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

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

Attorneys for Plaintiff
NETLIST, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

GOOGLE INC., Plaintiff, v. NETLIST, INC. Defendant.	CASE NO. C08 04144 SBA [Related to civil Action No. C09-05718 SBA] **DEFENDANT NETLIST, INC.'S OPPOSITION TO GOOGLE INC'S MOTION TO SHORTEN TIME**

Defendant and Counterclaimant Netlist, Inc. ("Netlist") hereby opposes Plaintiff and Counterdefendant Google Inc.'s ("Google") motion to shorten time on its Motion to Stay Pending Reexamination of U.S. Patent No. 7,289,386 (the "Motion to Stay").

ARGUMENT

I. GOOGLE CANNOT SHOW SUBSTANTIAL HARM OR PREJUDICE FROM HAVING ITS MOTION TO STAY HEARD ON THE SCHEDULE IMPOSED BY THE LOCAL RULES

Google has not made the showing required to shorten time on its Motion to Stay under this Court's Local Rules. According to the Court's calendar, the next available date for a hearing on Google's Motion to Stay is October 26, 2010. The parties currently have three (3) summary judgment motions scheduled to be heard on September 14, 2010. The motions were filed in June and were originally scheduled to be heard on July 27, 2010. *See* Dkt. Nos. 141, 150 and 172. However, Google now seeks to rush its Motion to Stay by asking the Court to add it as a fourth motion to be heard on September 14, 2010. Google's request should be denied because Google has made no showing of good cause for shortening time and because the briefing schedule requested by Google would deprive Netlist of meaningful time to oppose the Motion to Stay.

Under Local Rule 6-3(a)(3), a party seeking an order shortening time on a motion must identify the substantial harm or prejudice that would occur if the Court did not change the time. Google cannot make the required showing. The only harm identified by Google is that the "Motion to Stay should be heard as soon as practically possible so that the parties and especially the Court can avoid expending significant work in preparing for the remaining portions of the this case". Motion p. 1. Google's argument presupposes that its reexamination will

"resolve all issues in the litigation" and result in the cancellation of the asserted Netlist claims. Otherwise, the "work" that Google references will be *deferred*, not avoided. The Patent Office has now issued a first Office Action based on the references cited by Google. Taylor Decl., ¶2, Exh. "A". However, Netlist has two months to respond to the Office Action and, if necessary, the right to appeal an adverse decision to the Board of Patent Appeals and Interferences, and ultimately, the Federal Circuit Court of Appeals. *Id.;* 35 U.S.C. §§ 134, 141, 415. If the references were as strong as Google would have the Court believe, Google would have filed a Motion for Summary Judgment of Invalidity based on the prior art months ago. It did not do so. Instead, after taking written discovery of Netlist and questioning Netlist's inventors and expert about the prior art at deposition, Google realized that it was *unlikely* to prevail on its prior art invalidity arguments. Thus unsatisfied with the results in this forum, Google sought another bite at the apple in the Patent Office.

Further, Google has raised invalidity challenges in this lawsuit that cannot be resolved in the reexamination proceeding. Google filed a Motion for Summary Judgment of Invalidity based on the written description requirement of 35 U.S.C. § 112, ¶ 1. *See* Dkt. No. 150. Invalidity under 35 U.S.C. § 112, ¶ 1 *cannot* be decided in a reexamination proceeding. By statute, reexamination proceedings may only consider invalidity of issued patent claims based on "patents or printed publications." 35 U.S.C. §§ 301 and 311. *See also*, 37 C.F.R. § 1.906 (a) and (c) (limiting consideration of the patentability requirements of 35 U.S.C. § 112 to "subject matter *added or deleted in the reexamination proceeding*") (emphasis added). Thus, the reexamination proceeding will not even resolve all of Google's invalidity challenges, much less the entire lawsuit, further indicating that even with a stay—at best—work on this lawsuit will be deferred, not avoided.

Google could have sought reexamination instead of filing this lawsuit. Instead, it consumed the resources of this Court for two years and forced Netlist to

defend its patent in this forum. Netlist has devoted substantial resources to litigating this case and has distinguished the prior art asserted by Google from the asserted patent claims. Contrary to Google's assertions, a stay would unduly prejudice and impose a clear tactical disadvantage on Netlist. This type of manipulation of the Federal Courts should not be tolerated.

Finally, Google's requested hearing date of September 14, 2010 would unnecessarily deprive Netlist of adequate time to respond to Google's Motion to Stay. Under Local Rule 6-3(c) and Fed. R. Civ. P. 6, Netlist's opposition to this Motion to Shorten Time is due on September 1, 2010; yet under Google's proposed schedule, Netlist's Opposition to the Motion to Stay would be due on September 3, 2010, merely two days later. Such a brief time period to prepare on opposition to a motion seeking to stay a significant action shortly before trial is severely prejudicial to Netlist. Given the lack of any compelling reason for inflicting such prejudice on Netlist, the Court should hear Google's Motion to Stay on its normal schedule.

CONCLUSION

For the foregoing reasons, Google's Motion to Shorten Time should be denied.

DATED: September 1, 2010 LEE TRAN & LIANG APLC

By: /s/ Daniel J. Taylor
Daniel J. Taylor
Attorneys for Plaintiff NETLIST, INC.