

Exhibit 2

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13 UNITED STATES DISTRICT COURT FOR THE
14 NORTHERN DISTRICT OF CALIFORNIA
15 OAKLAND DIVISION

17 GOOGLE INC.

18 Plaintiff,

19 v.

20 NETLIST, INC.,

21 Defendant.

Case No. C08-04144 SBA
[Related to Case No: C 09-05718 SBA]

**REDACTED COPY OF PLAINTIFF
GOOGLE INC.'S OPPOSITION TO
DEFENDANT NETLIST INC.'S MOTION
FOR LEAVE TO AMEND
INFRINGEMENT CONTENTIONS
(PATENT L.R. 3-1 AND 3-6)**

1 **MEMORANDUM OF POINT AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Days before the close of fact discovery, Netlist, Inc. (“Netlist”) served amended
4 infringement contentions seeking to *quadruple* the number of patent claims it asserts against
5 Google Inc. (“Google”). Netlist’s attempt to expand the instant case at this late hour is particularly
6 egregious in light of its access to relevant facts that have been available to it for months, if not
7 years—through Google’s document production in early 2009, through publicly available
8 information in existence at the outset of this action, and even through Netlist’s own actual
9 knowledge of relevant events as of 2007. Netlist’s lack of diligence precludes a showing of good
10 cause and therefore warrants denial of its motion. Moreover, the addition now of six new claims
11 would itself drastically expand the case and would prejudice Google. Netlist’s delay until the
12 close of fact discovery compounds that prejudice by preventing Google from developing an
13 invalidity case with respect to these new claims. At bottom, this is precisely the type of “shifting
14 sands” approach to infringement contentions that this Court’s Patent Local Rules are designed to
15 avoid. *O2 Micro Int’l Ltd. v. Monolithic Power Sys., Inc.*, 467 F.3d 1355, 1364 (Fed. Cir. 2006)
16 (quoting *Atmel Corp. v. Info. Storage Devices, Inc.*, No. C 95-1987 FMS, 1998 WL 775115, at *2
17 (N.D. Cal. 1998)).

18 **II. STATEMENT OF RELEVANT FACTS**

19 Netlist filed its “Amended Disclosure of Asserted Claims and Preliminary Infringement
20 Contentions (Patent L.R. 3-1 and 3.2)” (“PICs”) in April 2009. At that time, Netlist asserted
21 claims 1 and 11. The parties completed claim construction briefing for the disputed terms of those
22 two claims on September 22, 2009, and this Court issued its *Markman* order on November 12,
23 2009. Netlist served its Second Amended Infringement Contentions on March 18, 2010. Google
24 has objected to Netlist’s tardy amendment of its contentions.

25 Netlist focuses its motion largely on the supposed discovery of new evidence regarding
26 Advanced Memory Buffers (“AMBs”), which Netlist accuses as the “logic element” component.

1 Netlist Br. at 6. Netlist, however, has had detailed knowledge of AMBs for years. Netlist
2 participated in the standard-setting process for the component, which was led by Intel, [REDACTED]

3 [REDACTED]
4 [REDACTED]
5 [REDACTED] Netlist also [REDACTED]
6 [REDACTED] has had access to publicly available

7 information on the subject. [REDACTED]
8 [REDACTED]

9 [REDACTED] In addition, Intel originally propounded
10 the (publicly available) standard for 4-rank AMBs and developed the logic for the AMBs during a
11 standard-setting process in which Netlist was an active participant. [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]

16 In contrast to Netlist's detailed knowledge of AMBs, Google, as an acquirer of 4-Rank
17 FBDIMMs and the AMBs they include, has only limited knowledge of the products. For example,
18 it is undisputed that Google does not manufacture AMBs. Rather, AMBs are made by component
19 manufacturers such as IDT and NEC. Netlist waited until just recently to subpoena these
20 manufacturers. (Ex. 5, Netlist's Amended Notice of Subpoena to IDT dated March 15, 2010; Ex.
21 6, Netlist's Amended Notice of Subpoena to NEC Electronics dated March 8, 2010). And Netlist
22 has not subpoenaed or sought any discovery from Intel, despite Intel's foundational role in the
23 standard-setting process for the 4-Rank FBDIMM standard at the heart of this action.

