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NETLIST, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

NETLIST, INC.,

Plaintiff,

Case No. CV09-05718 SBA [Related to
Case No: CV08-04144 SBA]

**[PROPOSED] STIPULATED
PROTECTIVE ORDER**

1
2 v.
3 GOOGLE INC.,
4 Defendant.

5 To expedite the flow and use of discovery materials produced in this action (Case No.
6 CV09-05718 SBA) and the related case *Google Inc. v. Netlist, Inc.*, Case No. CV08-04144 SBA
7 (“Related Case”) (collectively “Google/Netlist Cases”), to facilitate the prompt resolution of
8 disputes over confidentiality of discovery materials, to adequately protect information the parties
9 are entitled to keep confidential, to ensure that only materials the parties are entitled to keep
10 confidential are subject to such treatment, and to ensure that the parties are permitted reasonably
11 necessary uses of such materials in preparation for and in the conduct of trial, pursuant to Fed. R.
12 Civ. P. 26(c), it is HEREBY ORDERED THAT:

13 **INFORMATION SUBJECT TO THIS ORDER**

14 Discovery materials produced in the Google/Netlist Cases may be labeled as one of three
15 categories: CONFIDENTIAL, CONFIDENTIAL ATTORNEYS' EYES ONLY and
16 RESTRICTED CONFIDENTIAL - SOURCE CODE, as set forth below. All three of the
17 identified categories of information shall be identified collectively in this Order by the title
18 "Protected Information." Any documents derived from or containing "Protected Information"
19 must also be designated with the appropriate category of confidentiality, according to the terms
20 of this Order. Any discovery materials produced in the Google/Netlist Cases as
21 CONFIDENTIAL, CONFIDENTIAL ATTORNEYS' EYES ONLY, or RESTRICTED
22 CONFIDENTIAL - SOURCE CODE may be used only for purposes of either and/or both of the
23 Google/Netlist Cases. Specifically, the parties expressly agree that Protected Information
24 produced in the Related Case may be used in this action subject to the requirements of this
25 Stipulated Protective Order, the *Federal Rules of Civil Procedure* and the *Federal Rules of*
26 *Evidence* and that Protected Information produced in this action may be used in the Related Case
27 subject to the same requirements. Notwithstanding the foregoing, a party wishing to use
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1 Protected Information produced by a third party in one of the Google/Netlist Cases in the other
2 action must first obtain permission from the third party to do so.

3 **INFORMATION DESIGNATED AS "CONFIDENTIAL INFORMATION"**

4 1. For purposes of this Order, "CONFIDENTIAL INFORMATION" shall mean all
5 information or material produced for or disclosed to a Requesting Party that the Producing Party,
6 including any party to the Google/Netlist Cases and any non-party producing information or
7 material voluntarily or pursuant to a subpoena or a court order, considers to constitute or to
8 contain trade secrets or other confidential research and development, technical, sales, marketing,
9 financial, personnel, customer, vendor, or other commercial information, whether embodied in
10 physical objects, documents, or the factual knowledge of persons, and which has been so
11 designated by the Producing Party.

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

15 3. All CONFIDENTIAL INFORMATION not reduced to documentary, tangible or
16 physical form or which cannot be conveniently designated as set forth in paragraph 2, shall be
17 designated by the Producing Party by informing the Requesting Party of the designation in
18 writing.

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

27 5. The following are examples of information that is not CONFIDENTIAL
28 INFORMATION:

1 a. Published advertising materials;
2 b. Any information which is or, after its disclosure to a Requesting Party,
3 becomes part of the public domain as a result of publication not involving a violation of this
4 Order;

5 c. Any information that the Requesting Party can show by written records
6 was already known to it prior to the disclosure, provided that it was either 1) received from the
7 Producing Party and was not received under an obligation of confidentiality to the Producing
8 Party, or 2) received from a source who obtained the information lawfully and under no
9 obligation of confidentiality to the Producing Party;

10 d. Any information which the Requesting Party can show by written
11 records was received by it after the disclosure from a source who obtained the information
12 lawfully and under no obligation of confidentiality to the Producing Party; and

13 e. Any information which the Requesting Party can show was
14 independently developed by it after the time of disclosure by personnel who did not have access
15 to the Producing Party's CONFIDENTIAL INFORMATION.

