**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF TEXAS**
**MARSHALL DIVISION**

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| PACKET INTELLIGENCE LLC,<br><br>Plaintiff,<br><br>v.<br><br>NETSCOUT SYSTEMS, INC.,<br>TEKTRONIX COMMUNICATIONS,<br>TEKTRONIX TEXAS, LLC,<br><br>Defendants. | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | CIVIL ACTION NO. 2:16-CV-00230-JRG |

**ORDER GRANTING MOTION FOR ENHANCED DAMAGES**

Before the Court is Packet Intelligence LLC's[1] Motion for Enhanced Damages and Entry of Judgment. (Dkt. No. 269). Having considered the Motion, the Court is of the opinion that it should be and hereby is **GRANTED** to the extent and for the reasons set forth herein.

## I. BACKGROUND

This case was tried to a jury between October 10, 2017, and October 13, 2017. (Dkt. Nos. 239–42). The jury returned a verdict on October 13, 2017, finding willful infringement of the asserted claims, finding none of the asserted claims invalid, and awarding damages in the amount of $5.75 million. (Dkt. No. 237). Following submission of the evidence to the jury, on October 13, 2017, a bench trial was conducted as to equitable issues. (Dkt. No. 242). The Court entered a Post-Trial Docket Control Order setting the conduct of post-trial proceedings. (Dkt. No. 243).

[1] For clarity, Plaintiff Packet Intelligence LLC will be referred to as "Plaintiff," "Packet Intelligence," or "PI." Similarly, Defendants NetScout Systems, Inc., Tektronix Communications, and Tektronix Texas, LLC will be referred to as "Defendants," "NetScout," or the "NetScout Defendants."

The Court heard argument on various motions, including the instant Motion on January 17, 2017. (Dkt. No. 293).

The Jury found that Packet Intelligence proved that (i) NetScout infringed the U.S. Pat. Nos. 6,665,725, 6,839,751, and 6,954,789 (the "Asserted Patents"), (ii) that the infringement was willful, (iii) that none of the asserted claims of the Asserted Patents were invalid, (iv) that PI was entitled to damages of $3.5 million from the date of first infringement to March 15, 2016 (the date of the filing of this suit) and $2.25 million for infringement from the March 15, 2016 to the date the verdict was rendered, and (v) that that damages award was intended to be a running royalty. (Dkt. No. 237).

## II. DISCUSSION

The jury found that NetScout's infringement of the asserted claims was willful. (Jury Verdict, Dkt. No. 237 at 3). NetScout argues that "no reasonable jury could have found willfulness in this case," as (i) "PI did not notify NetScout of the asserted patents prior to filing suit," (ii) NetScout's inventorship defense was not a "personal attack[] on Mr. Dietz," (iii) the Jury's rejection of all of NetScout's defenses does not establish that infringement was willful, and (iv) "NetScout's conduct has been entirely appropriate and reasonable throughout this case." (Dkt. No. 277 at 3–4). Packet Intelligence notes that "the jury, after weighing all of the evidence, found that NetScout's infringement was 'wanton, malicious, in bad faith, deliberate, consciously wrong, or flagrant.'" (Dkt. No. 280 at 1 (citing Dkt. 237 at 3 (Verdict); Dkt. No. 252 10/13/17 Trial Tr. at 32:1–11 (willfulness jury instructions)). Packet Intelligence argues that "the Court should enter judgment on willfulness," "[b]ecause questions of credibility and motivation relating to willfulness are classic jury issues and that the evidence construed in a light most favorable to PI does not permit a conclusion contrary to the verdict." (*Id*. (citing *Polara Eng'g, Inc. v. Campbell Co.*, 237 F. Supp. 3d 956, 980 (C.D. Cal. 2017) (jury verdicts on willfulness are not advisory)).

