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17
 18 UNITED STATES DISTRICT COURT
 19 NORTHERN DISTRICT OF CALIFORNIA
 20 OAKLAND DIVISION

21 GOOGLE, INC.,

22 Plaintiff,

23 v.

24 NETLIST, INC.,

25 Defendant.

Case No. 08-04144 SBA

**[PROPOSED] STIPULATED
 PROTECTIVE ORDER**

26
 27 To expedite the flow of discovery materials, to facilitate the prompt resolution of disputes
 28 over confidentiality of discovery materials, to adequately protect information the parties are

1 entitled to keep confidential, to ensure that only materials the parties are entitled to keep
2 confidential are subject to such treatment, and to ensure that the parties are permitted reasonably
3 necessary uses of such materials in preparation for and in the conduct of trial, pursuant to Fed. R.
4 Civ. P. 26(c), it is HEREBY ORDERED THAT:

5 **INFORMATION SUBJECT TO THIS ORDER**

6 Discovery materials produced in this case may be labeled as one of three categories:
7 CONFIDENTIAL, CONFIDENTIAL ATTORNEYS' EYES ONLY and RESTRICTED
8 CONFIDENTIAL - SOURCE CODE, as set forth in Items A-C below. All three of the identified
9 categories of information shall be identified collectively in this Order by the title "Protected
10 Information." Any documents derived from or containing "Protected Information" must also be
11 designated with the appropriate category of confidentiality, according to the terms of this Order.
12 Any discovery materials produced in this lawsuit as CONFIDENTIAL, CONFIDENTIAL
13 ATTORNEYS' EYES ONLY, or RESTRICTED CONFIDENTIAL - SOURCE CODE may be
14 used only for purposes of this litigation.

15 **A. Information Designated as "CONFIDENTIAL INFORMATION"**

16 1. For purposes of this Order, "CONFIDENTIAL INFORMATION" shall mean all
17 information or material produced for or disclosed to a Requesting Party that the Producing Party,
18 including any party to this action and any non-party producing information or material voluntarily
19 or pursuant to a subpoena or a court order, considers to constitute or to contain trade secrets or
20 other confidential research and development, technical, sales, marketing, financial, personnel,
21 customer, vendor, or other commercial information, whether embodied in physical objects,
22 documents, or the factual knowledge of persons, and which has been so designated by the
23 Producing Party.

24 2. Any document or tangible thing containing or including any CONFIDENTIAL
25 INFORMATION may be designated as such by the Producing Party by marking it
26 "CONFIDENTIAL" prior to or at the time copies are furnished to the Requesting Party.

27 3. All CONFIDENTIAL INFORMATION not reduced to documentary, tangible or
28 physical form or which cannot be conveniently designated as set forth in paragraph 2, shall be

1 designated by the Producing Party by informing the Requesting Party of the designation in
2 writing.

3 4. Except as otherwise provided elsewhere in this protective order and/or in any
4 supplemental protective order entered in this matter, any documents (including physical objects)
5 made available for inspection by counsel for the Requesting Party prior to producing copies of
6 selected items shall initially be considered, as a whole, to constitute CONFIDENTIAL
7 ATTORNEYS' EYES ONLY information and shall be subject to this Order. Thereafter, the
8 Producing Party shall have a reasonable time to review and designate the appropriate documents
9 as CONFIDENTIAL, CONFIDENTIAL ATTORNEYS' EYES ONLY or RESTRICTED
10 CONFIDENTIAL - SOURCE CODE prior to furnishing copies to the Requesting Party.

11 5. The following are examples of information that is not CONFIDENTIAL
12 INFORMATION:

- 13 a. Published advertising materials;
- 14 b. Any information which is or, after its disclosure to a Requesting Party,
15 becomes part of the public domain as a result of publication not involving a violation of this
16 Order;
- 17 c. Any information that the Requesting Party can show by written records
18 was already known to it prior to the disclosure, provided that it was either 1) received from the
19 Producing Party and was not received under an obligation of confidentiality to the Producing
20 Party, or 2) received from a source who obtained the information lawfully and under no
21 obligation of confidentiality to the Producing Party;
- 22 d. Any information which the Requesting Party can show by written
23 records was received by it after the disclosure from a source who obtained the information
24 lawfully and under no obligation of confidentiality to the Producing Party; and
- 25 e. Any information which the Requesting Party can show was
26 independently developed by it after the time of disclosure by personnel who did not have access
27 to the Producing Party's CONFIDENTIAL INFORMATION.

