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19 **UNITED STATES DISTRICT COURT**
20 **CENTRAL DISTRICT OF CALIFORNIA**

21 NETLIST INC. a Delaware
22 corporation,

23 Plaintiff,

24 vs.

25 SAMSUNG ELECTRONICS CO.,
26 LTD., a Korean corporation,

27 Defendant.

Case No.: 8:20-cv-00993-MCS-ADS

**SAMSUNG'S OPPOSITION TO
NETLIST'S MOTION TO QUASH
TRIAL SUBPOENA ON GAIL
SASAKI**

Final Pretrial Conference:

Date: May 6, 2024
Time: 2:00 p.m.
Judge: Hon. Mark C. Scarsi
Location: Courtroom 7C

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1 **I. INTRODUCTION**

2 Netlist’s belated motion to quash the valid and properly served trial subpoena
3 on its Chief Financial Officer, Gail Sasaki—an undisputedly relevant witness
4 Netlist disclosed as having knowledge of the JDLA, the products ordered by
5 Netlist, and Samsung’s alleged failure to fulfill orders, and who Netlist also
6 designated as its 30(b)(6) witness on the purchases of NAND and DRAM at
7 issue—should be denied for several independent reasons.

8 **First**, in what has now become a pattern and practice, Netlist has once again
9 failed to properly meet and confer in advance of filing this motion. Ms. Sasaki was
10 served on March 1, 2024 with a subpoena to appear on the original trial date—
11 which subpoena the parties agreed would apply to any new date if the Court
12 continued trial. However, at the March 18th hearing regarding a new trial date,
13 Netlist’s counsel said nothing about Ms. Sasaki’s vacation plans and represented
14 that May would work for trial.¹ Nor did Netlist disclose her vacation plans after the
15 Court’s March 22 order setting trial for May 14, 2024. And Netlist said nothing
16 after Samsung, in an abundance of caution, served Ms. Sasaki again on March 30th
17 with a subpoena bearing the new trial date. Instead, Netlist informed Samsung
18 about Ms. Sasaki’s apparently long-planned vacation and that it intended to move
19 to quash for the first time on April 4—just two court days before it filed the instant
20 motion.

21 **Second**, Netlist does not—and cannot—show that enforcing the subpoena
22 would unduly burden Ms. Sasaki. While Samsung is sympathetic to Ms. Sasaki’s
23 desire to go on a long-awaited vacation that Netlist’s counsel failed to inform
24 Samsung or the Court about, that inconvenience to Ms. Sasaki cannot outweigh the

25 _____
26 ¹ Netlist’s counsel stated in an email shortly before the March 18 hearing that Ms.
27 Sasaki was “not available” from May 8 to May 22. *See* Dkt. 486-4 at 1. But
28 counsel did not provide any details regarding her conflict or represent it was
immovable, let alone disclose that it was a nonrefundable international vacation that
could not be rescheduled, such that Netlist would contend that her live testimony
could not be accommodated in any way.

1 importance of presenting the jury with the live testimony of a witness that Netlist
2 itself designated as being most knowledgeable on several key topics central to the
3 May 14th trial and that no other witness on Samsung's list can cover.

4 *Third*, any burden on Ms. Sasaki is attributable to Netlist, not Samsung, as
5 Netlist has doggedly refused Samsung's reasonable compromise proposals that
6 would have allowed Ms. Sasaki to go on her vacation without depriving Samsung
7 of a live witness. Instead, Netlist seeks to prevent Samsung from calling *any* live
8 Netlist witnesses on Samsung's list other than CEO Chuck Hong. In that regard,
9 Netlist refuses to voluntarily produce its Chief Operating Officer P.K. Hong,
10 claiming without any support that he is medically unavailable. Therefore, as a
11 compromise to Ms. Sasaki not attending trial, Samsung proposed that Netlist
12 produce its Commodity Manager Steven Yu, who reports to P.K. Hong and has
13 handled all of Netlist's purchases of NAND and DRAM since 2018—nearly the
14 entire period of the alleged breach—and could therefore testify live on those topics
15 in lieu of Ms. Sasaki (and P.K. Hong). There is no dispute that Mr. Yu is subject to
16 the subpoena power of the Court, but he has been evading service for nearly two
17 months now despite Samsung's substantial efforts to serve him. Netlist's counsel
18 has never disputed that Mr. Yu is available and or that they *could* accept service of
19 a subpoena on him, but refuses to do so without any reasonable explanation.

20 Unless Samsung is able to call Steven Yu, Ms. Sasaki is the only Netlist
21 witness on Samsung's list other than Chuck Hong who will testify live. Ms. Sasaki
22 has knowledge of key issues in dispute, even according to Netlist's own discovery
23 disclosures. Quashing Ms. Sasaki's subpoena so she can go on a vacation that
24 Netlist's counsel knew about but willfully failed to disclose to the Court or
25 Samsung until now, while depriving Samsung of any replacement live witness,
26 would materially prejudice Samsung's ability to defend itself—all while Netlist
27 seeks to present its own case by ambush through multiple undisclosed and
28 undeposed witnesses.

