PRUETZ LAW GROUP LLP
Adrian M. Pruetz (Bar No. 118215)
ampruetz@pruetzlaw.com
Erica J. Pruetz (Bar No. 227712)
ejpruetz@pruetzlaw.com
200 N. Sepulveda Blvd., Suite 1525
El Segundo, CA 90245
Phone: 310.765.7650
Fax: 310.765.7641

LEE TRAN & LIANG APLC
Enoch H. Liang (Bar No. 212324)
ehl@ltlcounsel.com
Steven R. Hansen (Bar No. 198401)
srh@ltlcounsel.com
Edward R. Quon (Bar No. 214197)
eq@ltlcounsel.com
601 S. Figueroa Street, Suite 4025
Los Angeles, CA 90017
Phone: 213.612.3737
Fax: 213.612.3773

Attorneys for Defendant
NETLIST, INC.

UNITED STATES DISTRICT COURT

NOERTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

NETLIST, INC., Plaintiff, vs. GOOGLE INC., Defendant.	CASE NO. CV09-05718-SBA **PLAINTIFF NETLIST, INC.'S REPLY TO DEFENDANT GOOGLE INC.'S COUNTERCLAIMS** **[JURY TRIAL DEMANDED]**

Plaintiff Netlist, Inc. ("Netlist" or "Plaintiff"), by and through its undersigned counsel, hereby files its Reply and Affirmative Defenses to Defendant Google Inc.'s ("Google" or "Defendant") Counterclaims (the "Counterclaims"), as follows:

COUNTERCLAIMS

The Parties

1. Netlist admits that Google has asserted that it is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 1600 Amphitheatre Parkway, Mountain View, California 94043.

2. Netlist admits that it is a corporation organized and existing under the laws of the state of Delaware, and its principal place of business is located at 51 Discovery, Irvine, California 92618.

Jurisdiction And Venue

3. Netlist admits that the court has subject matter jurisdiction over claims arising under 28 U.S.C. §§ 1331, 1367, 1338(a) and 2202. Netlist denies the remaining allegations in paragraph 3.

4. Netlist admits the allegations in paragraph 4.

Factual Background

5. Netlist admits the allegations in paragraph 5.

6. Netlist denies the allegations in paragraph 6.

7. Netlist admits that there is an actual case or controversy concerning Google's infringement of the '912 Patent. Except as expressly admitted herein, Netlist denies the allegations of paragraph 7.

COUNT ONE

Declaratory Judgment of Non-Infringement of U.S. Patent No. 7,619,912

8. Netlist's responses to paragraphs 1 through 7 are incorporated by reference.

9. Netlist admits the allegations of paragraph 9.

10. Netlist denies the allegations of paragraph 10.

11. Netlist denies the allegations of paragraph 11.

12. Netlist denies the allegations of paragraph 12.

COUNT TWO

Declaratory Judgment of Invalidity of U.S. Patent No. 7,619,912

13. Netlist's responses to paragraphs 1 through 12 are incorporated by reference.

14. Netlist denies the allegations of paragraph 14.

15. Netlist denies the allegations of paragraph 15.

16. Netlist denies the allegations of paragraph 16.

17. Netlist denies the allegations of paragraph 17.

COUNT THREE

Fraud/Deceit/Concealment

18. Netlist admits that JEDEC is a solid state technology standard setting organization. Except as expressly admitted herein, Netlist denies the allegations of paragraph 18.

19. Netlist admits the allegations of paragraph 19.

20. Netlist is without sufficient information or belief to enable it to answer the allegations in paragraph 20, and, on such ground, denies the allegations of paragraph 20.

21. Netlist denies the allegations of paragraph 21.

22. Netlist denies the allegations of paragraph 22.

23. Netlist admits that JEDEC has a process by which attendees can confirm their attendance at particular JEDEC meetings. Except as expressly admitted herein, Netlist denies the allegations of paragraph 23.

