then on left-hand side of  
13 this we have the paragraph we just looked at with a particular  
14 highlighted section.

15 A. Yes, sir.

16 Q. Are you refreshed?

17 A. I'm refreshed.

18 Q. Okay. Do you agree with Dr. Chatterjee's opinions  
19 here?

20 A. Absolutely not.

21 Q. And what is it telling us in Woycik in 0072?

22 A. It's telling us that it is possible to have a client  
23 and software -- client server. So it's talking about  
24 accomplishing a separate client and server software both on a  
25 single kiosk. But the combination of putting a -- the client

1 functionality on a server doesn't make it not a server.

2 Q. And so that's different than a food truck  
3 environment, correct?

4 A. That is not what a food truck environment is. No,  
5 sir.

6 Q. And that's different than the patents teaching about  
7 being loosely coupled to the Internet, correct?

8 A. That is absolutely correct.

9 MR. YATES: We can take the one slide down.

10 BY MR. YATES:

11 Q. Does Woycik disclose a vendor subscription service?

12 A. Not once.

13 Q. Does Woycik disclose SaaS or software as a service?

14 A. No, sir.

15 Q. Would it make sense that the Patent Office didn't  
16 consider Woycik?

17 A. It would make sense. It has a local in-store server  
18 as a key component of this invention. And it's in conflict  
19 with the patents-in-suit.

20 Q. So does Woycik anticipate the asserted claims of the  
21 '640 patent?

22 A. Absolutely not. No, sir.

23 Q. And does Woycik anticipate the asserted claims of the  
24 '012 patent?

25 A. Absolutely not. No, sir.

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1 Q. Let's turn to Brown.

2 MR. YATES: Can we pull up DTX-58?

3 BY MR. YATES:

4 Q. So again, this is another U.S. patent publication.

5 Are you familiar with this document?

6 A. I am. Yes, sir. This is a patent application  
7 document again. It's filed originally by Michael James Brown,  
8 and we have been calling it Brown.

9 Q. And Dr. Chatterjee offered opinions on Brown  
10 yesterday, didn't he?

11 A. He did. Yes.

12 Q. And do you agree with those opinions?

13 A. No, sir. I do not.

14 Q. Why not?

15 A. Brown is an inventory and point-of-sale management  
16 system. It is focused around building websites for e-commerce.

17 Q. So when you say "e-commerce," what do you mean?

18 A. E-commerce sites like Etsy or eBay, building sites  
19 for that type of feature.

20 Q. So is that similar to a point-of-sale at a restaurant  
21 or a retail store?

22 A. Not even close. No, sir.

23 MR. YATES: Can we go to Figure 59 in this document?

24 BY MR. YATES:

25 Q. Now, is the quality of this image what the Patent

1 Office has?

2 A. We have -- I have to apologize for the quality of  
3 this image that we're using. It is in the original filing, and  
4 it's not great to look at. So apologies in advance.

5 Q. But this is what we have, right?

6 A. This is what we have.

7 Q. And what is this slide showing us?

8 A. This is showing the functionality that I described.  
9 This is essentially an e-commerce -- or e-commerce site, like  
10 eBay. This trinket, I believe, is a -- like a Chinese table or  
11 something. So it's -- a user has created this website to sell  
12 items over the Internet.

13 Q. So this reference is showing us how to make an  
14 Ebay-like site. It's not involved with point-of-sale systems  
15 as the '640 and the '012 patents; is that correct?

16 A. No, sir. This is not a point-of-sale system.

17 Q. Are there other differences, besides the e-commerce  
18 or web selling features that -- with Brown, or does Brown have  
19 other differences from the '640 and '012 patent?

20 A. It does. It also doesn't -- it doesn't mention  
21 software subscription or hosting or any of those other types of  
22 features that were in the patents-in-suit.

23 Q. Now, is Brown specifically about a website builder?

24 A. It is. And it actually says it in black and white,  
25 "website builder."

1 MR. YATES: Well, can we go to, I guess, Paragraph 0073?

2 BY MR. YATES:

3 Q. And so here on the last page -- on the second to the  
4 last page in Paragraph -- of this document, 0073, paragraph  
5 split across.

6 This is the only reference, this paragraph, to any sort of  
7 builder at all, correct?

8 A. That is correct. And it's a website builder.

9 Q. And it's building like an Etsy, an eBay or your own  
10 personal antique store?

11 A. Yes, sir. That's correct.

12 Q. Does Brown teach about a merchant configuring a  
13 point-of-sale system?

14 A. No, sir. It does not.

15 Q. Does Brown disclose a vendor description service?

16 A. No, sir. It does not.

17 Q. Does Brown disclose SaaS or software as a service?

18 A. Not once. No, sir.

19 MR. YATES: If we could go the Paragraph 0001.

20 BY MR. YATES:

21 Q. Now, you understand that there's a claim that deals  
22 with the patents that deals with no specialized hardware?

23 A. Yes, sir. That's correct.

24 Q. And what does Brown teach us about specialized  
25 hardware?

1           A.    Brown is teaching us here the exact opposite.  It's  
2 saying the merchants must acquire specialized computer hardware  
3 and have it configured.

4           Q.    And so the implication of the Brown solution -- this  
5 is in Paragraph 1 -- is that regular point-of-sale systems  
6 require specialized hardware; is that correct?

7           A.    That's what it's saying.

8           Q.    And Brown's telling you, you can just have your  
9 website that they can help you build?

10          A.    Yes, sir.  That's correct.

11          Q.    So would it make sense that the Patent Office didn't  
12 look at Brown?

13          A.    It makes absolute sense.  This is a website builder.  
14 It is not a point-of-sale system.

15          Q.    And it's about e-commerce?

16          A.    And it's about e-commerce.

17          Q.    Does Brown anticipate the asserted claims of the '640  
18 patent?

19          A.    No, sir.

20          Q.    Does Brown anticipate the asserted claims of the '012  
21 patent?

22          A.    No, sir.  It does not.

23          Q.    Let's switch to obviousness.

24                Did Dr. Chatterjee offer opinions on obviousness  
25 yesterday?

1 A. Yes. He did.

2 Q. And do you agree with those opinions?

3 A. No, sir. I do not.

4 Q. Well, why not?

5 A. He didn't mention any motivation to combine. And the  
6 combinations of these -- the combinations of these inventions  
7 don't work at all.

8 Q. So you say Dr. Chatterjee didn't offer motivations to  
9 combine. Did you check the transcript?

10 A. Yes, sir. I did.

11 Q. And Woycik has a local server in every store?

12 A. Yes, sir. It does.

13 Q. And Brown is about e-commerce and website building?

14 A. Yes, sir. That's correct.

15 Q. There's a third reference that was Michaud.

16 MR. YATES: If we can pull up DTX-133.

17 BY MR. YATES:

18 Q. Is this the Michaud reference?

19 A. Yes, sir. This is the reference we call Michaud.

20 Q. And are you familiar with this reference?

21 A. Yes, sir. I am.

22 Q. And was Michaud already fully considered by the  
23 Patent Office on the '640 patent?

24 A. Yes, sir. It was.

25 Q. Okay.

1 MR. YATES: Can we go to JTX-1? And I think it's on the  
2 second column on the right, if we want to blow up Michaud in  
3 the list of references cited above that. The second entry.

4 BY MR. YATES:

5 Q. And so is this the Michaud reference?

6 A. Yes, sir. It is.

7 Q. And if we go -- zoom out real quick on the JTX-1, is  
8 this the '640 patent that we've been discussing this week?

9 A. Yes, sir. That's correct.

10 Q. And when we see Michaud, there's that little asterisk  
11 right next to it. Do you see that?

12 A. Yes, sir.

13 Q. And what's your understanding of what that asterisk  
14 means?

15 A. I believe it means it was considered and not -- it  
16 was considered and rejected.

17 MR. YATES: So if we can pan down, the asterisk is  
18 explained below here on the face of the '640 patent. About  
19 midway through.

20 BY MR. YATES:

21 Q. And so that asterisk means in patent speak it was  
22 cited by the examiner, so the examiner specifically cited that  
23 and paid attention to it, correct?

24 A. Absolutely, sir. Yes.

25 Q. Did Dr. Chatterjee offer any opinions regarding

1 obviousness with respect to a reasonable expectation of  
2 success?

3 A. No, sir.

4 Q. And did he offer any opinions providing a motivation  
5 to combine any of these references?

6 A. No, sir.

7 Q. Are the asserted claims of the '640 patent obvious  
8 over a combination of Woycik, Brown and Michaud?

9 A. No, sir.

10 Q. And are the asserted claims of the '012 patent  
11 obvious over a combination of Woycik and Brown?

12 A. No, sir.

13 MR. YATES: Pass the witness.

14 CROSS-EXAMINATION

15 BY MR. PHIPPS:

16 Q. Mr. Crouse, good morning.

17 A. Good morning, Mr. Phipps.

18 Q. As of March 10th of this year, you had not met  
19 Mr. Baratta and Mr. Olson in person, had you?

20 A. In person, no, sir.

21 Q. As of March 10th of this year, you had only had one  
22 conversation involving you and both Mr. Baratta and Mr. Olson,  
23 and that conversation lasted about one hour, correct?

24 A. Yes, sir. That's correct.

25 Q. During that call you did not discuss any prior art

1 patents with Mr. Baratta and Mr. Olson, did you?

2 A. I did not.

3 Q. You admit that the asserted patents did not invent  
4 POS builder software, don't you?

5 A. That's correct.

6 Q. You admit that the asserted patents did not invent  
7 the use of POS builder software to build a POS terminal, don't  
8 you?

9 A. Yes, sir. That's correct.

10 Q. You admit that the asserted patents did not invent  
11 the use of a PC workstation to access POS builder software,  
12 don't you?

13 A. Yes, sir. That's correct.

14 Q. You admit that the asserted patents did not invent  
15 using software provided by a vendor, correct?

16 A. No, sir.

17 Q. You admit that they did not invent that?

18 A. Oh, my apology. I agree with you. You're correct.

19 Q. You admit that you used, in the prior art time frame,  
20 software provided as a vendor subscription service, correct?

21 A. Yes, sir.

22 Q. You admitted that, in the prior art time frame, you  
23 used a number of banking packages that were cloud-enabled and  
24 that were under a subscription service?

25 A. Yes, sir.

1           Q.    You admitted that one of those banking packages was  
2 provided by SunGuard in the year 2000 and that it was hosting  
3 its software on a web server and providing it as a subscription  
4 service, correct?

5           A.    It wasn't a point-of-sale solution, but yes, sir.

6           Q.    Okay. That wasn't part of my question, Mr. Crouse.

7           A.    My apologies. Yes, sir.

8           Q.    One of the other companies who, in the prior art time  
9 frame, that you worked with provided software over the Internet  
10 as a subscription service, and that company was Salesforce,  
11 correct?

12          A.    Yes, sir. That's correct.

13          Q.    And the software offered by Salesforce was hosted on  
14 a web server, correct?

15          A.    Yes, sir. That's correct.

16          Q.    You admit that the asserted patents did not invent  
17 the hosting of software on a web server and providing it as a  
18 subscription service, don't you?

19          A.    Yes, sir. That's correct.

20          Q.    So you agree that we have to use the same scope for  
21 these asserted patents when we look at allegations of  
22 infringement and when we look at allegations of invalidity,  
23 correct?

24          A.    I'm sorry. Could you -- could you -- I wasn't  
25 following you.

1 Q. Regardless of what we're looking at in terms of  
2 whether something infringes or invalidates, we have to use the  
3 same scope of the asserted patents, correct?

4 A. I believe that to be correct. Yes, sir.

5 Q. You admit that the asserted patents did not invent  
6 hosting software remotely, correct?

7 A. That's correct.

8 Q. You admit that the asserted patents did not invent  
9 cloud servers, don't you?

10 A. I agree with that.

11 Q. In terms of hardware, there's nothing different  
12 between the asserted claims and the prior art, correct?

13 A. Correct.

14 Q. The asserted patents did not contribute to the  
15 Internet, did they?

16 A. Correct.

17 Q. The asserted patents are not the first POS system to  
18 allow consumers to process transactions, is it?

19 A. That statement's correct.

20 Q. In terms of new hardware that was available to the  
21 POS industry, the asserted patents didn't contribute any new  
22 hardware, did they?

23 A. Yes, sir. That's correct.

24 Q. On Page 17 of your report, you admit that the POS  
25 systems existed from the prior art, didn't you?

1           A.    Yes, sir.  That's correct.

2           Q.    And you listed four components.  And you heard  
3 Mr. Olson admit that those four components were a part of the  
4 prior art, correct?

5           A.    Yes, sir.

6           Q.    So the first four components that you listed in your  
7 report are not unique to the asserted patents, are they?

8           MR. YATES:  Objection, Your Honor.  I don't believe this  
9 is in the invalidity report that he's asking about.  I could be  
10 mistaken, but I believe he's gone back to an infringement  
11 report.

12          MR. PHIPPS:  No, Your Honor.  I'm talking about what's  
13 admitted into the prior art.

14          THE COURT:  Overruled.

15          MR. PHIPPS:  Thank you, Your Honor.

16 BY MR. PHIPPS:

17          Q.    You admit that those four components were part of the  
18 prior art POS systems that you worked on previously as part of  
19 your work experience, didn't you?

20          A.    Yes, sir.  That's correct.

21          Q.    So those four components can't be attributed to the  
22 asserted patents solely, correct?

23          A.    Solely.  You're correct.

24          Q.    We're talking about the system that you used selling  
25 car parts.  You admit that you yourself used in the prior art a

1 third-party POS system that was provided to you as a  
2 subscription service, don't you?

3 A. Yes, sir. That's correct.

4 Q. And you admitted that you entered sales prices in  
5 that third-party prior art system to sell car parts, didn't  
6 you?

7 A. Yes, sir.

8 Q. Let's talk about the Woycik reference that  
9 Dr. Chatterjee discussed in detail yesterday. You admit that  
10 the Woycik reference discloses building screens around kiosks,  
11 don't you?

12 A. No, sir. I don't agree with that.

13 Q. Okay.

14 MR. PHIPPS: Let's look at the Volume 2 of your deposition  
15 transcript. Page 106, Lines 17 through 20.

16 BY MR. PHIPPS:

17 Q. Again, we're talking about the Woycik reference. I  
18 asked you this question and you provided this answer.

19 "Mr. Crouse, you agree that the Woycik reference discloses  
20 building screens around kiosks, correct?"

21 And what was your answer?

22 A. My answer then was: "I do. Yes."

23 Q. You admit that the Woycik prior art reference  
24 discloses that a user of the Woycik system could use a PC  
25 workstation to communicate with a server over the Internet to

1 build a kiosk menu, correct?

2 A. Yes. Correct.

3 Q. You admit that web servers were part of the Woycik  
4 system, didn't you?

5 A. Yes, sir.

6 Q. You admit that there is nothing in Woycik that would  
7 prevent its central server from being owned by a third party  
8 and provided as a subscription service, correct?

9 A. I don't remember saying that.

10 Q. Okay. Well, let's look at your transcript,  
11 Mr. Crouse.

12 In Volume 2, Line 121, Line 16 -- Page 121. Sorry. I  
13 asked you this question, and you provided this answer.

14 "As you reviewed and studied Woycik, is there anything in  
15 here that would prevent the central server from being made  
16 available to a store operator via a subscription service?"

17 You answered: "Unfortunately Woycik" -- I'm sorry. Could  
18 you just read your answer, Mr. Crouse?

19 A. I think if we look at the answer above, it's -- gets  
20 to the point here. It's not in this invention, what you're  
21 discussing.

22 Q. Okay.

23 A. And so -- and what I'm talking about here is, Woycik  
24 doesn't go to this level of detail, and I wasn't involved with  
25 the invention. So it's very difficult, and that's kind of what

1 I'm saying here. It doesn't go to that level of detail.

2 Q. And then your testimony goes on. I'm just trying to  
3 provide the full context for your deposition testimony.

4 A. Uh-huh.

5 Q. And then I asked you, in Line 22: "But it could be,  
6 yes? Correct?"

7 And you say: "I'm sorry?"

8 "And you indicated that it could be, correct?"

9 And what was your answer?

10 A. "There's not enough information here, as a systems  
11 architect, to be able to make that determination."

12 Q. Okay. And then if we drop down to Line 20, Page 122,  
13 I asked you this question: "But there's not any -- but there's  
14 nothing about Woycik that prevents it from being provided as a  
15 third party pursuant to a subscription service, correct?"

16 And then --

17 A. I'm sorry. Where are we? I've lost my --

18 Q. Oh, yes.

19 A. I've lost the place here.

20 Q. Page 122.

21 A. Okay.

22 Q. Line 20.

23 A. I see that. Yes.

24 Q. Okay. And then you -- there's an answer. Then  
25 there's objection, and then you continue with your answer on

1 Line 25.

2 A. And what I'm saying, again, here is, there's just not  
3 enough information to make that determination.

4 Q. Okay. And then if you keep going, Line 123 (sic).  
5 Okay.

6 "And again, but as you understand it, there's nothing  
7 preventing it from being owned by a third party or being  
8 provided by a subscription service, correct?"

9 And then what was your answer?

10 A. Basically what I've been saying this entire time,  
11 it's nothing specifically stated either way. If you ask any  
12 technologist if anything is possible with enough time or money,  
13 the answer would be yes.

14 Q. And, Mr. Crouse, did you say in your answer, "There's  
15 nothing" -- "nothing is written to prevent it"?

16 Did you say that?

17 A. Yes, sir. That is one of the many things that I've  
18 said in this whole -- many pages of this answer is, I have said  
19 nothing is written to prevent it.

20 Q. Okay. So just getting back to my initial question,  
21 you admit that there's nothing in Woycik that would prevent a  
22 central server from being owned by a third party and provided  
23 as a subscription service, correct?

24 A. Yes, sir.

25 Q. Thank you, Mr. Crouse.

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1           A.    Yes, sir.

2           Q.    Now, let's talk about the Brown reference.  You admit  
3 that the prior art Brown reference disclosed that its system  
4 could be accessed via a website, www.UTOPA.com, and that it  
5 offered a subscription-based service, correct?

6           A.    Yeah.  I don't remember saying the subscription-based  
7 service component.

8           Q.    Okay.  Well, we can look at your transcript Page 130,  
9 Line 4.  And that goes through -- let's see here.  Okay.

10          I asked you this question, you provided these answers.

11          "Mr. Crouse, do you see this to be a representation of the  
12 UTOPA website on August 23, 2006 there at the top of  
13 Exhibit 171?"

14          And what was your answer?

15          A.    "I see that reference."

16          Q.    And then I asked you:  "On the left, do you see that  
17 it references UTOPA's innovative subscription-based system,  
18 correct?"

19          A.    "Yes, sir.  I see that."

20          Q.    And you say yes.

21          And then in Line 16 I ask you:  "What subscription is  
22 being offered there by UTOPA?"

23          And what was your answer?

24          A.    I was reading, I believe, here.  I believe it's  
25 saying it's an innovative subscription-based system that does

1 realtime inventory, complete electronic cash register system,  
2 free credit gateway --

3 THE COURT: Excuse me.

4 THE WITNESS: Sorry.

5 BY THE WITNESS:

6 A. Free --

7 MR. YATES: Your Honor, objection. While this isn't in  
8 his deposition, this is actually, I believe, referring to an  
9 invalidity document that is not on the narrowed list of  
10 combinations. So it's not part of this case.