16 6. Documents designated CONFIDENTIAL and information contained therein shall
17 be available only to:

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

21 b. Technical Advisers and their necessary support personnel, subject to the
22 provisions of paragraphs 15-20 herein, and who have signed the form attached hereto as
23 Attachment A;

24 c. Up to two (2) in-house counsel with responsibility for managing the
25 Google/Netlist Cases, and up to five (5) non-attorney officers, directors, and employees to whom
26 disclosure is reasonably necessary for the Google/Netlist Cases and who have signed the form
27 attached hereto as Attachment A;
28

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

3 e. Independent legal translators retained to translate in connection with the
4 Google/Netlist Cases; independent stenographic reporters and videographers retained to record
5 and transcribe testimony in connection with the Google/Netlist Cases;

6 f. Graphics, translation, or design services retained by counsel for
7 purposes of preparing demonstrative or other exhibits for deposition, trial, or other court
8 proceedings in the Google/Netlist Cases; non-technical jury or trial consulting services, not
9 including mock jurors, who have signed the form attached hereto as Attachment A; and

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

12 **INFORMATION DESIGNATED “CONFIDENTIAL ATTORNEYS' EYES ONLY”**

13 7. The CONFIDENTIAL ATTORNEYS' EYES ONLY designation is reserved for
14 CONFIDENTIAL INFORMATION that constitutes commercially sensitive competitive
15 information, the disclosure of which is likely to cause harm to the competitive position of the
16 Producing Party; CONFIDENTIAL information obtained from a nonparty pursuant to a current
17 Nondisclosure Agreement ("NDA"); and settlement agreements or settlement communications.
18 In determining whether information should be designated as CONFIDENTIAL ATTORNEYS'
19 EYES ONLY, each party agrees to use such designation only in good faith.

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

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

25 b. Technical Advisers and their necessary support personnel, subject to the
26 provisions of paragraphs 15-20 herein, who have signed the form attached hereto as Attachment
27 A;

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

3 d. Independent legal translators retained to translate in connection with the
4 Google/Netlist Cases; independent stenographic reporters and videographers retained to record
5 and transcribe testimony in connection with the Google/Netlist Cases;

6 e. Graphics, translation, or design services retained by counsel for
7 purposes of preparing demonstrative or other exhibits for deposition, trial, or other court
8 proceedings in the Google/Netlist Cases; non-technical jury or trial consulting services, not
9 including mock jurors, who have signed the form attached hereto as Attachment A; and

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

12 **INFORMATION DESIGNATED “RESTRICTED CONFIDENTIAL - SOURCE CODE”**

13 9. Documents or other things that are designated CONFIDENTIAL
14 INFORMATION and contain a party's source code may be designated "RESTRICTED
15 CONFIDENTIAL—SOURCE CODE", if they comprise or include confidential, proprietary
16 and/or trade secret computer code in source or other human-readable form (hereinafter “source
17 code”). Nothing in this Order shall obligate the parties to produce any source code or act as an
18 admission that any particular source code is discoverable. However, if material designated as
19 RESTRICTED CONFIDENTIAL—SOURCE CODE is produced, it shall be subject to the
20 following provisions.

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

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

27 12. The Producing Party shall make materials designated as RESTRICTED
28 CONFIDENTIAL —SOURCE CODE available for inspection in electronic format at the

1 Redwood Shores office of King & Spalding LLP (in the case of production by Google) or at
2 either the El Segundo office of Pruetz Law Group LLP or the Los Angeles office of Lee, Tran &
3 Liang APLC (in the case of production by Netlist). Such inspection of materials designated as
4 RESTRICTED CONFIDENTIAL —SOURCE CODE is subject to the following requirements:

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

16 b. Materials designated as RESTRICTED CONFIDENTIAL —SOURCE
17 CODE shall be made available by the Producing Party to the Requesting Party’s outside counsel
18 and/or Technical Advisers in a private room on a secured computer (“Source Code Computer”)
19 without Internet access or network access to other computers, as necessary and appropriate to
20 prevent and protect against any unauthorized copying, transmission, removal or other transfer of
21 any source code outside or away from the Source Code Computer. The Producing Party shall be
22 obligated to install such tools or programs as necessary to review and search the code produced
23 on the platform produced. The Requesting Party's outside counsel and/or Technical Advisers
24 may install on the Source Code Computer commercially available licensed software tools for
25 viewing and searching source code.

