

## Judge Albright Denied NCR's Motion for JMOL or New Trial After Jury's \$13.2 Million Verdict

NOVEMBER 8, 2022

On October 27, 2022, Judge Albright denied Defendant NCR Corporation's ("NCR") Rule 50(b) Motion for Judgment as a Matter of Law or, Alternatively, a New Trial.

Plaintiff CloudfChange, LLC ("CoC") accused NCR of infringing two patents related to web-based point-of-sale ("POS") systems. On May 17, 2021, following a four-day trial, the jury found that NCR had willfully infringed twelve claims of the asserted patents. The jury awarded CoC lump-sum damages of \$13.2 million. NCR later filed a Rule 50(b) Motion for JMOL and, alternatively, a Rule 59 Motion for a New Trial on August 10, 2021.

Judge Albright, in denying the motion, rejected NCR's claims that (1) the jury was erroneously instructed, (2) the jury's infringement findings were not supported by substantial evidence, (3) the asserted patents were invalid, (4) CoC had not proved willfulness, and (5) the jury's damages award was not supported by substantial evidence.

### **(1) The jury was not erroneously instructed.**

NCR argued that a new trial was necessary because of an instructional error to the jury. NCR contended that the jury instruction did not properly clarify CoC's burden to show that NCR controlled and benefited from each element of the claimed system as well as the system as a whole. By not clarifying the burden, NCR argued, the jury instruction conflated use by the end user with use by NCR and improperly allowed the jury to find infringement. CoC countered by pointing to the immediately preceding instruction language that CoC claimed provided the clarity the jury needed.

Applying Fifth Circuit law, the court did not find NCR's argument persuasive. It noted that (1) the instruction, read as a whole, instructed the jury properly to look at each claim and (2) if the instruction were in error, NCR's proposed instruction did not clarify the error.

### **(2) Substantial evidence supported the jury's infringement findings of the asserted patents.**

NCR argued that substantial evidence did not support the jury's infringement findings related to several claim limitations.

1. "Internet connection," "network," and "network access": The court first started by analyzing whether NCR "used" the NCR Silver system in the way contemplated by the Federal Circuit in *Centillion Data Systems v. Qwest Communications*. In *Centillion*, the Federal Circuit held that to use a system for infringement purposes, the accused infringer must put the system "into service," controlling the system as a whole and benefiting from it. The court, guided by the facts in *Centillion* and in a similar district court case, found that NCR had not put the NCR Silver system "into service."  
The court then analyzed whether the actions of merchants could be attributed to NCR. Guided by *Centillion* as well as the Federal Circuit's en banc decision in *Akamai Technologies v. Limelight Networks (Akamai V)*, the court found that NCR exercised control over merchants through two mechanisms: (1) contractual requirements and (2) conditioning a benefit to merchants according to the merchants' performance of claim elements.
2. "PC Workstation" and "POS terminal": The court also found there was enough evidence to support the jury's finding as to the "PC Workstation" limitation in the claims. The court cited its previous analysis of "use" and "control" to find that NCR had control over the "PC Workstation." The court also refuted NCR's argument distinguishing between "PC Workstation" and "POS system," noting that the language of the patent itself did not support distinguishing the two. The court applied the same framework to the "POS terminal" limitation.
3. "POS builder": The court found there was enough evidence to support the jury's finding as to the "POS builder" limitation. NCR pointed to alleged conflicting testimony from CoC's technical expert; it also claimed the court erred in using the plain and ordinary meaning of "builder" because that construction failed to give meaning to an essential term. CoC highlighted that NCR took the expert's testimony out of context and that both parties were using the plain and ordinary meaning of the term as used in the applicable industry. The court sided with CoC, agreeing that NCR cited the expert testimony misleadingly and noting that NCR waived any rehashing of the term after claim construction.
4. "Web server": The court found there was enough evidence to support the jury's finding as to the "web server" limitation. The court, noting that the jury got the chance to hear competing expert testimony at trial, concluded that the jury's finding was supported by the evidence.

Because the jury's findings were not against the great weight of the evidence and the verdict was not a miscarriage of justice, the court denied NCR's motions for JMOL and for a new trial.

### **(3) The proposed invalidity claim was unpersuasive.**

NCR argued that, through its expert testimony, it had proved the invalidity of the asserted patents. The court found that the jury did not have to believe NCR's expert testimony, since the jury heard competing evidence from both parties, weighed the evidence, and reached a conclusion based on that evidence.

NCR also claimed that the asserted patents were invalid as obvious. The court found that NCR failed to meet its burden to provide "clear and convincing evidence" of obviousness since only one expert provided testimony to support an obviousness conclusion.

### **(4) CoC sufficiently proved willfulness.**

NCR argued that CoC failed to prove NCR's "specific intent" to infringe, citing an Eastern District of Texas case that granted a pre-verdict JMOL, determining it would be inappropriate to put the issue of willfulness before the jury. The court here found sufficient evidence to support the jury's verdict. It also found the issue mainly moot since it had denied CoC's Motion for Enhanced Damages.

### **(5) Substantial evidence supported the jury's damages award.**

NCR contested the jury's lump-sum award of \$13.2 million for infringement. It argued that (1) CoC's expert had erred in relying on the entire-market value, (2) CoC's expert had failed to apportion damages to the allegedly patented features separately, and (3) NCR was entitled to a remittitur because its own expert had provided the sole apportionment evidence.

The court noted that if a patentee is relying on an entire-market theory for damages, it is the burden of the patentee, not the accused infringer, to prove that the entire-market theory applies. CoC, by providing the jury with four patented features that drove customer demand, supplied the jury with sufficient evidence to support its entire-market theory. The court noted that because the jury could reasonably find the entire-market theory applied, it could reasonably disagree with NCR's remittitur theory.

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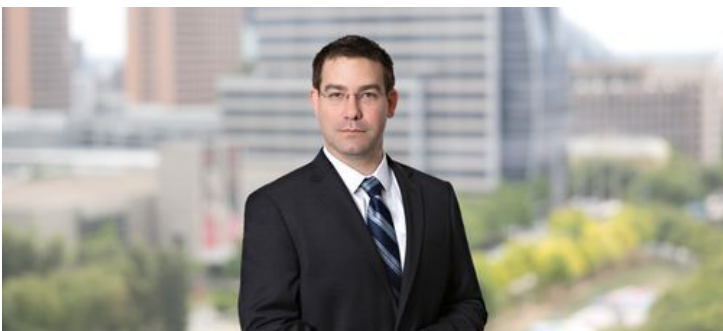
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