1 The only way the Court should grant this motion is on the conditions in
2 Samsung’s compromise offer that requires Netlist to accept service and produce for
3 trial Steven Yu. Otherwise, Netlist should not be permitted to capitalize on its own
4 gamesmanship by removing from live cross-examination a relevant witness with
5 key knowledge of the very transactions that Netlist alleges were a breach of the
6 JDLA.

7 **II. BACKGROUND**

8 Ms. Sasaki was one of two company witnesses—along with Netlist’s CEO,
9 Chuck Hong—that Netlist identified in February 2021 in its initial Rule 26
10 disclosures as likely to have discoverable information to support Netlist’s claims.
11 Ex. 13 at 3. Netlist identified Ms. Sasaki as knowledgeable about, among other
12 things, the JDLA, products ordered by Netlist, Samsung’s fulfillment or
13 nonfulfillment of Netlist’s orders, and harm to Netlist. *Id.* In interrogatory
14 responses, Netlist also identified Ms. Sasaki as one of the individuals “primarily
15 involved in the drafting, negotiation, and execution” of the JDLA. Ex. 15 at 5-6
16 (emphasis added). Ms. Sasaki, along with Mr. Hong, was responsible for
17 “approv[ing] the final terms and structure of the agreement.” *Id.* Netlist designated
18 Ms. Sasaki as Netlist’s 30(b)(6) witness on the quantity and prices for Netlist’s
19 NAND and DRAM purchases. Ex. 10; Ex. 11 at 17:20-19:5.

20 Shortly before discovery ended, Netlist identified three more Netlist
21 witnesses knowledgeable about “[p]roducts ordered by Netlist” and Samsung’s
22 fulfillment or nonfulfillment of orders: Paik Ki Hong, Steven Yu, and Raymond
23 Jiang. Ex. 14 at 3-4; *see also* Ex. 15 at 7.² Mr. Yu is directly responsible for
24 handling all of Netlist’s purchases of NAND and DRAM chips from Samsung and
25 others and has been in that position since 2018. *See* Ex. 16 104:4-18. He therefore
26 has direct knowledge of the very transactions that underlie Netlist’s claims of

27 _____
28 ² Netlist also identified Jibum Kim, a Netlist employee based in Korea, as
knowledgeable about the JDLA and its negotiation. Ex. 14 at 4.

1 breach and about which Ms. Sasaki was designated to testify as Netlist’s 30(b)(6)
2 witness.

3 Samsung included all five Netlist witnesses it deposed on its witness list for
4 the upcoming trial. Dkt. 401. Four of those five witnesses—Chuck Hong, Paik Ki
5 Hong, Gail Sasaki, and Steven Yu—reside and work within the Court’s subpoena
6 power.³ See Lucas Decl. ¶¶ 2-5, 13, 17-18. Yet Netlist seeks to deprive Samsung
7 of the opportunity to examine *any* of them live at trial except for Chuck Hong.
8 Notably, P.K. Hong lives in Irvine, owns a house there, and works in Netlist’s
9 Irvine office, but Netlist’s counsel has claimed—without providing any evidentiary
10 support—that he is in China and will not be returning to the United States or
11 appearing at trial due to his poor health.⁴ Lucas Decl. ¶¶ 13-15.

12 Mr. Yu is undisputedly within the Court’s subpoena power *and* apparently
13 available to testify at trial, *see* Ex. 6, but has been evading service for nearly two
14 months. After Netlist refused to accept service on his behalf, Samsung initially
15 attempted to serve Mr. Yu on Saturday, February 24 at his home in Diamond Bar.
16 Lucas Decl. ¶ 6. Although Mr. Yu’s car was parked in the driveway along with
17 several others, no one answered the door. *Id.* Since then, Mr. Yu and his car have
18 disappeared, family and colleagues have given conflicting stories as to his
19 whereabouts, and Netlist’s counsel has continued to refuse to accept service or
20 provide additional information beyond claiming that Mr. Yu is “in town.”⁵

21 _____
22 ³ It is undisputed that Raymond Jiang, who lives in Las Vegas, Nevada, is beyond
23 the Court’s subpoena power. Samsung has not asked Netlist to accept service of a
24 trial subpoena on behalf of any Netlist employee who is beyond the subpoena
25 power of the Court. Lucas Decl. ¶ 24. At trial, the parties plan to present
26 designated testimony from his deposition.