24 Google has been forthcoming about its limited knowledge and understanding of the
25 accused 4-Rank FBDIMM products. Moreover, between May and July of 2009, Google produced

26 _____
27 ¹ All references to "Ex. " refer to Exhibits to the Declaration of Allison Altersohn filed
concurrently herewith.

1 hundreds of thousands of documents, including technical documents directly relevant to Netlist's
2 present motion. (Ex. 7, letters confirming production of GNET000001-002313 dated April 13,
3 2009 (7A); production of GNET002314-046640 dated May 14, 2009 (7B); production of
4 GNET046641-258308 dated June 10, 2009 (7C), and production of GNET258309-273742 dated
5 July 16, 2009) (7D)). [REDACTED]

6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED] The documents also included
10 identifications of IDT and NEC as suppliers of AMBs. [REDACTED] In
11 keeping with its ongoing duty and in response to specific document requests made by Netlist in
12 December 2009, Google produced additional documents in February and March of 2010, but those
13 documents do not relate to the technical operation of AMBs.

14 III. ARGUMENT

15 This Court's Patent Local Rules "are designed to require parties to crystallize their theories
16 of the case early in the litigation and to adhere to those theories once they have been disclosed."
17 *CBS Interactive, Inc. v. Etilize, Inc.*, 257 F.R.D. 195, 201 (N.D. Cal. 2009) (citation and quotation
18 marks omitted). A party may amend its infringement contentions "only by order of the Court
19 upon a timely showing of good cause." Patent L.R. 3-6. Good cause exists only if the moving
20 party has been diligent and the non-moving party is not unduly prejudiced. *Id.*; see also *CBS*
21 *Interactive*, 257 F.R.D. at 201. The party seeking to amend its infringement contentions bears the
22 burden of establishing its diligence. *CBS Interactive*, 257 F.R.D. at 201.

23 A. Netlist Has Failed To Demonstrate Good Cause For Amending Its Disclosure 24 Of Asserted Claims

25 Netlist has not carried its burden to establish the requisite diligence for amending its
26 infringement contentions. Netlist had at least nine months, beginning from the CMC on January
27

1 28, 2009 and including at least two months after production of Google's technical documents, to
2 take third-party discovery and to depose Google's technical staff in advance of the *Markman*
3 hearing. (See Ex. 7 (showing Ex. 8 and Ex. 9 were produced no later than June 10, 2009)). In
4 other words, Netlist had information related to these claims "months before it filed its current
5 motion." *Monolithic Power Sys., Inc. v. O2 Micro Int'l Ltd.*, No. C 08-04567 CW, 2009 WL
6 3353306, at *2 (N.D. Cal. Oct. 16, 2009). In fact, Google's sizeable document production, which
7 Netlist admits included "hundreds of thousands of pages," (Netlist Br. at 4), occurred mainly
8 between May and July of 2009. (Ex. 7). If Netlist ever had a basis to amend its infringement
9 contentions, the appropriate time was then. The production was certainly not so large as to
10 preclude review in a reasonable period of time. By waiting essentially until the close of discovery,
11 Netlist did not act diligently and therefore has not shown good cause to amend its infringement
12 contentions to add six new claims. See *Monolithic Power Sys.*, 2009 WL 3353306, at *2.

13 Netlist primarily seeks to justify its late motion by attempting to shift the responsibility for
14 its delay to Google. But it was Netlist that waited until after the Court had issued its Order on
15 Claim Construction to even begin pursuing in earnest the deposition testimony it now seeks to rely
16 on. Tellingly, Netlist gives no reason for this delay.

17 Instead, Netlist points to Google's responses to discovery requests in which Google stated
18 that it lacked sufficient knowledge to respond. Netlist Br. at 4. But Google's lack of knowledge
19 undermines rather than advances Netlist's position. Google had (and continues to have)
20 insufficient knowledge because it neither designed nor manufactured the components at issue—the
21 AMBs, which are being accused as the "logic element" of the asserted claims. [REDACTED]

22 [REDACTED]
23 [REDACTED] Netlist had every reason and opportunity to seek
24 discovery from these third parties earlier in the case, and it certainly had no reason to wait until
25 after the Court's *Markman* order to take third party discovery or to pursue in earnest the
26 deposition of Mr. Sprinkle.