28

1 6. Documents designated CONFIDENTIAL and information contained therein shall
2 be available only to:

3 a. Outside litigation counsel of record and supporting personnel employed
4 in or by the law firm(s) of outside litigation counsel of record, such as attorneys, paralegals, legal
5 translators, legal secretaries, legal clerks, commercial copy vendors, and shorthand reporters;

6 b. Technical advisers and their necessary support personnel, subject to the
7 provisions of paragraphs 15-20 herein, and who have signed the form attached hereto as
8 Attachment A;

9 c. Up to two (2) in-house counsel with responsibility for managing this
10 litigation, and up to five (5) non-attorney officers, directors, and employees to whom disclosure is
11 reasonably necessary for this litigation and who have signed the form attached hereto as
12 Attachment A;

13 d. The Court, its personnel and stenographic reporters (under seal or with
14 other suitable precautions determined by the Court);

15 e. Independent legal translators retained to translate in connection with this
16 action; independent stenographic reporters and videographers retained to record and transcribe
17 testimony in connection with this action;

18 f. Graphics, translation, or design services retained by counsel for purposes
19 of preparing demonstrative or other exhibits for deposition, trial, or other court proceedings in the
20 action; non-technical jury or trial consulting services, not including mock jurors, who have signed
21 the form attached hereto as Attachment A; and

22 g. With respect to a particular document, an individual who is shown on the
23 face of the document to have been an author, source, or recipient of the document.

24 **B. Information Designated “CONFIDENTIAL ATTORNEYS' EYES ONLY”**

25 7. The CONFIDENTIAL ATTORNEYS' EYES ONLY designation is reserved for
26 CONFIDENTIAL INFORMATION that constitutes commercially sensitive competitive
27 information, the disclosure of which is likely to cause harm to the competitive position of the
28 Producing Party; CONFIDENTIAL information obtained from a nonparty pursuant to a current

1 Nondisclosure Agreement ("NDA"); and settlement agreements or settlement communications. In
2 determining whether information should be designated as CONFIDENTIAL ATTORNEYS'
3 EYES ONLY, each party agrees to use such designation only in good faith.

4 8. Documents designated CONFIDENTIAL ATTORNEYS' EYES ONLY and
5 information contained therein shall be available only to:

6 a. Outside litigation counsel of record and supporting personnel employed
7 in the law firm(s) of outside litigation counsel of record, such as attorneys, paralegals, legal
8 translators, legal secretaries, legal clerks, commercial copy vendors, and shorthand reporters;

9 b. Technical advisers and their necessary support personnel, subject to the
10 provisions of paragraphs 15-20 herein, who have signed the form attached hereto as Attachment
11 A;

12 c. The Court, its personnel and stenographic reporters (under seal or with
13 other suitable precautions determined by the Court);

14 d. Independent legal translators retained to translate in connection with this
15 action; independent stenographic reporters and videographers retained to record and transcribe
16 testimony in connection with this action;

17 e. Graphics, translation, or design services retained by counsel for purposes
18 of preparing demonstrative or other exhibits for deposition, trial, or other court proceedings in the
19 action; non-technical jury or trial consulting services, not including mock jurors, who have signed
20 the form attached hereto as Attachment A; and

21 f. With respect to a particular document, an individual who is shown on the
22 face of the document to have been an author, source, or recipient of the document.

23 **C. Information Designated "RESTRICTED CONFIDENTIAL - SOURCE CODE"**

24 9. Documents or other things that are designated CONFIDENTIAL
25 INFORMATION and contain a party's source code may be designated "RESTRICTED
26 CONFIDENTIAL-SOURCE CODE", if they comprise or include confidential, proprietary and/or
27 trade secret computer code in source or other human-readable form (hereinafter "source code").

28 Nothing in this Order shall obligate the parties to produce any source code or act as an admission

1 that any particular source code is discoverable. However, if material designated as
2 RESTRICTED CONFIDENTIAL—SOURCE CODE is produced, it shall be subject to the
3 following provisions.

4 10. Any source code produced shall be produced as it is used or kept in the ordinary
5 course of business, unless otherwise agreed to by the parties, provided, however, that said source
6 code must be produced in searchable format.

7 11. Only those individuals identified in Paragraph 8 of this Order shall be permitted to
8 participate in the inspection of or otherwise review information designated as “RESTRICTED
9 CONFIDENTIAL – SOURCE CODE.”

10 12. The Producing Party shall make materials designated as RESTRICTED
11 CONFIDENTIAL —SOURCE CODE available for inspection in electronic format at the
12 Redwood City office of Fish & Richardson P.C. (in the case of production by Google) or at the
13 Palo Alto office of Morrison & Foerster LLP (in the case of production by Netlist). Such
14 inspection of materials designated as RESTRICTED CONFIDENTIAL —SOURCE CODE is
15 subject to the following requirements:

16 a. Said source code shall be made available during regular business hours
17 (weekdays, 8:00 a.m. to 6:00 p.m. local time) on 24 hours notice. Notices requesting inspection
18 shall include a list of names of persons who will view the source code. Access from 6:00 p.m.
19 through 10:00 p.m. local time on weekdays shall be provided so long as notice of such need is
20 provided to the Producing Party not later than 4:00 p.m. local time on the preceding day. Access
21 will also be provided on Saturdays and Sundays from 8:00 a.m. to 6:00 p.m. local time, so long as
22 notice is provided to the Producing Party not later than 12:00 p.m. on the Friday before the
23 weekend for which access is required. For purposes of this subparagraph, notice is complete
24 upon the sending of an e-mail requesting inspection or upon actual notice via mail. E-mail notice
25 must be sent to each lawyer and paralegal appearing on a list provided by the other party to
26 receive such notice.

