

1 TIMOTHY T. SCOTT (CA Bar No. 126971/tscott@kslaw.com)
2 GEOFFREY M. EZGAR (CA Bar No. 184243/gezgar@kslaw.com)
3 LEO SPOONER III (CA Bar No. 241541/lspooner@kslaw.com)
4 KING & SPALDING LLP
333 Twin Dolphin Drive, Suite 400
Redwood Shores, CA 94065
Telephone: (650) 590-0700/Facsimile: (650) 590-1900

5 SCOTT T. WEINGAERTNER (pro hac vice/sweingaertner@kslaw.com)
6 ROBERT F. PERRY (rperry@kslaw.com)
7 ALLISON ALTERSOHN (pro hac vice/aaltersohn@kslaw.com)
8 SUSAN KIM (pro hac vice/skim@kslaw.com)
9 MARK H. FRANCIS (pro hac vice/mfrancis@kslaw.com)
DANIEL MILLER (pro hac vice/dmiller@kslaw.com)
King & Spalding LLP
1185 Avenue of the Americas
New York, NY 10036-4003
Telephone: (212) 556-2100/Facsimile: (212) 556-2222

10 Attorneys for Plaintiff, GOOGLE INC.

11 Adrian M. Pruetz (CA Bar No. 118215/ampruetz@pruetzlaw.com)
12 Erica J. Pruetz (CA Bar No. 227712/ejpruetz@pruetzlaw.com)
13 PRUETZ LAW GROUP LLP
200 N. Sepulveda Blvd., Suite 1525
El Segundo, CA 90245
Telephone: (310) 765-7650/Facsimile: (310) 765-7641

14 Enoch H. Liang (CA Bar No. 212324/ehl@ltlcounsel.com)
15 Steven R. Hansen (CA Bar No. 198401/srh@ltlcounsel.com)
16 Edward S. Quon (CA Bar No. 214197/eq@ltlcounsel.com)
LEE TRAN & LIANG PLC
601 S. Figueroa St., Suite 4025
Los Angeles, CA 90017
Telephone: (213) 612-3737/Facsimile: (213) 612-3773

18 Attorneys for Defendant, NETLIST, INC.

20 UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
(OAKLAND DIVISION)

22 GOOGLE INC.,
23 Plaintiff,

24 v.

25 NETLIST, INC.,
26 Defendant.

27 AND RELATED COUNTERCLAIMS.

Case No. C 08-04144 SBA

**SECOND AMENDED JOINT CASE
MANAGEMENT CONFERENCE
STATEMENT**

Date: March 4, 2010
Time: 3:15 p.m
Dept.: Telephonic

1 Google Inc. (“Google”) and Netlist, Inc. (“Netlist”) hereby respectfully submit the
2 following Second Amended Joint Case Management Conference Statement.

3 **1. Jurisdiction and Service**

4 This is an action arising under the patent laws of the United States, Title 35, United States
5 Code. This Court has jurisdiction over the claims and defenses of this action pursuant to 35
6 U.S.C. § 1 *et seq.*, and 28 U.S.C. §§ 1331, 1338(a), 2201, and 2202. The parties do not believe
7 that any jurisdiction or venue issues exist at this time. No parties remain to be served.

8 **2. A Brief Description of the Facts and Procedural History**

9 Netlist is listed with the United States Patent and Trademark Office (“USPTO”) as the
10 assignee of record of U.S. Patent No. 7,289,386 (“the ‘386 Patent”). In May of 2008, Netlist sent
11 Google a letter asserting ownership of the ‘386 Patent and alleging that Google was infringing the
12 patent by using technology covered by the ‘386 Patent in its servers. The technology related to
13 memory modules used in the server memory. Netlist’s outside counsel sent additional letters to
14 Google in June of 2008 reiterating its allegations. On August 29, 2008, Google initiated this
15 action for declaratory judgment of non-infringement and invalidity of the ‘386 Patent; Netlist then
16 counterclaimed for patent infringement and related claims.

