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13 Attorneys for Plaintiff Netlist Inc.

14
15 UNITED STATES DISTRICT COURT
16 CENTRAL DISTRICT OF CALIFORNIA
17 SOUTHERN DIVISION

18 NETLIST INC., a Delaware
corporation,

19 Plaintiff,

20 v.

21 SAMSUNG ELECTRONICS CO.,
LTD., a Korean corporation,

22 Defendant.
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Case No. 8:20-cv-00993-MCS (ADS)

**NETLIST INC.'S NOTICE OF
MOTION AND MOTION TO
QUASH TRIAL SUBPOENA ON
GAIL SASAKI**

Date: May 6, 2024
Time: 2 p.m. PT
Location: Courtroom 7C
Judge: Hon. Mark C. Scarsi

NOTICE OF MOTION

1
2 TO ALL PARTIES AND THEIR COUNSEL OF RECORD: PLEASE TAKE
3 NOTICE that on May 6, 2024, at 2:00 p.m., or as soon thereafter as this matter may
4 be heard, in Courtroom 7C of the United States District Court for the Central District
5 of California, located at 350 W. 1st Street, Los Angeles, CA 90012, Plaintiff Netlist
6 Inc. will and hereby does move to quash the trial subpoena served on Gail Sasaki.

7 This Motion is based on this Notice; the concurrently filed Memorandum of
8 Points and Authorities; the Declaration of Michael Harbour and accompanying
9 exhibits; the concurrently lodged Proposed Order; such matters of which this Court
10 may take judicial notice; the other records, pleadings, and papers filed in this action;
11 and any other documentary evidence or arguments that may be presented to this Court.
12 This Notice is motioned for May 6 in accordance with L.R. 7-4, however, Netlist
13 intends to seek expedited resolution of this motion without a hearing. Netlist has met
14 and conferred with Samsung regarding this request, and Samsung has indicated it
15 needs additional time to consider whether it will oppose Netlist’s motion for expedited
16 resolution. Accordingly, Netlist will file this request tomorrow, April 9, 2024, after
17 it has received confirmation of Samsung’s position.

18 This motion is made following the conference of counsel pursuant to L.R. 7-3,
19 which took place on April 5, 2024.

20 Dated: April 8, 2024

Respectfully submitted,

IRELL & MANELLA LLP
Jason Sheasby
A. Matthew Ashley
Michael Harbour

24 By: /s/ Michael Harbour
25 Michael Harbour

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 On April 4, 2024, Samsung served Ms. Gail Sasaki with a subpoena
4 commanding her appearance at trial on May 14, 2024. Samsung had previously
5 subpoenaed Ms. Sasaki to appear on the original trial date of March 26, 2024, which
6 Ms. Sasaki had prepared to do. Samsung sought to move the trial date to its current
7 date even though Netlist had expressly informed Samsung that Ms. Sasaki was not
8 available for that date. Specifically, Ms. Sasaki is not available from May 8 to May
9 22, 2024. Since 2022, Ms. Sasaki has had plans to take a prepaid vacation with her
10 husband during which she will be out of the country. The trip was planned with Ms.
11 Sasaki’s close friends and cannot be rescheduled. Sasaki Decl. at ¶¶ 4-7.

12 Requiring Ms. Sasaki to cancel her preplanned vacation—her first in five
13 years—and forfeit the amount she has already spent constitutes an undue hardship.
14 Ms. Sasaki was fully prepared to attend the original trial date of March 26, 2024. The
15 trial, however, was rescheduled at Samsung’s request. Netlist informed Samsung of
16 Ms. Sasaki’s conflicts when the parties’ discussed potential new trial dates, Harbour
17 Decl. ¶ 2, and offered to move the trial to April 1 when both Netlist’s counsel and Ms.
18 Sasaki would be available to appear. Dkt. 468. Samsung did not accept this proposal.
19 Samsung also claimed that it could not be prepared for trial during the second week
20 in April (even though it had previously asked Netlist for just a one or two week
21 extension), when Ms. Sasaki was also available. Dkt. 476 (Hearing Tr.) at 23:13-17.
22 Instead, at Samsung’s request, the trial date was scheduled for mid-May “sole[ly]...
23 to give [Samsung’s substitute lead] counsel a reasonable amount of time to become
24 sufficiently familiar with the case to go to trial.” Dkt. 470 at 2. In sum, Samsung
25 advocated for a trial date during which it knew Ms. Sasaki was not available. Ms.
26 Sasaki should not be penalized for Samsung’s choice.

