Exhibit H

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

CloudofChange, LLC, *Plaintiff* -v- NCR Corporation, *Defendant*	§ § § § § § § §	6:19-CV-00513-ADA

MEMORANDUM OPINION AND ORDER

Before the Court is Defendant NCR Corporation ("NCR")'s Motion to Exclude the opinions and testimony of Plaintiff CloudofChange, LLC's ("CoC") technical expert Mr. Gregory Crouse ("Crouse"). Dkt. 68. The Court heard the parties' arguments on April 29, 2021 and made oral rulings on the Motion during the hearing. Dkt. 127. Consistent with the Court's oral rulings and for the reasons set forth below, Defendant NCR's Motion is **GRANTED-IN-PART** and **DENIED-IN-PART**.

I. BACKGROUND

This is a patent infringement case involving two patents related to point of sale ("POS") systems. Plaintiff CoC has asserted U.S. Patent Nos. 9,400,640 ("the '640 patent") and 10,083,012 ("the '012 patent") (collectively, the "asserted patents") against Defendant NCR. Both asserted patents are entitled "Web-Based Point of Sale Builder" and are directed to a system used to build POS terminals for use in a "store or business." '640 patent, col. 2, line 57. CoC's technical expert Mr. Crouse has submitted three documents containing his opinions: an opening report on infringement, a declaration concerning his apportionment analysis, and a rebuttal report on the issue of patent validity. NCR filed its Motion to exclude Crouse's opinions (Dkt. 68), which was subsequently fully briefed (Response, Dkt. 83; Reply 94).

II. LEGAL STANDARD

An expert witness may provide opinion testimony only if "(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702.

Rule 702 requires the district court to act as a gatekeeper to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert v. Merrell Dow Pharm., Inc*., 509 U.S. 579, 592–93 (1993). The "basic gatekeeping obligation" articulated in *Daubert* applies not only to scientific testimony but to all expert testimony. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999). Accordingly, "a district court may exclude evidence that is based upon unreliable principles or methods, legally insufficient facts and data, or where the reasoning or methodology is not sufficiently tied to the facts of the case." *Summit 6, LLC v. Samsung Elecs. Co*., 802 F.3d 1283, 1295 (Fed. Cir. 2015). A district court shall consider "whether the theory or technique the expert employs is generally accepted; whether the theory has been subjected to peer review and publication; whether the theory can and has been tested; whether the known or potential rate of error is acceptable; and whether there are standards controlling the technique's operation." *Knight v. Kirby Inland Marine Inc.*, 482 F.3d 347, 351 (5th Cir. 2007) (citing *Daubert,* 509 U.S. at 593). Further, a district court "must be assured that the proffered witness is qualified to testify by virtue of his 'knowledge, skill, experience, training, or education.'" *Wilson v. Woods*, 163 F.3d 935, 937 (5th Cir. 1999) (quoting FED. R. Evid. 702). The ultimate inquiry in a Rule 702 determination is whether the expert's testimony is sufficiently reliable and relevant to be helpful to the finder of fact and thus to warrant admission at trial. *United States v. Valencia*, 600 F.3d 389, 424 (5th Cir. 2010).

"[W]hether *Daubert*'s specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine." *Kumho Tire*, 526 U.S. at 147. Thus, "the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Id*. at 152. However, in a jury trial setting, the Court's role under *Daubert* is not to weigh the expert testimony to the point of supplanting the jury's fact-finding role; instead, the Court's role is limited to that of a gatekeeper, ensuring that the evidence in dispute is at least sufficiently reliable and relevant to the issue before the jury that it is appropriate for the jury's consideration. *See Pipitone v. Biomatrix, Inc*., 288 F.3d 239, 249–50 (5th Cir. 2002) ("'The trial court's role as gatekeeper [under *Daubert*] is not intended to serve as a replacement for the adversary system.' . . . Thus, while exercising its role as a gate-keeper, a trial court must take care not to transform a *Daubert* hearing into a trial on the merits." (quoting Fed. R. Evid. 702 advisory committee note)). Rather, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596.

III. ANALYSIS

A. Crouse's Qualification as an Expert

Witnesses may be qualified as experts if they possess the relevant specialized "knowledge, skill, experience, training, or education." Fed. R. Evid. 702. "The standard for qualifying expert witnesses is fairly liberal; the witness need not have specialized expertise in the area directly pertinent to the issue in question if the witness has qualifications in the general field

related to the subject matter in question." *Wealthmark Advisors Inc. v. Phoenix Life Ins. Co*., No. SA16CA00485FBESC, 2017 WL 1133506, at *3 (W.D. Tex. Mar. 24, 2017).

NCR contends that Crouse is not a person of ordinary skill in the art even according to his own standard and is therefore not qualified as an expert witness. Dkt. 68 at 3–4. In his opening expert report, Crouse opines that a person of ordinary skill in the art would have "at least a Bachelor's of Science in computer engineering, software engineering, computer science, or an equivalent degree *and/or equivalent practical work experience and two years of work experience with point of sale systems*." Dkt. 68, Ex. 3 at 9 (emphasis added). NCR contends that Crouse does not meet the education standard because he only has a Bachelor's degree of Business Administration in finance. Dkt. 68 at 4. NCR further contends that Crouse does not meet the experience standard because Crouse's three relevant work experiences with BearingPoint, Dell/Perot Systems, and KPMG involved projects for bank clients, and none of the projects "involved systems that involved the use of web servers" or "the use of the Internet." *Id*. at 4–5. However, CoC proffers evidence that during Crouse's three years at BearPoint from 2004 to 2007, Crouse worked on two projects involving point of sale solutions for large financial institutions and dealt with most of the major point of sale vendors, including "Hypercom, Verifone, IBM, and about five others" and their "POS terminals plus software." Dkt. 83 at 4–5 and 8. Further, while at Perot Systems (now Dell), Crouse was involved in another point of sale system project for a financial institution from 2007 to 2009. *Id*. NCR contends that Crouse's working experiences are "in the field of banking" and "did not include the manual coding" of the point of sale system as described in the asserted patents. Dkt. 68 at 11. However, as courts have recognized, a witness "need not have specialized expertise in the area directly pertinent to the issue in question if the witness has qualifications in the general field related to the subject matter

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