17 On February 2, 2009, the parties filed a Joint Case Management Statement. On February
18 18, 2009, the parties telephonically participated in a Case Management Conference with this
19 Court. On February 19, 2009 this Court issued a scheduling order for the period through claim
20 construction proceedings. On June 12, 2009, the parties filed their Joint Claim Construction
21 Statement. The parties submitted their respective claim construction briefs during July-
22 September 2009. The parties filed an Amended Joint Case Management Statement on November
23 2, 2009, and the Court conducted a *Markman* Hearing on disputed claim construction issues on
24 November 12, 2009. The Court issued its Order Re Claim Construction on November 12, 2009,
25 and issued an Order For Pretrial Preparation setting the schedule for the remainder of the case on
26 November 18, 2009.

1 On February 26, 2009, Netlist served its Disclosure of Asserted Claims and Infringement
2 Contentions. On April 13, 2009, Netlist served an Amended Disclosure of Asserted Claims and
3 Infringement Contentions, and also on April 13, 2009 Google served its Invalidity Contentions.
4 The only motion filed to date in this case concerned a discovery dispute. On May 19, 2009, the
5 parties filed a letter brief with the Honorable Judge Spero, in which Netlist requested a physical
6 inspection of one of Google's servers, to which Google objected. A telephonic hearing was held
7 on the issue on May 29, 2009. The parties submitted a proposed order concerning the scope of
8 the inspection on June 24, 2009, which order issued on June 25, 2009.

9 On December 4, 2009, Netlist filed a separate action (*Netlist, Inc. v. Google, Inc.*, C 09-
10 5718 SBA) against Google asserting infringement of U.S. Patent No. 7,619,912 (the "'912
11 Patent"), which issued on November 17, 2009. The '912 Patent is a continuation of the '386
12 Patent asserted in this case. The parties filed a Joint Motion To Consolidate Cases on January 6,
13 2010, which this Court denied on February 3, 2010.

14 **3. Principal Factual Issues Disputed by the Parties**

- 15 • Whether Google has infringed the '386 Patent;
- 16 • Whether the accused Google products have substantial non-infringing uses;
- 17 • Whether the '386 Patent is invalid;
- 18 • Whether Netlist failed to meet its disclosure or other obligations under applicable
19 JEDEC rules and policies;
- 20 • Whether infringement was willful; and
- 21 • Appropriate damages and equitable relief for any infringement.

22 **4. Principal Legal Issues Disputed by the Parties**

- 23 • Claim construction of terms in the '386 Patent;
- 24 • Whether any or all claims of the '386 Patent are invalid under 35 U.S.C. §§ 101,
25 102, 103, or 112;
- 26 • Whether the '386 Patent is unenforceable;
- 27
- 28

- 1 • Whether Google has properly pled a claim of unenforceability, including
- 2 unenforceability based on alleged non-compliance with disclosure or other
- 3 obligations under applicable JEDEC rules and policies;
- 4 • Whether the claims set forth in Netlist's counterclaims are barred by waiver;
- 5 • Whether the claims set forth in Google's complaint are barred by waiver;
- 6 • Whether the claims set forth in Netlist's counterclaims are barred by Netlist's
- 7 unclean hands;
- 8 • Whether the claims set forth in Google's complaint are barred by Google's
- 9 unclean hands;
- 10 • Whether the claims set forth in Netlist's counterclaims are barred by estoppel;
- 11 • Whether the claims set forth in Google's complaint are barred by estoppel;
- 12 • Whether the Court should declare the case exceptional under 35 U.S.C. § 285 and
- 13 award attorneys fees to the prevailing party; and
- 14 • Whether and what relief should be granted.

15 **5. Motions**

16 There has been one motion in this case, which concerned a discovery dispute. On May
17 19, 2009, the parties filed a letter brief with the Honorable Judge Spero, in which Netlist
18 requested a physical inspection of one of Google's servers, to which Google objected. A
19 telephonic hearing was held on the issue on May 29, 2009. The parties submitted a proposed
20 order concerning the scope of the inspection on June 24, 2009, which order issued on June 25,
21 2009. The inspection was performed on August 19, 2009.

22 No motions are currently pending. Both Google and Netlist anticipate filing motions for
23 summary judgment and, to the extent it becomes necessary, motions relating to discovery.

24 **6. Amendment of Pleadings**

25 The parties may amend their claims and defenses as discovery progresses, but do not plan
26 to add or dismiss claims at this time.