27 ⁴ Netlist has not met its evidentiary burden to establish that P.K. Hong is
28 unavailable to testify due to his poor health, which requires objective evidence,
such as health records or the declaration of a medical professional. *See Sheetz v.*
Wal-Mart Stores, Inc., 2018 WL 8344383, at *1 (M.D. Pa. Mar. 28, 2018) (claims
of medical unavailability require “objective medical support”). Nonetheless,
despite Samsung’s substantial efforts to serve a subpoena requiring P.K. Hong’s
appearance at trial, *see* Lucas Decl. ¶ 13, Samsung has been unable to do so.

⁵ Lucas Decl. ¶¶ 7-10, 15. Mr. Yu’s family initially told a process server on

1 As for Ms. Sasaki, Samsung served her with a trial subpoena on March 1,
2 which on March 11 the parties agreed would remain effective as to the new trial
3 date set by the Court. *See id.* at ¶¶ 4, 14. Despite knowing about Ms. Sasaki’s
4 planned vacation and the prior agreement to make her available, Netlist’s counsel
5 represented to the Court on March 18 that Netlist had “significant availability” in
6 the “first three weeks of May.” *See* Dkt. 478-1 at 24:11-14. Thereafter, the Court
7 issued its March 22 order resetting trial for May 14, yet Netlist’s counsel again
8 failed to raise the issue—despite the parties’ explicit agreement that the subpoena
9 previously served on Ms. Sasaki remained effective as to the new date. Lucas Decl.
10 ¶ 16. Even after Samsung (out of an abundance of caution) re-served Ms. Sasaki
11 with a trial subpoena on March 30, Netlist’s counsel *still* did not raise the issue or
12 disclose Ms. Sasaki’s vacation plans.⁶ *Id.* ¶ 17. It was not until April 4 that Netlist
13 finally informed Samsung that Ms. Sasaki had a prepaid vacation that could not be
14 rescheduled and that it intended to move to quash the subpoena. *Id.* ¶ 19.

15 In an effort to accommodate Ms. Sasaki’s previously undisclosed vacation
16 plans, minimize the prejudice to Samsung’s ability to examine Netlist’s witnesses
17 live at trial, and avoid motion practice, Samsung first proposed that Ms. Sasaki
18 testify remotely via videoconference from abroad. *See id.* ¶ 20. However, Netlist
19 declined that proposal and proceeded to file the instant motion. *Id.* ¶ 21.

20 Thereafter, in a further effort to accommodate Ms. Sasaki and obviate the
21 instant motion, Samsung proposed another compromise, under which it would
22 withdraw the subpoena to Ms. Sasaki if Netlist agreed to accept service of a trial

23 _____
24 February 29 that he was out of town for work, but they did not know where and had
25 no way to reach him. *Id.* ¶ 7. A few days later, employees at Netlist’s headquarters
26 told a process server that he was out of the country with P.K. Hong and Chuck
27 Hong. *Id.* ¶ 8. Mr. Yu’s family members then stated on March 29 that he was in
28 the United States, though they would not disclose where, and said he would not be
back until after July 4. *Id.* ¶ 10.

⁶ Netlist’s brief and Ms. Sasaki’s declaration both wrongly represent to the Court
that she was served on April 4, the same day that Netlist reached out to Samsung.
Dkt. 486 at 1; Dkt. 486-1 ¶ 3. That is incorrect, because Ms. Sasaki was served at
her home nearly a week prior, on March 30th.

1 subpoena for Mr. Yu so he could provide live testimony (in lieu of Ms. Sasaki), and
2 if Netlist agreed to the orderly designation of Ms. Sasaki’s prior deposition and trial
3 testimony and admission of certain trial exhibits without testimony. *Id.* ¶ 22. But
4 Netlist rejected that proposal as well, indicating that it would agree to the
5 designation of testimony and admission of exhibits (which would be admissible in
6 any event), but adamantly refusing to accept service of a trial subpoena for Mr. Yu.
7 *Id.* Netlist has refused to provide any reasoned basis for its refusal to produce Mr.
8 Yu as a live witness. *Id.* at ¶ 24.

9 All the while, Netlist has attempted to present its case through various Netlist
10 employees—Scott Milton, Devon Park, and Noel Whitley—despite them never
11 having been properly disclosed as potential witnesses, which caused Samsung to
12 not depose any of them prior to the close of fact discovery.⁷ The result Netlist
13 plainly seeks is to deprive Samsung of live examination of any Netlist witness on
14 Samsung’s list other than Chuck Hong, while presenting its own case in a trial by
15 ambush.

16 **III. LEGAL STANDARD**

17 A subpoena may be modified or quashed where complying with the
18 subpoena would impose an “undue burden” on the person subject to the subpoena.
19 Fed. R. Civ. P. 45(d)(3)(A)(iv). As the party opposing the subpoena (which no one
20 disputes was validly served and enforceable), Netlist bears the burden of showing
21 that the subpoena to Ms. Sasaki, the CFO of Netlist, is unduly burdensome. *See*
22 *Goodman v. United States*, 369 F.2d 166, 169 (9th Cir. 1966). This burden “is a
23 heavy one” and requires showing that compliance with the subpoena would be
24 “unreasonable and oppressive.” *In re Yassai*, 225 B.R. 478, 484 (Bankr. C.D. Cal.
25 1998) (quotations omitted).