27 Moreover, any prejudice that Samsung might suffer as a result of Ms. Sasaki’s
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1 absence is minimal at best given that Samsung can, if it chooses, simply play her prior
2 deposition testimony and read her prior trial testimony to the jury. Samsung’s witness
3 list indicates that it plans to examine Ms. Sasaki on “JDLA negotiations” and “Netlist
4 financial documents and public disclosures.” Dkt. 401. Samsung deposed Ms. Sasaki
5 in this action on August 5, 2021, on a number of topics including both JDLA
6 negotiations and Netlist’s financial information and public disclosures. Samsung then
7 called Ms. Sasaki to testify at the previous trial beginning on December 1, 2021,
8 where it examined her again on Netlist’s financial documents and public disclosures.
9 Pursuant to Fed. R. Civ. P. 32(a)(4), this testimony (to the extent it is otherwise
10 admissible) can be played to the jury in lieu of having Ms. Sasaki testify in person.

11 Accordingly, Netlist’s motion to quash should be granted.

12 **II. ARGUMENT**

13 **A. Legal Standard**

14 Rule 45 requires a party “responsible for issuing and serving a subpoena” to
15 “take reasonable steps to avoid imposing undue burden or expense on a person subject
16 to the subpoena.” Fed. R. Civ. P. 45(d)(1). If a subpoenaing party does impose an
17 “undue burden” on a person subject to the subpoena, the Court “must quash or
18 modify” the subpoena. Fed. R. Civ. P. 45(d)(3)(A)(iv). “[A] court determining the
19 propriety of a subpoena balances the relevance of the discovery sought, the requesting
20 party's need, and the potential hardship to the party subject to the subpoena.” *Morning*
21 *Star, LLC v. Canter*, 2023 U.S. Dist. LEXIS 69559 (C.D. Cal. April 20, 2023).

22 **B. Samsung’s Trial Subpoena on Ms. Sasaki Should Be Quashed**

23 Requiring Ms. Sasaki to attend trial would impose an undue burden and
24 unnecessary expenses on her. Ms. Sasaki is Netlist’s current CFO. In 2022, she and
25 her husband booked a vacation to Japan from May 8 to May 23, 2024. Sasaki Decl.
26 ¶¶ 4-5. This is Ms. Sasaki’s first vacation in four years. *Id.* at ¶ 4. She has already
27 paid \$20,000, which she will forfeit if she has to cancel. *Id.* at ¶ 6. Planning the trip
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1 required close coordination with close family friends, and it is unlikely that they
2 would be able to coordinate a similar trip again for several years, if ever. *Id.* at ¶¶ 5-
3 6. The trip involves a two-week long tour of rural areas of Japan that are difficult to
4 access without a guide, and involves seasonal sights and festivals that only occur once
5 every year during mid-May. *Id.* at ¶ 4. Planning this trip also required Ms. Sasaki’s
6 brother to make arrangements over a year ago to take this time off of work in order to
7 care for their mother, who will be 94 years old this year, in Ms. Sasaki’s absence. *Id.*
8 at ¶ 5.

9 Ms. Sasaki was prepared to attend the original trial date of March 26, 2024. *Id.*
10 at ¶ 2. On March 13, 2024, “Samsung requested a 1-2 week continuance” because
11 their lead counsel had a medical issue. Dkt. 469 at 2. This would have put the trial on
12 April 2, 2024 or April 9, 2024. Ms. Sasaki would have been available during this
13 window as well. At the March 18, 2024 status conference, however, Samsung’s
14 counsel informed the Court that a 1-2 weeks continuance was no longer sufficient as
15 it “would simply be not enough time for our new[] trial counsel to get prepared.” Dkt.
16 476 at 23:16-17. Because Netlist’s lead counsel has two trials in Texas scheduled for
17 April 15 and April 29, this meant that the trial could not be scheduled until the second
18 week in May at the earliest. Samsung was fully aware that Ms. Sasaki would not be
19 available at this time. Harbour Decl. ¶ 2; Ex. 2 (March 18, 2024 email informing
20 Samsung that “Gail Sasaki is not available May 8-22.”).