27 b. Materials designated as RESTRICTED CONFIDENTIAL —SOURCE
28 CODE shall be made available by the Producing Party to the Requesting Party’s outside counsel

1 and/or Technical Advisors in a private room on a secured computer (“Source Code Computer”)
2 without Internet access or network access to other computers, as necessary and appropriate to
3 prevent and protect against any unauthorized copying, transmission, removal or other transfer of
4 any source code outside or away from the Source Code Computer. The Producing Party shall be
5 obligated to install such tools or programs as necessary to review and search the code produced
6 on the platform produced. The Requesting Party's outside counsel and/or Technical Advisors
7 may install on the Source Code Computer commercially available licensed software tools for
8 viewing and searching source code.

9 c. The Producing Party shall provide two “stand-alone” computers for use
10 by the Requesting Party. Subject to the other provisions of this Order, the Requesting Party may
11 also bring with it laptop computers. The Producing Party shall provide either wired or wireless
12 internet access.

13 d. The Requesting Party’s outside counsel and/or Technical Advisors shall
14 be entitled to take notes relating to the source code but may not copy substantial portions (i.e., no
15 more than three consecutive lines and no more than thirty cumulative lines) of the source code
16 into the notes. No copies of the source code may leave the room in which the source code is
17 inspected except as otherwise provided herein, and no other written or electronic record of the
18 source code is permitted except as otherwise provided herein. Other than as provided explicitly
19 in this Order, the Requesting Party shall not transmit any source code in any way from the
20 Producing Party’s inspection room.

21 e. The Producing Party shall make available a laser printer with
22 commercially reasonable printing speeds for on-site printing during inspection of the code. The
23 Requesting Party may print portions of the code as necessary to facilitate the Requesting Party’s
24 preparation of the case, including but not limited to when necessary to prepare any filing with the
25 Court or to serve any pleadings or other papers on any other party; to prepare internal attorney
26 work product materials; or to prepare other necessary case materials such as testifying expert
27 reports, consulting expert written analyses, and related drafts and correspondence.

28

1 f. Any pages printed by the Requesting Party shall be Bates numbered and
2 labeled “RESTRICTED CONFIDENTIAL – SOURCE CODE”, and shall be printed in duplicate,
3 with one Bates numbered printout provided to the Producing Party.

4 g. The Requesting Party may make additional paper copies of source code
5 printed pursuant to paragraph 12(f), not including copies attached to court filings, as reasonably
6 necessary to facilitate the Requesting Party’s preparation of the case. The Requesting Party shall
7 maintain a log of all copies of the source code that are provided to any person qualified under
8 Paragraph 8 above. The log shall include the names of the recipients and reviewers of copies and
9 locations where the copies are stored. The log shall be provided by the Requesting Party to the
10 Producing Party at the conclusion of this litigation. If the Producing Party believes in good faith
11 that it needs to inspect the log during the pendency of the litigation, it shall request production of
12 the log from the Requesting Party. If the Requesting Party declines to produce the log, the
13 Producing Party may move the Court for an order compelling such production. In any such
14 motion, it shall be the Producing Party’s burden to demonstrate that its need for access to the log
15 outweighs the Receiving Party’s interest in protecting privilege or work product immunity, to the
16 extent that either applies.

17 h. The Producing Party may observe all entrances and exits from the source
18 code viewing room, but shall not otherwise monitor the Receiving Party during its review of
19 source code.

20 i. Beginning one week prior to the beginning of trial and continuing
21 through the end of trial, access to source code made available for inspection under this Order shall
22 be provided at counsel for the Producing Party in Oakland, California, under the same conditions
23 and with the same limitations and restrictions as provided herein.

24 j. Provided that it complies with Paragraph 25 of this Order, the
25 Requesting Party may include excerpts of source code in a pleading, exhibit, expert report,
26 discovery document, deposition transcript, other Court document, or any drafts of these
27 documents (“Source Code Documents”). The Requesting Party shall only include such excerpts
28 as are reasonably necessary for the purposes for which such part of the source code is used. To

1 the extent portions of source code are quoted in a Source Code Document, either (1) the entire
2 document will be stamped and treated as RESTRICTED CONFIDENTIAL – SOURCE CODE or
3 (2) those pages containing quoted source code will be separately bound, and stamped and treated
4 as RESTRICTED CONFIDENTIAL – SOURCE CODE.

5 k. The Requesting Party (including its outside counsel of record and/or
6 Technical Advisers) shall maintain and store any paper copies of the source code in a manner that
7 prevents duplication of or unauthorized access to the source code, including, without limitation,
8 storing the source code in a locked room or cabinet at all times when it is not in use. Subject to
9 the provisions of this Order, paper copies of source code may be stored by any person authorized
10 to review materials under Paragraph 8 at that person’s place of business or home office.

