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 16 NETLIST, INC.

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

21 GOOGLE INC.,  
 22 Plaintiff,  
 23 v.  
 24 NETLIST, INC.,  
 25 Defendant.

Case No. C 08-04144 SBA

**AMENDED JOINT CASE  
 MANAGEMENT CONFERENCE  
 STATEMENT AND [PROPOSED] ORDER**

Date: November 12, 2009  
 Time: TBD  
 Dept.: SBA

26  
 27 AND RELATED COUNTERCLAIMS.  
 28

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

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, this Court issued a scheduling order. On June 12, 2009, the parties filed  
20 their Joint Claim Construction Statement.

21 On February 26, 2009, Netlist served its Disclosure of Asserted Claims and Infringement  
22 Contentions. On April 13, 2009, Netlist served an Amended Disclosure of Asserted Claims and  
23 Infringement Contentions, and also on April 13, Google served its Invalidity Contentions.  
24 The only motion filed to date in this case has concerned a discovery dispute. On May 19, 2009,  
25 the parties filed a letter brief with the Honorable Judge Spero, in which Netlist requested a  
26 physical inspection of one of Google’s servers, to which Google objected. A telephonic hearing  
27

1 was held on the issue on May 29, 2009. The parties submitted a proposed order concerning the  
2 scope of the inspection on June 24, 2009, which order issued on June 25, 2009.

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

4 Whether Google has infringed the '386 patent; and  
5 Appropriate damages and equitable relief for any infringement.

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

- 7 • Claim construction of terms in the '386 patent;
- 8 • Whether any or all claims of the '386 patent are invalid under 35 U.S.C. §§ 101,  
9 102, 103, or 112;
- 10 • Whether the '386 patent is unenforceable;
- 11 • Whether the claims set forth in Netlist's counterclaims are barred by waiver;
- 12 • Whether the claims set forth in Google's complaint are barred by waiver;
- 13 • Whether the claims set forth in Netlist's counterclaims are barred by Netlist's  
14 unclean hands;
- 15 • Whether the claims set forth in Google's complaint are barred by Google's unclean  
16 hands;
- 17 • Whether the claims set forth in Netlist's counterclaims are barred by estoppel;
- 18 • Whether the claims set forth in Google's complaint are barred by estoppel;
- 19 • Whether the Court should declare the case exceptional under 35 U.S.C. § 285 and  
20 award attorneys fees to the prevailing party; and
- 21 • Whether and what relief should be granted.

22 **5. Motions**

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

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

3 **6. Amendment of Pleadings**

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

6 **7. Evidence Preservation**

7 The parties' proposal for document preservation is described in Section 8, below.

8 **8. Disclosures**

9 The parties exchanged the information required by Fed. R. Civ. Proc. 26(a)(1) on February  
10 5 and 6, 2009.

11 **9. Discovery**

12 **A. Discovery Taken to Date**

- 13 • Both parties have served and responded to written discovery. The parties have met and  
14 conferred regarding their respective discovery responses.
- 15 • Both parties have started their respective document production, which is ongoing.
- 16 • Google has provided a server for inspection, per court order, and Netlist inspected the  
17 server on August 19, 2009.
- 18 • Google has deposed the named inventors, Netlist employees Jayesh Bhakta and Jeffrey  
19 Solomon. Google's position is that their depositions revealed the existence of relevant  
20 documents that had not at that point been produced during the course of this litigation,  
21 and as such the depositions should be held open to address any questions that arise in  
22 light of the production of such documents at some later date.
- 23 • Google has issued subpoenas for written discovery and depositions from third parties,  
24 and has collected documents from and taken depositions of certain of these third  
25 parties.
- 26 • Netlist has deposed one Google employee, Rick Roy, who was involved in the  
27 development of the accused four-rank FBDIMMs and who participated in meetings  
28

1 with Netlist concerning its patented technology prior to the filing of this lawsuit.  
2 Netlist's position is that Mr. Roy's deposition revealed the existence of relevant  
3 documents that have not been produced during the course of this litigation and that the  
4 deposition should be held open to address any questions that arise in light of the  
5 production of such documents at a later date.