21 Netlist is sympathetic to Samsung’s situation, and has worked with Samsung
22 to accommodate its request to reset the trial date. It would, however, be unfair to force
23 Ms. Sasaki to cancel a vacation that she may not be able to reschedule and that would
24 also require her to forfeit considerable expenses based on Samsung’s own choices.
25 This is particularly true given that Samsung has not demonstrated any need for Ms.
26 Sasaki’s live testimony at all, much less a need outweighing the burden this would
27 impose on her. One of the topics that Samsung seeks to question Ms. Sasaki about are
28 the “JDLA negotiations.” Dkt. 401 (Samsung’s Witness Disclosures). But Ms. Sasaki

1 has already testified she was only “[v]ery peripherally” involved in these negotiations.
2 Ex. 1 (Sasaki Depo.) at 71:12-72:15; *See Mount Hope Church v. Bash Back*, 705 F.3d
3 418, 427-28 (9th Cir. 2012) (“[I]t might be an undue burden to compel an adversary
4 to attend trial as a witness if [they] are known to have no personal knowledge of
5 matters in dispute, especially if [they] would be required to incur substantial travel
6 burdens”) (quoting Fed. R. Civ. P. 45(c)(3)(A)(iv) advisory committee's note)).

7 The other topic that Samsung seeks to question Ms. Sasaki about is “Netlist
8 financial documents and public disclosures.” Dkt. 401. But there is no need to compel
9 Ms. Sasaki to testify live about this topic. Pursuant to Fed. R. Civ. P. 32(a)(4),
10 Samsung can simply designate Ms. Sasaki’s prior deposition and trial testimony from
11 this action. Fed. R. Civ. P. 32(a)(4)(B) (permitting use of deposition testimony for
12 any witness who is “more than 100 miles from the place of . . . trial or is outside the
13 United States”); *see also MMG Ins. Co. v. Samsung Elecs. Am., Inc.*, 293 F.R.D. 58,
14 67 (D.N.H. 2013) (concluding Rule 32(a)(4)(B)'s distance “criterion has been
15 satisfied by [party's] admission that [witness] will be away on vacation during the
16 trial, so the defendants are entitled to use his deposition at trial under Rule
17 32(a)(4)(B)”; *Banta Properties, Inc. v. Arch Specialty Ins. Co.*, No. 10-61485-CIV,
18 2011 WL 13096150, at *1 (S.D. Fla. Dec. 30, 2011) (concluding that because
19 witness's vacation “out of the state would either be 100 miles from the place of trial
20 or outside the United States, [his] deposition testimony could properly be used in this
21 case”).¹

22 Samsung has not explained why this testimony is insufficient or what additional
23 benefit it seeks from Ms. Sasaki’s live appearance. Ms. Sasaki was designated as
24 30(b)(6) witness to testify on Netlist’s financial documents and public disclosures,
25 and Samsung questioned Ms. Sasaki at length on these topics. *See, e.g.*, Ex. 1 (Sasaki
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27 ¹ Even if Rule 32(a)(4)(B) did not apply, Netlist would be willing to stipulate
28 that Samsung may introduce Ms. Sasaki’s prior deposition and trial testimony to the
extent that this testimony was otherwise admissible and unobjectionable.

1 Depo.) at 289:8-290:23; 302:4-25; 318:14-22 (questioning Ms. Sasaki at length about
2 Netlist’s published 10-Qs).

3 Samsung also had an opportunity to examine Ms. Sasaki on Netlist’s financial
4 documents and public disclosures during the previous trial. Dkt. 251; Ex. 3 (Day 3
5 Trial Tr.) at 115:8-119:25 (testimony on Netlist’s financial reports). Notably,
6 Samsung’s witness list for the previous trial similarly stated that Ms. Sasaki would
7 provide testimony related to “Netlist’s...financials.” Dkt. 251. At trial, however,
8 Samsung’s counsel only asked Ms. Sasaki to read two exhibits aloud and verify their
9 accuracy. Ex. 3 at 115:8-119:25. Ms. Sasaki’s live testimony is not required for this
10 purpose, nor has Samsung explained what further testimony on Netlist’s financial
11 documents it needs from Ms. Sasaki beyond what she already provided in her
12 deposition or the previous trial.

13 Courts in this Circuit have quashed trial subpoenas in similar circumstances.
14 *See, e.g., Lister v. Hyatt Corp.*, 2020 U.S. Dist. LEXIS 14802, *10 (W.D. Wash. Jan.
15 24, 2020) (finding trial subpoena would “subject [witness] to ‘undue burden’” where
16 witness had previously been deposed as a 30(b)(6) representative and “[o]ther than
17 attempting a second bite at the Rule 30(b)(6) apple, [defendant] has not explained
18 what relevant, percipient testimony [witness] can provide... [where] he has no
19 additional testimony based on personal knowledge to offer.”); *Leader Techs., Inc. v.*
20 *Facebook, Inc.*, No. C10-80028 MISC, 2010 WL 76 296, at *1 (N.D. Cal. Mar. 2,
21 2010) (granting motion to quash and for protective order in light of less burdensome
22 alternatives to testimony); *see also United States v. 62.64 Acres of Land, More or*
23 *Less*, 2013 U.S. Dist. LEXIS 194819, *6 (C.D. Cal. Jan. 4, 2013) (denying to compel
24 deposition where testimony would “yield the same information that has already been
25 provided to Defendants”).