24. Netlist admits that the application for the '912 patent was filed on September 27, 2007. Netlist also admits that the application for the '912 Patent is a continuation of U.S. Patent Application No. 11/173,175, which was filed on Jul. 1, 2005 and issued as U.S. Patent No. 7,289,386. Netlist further admits that the

application for the '912 Patent claims the benefit of U.S. Provisional Patent Application No. 60/588,244, filed on Jul. 15, 2004, U.S. Provisional Patent Application No. 60/550,668, filed on Mar. 5, 2004, and U.S. Provisional Patent Application No. 60/575,595, filed on May 28, 2004. Netlist denies any remaining allegations of paragraph 24.

25. Netlist denies the allegations of paragraph 25.

26. Netlist admits that a set of June 2007 minutes of the JEDEC JC-45 Committee meeting refer to an "FYI Showing" made by Intel concerning an "AMB Quad Rank Support" proposal. Netlist also admits that a set of minutes which appear to be for an August 2007 meeting of a JEDEC JC-45 Committee, but which also bear the dates August 29-30, 2006, refer to a discussion by Intel concerning "FB DIMM Quad Rank SPD Bytes." Netlist further admits that a set of December 2007 minutes of a JEDEC JC-45 Committee meeting refer to a ballot review for an "FB DIMM Quad Rank SPD Bytes" proposal. Except as expressly admitted herein, Netlist denies the allegations of paragraph 26.

27. Netlist admits that the names Mario Martinez, Hyun Lee and Jeff Solomon appear on a set of minutes for a June 2007 JEDEC JC-45 committee meeting and that the same set of minutes refers to an "FYI Showing" made by Intel concerning an "AMB Quad Rank Support" proposal. Netlist also admits that the same meeting minutes state that "In response to a question by the secretary, Mr. Tsang (Intel) indicated that IP filings are likely and he will pursue this information. He further indicated that Intel would likely be willing to meet the JEDEC RAND terms for any such IP." Netlist further admits that Jeff Solomon is a named inventor on the '386 and '912 patents. Except as expressly admitted herein, Netlist denies the allegations of paragraph 27.

28. Netlist admits that name Mario Martinez appears on a set of JEDEC JC-45 meeting minutes which appear to be for the period August 29-30, 2007 but which also bear the dates August 29-30, 2006. Netlist also admits that the same

meeting minutes reference a discussion by Intel concerning an "FB DIMM Quad Rank SPD Bytes" proposal. Netlist further admits that the same meeting minutes state "Motion by Intel and seconded by Netlist to authorize the SPD task group to issue a committee ballot on the material." Except as expressly admitted herein, Netlist denies the allegations of paragraph 28.

29. Netlist admits that the name Mario Martinez appears on a set of meeting minutes for a December 2007 JEDEC JC-45 committee meeting and that the same set of meeting minutes references a ballot for an "FBDIMM Quad Rank SPD Bytes" proposal and states that "Netlist indicated that it may have some IP that may apply to the quad rank logic and DIMM designs. Netlist will abide by the JEDEC patent policy and provide a RAND letter in a timely manner." Netlist also admits that JEDEC Committee Ballot Records indicate that on or before November 28, 2007, a vote was taken on an "FBDIMM Quad Rank SPD Bytes" proposal sponsored by Micron and that the same Committee Ballot Records state that "Netlist may have some IP that might apply to any Quad Rank logic and DiMM design ballots. Netlist will abide by the JEDEC patent policy and will provide a RAND letter in a timely manner." Netlist additionally admits that the name Mario Martinez appears on a set of meeting minutes for a December 2007 JEDEC JC-40 committee meeting and that the same set of meeting minutes references a ballot for an "AMB Quad Rank Support" proposal and states that "Netlist indicated that it may have some IP that may apply to the ballot material-Mr. Martinez indicated that Netlist will abide by the JEDEC patent policy and a RAND letter will be provided in a timely manner." Netlist further admits that JEDEC Committee Ballot Records indicate that on or before November 29, 2007 a vote was taken on an "AMB Quad Rank Support Standard" sponsored by Intel. Netlist further admits that the same Committee Ballot Records state that "Netlist may have some IP that might apply to any Quad Rank logic and DiMM design ballots. Netlist will abide by the JEDEC

patent policy and will provide a RAND letter in a timely manner." Except as expressly admitted herein, Netlist denies the allegations of paragraph 29.