The Court holds that the jury's finding of willfulness is more than adequately supported by the evidence adduced at trial including, at least, testimony by NetScout witnesses accusing Mr. Deitz of lying and stealing the patented inventions without having reviewed the patent. (*See, e.g.*, Dkt. No. 269-4 at 109-11, 116 ("Q. Okay. So you haven't read the patent? A. I have not. Q. And yet you've come in here and you've decided that Mr. Dietz has lied and stolen about his inventions? A. Yes."). Additionally, NetScout's infringement has been ongoing since March 15, 2016, when it was put on specific notice of infringement via the filing of the instant suit, (Dkt. No. 1), and continued through at least the time of trial. (*See* Dkt. No. 248, Trial Tr. (10/11/17 Afternoon Session) at 11:13–15 ("Q. And NetScout Texas sells the GeoProbe --GeoProbe products today; is that correct? A. Yes, it is.")). While the Parties dispute whether NetScout was on notice of the '725 Patent before that date,[2] NetScout was on notice at least as of that date and willfulness based on egregious post-filing conduct is permitted. *See, e.g.*, *Ericsson Inc. v. TCL Commun. Tech. Holdings, Ltd*., No. 2:15-cv-00011-RSP, 2017 U.S. Dist. LEXIS 183216, at *18-19 (E.D. Tex. Nov. 4, 2017); *Huawei Techs. Co. v. T-Mobile US, Inc*., 2017 U.S. Dist. LEXIS 43240, 2017 WL 1129951, at *4 (E.D. Tex. Feb. 21, 2017). This Court "'will not second-guess the jury or substitute [the Court's] judgment for [the Jury's] judgment' where the verdict is supported by substantial evidence." *Arctic Cat Inc. v. Bombardier Recreational Prod. Inc.*, 876 F.3d 1350, 1371 (Fed. Cir. 2017). Accordingly, the Court finds that the jury's finding of willfulness is properly supported and shall **ENTER** the verdict of willfulness in the Final Judgement (issued concurrently).

A properly supported finding of willfulness "invites the Court to exercise its discretion to determine whether enhanced damages are appropriate under 35 U.S.C. § 284." *Core Wireless*

[2] Indeed Netscout concedes that a PTO examiner notified Tektronix of PI's '725 patent during prosecution of its own patent several years before PI filed this lawsuit. (Dkt. No. 277 at 2). The Court notes the district court opinions that hold that "mere citation to a patent number in correspondence from the Patent Office is legally insufficient to support a finding of willfulness." *Radware, Ltd. v. F5 Networks, Inc.*, No. 5:13-CV-02024-RMW, 2016 WL 4427490, at *4 (N.D. Cal. Aug. 22, 2016) (collecting cases). The Court need not address this issue at this time.

*Licensing S.A.R.L. v. LG Elecs., Inc.*, No. 14-cv-912-JRG, Final Judgment Order, Dkt. No. 47 at 1 (E.D. Tex. Nov. 1, 2016). In addition to determining whether to award enhanced damages, courts also have discretion as to the amount of damages to be awarded. *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1932 (2016) ("District courts enjoy discretion in deciding whether to award enhanced damages, and in what amount."); *see also Halo*, 136 S. Ct. at 1926 ("§ 284 allows district courts to punish the full range of culpable behavior."). The Court may increase damages up to three times the damages assessed by the Jury. *See Jurgens v. CBK, Ltd.*, 80 F.3d 1566, 1570 (Fed. Cir. 1996). To determine whether and how much to enhance damages, courts consider the "*Read* factors:"

(1) "whether the infringer deliberately copied the ideas or design of another";

(2) "whether the infringer, when he knew of the other's patent protection, investigated the scope of the patent and formed a good-faith belief that it was invalid or that it was not infringed";

(3) "the infringer's behavior as a party to the litigation";

(4) "[d]efendant's size and financial condition";

(5) "[c]loseness of the case,"

(6) "[d]uration of defendant's misconduct";

(7) "[r]emedial action by the defendant";

(8) "[d]efendant's motivation for harm"; and

(9) "[w]hether defendant attempted to conceal its misconduct."

*Read Corp. v. Portec Inc.*, 970 F.2d 816, 826–27 (Fed. Cir. 1992), *abrogated in part on other grounds by Markman v. Westview Instr. Inc.*, 52 F.3d 967 (Fed. Cir. 1995) (en banc). The Court addresses each factor in turn.

### II.A. Copying [*Read* Factor 1]

Packet Intelligence concedes that this factor is not present. (Dkt. No. 280 at 5 ("*Read* 1 (copying) and 8 (desire to harm) are not present . . .")). Accordingly, this factor weighs against enhancement.