26 Similarly, Samsung has asked Ms. Sasaki about the JDLA negotiations during
27 her deposition as well. *See, e.g., Ex. 1 (Sasaki Depo.)* at 71:12-73:11 (“you were
28 involved in the negotiations of the [JDLA], correct?... A. Very peripherally...”). Thus,

1 while Ms. Sasaki has already informed Samsung that her involvement in this
2 negotiation was “very peripheral,” Samsung can designate her prior deposition
3 testimony on this topic as well assuming it is otherwise admissible.

4 Additionally, Mr. Chuck Hong, Netlist’s CEO, who is also on Samsung’s
5 witness list, will be at trial and is fully capable of testifying on the topics that Samsung
6 claims it intends to question Ms. Sasaki about. Indeed, Samsung’s witness list
7 indicates that it plans to examine Mr. Hong on JDLA negotiations. Dkt. 483.
8 Moreover, as Netlist’s CEO, Mr. Hong can also testify as to Netlist’s financial
9 documents and public disclosures. Indeed, he is a co-signatory on Netlist’s SEC
10 filings, just as Ms. Sasaki. *See, e.g.*, Ex. 3 (Trial Tr.) at 117:22-118:16 (“Q. Exhibit
11 1020 is what’s called a form 10-Q; correct? A. Yes... Q. Also signed by Mr. Chun K.
12 Hong. The CEO of the company; correct? A. Yes.”).

13 During the parties’ meet and confer, Samsung asked whether Ms. Sasaki could
14 testify remotely from Japan. Harbour Decl. ¶ 6. This is not a viable option. While
15 Japanese law permits remote depositions for foreign court proceedings under very
16 narrow circumstances, there is no similar provision for remote court testimony, and it
17 is thus not clear it would be legally permissible for Ms. Sasaki to remotely testify
18 from Japan at all. *See* Article 17(1) (e) of the U.S. - Japan Consular Convention. In
19 fact, Japanese law prohibits U.S. Courts from presiding over testimony given by
20 witnesses in Japan. *See* U.S. Department of State, Bureau of Counselor Affairs, Japan
21 (“Taking Voluntary Depositions of Willing Witnesses”)
22 ([https://travel.state.gov/content/travel/en/legal/Judicial-Assistance-](https://travel.state.gov/content/travel/en/legal/Judicial-Assistance-CountryInformation/Japan.html)
23 [CountryInformation/Japan.html](https://travel.state.gov/content/travel/en/legal/Judicial-Assistance-CountryInformation/Japan.html)) (“Japan has advised the United States that it will not
24 permit the participation of foreign judges in the deposition of a witness located in
25 Japan.”) Moreover, even for depositions, Japan places strict limitations on the
26 circumstances in which a witness may testify from Japan. *Id.* This would require,
27 among other things, that Ms. Sasaki testify at a designated US Consular office, that a
28 US Consular officer preside over the testimony, and prior approval from the Japanese

1 government if the testimony is to be videotaped. The U.S. Consulate and Embassy are
2 not available during the week of May 14, 2024.² Further, given that Ms. Sasaki will
3 be traveling to rural Japan and the time differences, it will not be possible for Ms.
4 Sasaki to provide testimony at one of the required locations.

5 In sum, Samsung's subpoena seeks to compel Ms. Sasaki to incur significant
6 burden and financial cost to appear for thirty minutes at trial on topics she has already
7 testified on multiple times, and that other Netlist witnesses are equally, if not more,
8 capable of testifying to at trial. Dkt. 401. Samsung has not explained what benefit
9 there is to compelling Ms. Sasaki's appearance, and cannot explain how such minimal
10 benefit would outweigh the undue burden and unnecessary costs that Ms. Sasaki
11 would incur.

12 **II. CONCLUSION**

13 For the foregoing reasons, the Court should quash the subpoena served on
14 Ms. Sasaki.

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27 ² According to the U.S. Embassy website, the deposition rooms in the Tokyo
28 embassy are only available from May 20 to May 23, and after May 28, 2024, whereas
the Osaka consulate is only available after May 28, 2024.
<https://jp.usembassy.gov/services/depositions-in-japan/>

1 Dated: April 8, 2024

Respectfully submitted,

2 IRELL & MANELLA LLP
3 Jason Sheasby
4 A. Matthew Ashley
5 Michael Harbour

6 By: /s/ Michael Harbour

7 Michael Harbour

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