1 **7. Evidence Preservation**

2 The parties' proposal for document preservation is described in Section 9, below.

3 **8. Disclosures**

4 The parties exchanged the information required by Fed. R. Civ. Proc. 26(a)(1) on
5 February 5 and 6, 2009. The parties have supplemented their disclosures through the course of
6 discovery.

7 **9. Discovery**

8 **A. Discovery Taken to Date**

- 9 • Both parties have served and responded to written discovery. The parties have met
10 and conferred regarding their respective discovery responses.
- 11 • Both parties have substantially completed their respective document productions.
- 12 • Google has provided a server for inspection, per court order, and Netlist inspected the
13 server on August 19, 2009.
- 14 • Google has deposed the named inventors, Netlist employees Jayesh Bhakta and
15 Jeffrey Solomon. Google's position is that their depositions revealed the existence of
16 relevant documents that had not at that point been produced during the course of this
17 litigation, and as such the depositions should be held open to address any questions
18 that arise in light of the production of such documents at some later date. Google has
19 also deposed third party witnesses Arun Kamat and William Gervasi, who were both
20 former employees of Netlist.
- 21 • Google has issued subpoenas for written discovery and depositions from third parties,
22 and has collected documents from and taken depositions of certain of these third
23 parties.
- 24 • In December 2009, Google served a Rule 30(b)(6) Notice of Deposition seeking
25 testimony from Netlist on a variety of topics related to non-infringement, invalidity,
26 damages, and the JEDEC standards. The parties agreed this deposition would not
27 proceed on January 15, 2010, as originally noticed, and are in the process of
28

1 discussing the Notice and setting dates for depositions on some or all of the noticed
2 topics. Google anticipates seeking leave of the Court to amend its invalidity
3 contentions following the depositions of Netlist.

- 4 • Netlist has deposed two Google employees, Rick Roy and Andrew Dorsey. Netlist
5 states that Mr. Dorsey and Mr. Roy were involved in the development of the accused
6 four-rank FBDIMMs and participated in meetings with Netlist concerning its patented
7 technology prior to the filing of this lawsuit. It is Google's assertion that the
8 development of the accused four-rank FBDIMMs was done by Intel. Netlist's position
9 is that Mr. Roy's deposition and Mr. Dorsey's deposition revealed the existence of
10 relevant documents that have not been produced during the course of this litigation
11 and that the depositions should be held open to address any questions that arise in light
12 of the production of such documents at a later date. Netlist has requested that Google
13 produce documents identified by Mr. Roy and Mr. Dorsey during their depositions,
14 and Google has not yet responded to Netlist's requests.
- 15 • Netlist deposed Google employee, Robert Sprinkle, on February 18, 2010. Mr.
16 Sprinkle is the key Google employee involved in the design and development of the
17 accused 4-Rank FBDIMMs. In early January 2010, Netlist served a 30(b)(6)
18 Deposition Notice seeking testimony from Google on a variety of topics related to
19 infringement, damages, and validity issues. Google designated Mr. Sprinkle to testify
20 to certain of the noticed topics relating to technical aspects of the accused 4-Rank
21 FBDIMMs on February 18, 2010. Google has identified Norm Haus and Jack Ancone
22 as additional Rule 30(b)(6) designees to testify to the remainder of the noticed topics.
23 Both of these depositions are scheduled to take place in mid-March 2010. Netlist
24 anticipates seeking leave of the Court to amend its infringement contentions following
25 Mr. Sprinkle's deposition.
- 26 • Netlist deposed third party Desi Rhoden on February 17, 2010. Mr. Rhoden was
27 identified by Google as a person with knowledge of the practices and procedures of
28

1 the JEDEC standard setting organization and Netlist's participation in JEDEC
2 standards development.

3 **B. Anticipated Discovery**

4 Google anticipates taking the depositions of one or more Netlist witnesses under Rule
5 30(b)(6) on topics including the conception and reduction to practice of the '386 Patent, the
6 prosecution of the '386 Patent, the sale of any products alleged to embody the '386 Patent,
7 Netlist's knowledge of prior art during the prosecution of the '386 Patent, Netlist's participation
8 in the JEDEC standards process, Netlist's licensing of the '386 Patent and other topics related to
9 the enforceability of the '386 Patent and Netlist's claim for damages. Google has also noticed the
10 deposition of Mario Martinez and the parties are in the process of setting a date for this
11 deposition. Depending on the information developed through discovery, Google may seek
12 discovery from third parties relating to development of Netlist's memory modules using rank
13 multiplication technology and licensing efforts of the subject matter of the '386 Patent. Google
14 also anticipates serving additional written discovery on Netlist directed to the foregoing topics.