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27
28 ⁷ As explained in Samsung’s Motion *in Limine* No. 1, the Court should preclude
Netlist from calling those witnesses at trial. Dkt. 403.

1 A court has “ample discretion” to modify a subpoena, *Exxon Shipping Co. v.*
2 *U.S. Dep’t of Interior*, 34 F.3d 774, 779 (9th Cir. 1994), and, even where a court
3 grants a motion to quash, it may impose conditions in doing so, *see Trebby v.*
4 *Goodyear Tire & Rubber Co.*, 129 F.R.D. 468, 469 (S.D.N.Y. 1990).

5 **IV. ARGUMENT**

6 Netlist’s motion to quash fails for three independent reasons. *First*, Netlist
7 failed to be forthcoming with Samsung and the Court regarding Ms. Sasaki’s
8 vacation and belatedly brought this motion without properly meeting and
9 conferring. *Second*, Netlist has failed to meet its burden of showing that changing
10 Ms. Sasaki’s personal vacation plans would be so unduly burdensome as to warrant
11 depriving Samsung of the opportunity to examine a key Netlist employee with
12 relevant knowledge live at trial that cannot be otherwise obtained. *And third*, any
13 burden on Ms. Sasaki is squarely attributable to Netlist, as Netlist not only failed to
14 promptly disclose her vacation plans, but has rejected all of Samsung’s reasonable
15 compromises to accommodate Ms. Sasaki’s personal vacation plans, including
16 accepting service on behalf of Mr. Yu.

17 **A. Netlist’s Lack of Diligence and Failure to Properly Meet and**
18 **Confer Warrants Denial of the Motion.**

19 The issues raised in Netlist’s motion to quash are problems entirely of
20 Netlist’s own making. The motion should be denied not only for that reason, but
21 also because Netlist failed to adequately meet and confer before belatedly filing its
22 motion. Samsung previously served Ms. Sasaki with a trial subpoena, which the
23 parties agreed would be effective as to the new trial date set by the Court. *See*
24 Lucas Decl. ¶¶ 4, 14. Netlist’s counsel knew of Ms. Sasaki’s vacation plans well
25 before the March 18th hearing—indeed, she has been planning this vacation for two
26 years. *See* Dkt. 486-1 ¶ 5. Yet when the Court asked at the March 18th hearing
27 about Netlist’s availability for a May trial, Netlist’s counsel represented to the
28 Court that Netlist had “significant availability.” *See* Dkt. 478-1 at 24:11-14. Nor

1 did Netlist’s counsel promptly raise the issue once the Court issued its March 22
2 order resetting trial for May 14, or once Samsung re-served Ms. Sasaki on March
3 30. Lucas Decl. ¶¶ 16-17. Instead, Netlist waited until Thursday, April 4, 2024, to
4 inform Samsung for the first time that Ms. Sasaki had a prepaid international
5 vacation from May 8 to May 22 and that it intended to file a motion to quash.

6 Remarkably, Netlist seeks to blame Samsung for not raising Ms. Sasaki’s
7 vacation plans with the Court, claiming that it “expressly informed Samsung” of
8 Ms. Sasaki’s unavailability. Dkt. 486 at 1, 3. But Samsung had no reason to know
9 what those plans were much less that they supposedly cannot be moved, because
10 Netlist’s counsel failed to disclose that to anyone. Lucas Decl. ¶¶ 15-16. Samsung
11 had every reason to believe any conflict had been resolved and any plans were
12 flexible when Netlist’s counsel represented to the Court that Netlist had “significant
13 availability” the first three weeks of May for trial. Dkt. 478-1 at 24:11-14. And
14 Samsung continued to believe that Ms. Sasaki would be available for trial when
15 Netlist said nothing after the Court set the new trial date and after Samsung re-
16 served her. Lucas Decl. ¶¶ 16-17.

17 When Netlist finally did disclose Ms. Sasaki’s vacation plans on April 4th,
18 instead of complying with Local Rule 7-3’s requirement to meet and confer at least
19 seven days before filing any motion, Netlist unilaterally demanded that Samsung
20 confer the very next day, Friday, April 5th, telling Samsung that absent Samsung
21 withdrawing Ms. Sasaki’s subpoena, Netlist would file its motion the following
22 Monday, April 8th. *See id.* ¶¶ 19-20. Had Netlist’s counsel been forthcoming
23 about Ms. Sasaki’s vacation plans from the outset or with the Court, the trial could
24 have scheduled for a different date. And had Netlist’s counsel been diligent in
25 addressing this issue once the Court reset trial for May 14, the parties could have
26 properly met and conferred, and explored various compromise positions without
27 resorting to the present motion practice, including Netlist’s *Ex Parte* Application,
28 Dkt. 487, to expedite resolution of its motion to quash. Netlist’s lack of candor,

1 lack of diligence, and continued refusal to meaningfully participate in the meet and
2 confer process, *see also infra* at §IV.C, are reason enough to deny Netlist’s motion.
3 *See* Dkt. 390 at 5-6 (denying Netlist’s motion to supplement due to failure to
4 properly meet and confer).