11 (Clarification by Reporter.)

12 MR. YATES: Objection, Your Honor. This testimony, I  
13 believe, involves a invalidity document that has been narrowed  
14 in this case per this Court's order, and is not actually the  
15 reference Brown.

16 MR. PHIPPS: Your Honor, this website was listed in the  
17 Brown reference. And so we were looking at that website during  
18 the deposition testimony.

19 THE COURT: Does it have to do with references that you're  
20 asserting?

21 MR. PHIPPS: Yes, Your Honor.

22 THE COURT: Okay. Overruled.

23 MR. YATES: Your Honor, it's not one of the combinations  
24 that's listed in the -- it's not one of the combinations of  
25 references that they're offering. It is related to in the

1 sense that it is something that's referred to in the patents.  
2 But it is not one of the obviousness combinations. It was not  
3 opined on yesterday. This reference or document was not opined  
4 on by Dr. Chatterjee before this jury, and therefore I believe  
5 this line of questions is improper.

6 THE COURT: Was it brought up during your direct?

7 MR. YATES: No, Your Honor.

8 THE COURT: Then I'll exclude it.

9 MR. PHIPPS: Thank you, Your Honor.

10 BY MR. PHIPPS:

11 Q. Mr. Crouse, during your direct examination, isn't it  
12 correct that the only claim that you brought up on the screen  
13 was a dependent claim, correct?

14 A. I believe that's correct.

15 Q. And that was Claim 9 from one of the patents?

16 A. Yes, sir.

17 Q. And you saw yesterday that Dr. Chatterjee went  
18 through all of the asserted claims and all of the limitations,  
19 correct?

20 A. I believe that to be correct.

21 Q. Now, Mr. Crouse, you're getting paid to be here,  
22 correct?

23 A. I am. Yes.

24 Q. And so was Dr. Chatterjee, correct?

25 A. I believe so. Yes.

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1 Q. And what is your hourly rate for this case?

2 A. The rate my company charges for my time is \$575.

3 Q. Okay. And about how many hours have you worked on  
4 this case?

5 A. I couldn't tell you how many I've worked on this  
6 case. I can tell you that the last invoice I saw was less than  
7 100 hours.

8 Q. The last invoice is the only one you remember?

9 A. I'm saying that's the last invoice collectively. All  
10 of the invoices at that point was under 100 hours.

11 Q. Okay. But in terms of a total number of hours, do  
12 you have a --

13 A. I couldn't go beyond that. I haven't -- at the time  
14 of the last invoice I looked, it was about -- under 100 hours.

15 Q. Okay. So you're being paid to be here and  
16 Dr. Chatterjee's being paid to be here, and there is nothing  
17 wrong with that, is there?

18 A. No.

19 Q. And you only addressed Claim 9 today in your  
20 testimony, correct?

21 MR. YATES: Objection, Your Honor. That misstates the  
22 record.

23 THE COURT: I think he can answer then.

24 BY MR. PHIPPS:

25 Q. In terms of the charts you put up today, you only

1 discussed Claim 9, correct?

2 A. I don't believe so. The charts -- but I don't think  
3 what we've been talking about. We've talked about numerous  
4 claims.

5 Q. Mr. Crouse, your only formal education is a degree in  
6 finance; is that correct?

7 A. Yes, sir. That's correct.

8 MR. PHIPPS: No further questions, Your Honor.

9 REDIRECT EXAMINATION

10 BY MR. YATES:

11 Q. So you were asked about a laundry list of things  
12 being in the prior art just now and earlier, correct?

13 A. Yes, sir.

14 Q. And excluding the references you opined on, did  
15 Dr. Chatterjee offer any opinions of invalidity with respect to  
16 any of that laundry list?

17 A. I don't believe so.

18 Q. And you're here to rebut Dr. Chatterjee, correct?

19 A. Yes, sir. That's correct.

20 Q. And despite the laundry list, and despite counsel  
21 wanting to see more slides in front of this jury, when we  
22 talked directly about claim elements, do you still believe that  
23 Woycik does not anticipate Claim 1 of the '640 patent?

24 A. I do still believe that.

25 Q. And because it doesn't meet claim elements in

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1 Claim 1, that means it can't anticipate any of the dependent  
2 claims of the '640 patent, correct?

3 A. That is my understanding. Yes, sir.

4 Q. And likewise, we went through claim elements in the  
5 independent claim for the '012 patent that Woycik does not  
6 teach in your opinion, correct?

7 A. Yes, sir. That is correct.

8 Q. We also did the same with Brown going through  
9 independent -- I mean, going through elements in Claim 1 of the  
10 independent claim of the '640 patent as well as the independent  
11 Claim 1 of the '012 patent, correct?

12 A. Yes, sir. That's correct.

13 Q. And so if there's no anticipation or invalidity on  
14 Claims 1 of the patents, none of the dependent claims can be  
15 found invalid, correct?

16 A. That is correct.

17 Q. Thank you, sir.

18 A. Thank you.

19 MR. PHIPPS: No further questions.

20 THE COURT: May he be dismissed?

21 MR. PHIPPS: Yes, Your Honor.

22 THE COURT: Very good.

23 You may step down, sir.

24 THE WITNESS: Thank you, Your Honor.

25 THE COURT: Mr. Yates, does the plaintiff have any other

1 witnesses?

2 MR. YATES: No, Your Honor.

3 THE COURT: Does the plaintiff rest?

4 MR. BARR: Subject to our motions, Your Honor, that we'll  
5 take up with you, yes, sir.

6 THE COURT: Very good.

7 Ladies and gentlemen of the jury, here's what we're going  
8 to do. It is a little after 12:00. I'm going to give a little  
9 bit of an extended break right now. The lawyers and I have to  
10 do a couple of things, and I don't think they should take that  
11 long, but I want to make sure they can get organized to do  
12 their closing arguments.

13 You ought to be very complimentary of the lawyers. They  
14 have been very efficient. They've done a very good job. I  
15 thought this case would end tomorrow, and we're a day ahead.

16 So I'm going to give them a little extra time here at  
17 lunch to make sure they're fully prepared to give you the  
18 closing arguments. Because after they finish their closing  
19 arguments, you're going to begin your deliberations, and then  
20 your schedule will be entirely up to you.

21 So for the final time you will get to hear me say, please  
22 do not discuss this case amongst yourselves. We will be in  
23 recess probably until about 1:45. If we get everything wrapped  
24 up on our end and can start a little sooner, we will. But that  
25 will be about when I predict we'll be ready to go. Hopefully

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1 by 1:30, but probably more realistically about 1:45.

2 Thank you.

3 THE BAILIFF: All rise.

4 (Jury exited the courtroom at 12:12.)

5 THE COURT: You may be seated.

6 Let's -- so I remember to do it, let's start with motions  
7 that would have been made at the end of defense -- the defense  
8 case, starting with the defendant.

9 MR. BAKER: I'm sorry, yes. We've made our motions.  
10 We're going to re-urge those same motions again here, Your  
11 Honor.

12 THE COURT: Okay. Those will be overruled.

13 Mr. Barr, does the plaintiff have any motions that we --  
14 that we suspended from when the defendant finished its case  
15 that you'd like to make?

16 MR. BARR: We do, Your Honor. We have a few motions, and  
17 I'll do them orally.

18 We have a JMOL on infringement.

19 Your Honor, plaintiff CloudfChange respectfully moves for  
20 judgment as a matter of law pursuant to Federal Rule of Civil  
21 Procedure 50(a) for infringement of Asserted Claims 1, 3, 4, 5,  
22 6, 11, 12 and 13 of the '640 patent and Asserted Claim 1, 2, 3,  
23 4, and 9 of the '012 patent.

24 The jury heard extensive evidence on the issue of  
25 infringement of the asserted claims through the testimony of

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1 CloudofChange expert witness, Mr. Gregory Crouse.

2 Furthermore, NCR's own company documents provide  
3 overwhelming evidence that NCR's NCR Silver product infringes  
4 the asserted claims.

5 The testimony of NCR's corporate representatives,  
6 Mr. McGill Quinn and Ms. Kristin Schoonover, not only failed to  
7 and failed to provide a legally sufficient evidentiary basis to  
8 deny this motion but actually provided further evidence as to  
9 NCR's infringement of the asserted claims of these patents.

10 Furthermore, NCR's expert witness on noninfringement,  
11 Dr. Sandeep Chatterjee, failed to rebut several elements of the  
12 asserted claims and failed to provide a sufficient evidentiary  
13 basis to deny this motion.

14 Accordingly, a reasonable jury could not have a legally  
15 sufficient evidentiary basis to find that NCR did not infringe  
16 these asserted claims.

17 With regard to each of the asserted claims of the '640  
18 patent and the '012 patent, the evidence shows: Mr. Crouse  
19 traveled to Atlanta to inspect and operate the NCR Silver  
20 program. Mr. Crouse opined that the NCR Silver product met all  
21 of the claim limitations of the two patents.

22 NCR's corporate documents show that the product meets all  
23 limitations of the asserted claims.

24 Dr. Chatterjee admitted that he did not use the NCR Silver  
25 software from a blank slate.

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1 Claim 1 -- we're going to go through the --

2 (Conference between counsel.)

3 MR. BARR: Claim 1, Your Honor. Mr. Crouse opined that  
4 NCR Silver satisfies the claim element of a web-based  
5 point-of-sale builder system construed to mean point-of-sale  
6 builder software that requires the Internet. That was at trial  
7 transcript 382 at 23 through 24 at 9:27 a.m.

8 Mr. Crouse flew to Atlanta to NCR's headquarters to view  
9 and use the NCR Silver product. He personally observed the  
10 function of the NCR Silver product and used his own computer to  
11 build POS terminals through his computer, accessing a web  
12 browser connected to the Internet.

13 The jury saw excerpts of JTX-30 which was NCR's own U.S.  
14 training video of the accused product that showed a web-based  
15 point-of-sale builder system. Dr. Chatterjee stated that he'd  
16 never used the NCR Silver to build anything from a blank slate.

17 The jury heard on Claim 1, Element 1 that the Court  
18 construed this element to mean a POS screen as a visual display  
19 depicting buttons. Mr. Crouse opined that during his trip to  
20 Atlanta he personally observed that the NCR Silver product used  
21 multiple POS terminals which each displayed screens.

22 NCR's own document, the JTX-30 training video, clearly  
23 depicts the my devices screen where one or more terminals can  
24 exist in a single system. Each POS terminal contains selection  
25 keys or buttons that allow a merchant to ring up a transaction.

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1 At Claim 1, Element 2, Mr. Crouse opined that NCR satisfies  
2 this claim element.

3 JTX-30 depicts that the POS terminals are connected over  
4 the Internet to a web server. Cloud icon shows connection to a  
5 web server via the Internet. Mr. Crouse personally observed  
6 how the one or more POS terminals used the Internet to connect  
7 to a web server during his trip to Atlanta.

8 NCR's corporate representatives admitted that each POS  
9 terminal must connect to the Internet to complete sales  
10 transactions.

11 Claim 1, Element 3. Mr. Crouse opined during his trip to  
12 Atlanta to inspect the NCR Silver product, he used his laptop  
13 to leverage the NCR Silver environment. Mr. Crouse opined that  
14 a laptop is a PC workstation. NCR's corporate witnesses  
15 admitted that either a laptop or an iPad is a PC workstation.  
16 Mr. Crouse opined that he observed NCR hardware setup as a  
17 workstation at NCR headquarters during his inspection to the  
18 product.

19 DTX-30 the training video from NCR depicts the Back Office  
20 feature of the product wherein the merchant can access the Back  
21 Office transaction data and POS builder software through their  
22 own personal computer. NCR's marketing materials admit that a  
23 merchant can use their own iPad and can operate as a  
24 workstation and a POS terminal.

25 Claim 1, Element 4. The web server has been demonstrated

1 to be the hardware and software that uses HTTP and HTTPS to  
2 serve data or files that form web pages. Mr. Crouse opined  
3 that during his trip to Atlanta to inspect the NCR Silver  
4 product he used his own laptop to build screens. He was  
5 connected to the Internet, changes were propagated to the rest  
6 of the devices within the environment. And Mr. Crouse opined  
7 that the builder software process takes place over the  
8 worldwide web on a web browser.

9 NCR's training video, JTX-30, depicts that the NCR Silver  
10 product meets this limitation. It showed a web browser running  
11 on a web page -- or running a web page. It showed that it was  
12 connected to the Internet. It showed the building functions.  
13 It showed adding new category, which was horchata ice cream.

14 Claim Element 1 -- I'm sorry. Claim 1, Element 5. The  
15 jury saw how NCR Silver merchant agreement shows vendor  
16 subscriptions as a software as a service.

17 Mr. Crouse opined that during his inspection, the NCR  
18 Silver product did not rely on servers in the room, rather, NCR  
19 utilizes Google Cloud.

20 It was admitted in the NCR Silver merchant agreement that  
21 the software and hardware in the merchant agreement and there's  
22 websites and servers in the merchant agreement, as we went  
23 through with the jury -- or with the evidence.

24 Furthermore, Mr. Crouse opined in his observation of the  
25 product, namely, that -- and the jury saw that the products had

1 a my account screen. The evidence clearly showed the account  
2 status being active, which shows that NCR can turn your  
3 subscription off per the NCR merchant agreement.

4 Claim Element 1 -- I'm sorry. Claim 1, Element 6.  
5 Mr. Crouse opined that the accused NCR Silver products meet  
6 this limitation. The POS terminal interacts with a web server  
7 software. It's reflected on a web server Back Office. It's  
8 connected to the Internet, and the NCR merchant agreement  
9 references these features.

10 All right. Your Honor, we will -- we believe all the  
11 features of all the asserted claims are met; but in the  
12 interest of time, we'll dispense with going through all of the  
13 other features of the claims. But we think those are all met  
14 by things that I've already read in the record from Mr. Crouse  
15 and the other evidence.

16 THE COURT: I'll overrule all the pending motions.

17 I have your final -- your draft final jury instructions.  
18 What I suggest we do, it's 12:20. I will take a ten-minute  
19 break. We will -- I'll go through the -- any issues that we  
20 have. Like I said, it will be off the record.

21 As we go through it, I will give you my rulings. And then  
22 we will go back through on the record and give -- I'll give  
23 each of you an opportunity to make your objections formally to  
24 what I've either given that you didn't want or didn't give that  
25 you did. And I'll let you put those on the record.

1           And then I -- just so you know, I read it first, and then  
2           you'll do your closing arguments. So I am not going to read  
3           the glossary. So -- okay.

4           I'll be back in about ten minutes, and we'll take this up.

5           THE BAILIFF: All rise.

6           (Recess taken from 12:22 to 1:26.)

7           THE COURT: You all may be seated.

8           Let me make a suggestion. Why don't we go ahead and --  
9           while they're running copies off, why don't we go ahead and  
10          take up your objections on the record. And then we'll -- and  
11          then -- are you able to do that from the copy that you have,  
12          since you gave it to us, or do you need to wait to have the  
13          copies?

14          MR. PHIPPS: Yeah. Jun provided us with a copy in Word  
15          format, and we have worked together to make the edits to the  
16          jury charge.

17          THE COURT: I'm just saying, and we're printing it right  
18          now. I'm just saying, can you make your objections without  
19          having our version, since -- I thought you all gave us the  
20          version that's being printed, or do you need the printed copy  
21          for you to make the objections?

22          MR. PHIPPS: Your Honor, as to the systems limitation,  
23          Mr. Baker indicated that those paragraphs were not in the  
24          final.

25          THE COURT: Right.

1 MR. PHIPPS: Okay. So we would object to the instruction.  
2 We believe that Mr. Barr misspoke when he referenced a recent  
3 case. I confirmed with his other side that that was merely the  
4 date that they printed that case out.

5 That case is from 2011, ten years ago. It confirmed the  
6 standard for systems infringement. The issue there was whether  
7 a software provider, in a single-actor infringement theory,  
8 must have physical control of all the components to infringe.

9 And the Federal Circuit said, the limitations at issue in  
10 these claims did not require divided infringement, and you seem  
11 to require that the plaintiff to prove physical control.

12 And so the Federal Circuit clearly said, we're going to  
13 remand it to follow our instructions on what is a single-actor  
14 theory for systems infringement, consistent with Acceleration  
15 Bay.

16 But we want you to make it very clear that a single-actor  
17 infringer of a systems claim does not have to have physical  
18 control but still has to put it into service consistent with  
19 the instructions that defendant NCR Corporation recommended to  
20 be included in the final charge.

21 So nothing Mr. Barr said contradicts that law whatsoever,  
22 and it was not a recent Federal Circuit case. It's ten years  
23 old, Your Honor.

24 THE COURT: Mr. Barr?

25 MR. BARR: I would say, I'm sorry, Your Honor. I misread

1 the date --

2 THE COURT: I'm not concerned about the date.

3 MR. BARR: I would note it's the law -- nothing I said  
4 about the law was wrong. And it's still seven years newer than  
5 Mr. Phipps' case. We gave you six other cases that say similar  
6 law, Your Honor. So we think that the law that the Court has  
7 put in the charge is correct, and it is supported by the law.

8 THE COURT: Mr. Barr, why don't you go ahead then and tell  
9 me any objections you have to the jury charge?

10 MR. BARR: Plaintiff has no objections to the charge, Your  
11 Honor.

12 THE COURT: And other than that, the charges -- let me  
13 start over. Other than the omission of those three paragraphs  
14 whose numbers I don't remember, but they had to do with the  
15 systems charge, and I think it's pretty clear -- I think it's  
16 pretty clear in your submission to me which those three are, I  
17 just don't remember their numbers, does the defendant have any  
18 other objections?

19 MR. PHIPPS: No, Your Honor.

20 THE COURT: Okay. So as soon as the copies are ready to  
21 be handed out, I'll bring the jury in.

22 And are you all ready to do your closing arguments?

23 MR. BARR: Plaintiff's ready, Your Honor.

24 MR. BAKER: Defendants are ready, Your Honor.

25 THE COURT: So I'm happy to do it however you all would

1 like. If you all would -- are aiming for 30 minutes or  
2 whatever -- again, I've told you to do what you think is  
3 best -- if you want me to give you a warning at some point,  
4 that's fine. If you don't, that's fine too. I'm happy to do  
5 whatever. If you'll just let me know what you want me to do,  
6 I'm happy to do that.

7 Occasionally lawyers say, if you'll let me know at  
8 25 minutes -- I'm at 25 minutes, then -- and, again, I'm not  
9 going to sit you down because you hit 30 minutes or 35 minutes.  
10 I did have someone who I said this to, who -- when they got to  
11 over an hour, I said, you really need to wrap this up.

12 And he said, no, I'm good.

13 (Laughter.)

14 THE COURT: And I said, no. You really need to wrap this  
15 up. But hopefully that won't happen today. So as soon as the  
16 charge is printed, we'll bring it out with the jury.

17 THE BAILIFF: All rise.

18 (Recess taken from 2:20 to 2:27.)

