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NETLIST, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

NETLIST, INC.,

Plaintiff,

v.

GOOGLE INC.,

Defendant.

CASE NO. CV-09-05718 SBA
[Related to Case No. CV-08-04144 SBA]

PLAINTIFF NETLIST, INC.'S REPLY CLAIM CONSTRUCTION BRIEF

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INTRODUCTION

Google's Responsive Claim Construction Brief confirms that each one of Google's proposed constructions violates the Federal Circuit's canons of claim construction. Google does not dispute that its indefiniteness challenges to the '912 Patent violate the requirements for moving for summary judgment under *Fed. R. Civ. P.* 56 and the Local Rules of this Court. Google's Brief also confirms that the grounds of Google's indefiniteness challenges are not set forth in its Preliminary Invalidity Contentions, in violation of Patent Local Rule 3-3(d).

Google's construction of "bank" violates the Federal Circuit's prohibition against construing terms with broad dictionary definitions that are divorced from the intrinsic evidence, such as the specification and file history. Also, Google has now revealed its true purpose in seeking a construction of "bank," which is to apply the Court's definition to *the prior art* so it can argue that the term "bank" in prior art references means the same thing as "rank" in the '912 Patent claims. The purpose of claim construction is to construe the patent claims at issue, not the prior art, and Google's attempt to do so should be rejected.

Google's constructions of the "input signal limitations" and "output signal limitations" violate the Federal Circuit's prohibition against construing the same claim language differently in different claims unless the patent so provides. Google misleadingly suggests that the recitation of particular *species* of input and output control signals in various claims warrants defining the broader *genus* terms "set of input control signals" and "set of output control signals" (or their variants) differently in different claims. However, Google cites no case holding that such varying and inconsistent constructions are appropriate. Further, Google points to nothing in the text of the '912 Patent that calls for varying and claim-specific constructions of these terms.

Google's construction of "operatively coupled" and "operationally coupled" cannot be squared with the Federal Circuit's holding that the similar phrase "operatively connected" is a general term of patent drafting used to reflect a *functional* relationship between components. In addition, Google's construction adds nothing to the meaning of "coupled," running afoul of the Federal Circuit's requirement that all claim terms should give meaning to the claim.

Google's construction of "at a time" as meaning "at the same time" violates the Federal Circuit's doctrine of claim differentiation by rendering claims 18 and 20 redundant. Google does not dispute the redundancy, but instead attempts to avoid the doctrine by arguing that no other construction is possible. However, Google fails to address the evidence presented by Netlist showing that Table 1 of the specification establishes a broader meaning for "at a time" than Google's construction would allow.

With respect to its indefiniteness challenges, Google does not dispute or even address the fact that its challenge to claim 45 necessarily relies on an implicit construction of claim 39, which limits the latter claim to those modules in which all three of a logic element, register, and phase lock loop device are combined in a single component. Instead, Google camouflages its implicit construction by seeking no construction of claim 39 and suggesting that it is merely applying the claim's "plain meaning." Google also mischaracterizes claim 45 as being *limited* to those modules in which *only two* (and not all three) of a logic element, register, and phase lock loop are combined in a single component. However, the claim expressly uses the phrase "two or more" and clearly embraces modules in which two or three of the logic element, register, and phase lock loop are provided in a single component.

Google's argument that "spaced from" in claims 10 and 11 is indefinite runs afoul of established Federal Circuit precedent indicating that numerical precision in patent claims is not required. Google's invalidity challenges to "spaced from" and "in a direction along the first side/in a direction along the second side" ignore Google's application of those terms to the alleged prior art in its Preliminary Invalidity Contentions. Google suggests that the Court should ignore those Contentions because Google is entitled to use "alternative pleading." However, its Preliminary Invalidity Contentions do not include alternative pleading. Google simply applied the disputed terms to the alleged prior art in an unqualified manner and made no mention of the alleged indefiniteness of the now-disputed phrases. Google's constructions and indefiniteness contentions are disingenuous and should be rejected.