11 l. Except as provided in this sub-paragraph 10(l), the Requesting Party
12 may not create electronic images, or any other images, of the source code from a paper copy for
13 use on a computer (e.g., may not scan the source code to a PDF, or photograph the code). The
14 Requesting Party may create an electronic copy or image of selected portions of the source code
15 only when reasonably necessary to prepare any filing with the Court or to serve any pleadings or
16 other papers on any other party; to prepare internal attorney work product materials; or to prepare
17 other necessary case materials such as testifying expert reports, consulting expert written
18 analyses, and related drafts and correspondences. Images or copies of source code shall not be
19 included in correspondence between the parties (references to production numbers shall be used
20 instead) and shall be omitted from pleadings and other papers except to the extent permitted
21 herein. The Requesting Party may create an electronic image of portions of relevant source code
22 files produced by the Producing Party (or copies thereof) only when the electronic file containing
23 such image has been encrypted using commercially reasonable encryption software including
24 password protection; pleadings, briefs, and other work product containing excerpts of source code
25 need not be encrypted. The communication and/or disclosure of electronic files containing any
26 portion of source code shall at all times be limited to individuals who are authorized to see source
27 code under the provisions of this Protective Order. Electronic copies of source code (excluding
28 excerpts contained in pleadings, briefs and other work product) shall be included on the log

1 required in sub-paragraph 12(g). All electronic copies must be labeled "RESTRICTED
2 CONFIDENTIAL - SOURCE CODE."

3 m. Subject to Paragraph 25 and other applicable provisions of this Order,
4 the Producing Party agrees to make source code available at those depositions where the
5 Requesting Party requests such source code to be available.

6 **PROSECUTION BAR**

7 13. "PROSECUTION BAR" materials refers to materials produced in this lawsuit and
8 designated as CONFIDENTIAL ATTORNEYS' EYES ONLY or RESTRICTED
9 CONFIDENTIAL—SOURCE CODE. However, the following documents and materials shall
10 not be considered or classified as PROSECUTION BAR materials: (i) publicly available
11 publications, including patents and published patent applications; (ii) materials regarding third
12 party systems or products that were publicly known, on sale, or in public use; (iii) information
13 that is otherwise publicly available; and (iv) documents and information related solely to damages
14 or reasonably royalty rates.

15 14. Any person reviewing any PROSECUTION BAR materials produced by any party
16 shall not, for a period commencing upon receipt of such information and ending one year
17 following the conclusion of this case (including any appeals) engage in any PROSECUTION
18 ACTIVITY on behalf of a party in this case or any successor in ownership of such party, or any
19 assignee or exclusive licensee of a patent. PROSECUTION ACTIVITY shall mean: (1) prepare
20 and/or prosecute or otherwise aid in preparing or prosecuting any patent application (or portion
21 thereof); (2) prepare or otherwise aid in the drafting or amending of patent claim(s); (3) for a
22 patent application, interference, or reissue proceeding, participate on behalf of a party in this case
23 or any successor in ownership of such party, or any assignee or exclusive licensee of a patent
24 asserted in this case, or (4) provide advice, counsel or suggestions regarding claim scope and/or
25 language, embodiment(s) for claim coverage, claim(s) for prosecution, or products or processes
26 for coverage by claim(s), where each of (1) – (4) applies to any patent application (or portion
27 thereof), whether design or utility, and either in the United States or abroad, any reissue
28 application or proceeding, any opposition, or any interference of any patent or patent application

1 on behalf of a party in this case or any successor in ownership of such party, or any assignee or
2 exclusive licensee of a patent asserted in this case. Nothing in this section shall be construed as
3 preventing any attorney from challenging the validity or enforceability of any patent, including
4 without limitation in proceedings in this court or reexamination or reissue proceedings in the
5 United States or foreign patent offices. The parties expressly agree that the PROSECUTION
6 BAR set forth herein shall be personal to any attorney who reviews PROSECUTION BAR
7 material and shall not be imputed to any other persons or attorneys at the attorney's law firm or
8 company. Attorneys and staff involved in patent prosecution of claims involving methods,
9 apparatus, or systems for computer research tools for indexing, searching and/or displaying data
10 on the Internet and/or through a network shall be ethically walled, in those matters, from
11 attorneys and staff who review PROSECUTION BAR materials. Notwithstanding the foregoing,
12 the mere fact of a first attorney sending or communicating Prior Art to a second attorney, where
13 the second attorney is involved in PROSECUTION ACTIVITY shall not be construed as
14 involvement by the first attorney in PROSECUTION ACTIVITY. Prior Art shall mean (i)
15 publications, including patents and published patent applications; and (ii) materials or information
16 regarding third party systems or products that were publicly known, on sale, or in public use
17 before May 4, 1998, unless such materials are designated as PROSECUTION BAR materials by
18 such third party. This section does not apply to any attorney, patent agent, or other person
19 participating in any re-examination proceedings if such attorney, patent agent, or other person has
20 not reviewed the other party's Discovery Material designated CONFIDENTIAL ATTORNEYS'
21 EYES ONLY or RESTRICTED CONFIDENTIAL—SOURCE CODE.