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

3 d. The Requesting Party's outside counsel and/or Technical Advisers shall
4 be entitled to take notes relating to the source code but may not copy substantial portions (i.e., no
5 more than three consecutive lines and no more than thirty cumulative lines) of the source code
6 into the notes. No copies of the source code may leave the room in which the source code is
7 inspected except as otherwise provided herein, and no other written or electronic record of the
8 source code is permitted except as otherwise provided herein. Other than as provided explicitly
9 in this Order, the Requesting Party shall not transmit any source code in any way from the
10 Producing Party's inspection room.

11 e. The Producing Party shall make available a laser printer with
12 commercially reasonable printing speeds for on-site printing during inspection of the code. The
13 Requesting Party may print portions of the code as necessary to facilitate the Requesting Party's
14 preparation of the Google/Netlist Cases, including but not limited to when necessary to prepare
15 any filing with the Court or to serve any pleadings or other papers on any other party; to prepare
16 internal attorney work product materials; or to prepare other necessary case materials such as
17 testifying expert reports, consulting expert written analyses, and related drafts and
18 correspondence.

19 f. Any pages printed by the Requesting Party shall be Bates numbered and
20 labeled "RESTRICTED CONFIDENTIAL – SOURCE CODE", and shall be printed in
21 duplicate, with one Bates numbered printout provided to the Producing Party.

22 g. The Requesting Party may make additional paper copies of source code
23 printed pursuant to paragraph 12(f), not including copies attached to court filings, as reasonably
24 necessary to facilitate the Requesting Party's preparation of The Cases. The Requesting Party
25 shall maintain a log of all copies of the source code that are provided to any person qualified
26 under Paragraph 8 above. The log shall include the names of the recipients and reviewers of
27 copies and locations where the copies are stored. The log shall be provided by the Requesting
28 Party to the Producing Party at the conclusion of the Google/Netlist Cases. If the Producing

1 Party believes in good faith that it needs to inspect the log during the pendency of the
2 Google/Netlist Cases, it shall request production of the log from the Requesting Party. If the
3 Requesting Party declines to produce the log, the Producing Party may move the Court for an
4 order compelling such production. In any such motion, it shall be the Producing Party's burden
5 to demonstrate that its need for access to the log outweighs the Receiving Party's interest in
6 protecting privilege or work product immunity, to the extent that either applies.

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

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

14 j. Provided that it complies with Paragraph 25 of this Order, the
15 Requesting Party may include excerpts of source code in a pleading, exhibit, expert report,
16 discovery document, deposition transcript, other Court document, or any drafts of these
17 documents ("Source Code Documents"). The Requesting Party shall only include such excerpts
18 as are reasonably necessary for the purposes for which such part of the source code is used. To
19 the extent portions of source code are quoted in a Source Code Document, either (1) the entire
20 document will be stamped and treated as RESTRICTED CONFIDENTIAL – SOURCE CODE
21 or (2) those pages containing quoted source code will be separately bound, and stamped and
22 treated as RESTRICTED CONFIDENTIAL – SOURCE CODE.

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

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

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

26 **PROSECUTION BAR**

27 13. "PROSECUTION BAR" materials refers to materials produced in the
28 Google/Netlist Cases and designated as CONFIDENTIAL ATTORNEYS' EYES ONLY or

1 RESTRICTED CONFIDENTIAL—SOURCE CODE. However, the following documents and
2 materials shall not be considered or classified as PROSECUTION BAR materials: (i) publicly
3 available publications, including patents and published patent applications; (ii) materials
4 regarding third party systems or products that were publicly known, on sale, or in public use; (iii)
5 information that is otherwise publicly available; and (iv) documents and information related
6 solely to damages or reasonably royalty rates.