19 THE BAILIFF: All rise.

20 THE COURT: Please remain standing for the jury.

21 (The jury entered the courtroom at 2:27.)

22 THE COURT: Thank you. You may be seated.

23 Ladies and gentlemen, I'm about to read you -- you have in  
24 front of you, by the way, a copy of this -- the final  
25 instructions on the law that I'm going to give you. I hate

1 having to read this for a couple of reasons. A, I just hate  
2 having to read it. Number two, it will delay you getting to  
3 hear closing arguments from some very good lawyers. I'm very  
4 much looking forward to the closing arguments.

5 But I have bosses and my bosses tell me that I have to  
6 read this to you. So I'm doing this. So, again, you're  
7 welcome to follow along or you're welcome to just listen. I've  
8 had folks do both.

9 CLOSING INSTRUCTIONS BY THE COURT

10 THE COURT: Members of the jury, it is my duty and  
11 responsibility to instruct you on the law that you are to apply  
12 in this case. The law contained in these instructions is the  
13 only law that you may follow. It is your duty to follow what I  
14 instruct you the law is regardless of any opinion that you  
15 might have as to what the law ought to be.

16 If I have given you the impression during the trial that I  
17 favor either party, you must disregard that impression. If  
18 I've given you the impression during the trial that I have any  
19 opinion at all about the facts of this case, likewise, you must  
20 disregard that impression.

21 Why? Because you are the sole judges of the facts of this  
22 case. Other than these instructions with respect to the law,  
23 you should disregard anything that I may have said or done  
24 during the trial when you are arriving at your verdict.

25 You should consider all of these instructions about the

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1 law as a whole and regard each instruction in light of all of  
2 the others without isolating a particular statement or  
3 paragraph.

4 The testimony of the witnesses and other exhibits  
5 introduced by the parties constitute the evidence. The  
6 statements of counsel are not evidence. They are only  
7 arguments.

8 It is important for you to distinguish between the  
9 arguments of counsel and the evidence on which those arguments  
10 rest. What the lawyers say or do is not evidence. You may,  
11 however, consider their arguments in light of that evidence  
12 that has been admitted and determine whether or not the  
13 evidence admitted in this trial supports their arguments.

14 You must determine the facts from all of the testimony  
15 that you've heard and all evidence submitted. You and you  
16 alone are the judges of the facts. But in finding those facts,  
17 you must apply the law as I instruct you.

18 You're required by law to decide this case in a fair,  
19 impartial and unbiased manner, based entirely on the law and on  
20 the evidence presented to you here in this courtroom. You may  
21 not be influenced by passion or prejudice or sympathy that you  
22 might have for either the plaintiff or the defendant when you  
23 are arriving at your verdict.

24 A verdict form has been prepared for you. You'll get it  
25 when you get back to the jury room. You will take the form;

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1 and when you have reached a unanimous agreement as to your  
2 verdict, you will have your foreperson fill it in, date it and  
3 sign that form.

4 Answer each question on the verdict form from the facts as  
5 you find them. Do not decide who you think should win and  
6 answer the questions accordingly. With respect to each  
7 question asked, your answers and your verdicts must be  
8 unanimous.

9 The evidence you are to consider consists of the testimony  
10 of the witnesses here at trial or at a deposition that's been  
11 presented to you, the documents and other exhibits admitted by  
12 me into evidence, the stipulations to which lawyers have agreed  
13 and any fair inference and reasonable conclusions that you can  
14 draw from the facts and circumstances that you believe have  
15 been proven.

16 Nothing else is evidence. The lawyers' statements and  
17 arguments are not evidence. Their questions and objections are  
18 not evidence. My legal rulings are not evidence. My comments  
19 and my questions are not evidence. The notes taken by any of  
20 you are not evidence.

21 During the trial I may have let you hear the answers from  
22 some of the questions the lawyers asked. I'm sorry -- may not  
23 have let you. I may also have ruled that you could see some of  
24 the exhibits that the lawyers wanted you to see. Further,  
25 sometimes I may have ordered you to disregard things you saw or

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1 heard or struck things from the record. Again, follow my  
2 rulings and completely ignore all of those things.

3 Don't speculate about what a witness may have said or what  
4 an exhibit might have shown, because they're not in evidence.  
5 And you are bound by your oath not to let them influence your  
6 decision in any way.

7 Generally speaking, there are two types of evidence. One  
8 is direct, such as the testimony of an eyewitness. The other  
9 is circumstantial evidence. Circumstantial evidence is that  
10 which proves a fact from which you can logically conclude  
11 another fact exists.

12 As a general rule, the law makes no distinction between  
13 direct evidence on the one hand and circumstantial evidence on  
14 the other. It simply requires that you find facts from all of  
15 the evidence in the case, whether it be direct, circumstantial  
16 or a combination.

17 Judging the facts, you should consider all the evidence,  
18 both direct and circumstantial and then proceed to give it  
19 whatever weight you and you alone believe it deserves.

20 You must not conduct any independent research or  
21 investigation. You must make your decision based exclusively  
22 on the evidence as I have defined it here, and nothing else.

23 You alone are to determine the questions of credibility or  
24 truthfulness of the witnesses you heard. In weighing the  
25 testimony of these witnesses, you may consider their manner and

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1 demeanor on the witness stand, any feelings or interest they  
2 might have in the case, or any prejudice or bias about the case  
3 that he or she might have had, and the consistency or  
4 inconsistency of their testimony considered in the light of all  
5 circumstances.

6 For instance, has the witness been contradicted by other  
7 credible evidence? Has he or she made statements at other  
8 times and places contrary to those made in front of you at the  
9 witness stand? You must give the testimony of each witness the  
10 credibility that you think it deserves.

11 Even though a witness might be a party to the action and  
12 therefore interested in the outcome, the testimony may still be  
13 accepted if it is not contradicted by direct evidence or by any  
14 inference that may be drawn from the evidence, if you believe  
15 that testimony.

16 You are not to decide the case by counting the number of  
17 witnesses who testified on opposing sides. Witness testimony  
18 is weighed. Witnesses are not counted.

19 The test is not the relative number of witnesses but the  
20 relative convincing force of the evidence. The testimony of a  
21 single witness is sufficient to prove any fact, even if a  
22 greater number of witnesses testified to the contrary, if after  
23 considering all the evidence, you believe that single witness.

24 In determining the weight to be given to the testimony of  
25 any witness, consider whether there was evidence that at some

1 other time the witness said or did something, or failed to say  
2 or do something, that was different from the testimony given at  
3 trial.

4 A simple mistake by a witness does not necessarily mean  
5 that the witness did not tell the truth as he or she remembered  
6 it. People forget things and they remember things  
7 inaccurately. A witness can make a misstatement and --  
8 consider whether that misstatement was, in your opinion, an  
9 intentional falsehood or simply an innocent mistake.

10 The significance of that may depend on whether it had to  
11 do with an important fact or an unimportant detail. This  
12 instruction applies to the testimony of every witness that you  
13 heard.

14 Turning to expert testimony. Expert testimony which you  
15 heard is testimony from a person who has a special skill or  
16 some special knowledge in a science, profession or business.  
17 The skill or knowledge is not common to an average person, but  
18 it's been acquired by the expert through study and expertise --  
19 I'm sorry -- and experience.

20 In weighing expert testimony, you may consider the  
21 expert's qualifications, their reasons for their opinions and  
22 their reliability of the information that supported their  
23 opinions, as well as all of the factors I've previously  
24 mentioned for weighing testimony of any other witness.

25 Expert testimony should receive, again, whatever weight

1 and credit that you and you alone think appropriate, given all  
2 the other evidence in the case. You are not required to accept  
3 the opinion of an expert, rather, you are free to accept it or  
4 to reject it just as with any other witness.

5 A stipulation is an agreement when there is no dispute  
6 about certain facts. The attorneys may agree or stipulate to  
7 those facts. If there is a stipulation of fact, you must  
8 accept it as evidence and treat that fact as though it had been  
9 proven here in court.

10 When testimony or an exhibit is admitted for a limited  
11 purpose, you may consider that testimony or exhibit only for  
12 the specific limited purpose for which the Court admitted it.

13 Certain charts and summaries have been shown to you solely  
14 to help explain or summarize the facts disclosed by books,  
15 records and other documents that are in evidence. Charts and  
16 summaries are not evidence or proof of any fact unless I have  
17 specifically admitted that chart or that summary into evidence.

18 If I -- I'm going to ad-lib for a second. If I have  
19 admitted it -- if I've admitted an exhibit, that means you will  
20 have it. If there's something that you can't find, then --  
21 that you think you saw, it's because I did not admit it. It  
22 may have been a demonstrative, but you will have all of the  
23 exhibits that the Court admitted and are part of the evidence.

24 You alone from that must determine the facts from the  
25 evidence.

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1           This is what I was about to get to. Certain exhibits  
2 shown to you are illustrations of the evidence, but are not  
3 themselves evidence. We call these types of exhibits  
4 "demonstrative exhibits."

5           Demonstrative exhibits are a party's description, picture  
6 or model to describe something involved in the trial. If your  
7 recollection of the evidence differed from the demonstrative  
8 exhibit, rely on your recollection.

9           However, you will not have the demonstrative exhibits back  
10 there with you. They were demonstrative, and they are not  
11 evidence themselves.

12           Do not let bias, prejudice or sympathy play any part in  
13 your deliberations. A corporation and all other persons are  
14 equal before the law and must be treated as equals in a court  
15 of justice.

16           In any legal action, the facts must be proved by some form  
17 or a required level or amount of evidence known as a "burden of  
18 proof." The burden of proof in this case is on CloudofChange  
19 for some issues and on the defendant NCR for others.

20           The plaintiff CloudofChange contends that NCR infringes  
21 certain claims of the '640 and '012 patents. Therefore,  
22 CloudofChange, the plaintiff, has the burden of proving patent  
23 infringement by a burden of proof of a preponderance of the  
24 evidence.

25           Plaintiff also contends it is entitled to damages for the

1 alleged infringement. For them -- if they have proved  
2 infringement, for CloudfChange to carry its burden of proving  
3 the amount of damages, it must do so by a preponderance of the  
4 evidence, which means evidence that persuades you that a claim  
5 is more probably true than not true. Sometimes we talk about  
6 this as being the greater weight and degree of credible  
7 testimony.

8       The defendant NCR has the burden of proving patent  
9 invalidity by clear and convincing evidence, a different  
10 standard than I just told you about. Clear and convincing  
11 evidence means evidence that produces, in your mind, an abiding  
12 conviction that the truth of the parties' factual contentions  
13 are highly probable.

14       Although proof to an absolute certainty is not required,  
15 the clear and convincing evidence standard requires a greater  
16 degree of persuasion than is necessary for the preponderance of  
17 the evidence standard above. If proof establishes in your mind  
18 an abiding conviction in the truth of the matter, then the  
19 clear and convincing standard has been met.

20       In determining whether any fact has been proved by a  
21 preponderance of the evidence or by the clear and convincing  
22 evidence standard, you may, unless I instruct you otherwise,  
23 consider any stipulation that has been entered, the testimony  
24 of all the witnesses regardless of who may have called them and  
25 all exhibits received into evidence regardless of who may have

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1 produced them.

2 The fact that CloudfChange brought a lawsuit in this  
3 court seeking damages creates no inference in its favor that it  
4 is entitled to a judgment. The act itself of making a claim in  
5 a lawsuit does not in any way tend to establish that claim, and  
6 it is not evidence.

7 As I did at the start of the case, I will first give you a  
8 summary of each side's contentions in this case. I will then  
9 provide you with detailed instructions on what each side must  
10 prove to win on each of its contentions.

11 CloudfChange seeks money damages from NCR for allegedly  
12 infringing both the '640 patent and the '012 patent by making,  
13 using, selling and/or offering for sale certain software and  
14 hardware systems of NCR and the plaintiff argues are covered by  
15 Claims 1, 3, 4, 5, 6, 11, 12 and 13 of the '640 patent and  
16 Claims 1 through 4 and 9 of the '012 patent. These are the  
17 asserted claims of the two patents.

18 The products that are alleged to infringe are the NCR  
19 Silver point-of-sale software and hardware system.

20 The defendant denies that it infringed any of these  
21 asserted claims and argues that, in addition, Claims 1, 3, 4,  
22 5, 6, 11, 12 and 13 of the '640 patent and 1 through 4 and 9 of  
23 the '012 patent are invalid.

24 Noninfringement is a defense to a charge of infringement.  
25 Also, invalidity is a defense to a charge of infringement. The

1 defendant NCR contends that plaintiff CloudfChange is not  
2 entitled to any damages.

3 It will be your job to decide, first, whether NCR has  
4 infringed the asserted claims of the -- either of the '640  
5 patent or the '012 patent; next, whether any of the asserted  
6 claims of the '640 patent and the '012 patent are invalid.

7 If you decide that any claim of either of the patents has  
8 been infringed and is not invalid, then you will need to decide  
9 any money damages that should be awarded to CloudfChange to  
10 compensate it because of the infringement.

11 You will also need to make a finding as to whether the  
12 infringement was willful. If you decide that any infringement  
13 was willful, that decision should not affect any damages award  
14 you make. It's up to me to take that into account later.

15 I just need you to answer yes or no, if you get to that  
16 question.

17 Before you decide -- before you can decide many of the  
18 claims of this case, you'll need to understand the role of  
19 patent "claims." The patent claims are the numbered sentences  
20 at the end of each patent.

21 The claims are important because it is the words of the  
22 claims that define what a patent covers. The figures and texts  
23 in the rest of the patent are intended to provide to you and  
24 the world a description and/or examples of the invention and  
25 provide a context for the claims themselves, but it is the

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1 claims that define the breadth of the patent's coverage.

2 Therefore, what a patent covers depends, in turn, on what each  
3 of its claims covers.

4 To know what a claim covers, a claim sets forth in words a  
5 set of requirements. Each claim sets forth its requirements in  
6 a single sentence. If a system or a method satisfies each of  
7 these requirements, then it is covered by the asserted claim.

8 In patent law, the requirements of a claim are often  
9 referred to either as claim elements or claim limitations. The  
10 coverage of a patent is asserted claim by claim. When a thing,  
11 here a system or process, meets all the requirements of the  
12 claim, that is, when a thing does, the claim is said to cover  
13 that thing and that thing is said to fall within the scope of  
14 that claim. In other words, a claim covers a system or process  
15 where each of the claim elements or limitations is present in  
16 that system or process.

17 Sometimes the words in a patent claim might be a little  
18 difficult to understand. Therefore, it is difficult to  
19 understand occasionally what requirements those words impose.  
20 It was my job to explain to you the meaning of the words in the  
21 claims and the requirements that those words imposed.

22 As I just instructed you, there are specific terms that  
23 I've defined and that you must apply the definitions that I  
24 provide to you. By understanding the meaning of the words in a  
25 claim and by understanding that the words in that claim set

1 forth the requirements that a product or process must meet in  
2 order to be covered by that claim, you will be able to  
3 understand the scope of coverage for each claim.

4       Once you understand what each claim covers, then you are  
5 prepared to decide the issues that you'll be asked to decide,  
6 such as infringement. You will first need to understand what  
7 each claim covers in order to decide whether or not there's  
8 infringement of the claim and decide whether or not the claim  
9 is invalid.

10       The first step is to understand the meaning of the words  
11 used. The law says that it is my role to define the terms of  
12 the claim. It is your role to take my definitions and -- as  
13 I've construed them and that you're asked to decide in the  
14 case. As I stated to you at the beginning of the case, I've  
15 determined the meaning of certain claim terms and provided to  
16 you my definitions of those claim terms. You must accept those  
17 definitions of the words in the claims as being correct.

18       It is your duty and your job to take these definitions and  
19 apply them to the issues you are deciding, including the issues  
20 of infringement and validity.

21       The beginning portion, also known as the preamble of a  
22 claim often uses the word "comprising."

23       The word "comprising," when used in the preamble or the  
24 beginning portion, means "including but not limited to" or  
25 "containing but not limited to." When comprising is used in

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1 the preamble, if you decide that an accused system includes all  
2 of the requirements of the claim, that claim is infringed.  
3 This is true even if the accused system also contains  
4 additional elements beyond those in the patent.

5 For any words in the claim for which I have not provided  
6 you with a definition claim limitation or that I've not  
7 construed -- that is, that I've not interpreted or defined, you  
8 should simply apply the plain and ordinary meaning to one of  
9 skill in the art at the time of the invention.

10 You should not take my definition of the language of the  
11 claims as an indication that I have a view regarding how you  
12 should decide any issue that you are being asked to decide.  
13 The two prominent ones are infringement and invalidity.

14 The term "web-based point-of-sale building system," I've  
15 construed to be "a point-of-sale builder system that requires  
16 the Internet."

17 "Point-of-sale terminals" was plain and ordinary meaning.

18 "POS screens" are -- was defined as "a POS terminal's  
19 visual display depicting selection keys or buttons."

20 I defined "a web server" as "hardware and software that  
21 uses HTTP, or hypertext transfer protocol, to serve data or  
22 files that form web pages."

23 I defined a "PC workstation" to have its plain and  
24 ordinary meaning.

25 I've defined "point-of-sale builder software" to also have

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1 plain and ordinary meaning, wherein that meaning means  
2 "software that builds the POS terminals."

3 "To build or edit said POS terminals in real time," plain  
4 and ordinary meaning.

5 "Programatically creating or modifying said one or more  
6 POS terminals in real time," plain and ordinary meaning.

7 "Said web servers are provided as a vendor subscription  
8 service," I construed to be "wherein a web server is provided  
9 by a vendor to a subscriber as a subscription service."

10 For "web server software," "vendors' remote servers" and  
11 "generated by said POS builder software," I gave it their plain  
12 and ordinary meaning.

13 For "POS builder interface," I also gave plain and  
14 ordinary meaning, but it had to be "an interface to the POS  
15 builder software."

16 For the claim term "configured to be utilized to access  
17 said POS builder software for programatically creating or  
18 modifying said one or more POS terminals in real time," I gave  
19 the definition of plain and ordinary meaning.

20 This case -- you heard me list off the claim numbers for  
21 each of the patents. Those claim numbers include two kinds of  
22 claims. Some were independent, some were dependent.

23 An "independent claim" does not refer to any other claim  
24 of the patent. An independent claim sets forth all of the  
25 requirements that must be met in order to be covered by that

1 claim.

2 In an independent claim, it is not necessary to look at  
3 any other claim to determine what the independent claim covers.  
4 Asserted Claim 1 of the '640 patent, Asserted Claim 1 of the  
5 '012 patent are both independent claims.

6 You know Claim 1 is independent because it mentions no  
7 other claims. Accordingly, the words of Claim 1 of the '640  
8 patent are read by themselves in order to determine what  
9 Claim 1 covers.

10 You know Claim 3 of the '640 patent, on the other hand, is  
11 what's called a "dependent claim," because it specifically  
12 refers back to Independent Claim 1.

13 Accordingly, the words of Claims 1 and 3 are read together  
14 in order to determine what Claim 3 of the '640 patent covers.

15 The remainder of the asserted claims in the '640 and the  
16 '012 patents are all dependent claim. A dependent claim does  
17 not itself recite all the requirements of the claim. Instead  
18 it refers back to some claim for some of its requirements. In  
19 this way the claim depends on another claim.