22 **DISCLOSURE OF TECHNICAL ADVISERS**

23 15. Information designated by the Producing Party under any category of Protected
24 Information and such copies of this information as are reasonably necessary for maintaining,
25 defending or evaluating this litigation may be furnished and disclosed to the Requesting Party's
26 technical advisers and their necessary support personnel. The term "technical adviser" shall mean
27 an independent, outside expert witness or consultant to whom disclosure is reasonably necessary
28 for this litigation and who complies with applicable provisions of this Order.

1 16. No disclosure of Protected Information to a technical adviser or their necessary
2 support personnel shall occur until that person has accurately completed and signed the form
3 attached hereto as Attachment A, and a signed copy has been provided to the Producing Party;
4 and to the extent there has been an objection under paragraph 18, that objection is resolved as
5 discussed below.

6 17. A party desiring to disclose Protected Information to a technical adviser shall also
7 give prior written notice to the Producing Party, who shall have seven (7) business days after such
8 notice is given to object in writing. The party desiring to disclose Protected Information to a
9 technical adviser must provide the following information for each technical adviser: name,
10 address, curriculum vitae, current employer, and employment (including consulting) history for
11 the past four (4) years, and a listing of cases in which the witness has testified as an expert at trial
12 or by deposition within the preceding four years. No Protected Information shall be disclosed to
13 such expert(s) or consultant(s) until after the expiration of the foregoing notice period.

14 18. A party objecting to disclosure of Protected Information to a technical adviser
15 shall state with particularity the ground(s) of the objection and the specific categories of
16 documents that are the subject of the objection. The objecting party's consent to the disclosure of
17 Protected Information to a technical adviser shall not be unreasonably withheld.

18 19. If after consideration of the objection, the party desiring to disclose the Protected
19 Information to a technical adviser refuses to withdraw the technical adviser, that party shall
20 provide notice to the objecting party. Thereafter, the party seeking disclosure shall move the
21 Court, within seven (7) business days of giving such notice, for a ruling on the objection. A
22 failure to file a motion within the seven (7) business day period shall operate as a withdrawal of
23 the technical adviser. Although the party seeking disclosure bears the burden of moving the
24 Court for a ruling on the objection, the objecting party retains the burden of proof as set forth in
25 Paragraph 20. The parties agree to cooperate in good faith to shorten the time frames set forth in
26 this paragraph if necessary to abide by any discovery or briefing schedules.

27 20. The objecting party shall have the burden of showing to the Court that the risk of
28 harm that the disclosure would entail (under any safeguards proposed) outweighs the Requesting

1 Party's need to disclose the Protected Information to its technical adviser. Moreover, failure to
2 object to a Technical Adviser shall not preclude the non-objecting party from later objecting to
3 continued access by that Technical Adviser where facts suggesting a basis for objection could not
4 have been discovered by the objecting party or its counsel, exercising due diligence, within the
5 period for making a timely objection. A later objection to a Technical Advisor cannot be made
6 on the basis of information disclosed pursuant to Paragraphs 17-18, except to the extent that said
7 disclosure contained a material omission or misrepresentation. If a later objection is made, no
8 further Protected Information shall be disclosed to the Technical Adviser until the matter is
9 resolved by the court or the Producing Party withdraws its objection. If a later objection is made,
10 the parties shall meet and confer within three (3) business days; and, if not resolved, the
11 Producing Party may move for a protective order precluding the disclosure of the Protected
12 Information to the Technical Adviser within two (2) business days after the meet and confer.

13 **CHALLENGES TO CONFIDENTIALITY DESIGNATIONS**

14 21. The parties shall use reasonable care when designating documents or information
15 as Protected Information. Nothing in this Order shall prevent a Requesting Party from contending
16 that any documents or information designated as Protected Information have been improperly
17 designated. Unless prompt challenge is necessary to avoid foreseeable, substantial unfairness,
18 unnecessary economic burdens, or a later significant disruption or delay of the litigation, a
19 Requesting Party may at any time request that the Producing Party cancel or modify the Protected
20 Information designation with respect to any document or information contained therein

21 22. A party shall not be obligated to challenge the propriety of a designation of any
22 category of Protected Information at the time of production, and a failure to do so shall not
23 preclude a subsequent challenge thereto. Such a challenge shall be written, shall be served on
24 counsel for the Producing Party, and shall particularly identify the documents or information that
25 the Requesting Party contends should be differently designated. The parties shall use their best
26 efforts to resolve promptly and informally such disputes. If an agreement cannot be reached, the
27 Requesting Party will bear the burden of requesting that the Court cancel or modify a designation.