7 14. Any person reviewing any PROSECUTION BAR materials produced by any
8 party shall not, for a period commencing upon receipt of such information and ending one year
9 following the conclusion of this action (including any appeals) or the Related Case (including
10 any appeals), whichever is later, engage in any PROSECUTION ACTIVITY on behalf of a party
11 in the Google/Netlist Cases or any successor in ownership of such party, or any assignee or
12 exclusive licensee of a patent. PROSECUTION ACTIVITY shall mean: (1) prepare and/or
13 prosecute or otherwise aid in preparing or prosecuting any patent application (or portion thereof);
14 (2) prepare or otherwise aid in the drafting or amending of patent claim(s); (3) for a patent
15 application, interference, or reissue proceeding, participate on behalf of a party in the
16 Google/Netlist Cases or any successor in ownership of such party, or any assignee or exclusive
17 licensee of a patent asserted in the Google/Netlist Cases, or (4) provide advice, counsel or
18 suggestions regarding claim scope and/or language, embodiment(s) for claim coverage, claim(s)
19 for prosecution, or products or processes for coverage by claim(s), where each of (1) – (4)
20 applies to any patent application (or portion thereof), whether design or utility, and either in the
21 United States or abroad, any reissue application or proceeding, any opposition, or any
22 interference of any patent or patent application on behalf of a party in the Google/Netlist Cases
23 or any successor in ownership of such party, or any assignee or exclusive licensee of a patent
24 asserted in the Google/Netlist Cases. Nothing in this section shall be construed as preventing any
25 attorney from challenging the validity or enforceability of any patent, including without
26 limitation in proceedings in this court or reexamination or reissue proceedings in the United
27 States or foreign patent offices. The parties expressly agree that the PROSECUTION BAR set
28 forth herein shall be personal to any attorney who reviews PROSECUTION BAR material and

1 shall not be imputed to any other persons or attorneys at the attorney's law firm or company.
2 Attorneys and staff involved in patent prosecution of claims involving methods, apparatus, or
3 systems for computer research tools for indexing, searching and/or displaying data on the
4 Internet and/or through a network shall be ethically walled, in those matters, from attorneys and
5 staff who review PROSECUTION BAR materials. Notwithstanding the foregoing, the mere fact
6 of a first attorney sending or communicating Prior Art to a second attorney, where the second
7 attorney is involved in PROSECUTION ACTIVITY shall not be construed as involvement by
8 the first attorney in PROSECUTION ACTIVITY. Prior Art shall mean (i) publications, including
9 patents and published patent applications; and (ii) materials or information regarding third party
10 systems or products that were publicly known, on sale, or in public use before May 4, 1998,
11 unless such materials are designated as PROSECUTION BAR materials by such third party.
12 This section does not apply to any attorney, patent agent, or other person participating in any re-
13 examination proceedings if such attorney, patent agent, or other person has not reviewed the
14 other party's Discovery Material designated CONFIDENTIAL ATTORNEYS' EYES ONLY or
15 RESTRICTED CONFIDENTIAL—SOURCE CODE.

16 **DISCLOSURE OF TECHNICAL ADVISERS**

17 15. Information designated by the Producing Party under any category of Protected
18 Information and such copies of this information as are reasonably necessary for maintaining,
19 defending or evaluating this litigation may be furnished and disclosed to the Requesting Party's
20 Technical Advisers and their necessary support personnel. The term "Technical Adviser" shall
21 mean an independent, outside expert witness or consultant to whom disclosure is reasonably
22 necessary for this litigation and who complies with applicable provisions of this Order.

23 16. No disclosure of Protected Information to a Technical Adviser or their necessary
24 support personnel shall occur until that person has accurately completed and signed the form
25 attached hereto as Attachment A, and a signed copy has been provided to the Producing Party;
26 and to the extent there has been an objection under paragraph 18, that objection is resolved as
27 discussed below.
28

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

10 18. A party objecting to disclosure of Protected Information to a Technical Adviser
11 shall state with particularity the ground(s) of the objection and the specific categories of
12 documents that are the subject of the objection. The objecting party's consent to the disclosure of
13 Protected Information to a Technical Adviser shall not be unreasonably withheld.