20 A dependent claim incorporates all the requirements of the  
21 claim or claims to which it refers. The dependent claim then  
22 adds its own additional requirements. To determine what a  
23 dependent claim covers, you must both look at the dependent  
24 claim and the claim or claims it refers back to.

25 A system that meets all the requirements of both the

1 dependent claim and the claim to which it refers is covered  
2 therefore by the dependent claim.

3 If any requirement of the dependent claim is not met or if  
4 any requirement of the independent claim from which the  
5 dependent claim depends is not met, then the system cannot be  
6 covered by that dependent claim.

7 On the other hand, if the requirements of an independent  
8 claim -- in this case, again, Claim 1 of each patent are the  
9 only independent claims -- are met by a system, but a  
10 requirement of a dependent claim is not met, the independent  
11 claim is still infringed if the system is made, used, sold,  
12 offered for sale within or imported in the United States  
13 without the permission of the patent owner.

14 Infringement generally. I will now instruct you to decide  
15 whether or not CloudfChange has proven that NCR's infringed  
16 any of the claims of either of the patents. Infringement is  
17 assessed on a claim-by-claim basis. Therefore, there may be  
18 infringement as to one or more asserted claims, but not --  
19 there's no infringement as to other asserted claims.

20 A patent owner has the right to prevent others from using  
21 the invention covered by his or her patent claims in the United  
22 States during the life of that patent.

23 If any person makes, uses, sells or offers to sell within  
24 the United States or imports in the United States something  
25 that is covered by the patent claims without the patent owner's

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1 permission, that person is said to infringe the patent.

2 In reaching your decision on infringement, keep in mind  
3 that only the claims of a patent can be infringed. You must  
4 compare the asserted patent claims as I've defined each of them  
5 to the accused system and determine whether or not there's  
6 infringement.

7 You should not compare the accused system with any  
8 specific sample -- specific example set out in the patents or  
9 with the prior art in reaching your decision on any issue of  
10 infringement.

11 The only correct comparison is to compare the accused  
12 system with the language of the claim itself, as I have  
13 explained its meaning to you.

14 You must reach your decision as to each assertion of  
15 infringement based on my instructions about the meaning and  
16 scope of the claims, the legal requirements for infringement  
17 and the evidence that you heard from the parties.

18 Again, in this case, CloudfChange alleges NCR directly  
19 infringes the asserted claims of the '640 and '012 patent.

20 In order to prove infringement, CloudfChange must prove  
21 the requirements for direct infringement are met by the  
22 standard of proof of a preponderance of the evidence, that it  
23 is more likely than not that all the requirements of direct  
24 infringement have been proved.

25 Now, let me explain direct infringement in more detail.

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1           In order to prove direct infringement by literal  
2           infringement, the plaintiff must prove by a preponderance of  
3           the evidence, i.e., more likely than not, that NCR made, used,  
4           sold or offered for sale within or imported into the United  
5           States a system that meets all the requirements of a claim and  
6           did so without the permission of the plaintiff during the time  
7           that either the '640 patent or the '012 patent were effective  
8           and enforced.

9           You must compare the system with each and every one of the  
10          requirements of a claim to determine whether or not all of the  
11          requirements of that claim have been met.

12          If you find, in your own independent judgment, by a  
13          preponderance of the evidence, that the accused system includes  
14          each element of the asserted claim, then that system infringes  
15          that particular asserted claim. Infringement does not require  
16          proof that a person copied the patent claim.

17          If one party controls and makes beneficial use of a system  
18          that contains all the requirements of the claim, that party may  
19          be an infringer even though the parts of the system do not all  
20          operate in the same place or at the same time.

21          What is willful infringement? In this case CloudfChange  
22          argues that NCR willfully infringed both patents. If first you  
23          decide that NCR's infringed either of the patents, you must  
24          then move forward and address the additional issue of whether  
25          or not the infringement was willful, which requires you to

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1 determine whether or not plaintiff proved that it is more  
2 likely than not that NCR knew of the '640 patent and/or the  
3 '012 patent, and that the infringement by NCR was intentional.

4 You may not determine that the infringement was willful  
5 just because NCR was aware of either of the patents and  
6 infringed it. Instead, you must also find that NCR  
7 deliberately infringed either or both of the patents.

8 To determine whether NCR acted willfully, consider all  
9 facts and assess its knowledge at the time of the challenged  
10 conduct.

11 The following facts may be considered, but this -- they're  
12 not limited to this. First, did NCR act consistently with the  
13 standards of behavior for its industry? Did it intentionally  
14 copy a product of CloudfChange that is covered by these  
15 patents? Whether or not NCR reasonably did not infringe or  
16 that the patent was invalid. Whether or not NCR made a  
17 good-faith effort to avoid infringing the patents. For  
18 example, whether it attempted to design around these patents or  
19 whether or not NCR tried to cover up its infringement.

20 What is invalidity? I will now instruct you on the rules  
21 you must follow in deciding whether or not NCR has proven its  
22 burden that the asserted claims are invalid. To prove that any  
23 claim of a patent is invalid, NCR must persuade you by the  
24 standard of proof of clear and convincing evidence. That is,  
25 you must be left with a clear conviction that the claims are --

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1 claim or claims are invalid.

2 In order for someone to be entitled to a patent, the  
3 invention must actually be "new" and not obvious to what came  
4 before, which is required -- referred to as prior art. Prior  
5 art is considered in determining whether claims of the patent  
6 at issue are anticipated or obvious.

7 Prior art may include items that were publicly known or  
8 that have been used or offered for sale or references, such as  
9 publications or patents, that disclose the claimed invention or  
10 elements of that claimed invention.

11 Anticipation. In order for someone to be entitled to a  
12 patent, the invention must be "new." The defendant NCR  
13 contends that the asserted claims in the patents are invalid  
14 because the claimed inventions were and are anticipated.

15 To do so, they must convince you of this by clear and  
16 convincing evidence that the evidence highly probably  
17 demonstrates that the claim is invalid.

18 Anticipation is determined on a claim-by-claim basis. It  
19 must prove by clear and convincing evidence that all the  
20 requirements of a claim are present in a single piece of prior  
21 art.

22 To anticipate the invention, the prior art does not have  
23 to use the same words as the claim, but all the requirements of  
24 the claim must have been disclosed and arranged as in the  
25 claim. The claim requirements may be disclosed expressly or

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1 inherently -- that is, necessarily implied -- such that a  
2 person having ordinary skill in the art in the technology of  
3 the invention, looking at that one reference, could have  
4 themselves made and used the inventions claimed in either of  
5 the patents.

6       Where NCR is relying on prior art that was not considered  
7 by the Patent Office, or PTO, during examination, you may  
8 consider whether that prior art is significantly different and  
9 more relevant than the prior art that the Patent Office had in  
10 front of it and did consider.

11       If you decide it is different and more relevant, you may  
12 weigh that prior art more heavily when considering whether the  
13 challenger has carried its clear and convincing burden of  
14 proving invalidity.

15       If a dependent claim is anticipated by prior art, then the  
16 claims from which it depends are necessarily anticipated as  
17 well. NCR can show a patent claim is invalid if, one, an  
18 invention is not new if it was already patented or described in  
19 a publicly-accessible printed publication anywhere in the world  
20 before the date of February 5, 2008.

21       Two, the claimed invention was already patented or  
22 described in a publicly-accessible printed publication anywhere  
23 in the world by CloudfChange or anyone else at least a year  
24 before February 5, 2008 which is the effective filing date of  
25 the application for both of the asserted patents.

1       An invention was patented by another if the other patent  
2 describes the same invention claimed by the plaintiff to a  
3 person having ordinary skill in that technology.

4       An invention is not new if it was known to or used by  
5 others in the United States before February 5, 2008. An  
6 invention is known when the information about it was reasonably  
7 accessible to the public on that date, meaning a year prior to  
8 February 5, 2008.

9       An invention is not new if it was described in a published  
10 patent application filed by another in the United States or  
11 under the PCT system and designated in the United States and  
12 was published in English before February 5, 2008.

13       An invention is not new if the claimed invention was  
14 described in a patent granted on an application for a patent by  
15 another filed in the United States or under the PCT system and  
16 designated in the United States and was published in English  
17 and the application was filed before February 5, 2008.

18       An invention is not new if the invention was made by  
19 someone else in the United States before the invention was made  
20 by CloudofChange and the other person did not abandon, suppress  
21 or conceal that invention.

22       What is obviousness? Even though the invention may not  
23 have been identically disclosed or described before it was made  
24 by an inventor, in order to be patentable, the invention must  
25 not -- also not have been obvious to a person of ordinary skill

1 in the field of technology of the patent at the time the  
2 invention was made.

3 NCR may establish that a patent claim is invalid, by clear  
4 and convincing evidence, that the claimed invention would have  
5 been what is known as obvious by persons -- to persons having  
6 ordinary skill in the art at February 5th, 2008.

7 In determining whether a claimed invention is obvious, you  
8 must consider the level of ordinary skill in the field of the  
9 invention that someone would have had at February 5th, 2008,  
10 the scope and content of the prior art, any differences between  
11 the prior art and the claimed invention and, if present,  
12 so-called objective evidence or secondary considerations, which  
13 I will describe shortly. Do not use hindsight; consider only  
14 what was known at the time of the filing of the '640 patent,  
15 (i.e., February 5th, 2008).

16 Keep in mind that the evidence of each and every element  
17 of the claimed invention in the prior art does not necessarily  
18 prove obviousness. Most, if not all, inventions rely on  
19 building blocks of prior art.

20 In considering whether a claimed invention is obvious, you  
21 should consider, whether at the time of the filing of the '640  
22 patent (February 5th, 2008), there was a reason that would have  
23 prompted a person having ordinary skill in the field of the  
24 invention to combine the known elements in a prior -- of the  
25 prior art in a way the claimed invention does.

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1       Take into account the following factors: Whether the  
2       claimed invention was merely the predictable result of using  
3       prior art elements according to their own functions; whether  
4       the claimed invention provides an obvious solution to a known  
5       problem in the relevant field; whether the prior art teaches or  
6       suggests the desirability of combining elements claimed in the  
7       invention; whether the prior art teaches away from combining  
8       elements in the claimed invention; whether it would have been  
9       obvious to try the combination of elements, such as when there  
10      is a design incentive or market pressure to solve a problem and  
11      there are a finite number of identified, predictable solutions;  
12      and (6), whether the change resulted more from design  
13      incentives or other market forces.

14       To find it rendered the claimed invention obvious, you  
15      must find that the prior art provided a reasonable expectation  
16      of success. Obvious to try is not sufficient in unpredictable  
17      technologies.

18       In determining whether the claimed invention is obvious,  
19      you should take into account any objective evidence (sometimes  
20      called "secondary considerations") that might shed light on  
21      whether or not the claimed invention is obvious, such as the  
22      following:

23       Whether the claimed invention was commercially successful  
24      as a result of the merits of the claimed invention (rather than  
25      the result of design needs or market-pressure advertising or

1 similar activities);

2 Whether the claimed invention satisfied a long-felt need;

3 Whether others had tried and failed to make the claimed  
4 invention;

5 Whether others invented the claimed invention at roughly  
6 the same time;

7 Whether others copied the claimed invention;

8 Whether there were changes or related technologies or  
9 market needs contemporaneous with the claimed invention;

10 Whether the claimed invention achieved unexpected results;

11 Whether others in the field praised the claimed invention;

12 Whether persons having ordinary skill in the art of the  
13 invention expressed their surprise or disbelief regarding the  
14 claimed invention;

15 Whether others sought or obtained rights to the patent  
16 from the patent holder; and

17 Whether the inventor proceeded contrary to accepted wisdom  
18 in the field.

19 In determining whether the claimed invention was obvious,  
20 consider each claim separately. But to understand that if a  
21 dependent claim is obvious, then the claims from which it  
22 depends are necessarily obvious as well. In determining  
23 whether the claimed invention was obvious, consider each claim  
24 separately. But understand that if the dependent claim is  
25 obvious, then the claims from which it depends are necessarily

1 obvious as well.

2 In deciding what the level of ordinary skill in the field  
3 of online building configuration of a web point-of-sale, POS,  
4 system is, you should consider all the evidence introduced at  
5 trial, including but not limited to the levels of education and  
6 experience of the inventor and other persons actively working  
7 the field, the types of problems encountered in the field,  
8 prior art solutions to these problems, the rapidly -- the  
9 rapidity with which innovations are made, and finally the  
10 sophistication of the technology.

11 Let's turn to damages. If you find that NCR infringed any  
12 claims of either the '640 patent or the '012 patent, you must  
13 then determine the amount of damages to be awarded to  
14 CloudfChange to compensate it for that infringement.

15 Allow me to instruct you about the measuring of damages.  
16 Let me note that by instructing you on damages, I'm not  
17 suggesting in any way which party should win this case or an  
18 opinion on any other issue that may have preceded it.

19 If you find that NCR has not infringed any valid claims of  
20 these patents, then the plaintiff is not entitled to any  
21 damages. I'm simply reading to you what -- how the damages  
22 work.

23 If you award damages, they must be adequate to compensate  
24 plaintiff for any infringement you find. You must not award  
25 plaintiff more damages than are adequate to compensate for the

1 infringement, but you should not include any additional amount  
2 for the purpose of punishing NCR. Damages are not meant to  
3 punish an infringer or set an example.

4 Your damages award, if you reach this issue, should put  
5 CloudofChange in approximately the same financial position that  
6 it would have had -- would have been in had the infringement  
7 not occurred. But in no event may the damages award be less  
8 than what CloudofChange would have received had it received a  
9 reasonable royalty.

10 While CloudofChange is not required to prove the amount of  
11 its damages with mathematical precision, it certainly must  
12 prove them with reasonable certainty. You may not award  
13 damages if they are speculative, damages that are merely  
14 possible or damages based simply on guesswork. CloudofChange  
15 seeks patent damages in the form of what is known as a  
16 reasonable royalty.

17 But regardless of the type of damages you choose to award,  
18 if any, you must be careful to ensure the award is no more and  
19 no less than the value of the patented inventions. If you find  
20 that a patent claim is infringed and not invalid, CloudofChange  
21 is entitled to at least a reasonable royalty to compensate it  
22 for the infringement that's been proven.

23 A reasonable royalty is defined as the amount of money  
24 CloudofChange and NCR would have agreed to had there been a  
25 hypothetical negotiation taking place at the moment just prior

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1 to when the infringement first began. In considering this  
2 hypothetical negotiation, you should focus on what the  
3 expectations of both would have been had they entered into an  
4 agreement at that time and had they acted reasonably during the  
5 negotiations.

6 Now, these aren't real-world negotiations. In a  
7 hypothetical negotiation, the parties are presumed to believe,  
8 first, the patent was valid, second, that it was infringed.  
9 And they must both be willing to enter into an agreement.

10 The reasonable royalty you determine must be a royalty  
11 that would have resulted from the hypothetical negotiation. It  
12 cannot simply be a royalty one party or the other might have  
13 preferred.

14 Evidence of things that happened after the infringement  
15 first began actually can be considered in evaluating the  
16 reasonable royalty, but only to the extent that the evidence  
17 aids in assessing what royalty would have resulted at that  
18 moment of the hypothetical negotiation.

19 Although evidence of the actual profits of the alleged  
20 infringer made may be used to determine the anticipated profits  
21 at the time of the hypothetical negotiation, the royalty may  
22 not be limited to or increased by the actual profits that the  
23 alleged infringer made.

24 There's several relevant factors with respect to how you  
25 calculate what a reasonable royalty would have been after --

1 had there been a hypothetical negotiation. What you -- again,  
2 you must remember these are factors that the patent owner at  
3 the time of the alleged infringement would have considered in  
4 setting the amount.

5 First, the royalties received by the patentee for the  
6 licensing of the patent-in-suit, proving or tending to prove an  
7 established royalty.

8 Second, the rates paid by the licensee for the use of  
9 other patents comparable to the patent-in-suit.

10 Third, the nature and scope of the license, as either  
11 exclusive or nonexclusive, or as restricted or non-restricted  
12 in terms of territory or with respect to whom the manufactured  
13 product might be sold.

14 Fourth, the licensor's established policy and marketing  
15 program to maintain his or her patent monopoly by not licensing  
16 others to use the invention or by granting licenses under  
17 special conditions designed to preserve the monopoly.

18 Fifth, a commercial relationship between the licensor and  
19 the licensee, such as whether they are competitors in the same  
20 territory in the same line of business, or whether they are the  
21 inventor and promoter.

22 Sixth, the effect of selling the patented specialty in  
23 promoting sales of other products of the licensee, the existing  
24 value of the invention to the licensor as a generator of sales  
25 of his non-patented items and the extent of such derivative or

1     convoyed sales.

2             Seven, the duration of the patent and the term of the  
3     license.

4             The established profitability of the products made under  
5     the patents, its commercial success, its current popularity.

6             Seven (sic), the utility and advantages of the patented  
7     property over the old modes or devices, if any, that had been  
8     used for working out similar results.

9             Ten, the nature of the patented invention, the  
10    characteristics of the commercial embodiment as it's owned and  
11    produced by the licensor, and the benefits to those who have  
12    used the invention.

13            11, the extent to which the infringer has made use of the  
14    invention and any evidence probative of the value in the case.

15            12, the portion of the profit of the selling price that  
16    may be customary in the particular businesses or in comparable  
17    businesses to allow for the use of the invention or analogous  
18    inventions.

19            13, the portion of the realizable profits that should be  
20    credited to the invention as distinguished from non-patented  
21    elements, the manufacturing process, business risks, or  
22    significant features or improvements added by the infringer.

23            14, the opinion and testimony of qualified experts.

24            15, the amount that a licensor (such as the patentee) and  
25    a licensee (such as the infringer) would have agreed upon (at

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1 the time the infringement began) if both had been reasonably  
2 and voluntarily trying to reach an agreement; that is, the  
3 amount which a prudent licensee who desired, as a business  
4 proposition, to obtain a license to manufacture and sell a  
5 particular article embodying the patented invention would have  
6 been willing to pay as a royalty and yet be able to make a  
7 reasonable profit and which amount would have been acceptable  
8 by a prudent patentee or licensor who was willing to grant a  
9 license.

10 No one factor is dispositive. You can and should consider  
11 the evidence that has been presented to you in this case with  
12 respect to each and every one of the factors. You may also  
13 consider any other factors which, in your mind, would have  
14 increased on the one hand or decreased on the other hand the  
15 royalty the alleged infringer would have been willing to pay  
16 and the patent holder would have been willing to accept, acting  
17 as a -- normally prudent business people.

18 The amount you find as damages must be based on the value  
19 attributable to the patented technology, as distinct from the  
20 other unpatented features of the accused products, or other  
21 factors such as marketing, advertising or NCR's sizing or  
22 market position.

23 In determining the appropriate royalty base and the  
24 appropriate royalty rate, the ultimate combination of both the  
25 royalty rate and the royalty base must reflect the value

1     attributable to the patented technology.