28

1 The burden of demonstrating the confidential nature of any information shall at all times be and
2 remain on the designating party.

3 23. Until a determination by the Court, the information in issue shall be treated as
4 having been properly designated and subject to the terms of this Order.

5 **LIMITATIONS ON THE USE OF PROTECTED INFORMATION**

6 24. All Protected Information shall be held in confidence by each person to whom it is
7 disclosed, shall be used only as allowed by the terms of this protective order, shall not be used for
8 any business purpose, and shall not be disclosed to any person who is not entitled to receive such
9 information as herein provided. All produced Protected Information shall be carefully maintained
10 so as to preclude access by persons who are not entitled to receive such information. Protected
11 Information of one defendant shall not be shown to another defendant's technical adviser without
12 prior consent of Producing Party.

13 25. Except as may be otherwise ordered by the Court, any person may be examined as
14 a witness at depositions and trial and may testify concerning all Protected Information of which
15 such person has prior knowledge. Without in any way limiting the generality of the foregoing:

16 a. A present or former director, officer, employee of a Producing Party,
17 may be examined and may testify at deposition or trial concerning all Protected Information
18 which has been produced by that party and either (1) identifies on its face the director, officer,
19 and/or employee as an author or recipient, (2) concerns a subject matter of which the director,
20 officer and/or employee has knowledge or (3) concerns a topic about which said director, officer,
21 and/or employee has been identified or designated to testify.

22 b. Non-parties may be examined or testify at deposition or trial concerning
23 any document containing Protected Information of a Producing Party which appears on its face or
24 from other documents or testimony to have been received from or communicated to the non-party
25 as a result of any contact or relationship with the Producing Party or a representative of the
26 Producing Party, but may not retain originals or copies of such Protected Information or any notes
27 or transcripts reflecting such Protected Information, other than for the limited period of time
28 necessary to review any deposition transcripts and make corrections. Any person other than the

1 witness, his or her attorney(s), or any person qualified to receive Protected Information under this
2 Order shall be excluded from the portion of the examination concerning such information, unless
3 the Producing Party consents to persons other than qualified recipients being present at the
4 examination. If the witness is represented by an attorney who is not qualified under this Order to
5 receive such information, then prior to the examination, the Producing Party shall request that the
6 attorney provide a signed statement, in the form of Attachment A hereto, that he or she will
7 comply with the terms of this Order and maintain the confidentiality of Protected Information
8 disclosed during the course of the examination. In the event that such attorney declines to sign
9 such a statement prior to the examination, the parties, by their attorneys, shall jointly seek a
10 protective order from the Court prohibiting the attorney from disclosing Protected Information.

11 26. All transcripts of depositions, exhibits, answers to interrogatories, pleadings,
12 briefs, and other documents submitted to the Court that have been designated as Protected
13 Information or which contain information so designated, shall be filed under seal in a manner
14 prescribed by the Court for such filings.

15 27. Outside attorneys of record for the parties are hereby authorized to be the persons
16 who may retrieve confidential exhibits and/or other confidential matters filed with the Court upon
17 termination of this litigation without further order of this Court, and are the persons to whom such
18 confidential exhibits or other confidential matters may be returned by the Clerk of the Court, if
19 they are not so retrieved. No material or copies thereof so filed shall be released to outside
20 counsel of record except by order of the Court or as otherwise provided for hereunder.
21 Notwithstanding the foregoing and with regard to material designated as RESTRICTED
22 CONFIDENTIAL—SOURCE CODE, the provisions of Section C (titled “Information
23 Designated Restricted Confidential – Source Code”) are controlling to the extent those provisions
24 of Section C differ from this paragraph.

25 28. Protected Information shall not be copied or otherwise produced by a Requesting
26 Party, except for transmission to qualified recipients, without the written permission of the
27 Producing Party, or, in the alternative, by further order of the Court. Nothing herein shall,
28 however, restrict a qualified recipient from making working copies, abstracts, digests and

1 analyses of Protected Information for use in connection with this litigation and such working
2 copies, abstracts, digests and analyses shall be deemed Protected Information under the terms of
3 this Order. Further, nothing herein shall restrict a qualified recipient from converting or
4 translating Protected Information (other than RESTRICTED CONFIDENTIAL - SOURCE
5 CODE material) into machine readable form for incorporation into a data retrieval system used in
6 connection with this action, provided that access to that Protected Information, in whatever form
7 stored or reproduced, shall be limited to qualified recipients.

8 29. At the request of any party, the original and all copies of any deposition transcript,
9 in whole or in part, shall be marked "CONFIDENTIAL, CONFIDENTIAL ATTORNEYS' EYES
10 ONLY and/or RESTRICTED CONFIDENTIAL—SOURCE CODE" by the reporter. This
11 request may be made orally during the deposition or in writing within twenty-one (21) days of
12 receipt of the final certified transcript. Deposition transcripts shall be treated as CONFIDENTIAL
13 ATTORNEYS' EYES ONLY until the expiration of the time to make a confidentiality
14 designation. Any portions so designated shall thereafter be treated in accordance with the terms of
15 this Order.