ARGUMENT

I. THE COURT SHOULD REJECT GOOGLE'S CONSTRUCTIONS AND INDEFINITENESS ARGUMENTS AND ADOPT NETLIST'S CONSTRUCTIONS IN THEIR ENTIRETY

A. Google's Construction of "Bank" Improperly Relies on a Broad Dictionary Definition Divorced From the Specification

As Google acknowledges, "A term's plain meaning is not determined in a vacuum, but rather is given its meaning to the ordinary artisan after reading the entire patent." Google's Responsive Claim Construction Brief (Dkt. 49) ("Google's Brief") at 2, citing *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312 (Fed. Cir. 2005)(*en banc*). Google's definition of "bank" relies on an IEEE dictionary that broadly defines the term to cover *any* "addressable unit of memory cells." Google's Brief at 4-5. Nowhere does the '912 Patent use the term "bank" so broadly. In every instance, the term is used to describe a group of memory cells or locations inside a memory device. Google cites—and then ignores—the Federal Circuit's pronouncement that "heavy reliance on the dictionary divorced from the intrinsic evidence risks transforming the meaning of the claim term to the artisan into the meaning of the term in the abstract, out of its particular context, which is the specification." Google's Brief at 3, citing *Phillips*, 415 F.3d at 1321. The context provided by the '912 Patent makes clear that "bank" refers to an internal memory cell or location.

The asserted claims recite memory devices, called "DDR memory devices." DDR memory devices each include banks, which are internal memory locations, as shown in Tables 3A and 3B. The '912 Patent at 12:39-55 and 12:66-13:11 (Hansen Decl., Exh. A). In the asserted claims, the term "bank" appears only in the phrase "bank address signals." *Id.* at 33:3-4, 34:6, 28:49-50, and 39:56-57. Thus, the recitation of "DDR memory devices" makes clear that "bank address signals" refers to the *internal banks* associated with DDR memory devices. Google has not identified one usage of the term "bank" to refer to anything other than a memory location internal to a memory device.

Google can only point to a couple of isolated locations in the '912 Patent specification where the term "internal" precedes the word "bank." Google's Brief at 5. However, in numerous

other locations in the specification, "bank" is used without the modifier "internal" but nevertheless clearly refers to an internal location within a memory device. *See* the '912 Patent at 1:40-44 , 1:58-62, 10:59-62, 12:39-55 (Hansen Decl., Exh. A).

Google contends that its dictionary definition is appropriate because Netlist has not "acted as its own lexicographer" and because the '912 Patent "demands no exclusive limitations on the definition." Google's Brief at 4. However, if taken at face value, Google's argument is that a broad dictionary definition should govern a claim construction unless there is an explicit definition or disclaimer to the contrary in the specification. This is the very methodology that the Federal Circuit rejected in *Phillips*. "[A]ssigning such a limited role to the specification, and in particular requiring that any definition of claim language in the specification be express, is inconsistent with our rulings that the specification is 'the single best guide to the meaning of a disputed term,' and that the specification 'acts as a dictionary when it expressly defines terms used in the claims or when it defines terms by implication.'" *Phillips*, 415 F.3d at 1320-1321.

Google's Brief reveals that Google seeks a construction of the term "bank" in the alleged prior art and not a construction of the term used in the '912 patent claim phrase "bank address signal." Both Netlist's and Google's experts have pointed out that certain prior art references use the term "bank" to refer to collections of memory devices. Google's Brief at 5-6. More specifically, Google argues that a particular prior art reference uses the term "'bank' to refer to addressable memory that spans multiple memory devices." *Id.* at 6. Google seeks a judicial definition of "bank" so it can argue that the "banks" in these references are the same as the *ranks* of the asserted claims. However, the purpose of claim construction is to construe the meaning of claim terms, not to construe the prior art. *See Gart v. Logitech*, 254 F.3d 1334, 1339 (Fed. Cir. 2001) (the purpose of claim construction is to elaborate *claim language*). Thus, the Court should apply the claim construction methodology mandated by *Phillips* and define "bank" to mean "a group of memory cells or locations inside a memory device."