5 **B. Netlist Fails to Meet its Burden to Show an “Undue Burden” on**
6 **Ms. Sasaki.**

7 Even if the Court reaches the merits of Netlist’s motion, Netlist cannot meet
8 its heavy burden of showing that Ms. Sasaki—a key witness Netlist repeatedly
9 disclosed as being the most knowledgeable on critical issues—changing her
10 personal vacation plans that Netlist failed to disclose constitutes an “undue burden”
11 that would justify quashing the subpoena and depriving Samsung of a live witness.

12 Determining whether a subpoena imposes an “undue burden” requires
13 balancing the relevance of the information and the subpoenaing party’s need for
14 that information against the burden on the subpoena recipient. *Pate v. Pac. Harbor*
15 *Line, Inc.*, 2023 WL 2629867, at *9 (C.D. Cal. Feb. 6, 2023). Courts regularly
16 deny motions to quash subpoenas issued to witnesses—even third-party witnesses,⁸
17 which Ms. Sasaki is not—with far more compelling burdens than changing vacation
18 plans where the witnesses’ testimony is important. *See, e.g., U.S. ex rel.*
19 *Fesenmaier v. Cameron-Ehlen Grp., Inc.*, 2022 WL 18012008, at *3 (D. Minn.
20 Dec. 30, 2022) (denying motion to quash trial subpoena even though it would
21 require non-party to take time away from “busy surgical schedule” treating “elderly
22 and financially disadvantaged patients” given the importance of his testimony);
23 *Alston v. Jones*, 2022 WL 1809422, at *1-2 (M.D.N.C. June 2, 2022) (denying
24 motion to quash trial subpoena issued to non-party physician despite burdens of
25

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27 _____
28 ⁸ Third-party witnesses are given special consideration in the undue burden
analysis. *See Realtime Data, LLC v. MetroPCS Tex., LLC*, 2012 WL 1905080, at
*2 (S.D. Cal. May 25, 2012).

1 “reschedul[ing] patient appointments” given the “critical importance” of his
2 testimony).

3 Netlist attempts to minimize the significance of Ms. Sasaki, who is Netlist’s
4 Chief Financial Officer, by arguing that Samsung “has not demonstrated any need
5 for Ms. Sasaki’s live testimony.” Dkt. 486 at 3. Netlist first argues that Ms. Sasaki
6 was only “peripherally” involved in the JDLA negotiations. *Id.* at 3-4. This is
7 disingenuous at best, as Netlist itself has repeatedly disclosed Ms. Sasaki as a key
8 witness in the case with knowledge of and final authority over not only the JDLA,
9 but also knowledge of Netlist’s purchases from Samsung and Samsung’s alleged
10 failure to fulfill orders. Ex. 13 at 3; Ex. 15 at 5-6. Indeed, Netlist designated Ms.
11 Sasaki as its 30(b)(6) witness on the quantity and prices for Netlist’s NAND and
12 DRAM purchases—the very transactions at issue as the purported breaches in this
13 case. *See* Ex. 10; Ex. 11 at 17:20-19:5. Ms. Sasaki’s live testimony on these
14 NAND and DRAM purchases is especially critical because Netlist is seeking to
15 deprive Samsung of the opportunity to examine the other Netlist witnesses most
16 knowledgeable about those purchases—P.K. Hong and Steven Yu.

17 Netlist also implies that Ms. Sasaki’s testimony is not critical because
18 Samsung called Ms. Sasaki only briefly in the previous trial in this case. Dkt. 486
19 at 5. But that trial was about damages only, not about the parties’ intent regarding
20 Section 6.2 or materiality of any breach. And both P.K. Hong and Steven Yu
21 testified live at the damages trial, meaning that Ms. Sasaki’s testimony on NAND
22 and DRAM purchases was unnecessary. Similarly, at the time the witness lists for
23 this trial were submitted, Samsung believed that P.K. Hong or Steven Yu would
24 cover Netlist’s purchases of NAND and DRAM from Samsung. *See* Dkt. 401 at 1,
25 4. Without either of them, Ms. Sasaki—who Netlist disclosed as also having such
26 knowledge—is critical.⁹

27 _____
28 ⁹ For that reason, any suggestion by Netlist that Ms. Sasaki was not designated to
testimony on NAND and DRAM purchases in Samsung’s witness list is unavailing.