### II.B. Good Faith [*Read* Factor 2]

Packet Intelligence argues that "[t]he jury's willfulness verdict reflects the evidence at trial that NetScout never established a good-faith belief of invalidity or non-infringement." (Dkt. No. 269 at 10). In support, PI points to alleged "personal attacks" on Mr. Deitz accusing him of stealing NetScout's invention, "even as these same witnesses admitted to not having read Mr. Deitz's patents," and that the one NetScout witnesses who testified he had read PI's patents, Mr. Waldbusser, was biased against PI and, essentially, bought and paid for. (*Id*. at 11). PI argues that this "indicates that NetScout had never formed a good-faith belief that it did not infringe PI's patents, and instead contrived a story about Mr. Dietz stealing his invention from others in order to detract from its own willful infringement." (*Id*.) This is the sole basis advanced by PI in support of its contention that NetScout lacked good faith.

NetScout responds that "[a]s soon as PI filed its Complaint, NetScout promptly investigated the patents and formed its non-infringement and invalidity defenses in good faith." (Dkt. No. 277 at 5). NetScout details the good-faith basis for its invalidity and unenforceability defenses including the alleged questionable inventorship of Mr. Deitz, the alleged anticipation of the asserted patents by the "industry-standard 'TrackSessions' functionality" and the IETS's RMON Working Group RMON1 and RMON2 standards. (*Id*. at 5–6). NetScout also details its good-faith belief of non-infringement in that the accused G10 and GeoBlade products allegedly

"do not have the ability to identify conversational flows—*i.e.*, the ability to join together connections related to an activity—which is required by every asserted claim." (*Id*. at 7).

The Court does not perceive this case as one wherein the defenses mounted by NetScout are inappropriately weak to begin with, even though the Court agrees with PI that at least the inventorship defense completely collapsed during testimony at trial. However, incredibly effective cross-examination, which the jury credited and relied upon in rejecting the position whole-cloth, does not negate NetScout's good-faith basis in raising the issue in the first place. Indeed, enabling such searching examination of the rationale underlying the various claims and defenses is precisely why submission of such questions to determination by the jury is so important and enshrined in the Nation's Constitution. The jury's rejection of the invalidity and infringement argument similarly do not undercut the propriety of NetScout's good-faith belief in those position. *See Erfindergemeinschaft UroPep GbR v. Eli Lilly & Co.*, No. 2:15-cv-1202-WCB, 2017 WL 3034655, at *10 (E.D. Tex. July 18, 2017) (Bryson, J., sitting by designation); *Finjan, Inc. v. Blue Coat Sys., Inc.*, No. 13-CV-03999-BLF, 2016 WL 3880774, at *16 (N.D. Cal. July 18, 2016) ("When this lawsuit was filed, Blue Coat ha[d] reasonable good-faith non-infringement and invalidity defenses, they were not rendered unreasonable because Finjan prevailed at trial."). This is not the sort of case where the defendant infringed in the face of so obvious a risk of infringement that enhancement is appropriate. *Cf. WesternGeco L.L.C. v. ION Geophysical Corp.*, 837 F.3d 1358, 1362 (Fed. Cir. 2016) (noting that *Halo* "emphasized that subjective willfulness alone—i.e., proof that the defendant acted despite a risk of infringement that was either known or so obvious that it should have been known to the accused infringer,"—can support an award of enhanced damages.") (citing *Halo*, 136 S. Ct. at 1930) (internal quotations omitted).

Accordingly, the Court finds this factor to weigh against enhancement.

### II.C. Litigation Behavior [*Read* Factor 3]

"Typically, 'litigation misconduct' refers to bringing vexatious or unjustified suits, discovery abuses, failure to obey orders of the court, or acts that unnecessarily prolong litigation." *i4i Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 859 (Fed. Cir. 2010).