15 Netlist anticipates deposing one or more Google witnesses under Rule 30(b)(6) and on
16 topics including the structure and operation of the accused 4-Rank FBDIMMs, damages, and
17 willfulness. Netlist also anticipates deposing additional Google employees who are identified as
18 knowledgeable about the foregoing topics and serving additional written discovery directed to the
19 foregoing topics. Depending on the information developed through such discovery, Netlist may
20 seek discovery from third parties involved in the development of the components used to
21 manufacture the accused four-rank FBDIMMs.

22 **C. Discovery Schedule**

23 The Court issued a scheduling order which sets a discovery cut-off of March 30, 2010.

24 **D. Discovery Limits**

25 The parties agree to the following limits on discovery.

- 26 • Maximum of 30 interrogatories, including contention interrogatories, for each
27 party.

- 1 • Maximum of 50 requests for admission by each party, excluding those directed
2 solely to authenticating exhibits for trial.
- 3 • Maximum of 10 non-expert depositions, including third party depositions, for each
4 party.
- 5 • With respect to expert reports and discovery, the parties agree that final expert
6 reports and materials identified by the experts as relied upon in their reports are
7 discoverable. (If an expert indicates in deposition that he or she relied upon a
8 document or source not otherwise specified in the final report, that information is
9 also discoverable.) Any attorney communications to or from any expert, any draft
10 reports, and any notes of experts relating to any communication to or from an
11 attorney are not discoverable and do not need to be logged in a privilege log.

12 **E. Electronic Discovery and Document Preservation**

13 In order to avoid discovery disputes, the parties make the following proposals concerning
14 electronic discovery:

15 Preservation: Each party shall send a Document Retention Notice to employees it
16 believes are likely to possess relevant, responsive electronic documents. This Document
17 Retention Notice shall request that the identified employee refrain from deleting or destroying
18 relevant electronic documents for the pendency of the litigation. No claim for sanctions shall lie
19 in the inadvertent deletion of electronic documents. No party shall suspend the recycling or
20 deletion of backup tapes or backup copies of electronic documents unless and until such
21 suspension is explicitly requested by a Requesting Party. If such a request for suspension of
22 deletion of backups is made, the Requesting Party shall specifically identify the electronic
23 documents that should be maintained, as well as the duration for such maintenance. The
24 Requesting Party must pay the costs associated with maintaining said backups, although the
25 Requesting Party can choose to rescind or modify its request for the suspension of recycling or
26 deletion at any time.

1 Discovery and Form of Production: The parties agree to meet and confer concerning the
2 format for the production of any remaining documents that may be produced during the
3 remainder of the litigation.

4 Assertion of Privilege After Production: The inadvertent production of any privileged
5 material shall not be deemed a waiver of any claim of privilege of the information. Upon
6 receiving oral or written notice from the Producing Party that privileged material has been
7 inadvertently produced, all such privileged material and any copies thereof shall immediately be
8 returned to the Producing Party and the receiving party shall not use any such privileged material
9 or privileged information therein for any purpose absent further Order of this Court.

10 **10. Class Actions**

11 This case is not currently a class action.

12 **11. Related Cases**

13 There is one related case, *Netlist, Inc. v. Google, Inc.*, C 09-5718 SBA, which is currently
14 pending before this Court. In this related case, Netlist asserts that Google’s 4-Rank FBDIMMs
15 infringe U.S. Patent No. 7,619,912 (the “’912 Patent”), which issued on November 17, 2009. The
16 ‘912 Patent is a continuation of the ‘386 Patent asserted in this case.