B. Google's Indefiniteness Challenge to Claim 45 is Improper and Relies on an Insupportable Construction of Claim 39

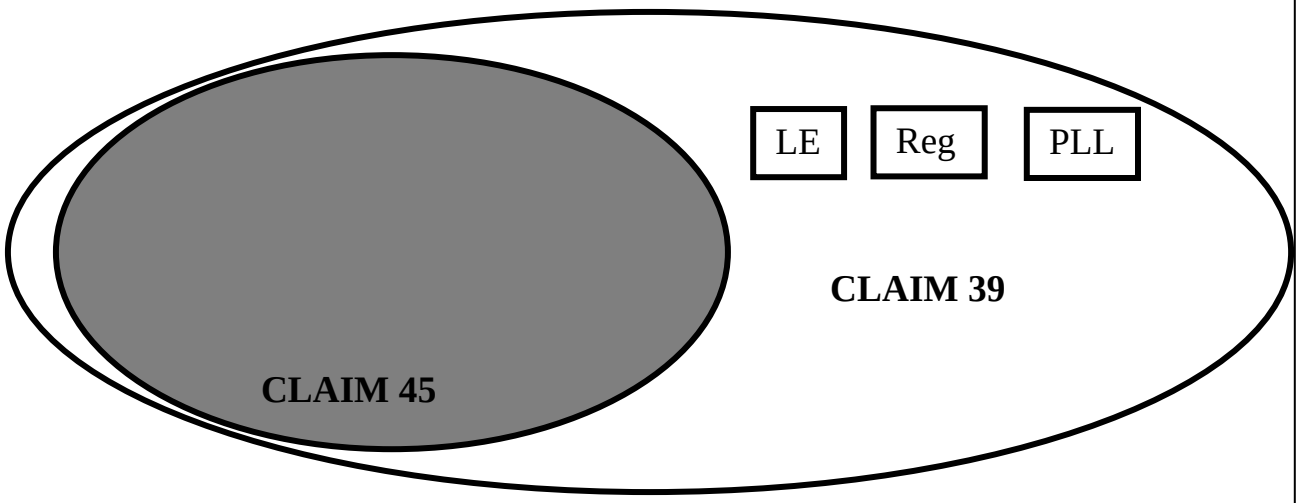
Google makes no attempt to reconcile its request for a judgment of invalidity based on indefiniteness with the summary judgment requirements of *Fed. R. Civ. P.* 56 or the Rules of this Court. For this reason alone, Google's indefiniteness argument should be rejected. Google similarly fails to show that it complied with Patent Local Rule 3-3(d) by including the alleged indefiniteness of claim 45 in its Preliminary Invalidity Contentions. In a footnote, Google contends that it "clearly and unequivocally stated that the asserted claims of the patent are invalid under § 112, ¶¶1-2." Google's Brief at 7 n.1. However, Patent Local Rule 3-3(d) requires Google to specify "[a]ny *grounds* of invalidity based on . . . indefiniteness under 35 U.S.C. § 112(2) . . . ." PLR 3-3(d)(emphasis added). Google's Preliminary Invalidity Contentions state that "Exhibit 14 [is] a claim chart that identifies exemplary grounds of invalidity for the asserted claims based on indefiniteness . . . ." Weingaertner Decl., Exh. D at 6 (Dkt. 49-5). However, the referenced Exhibit 14 (which Google did not provide with its Responsive Brief) makes *no reference to any grounds* of indefiniteness. Hansen Decl. Exh. G. For this reason as well, the Court should reject Google's request for a finding of indefiniteness.

Regardless of whether the Court adjudicates Google's indefiniteness argument now or later, the argument makes clear that the parties dispute the proper construction of "the at least one integrated circuit element comprising a logic element, a register and a phase lock loop" in claim 39, from which claim 45 depends. Google does not dispute that its indefiniteness argument for claim 45 is necessarily based on an implicit construction of claim 39 which limits the latter claim to modules having a single circuit that includes all three of a logic element, register, and phase lock loop. Google asks the Court not to construe the phrase "the at least one integrated circuit" so it can conceal its implicit claim construction and asserts that in so doing, it is merely according the claim its "plain meaning." Google's Brief at 7.