- 6 • Netlist noticed the deposition of another Google employee, Andrew Dorsey, for  
7 November 4, 2009. Mr. Dorsey was also involved in the development of the accused  
8 four-rank FBDIMMs as well as in meetings with Netlist concerning its patented  
9 technology prior to the filing of this lawsuit. On October 30, 2009, Google informed  
10 Netlist that Mr. Dorsey would be unable to appear for deposition on November 4 and is  
11 in the process of obtaining alternative dates on which he can appear. Netlist has also  
12 informed Google of its intent to depose Rob Sprinkle, another Google employee  
13 involved in the development of the accused four-rank FBDIMMs and in meetings  
14 concerning Netlist's patented technology. Netlist was unable to depose Mr. Sprinkle  
15 on the date for which he was offered by Google and has asked Google to identify  
16 alternative dates on which he can appear.

17 **B. Anticipated Discovery**

18 Google anticipates taking the depositions of one or more Netlist witnesses under Rule  
19 30(b)(6) on topics including the sale of any products alleged to embody the patent-in-suit, Netlist's  
20 knowledge of prior art during the prosecution of the patent-in-suit, Netlist's participation in the  
21 JEDEC standards process, Netlist's licensing of the patent-in-suit and other topics related to the  
22 enforceability of the patent-in-suit and Netlist's claim for damages. Google has also noticed the  
23 deposition of three additional Netlist employees but agreed to put off the depositions pending  
24 Netlist's supplemental production of documents. Depending upon the staging of this matter, many  
25 of these depositions would be scheduled for the second phase of the case, if one is necessary.

26 Netlist anticipates deposing one or more Google witnesses under Rule 30(b)(6) on topics  
27 including the structure and operation of the accused 4-Rank FBDIMMs, damages, and willfulness.

1 Netlist also anticipates deposing additional Google employees who are identified as  
2 knowledgeable about the foregoing topics and serving additional written discovery directed to the  
3 foregoing topics. Depending on the information developed through such discovery, Netlist may  
4 seek discovery from third parties involved in the development of the components used to  
5 manufacture the accused four-rank FBDIMMs.

6 **C. Discovery Schedule**

7 The parties' proposed dates for the completion of fact and expert discovery are provided in  
8 Section 18 below.

9 **D. Discovery Limits**

10 The parties agree to the following limits on discovery.

- 11 • Maximum of 30 interrogatories, including contention interrogatories, for each  
12 party.
- 13 • Maximum of 50 requests for admission by each party, excluding those directed  
14 solely to authenticating exhibits for trial.
- 15 • Maximum of 10 non-expert depositions.
- 16 • With respect to expert reports and discovery, the parties agree that final expert  
17 reports and materials identified by the experts as relied upon in their reports are  
18 discoverable. (If an expert indicates in deposition that he or she relied upon a  
19 document or source not otherwise specified in the final report, that information is  
20 also discoverable.) Any attorney communications to or from any expert, any draft  
21 reports, and any notes of experts relating to any communication to or from an  
22 attorney are not discoverable and do not need to be logged in a privilege log.

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

24 In order to avoid discovery disputes, the parties make the following proposals concerning  
25 electronic discovery:

26 Preservation: Each party shall send a Document Retention Notice to employees it believes  
27 are likely to possess relevant, responsive electronic documents. This Document Retention Notice

1 shall request that the identified employee refrain from deleting or destroying relevant electronic  
2 documents for the pendency of the litigation. No claim for sanctions shall lie in the inadvertent  
3 deletion of electronic documents. No party shall suspend the recycling or deletion of backup  
4 tapes or backup copies of electronic documents unless and until such suspension is explicitly  
5 requested by a Requesting Party. If such a request for suspension of deletion of backups is made,  
6 the Requesting Party shall specifically identify the electronic documents that should be  
7 maintained, as well as the duration for such maintenance. The Requesting Party must pay the  
8 costs associated with maintaining said backups, although the Requesting Party can choose to  
9 rescind or modify its request for the suspension of recycling or deletion at any time.

10 Discovery and Form of Production – Google’s Proposal: The parties agree to exchange  
11 electronic discovery as single-page TIFF images with corresponding load files.