2             Now, the words "royalty base" must be closely tied to the  
3     invention. It is not sufficient to use a royalty base that's  
4     too high and then adjust the damages downward by applying a  
5     lower royalty rate. Similarly, it is not appropriate to select  
6     a royalty base that is too low and then adjust it upwards by  
7     applying a higher royalty rate.

8             Rather, you must determine an appropriate royalty rate and  
9     an appropriate royalty base that reflect the value attributable  
10    to the patented invention alone.

11            Damages are not based on a hindsight evaluation of what  
12    happened, but on what the parties to the hypothetical license  
13    negotiations would have agreed upon. Nevertheless, evidence  
14    relevant to the negotiation is not necessarily limited to facts  
15    that occurred on or before the date of that hypothetical  
16    negotiation.

17            You may also consider information the parties would have  
18    foreseen or estimated during the hypothetical negotiation which  
19    may, under certain circumstances, include evidence of usage  
20    after infringement started, license agreements entered into by  
21    parties shortly after the date of the hypothetical negotiation,  
22    profits earned by the infringer, any potential noninfringing  
23    alternatives.

24            In determining a reasonable royalty, you may also consider  
25    evidence concerning the availability and costs of acceptable

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1 noninfringing substitutes to the patented invention. An  
2 acceptable substitute must be a product or method that is  
3 licensed under the patent or that does not infringe the patent  
4 and that is equally acceptable to customers.

5       The two asserted patents issued on different dates. For  
6 direct infringement, knowledge of the patent is not relevant.  
7 If you find that NCR has directly infringed the '640 patent,  
8 the date of commencement of damages for direct infringement is  
9 the date the patent issued, July 26, 2016. The parties agree  
10 that this is the date to be used in the analysis of any damages  
11 for direct infringement for this patent.

12       If you find that NCR has directly infringed the '012  
13 patent, the day of commencement of damages for direct  
14 infringement is the date the patent issued, September 25, 2018.  
15 The parties agree that this is the date to be used in the  
16 analysis of any damages for direct infringement of this patent.

17       This is not quite accurate. Judges go back and forth on  
18 whether they do the closing arguments first and then read or  
19 read first and then do closing arguments. So this is a little  
20 out of sync. But basically let me go through this and tell you  
21 what's going to happen after you hear the closing arguments,  
22 which again are not evidence and are just arguments.

23       It will be your duty to deliberate and consult with each  
24 other in your efforts to reach a verdict. Each of you must  
25 decide the case for yourself but only after an impartial

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1 consideration of the evidence with your fellow jurors.

2 During your deliberations do not hesitate ever to  
3 reexamine your own opinions, change your mind if you are  
4 convinced that you were wrong. But don't give up on your own  
5 honest beliefs because other jurors think differently or just  
6 to get the case finished.

7 Remember at all times you and you alone are the judges of  
8 this case. You're the judges of the facts.

9 I've allowed you to take notes during the trial. Any  
10 notes that you took, if you did take notes, are only aids to  
11 memory. If your memory differs from your notes, rely on your  
12 memory, not your notes. They're not evidence. If you did not  
13 take notes or didn't take many, rely on your own independent  
14 recollection of the evidence and do not be unduly influenced by  
15 notes of other jurors. Notes are not entitled to greater  
16 weight than the recollection or impression of each juror about  
17 what the evidence or testimony actually was.

18 So here's what's going to happen. I'm going to go a  
19 little off script here, but I think I can wing this part.

20 We're about to hear from the plaintiffs who will go first.  
21 Remember, they have the burden on several issues. Then the  
22 defendant will give a closing argument. Because the plaintiff  
23 has the ultimate burden on the issues that brought the case to  
24 trial, they'll get to give the final argument. It'll go  
25 plaintiff, defendant, the plaintiff will wrap up.

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1       Once that happens, once Mr. Barr or whoever finishes  
2 speaking the final time for the plaintiff, what's going to  
3 happen is you all are going to go back to the jury room.

4       The very first thing that you all have to do before you do  
5 anything else is select a foreperson. There'll be a note pad  
6 back there. Whenever you do select your foreperson, you'll  
7 need to write that person's name -- that foreperson will need  
8 to write his or her name down, sign it and give it to William  
9 who'll be sitting outside the door. He will hand it to me and  
10 I'll let the lawyers know who the foreperson is.

11       Once you have selected your foreperson, you may then begin  
12 deliberating. And if at any time during the course of your  
13 deliberations you feel the urge or need to write me a note and  
14 ask me a question about anything, it's up to the foreperson to  
15 write out the note on the notepad we have provided to you back  
16 there, and then sign it and put down the date and time and send  
17 it, again, through William to me. The note will come to me.  
18 I'll come out in the courtroom and talk to the lawyers about it  
19 and I will come up with an answer to give back to you. I will  
20 return it through William back to the jury room, and you'll  
21 have the answers to your questions.

22       Again, I will read this part because it's important.  
23 Answer each question in the verdict form from the facts as you  
24 find them. Do not decide who you think should win and answer  
25 the questions accordingly. Your answers and your verdict must

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1 be unanimous. I'll go in the other -- after your deliberations  
2 have finished.

3 During your deliberations -- this is obvious -- you'll be  
4 in the jury room. You may not communicate with or provide  
5 information to anyone by any means. You will not be able to  
6 call anyone. A possible exception -- I've had jurors who  
7 needed to have someone come pick them up, and we allow  
8 you to -- you're not stuck here, you can call someone and say  
9 come get me.

10 But other than that, you cannot have communications with  
11 anybody. We want you to deliberate. You cannot -- if you were  
12 to finish today, you finish today. If you were not to finish  
13 today, then when you went home you would not be able to do any  
14 research about the case and you would not be able to post  
15 anything on social media about the case or discuss it with  
16 anyone.

17 So that is about as long as I ever hope to read anything  
18 again.

19 (Laughter.)

20 THE COURT: But it's not the first time I've had to read  
21 something that long and it won't be the last.

22 Like I said before, though, the only problem with me  
23 having to read something that long is that it keeps you all  
24 from hearing the closing arguments of some fine lawyers.

25 So, Mr. Barr, I invite you to speak on behalf of the

1 plaintiff.

2 And then, Mr. Baker, will you be giving the closing  
3 argument?

4 You'll hear from Mr. Baker.

5 MR. BAKER: Yes, sir. Yes, Your Honor.

6 THE COURT: I look forward to hearing from both of you.

7 Mr. Barr?

8 CLOSING ARGUMENT ON BEHALF OF THE PLAINTIFF

9 MR. BARR: Thank you, Your Honor.

10 Good afternoon, ladies and gentlemen. John Barr for  
11 CloudofChange.

12 Remember that actions speak louder than words. The first  
13 time that we met I told you that you should focus on what NCR  
14 does and not on what NCR says they do. And that if you did  
15 that, your common sense would lead you to the right result in  
16 this case.

17 When we started this case I told you that this was an idea  
18 that forever changed how merchants do business. An idea that  
19 was so novel that two United States patents had been granted on  
20 it. An idea that was so valuable that NCR had used it to earn  
21 over \$100 million in only four years.

22 In this case we proved everything that we told you that we  
23 would prove. Even though the road to truth has been winding  
24 and NCR has thrown up a lot of diversions along the way to try  
25 to throw you off the trail.

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1           In 2007 Quentin Olson and Wayne Baratta did everything  
2           that they could have done to make a successful company. They  
3           identified a problem. They learned how to harness the power of  
4           the Internet to take computer servers out of stores and to  
5           provide a point-of-sale builder system usable by merchants  
6           without having to call in computer programmers.

7           Quentin and Wayne made a good team. Both of them did  
8           their part. You'll recall that Quentin Olson was an  
9           experienced computer programmer with decades of experience  
10          working in computer systems. Wayne Baratta was an experienced  
11          merchant with decades of experience running point-of-sale  
12          systems and stores. Together they were able to put this  
13          invention together that we have the two patents at issue in  
14          this case.

15          They spent thousands of hours and 2 to \$3 million that  
16          they raised from their friends and their family to develop  
17          their idea. And the business had some amazing achievements.  
18          You remember that Mr. Baratta told you that he was able to get  
19          in-person meetings with top executives at global companies,  
20          like IBM, Sharp, Panasonic and Hewlett Packard, after only  
21          describing the invention over the telephone to those companies.  
22          The reaction that those companies had to this invention proves  
23          its value.

24          Unfortunately, those early business successes did not  
25          sustain the company over the long term. Because, as you heard,

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1 that Quentin and Wayne had a hard time getting small businesses  
2 to buy their product at that time.

3 Back in -- when the invention was filed in 2008, and  
4 thereafter, when they were trying to commercialize it, you'll  
5 recall that the hardware that they needed to implement this  
6 system was expensive, costs thousands of dollars. It was hard  
7 to get small businesses to put out that kind of an investment  
8 on a brand new idea.

9 Likewise, the Internet security was not as good as it is  
10 today. Many people were very nervous to put their financial  
11 information out on the Internet. But the fact that their early  
12 business was not successful does not mean that Quentin and  
13 Wayne's ideas have no value. Times have changed, and the value  
14 of these patents has changed along with the times.

15 As you saw from NCR's own documents, such as Plaintiff's  
16 Exhibit 100, the market for cloud-based point-of-sale systems  
17 for small business is as big -- it's big now, \$1.34 billion.  
18 And NCR has predicted that by 2023, it's going to triple to  
19 almost 3.73 billion.

20 Let's talk about the first diversion. The first diversion  
21 that NCR threw at you was the NCR innovation diversion.  
22 Mr. Baker talked about NCR being an innovative company with a  
23 long history of invention, a company with over 1,000 patents,  
24 and he showed you some pictures of some pretty innovative  
25 things.

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1 But we soon found out that NCR's days of innovation are  
2 far behind it. The next to the last slide that Mr. Baker  
3 showed you was this 40-year-old computer, a business that  
4 Mr. Baker said NCR had abandoned.

5 And what was the very last slide in Mr. Baker's  
6 presentation? This point-of-sale system from 2011. This  
7 wasn't a system invented by NCR. This was a system that NCR  
8 bought from Radiant. It says so right here on Mr. Baker's  
9 slide, "NCR acquires Radiant System." That's the company that  
10 Ms. Schoonover used to work for. You heard about that from her  
11 testimony.

12 And what did we learn about the 1,000 patents that  
13 Mr. Baker showed you? Ms. Schoonover told you that none of  
14 those patents, not one, covered point-of-sale, the issues in  
15 this case.

16 Today, NCR gets technology by buying companies like  
17 Radiant or by taking it from Mr. -- people like Mr. Baratta and  
18 Mr. Olson without paying for it.

19 Let's talk about the next diversion, the notice letter  
20 diversion. When we found out that NCR was infringing our  
21 patents, we wrote them a letter, and we asked them to sit down  
22 with us for a real negotiation.

23 But what did NCR do? Nothing. Absolutely nothing. They  
24 ignored our letter, even though we sent it by certified mail  
25 and NCR signed for it at their office, and they never stopped

1 infringing.

2 All we heard was crickets. I was surprised when  
3 Mr. McGill Quinn, the head of engineering at NCR, sat on the  
4 witness stand and he joked that the person who signed this  
5 certified letter, a letter from a law firm, might have just  
6 been some maintenance man who happened to be there to fix the  
7 light bulbs or something.

8 We didn't find that funny at all. We found it very  
9 frustrating when they didn't respond to our letter.

10 And what has NCR said about the notice letter in this  
11 courtroom? Of course they say that they never got it, but they  
12 never tried to find the person who signed for it, R. Brees.

13 Remember what Mr. Quinn said? He checked the employee  
14 directory for R. Brees long after we'd sued them and long after  
15 R. Brees had probably left the company. But he didn't check  
16 with human resources. He didn't check with payroll. And,  
17 strangely of all, he didn't check with the addressee that we  
18 sent the letter to, Mr. Gallagher. Maybe NCR didn't really  
19 want to find out the truth about whether or not they got that  
20 letter.

21 And what did NCR try to do to divert you away from the  
22 notice letter? The lawyers suggested, without ever actually  
23 saying so, that we sent it to the wrong address, but we found  
24 out that wasn't true when Ms. Schoonover sat on the witness  
25 stand and told us that we sent it to the Radiant office where

1 she worked and then where Radiant had their point-of-sale  
2 business, an office that was bought by NCR and became an NCR  
3 office.

4 And why didn't anyone ever check with Mr. Gallagher? He  
5 wasn't just a regular employee. He was the general counsel of  
6 the company, a top executive, the top lawyer at NCR  
7 Corporation. Do they really expect you to believe that a  
8 \$6.2 billion company can't keep up with their mail? NCR was  
9 able to come up with \$825 an hour to pay Dr. Chatterjee, but  
10 they couldn't come up with 25 cents to call Mr. Gallagher.

11 All week NCR has been talking about this whole case  
12 depends on the claims of the patents. But while they've been  
13 talking about the claims, they've been trying to divert your  
14 attention away from the claims to things that aren't in the  
15 claims like "prebuilt" and "application server." Let's discuss  
16 those diversions.

17 NCR's expert, Dr. Chatterjee, sat in the witness stand and  
18 he tried to convince you that NCR Silver is all prebuilt and  
19 that the merchants can't change the software code. The only  
20 people in this courtroom talking about building software are  
21 NCR.

22 These patents are not about building software. They're  
23 about using software to build point-of-sale terminals. Nobody  
24 needs to change any software code to build a point-of-sale  
25 terminal. That's the beauty of this invention. Remember? Get

1 the servers out of the store. Be able for the merchants to  
2 make their own point-of-sale terminals without calling in  
3 expensive computer programmers.

4 Now, if you like, you can open your juror notebook and you  
5 can flip to the '640 patent and we're going to walk through it  
6 briefly.

7 So this is the patent. The first place I'd like for you  
8 to look, and we'll just walk through the parts, you heard this  
9 when you watched the video with Judge Fogel when you were first  
10 selected on the -- after jury selection. But I'm just going to  
11 remind everybody about the parts.

12 So the first page of the patent, we see the patent number  
13 on the top right-hand corner. We see the abstract of the  
14 patent. We see one of the figures of the patents which is  
15 repeated later in the patents, luckily in a larger figure that  
16 you can actually read.

17 Then we walk through the figures of the patents which  
18 demonstrate the invention. So we have Figure 1, Figure 2,  
19 Figure 3 which is actually the same one that's on the front  
20 figure -- of the front of the patent, but it's big enough to  
21 actually read it. We've got Figures 4A and 4B which we'll be  
22 talking about here in a minute. Figure 5 which is a very  
23 important figure that we'll also be talking about in a minute.

24 And then we get to what's called the specification of the  
25 patents. And that talks about the background of the

1 inventions, the other things that were out there before this  
2 invention came about. There's a brief description of the  
3 drawings that I just showed you, a detailed description of the  
4 invention which goes on for several pages.

5 And then we get to the claims, the things that you've been  
6 hearing about throughout this trial. And they start -- if you  
7 look at the patent, at the top of the patent, there's some  
8 numbers. And you see on the last page of the patent it goes 3,  
9 4, 5, 6. Those are called columns. And then you'll have  
10 lines, and the lines of the patents are all numbered on the  
11 left-hand side.

12 So the last thing on Page -- on Column 6 starting at Line  
13 10 it says, what is claimed is. And then it has a number and  
14 it says a web-based point-of-sale, POS, builder system  
15 comprising.

16 Now, so that -- what I've just read you is one of the  
17 first terms of the -- first claim of the '640 patent.

18 Now, the Court has construed or defined many of these  
19 terms that you're going to see in the patent, such as a  
20 "web-based point-of-sale builder system." And in your juror  
21 notebook there's a one-page document which lists all of the  
22 claims on the left -- claim terms on the left-hand side; and  
23 then on the right-hand side, it has the Court's constructions  
24 for those terms. And the Court's constructions, or  
25 definitions, is what you're supposed to use when you're

1 interpreting those patent claims.

2 So I told you we're going to be talking about Figure 5.  
3 And so I'd like for you to have a look at Figure 5, and  
4 Figure 5 is on the left side of this screen.

5 Figure 5, you'll find in Joint Exhibit 1 and Joint  
6 Exhibit 2. Those are the two patents. And then what we're  
7 comparing Figure 5 to is the Joint Exhibit 30, one of the  
8 screens for the -- for the point-of-sale terminals that we saw  
9 throughout the trial for the NCR Silver software that's  
10 accused.

11 And what we're going to do is, I'm going to take you  
12 through Figure 5, and we're going to walk through how you build  
13 one of these POS terminals and how this patent tells you  
14 exactly how you do it. And how -- the way that it's done in  
15 the patent is exactly the way that it's done in the NCR Silver  
16 system.

17 So the first thing that we see there is highlighted in  
18 yellow, it says "Begin POS Build." So you're starting to  
19 build -- you're a merchant. Imagine yourself standing in your  
20 pizza shop in front of your brand new NCR Silver software  
21 point-of-sale system, and you're going to start working on it.  
22 You begin your build.

23 And so we see the first thing you do is you hit the "Basic  
24 Item Setup." Then we go to the "Select Screen" category. And  
25 you see we have a category, and there's some words there. It

1 says "dessert" here. That's going to select the screen for  
2 you.

3 And you remember how we talked about how these  
4 point-of-sale terminals have buttons on them, and we talked  
5 about how the buttons have particular items on them that might  
6 be sold in a store -- and we'll look through those in a  
7 minute -- and how you, as the owner of the store, get to use  
8 your creativity in deciding what buttons you want on your  
9 point-of-sale.

10 This isn't something that NCR decides. This is something  
11 that you decide. Sure. Their software has the ability to make  
12 buttons. That's the point. You've got to be able to use it to  
13 build point-of-sale terminals.

14 But what the NCR software doesn't have when it comes out  
15 of the box, it's not prebuilt with the buttons you want. If  
16 you've got a pizza shop, you might want pizza. If you've got,  
17 you know, an auto parts store, you might want batteries. You  
18 get to make those decisions, and you get to decide what it  
19 says.

20 So the next thing we do is we edit. We edit the name, and  
21 we see right there, on the NCR Silver software, it says "Item  
22 Name," and in this case, "Horchata Ice Cream." So this person,  
23 maybe they've got an ice cream shop, and they get to put the  
24 horchata ice cream there.

25 And you move on down from there, and you're building and

1 you get to pick the sales price. It's your store. You get to  
2 charge what you want for what you're selling. You get to put  
3 that in this, which is going to result in having the price on  
4 your point-of-sale terminal, which is important.

5 You also get to choose the tax category, and you see right  
6 there in Figure 5, you've got price and you've got taxable.  
7 That is the same thing that we're seeing here on the NCR  
8 Silver.

9 And last, we get down to the end, it says "Screen Done."  
10 You hit the green button for save, and you're done with that  
11 screen. You may want to build more. You just go through this  
12 process to build more buttons as you go along, however many  
13 buttons that you need. I think Dr. Chatterjee argued with me  
14 about how many buttons you could have. And, you know, he kept  
15 telling me, within the limits of the software, you can't have a  
16 million buttons at your pizza shop. I don't know why you'd  
17 want to.

18 We also see at the top -- and there's been a lot of  
19 testimony from NCR and its experts in this case denying that  
20 they use the Internet. Don't listen to what they say about the  
21 Internet. Trust your own eyes. You know what the Internet is.  
22 You know what happens when you pull up your web browser and web  
23 servers and things like that at home and you get to see HTTPS:  
24 or HTTP.