Google effectively concedes that Netlist's construction is correct by arguing that "Claim 39 *includes within its scope* the possibility that the logic element, the register, and the phase lock loop

are part of a single circuit (as well as two, three, or more integrated circuits)." Google's Brief at 7 (emphasis added). However, Google then argues that "claim 45 attempts to exclude the possibility that all three elements may be part of a single component by specifying that only two of them are part of a single component." *Id.* Google is incorrect in its characterization of claim 45. Claim 45 does not exclude embodiments in which the logic element, register, and phase lock loop are part of a single component. Instead, it includes those embodiments and *further includes* those embodiments in which only two of them are in a single component. This necessarily follows from the phrase "two or more" in claim 45. Google ignores the phrase "or more." Claim 45 excludes those modules in which each of the logic element, register, and phase lock loop is provided in its own separate component, not those in which all three are combined in a single component.

Google boldly misstates the law when it argues that "because claim 39 includes the possibility that all three elements may be part of a single component, claim 45 has to be read to apply to all of the possible embodiments." *Id.* That is simply not true. By limiting claim 39, claim 45 can exclude embodiments that fall within the scope of claim 39: "[A] claim in dependent form shall contain a reference to a claim previously set forth and then specify a further limitation of the subject matter claimed." 35 U.S.C. § 112, ¶4. If properly construed, claim 39 encompasses one or more integrated circuit elements among which a logic element, register, and phase lock loop device are distributed. Claim 45 limits claim 39 by requiring that two or more of them be combined in a single component. A Venn diagram illustrates the fallacy in Google's reasoning:



Each box represents a single component. "LE" is a logic element. "Reg" is a register, and "PLL" is a phase lock loop. As the foregoing indicates, as properly construed, claim 39 embraces everything in claim 45, while claim 45 embraces a subset of claim 39. When claim 39 is properly construed, claim 45 is definite.

C. Google's Constructions of the Input Signal Limitations and Output Signal Limitations Violate the Federal Circuit's Prohibition Against Inconsistently Construing Claim Terms in Different Claims

Google ignores and fails to address the Federal Circuit's repeated prohibition against construing the same claim terms differently in different claims "unless the patent otherwise provides." *Georgia-Pacific Corp. v. U.S. Gypsum Co.*, 195 F.3d 1322, 1331 (Fed. Cir. 1999); *The Chamberlain Group, Inc. v. Lear Corp.*, 516 F.3d 1331, 1338 (Fed. Cir. 2008); *Southwall Technologies, Inc. v. Cardinal IG Co.*, 54 F.3d 1570, 1579 (Fed. Cir. 1995). Instead, Google incorrectly suggests that that *Haemonetics Corp. v. Baxter Healthcare Corp.*, 607 F.3d 776 (Fed. Cir. 2010) sanctions inconsistent constructions of the same claim language in different claims based merely on "the plain language of the claim." Google's Brief at 8. Google ignores the Federal Circuit's express holding that the specification of the patent at issue in *Haemonetics* defined the disputed claim term differently for two distinct embodiments, each of which tracked the language of different claims:

> Furthermore, the specification defines "centrifugal unit" in the context of the height and radius limitations in two different embodiments, one that tracks the language of claim 1, in which the parties agree that "centrifugal unit" refers to the vessel alone, and one that tracks the language of claim 16.

Haemonetics, 607 F.3d at 782. The '912 Patent does not describe any of the Input Signal Limitations or Output Signal Limitations differently as between different claims. Nor has Google even suggested it does. *Haemonetics* does not support Google's construction.