12 Discovery and Form of Production – Netlist’s Proposal: The parties agree to exchange  
13 electronic discovery as native-format files for common (e.g., Microsoft Office) applications, and  
14 for other applications, single-page TIFF images with corresponding load files. The parties shall  
15 meet and confer to distinguish common from unusual applications based on the applications at  
16 issue for each party.

17 Explanation Regarding the Parties’ Different Proposals for Discovery and Form of  
18 Production: Google and Netlist have been unable to agree on a format and process for electronic  
19 document production for the following reasons. Google’s position is that document collection and  
20 production can be managed more efficiently and cost-effectively if single-page TIFF images are  
21 used. Google also feels that discovery will be more efficient if the parties simply use a standard  
22 format for all documents, rather than meeting and conferring to identify “common applications.”

23 Netlist believes that using native format for standard applications will be significantly less  
24 expensive for the parties and will obviate the need for cumbersome databases containing TIFF  
25 files. In addition, using native format guarantees that relevant metadata and revision history  
26 information is maintained in the documents produced by the parties. Netlist suggests that the  
27

1 parties should meet and confer further on this issue, because this question is one that should not  
2 need Court intervention.

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

9 **10. Class Actions**

10 This case is not currently a class action.

11 **11. Related Cases**

12 There are no related cases.

13 **12. Relief**

14 Google seeks the following relief:

- 15 • A declaration that Google does not infringe any valid and enforceable claim of the  
16 '386 patent;
- 17 • A declaration that the '386 patent is invalid and unenforceable;
- 18 • A declaration that this case is exceptional under 35 U.S.C. § 285 and an award of  
19 its costs, disbursements, and attorney fees in connection with this case under 35  
20 U.S.C. § 285 and any other authority deemed appropriate by the Court; and
- 21 • Any other and further relief that this Court deems just, reasonable, and proper.

22 Netlist seeks the following relief:

- 23 • A judgment that Google has infringed the '386 patent;
  - 24 • A finding that such infringement was willful and deliberate;
  - 25 • Monetary damages and injunctive relief based on such infringement;
- 26  
27  
28

- A finding that this case is exceptional under 35 U.S.C. § 285 and an award of its costs, disbursements, and attorney fees in connection with this case under 35 U.S.C. § 285 and any other authority deemed appropriate by the Court; and
- Any other and further relief that this Court deems just, reasonable, and proper.

**13. Settlement and ADR**

The parties have met and conferred in compliance with ADR L.R. 3-5 and reached a stipulation pursuant to Civil L.R. 16-8 and ADR L.R. 3-5 to participate in private mediation. The parties filed this stipulation with the Court on December 12, 2008. The parties held a private mediation with Anthony Piazza in March, 2009, and were unable to resolve the case.

The parties will meet and confer regarding additional steps, formal or informal, that may lead to a rapid, efficient settlement of this case, but no further mediation is scheduled at this time.

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

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

**15. Other References**

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

**16. Narrowing of Issues**

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

**17. Expedited Schedule**

The parties' proposed schedule can be found below. The parties do not believe there is any need for an expedited schedule.

**18. Scheduling**

The parties have fully briefed claim construction in accordance with the Patent Local Rules and this Court's scheduling orders, and now stand ready to conduct a technology tutorial and claim construction hearing on November 12, 2009.

1 Google believes that this case would be appropriate for staging of the issues, and  
 2 accordingly proposes to bifurcate infringement and validity from all other issues (such as damages  
 3 and unenforceability). Since there is only one patent and one accused product, Google believes it  
 4 would be most efficient to first focus discovery on the liability and validity issues, followed by  
 5 discovery relating to damages and unenforceability issues only if necessary once the liability and  
 6 validity phase concludes. Issues in this case relating to damages and unenforceability are  
 7 potentially complex, and will involve substantial discovery pertaining to Netlist's actions as a  
 8 member of the JEDEC standards-setting organization, unclean hands allegations made by both  
 9 parties relating to JEDEC, and prior licensing offers. Google therefore proposes the following  
 10 schedule:

<b>Case Event</b>	<b>Date</b>
Close of fact discovery	February 26, 2010
Exchange of opening expert reports on issues for which the party bears the burden of proof	March 26, 2010
Rebuttal expert reports exchanged	April 16, 2010
Close of expert discovery	April 30, 2010
Motions for summary judgment due	May 14, 2010
Summary judgment responses due	June 11, 2010
Summary judgment replies, if any, due	June 25, 2010
Summary judgment hearing	July 9, 2010
Pre-trial conference	July 16, 2010
Trial on Infringement and Validity	<i>About August, 2010 at the convenience of the Court</i>
If necessary, additional Case Management Conference on discovery and trial schedule for remaining issues	<i>After Infringement and Validity trial, at the convenience of the Court</i>
Post-trial motions	<i>A single deadline after the trial(s), at the convenience of the Court</i>

24 Netlist believes that bifurcation of infringement and validity from damages is not  
 25 appropriate. Given that only one patent and one accused product are at issue, bifurcation is  
 26 unnecessary and would needlessly prolong the proceedings, as well as likely result in the  
 27 presentation of duplicative evidence. Moreover, Google's proposal would significantly escalate  
 28

1 the expense required to try the case as two juries would have to be empanelled. Given Netlist's  
 2 relatively smaller size, it would suffer the burden of such additional expense to a much greater  
 3 degree than would Google. Netlist further notes that Google has already taken extensive  
 4 discovery related to damages and enforceability issues, including by issuing document requests  
 5 directed to such issues, questioning Netlist's employees and ex-employees on such issues at  
 6 deposition, and issuing subpoenas to Netlist's customers for documents related to such issues.  
 7 Thus, Google's proposal would unfairly prejudice Netlist from obtaining the same information  
 8 Google has already sought and obtained. Netlist proposes the following schedule:

<b>Case Event</b>	<b>Date</b>
Google to inform Netlist whether Google will rely on an advice of counsel defense and produce any opinions embodying such advice and other documents and disclosures called for by Patent Local Rule 3-7.	Within 50 days of the Court's filing of its Claim Construction Ruling.
Close of fact discovery	April 30, 2010
Exchange of opening expert reports on issues for which the party bears the burden of proof	May 28, 2010
Rebuttal expert reports exchanged	June 18, 2010
Close of expert discovery	July 16, 2010
Motions for summary judgment due	August 6, 2010
Summary judgment responses due	September 3, 2010
Summary judgment replies, if any, due	September 17, 2010
Summary judgment hearing	October 8, 2010
Pre-trial conference	October 15, 2010
Trial	<i>About November, 2010 at the convenience of the Court</i>
Post-trial motions	<i>A single deadline after the trial(s), at the convenience of the Court</i>

23  
 24 With regard to Netlist's proposed schedule, Google notes that, as it informed Netlist's  
 25 counsel, its lead trial counsel is scheduled for a trial in another matter in the U.S. District Court for  
 26 the District of Delaware from October 4<sup>th</sup> through October 15<sup>th</sup> of 2010. With regard to Google's  
 27 proposed schedule, Netlist notes that its lead trial counsel is scheduled for trial in another matter  
 28 beginning on July 12, 2010.

1 **19. Trial**

2 This case will be tried before a jury.

3 The parties request a trial date as per the proposals above.

4 The parties expect that the trial will last for 7-9 days.

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

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

8 **21. Other issues**

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

11 Dated: November 2, 2009

FISH & RICHARDSON P.C.

12  
13  
14 By: /s/ Shelley K. Mack  
Shelley K. Mack

15 Attorneys for Plaintiff  
16 GOOGLE INC.

1 Dated: February 2, 2009

PRUETZ LAW GROUP LLP

2  
3  
4 By: /s/ Adrian M. Pruetz  
Adrian M. Pruetz

5 Attorneys for Defendant  
6 NETLIST, INC.

7  
8 **DECLARATION OF CONSENT**

9 Pursuant to General Order No. 45, Section X(B) regarding signatures, I attest under  
10 penalty of perjury that concurrence in the filing of this document has been obtained from Adrian  
11 M. Pruetz.

12 Dated: November 2, 2009

FISH & RICHARDSON P.C.

13  
14  
15 By: /s/ Shelley K. Mack  
Shelley K. Mack

16 Attorneys for Plaintiff  
17 GOOGLE INC.

18  
19 IT IS SO ORDERED.

20  
21 Dated: \_\_\_\_\_

22 \_\_\_\_\_  
UNITED STATES DISTRICT JUDGE

23 #50633143