Packet Intelligence argues that "[f]rom the beginning of this litigation to the present, NetScout has engaged in a pattern of misconduct such that this factor strongly supports enhancing damages against NetScout." (Dkt. No. 269 at 5). Packet Intelligence argues that NetScout "threatened" it for bringing this action, calling the asserted claims "baseless" and threatening to "invalidate[] [PI's] patent portfolio" and then "pursue all available remedies." (*Id*.) Finally, PI further argues that NetScout did not participate in mediation in this case in good-faith, contrary to this Court's mediation order, participating through an in-house lawyer with no advance authorization to consider settlements, a fact it alleges it learned through deposition of NetScourt's CEO months later. (*Id*. at 6). PI argues that NetScout violated PI's MIL No. 5 by referring to the geographic origin of Tektronix as being "Texas" or "Plano." (*Id*. at 7). PI points to NetScout's alleged "media campaign" targeted to undermine the credibility of PI's lawsuit, (*id*. at 7–8), and alleged discovery abuses, (*Id*. at 8), pointing to the Court's granting of Motions to Compel (Dkt. No. 94) but not recounting the fact that the Court denied imposing any sanctions in conjunction with its grant of those motions.

NetScout responds that the "threats" are better seen as a "intent to vigorously defend against PI's allegations." (Dkt. No. 277 at 8). As to the mediation, NetScout's Chief IP Counsel attended the March 28, 2017, mediation on NetScout's behalf; NetScout further notes that "an unwillingness to pay money is not litigation misconduct." (*Id*. at 9). NetScout argues that both sides referenced NetScout's employees in Plano and that both sides received warning to adhere to

the Court's MIL ruling. (*Id*.) NetScout also notes that issuing press releases defending itself from allegations are "typical." The alleged discovery abuses are defended as resulting in an admonition from the Court that, "[a]s is very often the case in these situations, the Court's persuaded that neither side has completely clean hands in this situation that we have before us." (*Id*. at 10; Dkt. No. 98, Hr'g Tr. at 57:23–58:1).

The Court does not find evidence of litigation misconduct in NetScout's actions in this case. Litigation tactics do not cross the line from zealous advocacy into abusive gamesmanship merely by being "vigorously employed and at times not well received, by the jury or the court." *Barry v. Medtronic, Inc.*, 250 F. Supp. 3d 107, 117 (E.D. Tex. 2017); *see also, Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.*, Case No. 09-cv-05235-MMC, 2017 WL 130236, at *4 (N.D. Cal. Jan. 13, 2017) ("[H]aving reviewed the asserted misconduct on which [the patentee] relies, [the court] finds 'this was a hard fought case but did not cross the line into improper conduct.'") (quoting *Finjan*, 2016 WL 3880774, at *16); *Mass Engineered Design, Inc. v. Ergoton*, Inc., 633 F. Supp. 2d 361, 391–92 (E.D. Tex. 2009) (no enhancement where alleged misconduct was not "particularly egregious or overwhelmingly supported by the evidence"); *cf. Imperium IP Holdings (Cayman), Ltd. v. Samsung Elecs. Co.*, 203 F. Supp. 3d 755, 763–64 (E.D. Tex. 2016) (trebling damages where the court found that defendants "made multiple misrepresentations under oath" in their sworn interrogatories, gave false testimony to the jury on key topics, and failed to produce key documents—despite repeated requests for them—until the fourth day of trial). The "misconduct" identified by Packet Intelligence is more properly characterized as bravado coupled with highly aggressive marketing, not threats, intimidation, and "egregious litigation behavior" that PI would have this Court ascribe to the conduct in this case. This factor weighs against enhancement, but only slightly.

### II.D. Size and Financial Condition [*Read* Factor 4]

Defendant's size and financial condition should be viewed both relative to the Plaintiff and also individually to ensure that enhanced damages would "not unduly prejudice the [defendant's] non-infringing business." *Krippelz v. Ford Motor Co.*, 670 F. Supp. 2d 815, 822 (N.D. Ill. 2009) (internal citations omitted); *Read*, 970 F.2d at 827.

Packet Intelligence argues that "NetScout is a global company with over 3,000 employees [with] [i]ts most recent publicly-reported annual revenue [at] nearly $1.2 billion, and its free cash flow this year [reported at] over $195 million." (Dkt. No. 269 at 12 (citations omitted)). Accordingly, Packet Intelligence argues, "NetScout's financial condition [] suggests that an award of enhanced damages would not impair its financial well-being," and that "[t]here is also no evidence in the record that NetScout's 'operations or business would be severely jeopardized by an award of enhanced damages.'" (*Id*. citing *Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.*, 762 F. Supp. 2d 710, 722 (D. Del. 2011) (awarding double damages); *Omega Patents, LLC v. CalAmp Corp.*, No. 6:13-cv-1950, 2017 U.S. Dist. LEXIS 55846, at *23–26 (M.D. Fla. Apr. 6, 2017) (awarding treble damages where defendant "has the financial wherewithal to endure the sanction of enhanced damages")).