16 30. Where Protected Information is used at trial, it is the burden of the Designating
17 Party whose documents or materials are being used to make arrangements with the Court to
18 ensure that its Protected Information remains confidential; however, where Protected Information
19 is to be used at trial by a party other than the Designating Party, the Designating Party must be
20 notified at least 10 days before trial, so that the Designating Party is able to make arrangements
21 with the Court to ensure that its Protected Information remains confidential.

22 **NONPARTY USE OF THIS PROTECTIVE ORDER**

23 31. A nonparty producing information or material voluntarily or pursuant to a
24 subpoena or a court order may designate such material or information as Protected Information
25 pursuant to the terms of this Protective Order.

26 32. A nonparty's use of this Protective Order to protect its Protected Information does
27 not entitle that nonparty access to the Protected Information produced by any party in this case.
28

1 **NO WAIVER OF PRIVILEGE**

2 33. Nothing in this Protective Order shall require production of information that a
3 party contends is protected from disclosure by the attorney-client privilege, the work product
4 immunity or other privilege, doctrine, right, or immunity. If information subject to a claim of
5 attorney-client privilege, work product immunity, or other privilege, doctrine, right, or immunity
6 is nevertheless inadvertently or unintentionally produced, such production shall in no way
7 prejudice or otherwise constitute a waiver of, or estoppel as to, any such privilege, doctrine, right
8 or immunity. If any party inadvertently or unintentionally produces materials protected under the
9 attorney-client privilege, work product immunity, or other privilege, doctrine, right, or immunity,
10 any holder of that privilege, right, or immunity may obtain the return of those materials by
11 notifying the recipient(s) promptly after the discovery of the inadvertent or unintentional
12 production and providing a privilege log for the inadvertently or unintentionally produced
13 materials. The recipient(s) shall gather and return all copies of the privileged or immune material
14 to the Producing Party, except for any pages containing privileged markings by the recipient,
15 which pages shall instead be destroyed and certified as such by the recipient to the Producing
16 Party. Nothing herein shall prevent the Requesting Party from challenging the propriety of the
17 attorney-client privilege or work product immunity or other applicable privilege or immunity
18 designation (based on information independent of the snapped-back content of the allegedly
19 privileged materials in question) by submitting a written challenge to the Court. Notwithstanding
20 this provision, no person is required to delete information that may reside on the respective
21 person's electronic back-up systems that are over-written in the normal course of business.

22 **MISCELLANEOUS PROVISIONS**

23 34. Any of the notice requirements herein may be waived, in whole or in part, but only
24 in writing signed by an outside counsel of record for the party against whom such waiver will be
25 effective.

26 35. Inadvertent or unintentional production of documents or things containing
27 Protected Information which are not designated as one or more of the three categories of
28 Protected Information at the time of production shall not be deemed a waiver in whole or in part

1 of a claim for confidential treatment. The Producing Party shall notify the receiving parties
2 promptly in writing after the discovery of the error and, with respect to documents, provide
3 replacement pages bearing the appropriate confidentiality legend. In the event of any
4 unintentional or inadvertent disclosure of Protected Information other than in a manner authorized
5 by this Protective Order, counsel for the party responsible for the disclosure shall immediately
6 notify opposing counsel of all of the pertinent facts, and make every effort to further prevent
7 unauthorized disclosure, including retrieving all copies of the Protected Information from the
8 recipient(s) thereof, and securing the agreement of the recipients not to further disseminate the
9 Protected Information in any form. Compliance with the foregoing shall not prevent the
10 Producing Party from seeking further relief from the Court.

11 36. Within sixty (60) days after the entry of a final non-appealable judgment or order,
12 or the complete settlement of all claims asserted against all parties in this action, each party shall,
13 at the option of the Requesting Party, either return or destroy all physical objects and documents
14 which embody Protected Information it has received, and shall destroy in whatever form stored or
15 reproduced, all physical objects and documents, including but not limited to, correspondence,
16 memoranda, notes and other work product materials, which contain or refer to any category of
17 Protected Information. All Protected Information not embodied in physical objects and
18 documents shall remain subject to this Order. Notwithstanding this provision, no person is
19 required to delete information that may reside on the respective person's electronic back-up
20 systems that are over-written in the normal course of business. Notwithstanding the foregoing,
21 outside counsel shall be entitled to maintain copies of all correspondence, pleadings, motions and
22 trial briefs (including all supporting and opposing papers and exhibits thereto), written discovery
23 requests and responses (and exhibits thereto), deposition transcripts (and exhibits thereto), trial
24 transcripts, and exhibits offered or introduced into evidence at any hearing or trial, and their
25 attorney work product which refers or is related to any CONFIDENTIAL and CONFIDENTIAL
26 ATTORNEYS' EYES ONLY information for archival purposes only, except such outside counsel
27 shall not retain any RESTRICTED CONFIDENTIAL-SOURCE CODE materials. If a party
28

1 destroys Protected Information, the destruction must be by means satisfactory to the Producing
2 Party, and the party must provide a Certificate of Destruction to the Producing Party.