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

23 20. The objecting party shall have the burden of showing to the Court that the risk of
24 harm that the disclosure would entail (under any safeguards proposed) outweighs the Requesting
25 Party's need to disclose the Protected Information to its Technical Adviser. Moreover, failure to
26 object to a Technical Adviser shall not preclude the non-objecting party from later objecting to
27 continued access by that Technical Adviser where facts suggesting a basis for objection could
28 not have been discovered by the objecting party or its counsel, exercising due diligence, within

1 the period for making a timely objection. A later objection to a Technical Adviser cannot be
2 made on the basis of information disclosed pursuant to Paragraphs 17-18, except to the extent
3 that said disclosure contained a material omission or misrepresentation. If a later objection is
4 made, no further Protected Information shall be disclosed to the Technical Adviser until the
5 matter is resolved by the court or the Producing Party withdraws its objection. If a later
6 objection is made, the parties shall meet and confer within three (3) business days; and, if not
7 resolved, the Producing Party may move for a protective order precluding the disclosure of the
8 Protected Information to the Technical Adviser within two (2) business days after the meet and
9 confer.

10 **CHALLENGES TO CONFIDENTIALITY DESIGNATIONS**

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

19 22. A party shall not be obligated to challenge the propriety of a designation of any
20 category of Protected Information at the time of production, and a failure to do so shall not
21 preclude a subsequent challenge thereto. Such a challenge shall be written, shall be served on
22 counsel for the Producing Party, and shall particularly identify the documents or information that
23 the Requesting Party contends should be differently designated. The parties shall use their best
24 efforts to resolve promptly and informally such disputes. If an agreement cannot be reached, the
25 Requesting Party will bear the burden of requesting that the Court cancel or modify a
26 designation. The burden of demonstrating the confidential nature of any information shall at all
27 times be and remain on the designating party.
28

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

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

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

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

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

20 b. Non-parties may be examined or testify at deposition or trial concerning
21 any document containing Protected Information of a Producing Party which appears on its face
22 or from other documents or testimony to have been received from or communicated to the non-
23 party as a result of any contact or relationship with the Producing Party or a representative of the
24 Producing Party, but may not retain originals or copies of such Protected Information or any
25 notes or transcripts reflecting such Protected Information, other than for the limited period of
26 time necessary to review any deposition transcripts and make corrections. Any person other than
27 the witness, his or her attorney(s), or any person qualified to receive Protected Information under
28 this Order shall be excluded from the portion of the examination concerning such information,

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

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

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

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

1 this Order. Further, nothing herein shall restrict a qualified recipient from converting or
2 translating Protected Information (other than RESTRICTED CONFIDENTIAL - SOURCE
3 CODE material) into machine readable form for incorporation into a data retrieval system used
4 in connection with the Google/Netlist Cases, provided that access to that Protected Information,
5 in whatever form stored or reproduced, shall be limited to qualified recipients.

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

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

20 **NONPARTY USE OF THIS PROTECTIVE ORDER**

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

24 32. A nonparty's use of this Stipulated Protective Order to protect its Protected
25 Information does not entitle that nonparty access to the Protected Information produced by any
26 party in the Google/Netlist Cases.

1 33. In the event that discovery materials produced in the Google/Netlist Cases contain
2 nonparty Protected Information subject to confidentiality obligations in force between the
3 nonparty and a Producing Party, the nonparty shall have the right to object to disclosure of such
4 Protected Information pursuant to the procedures set out in paragraphs 18-20 of this Order.

5 34. Any party desiring to use discovery materials containing nonparty Protected
6 Information at trial must provide written notice to the nonparty at least two weeks prior to any
7 such use.