NetScout argues that this factor should only come into play, and only against enhancement, when other *Read* factors strongly support enhancement. (Dkt. No. 277 at 11). The Court does not believe this factor is so limited—to ignore the size of infringing firms would be to not properly ensure that the damages assessed for infringement found to be willful are sufficient "to **punish** the full range of culpable behavior." *Halo Elecs.*, 136 S. Ct. at 1926. *But see Erfindergemeinschaft*, 2017 WL 3034655, at *10 (defendant's "size and financial condition, while sufficient to weather

an award of an enhanced royalty, does not by itself support UroPep's contention that Lilly has engaged in conduct deserving" enhancement). Accordingly, the Court finds this factor supports enhancement.

### II.E. Closeness of the Case [*Read* Factor 5]

Packet Intelligence argues that "[t]his was not a close case," as [t]he jury returned a verdict in a few hours in the liability phase, finding for PI on every issue, including willfulness." (Dkt. No. 269 at 13). PI submits that "NetScout's non-infringement defense was presented as an afterthought; instead, it focused its defense at trial on a smear campaign against PI and the patents' inventor, in an effort to persuade the jury to invalidate PI's patents," and that "NetScout did not even bother to put on a damages defense." (*Id*.)

While NetScout argues that the case was a close one, and cites authority for the proposition that a jury's verdict against a defendant does not automatically mean this factor weighs in the plaintiff's favor,[3] the Court does not view this as a particularly close case, especially when considering the evidence and testimony adduced at trial. Even though NetScout believes this was a close case because it presented what it views as a compelling case of non-infringement and invalidity, the sole judges of the facts of this case, the jury, did not arrive at a verdict which indicates a close case. The Jury found the asserted patents to be not invalid and willfully infringed. (Dkt. No. 237). In addition, the jury awarded Packet Intelligence $5.75 million in damages; NetScout did not present any testimony on an alternative damages theory, relying on cross-examination of PI's damages expert alone. The jury retired to deliberate at 10:36 am and returned its verdict shortly before 2 pm. (Dkt. No. 242 (Trial Minutes)). This case was not very close; to

[3] "That the jury did not ultimately find for [NetScout] does not automatically mean that this factor weighs in Plaintiff['s] favor." *Hako-Med USA, Inc. v. Axiom Worldwide, Inc.*, No. 06-CV-1790, 2009 WL 3064800, at *10 (M.D. Fla. Sept. 22, 2009); *see also Emcore Corp. v. Optium Corp.*, No. CV-7-326, 2010 WL 235113, at *3 (W.D. Pa. Jan. 15, 2010) ("Simply because Plaintiffs won does not mean this case was not close.").

the extent that any inference may be drawn in NetScout's favor from the jury verdict, only the 2/3rds reduction in the damages award from PI's damages demand supports NetScout's position. *See SSL Servs., LLC v. Citrix Sys., Inc.*, No. 08-CV-158-JRG, 2012 WL 4092449, at *5 (E.D. Tex. Sept. 17, 2012), *vacated and remanded on other grounds*, 769 F.3d 1073 (Fed. Cir. 2014) (factor favored enhancement where jury found that defendant willfully infringed and that the patent was not invalid and awarded a $10 million lump-sum award). That a defendant's position on various defenses "may have required resolution at trial . . . does not dictate that the case was close." *PPC Broadband, Inc. v. Corning Optical Commc'ns RF*, LLC, No. 5:11-cv-761-GLS-DEP, 2016 WL 6537977, at *7 (N.D.N.Y. Nov. 3, 2016), *appeal dismissed*, No. 16-4106, 2016 WL 10655596 (2d Cir. Dec. 12, 2016).

Accordingly, the Court finds that this factor weighs in favor of enhancement. *WCM Indus., Inc. v. IPS Corp.*, No. 2016-2211, 2018 WL 707803, at *10 (Fed. Cir. Feb. 5, 2018) ("[T]he closeness of the case was also in WCM's favor because the jury verdict was not a close call and the evidence strongly supported WCM's case.").