Google mistakes the fundamental difference between a genus, such as "input control signal" or "output control signal," and species--such as row/column address signals, command signals, bank address signals, and chip-select signals--that fall within the broader genus. As Google points out, the various independent claims *inclusively* recite particular species of input and

output control signals and therefore provide varying scope and different points of novelty for those claims. However, that fact does not suggest that the definitions of the genus terms "input control signals," input signals," "output control signals," or "output signals" differ from claim to claim. Google may argue that the various independent claims of the '912 Patent should be applied differently to the accused 4-Rank FBDIMMs or prior art because of the particular species of input and output signals that are recited in the claims. Whether the claims can be applied in such a manner is not a claim construction issue. The meaning of the genus input signal limitation terms and output signal limitation terms does not vary from claim to claim.

Referring to claims 1 and 15, Google asserts that "when 'command signal' is explicitly introduced as "a command signal" long after the term 'set of input control signals' is used, that command signal must be distinct from whatever the 'set of input control signals covers.'" Google's Brief at 9. Google cites no authority for this proposition and it is incorrect. Instead, the claims cover embodiments in which the "command signal" is part of the same set of input control signals as the listed control signal species as well as those in which it is not. Google does not dispute the fact that the word "comprising" means that the "set of input control signals" is an *open set* that requires the listed species (row/address signal, bank address signals, and at least one chip select signal) but which may include additional species. Google's Brief at 8; '912 Patent at 33:2-4 and 34:35-37 (Hansen Decl., Exh. A). Thus, the additionally recited "command signal" may be part of *or* distinct from the set of input control signals.

Nor does Google dispute the fact that the '912 Patent provides no implicit or explicit definition of any Input Signal Limitations or Output Signal Limitations which excludes command signals. Further, Google's construction improperly reads out the embodiments of the '912 Patent from the scope of claims 1 and 15.

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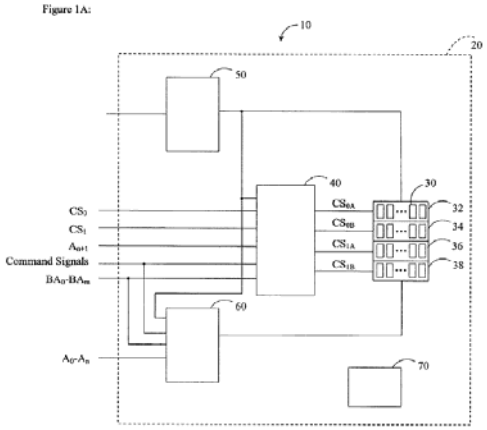
Figure 1A:



The description of FIG. 1A in the '912 Patent makes clear that the chip select signals (CS_0, CS_1), row/column address signal (A_{n+1}), bank address signals (BA_0-BA_m), and command signals, are all part of a set of input control signals received by logic element 40: "As schematically illustrated by FIGS. 1A and 1B, in certain embodiments, the logic element 40 receives a set of input control signals, which includes address signals (e.g., bank address signals, row address signals, column address signals, gated column address strobe signals, chip-select signals) and command signals (e.g., refresh, precharge) from the computer system." The '912 Patent at 6:55-61 (Hansen Decl., Exh. A). Claims 1 and 15 require, but are not limited to, those sets of input control signals that include specific control signal species, namely, "at least one row/column address signal, bank address signals, and at least one chip select signal." *Id.* at 33:2-4; 34:35-37. Because of the term "comprising," a command signal may or may not be received with the set that includes the row/column address signal, bank address signals, and at least one chip select signal. However, under Google's construction, FIG. 1A would be excluded from claims 1 and 15, a result which reveals the impropriety of Google's effort to limit the term "set of input control signals" to exclude command signals. *See Oately Co. v. IPS Corp.*, 514 F.3d 1271, 1276 (Fed. Cir. 2008); *see also MBO Labs, Inc. v. Becton, Dickinson & Co.*, 474 F.3d 1323, 1333 (Fed. Cir. 2007). The '912 Patent makes clear that the output control signals generated in FIG. 1A also include a command signal, a structure that would be excluded by Google's construction. *Id.* at 6:61-63.