8 **NO WAIVER OF PRIVILEGE**

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

5
6 **MISCELLANEOUS PROVISIONS**

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

10 37. Inadvertent or unintentional production of documents or things containing
11 Protected Information which are not designated as one or more of the three categories of
12 Protected Information at the time of production shall not be deemed a waiver in whole or in part
13 of a claim for confidential treatment. The Producing Party shall notify the receiving parties
14 promptly in writing after the discovery of the error and, with respect to documents, provide
15 replacement pages bearing the appropriate confidentiality legend. In the event of any
16 unintentional or inadvertent disclosure of Protected Information other than in a manner
17 authorized by this Stipulated Protective Order, counsel for the party responsible for the
18 disclosure shall immediately notify opposing counsel of all of the pertinent facts, and make every
19 effort to further prevent unauthorized disclosure, including retrieving all copies of the Protected
20 Information from the recipient(s) thereof, and securing the agreement of the recipients not to
21 further disseminate the Protected Information in any form. Compliance with the foregoing shall
22 not prevent the Producing Party from seeking further relief from the Court.

23 38. Within sixty (60) days after the entry of a final non-appealable judgment or order,
24 or the complete settlement of all claims asserted against all parties in this action or the Related
25 Case, whichever is later,, each party shall, at the option of the Requesting Party, either return or
26 destroy all physical objects and documents which embody Protected Information it has received,
27 and shall destroy in whatever form stored or reproduced, all physical objects and documents,
28 including but not limited to, correspondence, memoranda, notes and other work product

1 materials, which contain or refer to any category of Protected Information. All Protected
2 Information not embodied in physical objects and documents shall remain subject to this Order.
3 Notwithstanding this provision, no person is required to delete information that may reside on
4 the respective person's electronic back-up systems that are over-written in the normal course of
5 business. Notwithstanding the foregoing, outside counsel shall be entitled to maintain copies of
6 all correspondence, pleadings, motions and trial briefs (including all supporting and opposing
7 papers and exhibits thereto), written discovery requests and responses (and exhibits thereto),
8 deposition transcripts (and exhibits thereto), trial transcripts, and exhibits offered or introduced
9 into evidence at any hearing or trial, and their attorney work product which refers or is related to
10 any CONFIDENTIAL and CONFIDENTIAL ATTORNEYS' EYES ONLY information for
11 archival purposes only, except such outside counsel shall not retain any RESTRICTED
12 CONFIDENTIAL-SOURCE CODE materials. If a party destroys Protected Information, the
13 destruction must be by means satisfactory to the Producing Party, and the party must provide a
14 Certificate of Destruction to the Producing Party.

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

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

1 41. Nothing in this Order shall restrict any party to the Google/Netlist Cases or its
2 attorneys from disclosing or using, in any manner and for any purpose, its own Protected
3 Information.

4 42. Nothing in this Stipulated Protective Order obligates a party to produce trade
5 secrets, which are neither relevant, nor necessary to prove any claim or defense at trial, such as,
6 by way of example only, infringement based on the Court's claim construction.

7 43. Subject to the restrictions of paragraphs 13-14, nothing in this Stipulated
8 Protective Order shall bar counsel from rendering advice to his or her client with respect to this
9 litigation and, in the course thereof, relying upon any Protected Materials, provided that counsel
10 does not disclose Protected Materials in a manner not specifically authorized under this
11 Stipulated Protective Order.

12 44. The United States District Court for the Northern District of California, Oakland
13 Division, is responsible for the interpretation and enforcement of this Stipulated Protective
14 Order. After termination of this litigation, the provisions of this Stipulated Protective Order shall
15 continue to be binding except with respect to those documents and information that become a
16 matter of public record. This Court retains and shall have continuing jurisdiction over the parties
17 and recipients of the Protected Information for enforcement of the provision of this Stipulated
18 Protective Order following termination of this litigation. All disputes concerning Protected
19 Information produced under the protection of this Stipulated Protective Order shall be resolved
20 by the United States District Court for the Northern District of California, Oakland Division.

21 45. No party shall be required to identify on its privilege log any document or
22 communication dated on or after and/or created on or after the filing of the earliest of the
23 Google/Netlist Cases, which absent this provision, the party would have been obligated to so
24 identify on said privilege log.