**II.F. Duration of Misconduct [*Read* Factor 6]**

Packet Intelligence argues that NetScout's duration of infringement is "six years and counting" pointing to the PTO's citation of the '725 patent in prosecution of one of NetScout's own patents. That argument constitutes basically the whole of Packet Intelligence's argument on this factor.

NetScout disputes this as a proper basis for pre-suit knowledge regarding the asserted patents or of PI's infringement allegations. There is no question, however, of NetScout's knowledge, starting at least from the date of the commencement of this suit. (Dkt. No. 1). Further, there is no indication on the record that NetScout has ceased its infringement since the jury

rendered its verdict. (Dkt. No. 280 at 3 ("NetScout does not even address, and thus concedes, that it has not taken remedial measures and continues to infringe.")) Accordingly, NetScout's continued infringement has lasted over two years and five months and continues through today.

In considering this factor, the Court must weigh the period of time against NetScout's pre-suit notice and continued infringement. There is uncertainty among courts as to the weight these facts are given. *Compare Broadcom Corp. v. Qualcomm Inc.*, No. SACV 05-467-JVS, 2007 WL 2326838, at *3 (C.D. Cal. Aug. 10, 2007) ("The length of [the infringer's] infringement (approximately two years), coupled with the fact that infringement continued after [the patentee] filed its suit, supports an increase in damages."), *vacated on other grounds*, 2007 WL 8030058 (C.D. Cal. Nov. 21, 2007), *and PPC Broadband, Inc. v. Corning Optical Commc'ns RF, LLC*, No. 5:11-CV7-61 (GLS/DEP), 2016 WL 6537977, at *8 (N.D.N.Y. Nov. 3, 2016), *appeal dismissed*, No. 16-4106, 2016 WL 10655596 (2d Cir. Dec. 12, 2016) ("[C]ontinuing to sell the infringing products after notice of infringement and during the course of litigation supports enhancement."), *with Barry v. Medtronic, Inc.*, No. 1:14-cv-104, 2017 WL 1536492, at *8 (E.D. Tex. Apr. 20, 2017) (holding that infringement for more than two years—from March 2010 through 2013—did not support enhancement) *and Spectralytics, Inc. v. Cordis Corp.*, 834 F. Supp. 2d 920, 928 (D. Minn. 2011), *aff'd*, 485 F. App'x 437 (Fed. Cir. 2012) (holding that willful infringement for "about one [] year[]" was a "relatively short" "period of willful infringement" and did "not weigh in favor of enhanced damages."). Given that NetScout's period of willful infringement, including the period during the course of litigation, spans at least two years and continues without any indication of remediation, this factor favors enhancement.

### II.G. Remedial Action [*Read* Factor 7]

Packet Intelligence argues that "NetScout has 'not taken any remedial action to remove its infringing product from the marketplace or alter it to cease the infringement since the complaint was filed . . . despite a jury verdict finding willful infringement.'" (Dkt. No. 269 at 12 (quoting *Veracode, Inc. v. Appthority, Inc.*, 137 F. Supp. 3d 17, 85-86 (D. Mass. 2015); citing *Bos. Sci. Corp. v. Cordis Corp.*, 838 F. Supp. 2d 259, 280 (D. Del. 2012), *aff'd*, 497 F. App'x 69 (Fed. Cir. 2013) (same); *Finjan Software, Ltd. v. Secure Computing Corp.*, No. 06-369 (GMS), 2009 U.S. Dist. LEXIS 72825, at *51 (D. Del. Aug. 18, 2009) ("[Defendant] has continued to manufacture and sell its accused . . . products in the marketplace, despite the pendency of this litigation. The court, therefore, finds that this factor weighs in favor of enhanced damages.").

NetScout does not argue that it has undertaken any remedial measures. (*See generally* Dkt. Nos. 277, 288). Accordingly, because there is no evidence of remedial action, only preventative action, this factor clearly weighs in favor of enhancement.

### II.H. Motivation for Harm [*Read* Factor 8]

Packet Intelligence concedes that this factor is not present. (Dkt. No. 280 at 5 ("*Read* 1 (copying) and 8 (desire to harm) are not present")). Accordingly, this factor weighs against enhancement.