D. Google's Construction of "Operatively Coupled" and "Operationally Coupled" Does Not Give Meaning to "Operatively" and "Operationally"

Google's interpretation of "operatively coupled" and "operationally coupled" is improper because it "largely reads the term "operatively" [or operationally] out of the phrase . . . ." *Innova/Pure Water, Inc. v. Safari Water Filtration Sys., Inc.*, 381 F.3d 1111, 1119 (Fed. Cir. 2004). According to Google, its construction includes the agreed-upon meaning of "coupled" and further adds "to provide operation signaling" to give meaning to the words "operatively" and "operationally." Google's Brief at 17. Google is incorrect. As indicated in the parties' agreed upon construction of "coupled to the printed circuit board," the term "coupled" connotes direct or indirect electrical connection. Such an electrical connection would inherently provide "operation signaling" because it provides a path for the signals to travel on. Thus, "to provide operation signaling" adds nothing to the meaning of "coupled." The distinction between "coupled" and "operatively coupled" is underscored in claim 28, which provides that the phase lock loop is "coupled" to the circuit board and "operatively coupled to the plurality of DDR DRAM devices, the logic element and the register." Despite the cosmetic addition of "to provide operation signaling," Google's construction fails to account for the contrasting use of "coupled" and "operatively coupled" in claim 28. However, Netlist's construction gives meaning to "operatively" and "operationally" by indicating that the unmodified term "coupling" refers to physical coupling, while the modified terms "operatively coupled" and "operationally coupled" refer to *functional* coupling.

Google pejoratively dismisses Netlist's citation of *Innova/Pure Water, Inc.* as "bizarre" because the case dealt with an "unrelated patent." Google's Brief at 18. However, Google ignores the fact that the Federal Circuit described the *general usage* of the modifier *"operatively"* in patent drafting, holding that "operatively connected" is "a *general descriptive term frequently used in patent drafting* to reflect a functional relationship between claimed components." *Innova/Pure Water*, 381 F.3d at 1118 (emphasis added). Google is wrong that Netlist cites no support for its construction. The Federal Circuit plainly supports it.

In addition, Google mischaracterizes the '912 Patent Specification to support its construction. Citing column 5, lines 28-31, Google quotes the patent as stating that "the phase-lock loop device transmits clock signals to the plurality of memory devices 30, the logic element 50, and the register 60." Google's Brief at 17. Google then states that the quoted passage refers to "this electrical connection." *Id.* The quoted passage says nothing about direct or indirect electrical connections. Nowhere does the '912 Patent impose a requirement of direct or indirect electrical connections between the phase lock loop, logic element, and/or register. Google's construction is inaccurate and should be rejected.

E. Google's Indefiniteness Challenge to "Spaced From" Violates Federal Circuit Precedent Holding that Numerical Specificity in Claim Drafting is Not Required

Google does not dispute the fact that its indefiniteness challenge to the term "spaced from" is premised on an alleged requirement of numerical specificity patent claims. However, Google ignores and cannot reconcile its position with *Andrew Corp. v. Gabriel Electronics, Inc.*, 847 F.2d 819, 822 (Fed. Cir. 1988) which Netlist cited in its opening brief and which rejected that position. Similarly, in *Young v. Lumenis, Inc.*, 492 F.3d 1336 (Fed. Cir. 2007), the Federal Circuit considered an indefiniteness challenge to the term "near" in a claim directed to a laser-assisted method of declawing cats. The Federal Circuit found the challenged claim term definite, holding that "[a]s used in the claim, 'near' is not insolubly ambiguous and does not depart from the ordinary and customary meaning of the phrase 'near' as meaning 'close to or at' the edge of the ungual crest [recited in the claim]." *Id.* at 1346. *See also*¸ *Rosemount, Inc. v. Beckman Instruments*, 727 F.2d 1540, 1546-1547 (Fed. Cir. 1984) (affirming trial court's finding that the phrase "close proximity" did not render an asserted patent claim indefinite even though it was not "specifically or precisely defined").