1 Nor is Netlist correct that Samsung can obtain adequate testimony regarding
2 Netlist’s “financial documents and public disclosures” from CEO Chuck Hong.
3 Dkt. 486 at 6. As CFO, Ms. Sasaki is the most knowledgeable witness regarding
4 these issues—courts often recognize the importance of testimony from those
5 executives who are most informed about the relevant issues. Indeed, Mr. Hong
6 repeatedly did not know about or deferred to Ms. Sasaki on financial issues,
7 including those directly related to the JDLA, at his deposition. Ex. 12 at 57:8-24
8 (no knowledge of pre-JDLA cash-flow issues or existing debt secured by patents,
9 referred to Ms. Sasaki), 137:19-138:9 (no knowledge of whether Netlist was losing
10 money in 2015), 142:16-144:11 (no knowledge of net losses in SEC filings),
11 159:20-163:17 (no knowledge of customers referenced in SEC filings or major
12 customers lost), 171:12-172:7 (no knowledge of Netlist’s credit line with Samsung,
13 referred to Ms. Sasaki). *See Shawnee Holdings, Inc. v. Travelers Indem. Co. of*
14 *Am.*, 2004 WL 234369, at *1 (M.D. Pa. Feb. 4, 2004) (compelling testimony of
15 executives with “important decision-making positions within the defendant
16 corporations” that were “key participants in the circumstances” of the case); *see*
17 *also Pac. Oil & Gas, LLC v. Chesapeake Energy Corp.*, 2017 WL 1397538, *6 (D.
18 Kan. April 18, 2017) (transferring case because “top executives” “involved with
19 [the] transaction” at issue “will likely have material testimony”).

20 Netlist also argues that Ms. Sasaki’s live testimony is unnecessary because
21 Samsung can simply designate her prior testimony. Dkt. 486 at 4. But while the
22 designation of prior testimony is sometimes a necessary substitute where live
23 testimony is truly unavailable, that hardly means that videotaped or recited excerpts
24 are interchangeable with live testimony, which permits the jury to “better assess

25 _____
26 At the time there was no need to question Ms. Sasaki on those topics about which
27 she has knowledge, because Samsung intended to question other witnesses about
28 them. But Netlist seeks to prevent those other witnesses from testifying, too. And
Chuck Hong made clear at his deposition that he does not know this information.
Ex. 12 at 164:18-166:14 (no knowledge of Netlist cancelling purchase orders),
207:13-209:11 (no knowledge of Netlist’s resale revenue from Samsung products).

1 demeanor and credibility.” *In re Funeral Consumers Antitrust Litig.*, 2005 WL
2 2334362, at *5 (N.D. Cal. Sept. 23, 2005). Indeed, it is widely recognized that
3 “live testimony is the bedrock of the search for truth in our judicial system.”
4 *United States v. Thoms*, 684 F.3d 893, 903 (9th Cir. 2012); *see also Silva v. Aviva*
5 *PLC*, 2016 WL 1169441, *5 (N.D. Cal. Mar. 25, 2016) (“for trial, live testimony is
6 as a general matter preferable over deposition excerpts”); *U.S. ex rel. Hockaday v.*
7 *Athens Orthopedic Clinic, P.A.*, 2022 WL 15092294, at *2 (M.D. Ga. Oct. 26,
8 2022) (no undue burden where inconvenience of attending trial “pales in
9 comparison to the essential role that live testimony can play in the ascertainment of
10 the truth”).

11 Netlist cites no case in which a court has quashed a trial subpoena on the
12 basis of a witness’s undisclosed vacation plans, let alone a key witness who is
13 employed as the plaintiff’s CFO and was disclosed as having knowledge of the key
14 issues in dispute. Netlist first cites *Mount Hope Church v. Bash Back*, 705 F.3d
15 418 (9th Cir. 2012), which quotes from the advisory committee notes that there
16 “might be an undue burden” to compel a party witness “to incur substantial travel
17 burdens” to testify if they “have no personal knowledge of matters in dispute.” *Id.*
18 at 427-28 (quotations omitted). But *Mount Hope Church* had nothing to do with
19 quashing a trial subpoena due to a witness’s vacation—it concerned a subpoena
20 *duces tecum* seeking the identities of certain email account holders. *Id.* at 422.
21 And even the general statement of law that Netlist cites is irrelevant here. The
22 “travel burdens” that Rule 45 is concerned with are those burdens from traveling **to**
23 **court** to testify—not having to cut short a pre-planned but undisclosed vacation—
24 and, in any case, as discussed above, Ms. Sasaki has direct personal knowledge on
25 important issues in the case.