### II.I. Concealment of Misconduct [*Read* Factor 9]

Packet Intelligence argues that NetScout attempted to conceal its misconduct by arguing that it "was not aware of the asserted patent . . . prior to this case" when Tektronix, which NetScout owns, had previously cited one of the asserted patents in one of its own patents that issued in 2008. (Dkt. No. 269 at 12–13). Additionally, PI points to NetScout's press releases as being "designed to shift blame for its infringing conduct." (*Id.* at 13).

NetScout argues that it has, "at all times, openly sold and marketed the accused products as having the allegedly infringing features." (Dkt. No. 277 at 14–15 (citing *Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.*, No. 09-CV-05235, 2017 WL 130236, at *5 (N.D. Cal. Jan. 13, 2017) (defendant "did not attempt to conceal its infringing conduct" where its "published datasheets describe the features [plaintiff] challenges"); *Illinois Tool Works, Inc. v. MOC Prods. Co.*, 09-CV-1887, 2013 WL 12064544, at *6 (S.D. Cal. Oct. 25, 2013) ("That MOC took no measures to conceal its infringement clearly weighs against enhancement of damages" because "MOC openly displayed and sold the infringing UIT")). As to the denial of pre-suit knowledge, NetScout did not somehow "conceal" the patent citations, nor did NetScout's press release, which publicly set out the position that NetScout maintained throughout this litigation, somehow constitute concealment. (Dkt. No. 277 at 15).

The Court agrees. Packet Intelligence has not demonstrated any concealment on NetScout's behalf; that a party does not admit to infringement does not mean they are to be charged with concealment of the same following a jury finding the opposite. This factor weighs against enhancement.

## III. CONCLUSION

The *Read* factors provide "useful guideposts" in the court's exercise of discretion but are not binding or exhaustive. *Imperium*, 203 F. Supp. 3d at 763–64; *see also Finjan v. Blue Coat Sys.*, Case No. 13-cv-0399-BLF, 2016 WL 3880774, at *16 (N.D. Cal. July 18, 2016). "While the *Read* factors remain helpful to the [c]ourt's execution of its discretion, an analysis focused on egregious infringement behavior is the touchstone for determining an award of enhanced damages rather than a more rigid, mechanical assessment." *Imperium*, 203 F. Supp. 3d at 763; *accord Halo*, 136 S. Ct. at 1934 ("we eschew any rigid formula for awarding enhanced damages under § 284").

The Court has considered each of the *Read* factors as guideposts in its determination as to whether enhancement is appropriate in this case.[4] Having considered the factors, and mindful of the Court's obligation to focus its analysis on determining whether egregious infringement behavior is present, the Court finds that such behavior is present and enhancement is appropriate on that basis. "[W]hen only a subset of factors weigh in favor of enhanced damages a court should award less than treble damages." *WCM Indus., Inc. v. IPS Corp.*, No. 2016-2211, 2018 WL 707803, at *10 (Fed. Cir. Feb. 5, 2018). As such, the Court finds that less than treble damages are appropriate in this case.

Accordingly, the Court hereby **GRANTS** Packet Intelligence's Motion for Enhanced Damages, having found enhancement to be appropriate in this case and **ORDERS** enhanced damages in the amount of $2.8 million dollars be awarded to Packet Intelligence, in addition to the jury's compensatory award.

The Court finds that Packet Intelligence's arguments regarding exceptionality, attorneys' fees, and costs are premature, and **DENIES** them without prejudice to be refiled following entry of Final Judgment. (Dkt. No. 269 at 15). The Court **GRANTS** the Motion as to the entry of Final Judgment and does so concurrently with this Order.

[4] Summary of the *Read* factor holdings: (1) copying: "against enhancement"; (2) good faith belief: "against enhancement"; (3) litigation misconduct: "against enhancement, but only slightly"; (4) size and financial condition: "supports enhancement"; (5) closeness of the case: "in favor of enhancement"; (6) duration of misconduct "favors enhancement"; (7) remedial action: "clearly weighs in favor of enhancement"; (8) motivation for harm: "against enhancement"; (9) concealment of misconduct: "against enhancement".