30. Netlist admits that on January 8, 2008, Jayesh Bhakta sent a letter on behalf of Netlist to Mian Quddus which bears the subject line "Re: U.S. Patent No. 7,289,386" and that the letter speaks for itself. Netlist further admits that Jayesh Bhakta is a named inventor on the '386 and '912 patents. Except as expressly admitted herein, Netlist denies the allegations of paragraph 30.

31. Netlist admits that at least certain portions of an Intel proposal for AMB Quad Rank Support were incorporated in a JEDEC Standard bearing the standard number JESD82-20A. Except as expressly admitted herein, Netlist denies the allegations of paragraph 31.

32. Netlist denies the allegations of paragraph 32.

33. Netlist denies the allegations of paragraph 33.

34. Netlist denies the allegations of paragraph 34.

35. Netlist denies the allegations of paragraph 35.

36. Netlist denies the allegations of paragraph 36.

37. Netlist admits that it has alleged infringement by Google of the '912 Patent. Except as expressly admitted herein, Netlist denies the allegations of paragraph 37.

38. Netlist denies the allegations of paragraph 38.

COUNT FOUR

Negligent Misrepresentation

39. Netlist's responses to paragraphs 18 through 38 are incorporated by reference.

40. Netlist denies the allegations of paragraph 40.

41. Netlist denies the allegations of paragraph 41.

42. Netlist denies the allegations of paragraph 42.

43. Netlist denies the allegations of paragraph 43.

44. Netlist admits that it has alleged infringement by Google of the '912 Patent. Except as expressly admitted herein, Netlist denies the remaining allegations of paragraph 44.

45. Netlist denies the allegations of paragraph 45.

COUNT FIVE

Breach of Contract

46. Netlist's responses to paragraphs 18 through 45 are incorporated by reference.

47. Netlist admits that JEDEC has a process by which attendees can confirm their attendance at particular JEDEC meetings. Except as expressly admitted herein, Netlist denies the allegations of paragraph 47.

48. Netlist denies the allegations of paragraph 48.

Prayer for Relief

The Prayer for Relief does not contain any allegations. To the extent any response is required to any paragraph of Defendant's Prayer for Relief, including without limitation paragraphs a-l, Netlist denies paragraphs a through l of Defendant's Prayer for Relief.

AFFIRMATIVE DEFENSES

Except where specifically noted below, each of the affirmative defenses alleged is asserted as to each purported Counterclaim. By alleging the defenses set forth below, Netlist is in no way agreeing or conceding that it has the burden of proof or the burden of persuasion on any of the issues raised by the defenses. Netlist reserves all affirmative defenses under Rule 8(c) of the Federal Rules of Civil Procedure and any other defenses, at law or in equity, that may be available now or may become available in the future based on discovery or any other factual investigation in the case.

FIRST AFFIRMATIVE DEFENSE

The Counterclaims fail to state any claims upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

The Counterclaims are barred on the ground that Google has unclean hands with respect to the matters alleged therein.

THIRD AFFIRMATIVE DEFENSE

The Counterclaims are barred under the doctrine of estoppel.

FOURTH AFFIRMATIVE DEFENSE

The Counterclaims are barred under the doctrine of waiver.

FIFTH AFFIRMATIVE DEFENSE

Google has failed to make reasonable efforts to mitigate its damages, if any, in whole or in part.

SIXTH AFFIRMATIVE DEFENSE

Google has failed to take reasonable and necessary steps to avoid damages, if any, alleged in the Counterclaims.

SEVENTH AFFIRMATIVE DEFENSE

Google at all times gave their consent, expressly or impliedly, to any and all acts, omissions, representations and course of conduct of Netlist alleged in the Counterclaims.

EIGHTH AFFIRMATIVE DEFENSE

Google is not entitled to recovery of its reasonable costs and expense of litigation.

NINTH AFFIRMATIVE DEFENSE

Some or all of the Counterclaims are barred in that Netlist has fully performed under any contract, obligation or agreement alleged therein.

