

1 damages and an accounting and DENIES WITHOUT PREJUDICE Brocade's motion for entry of
2 judgment.

3 **I. BACKGROUND**

4 The history of this case and the details regarding Brocade's various claims have been
5 recounted in other orders,³ and so the court relates here only the procedural history necessary to
6 explain its decision. Brocade brought numerous claims of trade secret misappropriation, patent
7 infringement, copyright infringement, and various contractual claims against A10 and several
8 individual defendants.⁴ Many of the claims were either dismissed or were bifurcated and held for
9 a later trial.⁵ Of the remaining claims, Brocade pursued a copyright infringement claim, four
10 patent infringement claims, four trade secret misappropriation claims, an intentional interference
11 with contractual relations claim, and a breach of contract claim in a trial commencing July 3, 2012.

12 After the three-week trial, a jury found A10 liable for patent infringement, copyright
13 infringement, trade secret misappropriation, and intentional interference with contractual relations.
14 The jury awarded Brocade \$60 million in damages for the copyright infringement, \$1.00 in
15 damages for the trade secret misappropriation, and \$1.00 in actual damages and \$1 million in
16 punitive damages for the intentional interference with contractual relations.⁶ The jury made the
17 following findings regarding the patent infringement damages:

18 If you have found any of the foregoing claims infringed, what damages do you find
19 Brocade has proven it is more probable than not it has suffered as a result of that
20 infringement?

- 21 1. Lost Profits: \$ 49,397,904
- 22 2. Reasonable Royalty
- 23 a. rate: 4%
- 24 b. total royalty damages: \$ 1,975,916

25 ³ See Docket Nos. 434, 438.

26 ⁴ See Docket No. 85.

27 ⁵ See Docket No. 86 at 15:6-13; Docket No. 618 at 82:16-21.

28 ⁶ See Docket No. 771.

1 Although a patentee may be entitled to supplemental damages from infringement occurring
2 post-verdict but pre-judgment,¹⁶ the court finds Brocade’s motion premature in light of the court’s
3 determination that the jury’s patent infringement damages award was not supported by substantial
4 evidence.¹⁷ Based on the court’s review of the case law, a supplemental damages award should be
5 tied to a jury’s determination of damages for the original infringement.¹⁸ The court, however, has
6 found that the jury’s findings regarding patent infringement damages are irreconcilable with each
7 other and at least in part are not supported by substantial evidence.¹⁹ The findings therefore do not
8 provide a sound foundation from which the court can make a post-verdict supplemental damages
9 determination. Once the new trial has been conducted and a jury has made a damages
10 determination grounded in substantial evidence, Brocade may move again for an accounting of
11 A10’s post-verdict, pre-injunction infringement and for supplemental damages.

12 **B. Motion for Entry of Judgment Pursuant Fed. R. Civ. P. 54(b)**

13 Brocade also moves for entry of judgment on the claims adjudicated at trial and in the
14 amount of \$112,373,822 pursuant to Brocade’s interpretation of the jury’s damages awards.²⁰ A10
15 opposes the motion on multiple grounds. A10 asserts that the outstanding, bifurcated claims
16 overlap with the claims adjudicated at trial and therefore entry of judgment would not avoid
17 duplicative appeals, and A10’s JMOL motion must be resolved before entry of judgment is
18 appropriate.

19
20
21 ¹⁶ See *Hynix Semiconductor Inc. v. Rambus Inc.*, 609 F. Supp. 2d 951, 960-61 (N.D. Cal. 2009).

22 ¹⁷ See Docket No. 831.

23 ¹⁸ *Cf. Hynix Semiconductor Inc.*, 609 F. Supp. 2d at 964-65 (noting that case law regarding
24 supplemental damages “recommends applying the royalty rates determined by the jury” and
25 suggesting that if the post-verdict royalty rate should be changed it nevertheless should be
26 anchored to the jury’s determination); see also *August Tech. Corp. v. Camtek, Ltd.*, Case No. 05-
1396 MJD/AJB, 2010 WL 5560088, at *3 (D. Minn. Nov. 17, 2010) (noting that cases considering
supplemental damages “suggest that a determination that is consistent with the verdict is
presumptively reasonable under 35 U.S.C. § 285”).

27 ¹⁹ See Docket No. 845.

28 ²⁰ See Docket No. 785.

1 Pursuant to Fed. R. Civ. P. 54(b), the court “may direct entry of a final judgment as to one
2 or more, but fewer than all, claims or parties only if the court expressly determines that there is no
3 just reason for delay.” In making that determination, the court “must first determine that it is
4 dealing with a ‘final judgment.’”²¹ The court then “must go on to determine whether there is any
5 just reason for delay” but should be mindful to prevent “piecemeal appeals in cases which should
6 be reviewed only as single units.”²²

7 Because Brocade moved for entry of judgment before the court issued its order on A10’s
8 JMOL motion, its request exclusively deals with whether certification is appropriate given the
9 bifurcated claims and presumes the jury’s findings would be affirmed. But the court’s January 10
10 JMOL order did not affirm all of the jury’s findings; the court vacated the damages awarded for
11 patent infringement and punitive damages awarded for the intentional interference with contract
12 liability and ordered a new trial.²³ In light of the court’s order, those two damages awards cannot
13 be certified, and the court also finds that certifying the underlying patent liability and intentional
14 interference with contract liability findings is improper. The liability for the patent infringement
15 and intentional interference for contractual relations are intertwined with the damages for those
16 liabilities and would lead to piecemeal appeals of issues that should be appealed together.²⁴

17 As to the remaining claims for copyright liability, trade secret liability, and their
18 accompanying damages, Brocade’s request does not address the propriety of certifying these
19 claims while the court retains the patent and intentional interference with contractual relations
20 claims. Because Brocade moved for certification so early and therefore did not address
21

22 ²¹ *Stanley v. Cullen*, 633 F.3d 852, 864 (9th Cir. 2011) (quoting *Curtiss-Wright Corp. v. Gen. Elec.*
23 *Co.*, 446 U.S. 1, 7 (1980)).

24 ²² *Curtiss-Wright*, 446 U.S. at 7; *see also Stanley*, 633 F.3d at 865.

25 ²³ *See* Docket No. 845.

26 ²⁴ *See Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 8 (1980) (advising district courts to
27 determine “whether the claims under review were separable from the others remaining to be
28 adjudicated and whether the nature of the claims already determined was such that no appellate
court would have to decide the same issues more than once even if there were subsequent appeals”);
AmerisourceBergen Corp. v. Dialysist West, Inc., 465 F.3d 946, 954 (9th Cir. 2006) (same).

1 certification in light of the court's January 10 JMOL order, the court finds it premature to decide
2 whether certification of the copyright and trade secret claims is appropriate. In contrast to
3 Brocade's request, the court must consider not only whether certification would be appropriate
4 given the bifurcated claims but also whether certification is proper given the claims the court finds
5 should not be certified at this stage.

6 As such, the court DENIES WITHOUT PREJUDICE Brocade's motion for entry of
7 judgment pursuant to Fed. R. Civ. P. 54(b). If the parties believe that entry of judgment on the
8 claims affirmed in the court's January 10 JMOL order is appropriate, they may move again with
9 arguments reflecting their reasoning.

10 **IT IS SO ORDERED.**

11 Dated: January 23, 2013



PAUL S. GREWAL
United States Magistrate Judge