25 And HTTP and HTTPS, those are terms that the Court has

1 construed in some of the definitions that you have in your  
2 notebook, so look for those when you're looking at the patents  
3 and the software.

4       So next we look at Figure 4A and 4B and we're going to  
5 compare it to what we just did with Figure 5. So you can see  
6 that what we have on 4A, it actually shows you kind of what it  
7 looks like when you take the NCR Silver software out of the  
8 box. It's got those blank screens. It just says Screen 1,  
9 Screen 2. And Screen 1 it shows you subs. As I mentioned to  
10 you if you had a pizza shop, you might want to have a pizza  
11 button and maybe you choose to have toppings come up after that  
12 pizza button. And then you can choose, well, do you want your  
13 toppings to come up with cheese or anchovies or what do you  
14 want your toppings to say? That's up to you. But that's one  
15 of those sub-buttons. And there it is, right there in the  
16 patent just like NCR does it.

17       And so after you start with the NCR software with the  
18 blank screens, you can see in 4B where you've actually gotten  
19 an opportunity to start naming the screens with the names that  
20 you choose. So here we have a pizza. And there's a large  
21 pizza shown underneath it, because that merchant wanted his  
22 screens or her screens to look like that.

23       And at the end of that process when you go through  
24 building each button and building each screen, you're going to  
25 have your point-of-sale terminal which we looked at before.

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1 And this is the NCR Silver point-of-sale terminal that the  
2 merchant gets to look at in his store.

3 And remember, this was the one that we talked about that  
4 was -- showed how unique and how creative a merchant might be.  
5 Whoever this person is sells everything from rubber bands and  
6 head scarves to a '69 Dodge Charger. Kind of an unusual store,  
7 but merchants get to use their creativity to put whatever they  
8 want on their buttons and in their point-of-sale systems.

9 Now, NCR Silver is sold as a system. And this will be  
10 important when you're going through the jury charge. I know  
11 Judge Albright was reading all that to you. It's very dense  
12 and it's hard to memorize it as you're going along. But  
13 luckily you're going to have the charge with you back in the  
14 jury room. You'll have those instructions that Judge Albright  
15 just read to you, and you can read them yourself. And I have  
16 to read them myself a couple of times sometimes before I can  
17 get them.

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

24 As you'll see from the definition, NCR controls and makes  
25 beneficial use of this system. They require their customers to

1 have the Internet. They're going to say they don't provide it,  
2 but if you look at their merchant agreement that they make the  
3 customers sign to use the software, it says you have to have  
4 it. And if you don't have it, they're not going to let you use  
5 the software. Sounds like they're controlling the merchant  
6 having the Internet.

7 The other thing that NCR will say is, well, we don't  
8 supply those web servers. Well, that's not true either. You  
9 heard a lot about the Google web servers that were in the Cloud  
10 that NCR pays for, but they pass that cost along to their  
11 customers. In this software as a service which they charge on  
12 a monthly basis, that's part of the deal. You get to pay the  
13 monthly fee to use the software, NCR Silver. And part of using  
14 that software is accessing through the Internet, through HTTP,  
15 those computer servers that are up in the cloud, like Mr. Olson  
16 and Mr. Baratta invented, so that you don't have to have the  
17 servers in your coffee shop.

18 Now, as you heard from Ms. Schoonover, when Silver  
19 software's purchased, it doesn't have customized menus and  
20 buttons for any particular business. I think we -- as I  
21 mentioned, it's kind of we were beating a dead horse. I felt  
22 like talking about that, but they kept bringing it up through  
23 different witnesses, so I had to go into it with these  
24 different witnesses.

25 And you remember that Ms. Schoonover kind of got lawyered

1 by NCR on this issue, and it happened on her birthday.  
2 Remember that NCR played that video where Ms. Schoonover was  
3 selling the product, and they had the cupcake lady? NCR said  
4 in the video that it's built for speed. So Ms. Collings gets  
5 all excited, looks back at me and says, we finally found where  
6 NCR was prebuilt. Which it didn't actually say, but  
7 Ms. Schoonover agreed, kind of.

8 They're just trying to hoodwink you. You have to watch  
9 what they do, not what they say.

10 This whole prebuilt argument doesn't even matter. It  
11 doesn't matter if the software is prebuilt, post-built,  
12 rebuilt, Peterbilt. It infringes the patents because it's used  
13 to build POS terminals. Focus on the patent claims.

14 You get their app, you have nothing. You watch an hour of  
15 video and you learn how to use your creativity, you get to go  
16 through this process that I've just described, you get to build  
17 a point-of-sale terminal that you want to use in your store  
18 that might be different from the guy next door. That's  
19 building.

20 And we actually learned the truth yesterday, that this  
21 "prebuilt" word was made up by Dr. Chatterjee. Remember,  
22 Dr. Chatterjee was the expert who came into court to tell you  
23 that NCR does not infringe Mr. Baratta and Mr. Olson's patents?

24 NCR hired Dr. Chatterjee to contradict the opinions of  
25 Mr. Crouse. Dr. Chatterjee had some impressive credentials.

1 He has a Ph.D., he attended some very prestigious universities.  
2 What was much less impressive than his resume was his  
3 investigation that he did into the NCR Silver product.

4 I grew up in Tyler. Back in Tyler, you refer to a guy  
5 like Dr. Chatterjee as "all hat, no cattle."

6 NCR paid Dr. Chatterjee over \$800 an hour for nearly  
7 300 hours, over \$240,000, for a 100-page written report. From  
8 his testimony, I questioned what NCR really wanted for all that  
9 money. They got someone who was willing to say whatever they  
10 wanted, but they didn't get much of an infringement  
11 investigation. Maybe they weren't looking for one.

12 Let's look at Dr. Chatterjee's actions.

13 As I've demonstrated in this case, I may try technology  
14 cases, but I'm no technologist.

15 What Dr. Chatterjee didn't do. He didn't talk to Kristin  
16 Schoonover, the head of the product line. He only talked to  
17 McGill Quinn, the head of engineering, for 30 minutes the night  
18 before his 100-page report was due. And most interestingly of  
19 all, which I think actually demonstrates the arrogance of NCR  
20 more than any other fact in this case, they didn't even have  
21 their expert use the NCR Silver product that's accused of  
22 infringing.

23 You know, Dr. -- it seems like if Dr. Chatterjee really  
24 wanted to know anything about NCR Silver, you might start with  
25 the head of product, like Ms. Schoonover. You'd think that if

1 Dr. Chatterjee really wanted to know how the software works,  
2 you'd talk to the head of engineering, like Mr. Quinn.

3 Dr. Chatterjee claimed to have reviewed thousands of pages  
4 of NCR manuals and other technical documents, but he couldn't  
5 name one page that said "prebuilt" or that matters at all to  
6 infringement in this case.

7 This is another Chatterjee argument from the lawyers. NCR  
8 has been at this for 130 years, and they never created a single  
9 document anywhere claiming their software is prebuilt. The  
10 word never existed at NCR until Dr. Chatterjee or one of their  
11 lawyers made it up for this lawsuit.

12 Imagine NCR not demanding that their expert actually use  
13 NCR Silver before writing his report. Here's his testimony  
14 from trial. I asked him about it, he hasn't used it. Imagine  
15 coming into a United States District Court to testify about how  
16 a software system works and never even bother to take it out of  
17 the box. Maybe NCR really wasn't interested in the truth.

18 Contrast Dr. Chatterjee with our expert, Greg Crouse.

19 NCR first criticized Mr. Crouse, and they said that his  
20 40 years of software consulting and real-world point-of-sale  
21 experience didn't stack up to Dr. Chatterjee's Ph.D.

22 But let's remember what Mr. Crouse did in his  
23 investigation. Unlike Dr. Chatterjee, Greg Crouse rolled up  
24 his sleeves and he got to work. He got on a plane. He flew to  
25 Atlanta, Georgia. He went to NCR's offices. He personally

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1 used the NCR Silver software to build POS terminals. He  
2 studied NCR's manuals and their documents, and he analyzed the  
3 patent claims.

4 Based on the evidence, you only need to use your common  
5 sense to know that NCR doesn't come -- NCR Silver doesn't come  
6 out of the box prebuilt with a custom point-of-sale for a pizza  
7 restaurant. Software is not prebuilt with a custom  
8 point-of-sale for any customer.

9 When the pizza restaurant opens up NCR Silver, he can't  
10 immediately start selling pizzas because there's not a button  
11 for that. The pizza restaurant and the tire shop need to have  
12 different point-of-sale systems -- terminals. I'm sorry.  
13 Merchants have to customize the point-of-sale terminals to meet  
14 the needs of their particular businesses.

15 The point-of-sale builder that's patented in the '640 and  
16 '012 patents is what makes it possible for merchants to build  
17 the custom point-of-sale terminals that they need to run their  
18 unique businesses.

19 Let's talk about the next diversion, application server.

20 You remember when Mr. Phipps got Mr. Quinn to tell you  
21 this lawyer's tale about how you should ignore the web server  
22 that you can see with your own eyes, using HTTPS in the  
23 training videos that we showed you for NCR Silver.

24 But I caught him. The first thing that happened is --

25 If you put the Chatterjee figure up, please.

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1           You remember this? Mr. Phipps threw this up on the screen  
2 in front of Mr. Quinn, and he tried to suggest that this was an  
3 NCR document demonstrating how NCR Silver works.

4           We found out this isn't an NCR document. This is a  
5 document that Dr. Chatterjee wrote for this litigation. This  
6 is just Dr. Chatterjee's argument about why NCR infringes in  
7 this case. This isn't a real representation of NCR Silver.

8           You know, I felt bad for Mr. Quinn. I felt like he was  
9 just parroting kind of the company line. I felt like he felt  
10 uncomfortable about that. I felt like he was a nice guy, he  
11 was put in a tough spot.

12           And I got a little angry with Mr. Quinn. I'm sorry about  
13 that, but I get angry. I represent two guys who got a great  
14 invention, and they're not making \$100 million for using it,  
15 NCR is. I take this seriously. I get indignant when  
16 corporations like NCR act like this.

17           Let's look at another Dr. Chatterjee slide. This was the  
18 slide -- remember the design-around argument? Mr. Ikizler and  
19 I talked about it today. Dr. Chatterjee came up with what he  
20 calls a design-around so that NCR doesn't have to pay any money  
21 to our clients for using these patents. The argument is that  
22 if NCR infringes, well, they can just do a simple fix, pay some  
23 engineers a little bit of money and change up their system and  
24 it won't infringe anymore.

25           And what did they say they needed to do? What did

1 Dr. Chatterjee, the expert, Ph.D. software specialist, say  
2 needed to be done to come up with this noninfringing  
3 alternative? Well, he said, well, it's easy. All you do is  
4 take the web server out. I almost fell out of my chair.

5 All week long we've been hearing from NCR and  
6 Dr. Chatterjee about how they don't infringe because they don't  
7 have a web server. No, they have an application server.  
8 That's different. It's different than a web server. Don't  
9 look at the web server, look over here. Application server.

10 Well, if they don't have a web server, why would their  
11 noninfringement position be take out the web server? That  
12 makes no sense at all. You don't need to be a computer  
13 specialist with a Ph.D. from MIT to know that.

14 Where are NCR's real system documents? Do they really  
15 expect you to believe that they don't have any? The words that  
16 Dr. Chatterjee put on here, by the way, to try to distract you  
17 also are not evidence. These are additional Chatterjee  
18 arguments.

19 You'll see in the Court's claim construction that one of  
20 the terms is defined as having to use HTTP or HTTPS. As I  
21 understand it, the only difference between HTTP and HTTPS is  
22 that HTTPS is the secure one that you use for financial  
23 transactions.

24 Anyway, Dr. Chatterjee doesn't want to admit that you're  
25 using HTTP when you use NCR Silver. So he just came up with

1 some new terms. You see them on here. He still admits that  
2 you got Internet access but he says you get there through JSON,  
3 whatever that is.

4 Let's talk about the next diversion, costs. We heard a  
5 lot about costs. We started hearing about costs when Mr. Baker  
6 first stood up in opening statement. He said, well, you know,  
7 NCR's got 34,000 employees, they've got 130 some odd locations  
8 around the globe, they made \$100 million. But, you know, you  
9 got to think about those costs, because when you figure out our  
10 costs, we actually lost money. We don't make any money selling  
11 NCR Silver. So you can't give Mr. Olson or Mr. Baratta a dime,  
12 because we're not making any money.

13 But you heard from Ms. Salters that those costs were  
14 suspicious.

15 You heard about that Google license from Ms. Schoonover.  
16 Remember that? That Google license for cloud hosting for the  
17 entire NCR Corporation, a \$6.2 billion company, 34,000  
18 employees, worldwide operation? They pay Google \$22 million a  
19 year. Not surprising. I'm sure Google supplies a lot of  
20 services for them.

21 What was surprising though is that this little company --  
22 the little NCR Silver product line, a \$25 million a year  
23 product line, was charged 5.4 million of the 22 million annual  
24 fee. That didn't make any sense to me. Because if you do the  
25 math, with the 6.2 billion that NCR makes every year, NCR

1 Silver was less than one-half of 1 percent of NCR Corporation's  
2 revenue, .004. Yet they were tagging them with 25 percent of  
3 the costs of the Google license.

4 I think even Mr. Ikizler admitted that it's not  
5 appropriate to charge costs to a business unit that are paid --  
6 that benefit other business units. Your costs need to be  
7 charged to people that are using them, that are incurring them.

8 Now, we're seeking less than 20 percent of NCR's revenue  
9 on Silver. You heard Ms. Schoonover say that they'll pay their  
10 resellers up to 18 to 35 percent of revenue and still make a  
11 profit. Ms. Schoonover said, oh, yeah. That's just cost of  
12 sales.

13 Not only do they do that, but they give another 21 percent  
14 to people who refer them business. And Ms. Schoonover told you  
15 that they wouldn't agree to give away this much of the revenue  
16 if they still couldn't make a good profit.

17 So we know that paying a license fee of 20 percent of  
18 revenue to these men is not going to hurt NCR. In fact, they  
19 freely agreed to pay this in real-world negotiations, not the  
20 hypothetical negotiation that you have to apply in this case.

21 We know that NCR is fine with paying people that help them  
22 sell their product. What they're not fine with is paying  
23 people that invent it.

24 The Court's going to ask you at the end -- as the Judge  
25 mentioned, you're going to have a verdict form, which is going

1 to have some questions in it. And this is what I think the  
2 proof of the week will demonstrate are the correct answers.  
3 CloudfChange's invention put \$100 million into the pocket of  
4 NCR over the last four years.

5 Now, the royalty, as you heard from Ms. Salters, is the  
6 split of that revenue that's been created by CloudfChange's  
7 invention. We believe it should be a running royalty. I  
8 believe the verdict form will have a choice there between a  
9 running royalty and a lump sum. We believe it should be  
10 running. They're still using this product.

11 Going back to our timber example that we talked about in  
12 opening statement. This case is like someone trespassing on  
13 your land and taking out \$100 million worth of timber. In that  
14 case, what should the trespasser have to pay the landowner in  
15 compensation for the trespass?

16 You might say 100 percent. We propose a smaller split  
17 than that. \$20.3 million going to CloudfChange and allowing  
18 NCR to retain about \$80 million in revenue due to their  
19 trespass. NCR trespasses on CloudfChange's patents and still  
20 walks away with \$80 million.

21 Let's talk about invalidity for a minute. Remember the  
22 other people's patents that NCR claims invalidate Mr. Olson and  
23 Mr. Baratta's patents. We believe that the evidence is going  
24 to show that NCR's unable to prove invalidity by the high  
25 burden. As the Court mentioned, there's two burdens here that

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1 apply. I think I mentioned it in opening statement as well.

2 Preponderance of the evidence, more likely than not,  
3 getting it just past the 50-yard line. That's what applies to  
4 us in proving our claims of infringement and damages.

5 For NCR to prove their case of invalidity, it's a much  
6 higher burden, clear and convincing. Clear and convincing is  
7 more like getting down to the 20-yard line of the football  
8 field, getting to the red zone. It's a high burden, and it's a  
9 high burden for a reason. And that reason is that patents are  
10 presumed valid when they're issued by the United States Patent  
11 Office. So you have to meet a high burden to prove that the  
12 Patent Office made mistakes.

13 So the two patents that we heard about were -- and I think  
14 everyone kind of scrambled this name, and I don't know how to  
15 pronounce it either, I'm going to call it Woycik.

16 They brought you the Woycik patent. The Woycik patent,  
17 they said, was incredibly important because you will notice  
18 they've got some combinations, meaning putting one patent  
19 together with another. In all instances Woycik is part of this  
20 puzzle.

21 The problem with Woycik and the reason that Woycik is  
22 completely irrelevant to invalidate these patents, remember the  
23 second part of the invention that we have, Mr. Baratta and  
24 Mr. Olson's invention. The first part was this remote server  
25 in the cloud. The second part was the point-of-sale builder

1 that the merchants could use, which enables the merchants to  
2 get rid of those expensive computer servers in their stores.

3 Well, Woycik still has the computer servers. You'll have  
4 Woycik in evidence. You can look at it. I think it's  
5 Chatterjee -- oh, I'm sorry. It's Defendant's Exhibit 50.  
6 Have a look at Figure 1.

7 The servers, every one of them that they showed you, in  
8 the corner, it says "Store," Store 1, Store 2. Those servers  
9 aren't outside the store. They're in the store. Those are the  
10 old way of doing things in Woycik.

11 That's what Mr. Olson was trying to get away from, get  
12 away from Woycik. He didn't want computers in the store. He  
13 wanted to take them out and put them in the cloud.

14 Woycik has nothing to do with this case. And if you look  
15 at the patent, the actual -- the specification of Woycik, where  
16 they describe Figure 1 -- and by the way, if you're looking  
17 through your patents, any of these patents, and you're looking  
18 at a figure and you're kind of interested and want to learn  
19 more about the figure, you can look in the patent specification  
20 and you'll see bolded words. It'll say "Figure 1."

21 All those figures have written descriptions of them that  
22 you'll find in the specification, and they're easy to find  
23 because they're written in bold.

24 Well, if we look at the description for Figure 1, it says:  
25 "In each store, the local (on-site) server."

1           What does that mean? That means that server's not in the  
2 cloud. It's in the store. It's on site.

3           Woycik has nothing to do with this case, and it doesn't  
4 invalidate anything.

5           The other patent that was mentioned to you by Mr. Phipps  
6 was this Brown patent. This patent's completely unrelated. It  
7 deals with websites. If you wanted to become eBay, go out  
8 there and build a website, maybe you'd want to look at Brown.  
9 But if you're trying to build a point-of-sale builder system,  
10 Brown isn't going to help you.

11          Now, the Court's going to tell you that just because NCR  
12 knew about the patents, that is not enough to find that they  
13 willfully infringed them. You have to find that NCR's  
14 infringement was intentional.

15          The Court will give you instructions to tell you some  
16 factors that you need to consider -- or you may consider for  
17 willfulness. Here are some of them.

18          The first one is whether or not NCR reasonably believed  
19 that it did not infringe or that the patent was invalid.