26 Netlist also points to two other cases that are likewise completely inapposite.
27 Netlist cites *Leader Technologies v. Facebook*, 2010 WL 761296 (N.D. Cal. Mar.
28 2, 2010), but in that patent infringement case, the court quashed deposition

1 subpoenas because all of the subpoenaed witnesses had left Facebook before the
2 patent in question was issued and thus lacked relevant knowledge. *Id.* at *3.
3 Similarly, in *United States v. 62.64 Acres of Land, More or Less*, 2013 U.S. Dist.
4 LEXIS 194819 (C.D. Cal. Jan. 4, 2013), the court denied the defendants’ motion to
5 compel the deposition of a third-party witness who previously represented them in
6 real estate negotiations because the defendants themselves were involved in those
7 negotiations and thus already had all the relevant information. *Id.* at *6. Unlike in
8 those cases, Ms. Sasaki—Netlist’s long-time CFO and 30(b)(6) designee on the
9 very transactions in dispute here—is the most knowledgeable witness on several
10 key issues in the case.

11 Netlist’s other cited case, *Lister v. Hyatt Corp.*, 2020 U.S. Dist. LEXIS
12 14802 (W.D. Wash. Jan. 24, 2020), is equally inapposite. There, the court in a slip-
13 and-fall case quashed a trial subpoena served on one the defendant’s employees in
14 light of competing “family obligations” because he did not start working for the
15 defendant until over a year after the accident and therefore had no relevant personal
16 knowledge. *Id.* at *7, 9-10. But Ms. Sasaki does have relevant personal
17 knowledge, and she has been at Netlist since 2006 and served as Netlist’s CFO
18 during the entire time period relevant to this case. And it goes without saying that a
19 vacation with friends is not the same as “family obligations.”

20 C. **Any Burden on Ms. Sasaki Is Attributable to Netlist’s Refusal of**
21 **Samsung’s Reasonable Compromises Positions.**

22 Even though Netlist has failed to meet its burden of showing that Ms.
23 Sasaki’s attendance at trial would be unduly burdensome, Samsung is sympathetic
24 to Ms. Sasaki’s situation. Mindful of its obligation to take reasonable steps to
25 reduce the burdens on subpoenaed witnesses, *see* Fed. R. Civ. P. 45(d)(1), and in an
26 effort to avoid burdening the Court with unnecessary motion practice, Samsung has
27 repeatedly sought to reach a compromise with Netlist to accommodate Ms. Sasaki’s
28 desire to go on vacation with her friends, while minimizing the prejudice to

1 Samsung in her absence. However, Netlist has refused all compromise offers, even
2 though any inconvenience to Ms. Sasaki from testifying is entirely attributable to
3 Netlist and its counsel, who insist on trying to deprive Samsung of the opportunity
4 to examine any of the Netlist witnesses on Samsung's witness list besides Chuck
5 Hong live at trial, while simultaneously seeking to ambush Samsung with
6 undisclosed and undeposed witnesses in Netlist's own case.

7 When Netlist initially raised its intention to move to quash given Ms.
8 Sasaki's vacation, Samsung suggested that Ms. Sasaki testify remotely via
9 videoconference from Japan so as to minimize the disruption of her vacation, and
10 offered to accommodate her at counsel's Tokyo office. Lucas Decl. ¶ 20.
11 However, on Monday, April 8, Netlist stated that it did not believe remote
12 testimony would be feasible, declined, and proceeded with the motion. *Id.* ¶ 21; *see*
13 *also* Dkt. 486 at 6-7.¹⁰

14 In a further effort to accommodate Ms. Sasaki and obviate further motion
15 practice, Samsung proposed another compromise. Samsung would agree to
16 withdraw the subpoena to Ms. Sasaki provided that Netlist agreed to an orderly
17 designation of Ms. Sasaki's prior testimony and admission of trial exhibits, if
18 Netlist agreed to accept service of a trial subpoena for Netlist employee Steven Yu,
19 who could testify to at least *some* of the topics on which Ms. Sasaki would have
20 testified. Lucas Decl. ¶ 22. But Netlist likewise rejected that proposal too, because
21 it refuses to agree to accept service of a trial subpoena for Mr. Yu to testify as a live
22 witness. Lucas Decl. ¶¶ 22-24.

23 Netlist's only offer—that the parties designate Ms. Sasaki's testimony and
24 stipulate to two exhibits—is no offer (or compromise) at all. Ms. Sasaki's
25 testimony is always admissible under Rule 32(a)(3), and Netlist's own motion
26

27 ¹⁰ Netlist does not appear to have made any effort to contact the US Embassy in
28 Japan to inquire to the availability of room or applicability of the regulations it cites
in these circumstances, which do not involve a deposition. *See* Dkt. 486-2.

1 acknowledges that Ms. Sasaki’s prior testimony could be designated pursuant to
2 Rule 32(a)(4). *See* Dkt. 486 at 4. And under the Court’s trial order, Netlist is under
3 an ongoing obligation to confer and stipulate as far as possible to the admissibility
4 of exhibits.¹¹ *See* Order Re: Jury/Court Trial § II.B.