17 **12. Relief**

18 Google seeks the following relief:

- 19 • A declaration that Google does not infringe any valid and enforceable claim of the
20 ‘386 Patent;
- 21 • A declaration that the ‘386 Patent is invalid and unenforceable;
- 22 • A declaration that this case is exceptional under 35 U.S.C. § 285 and an award of
23 its costs, disbursements, and attorney fees in connection with this case under 35
24 U.S.C. § 285 and any other authority deemed appropriate by the Court; and
- 25 • Any other and further relief that this Court deems just, reasonable, and proper.

26 Netlist seeks the following relief:

- 27 • A judgment that Google has infringed the ‘386 Patent;
- 28

- 1 • A finding that such infringement was willful and deliberate;
- 2 • Monetary damages and injunctive relief based on such infringement;
- 3 • A finding that this case is exceptional under 35 U.S.C. § 285 and an award of its
- 4 costs, disbursements, and attorney fees in connection with this case under 35
- 5 U.S.C. § 285 and any other authority deemed appropriate by the Court; and
- 6 • Any other and further relief that this Court deems just, reasonable, and proper.

7 **13. Settlement and ADR**

8 The parties have met and conferred in compliance with ADR L.R. 3-5 and reached a
9 stipulation pursuant to Civil L.R. 16-8 and ADR L.R. 3-5 to participate in private mediation. The
10 parties filed this stipulation with the Court on December 12, 2008. The parties held a private
11 mediation with Anthony Piazza in March 2009, and were unable to resolve the case. In its Order
12 of February 2, 2010, this Court ordered the parties to file a joint statement regarding whether they
13 wish to conduct a settlement conference before a Magistrate Judge or a private mediator. On
14 February 16, 2010, the parties filed a Stipulation indicating their preference to have the settlement
15 conference proceed before a Magistrate Judge, but that they have not yet reached agreement on
16 the specific Magistrate Judge to handle such settlement conference. The parties subsequently
17 met-and-conferred and now agree to have the matter referred to Magistrate Judge Trumbull for an
18 early settlement conference.

19 **14. Consent to Magistrate Judge For All Purposes**

20 A declination to proceed before a United States Magistrate Judge was filed in this matter.

21 **15. Other References**

22 The parties do not believe that this case is suitable for reference to binding arbitration, a
23 special master, or the Judicial Panel on Multidistrict Litigation.

24 **16. Narrowing of Issues**

25 While the parties may reach or agreements or file dispositive motions narrowing the issues
26 in this case, it is premature at this time to determine the number and/or subject matter of any such
27 agreements or motions.
28

1 **17. Expedited Schedule**

2 The parties do not believe there is any need for an expedited schedule.

3 **18. Scheduling**

4 On November 12, 2009, the Court issued an Order For Pretrial Preparation (Dkt. 81) that
5 governs the case through trial.

6 **19. Trial**

7 This case will be tried before a jury. Trial is scheduled to begin November 1, 2010. The
8 parties expect that the trial will last for 7-9 days.

9 **20. Disclosure of Non-party Interested Entities or Persons**

10 Both Google and Netlist have filed the "Certification of Interested Entities or Persons"
11 required by Civil L.R. 3-16. No non-party interested entities or persons exist at this time.

12 **21. Other issues**

13 At this time, the parties are not aware of any other issues that may facilitate the just,
14 speedy and inexpensive disposition of this matter.

15 Dated: February 22, 2010

KING & SPALDING LLP

17
18 By: /s/ Geoffrey M. Ezgar
GEOFFREY M. EZGAR

19 Attorneys for Plaintiff
20 GOOGLE INC.

21 Dated: February 22, 2010

22 STEVEN R. HANSENLEE TRAN & LIANG
23 APLC

24
25 By: /s/ Steven R. Hansen
STEVEN R. HANSEN

26 Attorneys for Defendant
27 NETLIST, INC.
28

DECLARATION OF CONSENT

Pursuant to General Order No. 45, Section X(B) regarding signatures, I attest under penalty of perjury that concurrence in the filing of this document has been obtained from Steven R. Hansen.

Dated: February 22, 2010

KING & SPALDING LLP

By: /s/ Geoffrey M. Ezgar
GEOFFREY M. EZGAR

Attorneys for Plaintiff
GOOGLE INC.

PURSUANT TO STIPULATION, IT IS SO ORDERED.

Dated: February __, 2010

SAUNDRA BROWN ARMSTRONG
United States District Judge