TENTH AFFIRMATIVE DEFENSE

The Counterclaims are not exceptional under 35 U.S.C. §285 and Google is not entitled to recovery of attorneys' fees, expert witness fees and costs.

ELEVENTH AFFIRMATIVE DEFENSE

Google lacks standing to sue on the allegations contained in its Counterclaims.

TWELFTH AFFIRMATIVE DEFENSE

The Counterclaims are ambiguous and uncertain.

THIRTEENTH AFFIRMATIVE DEFENSE

The Counterclaims are barred in that Google ratified, consented to, had knowledge of, and approved, ratified and accepted the actions in question with full knowledge of the facts and matters of which Google now complains.

FOURTEENTH AFFIRMATIVE DEFENSE

Google has expressly or impliedly by operation of law excused Netlist from any and all obligations, if any relating to the subject matter of the Counterclaims.

FIFTEENTH AFFIRMATIVE DEFENSE

The Counterclaims fail to state facts upon which relief may be based and Google is barred from recovery therein by reason of a failure of a condition precedent.

SIXTEENTH AFFIRMATIVE DEFENSE

The failure of conditions subsequent to the allegations contained in the Counterclaims discharge Netlist's obligations to Google.

SEVENTEENTH AFFIRMATIVE DEFENSE

The Counterclaims fail to state facts upon which relief may be based and Google is barred from any recovery therein on the grounds that Netlist was and is justified in its non-performance in that Google did not perform in accordance with the terms and conditions of the contract alleged in the Counterclaims.

EIGHTEENTH AFFIRMATIVE DEFENSE

Google is barred in whole or in part from any recovery in that Google voluntarily and knowingly exposed itself to the alleged conditions that give rise to

this lawsuit and they assumed the risk of all harm and damages as are complained of in the Counterclaims.

NINETEENTH AFFIRMATIVE DEFENSE

Google is barred in whole or in part from any recovery in that Google, its agents and/or employees were negligent and/or guilty of other intentional misconduct or conduct which was unlawful and/or tortuous which did directly, legally and/or proximately cause and or contribute to the incident complained of in the Counterclaims and any damages suffered, if any there were, were the direct lawful and proximate result to the conduct of Google and its agents and/or employees and not Netlist.

TWENTIETH AFFIRMATIVE DEFENSE

Some or all of the Counterclaims are barred in that Netlist has fully performed under any contract, obligation or agreement alleged therein.

TWENTY-FIRST AFFIRMATIVE DEFENSE

Google has failed to take reasonable and necessary steps to avoid its damages, if any, alleged in the Counterclaims. To the extent such damages, if any, were incurred, Google's recovery, if any, should be reduced accordingly.

TWENTY-SECOND AFFIRMATIVE DEFENSE

The Counterclaims fail to state facts upon which relief may be based and Google is barred from recovery of punitive and/or exemplary damages therein on the grounds such damages constitute an excessive fine in violation of Amendment 8 of the Constitution of the United States and Amendment 14 of the United States Constitution and also by Article One, Section 17 of the California State Constitution and as an unjust and drastic interference with a fundamental right guaranteed to all people in the State and Nation.

RESERVATION OF ADDITIONAL DEFENSES

Discovery in this action has not yet commenced and Netlist continues to investigate the allegations set forth in the Counterclaims. Netlist specifically gives notice that it intends to rely upon such other defenses as may become available by law, or pursuant to statute, or discovery proceedings in this case, and hereby reserves the right to assert such additional defenses.

PRAYER FOR RELIEF

WHEREFORE, Netlist prays as follows:

1. That the Counterclaims be dismissed in their entirety, with prejudice;

2. That Google take nothing by way of its Counterclaims;

3. That Netlist's Claims be declared exceptional pursuant to 35 U.S.C. § 285; and

4. That Netlist be awarded its costs, attorneys' fees and such other and further relief as may be just and proper.

DATED: March 8, 2010

PRUETZ LAW GROUP LLP

By: /s/ Adrian M. Pruetz

Adrian M. Pruetz
Attorneys for Plaintiff
Netlist, Inc.