5 Netlist has no reasonable basis for its refusal to accept service for Mr. Yu.
6 Steven Yu, who lives in Diamond Bar and works at Netlist’s headquarters in Irvine,
7 is both within the Court’s subpoena power *and* available for trial. *See* Ex. 6. Mr.
8 Yu is the Netlist employee primarily responsible for handling all of Netlist’s
9 purchases of NAND and DRAM chips from Samsung and others beginning in
10 2018. *See* Ex. 16 104:4-18; Ex. 14 (Rule 26 disclosures); Ex. 15 (interrogatory
11 responses). Besides Ms. Sasaki, who was designated on NAND and DRAM
12 purchases, Mr. Yu is the *only* other witness on Samsung’s witness list who can
13 testify to the very sales transactions and purported breaches that are at issue in this
14 case.¹²

15 However, despite Samsung’s extensive efforts to serve Mr. Yu with a trial
16 subpoena—including spending over \$44,000 on service attempts through March
17 alone, *exclusive* of the substantial attorney time dedicated to attempting to serve
18 him, Lucas Decl. ¶ 12, Ex. 3-4—Mr. Yu has successfully evaded service. His
19 family and colleagues have given conflicting stories as to his whereabouts, and
20

21 ¹¹ One of the exhibits is not even new, as it is the original version of an email Ms.
22 Sasaki already authenticated. Lucas Decl. Ex. 9 at 9. And neither is controversial.
Id.

23 ¹² Netlist has suggested that its refusal to compromise by accepting service for
24 Steven Yu is because Samsung refuses to accept service on behalf of Samsung
25 witnesses. Lucas Ex. 9 at 3. But the only Samsung witnesses Samsung’s counsel
26 has not agreed to accept service for are Korean citizens who—like Netlist witness
27 Raymond Jiang who lives and works in Nevada—live and work in Korea, are
28 outside the subpoena power of the Court, and cannot be compelled to trial. And
even then, Samsung has offered to make available to plaintiffs to examine in their
case in chief HK Ji, who is not subject to subpoena but Samsung will call in its
case. *Id.* at 2. This is not a scenario where Samsung is unwilling to compromise,
the issue is that Netlist demands that it be a one-way street solely in Netlist’s favor
without ever providing any compromise in return.

1 Netlist’s counsel have refused to accept service or provide additional information
2 despite representing that he is “in town.” *See supra* at 4.

3 Netlist is now seeking to deprive Samsung of the ability to examine **both**
4 Gail Sasaki and Steven Yu live at trial (in addition to depriving Samsung of any
5 live examination of P.K. Hong in addition to Raymond Jiang). That would unfairly
6 prejudice Samsung, both because it would leave Samsung with only one Netlist
7 witness on Samsung’s witness list—Chuck Hong—to examine live at trial, and
8 because it would deny Samsung the ability to examine either of the two other
9 witnesses on Samsung’s list who are knowledgeable about the very NAND and
10 DRAM purchases underlying Netlist’s breach claim. Netlist’s refusal to agree to
11 Samsung’s reasonable compromise proposal and accept service for Mr. Yu—when
12 it could easily do so—is all the more egregious given that Netlist is trying to
13 conduct a trial by ambush and present its case through several undisclosed and
14 undeposed witnesses, as addressed in Samsung’s motion *in limine* regarding those
15 witnesses. *See* Dkt. 403.¹³

16 Such blatant gamesmanship should be rejected, and Netlist’s motion to quash
17 should be denied. If, however, the Court is inclined to grant Netlist’s motion, it
18 should do so on the reasonable conditions Samsung proposed in its proposal,
19 namely, that Netlist agree to accept service of a trial subpoena for Steven Yu and
20 produce him live at trial.

21
22
23
24 ¹³ Indeed, shortly before this opposition brief was due, Netlist proposed that it
25 simply present evidence of Netlist purchases of NAND and DRAM through one of
26 those improperly disclosed and undeposed witnesses, Devon Park. In addition to
27 the obvious prejudice to Samsung, Netlist fails to mention that Mr. Park was not
28 even a Netlist employee for some 15 months of the alleged breaches, having left
Netlist from March 2019 until 2022 to start his own company. Lucas Decl. ¶ 23.
And Netlist still has not explained why it cannot accept service on behalf of the
Netlist employee who *was* there from 2018 to the present and who did have primary
responsibility for those purchases—Steven Yu. *Id.*

1 **V. CONCLUSION**

2 For all the foregoing reasons, the Court should deny Netlist’s motion to
3 quash the trial subpoena served on Gail Sasaki.

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5 Dated: April 15, 2024

O’MELVENY & MYERS LLP

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7 By: /s/ Darin Snyder
8 Darin Snyder
9 Attorneys for Defendant Samsung
10 Electronics Co., Ltd.

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