3 37. If at any time documents containing Protected Information are subpoenaed by any
4 court, arbitral, administrative or legislative body, the person to whom the subpoena or other
5 request is directed shall within three (3) business days give written notice thereof to every party
6 who has produced such documents and to its counsel and shall provide each such party with an
7 opportunity to object to the production of such documents. If a Producing Party does not take
8 steps to prevent disclosure of such documents within ten (10) business days of the date written
9 notice is given, the party to whom the referenced subpoena is directed may produce such
10 documents in response thereto.

11 38. This Order is entered without prejudice to the right of any party to apply to the
12 Court at any time for additional protection, or to relax or rescind the restrictions of this Order,
13 when convenience or necessity requires. Furthermore, without application to this Court, any party
14 that is a beneficiary of the protections of this Order may enter a written agreement releasing any
15 other party hereto from one or more requirements of this Order even if the conduct subject to the
16 release would otherwise violate the terms herein.

17 39. Nothing in this Order shall restrict any party to this lawsuit or its attorneys from
18 disclosing or using, in any manner and for any purpose, its own Protected Information.

19 40. Nothing in this protective order obligates a party to produce trade secrets, which
20 are neither relevant, nor necessary to prove any claim or defense at trial, such as, by way of
21 example only, infringement based on the Court's claim construction.

22 41. Subject to the restrictions of paragraphs 13-14, nothing in this Protective Order
23 shall bar counsel from rendering advice to his or her client with respect to this litigation and, in
24 the course thereof, relying upon any Protected Materials, provided that counsel does not disclose
25 Protected Materials in a manner not specifically authorized under this Protective Order.

26 42. The United States District Court for the Northern District of California, Oakland
27 Division, is responsible for the interpretation and enforcement of this Agreed Protective Order.
28 After termination of this litigation, the provisions of this Agreed Protective Order shall continue

1 to be binding except with respect to those documents and information that become a matter of
2 public record. This Court retains and shall have continuing jurisdiction over the parties and
3 recipients of the Protected Information for enforcement of the provision of this Agreed Protective
4 Order following termination of this litigation. All disputes concerning Protected Information
5 produced under the protection of this Agreed Protective Order shall be resolved by the United
6 States District Court for the Northern District of California, Oakland Division.

7 43. No party shall be required to identify on its privilege log any document or
8 communication dated on or after and/or created on or after the filing of the lawsuit, which absent
9 this provision, the party would have been obligated to so identify on said privilege log.

10 44. Testifying experts shall not be subject to discovery on any draft of their reports in
11 this case and such draft reports, notes, outlines, or any other writings leading up to an issued
12 report(s) in this litigation are exempt from discovery. In addition, all communications to and
13 from a testifying expert, and all materials generated by a testifying expert with respect to that
14 person's work, are exempt from discovery unless relied upon by the expert in forming any
15 opinions in this litigation. No discovery can be taken from any consulting expert except to the
16 extent that consulting expert has provided information, opinions or other materials to a testifying
17 expert, who then relies upon such information, opinions or other materials in forming his final
18 report, trial or deposition testimony or any opinion in this case. Materials, communications and
19 other information exempt from discovery under this Paragraph shall be treated as attorney-work
20 product for the purposes of this litigation and protective order. Nothing in this Paragraph shall be
21 construed to bar discovery from any current or former employees of any of the parties to this
22 lawsuit, or any other persons with knowledge of relevant facts; provided however that their
23 communications with testifying and/or consulting experts will be treated in accordance with this
24 paragraph.

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Dated: April 22, 2009

JAMES POOLEY
L. SCOTT OLIVER
DANIEL A. ZLATNIK
MORRISON & FOERSTER LLP

By: /s/ L. Scott Oliver
L. SCOTT OLIVER

Attorneys for Defendant
NETLIST, INC.

Dated: April 22, 2009

FISH & RICHARDSON P.C.

By: /s/ Christina D. Jordan
CHRISTINA D. JORDAN

Attorneys for Plaintiff
GOOGLE, INC.

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 L. Scott Oliver.

Dated: April 22, 2009

FISH & RICHARDSON P.C.

By: /s/ Christina D. Jordan
Christina D. Jordan

Attorneys for Plaintiff
GOOGLE, INC.

IT IS SO ORDERED.

Dated: April __, 2009

SAUNDRA BROWN ARMSTRONG
United States District Judge

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

GOOGLE, INC.,

Plaintiff,

v.

NETLIST, INC.,

Defendant.

Case No. 08-04144 SBA
**ATTACHMENT A TO
STIPULATED PROTECTIVE
ORDER**