25 46. Testifying experts shall not be subject to discovery on any draft of their reports in
26 the Google/Netlist Cases and such draft reports, notes, outlines, or any other writings leading up
27 to an issued report(s) in this litigation are exempt from discovery. In addition, all
28 communications to and from a testifying expert, and all materials generated by a testifying expert

1 with respect to that person's work, are exempt from discovery unless relied upon by the expert in
2 forming any opinions in this litigation. No discovery can be taken from any consulting expert
3 except to the extent that consulting expert has provided information, opinions or other materials
4 to a testifying expert, who then relies upon such information, opinions or other materials in
5 forming his final report, trial or deposition testimony or any opinion in the Google/Netlist Cases.
6 Materials, communications and other information exempt from discovery under this Paragraph
7 shall be treated as attorney-work product for the purposes of this litigation and Stipulated
8 Protective Order. Nothing in this Paragraph shall be construed to bar discovery from any current
9 or former employees of any of the parties in the Google/Netlist Cases, or any other persons with
10 knowledge of relevant facts; provided however that their communications with testifying and/or
11 consulting experts will be treated in accordance with this paragraph.

12 Dated: June 23, 2010

Lee Tran & Liang, APLC

14 By: /s/ Daniel J. Taylor
15 Daniel J. Taylor
16 Attorneys for Plaintiff Netlist Inc.

17 Dated: June 23, 2010

KING & SPALDING LLP

19 By: /s/ Allison Altersohn
20 Allison Altersohn
21 Attorneys for Defendant Google Inc.

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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 Allison Altersohn.

Dated: June 23, 2010

Lee Tran & Liang, APLC

By: /s/ Daniel J. Taylor
Daniel J. Taylor
Attorneys for Plaintiff Netlist Inc.

IT IS SO ORDERED.

Dated: June __, 2010

JOSEPH C. SPERO
United States Magistrate Judge

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Attorneys for Plaintiff
NETLIST, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

NETLIST, INC.,

Plaintiff,

**Case No. CV09-05718 SBA [Related
to Case No: CV08-04144 SBA]**
**ATTACHMENT A TO
STIPULATED PROTECTIVE**

ORDER

v.
GOOGLE, INC.,
Defendant.

ATTACHMENT A TO STIPULATED PROTECTIVE ORDER

I reside at _____.

My present employer is _____.

1. My present occupation or job description is _____.

2. I am an inventor, applicant, assignee, and/or involved in the filing or prosecution of the following patents and patent applications (identify by number, country, and subject matter if not published): _____.

3. I have read the Stipulated Protective Order dated _____, 2010, and have been engaged as _____ on behalf of _____ in connection with the litigation styled Netlist, Inc. v. Google Inc., Case No. 09-05718 SBA.

4. I am fully familiar with and agree to comply with and be bound by the provisions of said Order. I understand that I am to retain all copies of any documents designated as CONFIDENTIAL, CONFIDENTIAL ATTORNEYS' EYES ONLY and/or RESTRICTED CONFIDENTIAL-SOURCE CODE information in a secure manner, and that all copies are to remain in my personal custody until I have completed my assigned duties, whereupon the copies and any writings prepared by me containing any CONFIDENTIAL, CONFIDENTIAL ATTORNEYS' EYES ONLY and/or RESTRICTED CONFIDENTIAL-SOURCE CODE information are to be returned to counsel who provided me with such material or destroyed as directed by such counsel.

5. I will not divulge to persons other than those specifically authorized by said Order, and will not copy or use except solely for the purpose of this action, any information obtained pursuant to said Order, except as provided in said Order. I also agree to notify any stenographic or clerical personnel who are required to assist me of the terms of said Order.

1 6. In accordance with paragraph 17 of the Stipulated Protective Order, I have
2 attached my curriculum vitae, current employer, and employment (including consulting) history
3 for the past four (4) years, and a listing of cases in which the witness has testified as an expert at
4 trial or by deposition within the preceding four years.

5 7. I agree that with the exception of my work on this litigation, I will not consult,
6 advise, or otherwise obtain employment with any competitor of any Producing Party from which
7 I have received or been provided access to Confidential Information in the subject areas of the
8 products or businesses at issue in this litigation without the consent of the Producing Party(ies),
9 which consent shall not be unreasonably withheld. This obligation expires two years after the
10 final termination of this litigation.

11 8. I state under penalty of perjury under the laws of the United States of America
12 that the foregoing is true and correct.

13 Executed on _____, at _____.

14
15 _____