20          So what did NCR do on this issue? Did they get a group of  
21 people together from engineering and marketing and the product  
22 group for NCR Silver and take a look at the patents, take a  
23 look at Mr. Olson and Mr. Baratta's patents? We didn't hear  
24 about that from that witness stand.

25          Did they even bother to talk to McGill Quinn and

1 Ms. Schoonover? Those two people probably could have helped if  
2 they'd been asked early on to take a look at these patents, but  
3 they weren't. They weren't even talked to after the lawsuit  
4 was filed. You heard that Dr. Chatterjee, the technical  
5 expert, didn't bother to talk to anybody, and neither did  
6 Mr. Ikizler.

7 Did they hire somebody with experience in the  
8 point-of-sale industry, like Mr. Crouse, someone who has  
9 actually built point-of-sale systems? No. They beat up  
10 Dr. Crouse -- I mean, Mr. Crouse. He's not a doctor. They  
11 beat up Mr. Crouse because he hadn't testified in a bunch of  
12 lawsuits. He actually works out there in the real world. He's  
13 not a professional testifier like Dr. Chatterjee and  
14 Dr. Ikizler. Someone like Mr. Crouse could have given NCR a  
15 real opinion on whether they infringe these patents. Not a  
16 bought opinion, like Dr. Chatterjee.

17 The second thing I think you should consider on  
18 willfulness is whether NCR made a good faith effort to avoid  
19 infringing these patents. Like maybe did they try to design  
20 around the patents? Mr. Chatterjee said they could have, would  
21 have been easy.

22 In fact, it would have cost less than NCR paid him to come  
23 in here and testify to you. They could have designed around  
24 easy. Only \$240,000. They wouldn't have been facing a  
25 \$20 million lawsuit. But they didn't bother to do that. And

1 to this day NCR is still infringing.

2 The last thing on the Court's list, which I think you  
3 should consider today is whether or not NCR tried to cover up  
4 its infringement.

5 Now, if all these made-up words and cooked-up drawings and  
6 soccer balls and hired-gun experts aren't an attempt to cover  
7 up this infringement, I don't know what is.

8 The bottom line is this. If a \$6 billion company like NCR  
9 wanted to take seriously the intellectual property of  
10 inventors, it could easily have put forth the resources to  
11 investigate this. And they could have made a determination  
12 whether they wanted to engage in a real-world negotiation, as  
13 they had the opportunity to do when we sent them a letter back  
14 in 2018 asking them to sit down with us at the table and make a  
15 negotiation for a license. Or they had the choice to stop  
16 selling the product. NCR chose to do neither. Not to license  
17 it and not to stop selling it.

18 If a company like NCR wanted to take us seriously, it  
19 could have easily put forth the effort to find out what really  
20 happened to our letter and bring that evidence to you. So when  
21 you get to that question, and it's Question -- I think maybe --  
22 Question 7. Sorry. You should answer yes. You should also  
23 answer yes to Questions 1 and 2 which is for both patents,  
24 that's infringement.

25 NCR can't put their hands over their eyes and ears and

1 avoid responsibility in this case. I'm going to sit down now  
2 and NCR's going to have an opportunity to make their argument.  
3 I'll get to stand up at the end, as Judge Albright mentioned,  
4 and talk to you about the charge. But remember, look at what  
5 NCR does and not at what NCR says they do.

6 THE COURT: Mr. Baker, do you want any warning?

7 MR. BAKER: Five minutes to go. 25 minutes.

8 THE COURT: Sure.

9 CLOSING ARGUMENT ON BEHALF OF THE DEFENDANT

10 MR. BAKER: Good afternoon, ladies and gentlemen. Charles  
11 Baker again, here for NCR Corporation. We appreciate your  
12 time, and we've been able to move this case along at a pretty  
13 good pace. And I want to tell you a little bit about that here  
14 in a minute.

15 What you've been hearing a lot about is what we call  
16 attorney argument. And this is the evidence part of the case,  
17 we're here to summarize what the evidence has shown. And  
18 you've heard Mr. Barr talk a little about the evidence. That's  
19 because they don't have a lot. It's their burden of proof to  
20 show that we infringed, and they haven't done it. And we're  
21 going to go through and I'm going to summarize to you.

22 But, you know, it's kind of funny. He's talking about  
23 diversions. Okay?

24 There we go. Okay.

25 Well, mine aren't called diversions, mine are called

1 distractions. It's funny how we kind of both started off with  
2 this.

3 But here's some words here you've been hearing a little  
4 bit about, little snippets about the last couple days.  
5 Prebuilt, okay? The cloud. What does the cloud have to do  
6 with any of this, okay? Web-based. R. Brees. What is this  
7 about?

8 This is about infringement, ladies and gentlemen. And  
9 then, of course, they throw out about me making a mistake or  
10 getting excited the other day and said that Mr. Chatterjee --  
11 Dr. Chatterjee was a UT professor. Well, as my partner  
12 explained, I'm kind of new to this case. I hadn't met any of  
13 these gentlemen, anybody, any of these professors, no one,  
14 until this case just started the other day. And I apologize,  
15 ladies and gentlemen. I made a mistake. I certainly didn't do  
16 it intentionally.

17 And then, of course, now this whole summer intern thing.  
18 Who cares? Who cares what the summer intern did or didn't?  
19 You heard Ms. Schoonover say they didn't rely upon any of that  
20 work, this whole weighting, they tossed it. But this is --  
21 again, this is just another distraction. They don't want to  
22 talk about infringement which is what we're here to decide  
23 today.

24 Again, this whole thing about prebuilt. And, again,  
25 Mr. Barr just again reinforced it. It doesn't matter. They

1 can say prebuilt, we're still going to show infringement. He's  
2 right. It doesn't matter whether it's prebuilt or not. Again,  
3 they're coming up -- they're trying to distract you from the  
4 main theme of the case.

5 How the cloud works. You remember this from opening, this  
6 little -- neat little drawing here. Did they use it as part of  
7 any of their case? No. And we had some pictures here of the  
8 cloud, okay? I think this is Mr. Barr's family there. Who  
9 cares? It's the cloud, it's not part of this case.

10 But let's talk about -- again, let's go back to the Brees.  
11 How much time did Mr. Barr cross-examine Mr. Quinn about this  
12 Brees issue, okay? He spent six pages of transcript, six pages  
13 of your time talking about this Brees. Did he talk about  
14 infringement for six pages? No.

15 Then -- okay. This whole letter thing, it's so important,  
16 why is it that the plaintiff here didn't follow up? Why didn't  
17 they call back NCR? Why didn't their lawyer say, hey, we got  
18 something here valuable here, we're going to sue you if you  
19 don't come and talk with us.

20 They didn't do anything about it. There's no -- and  
21 there's certainly no evidence, again, that they followed up.  
22 If this was so important, you would think they would have  
23 followed up with NCR, but they certainly didn't.

24 And what do we hear? We hear crickets about that. Okay.

25 So let's talk about -- a little bit about credibility.

1 Okay. Mr. Barr didn't say a word about credibility, did he? I  
2 wouldn't either. That's what this case is about -- boil down  
3 to, these expert witnesses. That's what these are -- cases  
4 are, they're technical.

5 And we've got two experts. It's called the battle of the  
6 experts. We have these in patent infringement cases every day,  
7 and that's what this case is about. And you'll see the  
8 instructions that you're going to get when you go back there  
9 and decide this case.

10 On credibility, it's your determination, ladies and  
11 gentlemen, who to believe, okay? It is your -- you have the  
12 power, ladies and gentlemen, to decide who to believe and not  
13 to believe. You can completely ignore one of these expert  
14 witnesses' testimony. You can say, I don't believe Mr. Crouse.  
15 I don't believe Ms. Salters. Completely ignore them, and you  
16 can find noninfringement for us and/or any -- no damages, if  
17 you guys decide to go the route, and invalidity as well too.

18 You have to look at do they have consistent or  
19 inconsistent testimony. I'm going to show you here in a minute  
20 they've got a problem with at least Mr. Crouse. He has a  
21 problem telling the truth consistently.

22 Expert testimony. Again, what do you look at about expert  
23 testimony? You look at their qualifications. Well, Mr. Barr  
24 wants to say, well, you know, we hired this expert, and poor  
25 Mr. Crouse, this is his first time.

1 Well, that's their decision, okay? They decided to hire  
2 somebody who didn't have the greatest world's experience, and  
3 he didn't do a good job, okay?

4 We decided -- instead hired somebody that had experience,  
5 okay, and who did dive in deep. And they're saying, well, he  
6 didn't do this, he didn't do that. But I tell you what he did  
7 do, he came up with expert opinions that had factual basis, and  
8 Mr. Crouse never did. And you're going to see -- you heard  
9 that on cross-examination.

10 All they did when they put Mr. Crouse up on the stand,  
11 they go through with Mr. Yates, and they check off these boxes,  
12 yes, infringement, infringement, infringement, infringement,  
13 infringement. Do they spend any time explaining why? No.  
14 Because there's no factual basis for it.

15 Here we go. Mr. Crouse, he's got no computer engineering  
16 degree, no software degree, no training, no patents of his own.  
17 He hadn't reviewed patents till this case, never designed  
18 computer hardware. First time providing opinions on  
19 infringement, and the first time providing opinion on the  
20 validity. This is an important case, ladies and gentlemen, and  
21 they went out and hired a rookie?

22 Dr. Chatterjee, Ph.D. in computer science, okay. Ph.D.,  
23 research on intelligent computing. He's done all these things,  
24 coauthored all these books, seven U.S. patents, seven  
25 international patents. He's recognized by Bloomberg.

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1       Again, Court's instruction on credibility: "In  
2       determining the weight to give the testimony of a witness,  
3       consider whether there's evidence or some other time that the  
4       witness said or did something or failed to do something that  
5       was different from the testimony at trial."

6       Fortunately, we're able to capture these things these  
7       days, what they say at trial and what they do at deposition,  
8       and I'm going to show you some differences here.

9       Let's see about Mr. Crouse's shifting testimony.

10       At trial, he was asked: "You consider what the bank  
11       tellers or the merchants were doing was more of a data entry  
12       exercise, correct?"

13       He said -- what did he say at trial? "I wouldn't say it  
14       was data entry."

15       Well, then my partner, Mr. Phipps, had to get up and pull  
16       up his deposition. Well, isn't this what you said? That was  
17       more of a data entry exercise.

18       Here we go again. At trial, he was asked the following  
19       questions: "So Claim 1 is on Slide 12, but you remember that  
20       being a limitation of Claim 1 of the '012 patent, correct?"

21       "Yes, sir. That's correct."

22       "Programmatically creating, okay. So what my question to  
23       you was: As to that term, this is the Claim 1 of the '012  
24       patent, you understand to mean, though, the effort of  
25       developing code, correct?"

1 "No, sir. I do not."

2 But at his deposition, again, we had to show him, what did  
3 you say at your deposition?

4 "What do you understand programatically creating to mean?"

5 "Through the effort of developing code."

6 Again, he was asked about his inspection at Silver. Were  
7 you not able to change the size or shape of the buttons, were  
8 you?

9 In this trial he said no, sir.

10 I said okay, and you were not able to move the buttons  
11 around relative to each other, were you?

12 He said, I was. That's not what he said at his  
13 deposition.

14 But, Mr. Crouse, but in terms of moving the buttons around  
15 relative to each other, you could not do that with the NCR  
16 Silver, correct?

17 That is correct.

18 Here we go again. Mr. Crouse said these were patented  
19 features that drove demand for the NCR Silver. He picked out  
20 these four patented features and he was asked about them. And  
21 this is part of his report. He said -- and this is what he  
22 gave Ms. Salters. This is what's important to know, this is  
23 what drives demand, and this is what you ought to build up your  
24 damages model part of.

25 But then when he asked one of the inventors about this

1 same thing, he said we had it back in Starbucks in 1999. They  
2 already had a POS system, and that system allowed them to do --  
3 manage transactions; is that right?

4 Yes.

5 And it allowed them to do management inventory?

6 Yes.

7 And it allowed them to manage their content?

8 Yes.

9 And did they have POS infrastructure?

10 Yes.

11 Then he was asked questions about the four components.

12 And this is what Mr. Crouse had to say. You just talked about  
13 four factors you pulled out in your report of general questions  
14 that are relevant to POS technology, correct?

15 Yes, sir.

16 And you were here when Mr. Olson testified?

17 Yes, sir. I was.

18 And you heard him talk about his prior art experience with  
19 Starbucks, correct?

20 Yes, sir. I heard that.

21 And I went through all four of these factors with him and  
22 he admitted that the POS that he had used at Starbucks had all  
23 those features, didn't he?

24 Yes. I believe he did admit that.

25 So what does this mean? These four patented features

1 drive demand -- he says drive demand to NCR Silver. They've  
2 been around since Starbucks days. They've been around since  
3 1999. These are not patented features. If it's patented  
4 features, then somebody's got it wrong here, and it's  
5 Mr. Crouse.

6 Now, let's talk about -- a little bit about the facts of  
7 the case. The evidence, the evidence that you've heard over  
8 the last couple of days.

9 The first evidence you heard was from McGill Quinn, an NCR  
10 employee that came here to testify. And he was asked what  
11 about the code? He was here to explain to you in real-world  
12 terms how the NCR code works. And he talked about it. He  
13 talked about his real-world experience and its capabilities and  
14 its features and its prioritizations of features.

15 Then he was asked, all this is not building because the  
16 NCR software's prebuilt, right?

17 That's correct. When you purchase an application from the  
18 App Store, you get it already built.

19 Okay. Same thing with Ms. Schoonover. She was asked to  
20 come and testify, and she did. She was a willing witness here  
21 and she came to testify on NCR. And she talked about it being  
22 a prebuilt solution that was out of the box. They can download  
23 it from the App Store, register the device and start using it,  
24 entering items on the point-of-sale, or they can log into the  
25 Back Office. But they can do everything on the point-of-sale.

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1       Mr. Quinn walked through this exercise. And, yes, this is  
2 not a company document. But what he confirmed was that  
3 Dr. Chatterjee, in his design of this document, was correct.  
4 Based upon his personal knowledge, he confirmed this is how the  
5 NCR fronts -- front side with the back -- with the iPad and the  
6 Back Office works.

7       There's nothing wrong with that.

8       And this is what I told you in the opening. This is my  
9 slide. Now, I was going to tell you what we were going to  
10 prove to you, what evidence. And I was going to say this is  
11 what Mr. McGill and Ms. Schoonover were going to testify.  
12 First of all, the merchant cannot move around these buttons.  
13 Okay. We have that testimony. Merchants cannot change layout,  
14 template or fields of menus. That's undisputed, ladies and  
15 gentlemen. Even their own expert or anybody else they try to  
16 put up on the stand have said you cannot change those items.

17       And, finally, in order to make these changes, merchants  
18 would have to make a request to NCR to make those changes. You  
19 remember Mr. McGill talking about all these requests his team  
20 gets on a daily basis. He gets e-mails. His e-mails are  
21 constantly being pinged by his members of his engineering team.  
22 Waffle House, this company, that company, they want changes to  
23 the way the software operates, and the templates and this and  
24 that, okay? They can't do that. They have to come to NCR.  
25 NCR provides that service to them.

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1       Now, let's spend time -- again, go back to what this case  
2 is really about. It's not about letters, okay? It's not about  
3 all these other things. It's about, does it infringe? That's  
4 what we're here, ladies and gentlemen, to decide.

5       And let's talk about Mr. Crouse. Again, we asked him  
6 about this is his first case on patent infringement, ladies and  
7 gentlemen. First case.

8       Yes, sir. That's it.

9       And this is the first time to give an opinion on patent  
10 invalidity?

11       Yes, sir. That's correct.

12       And this is the only case he's ever served as an expert on  
13 involving a patent, correct?

14       Yes. That's correct.

15       Okay. And then, of all things, he was asked, is the  
16 Court's construction broader than the definition that you're  
17 using with the word "content"?

18       I don't have any disagreement with the Court's  
19 construction.

20       Well, then why aren't you using it? And he said, I chose  
21 not to. I mean, I didn't -- I don't -- I'm not a robot. I  
22 just don't pick -- it's just not a copy and paste exercise.

23       He's completely ignoring what the Court has instructed  
24 what the definitions are in this case.

25       So let's go back again. I hate to go through this, but

1 again, this is our case. This is the case they had to prove  
2 and they have not.

3 What did the claims of the asserted patents require?  
4 They've got -- we went through this. This is the various  
5 elements in both the '640 patent and the '012 patent, okay?  
6 We've got four on the '640 and we've got three on the '012.  
7 We've got these limitations, you remember them. I know we've  
8 been talking about it. It's only been three days, but I'm sure  
9 you're tired of hearing them, but this is important, okay?  
10 These are the things they have to prove, okay? They have to  
11 prove that we meet these builder limitations.

12 And remember how I talked about at the opening. If they  
13 don't prove every single element in these patents, then we  
14 don't infringe, okay? Remember that.

15 I'm not going to show you the soccer ball patent, okay?  
16 But remember that football. If you couldn't make that last one  
17 meet when they came to the oval versus round, we don't  
18 infringe.

19 Guess who said data entry is not building? Mr. Olson over  
20 there, the inventor. The whole crux of their case, data entry  
21 is building. He says it's not. It's not.

22 Plaintiff's attorney, it's important for you to look at  
23 this case at NCR's actions to see what their software really  
24 does. I can't disagree more with that -- agree with him --  
25 excuse me -- more with that.

1 And not be distracted by what they say the software does,  
2 okay? Let's look at it what it really does, not what they say  
3 it does.

4 Well, we've got -- we tell you right there what -- exactly  
5 what it does. And here's Mr. Crouse: So this has to be on a  
6 web server, and this goes back to the web server limitation  
7 we've talked about. You agree that Claim 1 of the '012 patent  
8 requires that the POS builder be installed on the web server?

9 Yes, sir. That's correct.

10 He agrees.

11 So either installed or runs on?

12 Or runs on. Yes, sir.

13 But you don't know, with respect to the NCR Silver, where  
14 physically the alleged POS builder software resides, do you?

15 Correct.

16 He doesn't know where it resides, so how can there be  
17 infringement? They don't have -- they're missing that piece of  
18 the puzzle. They have no one to say that.

19 Dr. Chatterjee, on this other hand, knows exactly what's  
20 going on. This is irrefuted. "It runs on what's called an  
21 application server, and it's critical because an application  
22 server is very different from a web server."

23 And he explained that to you, ladies and gentlemen, when  
24 he was in that witness box over there the other day.

25 So we've talked about how we didn't meet the builder

1 limitation. We talked about how we -- installed on or runs on  
2 the web server limitation, we didn't meet that.

3 The interaction limitation, again, ladies and gentlemen,  
4 requires a POS builder software to interact with the POS  
5 terminal and requires the POS builder software installed or  
6 runs on a web server.

7 And, again, Dr. Chatterjee went through this exercise and  
8 explained, again, why we don't meet this claim limitation.

9 Do they have anything to refute this? Mr. Crouse didn't  
10 have much to say about this. He checked off boxes, okay, but  
11 that's about it. We didn't meet the interaction limitation.