Google also ignores the fact that it did not assert that "spaced from" is indefinite in its Preliminary Invalidity Contentions. As stated above in Section I.B., Google made a cursory reference to indefiniteness in the body of its Preliminary Invalidity Contentions Document.

However, nowhere did it explain that the grounds for indefiniteness included the phrase "spaced from."

Google's application of the term "spaced from" to the alleged prior art cited in its Preliminary Invalidity Contentions is also fatal to its indefiniteness attack. Google does not dispute that it applied the term to the prior art, but attempts to dodge the issue by asserting that it "can plead invalidity in the alternative." Google's Brief at 19 n.4. Nevertheless, Google *did not* alternatively argue that "spaced apart" was indefinite. It made no mention of it whatsoever. Google's application of "spaced apart" to the alleged prior art is *unqualified*, Hansen Decl., Exh. G, and is fatal to its indefiniteness challenge. *Rosemount, Inc.*, 727 F.2d at 1547 (rejecting defendant Beckman's indefiniteness argument and noting that "Beckman is confronted also with its own ease in applying 'close proximity' to the prior art at trial and in its briefs"); *see also*, *Chiron Corp. v. Genetech, Inc.*, 2002 U.S. Dist. LEXIS 19150 at *15 ("Genentech's use of similar terminology without apparent difficulty in arguing that the '561 Patent is invalid in light of the prior art . . . is another yet another indication that what is meant by 'useful degree of affinity' is not indefinite").

F. Google's Indefiniteness Challenge to "In a direction along the first side/ in a direction along the second side" Ignores the Intrinsic Evidence

Google does not dispute that its indefiniteness challenge to "in a direction along the first side/ in a direction along the second side" in claim 11 is premised on a misreading of claim 10, from which claim 11 depends. Google asserts that claim 11 is indefinite because "The specification provides no guidance regarding the placement of *ranks* in a direction. Google's Brief at 19 (third column of table at the bottom of the page). Claims 10 and 11 recite the spacing of *sets*--not ranks-- of DDR memory devices in directions along the first and second sides of the memory module. Google fails to address this flawed premise in its indefiniteness contention.

Google also fails to explain why common words such as "in a direction" would not be understood by those skilled in the art. In its Opening Brief, Netlist clearly illustrated an example of these terms with reference to Figures 11A and 11B of the '912 Patent. Google made no attempt to explain how those figures are not sufficiently illustrative of the meaning of the disputed terms.

Google similarly does not dispute that it readily applied "in a direction along the first side/in a direction along the second side" to the alleged prior art in its Preliminary Invalidity Contentions. Google did not even mention this particular ground of alleged indefiniteness, much less argue it "in the alternative." Thus, Google's indefiniteness challenge should be rejected.

G. Google's Construction of "At a Time" Violates the Doctrine of Claim Differentiation and Renders Claims 18 and 20 Redundant

Google does not dispute the fact that its construction of "at a time" as meaning "at the same time" in the claim 18 phrase "transmitted to two ranks . . . at a time" would render claim 20 redundant due to the latter claim's recitation of the term "concurrently." Nor does Google dispute that the Federal Circuit's doctrine of claim differentiation, if applied, would preclude its construction. Instead, Google argues that the doctrine is inapplicable, asserting that "[t]he only reference in the specification to what 'at a time' means suggests that it happens concurrently, and thus at the same time." Google's Brief at 20. However, Google selectively quotes one passage from column 8 of the '912 Patent and ignores Netlist's discussion of Table I from the Patent. Netlist explained that Table I illustrates how the phrase "at a time" refers to the selection of two ranks of memory during a particular time period, which in the case of Table I is a time period during which a given input signal state is present and two ranks are selected. Netlist's Opening Brief at 24-25. Thus, Google cannot escape the doctrine of claim differentiation and the resulting impropriety of its construction.

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CONCLUSION

For the reasons provided above, the Court should adopt Netlist's claim constructions in their entirety and reject Google's claim constructions and indefiniteness challenges to the asserted claims.

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