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2 UNITED STATES DISTRICT COURT
3 FOR THE NORTHERN DISTRICT OF CALIFORNIA
4 OAKLAND DIVISION

5 GOOGLE, INC.,

6 Plaintiff,

7 vs.

8 NETLIST, INC.

9 Defendant.

Case No: C 08-4144 SBA

Related to: C 09-5718 SBA

**ORDER DENYING JOINT MOTION
TO CONSOLIDATE**

Docket 85

10
11 Google, Inc. (“Google”), filed the above-captioned declaratory relief action (“the First
12 Case”) against Netlist, Inc. (“Netlist”), on August 29, 2008, seeking a declaration of non-
13 infringement and invalidity as to U.S. Patent No. 7,289,386, which is owned by Netlist. The
14 Court conducted a claims construction hearing on November 12, 2009, and scheduled a trial
15 date of November 10, 2010. A mandatory settlement conference is scheduled to take place
16 before Magistrate Judge Maria-Elena James on August 3, 2010. However, the parties have
17 also indicated that willing to participate in private mediation. See Docket 78.

18 On December 4, 2009, Netlist filed a separate action against Google, accusing it
19 infringing U.S. Patent No. 7,619,912. See Netlist, Inc. v. Google, Inc., C 09-5718 SBA (“the
20 Second Case”). On January 6, 2010, the parties filed a Joint Motion to Consolidate Cases.
21 (Docket 85.) The parties indicate that both cases involve the same memory modules used in
22 Google’s servers, and as such, the actions share a common nucleus of fact. Based on that
23 commonality, the parties request that the Court: (1) consolidate the cases for trial under
24 Federal Rule of Civil Procedure 42(a); (2) vacate the pretrial schedule and trial date in the First
25 Case in order to coordinate both cases for trial; and (3) schedule a date for a Case Management
26 Conference to set a new pretrial schedule applicable to both cases.

27 The Court is not convinced that the parties’ requests to consolidate and vacate the
28 pretrial schedule and trial date in the First Action are either necessary or appropriate. The First

1 Case has been pending for over a year and discovery is well under way in that case. In
2 addition, the Court has already held a claims construction hearing and construed the disputed
3 claim terms. Based on the advanced stage of the proceedings in the First Action, the Court sees
4 no reason to vacate the pretrial schedule in the First Case based on Netlist's decision to file a
5 new action over a year after the First Case was filed, particularly given that the new action
6 purportedly involves the same memory modules at issue in the First Case.

7 The Court also has serious concerns regarding the potential for the instant litigation to
8 expand exponentially, thereby increasing the cost to the parties and consuming an inordinate
9 amount of judicial resources. Although a settlement conference has been scheduled in the First
10 Case for August 3, 2010, the Court believes that it is in the parties' mutual interest to engage in
11 a settlement conference or mediation, sooner rather than later—before the parties have
12 expended what likely will be a considerable amount of time and resources litigating these two
13 cases. Accordingly,

14 IT IS HEREBY ORDERED THAT:

- 15 1. The parties' Joint Motion to Consolidate is DENIED, without prejudice.
- 16 2. Within fourteen days of the date this Order is filed, the parties shall file a joint
17 statement (and a proposed order) which specifies whether they prefer (a) to have both cases
18 referred to a Magistrate Judge for an early mandatory settlement conference or (b) to proceed
19 with a private mediator. In the event, the parties elect to have the cases referred to a Magistrate
20 Judge, the Court will issue an order referring this to a Magistrate Judge James for a mandatory
21 settlement conference to take place within 60 days. If the parties are in agreement on a specific
22 settlement judge (other than Magistrate Judge James), they should so indicate in their
23 statement. In the event that the parties elect to proceed with private mediation, they shall
24 indicate in their joint statement the name of the mediator and the date of the mediation.
- 25 3. The parties in both cases shall appear for a telephonic Case Management
26 Conference in connection with both cases on **March 4, 2010 at 3:15 p.m.** The parties shall
27 meet and confer prior to the conference and shall prepare a joint Case Management Conference
28 Statement which shall be filed no later than ten (10) days prior to the Case Management

1 Conference that complies with the Standing Order for All Judges of the Northern District of
2 California and the Standing Order of this Court. Plaintiff shall be responsible for filing the
3 statement as well as for arranging the conference call. All parties shall be on the line and shall
4 call (510) 637-3559 at the above indicated date and time.

5 4. The Clerk shall file this Order in C 08-4144 SBA and C 09-5718 SBA.

6 5. This Order terminates Docket 85.

7 IT IS SO ORDERED.

8 Dated: February 2, 2010


SAUNDRA BROWN ARMSTRONG
United States District Judge

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