12 The last one, subscription limitation. All right. This  
13 is undisputed. We -- merchants don't pay a subscription fee  
14 for the web server. There's just no evidence. We don't -- you  
15 know, we pay for it -- part of it, but the merchant does not.

16 The Google agreements and merchant agreements are separate  
17 agreements. In the merchant agreement they do not have to pay  
18 a subscription fee for any servers. So, again, we don't meet  
19 the subscription limitations -- limitation.

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

25 Again, that's what we're here to talk about at closing to

1 prove that we don't meet these limitations. We don't provide  
2 the Cloud. Google provides that. PCs, provided by somebody  
3 else, right? Internet access, provided by the customer. And  
4 because that's the case, NCR cannot infringe, ladies and  
5 gentlemen.

6 Mr. Crouse even confirms no system claim infringement.  
7 You admit that a merchant who purchases the NCR Silver has to  
8 obtain their own Internet access, don't you?

9 Yes, sir.

10 You admit that the merchants put NCR Silver into service,  
11 don't you?

12 Yes, sir.

13 You admit that NCR places restrictions on what a merchant  
14 can do? But within those restrictions a merchant controls its  
15 own use of the NCR Silver, correct?

16 Yes, sir.

17 If a merchant wants to use a PC workstation that's not the  
18 iPad in which the app is downloaded, the merchant has to  
19 provide that separate PC station themselves, correct?

20 Correct.

21 So, again, NCR does not infringe the '640 patent because  
22 it doesn't meet any of these limitations that we've just went  
23 through. And then we went through the last couple of days,  
24 ladies and gentlemen. We've got the evidence.

25 Again, don't infringe the '012 because we don't meet these

1 limitations as well either.

2 Now, you're going to get to this verdict form. And the  
3 very first question's going to be asked, do we infringe the  
4 Claim 1 of the '640 patent? And it's very simple. Claim 1 is  
5 the big claim in that patent. It's the independent claim. If  
6 you check off no there on Claim 1, you don't have to decide  
7 anything else on that claim because they're all dependent on  
8 that, ladies and gentlemen. And that's what we believe that  
9 the evidence will show you should do.

10 Same thing on '012. First claim out of the box there,  
11 Claim 1. Evidence shows you should check that box as no, and  
12 you don't have to answer anything else after that.

13 Now, a little bit about invalidity. I'm not going to  
14 spend a lot time about this again today. Again, we believe we  
15 showed you we've got three pieces of prior art. It's  
16 undisputed that they're prior art, they're U.S. patents. This  
17 happens all the time, people invent before somebody else. And  
18 that's what happened here.

19 We show where Woycik anticipates Claim 1 in '640. We've  
20 got Dr. Chatterjee coming up on the stand and explaining to you  
21 that he walked us through -- you know, it took some time, but  
22 all these things take time -- walked us through why the  
23 evidence is there that we don't -- that these -- excuse me --  
24 these -- this particular limitations are met by Woycik.

25 And, again, we asked Mr. Crouse about this. And we said,

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1 you admit that Woycik references discloses that building  
2 screens around a kiosk, don't you?

3 No, sir. I don't agree with that.

4 What did he say at his deposition? Mr. Crouse, you agree  
5 that the Woycik reference discloses building screens around  
6 kiosks, correct?

7 I do. Yes.

8 Woycik and Michaud render obvious the '640 patent. We put  
9 on more than sufficient evidence to show that it was -- we met  
10 our burden of clear and convincing evidence. Same thing with  
11 Woycik renders obvious on the '640 patent.

12 And then, again, we went through and showed Woycik, Brown  
13 and Michaud render obvious the '640 and '012 patents. Again,  
14 I'm not going to bore you guys with the details here today.  
15 You've heard it.

16 So, again, going back to your verdict form and invalidity.  
17 Here you have to check off each one of these boxes on each one  
18 of these claims. And we believe you should check off every one  
19 of those for yes.

20 Same thing on the '012 patent.

21 All right. Let's talk a second about damages. Again, you  
22 don't even have to get to this question, ladies and gentlemen,  
23 when you're debating. You find no infringement, it's over  
24 with. You've got to find invalidity too, though, because we  
25 still have a question on invalidity. But if you find no

1 infringement, there's no damages. You don't have to go through  
2 that debate. Or the patents are invalid, end of the day.

3 You've heard Dr. Ikizler today. He was on the stand and  
4 he was in that hot box, that's for sure. He was at that -- had  
5 questions -- some questions from Mr. Barr. But, again, he  
6 showed -- he stood his ground. He showed how Ms. Salters'  
7 calculations were overstated, that she ignored expenses that  
8 NCR charges in determining what it costs to sell NCR Silver.

9 Ms. Salters' opinions lack credibility. Again, we're  
10 talking about expert witnesses and who should you believe here,  
11 okay? She just tossed out Kristin Schoonover, actually called  
12 her a liar, said can't believe her. She doesn't give me any  
13 basis to support her reasons why these are direct costs. Even  
14 though she's not familiar with NCR's accounting policies and  
15 procedures, she says they don't know what they're doing. This  
16 is not the right way to do it, and my opinion, you should just  
17 ignore it, okay?

18 She also relied upon -- talking about this survey post and  
19 the blog post that determines the SaaS companies like NCR have  
20 a high gross margin. I don't think that's very reliable,  
21 ladies and gentlemen.

22 Dr. Ikizler also talked about -- again, about what he  
23 would call them, and, on the Georgia-Pacific factor, what the  
24 reasonable royalty would have been. This is kind of a summary  
25 here, ladies and gentlemen.

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1           And we're talking about, you know, the bargaining  
2 positions if they would have been negotiating a license back  
3 then. And we've got over 130 years of experience in the  
4 point-of-sale. CludofChange has not much.

5           We have a bunch of patents. They have two.

6           We're a known innovator. They're never past start-up  
7 phase.

8           We have over 26 acquisitions.

9           And no customer's ever paid them a dime, ladies and  
10 gentlemen, for their technology that is supposed to be so  
11 valuable.

12          You know, it's like I talked about in opening, there are a  
13 lot of inventions in this world. You heard from  
14 Ms. Schoonover, you heard from Mr. Quinn, they've all got  
15 patents just sitting there in paper. No one's using them,  
16 okay? That's just an unfortunate situation.

17          I talked to you a little bit earlier today about why I  
18 think this case -- why we're finishing so early. Mr. Barr and  
19 I've been kind of having a little side-bar jokes about this is  
20 the fastest patent case we've ever tried, and it certainly is.  
21 And congratulations for you guys, get to get out of here.

22          But it's real simple. They didn't meet their burden of  
23 proof. They didn't put on the evidence. It's done and over  
24 with. That's why we're out of here so fast. There's just not  
25 enough there to keep us here, so we're going to get out of

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1 here, ladies and gentlemen.

2 The inventors had no real story. You heard Mr. Olson over  
3 here, and he's over here in Washington and he's got this idea,  
4 this point-of-sale system. And magically, Mr. Baratta comes  
5 from New York, and they've got, you know, kind of cross paths.  
6 And they try to -- they get these ideas.

7 And believe me, okay, I don't have any -- inventors, I've  
8 represented inventors too, and they're the greatest thing in  
9 the world. What do you think the U.S. world economy is built  
10 on? It's built on inventors and inventions and everything  
11 else.

12 I mean, like I told you, NCR's been around for 130 years.  
13 It's not because they sit on their laurels, right?

14 But, you know, the invention they got together, they got  
15 the patents on it. But, unfortunately, it just wasn't  
16 commercially successful. Is that the fault of NCR? That's not  
17 the fault of NCR.

18 They don't blame NCR. They talk about how they're  
19 before -- they're ahead of their time. They talk about the  
20 equipment was too expensive and all these other reasons, but  
21 again, that's not our fault.

22 You know, I've talked about how that their experts just  
23 didn't do their job. You know, checking off the box and things  
24 like that.

25 You know, it's just -- it's just an unfortunate situation.

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1 You know, this is basically a business dispute. We talk about  
2 property lines and boundary lines and things like that, and  
3 that's what's going on here.

4 But again, NCR, just like you and I, we haven't been  
5 accused of some wrongdoing. We certainly have the right. We  
6 had the right to defend ourselves in this Court today, no  
7 matter what anybody else has to say.

8 He calls them excuses. Well, they're defenses, ladies and  
9 gentlemen. How would you like to be told by somebody, that's  
10 just an excuse, okay? You don't have any right to come in and  
11 defend yourself. Well, fortunately, they don't get to decide  
12 what our defenses are.

13 Now, I am going to tell you something that I was a little  
14 bit offended about in opening statement. There's been a  
15 statement made that NCR, they really don't make much. And you  
16 heard it again awhile ago, they're not an innovator, they  
17 haven't done anything for a long time, okay?

18 But that's not really what people -- his own clients say.  
19 NCR is an innovator for POS systems. Don't you -- don't you  
20 consider?

21 Yes. I do.

22 His own expert, NCR's an inventive company, you admit they  
23 would?

24 I would.

25 Ladies and gentlemen, you remember this is the first

1 slide, beginning of the case, and I said this is what we're  
2 going to show you and this is what it's about. And this is  
3 what it is about. The asserted patents, whatever value they  
4 have, that's fine. Okay? They can continue to have that  
5 value.

6 The question is: Did we cross those boundaries?

7 Irrespective of their value or not, irrespective of how  
8 great these patents are and their inventions are, I'm not  
9 taking that away from these gentlemen. That's fine.

10 But the question is: Did we cross the line?

11 That's what the answer is you guys need to make out today.  
12 And this is their asserted patents. They need to be built. We  
13 got to be built about the POS terminal, okay?

14 Software must run on a web server. They have no evidence  
15 it doesn't run on a -- on anything other than -- not -- it's  
16 not run on a web server.

17 NCR Silver's been fully built system, closed systems that  
18 do not allow users to change the software programming. It's  
19 not builder software, ladies and gentlemen, and we run ours on  
20 an application server.

21 Thank you, ladies and gentlemen. I appreciate your time.

22 CLOSING ARGUMENT ON BEHALF OF THE PLAINTIFF

23 MR. BARR: A few more minutes. I know everyone's tired  
24 and ready for me to move on. I just want to say a couple of  
25 things before I go into the verdict form.

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1       Mr. Baker brought up Mr. Quinn and Ms. Schoonover again.  
2       I want to make clear that I don't have any personal problem  
3       with Mr. Quinn and Ms. Schoonover. I think these people --  
4       those are nice people that were put in a really tough spot by  
5       their employer in having to come in here to this courtroom and  
6       talk about this case. So I don't have a problem with them  
7       personally at all. I think NCR was throwing Mr. Quinn and  
8       Ms. Schoonover under the bus by bringing them in here and  
9       making them, you know, be here. So let me get that out of the  
10      way.

11       Next, about this Starbucks deal. Obviously the functions  
12      of a point-of-sale functions have been around forever. That's  
13      not the issue. The issue in a patent is how the things get  
14      done. There is a patent that has specific claims. That's what  
15      we've been saying you have to focus on. The Baratta and Olson  
16      way is their invention. Starbucks has their own way of doing  
17      things. Remember, Mr. Olson got the idea that he could come up  
18      with a better system than the old system at Starbucks, and  
19      that's what led to him thinking about trying to come up with  
20      his own invention in this case.

21       So the fact that Starbucks might, in the '90s, have sold  
22      coffee certainly doesn't mean that Mr. Olson doesn't have an  
23      invention and Mr. Baratta doesn't have an invention.

24       Certainly the United States Patent Office would disagree  
25      with that. They issued two patents. You don't think they

1 would have known about Starbucks? I think they would have.

2 Last, the buttons. We keep hearing about building  
3 buttons. This is the diversion of the distinction between  
4 building software and building point-of-sale builders.  
5 Nobody's talking about building buttons. People are talking  
6 about using the buttons that are in the software to build  
7 point-of-sale terminals. That's what the patent claims say.  
8 They don't say build software, they say build point-of-sale  
9 terminals.

10 So let's go through the jury verdict form real quickly.

11 First question, this is the question that asks about  
12 infringement of the '640 patent. And we suggest that the  
13 evidence in this case has proven that each and every one of the  
14 asserted claims has been infringed by the NCR Silver system.  
15 And we suggest that you should answer yes to infringement on  
16 the '640 patent.

17 Their own training video showed you that. Their merchant  
18 agreement, what the customer shows that NCR requires their  
19 customers to have the Internet. Their documents show they  
20 charge customers the hosting fee to use that with the monthly  
21 subscription fee.

22 You heard testimony from Mr. Crouse that he personally  
23 inspected NCR Silver at the office, found it to infringe the  
24 asserted claims.

25 Same kind of slide, this is slide -- Question 2. It's for

1 the '012 patent. There's a few less claims there, only four.  
2 Same evidence applies, also should answer yes.

3 Next question is No. 3. This is to the invalidity case  
4 that NCR has the burden of proof by clear and convincing  
5 evidence to show that the patents are invalid. We think that  
6 it's clear that the other people's patents they brought to you  
7 do not show invalidity.

8 The Woycik patent, as I said, still has a server in the  
9 store. That's what these patents were intended to get away  
10 from. The Brown patent's about building websites, not  
11 point-of-sale builders. Neither of these patents have anything  
12 to do with this case.

13 The answer should be no for the '640 patent for every  
14 claim.

15 Similarly, the answer should be no for every claim of the  
16 '012 patent.

17 Next is the damages question. This is where, as we've  
18 said to you since the first day, you are the ultimate judges of  
19 this case. You are the ones who get to listen to all the  
20 evidence and take the information and things that you learned  
21 from that witness stand from Ms. Salters and apply that as you  
22 choose to apply that in this case. You get to decide what  
23 number, if any, that our clients should get in this case. It's  
24 your decision to make. We suggest to you that that number  
25 should be \$20,300,000. But it's your decision. You can give

*KRISTIE M. DAVIS, OFFICIAL COURT REPORTER  
U.S. DISTRICT COURT, WESTERN DISTRICT OF TEXAS (WACO)*

1 more than that, you can give less than that, as long as it's  
2 supported by the evidence.

3 On Question No. 6 you're going to be asked what type of  
4 royalty would be appropriate or what type of damages would be  
5 appropriate for that amount? We would urge you to put running  
6 royalty. It should be yes for running royalty. These patents  
7 are continuing to be infringed. This royalty should run into  
8 the future with these patents.

9 Next question is willfulness. We talked about willfulness  
10 in this case. We've talked about the notice letters. We sent  
11 it to the general counsel. It was addressed to one of their  
12 offices, we sent it certified mail, somebody signed for it,  
13 sent back a green card showing that they received it. What did  
14 NCR do? They didn't do anything. They didn't do anything even  
15 after they claimed they didn't know about the letter. That was  
16 in 2018 that we sent the letter.

17 They're coming to you in 2021, they still hadn't figured  
18 out what happened with this letter in 2018. Does that make any  
19 sense? It wouldn't be that hard to call Mr. Gallagher. I'm  
20 sure they could track him down and say, have you ever seen this  
21 letter? That would have put this issue to bed. But instead  
22 we've been talking about it for a couple days. So the answer  
23 should be yes.

24 I've read to you in my closing argument -- or at the first  
25 part of the closing about all of the factors that you can look

1 at -- and they're in the instructions -- to determine whether  
2 or not willful infringement is appropriate. And we gave you  
3 the evidence that supports each one of those factors that  
4 supports a yes answer to willful infringement for both patents.

5 So just to remind you, I thank you for your time. I've  
6 observed that you guys were an incredibly attentive jury, and  
7 we appreciate you taking time away from your families to hear  
8 our case.

9 THE COURT: Thank you, Mr. Barr.

10 Thank you, Mr. Baker.

11 Ladies and gentlemen, I don't get to say when you go back  
12 to the jury room you cannot discuss this case with each other,  
13 but I do get to say, you can't discuss it until you go back and  
14 do what?

15 Pick a foreperson. There you go.

16 So go back, pick a foreperson. Given the late hour of the  
17 day, we're a little later than I was hoping for, your decision  
18 on how long to start to -- how long to deliberate today is  
19 entirely up to you, within reason.

20 And then if you were to finish today, that's fine. If you  
21 need to come back tomorrow, that's absolutely fine. I'll be  
22 here and the lawyers will be here as long as we need to be here  
23 for you to deliberate, which is entirely in you all's province.

24 And so -- but the first thing you need to do when I excuse  
25 you is go to the back, pick a jury foreperson, give the note to

1 William of who it is, and then we'll be getting your exhibits  
2 back to you so you have them when you begin your deliberations.  
3 You can take your notes with you. And from now on, you all  
4 will be secluded away from the rest of us.

5 THE BAILIFF: All rise.

6 (Jury exited the courtroom for deliberations at 4:46.)

7 THE COURT: Thank you. You may be seated.

8 What I would prefer for counsel to do is, for the next  
9 couple minutes, not go anywhere, just because typically they  
10 get me the name of the foreperson pretty quickly. And as soon  
11 as I have it, I'll come back out here.

12 Once we have that, we have break-out rooms that you all  
13 can go to. But I prefer for two things: One, there be at  
14 least one member of the team that remains in the courtroom, and  
15 then -- the reason for that is, everyone else is free to  
16 disperse and go to a break-out room, wherever you want to.  
17 You're welcome to stay in here of course.

18 But if you don't want to stay in here, you need to stay  
19 close enough that -- the purpose of having one person here is  
20 if and when we get a note, that person can chase everyone down,  
21 get you back in here. I'll read the note to you. I'll tell  
22 you how I'm going to respond. I'll write the response, and I  
23 will return it to the jury.

24 Again, unless -- if the jury tells me they want to keep  
25 going past 6:00, I'm happy to stay. If they don't, then

1 they'll come back tomorrow. So it'll be entirely up to them.

2 THE BAILIFF: All rise.

3 (Recess taken from 4:48 to 4:57.)

4 THE COURT: Okay. So we're going to bet on -- I actually  
5 got this one. Last week we bet -- there were seven, and the  
6 only one -- the one who got it was -- no one picked. I mean,  
7 everyone picked, but it was not. I got this one.

8 So, Mr. Yates, I'll start with you. Who do you think  
9 it'll be?

10 MR. YATES: The gentleman in the front right. And I want  
11 to take the points, though, because I think that's a --

12 THE COURT: Anyone else?

13 MR. BAKER: The woman in the far left.

14 THE COURT: Okay. Mr. Yates, you're right. The jury  
15 foreman is Linn Wright, the gentleman seated on the front row.

16 (Recess taken from 4:58 to 5:43.)

17 THE COURT: I'm going to read into the record what the  
18 note says, and then I'll go back there.

19 "Jury would like to recess for today and return tomorrow  
20 morning at 8:30."

21 (Hearing adjourned at 5:44 p.m.)

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1 UNITED STATES DISTRICT COURT )  
2 WESTERN DISTRICT OF TEXAS )  
3

4 I, Kristie M. Davis, Official Court Reporter for the  
5 United States District Court, Western District of Texas, do  
6 certify that the foregoing is a correct transcript from the  
7 record of proceedings in the above-entitled matter.

8 I certify that the transcript fees and format comply with  
9 those prescribed by the Court and Judicial Conference of the  
10 United States.

11 Certified to by me this 8th day of June 2021.

12  
13 /s/ Kristie M. Davis  
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