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 22 NETLIST, INC.

23
 24 UNITED STATES DISTRICT COURT
 25 NORTHERN DISTRICT OF CALIFORNIA
 26 OAKLAND DIVISION
 27

28 GOOGLE, INC.,

Plaintiff,

vs.

NETLIST, INC.,

Defendant.

CASE NO. C-08-04144 SBA

[Related to CASE NO. C-09-05718 SBA]

**DEFENDANT NETLIST, INC.'S
 STATEMENT OF NON-OPPOSITION TO
 GOOGLE'S MOTION TO STAY**

Judge: Hon. Sandra Brown Armstrong

AND RELATED COUNTERCLAIMS.

1 Netlist does not oppose Google's motion to stay this case until the United States Patent
2 and Trademark Office concludes its *Inter Partes* Reexamination of Netlist's '386 patent. Netlist
3 also believes that it is in the best interests of judicial economy and conserving the parties'
4 resources to do so.

5 However, for the record, Netlist does not agree with Google's other arguments in support
6 of its motion. Google's motion to stay is untimely as its request for reexamination could have
7 been filed at the outset of this litigation, instead of a few months before the trial date. Indeed,
8 Google chose to preemptively file a declaratory judgment action in this Court on August 29, 2008
9 in an attempt to invalidate the '386 Patent. Google likely performed an analysis at that time to
10 determine the nature of its invalidity case and also to determine which forum would be most
11 favorable to Google's interests. Google could have easily decided at that time in the summer of
12 2008 to pursue a reexamination of the '386 Patent, but Google chose to initiate litigation in this
13 Court instead.

14 Furthermore, as Google has been aware of all of the alleged prior art cited in its
15 reexamination request since at least April of 2009,¹ Google's feeble attempt to explain its failure
16 to file its reexamination request at an earlier date strains all credibility. If its prior art invalidity
17 arguments were as strong as Google would have this Court believe, Google would have filed a
18 summary judgment motion of invalidity based on the prior art. Instead, it retreated from the
19 forum of its choosing at the eleventh hour to seek refuge in the Patent Office.

20 While Netlist takes serious issue with Google's excuse for its delay, and with the great
21 inconvenience it has caused to Netlist, Netlist agrees that considerations of judicial economy and
22 the parties' resources favor a stay of this matter until the pending reexamination of the '386
23 patent is concluded, and the validity of the patent confirmed. At that time, Google will be

24 ¹ Google's reexamination request cites five documents that are alleged to be prior art and all can
25 also be found in Google's invalidity contentions from April 2009: 1) U.S. Patent No. 4,368,515;
26 2) U.S. Patent No. 6,209,074; 3) U.S. Patent No. 6,414,868; 4) U.S. Patent Application No.
27 2006/0117152; and 5) an article entitled "Programmable Logic: What's it to Ya?" by Michael
28 Barr. See Reexamination Request attached as Exh. 2 to the Declaration of Allison Altersohn in
Support of Google Inc.'s Motion to Stay Pending Reexamination of U.S. Patent No. 7,289,386.

